INSURANCE COUNCIL OF AUSTRALIA

General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email: competition@treasury.gov.au

22 May 2015

Dear Sir/Madam

COMPETITION POLICY REVIEW FINAL REPORT

The Insurance Council of Australia[1] (Insurance Council) appreciates the opportunity to provide feedback on the Competition Policy Review's final recommendations to strengthen Australia's *Competition and Consumer Act 2010* (CCA). The Insurance Council comments on two main areas in response to the final recommendations, which follow from the arguments made in our previous submissions to the Review Panel in June and November 2014.

The Insurance Council continues to have concerns that the proposed Recommendation 30, regarding the misuse of market power and incorporation of the "effects test", will lead to greater uncertainty for business and a chilling of competition contrary to the Panel's objectives. In addition, the Insurance Council expresses support for competitive neutrality in statutory insurance schemes. We also consider that government providers of personal injury risk insurance should be subject to the equivalent prudential and regulatory requirements as non-government providers.

Misuse of Market Power: "Effects Test"

The Insurance Council raised serious concerns in its submission of November 2014 responding to the Competition Policy Review's Draft Report recommendation concerning the misuse of market power. The Insurance Council remains strongly opposed to the final misuse of market power recommendation (Recommendation 30), which proposes to incorporate an "effects test" into section 46 of the CCA.

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[1] The Insurance Council of Australia is the representative body of the general insurance industry in Australia. Our members represent more than 90 percent of total premium income written by private sector general insurers. Insurance Council members, both insurers and reinsurers, are a significant part of the financial services system. September 2013 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of $40.4 billion per annum and has total assets of $112.6 billion. The industry employs approximately 60,000 people and on average pays out about $92.5 million in claims each working day.

Insurance Council members provide insurance products ranging from those usually purchased by individuals (such as home and contents insurance, travel insurance, motor vehicle insurance) to those purchased by small businesses and larger organisations (such as product and public liability insurance, professional indemnity insurance, commercial property, and directors and officers insurance).

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The Insurance Council considers that the proposed effects test will be unable to distinguish pro-competitive from anti-competitive conduct. We are most concerned about the ambiguity of the recommendation and subsequent level of uncertainty that will be created. The proposal is likely to have a strong chilling impact on competition as companies seek to avoid lengthy and/or expensive litigation battles and repeated clearance or authorisation requests.

Recommendation 30 proposes that section 46 of the CCA should be re-framed to prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market. In recognition of the pro-competitive conduct that is captured, the proposal also recommends directing the court to have regard to whether, on the one hand, the conduct enhances efficiency, innovation, product quality or price competitiveness, and on the other hand, whether the conduct prevents, restricts or deters the potential for competitive conduct in the market or new entry into the market.

The proposal creates a large degree of uncertainty between conduct that is permitted and conduct that is not permitted under section 46. The proposal directs courts to distinguish between anti-competitive and pro-competitive conduct, which is a delineation that is a highly contested area of regulatory economics. This is demonstrated by the absence of clear international consensus on the analytical means to differentiate between legitimate and illegitimate unilateral conduct.

The decision making process which the Review Panel expects a court to undertake is highly complex. Each item that the court should "have regard to" requires a very subjective judgement, as each is on a continuum between pro-competitive and anti-competitive. For example, it is hard to identify the point at which an efficiency enhancing action begins to deter the potential for entry in the market. This is compounded by the multiple forms of efficiency typically used in economic analysis including (at a basic level) productive, allocative and dynamic efficiency, which each have complex relationships. These fine judgements are likely to be the subject of extensive economic and legal interpretation.

Due to the nature of dominant firms, any business action (pro-competitive or anti-competitive) could potentially substantially lessen competition. The ambiguity of what the court should "have regard to" makes it unclear how the proposed provisions will apply in practice to a range of routine and strategic business actions, such as:

- change to pricing structure;
- investment in new systems and processes;
- new product offerings;
- expansion into a new market;
- advertising;
- different ways of engaging with customers; and
- outsourcing certain arrangements.

The Final Report fails to seriously address the question of the costs that the proposed change will impose on businesses and ultimately consumers. The Final Report states that the change:

> "will (like all regulatory change) involve some transitional cost …In the Panel's view, the change is justified as transitional costs should not be excessive and be outweighed by the benefits".

However, this assertion is not based on any serious benefit/cost analysis of the recommendation. The Review Panel has not provided an estimate of the projected legal costs, efficiency loss from the chilling of competition, or decreased investment from the proposed changes. These factors are all likely to have a material impact.

The Final Report states that authorisation should be available in relation to section 46, and the ACCC should issue guidelines regarding its approach to the provision. The Insurance Council believes this is an inadequate solution to what will be a significant constraint on the routine activities of a firm that is dominant in any particular market.

