

12 February 2016

General Manager  
Market and Competition Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Via Email: [competition@treasury.gov.au](mailto:competition@treasury.gov.au)

Dear Sir


**Response to Discussion Paper – Options to Strengthen the Misuse of Market Power Law**

On behalf the Queensland Law Society, I thank you for the opportunity to comment on this important paper. The Society appreciates being consulted on these issues.

Please find **attached** the Society's response to the discussion paper, which has been prepared with the assistance of the Society's Competition and Consumer Law Committee.

Should you wish to discuss the issues raised, please not hesitate to contact me or the Society's Senior Policy Advisor, Shane Budden, on 3842 5889 or via email at [s.budden@qls.com.au](mailto:s.budden@qls.com.au)

Yours faithfully



Bill Potts  
President

## 1. Overview

This submission is provided in response to the Discussion Paper dated December 2015 and titled "Options to strengthen the misuse of market power law" ("Discussion Paper").

The Society acknowledges that there are a range of views as to whether section 46 of the Competition and Consumer Act ("CCA") should be amended. The Society made two submissions to the Harper Panel that addressed potential amendments of section 46: an initial submission dated 27 June 2014 that considered the general question of revision of section 46 and a submission dated 12 November 2014 that considered the scope of the proposed defence set out in the Harper Panel's Draft Report.

The Society supports revision of section 46 of the CCA. As between the six options outlined in the Discussion Paper, the Society supports Option F, including making authorisation available to exempt conduct from the prohibition in section 46 of the CCA but subject to the addition of a defence. There should be a defence if the conduct in question would have the effect or likely effect of benefiting the long term interests of consumers. The onus of making out the defence should fall on the corporation engaging in the conduct.

The Society supports such a revision for the reasons addressed in its submission dated 27 June 2014 to the Harper Panel. Some parts of that submission are reproduced below in response to the specific issues raised in the Discussion Paper.

If such an amendment is made, it would mean that the expression "likely effect" will be included in another section of the CCA. The Society submitted to the Harper Panel that it would be appropriate to amend Part IV of the CCA to clarify the meaning of "likely effect" and address the existing uncertainty. The Society continues to support such legislative clarification. The need for statutory clarification will be increased if section 46 of the CCA is amended so as to prohibit unilateral conduct which has the likely effect of substantially lessening competition.

## 2. Response to Issues for Discussion

1. *What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provision?*

Where a corporation with a substantial degree of market power engages in conduct for the purpose (or with the effect or likely effect) of substantially lessening competition, it may be very difficult to establish a contravention if the economic motivation for the conduct is the end result of a continuing substantial market power. The ACCC (or any person alleging a contravention) would need to be able to satisfy a Court that a corporation without substantial market power would not also engage in the conduct if the end result was a holding of substantial market power.

This is not idle speculation. The *Cement Australia* decision is an example of this situation. The respondent was found to have substantial market power, to have acted for one of the proscribed purposes in section 46, to have engaged in conduct with the purpose and likely effect of substantially lessening competition (and thereby maintained its market power) and yet not to have taken advantage of its substantial market power. The ACCC could not satisfy the Court that a corporation without substantial market power might not engage in the same conduct.

Another example is predatory pricing or other unilateral conduct that is engaged in to acquire, rather than to maintain, a position of substantial market power that substantially lessens competition in a market. This type of conduct is not caught by the current section and will not be caught by any of the proposed amendments. However, it is likely that such conduct would be caught by section 45 because it is improbable that a corporation without existing substantial market power could set about acquiring such power without entering into, or making, multiple contracts, arrangements or understandings. The cumulative effect of those contracts, arrangements or understandings can be considered pursuant to section 45(3) of the CCA and, therefore, if the overall effect or likely effect of all of the contracts, arrangements or understandings is to substantially lessen competition, the conduct will be prohibited.

*2. What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?*

The Society cannot identify any examples of conduct that is pro-competitive that could be captured under the Harper Panel's proposed provision. Indeed, it is almost by definition impossible. The well-established meaning of a "substantial lessening of competition" is material damage to the competitive process. Pro-competitive conduct may damage competitors (for example, by forcing them from the market if a more efficient means of production allows a corporation to sell at a lower price than its competitors' cost) but it cannot damage the competitive process. The standard of "substantial lessening of competition" has been part of Part IV of the CCA for many decades. If there were examples of situations where pro-competitive conduct was caught by the standard, they would have come to light.

In any event, any lingering concern could be addressed by the defence proposed by the Society.

There is a view within the Society that expresses concern that the Harper version of section 46 is likely to have a chilling effect on innovation by companies with substantial market power (particularly in the case of new or emerging markets) as any conduct for which the impacts on competition cannot be predicted with reasonable certainty may be viewed as inherently risky and may therefore not be undertaken.

Given the potential impact on innovation the difficulty of predicting examples of pro-competitive conduct that could be captured by the Harper proposal as it stands is unsurprising.

*3. Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?*

Yes. The Society refers to its response to the first issue.

