



OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW

SUBMISSION ON DISCUSSION PAPER BY
VODAFONE HUTCHISON AUSTRALIA

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EXECUTIVE SUMMARY

Vodafone Hutchison Australia (**VHA**) makes this submission in response to the discussion paper released by the Australian Government on 11 December 2015 (**Discussion Paper**) on options to strengthen the misuse of market power prohibition in section 46 of the *Competition and Consumer Act 2010 (Cth)* (**CCA**).

VHA has previously made a series of submissions in support of the review undertaken by the Competition Policy Review Panel (**Harper Panel**). We are pleased with the Australian Government's response to the Harper Panel recommendations.

VHA welcomes the Australian Government's decision to consider reform of s 46 of the CCA. An effective misuse of market power protection is a key part of the competition regulatory framework.

Given our strong support for effective competition regulation, VHA supports the need for reform to s 46. As the third largest telecommunications company we are a 'major corporate' in the scheme of Australian business. We are also a company that strongly supports the need for there to be an effective regulatory framework that promotes competition and prevents dominant players from using their strength to prevent other players competing effectively. We therefore believe that our perspective may present a middle way through the current s 46 debate which has unfortunately been framed as a 'big business vs small business' debate.

VHA's concern is that s 46 has a normative focus on purpose and firm-specific harm, rather an objective focus on holistic competitive effect. VHA notes the politicisation of debate, so while VHA supports the need for amendment, Option E seems the most appropriate of the various Options proposed.

Alternatively, given significant controversy directed at the removal of 'taking advantage', another sensible solution may be a simple 'effects test' amendment to s 46 to align it Part XIB and s151AJ(2) of the CCA, drawing from the approach that has applied in telecoms for the last two decades.

1. VHA supports the need for reform of s 46

While the reform of s 46 is only a small part of the Harper reforms, it has been the most controversial. We believe that the debate about s 46 reform has become emblematic of the debate about how we can improve competition regulation in this country. It is disappointing the debate has become polarised between the interests of 'big' and 'small' business. What is most important in this discussion is the need for reform to deliver an ability for the competition regulatory regime to overcome the barriers to effective competition and the prevention of any behaviour by firms with substantial market power (**SMP**) that prevent the market from delivering efficient outcomes.

It is VHA's view that the current s 46 provision has within it a number of requirements that are a major distraction from what should be the key issues that are assessed when there are allegations of a misuse of market power. Because there is a 'purpose' requirement, VHA's concern is that s 46 has a normative focus on the intentions of firms with SMP and firm-specific harm, rather an objective focus on how to ensure that there is efficient market. The current s46 provision requires the regulator to impugn the character of the leadership of major corporations and to trawl through the correspondence of companies looking for evidence that demonstrates ill intent. This is a major distraction from the main issue is whether or not markets are able to continue to drive efficient and competitive outcomes.

Competition is intense and the drive to win is important. This is a reality and it is essential. What is not acceptable is actions by firms with SMP that limit the ability of the market to deliver long term sustainable competition. This should be the focus of s 46 and it is why the 'effect' of market behaviour is more important than the 'purpose' of the dominant player.

For these reasons VHA supports the need for reform of s 46, particularly the adoption of an 'effects test' into s46:

- The focus should be on ensuring that Australia has effective competition laws that maintain and promote competition, yet without introducing legislative uncertainty that could chill legitimate competitive rivalry.
- VHA agrees that s 46 has not been as effective as it could have been in differentiating between legitimate and illegitimate conduct by firms with SMP. VHA considers that this has resulted from the requirement to prove an anti-competitive purpose. Much of the difficulty, uncertainty and expense in litigating s 46 is derived from the need to establish this subjective purpose.
- An 'effects test' avoids the need to prove that a firm had an intentional strategy to cause harm, so avoids the need for a court to attempt to second-guess the subjective purpose of that firm. An effects test resolves VHA's concerns regarding purpose.
- Proving purpose is particularly difficult for an individual litigant that does not have the ACCC's investigative powers, meaning private actions under s 46 have been very rare, extremely costly and generally unsuccessful.