Under the CCA, the ACCC can take up to 6 months (based on calendar days) to make a final determination on a new application for authorisation. Even the most straightforward applications may take 3 to 4 months for determination. In some cases this period can be extended by up to a further 6 months, meaning a calendar year can pass before a decision on an authorisation is granted. As the changes to section 46 will question the legality of a wide range of business conduct, this time delay would result in a significant lag to the execution of business strategy and adaption to market changes. This would result in dominant firms becoming less nimble and slower to respond to competitive behaviour as the original value of a strategy may be diminished or lost by the time authorisation is granted.

As raised in our submission on the Competition Policy Review's Draft Report, the Insurance Council strongly disagrees that the alleged difficulties in the application of the current section 46 warrants the addition of an effects test. The Insurance Council supports the findings of the Dawson Review (2003) that recommends no amendment should be made to section 46.

We have significant concerns that the Panel recommended against the Dawson Review's analysis, which we consider to be more rigorous than the Final Report. The Final Report has no additional evidence to contradict the findings of the Dawson Review. The Review Panel also opposes the aggregate findings from the eleven reviews that have taken place at regular intervals over the past 40 years, of which ten out of eleven do not recommend the "effects test":

Recommend an "effects test"	Review
No	2004: Senate Economics References Committee Inquiry into the Effectiveness of the *Trade Practices Act 1974* in protecting Small Business
No	2003: Trade Practices Act Review Committee (Dawson Review)
No	2003: Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the *Trade Practices Act 1974*.
No	2001: House of Representatives Standing Committee on Economics, Finance and Public Administration (Hawker Committee)
No	1999: Joint Select Committee on the Retailing Sector (Baird Committee)
No	1993: Independent Committee of Inquiry into Competition Policy in Australia (Hilmer Committee)
No	1991: Senate Standing Committee on Legal and Constitutional Affairs (Cooney Committee)

No	1989: House of Representatives Standing Committee on Legal and Constitutional Affairs (Griffiths Committee)
Yes	1984: Green Paper, The Trade Practices Act Proposals for Change
No	1979: Trade Practices Consultative Committee (Blunt Review)
No	1976: Trade Practices Act Review Committee (Swanson Committee)

Source: the Competition Policy Final Report

Only one of the reviews, conducted in 1984, supports the introduction of an effects test. In the 30 years since, section 46 has been the subject of extensive litigation that has built and tested a body of case law that provides clarity on permitted unilateral conduct for dominant firms (table below includes major cases over this period). It is important to note that the certainty around section 46 has come at considerable cost to regulators and industry in lengthy legal proceedings (see below). The proposed changes to section 46 may result in long periods of future uncertainty for business until the practical application of the new test is settled.

Case	Year
ACCC v Cement Australia	2013
ACCC v Ticketek Pty Ltd	2011
ACCC v Cabcharge	2010
ACCC v Baxter Healthcare	2007
Seven Network Ltd v News Limited	2007
ACCC v Eurong Beach Resort Ltd	2005
NT Power Generation v Power and Water Authority	2004
ACCC v Australian Safeway Stores Pty Limited	2003
Boral Besser Masonry Limited (now Boral Masonry Ltd) v ACCC	2003
Rural Press Limited v Australian Competition and Consumer Commission	2003
Universal Music Australia Pty Ltd v ACCC	2002
Melway Publishing Pty Ltd v Robert Hicks Pty Ltd	2001
Dowling v Dalgety Australia Ltd	1992
TPC v CSR Ltd	1991
ASX Operations Pty Ltd v Pont Data Australia Pty Ltd	1990
Pont Data Australia Pty Limited v ASX Operations Pty Limited	1990
Queensland Wire Industries v BHP	1989

We therefore question the necessity of the change, given that there is little empirical evidence to suggest that section 46 is not currently adequately capturing anti-competitive conduct or that the section is too difficult to apply. We note that the ACCC regularly pursues section 46 cases and is often successful in proving a contravention of the provision.

Despite the Final Report's criticism of the 'take advantage of market power' test, as argued above, Australian case law provides more nuanced guidance to differentiate pro-competitive from anti-competitive competition, compared to the proposal.

We also consider that unilateral conduct prohibitions should not be harmonised with prohibitions relating to multi-party conduct (e.g. sections 45, 47 and 50). This would also contribute to a very high bar being set for any decision by a firm that happens to be dominant in its market. Decisions made by a single firm, such as routine business matters, are far more common than decisions involving two or more parties (e.g. mergers and acquisitions, contracts, etc.).