The take advantage standard is difficult to apply (and potentially fails to capture anti-competitive conduct) for three reasons. First, the ACCC (or any person alleging a contravention) is effectively required to prove a negative by establishing that no corporation without substantial market power would see a business justification for the conduct. Second, the test necessitates an often complex inquiry into the business analysis and justifications of a corporation. Third, the standard is difficult to apply in practice because it is not possible to make absolute judgments about the economic profitability of conduct.

4. *Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed to certain 'exclusionary' conduct if the 'take advantage' limb is removed?*

No. The Society refers to its response to the second issue. In addition, attempting to define in advance particular 'exclusionary' conduct is likely to be unwieldy and render the prohibition unnecessarily and unhelpfully inflexible.

Our comments in response to Question 2 are also applicable here.

5. *Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?*

The Society refers to its responses to the earlier issues.

6. *Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?*

Yes. A reason for not imposing an "effects" test is that it would impose a burden on corporations with substantial market power to be vigilant about the unintended consequences of their conduct. On the other hand, section 45 of the CCA has always prohibited corporations from making agreements with anti-competitive effects, even if those effects were unintended. Both EU and US law prohibit unilateral conduct by a monopolist with anti-competitive effect. In determining the best way to protect the competitive process against the dangers of a monopolist, the judgment might be made that monopolists should be required to be attentive to the consequences of their conduct for the competitive process.

7. *Alternatively could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?*

The Society refers to its response to the sixth issue. However, the Society acknowledges the divergent views on this issue and the argument against an 'effects' test noted above.

8. *Given the understanding of the term 'substantially lessening competition' that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?*

Yes. The Society refers to its response to the second issue. However, the Society also cautions that a test of "substantially lessening competition" should not be combined with a "take advantage" test. The two tests use two different counterfactuals.

The "take advantage" test attempts to compare the status quo where the alleged contravener has substantial market power with a hypothetical situation in which the market is sufficiently different that the alleged contravener does not have substantial market power and then asks whether the conduct would be commercially possible in both the status quo and the hypothetical situation.

The "substantially lessening competition" test compares the state of the competitive process in the situation in which the conduct has been carried out (or a hypothetical situation in which the conduct had been carried out if it has not in fact occurred) with the state of competition in a hypothetical situation in which the conduct had not been carried out. The hypothesising required by the "substantially lessening competition" test is straightforward: it

simply requires assuming the conduct has or has not taken place. The hypothesising required by the "take advantage" test is not straightforward: it requires identification of the changes necessary to remove substantial market power but do no more and then to assess the likelihood of conduct occurring in that hypothetical situation.

To combine the tests would at least double, if not triple, the number of hypothetical situations that the Court was required to postulate and necessitate considering those hypotheticals at different junctures in time. To combine the two tests would significantly add to the burden of bringing a proceeding when compared with the existing section and make it even more difficult to apply the section.

*9. Should specific examples of prohibited behaviours or conduct be retained or included?*

No. Attempting to define in advance particular prohibited behaviours is likely to be unwieldy and render the prohibition unnecessarily and unhelpfully inflexible.

*10. An alternative to applying a 'purpose, effect or likely effect' test could be to limit the test to 'purpose of substantial lessening competition'. What would be the advantages and disadvantages of such an approach?*

The advantage of such an approach (provided it still removed the 'take advantage' element) would be that it would not penalise corporations with substantial market power for the unintended consequences of their conduct.

The disadvantages would be:

- (a) the provision will continue to be out of step with best international practice; and
- (b) the provision will continue to require the ACCC or any other party bringing a proceeding alleging a contravention to focus on the purpose of the corporation in engaging in the conduct rather than the outcome of the conduct.

*11. Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?*

Yes. Including mandatory factors would reduce uncertainty. The mandatory factors proposed by the Harper Panel are factors that ought to be taken into account in any event when considering the concept of substantially lessening competition.

Further a requirement to assess whether conduct is likely to have been in the long term interests of consumers should be adjudged at the time the conduct occurs.

*12. If mandatory factors were adopted, what should those factors be?*

The Society supports the factors identified in the draft legislation proposed by the Harper Panel.

*13. Should authorisation be available for conduct that might otherwise be captured by section 46?*

Yes. The Society supports authorisation being available.

*14. If quantitative data on the regulatory impact of alternative options on stakeholders (including the methodologies used) can be provided.*

The Society does not have quantitative data that it can provide.

*15. Are there any other alternative amendments to the Harper Panel's proposed provision that would be more effective than those canvassed in the Panel's proposal?*

Yes. The Society considers that the recommendation by the Harper Panel, should be amended to include the defence as advocated by the Society.

*16. Which of options A through F above is preferred? What are the relative strengths and weaknesses of each option? What information can you provide regarding the regulatory impact of each option on businesses?*

The Society supports Option F subject to the addition of the defence outlined above. The Society does not have further information to provide about the regulatory impact of the six options.

*17. Are there any other options (not outlined above) that should be considered?*

As already noted, the Society supports Option F subject to the addition of the defence outlined above.