2. Lessons can be learned from the telecoms solution adopted some 20 years ago

An 'effects test' has already operated in the telecoms sector since 1997 and has been applied to address and effectively rectify alleged anti-competitive conduct by Telstra in 1998 (Internet access), 1998 (commercial churn), 2001 (broadband), 2004 (broadband), and 2006 (wholesale line rental). This is a limited number of important issues and demonstrates that the arrangement has not resulted in significant amounts of litigation.

Under Part XIB and s151AJ(2) of the CCA, the ACCC may issue a 'competition notice' against a firm that takes advantage of its SMP with the effect or likely effect of substantially lessening competition in a telecommunications market. This 'effects test' has removed the evidential burden in proving an illegitimate purpose, so has shifted the focus to anti-competitive effect. The 'effects test' has not chilled legitimate competition and has existed for 20 years, providing benefits that far exceed any costs.

3. Of the various options presented, VHA prefers 'Option E'

VHA is supportive of options for reform of s46 that involve the adoption of an 'effects test' into s46. Accordingly, VHA is supportive of the Harper wording. However, VHA is concerned that political concerns regarding the Harper Review wording may result in no reform to s 46 at all. Accordingly, VHA urges that a political compromise is necessary.

VHA prefers Option E because it has the best articulation of an 'effects test' (which VHA considers is highly desirable), but involves fewer changes to the remaining wording of s 46 so results in less uncertainty.

However, a lot of political opposition has been associated with the uncertainty to business caused by the removal of the 'taking advantage' language in s 46. If this removal does occur, VHA strongly believes that the ACCC should be required to issue comprehensive guidelines to assist to address this uncertainty.

4. Another sensible solution would be to supplement s 46 with s151AJ(2)

Alternatively, given controversy directed at the removal of 'taking advantage', another sensible solution may be a simple 'effects test' amendment to s 46 to align it with the existing 'effects test' approach applied for two decades in telecoms under Part XIB and s151AJ(2) of the Act.

Under this solution, a new supplementary provision would be inserted into s 46 that would simply state as follows:

"A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market with the effect, or likely effect, of substantially lessening competition in that or any other market."

This solution has the advantage of maintaining certainty and avoids the more controversial wording changes to s 46, yet ensures that an 'effects test' is included by a simple amendment to supplement the existing wording. (VHA considers that the case law relating to 'taking advantage' is useful and some concerns regarding this wording have been overstated, so this aspect of the reform should not be the focus rather the fact that the normative 'purpose' test is the key distraction).

VHA considers that amending s 46 to include supplementary wording borrowed from the existing s 151AJ(2) would be a sensible political compromise that addresses the concerns of the various stakeholders, enabling the amendments to s 46 to proceed.

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DETAILED SUBMISSION BY VHA

1. VHA supports the need for reform of s 46

VHA is a strong supporter of the review of Australian competition law and policy. We have made extensive submissions to the Harper Panel.

We are pleased by the Australian Government's response to the Harper Panel recommendations. We note that the Australian Government has accepted the 'easier' recommendations and deferred many of the 'harder' recommendations for further analysis. We consider this policy response was prudent and appropriate.

We urge the Australian Government to proceed to implement the recommendations that it has accepted to date as soon as practicable.

(a) *A balanced approach is required*

One of the recommendations that has been deferred for further analysis is Harper Review recommendation 30 regarding the misuse of market power provision contained in section 46 of the CCA. Unlike the many previous reviews of the CCA, the Harper Panel recommended significant reform occur to that section. As the Australian Government will appreciate, s 46 is probably the single most important provision contained in Australia's competition laws.

For this reason, while the reform of s 46 is only a small part of the Harper Review recommendations, it has by far been the most controversial. VHA is disappointed that the resulting policy debate has become polarised between the interests of 'big' and 'small' business, exacerbated by media commentary. The polarisation of the debate is unfortunate, but is partly a consequence of the significance of the provision. A poorly considered reform to s46 could impose significant economic cost on larger firms and inadvertently chill legitimate competitive conduct.

Against this context, VHA considers that a balance is required. The policy focus for the Australian Government should be on ensuring that Australia has effective competition laws that maintain and promote competition, yet without introducing legislative uncertainty that could chill legitimate competitive rivalry. As such, any reforms to section 46 should be demonstrably beneficial to the maintenance and promotion of competition. However, the uncertainty introduced by such reforms (as well as the reforms themselves) should not be of such a nature that larger firms are dissuaded from engaging in legitimate competitive conduct.