Statutory Insurance Schemes

The Insurance Council refers to our initial submission of June 2014 in response to the final recommendations of the Competition Policy Review. This submission supported the application of the principle of competitive neutrality to statutory insurance schemes that are still delivered via a government monopoly. If governments wish to be insurers of personal injury risk, they should do so in competition with general insurers[2] and in accordance with the same prudential and other regulatory requirements that apply to general insurers.

The Insurance Council also submitted that while there are arguments to be made in support of underwriting of statutory insurance by governments or general insurers (particularly in relation to catastrophic injuries), general insurers are best placed to underwrite well-designed statutory insurance schemes to avoid:

- Financial risk to governments, taxpayers and future policyholders;
- Inherent volatility in the financial performance of government monopoly schemes;
- Political interference with pricing of risk; and
- Government reliance on insurance premiums collected from employers and motorists - as a source of general revenue (where there is a scheme surplus).

A reinvigorated National Competition Policy (NCP) agenda provides an appropriate opportunity for transparent and objective regulation and market reviews to be conducted for personal injury insurance schemes delivered as a government monopoly.

The Insurance Council strongly endorses the role of an independent, national authority to conduct such reviews against a public interest test, to view competition policy from a national perspective, and not to represent jurisdictional interests.[3]

The Insurance Council therefore strongly supports the relevant recommendations of the Competition Policy Review, namely:

Recommendation 1:	Competition principles
Recommendation 8:	Regulation reviews
Recommendations 15-17:	Competitive neutrality
Recommendations 43-44:	Establishment of the Australian Council for Competition Policy (ACCP)
Recommendation 45:	ACCP market studies power
Recommendation 46:	Market studies requests to ACCP, including from all market participants

[2] "General insurers" are defined as any entity authorised to undertake insurance in Australia in accordance with the requirements of the *Insurance Act 1973* (Cth).

[3] Competition Policy Review Report p76.

Recommendation 47: Annual competition analysis by ACCP
Recommendation 48: Competition payments and the role of the Productivity Commission

The Insurance Council also supports recommendations 55 and 56 concerning the implementation of a reinvigorated NCP agenda.

In supporting competition and legislation reviews of government monopoly schemes for statutory insurance, it is worth noting that the Productivity Commission's 2005 Report on National Competition Policy Reforms specifically identified the "Legislation Review Program" as a main area of "unfinished business".[4]

The Productivity Commission identified *priority* legislation reviews, and it explicitly identified frameworks for workers' compensation insurance and compulsory third party insurance as requiring a further review of restrictions on competition and efficiency.[5]

The Productivity Commission noted:

> "As part of the NCP process, all States and Territories have conducted separate legislation reviews of monopoly insurers and premium controls. However, moves to implement the recommendations arising from these reviews have been slow, with no action occurring in some cases. For instance, despite all of the initial reviews into the monopoly provision of CTP insurance recommending that more competition be introduced — and three out of the five workers' compensation reviews reaching the same conclusion — no jurisdiction has, as yet, amended legislation to allow this to happen. In some instances, governments have commissioned further reviews that have overturned the initial findings and recommended retaining monopoly insurers."[6]

Recommendation 9.6 from the 2005 Report states that:

> "The remit of the foreshadowed Advisory Council to develop nationally consistent frameworks for workers' compensation insurance should be expanded to encompass the development of national frameworks for compulsory third party insurance. As part of that process, the Council should consider whether a further (national) review of restrictions on competition and efficiency in workers' compensation and compulsory third party insurance is required to facilitate the development of these frameworks."

Since the national NCP program commenced in 1995, the only statutory insurance scheme to be opened to competitive underwriting is the South Australian Compulsory Third Party Insurance scheme, which will be underwritten by general insurers from 1 July 2016.

The Insurance Council strongly submits that a reinvigorated NCP process must consider the economic and consumer benefits of competitive underwriting for workers' compensation and personal injury motor accidents schemes – in all Australian jurisdictions. Any reviews in this area will also benefit from consideration of nationally consistent and best practice

[4] Productivity Commission, "Review of National Competition Policy Reforms", Inquiry Report No 33, 28 February 2005, p XVI.
[5] Ibid, pp 267-269.
[6] Ibid, p 268.

frameworks to deliver the best results for employers and motorists who pay the premiums, and for people who have been injured at work, or in a motor accident.

The Insurance Council will seek to work with the federal, State and Territory governments to promote this approach as the recommendations of the Competition Policy Review are carried forward.

If you have any questions or comments in relation to our submission please contact John Anning, the Insurance Council's General Manager Policy, Regulation Directorate, on tel: 02 9253 5121 or email: janning@insurancecouncil.com.au.

Yours sincerely

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