VHA's submission to the Australian Government is therefore premised on the need for a balanced approach. Ultimately, a sensible policy compromise is required that suitably addresses and balances the concerns of the respective stakeholders, thereby enabling important and beneficial amendments to s 46 to proceed.

(b) *The existing s 46 is sub-optimal due to the emphasis on purpose*

VHA agrees that s 46 has not been as effective as it could have been in differentiating between legitimate and illegitimate conduct by firms with substantial market power (**SMP**). VHA considers that this has resulted from the requirement to prove an anti-competitive purpose. In practical

effect, a litigant must prove on the balance of probabilities that a firm had an intentional strategy to cause harm to a particular competitor, as manifested by its purpose.

However, causing harm to one's competitors is an inevitable consequence of competitive rivalry. A firm that is inefficient may lose market share to a more efficient competitor. The High Court has stated: "*competition by its very nature is deliberate and ruthless. Competitors jockey for sale, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to 'injure' each other. This competition has never been a tort*".¹

The dilemma facing a court is therefore to differentiate between legitimate (and often highly aggressive) competitive rivalry as against a firm taking advantage of its substantial market power so as to harm or unfairly impede a legitimate and efficient competitor.

The existing formulation of section 46 seeks to differentiate between legitimate and illegitimate competition in three key ways:

- first, s 46 only applies to those firms that have the *capability* to engage in illegitimate conduct. This capability element is addressed by the requirement for a firm to have a substantial degree of market power, or 'SMP'. This means that s 46 only applies to the conduct of the larger firms that operate in imperfectly competitive markets, being those markets more susceptible to market failure;
- second, s 46 currently requires the larger firm (with SMP) to have *culpability* in the form of a specific intent to harm a particular competitor. This culpability element is addressed by the requirement for the larger firm to have one of three specified prohibited purposes; and
- third, s 46 requires the firm to have acted *illegitimately* by engaging in conduct that is not consistent with normal competitive behaviour. The legitimacy element is addressed by the requirement for a firm to be 'taking advantage' of its market power, which has been interpreted by the courts as involving a firm taking an action that it would or could not otherwise take in a competitive market.

However, VHA considers that the requirement for a court to establish culpability results in conduct that should be regulated by s 46 escaping regulation. To put it another way, the current requirement for culpability results in under-regulation, so permits anti-competitive conduct to occur that should not occur.

By way of example, under the current formulation of s 46, a firm with SMP can act in a way that is not consistent with normal competitive behaviour. In doing so, that firm can cause harm to the competitive process and can have the effect of substantially lessening competition. However, an action against that firm will fail if it is not possible to establish, on the balance of probabilities, that the firm had the specific intent (i.e., substantial purpose) to harm a particular competitor of that firm.

As a consequence of this focus on culpability in the existing formulation of s 46, significant effort is required by litigants under s 46 in trying to prove that a firm had an intentional strategy to cause harm. In effect, a court must be persuaded to second-guess the subjective purpose of that firm and

¹ *Queensland Wire Industries Pty Ltd vs Broken Hill Pty Co Ltd* (1989) 63 ALJR 181.

identify a malicious purpose. Much of the difficulty, uncertainty and expense in litigating s 46 is derived from the need to establish this subjective purpose to meet the evidential standards of a court.

Large corporations in Australia are well aware of the need for a successful action under s 46 to establish an anti-competitive purpose. As a consequence, it would rarely be the case that documentary evidence exists within a sophisticated large corporate that actually sets out a purpose that is illegitimate. Because any conduct can be undertaken with multiple purposes, any anti-competitive strategy undertaken by a firm with SMP can also be camouflaged under a net of competitive legitimacy. This is not conducive to the effective application of Australian competition law.

(c) *Proving purpose is particularly difficult and costly in private litigation*

Proving purpose is particularly difficult for an individual litigant that does not have the ACCC's investigative powers, meaning private actions under s 46 have been very rare, extremely costly and generally unsuccessful.

Practically, the requirement to prove purpose requires discovery in litigation. In the context of s 46, a key objective of discovery is to find so-called 'smoking gun' documents that evidence culpability - or to find a sufficient weight of circumstantial evidence that a court is comfortable imputing an illegitimate purpose, rather than the legitimate purpose advanced by the firm itself. In practical effect, discovery can be viewed as akin to hunting for a needle in a proverbial haystack. Not surprisingly, discovery is often the most expensive component of s 46 litigation.

By way of example, *Seven Network Ltd v News Limited* [2007] FCA 1062, often referred to as the C7 litigation, is an extreme example of mega litigation. The C7 litigation is widely regarded as the costliest litigation ever to be undertaken in Australia. This case involved arguments that the respondents had contravened s 46, among other matters. The trial lasted 120 days, involved 21 respondents and produced 85,654 documents including 1,028 pages of pleadings, 2,041 pages of expert reports and 1,613 statements from lay witnesses. The estimated cost of legal fees was some \$200 million. Justice Sackville described this as bordering on scandalous.

Moreover, as evidenced by the C7 litigation, proving purpose is particularly difficult for private litigants who cannot rely on the information gathering powers of regulatory authorities. The ACCC has extensive information gathering powers under s 155 of the CCA, including the ability to request documents and to cross-examine persons in the context of investigations. The ACCC has a skilled team of investigators that are skilled at using those powers. The ACCC has extensive databases of information that can be searched to verify data. As a consequence, the ACCC is much better placed to identify 'smoking gun' or circumstantial evidence at a fraction of the cost of private litigation.

As a result, private actions have been very rare, extremely costly and difficult to win. The OECD recognises that "few section 46 cases are brought to court."² There have only been 7 cases brought under the misuse of market power provision that have been considered by the Full Federal

² OECD, Australia – the Role of Competition Policy in Regulatory Reform, 2009, [56].

Court or the High Court in the last 15 years. Of these, 3 have been private actions.³ Only 1 was successful.⁴ As noted above, the C7 case incurred huge expense and was unsuccessful.

Clearly, for s 46 to be more effective, reform is required. VHA considers that the focus of this reform should be on the culpability element of s 46, namely the requirement to establish a prohibited purpose. The solution is an 'effects test'

2. Lessons can be learned from the effects test in telecoms

The expense and difficulty in establishing that a firm has an anti-competitive purpose could be avoided by the introduction of a so-called 'effects test' into section 46. An effects test would focus on the aggregate effect of the firm's conduct on the level of competition in a market, testing whether there is a substantial lessening of competition. The test involves comparing the projected future levels of competition with and without the relevant conduct.

An effects test is already applied in relation to the screening of mergers and in relation to the screening of provisions of arrangements between firms. An effects test focuses objectively on the economic effect of the conduct, so avoids any need to analyse or second-guess the subjective purpose of the firms involved.

(a) *An 'effects test' introduces an appropriate level of culpability*

An effects test avoids the need to prove that a firm had an intentional strategy to cause harm in circumstances where there is a demonstrable anti-competitive effect on the market as a whole, so avoids the need for a court to attempt to second-guess the subjective purpose of that firm in those circumstances.

Instead of a litigant being required to establish that a firm had a purpose of harming a competitor, that litigant could instead focus on the overall economic effect of the conduct in the market as a whole. If the overall effect of the conduct was to substantially reduce competition, then the conduct would be regarded as culpable irrespective of the intent of the firm.

VHA considers that an effects test would not run the risk of chilling legitimate competition in circumstances where the other screening devices in s 46 were retained, including the 'taking advantage' wording. Specifically, s 46 would only apply to firms with SMP that were engaging in conduct that they would not otherwise undertake in a competitive market. By definition, this means that the effects test would only apply to larger firms operating in imperfectly competitive markets that were taking advantage of the absence of competition. It is entirely appropriate that such firms be precluded from engaging in conduct, derived from their SMP, that further reduces the level of competition to which they are subject.

³ *NT Power Generation v Power and Water Authority* [2004] HCA 48; *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* [2001] HCA 13 (High Court); *Seven Network Ltd v News Limited* [2007] FCA 1062.

⁴ *NT Power Generation v Power and Water Authority* [2004] HCA 48.

In such circumstances, the practical effect of an effects test in s 46 would be to hold such firms to the same standards of competitive behaviour that would prevail if they were competing in a truly competitive market.

(b) *The telecoms sector has applied an 'effects test' for some 20 years*

The question arises why an effects test has not been introduced into s 46 to date. As the Australian Government will be aware, there have been many previous reviews of the CCA. In almost all cases, these reviews have recommended against reforms to s 46 or have preferred a 'wait and see' approach.

The answer to this question is that an effects test has been introduced into s 46, but only in the context of the telecommunications sector. This reform occurred in 1997 with the enactment of s 151AJ(2). This reform resulted in firms with SMP in the Australian telecoms sector becoming subject to an effects test as well as a purpose test. As such, the telecoms sector is a litmus test for the current proposed reforms.

The genesis for the 1997 reforms was a recognition at the time that the telecoms sector had a much greater concentration of market power (in Telstra) and was therefore more susceptible to market failure than other sectors. Greater regulatory intervention was therefore considered desirable. One manifestation of this regulatory intervention was the adoption of a stricter 'effects test' threshold in the misuse of market power provision in the CCA. This policy basis was explained in the Explanatory Memorandum to the *Trade Practices Amendment (Telecommunications) Bill 1996* as follows:

"The first circumstance is set out in proposed s. 151AJ(2) and is an effects-based test which does not require any examination of the purpose for which the conduct was engaged in. According to this test, a carrier or carriage service provider will be taken to engage in anti-competitive conduct for the purposes of Part XIB if the carrier or carriage service provider has a substantial degree of power in a telecommunications market and takes advantage of that power with the effect, or likely effect, of substantially lessening competition in that or any other telecommunications market.

An effects test has been included to address the danger that competition in the telecommunications industry will, or will be likely to, be damaged by aberrant behaviour that has a demonstrable, negative effect on competition regardless of the purpose motivating that behaviour. Proof of purpose is a subjective matter that requires a reason or motive for certain conduct to be established. Proof of purpose may not assist in distinguishing predatory conduct. Reliance on a 'purpose test' alone risks a focus on the perceived morality of conduct rather than its economic effect."

In its detailed inquiry report into Telecommunications Competition Regulation in 2001, the Productivity Commission also subsequently highlighted (at page 179) that "*an effects test has the advantage of focusing on the economic rationale for anti-competitive conduct regulation*".

Under the telecoms-specific competition provisions in Part XIB of the CCA, the ACCC may issue a 'competition notice' against a telecoms carrier or carriage service provider that takes advantage of its SMP with the effect or likely effect of substantially lessening competition in a telecommunications market. This 'effects test' has removed the evidential burden in proving an illegitimate purpose, so has shifted the focus to anti-competitive effect.

Importantly, as explained below, the 'effects test' contained in Part XIB of the CCA has not chilled legitimate competition and has existed now for some 20 years. Moreover, this 'effects test' has co-existed with the existing purpose test in s 46 for those 20 years, successfully, to regulate the conduct of firms with SMP.

(c) *An 'effects test' has operated effectively without the sky falling in*

Some 20 years' experience in the Australian telecommunications sector clearly demonstrates that the current concerns regarding the introduction of the effects test amount to much ado about nothing.

The effects test has not had the effect of chilling aggressive competitive behaviour by Telstra in the Australian telecommunications sector. Moreover, the effects test has had the effect of ensuring that Telstra has in fact been held to account for conduct that has allegedly overstepped the mark. VHA's experience in telecoms is that an effects test has resulted in no detriments, but with very substantial benefits, as explained below.

There is much information in the public domain regarding the benefits of the Part XIC regime and its effectiveness in regulating Telstra. The effectiveness of Part XIC is partly proved by its continued existence within the CCA, notwithstanding that it was originally intended to apply only for a limited period. In the Supplementary Explanatory Memorandum to the *Telecommunications Legislation Amendment Bill 1998*, the Australian Government acknowledged the importance of Part XIC as follows:

"The competition rule/notice regime is fundamentally sound and has been used to some effect in relation to Internet peering and commercial churn. (The Internet peering issue involved Telstra charging to carry competitors' Internet traffic on its network while refusing to pay its competitors for their carriage of its traffic. Commercial churn is the transfer of customers from one carrier or carriage service provider to another.)"

The Productivity Commission also noted in its 2001 inquiry report (at page 177) specifically in relation to the 'effects test' in Part XIB

"The ACCC considered that the effects test in Part XIB had enabled action to be taken where the alleged anti-competitive conduct was in fact a failure to do a positive act. It considered that its action in the internet peering and commercial churn cases would not have been possible under [section 46 alone]"

Since 2001, the effectiveness of the 'effects test' in Part XIB has been repeatedly recognised. Selvadurai, for example, wrote in 2014 that "*it has been suggested that Pt XIB provides a more effective mechanism than Pt IV for addressing anti-competitive conduct because it incorporates an effects-based test as opposed to a purpose-based test.*"⁵

More recently, the ACCC in proposing to the Harper Panel an 'effects test' amendment to s 46 modelled on the telecommunications regime in section 151AJ stated:

⁵ Selvadurai, N. 2014. 'Telecommunications-specific competition regulation in a converged digital environment – is it still relevant?' 22 *Australian Journal of Competition and Consumer Law* 307, 390-310.

“The concerns articulated by the Dawson Report that such a test would discourage legitimate competitive practices and therefore have a ‘chilling’ effect upon efficient, pro-competitive conduct are unfounded and have not been demonstrated in the telecommunications sector.”⁶

Indeed, we note the ACCC has made extensive submissions in various contexts in support of the effects test and pointing to the benefits of the effects test in the telecommunications sector. The ACCC’s submission to the Harper Review, for example, recognises the utility of the approach in s 151AJ(2) as follows:

“This latter provision was originally introduced in 1997, over 15 years ago, in recognition of the difficulties that may arise in obtaining evidence of a firm’s purpose and the concern that “reliance on a ‘purpose test’ alone risks a focus on the perceived morality of conduct rather than its economic effect”.”⁷

Part XIC and the ‘effects test’ approach has been applied to address and effectively rectify alleged anti-competitive conduct by Telstra in 1998 (Internet access), 1998 (commercial churn), 2001 (broadband), 2004 (broadband), and 2006 (wholesale line rental), as set out in the following table. In each case, the effects test meant that the ACCC focussed on the economic effect of the relevant conduct, not Telstra’s rationale, enabling the ACCC to act swiftly to achieve an effective resolution of the concern.

Year	Detail
1998 (Internet access)	Telstra was alleged to have charged its Internet competitors for services by Telstra while at the same time refusing to pay for a similar service it received from those same Internet competitors.
1988 (commercial churn)	Telstra was alleged to have offered its commercial churn service to wholesale customers under conditions so unattractive that they could not effectively compete if they used the service. Complainants suggested, for example, that the inability to offer customers one bill is stifling the further development of long distance competition, particularly for those who want a single service provider.
2001 (broadband)	Telstra was alleged to supply its wholesale asymmetrical digital subscriber line (ADSL) broadband products known as Flexstream to its wholesale customers at prices set at a level whereby there was only a small positive margin or negative margin between those prices and the corresponding prices at which Telstra supplied ADSL services to its residential and small business retail customers.
2004 (broadband)	Telstra raised the price of its wholesale ADSL broadband products, resulting in an alleged vertical price squeeze of its wholesale customers relative to Telstra’s BigPond ADSL retail offerings.
2006 (wholesale line rental)	Telstra raised the price of its Home Access product, which is an input used by Telstra's wholesale customers to provide line rental and local call services to

⁶ Australian Competition and Consumer Commission, Submission to the Competition Policy Review, 25 June 2014, 80.

⁷ Australian Competition and Consumer Commission, Submission to the Competition Policy Review, 25 June 2014, 77 citing Explanatory Memorandum, *Trade Practices Amendment (Telecommunications) Bill 1996* (Cth), 10.

	consumers. The price increase resulted in Telstra's retail prices for the line rental component for the majority of its fixed voice products being below Telstra's wholesale price for line rental.
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These issues were significant (not numerous) and the resolution materially improved the competitive landscape.

VHA considers that in the absence of an effects test, it would have been substantially more difficult for the ACCC to have commenced action against Telstra. In each case, the ACCC would have been faced with Telstra pointing to ostensibly legitimate purposes to justify Telstra's conduct. The ACCC would have been in the difficult position of gathering sufficient evidence to establish another illegitimate purpose. In each case, it is highly unlikely that there would have been documentary evidence to support any purpose of harming competitors, hence there would have been no practical ability to prevent Telstra's conduct. In each case identified above, the ACCC did not proceed on the basis of the purpose test, but rather favoured effect

3. Of the various options presented, VHA prefers 'Option E'

VHA is supportive of those options proposed by the Australian Government for reform of s 46 that involve the adoption of an 'effects test' into s 46. Accordingly, VHA is supportive of the Harper wording. However, VHA is concerned that political concerns regarding the Harper Review wording may result in no reform to s 46 at all. The wording proposed by the Harper Panel does involve significant reform and is untested, particularly as the wording would be unique in the world.

Both practically and from a policy perspective, it is crucial that changes to s 46 allow for clarity in interpretation and consistent, predictable outcomes. Reform should minimise the risk of confusion and uncertainty. VHA recognises that those opposing reform are concerned about harm to consumer welfare resulting from increased uncertainty and that legislative uncertainty might also 'chill' competitive behaviour

Accordingly, VHA urges that a political compromise is necessary. A political compromise could easily occur that introduced an 'effects test' without requiring substantial amendments to the remainder of s 46.

VHA prefers Option E because it has the best articulation of an 'effects test' (which VHA considers is highly desirable), but involves the fewest changes to the remaining wording of s 46 so results in less uncertainty.

However, a lot of political opposition has been associated with the uncertainty to business caused by the removal of the 'taking advantage' language in s 46. VHA notes that every reform option presented by the options paper involves the removal of the 'taking language' in s 46, except if no reform occurs. This is unfortunate, as the introduction of an effects test into s 46 could easily occur without amendments to the 'taking advantage' language. The options paper does not identify reforms to s46 that introduce an effects test without removing 'taking advantage'. In VHA's view, such reforms would be substantially easier to achieve and may deliver a better policy outcome.

VHA is concerned that the focus of the options paper on 'taking advantage', rather than the effects test, could result in the Australian Government following a path to reform that is destined for political failure given the weight of industry opposition to reforms to 'taking advantage'. As a result, the opportunity to introduce an effects test into s 46 may be lost.

Therefore, while VHA does support 'Option E' from the options paper, VHA has reservations whether the amendments to 'taking advantage' should occur. It would be better to focus on amendments that have clear benefits and no costs, rather than amendments that have unclear benefits and apparent costs. (VHA considers that the case law relating to 'taking advantage' is useful and some concerns regarding this wording have been overstated, so this aspect of the reform should not be the focus).

If the removal of the 'taking advantage' wording does occur, VHA strongly believes that the ACCC should be required to issue comprehensive guidelines to assist to address the resulting uncertainty. In doing so, the ACCC would significantly reduce compliance costs for business.

4. Another sensible solution would be to supplement s 46 with s151AJ(2)

Another solution would be to adopt the tried-and-tested approach adopted in telecoms, as identified by VHA above. Under this solution, a new supplementary provision would be introduced into the existing version of s 46 that would state as follows:

"A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market with the effect, or likely effect, of substantially lessening competition in that or any other market."

Under this amendment, the 'taking advantage' wording would remain, but 'effects test' wording would be inserted, as exists in s 151AJ(2). The 'effects test' would supplement the existing purpose test, so the provisions would co-exist and complement each other, in the same manner as currently occurs in the telecoms sector.

This solution has the advantage of maintaining certainty and avoids the more controversial 'taking advantage' wording changes to s 46, yet ensures that an 'effects test' is included by a supplementary amendment.

VHA considers that adopting the supplementary wording from the existing s 151AJ(2) may be a sensible political compromise that addresses the concerns of most stakeholders, enabling amendments to s 46 to proceed.

5. Conclusion

VHA believes that the reform of s 46 will progress a long way towards ensuring a consistent and high quality framework for the competition regulation in Australia.

VHA would be happy to meet with Treasury to discuss this submission and to provide any insights into the particular issues that VHA has faced in competition regulation in the telecommunications sector.