

9 January 2017

Dr Kathleen Dermody
Committee Secretary
Senate Economics Legislation Committee
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CANBERRA ACT 2600

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Dear Dr Dermody

COMPETITION AND CONSUMER AMENDMENT (MISUSE OF MARKET POWER) BILL 2016

The Insurance Council of Australia¹ (the Insurance Council) is grateful for the opportunity to provide a submission to assist the Senate Economics Legislation Committee (the Committee) in its Inquiry into the provisions of *the Competition and Consumer Amendment (Misuse of Market Power) Bill 2016* (the Bill).

We are pleased that the Committee is conducting the Inquiry, given the potential for any change to competition law to have serious consequences on businesses operating in Australia. This submission sets out the Insurance Council's views on Schedule 1 – Misuse of Market Power – of the Bill.

As the Committee may be aware, the Insurance Council has expressed² serious concerns with the Government's proposed changes to the misuse of market power provisions and incorporation of an 'effects test'. We do not share the Harper Review's view that Section 46 of the *Competition and Consumer Act 2010* (Section 46) is deficient in its current form.

Section 46 is well understood and operates effectively in its current form to restrict egregious anti-competitive conduct. Neither the Final Report of the Harper Review nor the December 2015 Discussion Paper³ provided a clear or sufficient rationale for changing Section 46.

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 2016 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$44.1 billion per annum and has total assets of \$120.5 billion. The industry employs approximately 60,000 people and on average pays out about \$124.6 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).

² The Insurance Council's 12 February 2016 [submission](#) to the Commonwealth Treasury [Discussion Paper](#) 'Options to strengthen the misuse of market power law', and 17 November 2014 [submission](#) to Harper Review Draft Report, refer.

³ The Commonwealth Treasury [Discussion Paper](#), 'Options to strengthen the misuse of market power law', refers.

Nevertheless, we respect the Government's decision to change Section 46 and introduce an 'effects test'. The Insurance Council has since shifted its focus to assist, where possible, in identifying any potential unintended consequences of the proposed legislative changes.

Clarification of the type of conduct being targeted

The proposed amendments to Section 46 in the Bill, which adopt the Harper Review's final recommendation, reframes the current provisions to prohibit a corporation with a substantial degree of power in a market from engaging in "*conduct that has the purpose, or has or is likely to have the effect, of substantially lessening competition in: ... that market ... or any other market ...*". In determining this, a court would have regard to the extent to which:

- *"the conduct has the purpose of, or has or would be likely to have the effect of, increasing competition in that market, including by enhancing efficiency, innovation, product quality or price competitiveness in that market; and*
- *the conduct has the purpose of, or has or would be likely to have the effect of, lessening competition in that market, including by preventing, restricting, or deterring the potential for competitive conduct or new entry into that market."*

As we explained in our September 2016 submission⁴ to the Government's Exposure Draft of the *Competition and Consumer Amendment (Competition Policy Review) Bill 2016*, the use of the broad term 'conduct', without qualification, may create uncertainty about how the term may be applied in practice.

For instance, it is not clear whether 'normal' competitive conduct may be captured, unintentionally, under the provisions of the Bill. This uncertainty does not appear to be addressed by the proposed factors that a court would need to have regard to, and would result in potentially significant unintended consequences and unnecessary litigation.

The Insurance Council appreciates that the Explanatory Memorandum to the Bill broadly explains why it is not possible to prescribe specific forms of conduct that always would or would not contravene Section 46:

"Given the wide range of conduct which may have a purpose, effect or likely effect of substantially lessening competition and the wide range of circumstances in which the conduct may occur, it is not possible to prescribe specific forms of conduct which always will or will not contravene section 46. In some markets, a particular type of conduct may substantially lessen competition, while in other markets the same conduct may have little or no effect on competition."⁵

However, we note that the Australian Competition and Consumer Commission's (ACCC) draft framework for misuse of market power guidelines (draft framework) provides that the type of conduct that it would target under Section 46 is "*exclusionary conduct*":

*"The objective of a misuse of market power provision is to prohibit unilateral conduct by a corporation with substantial market power that interferes with the competitive process by preventing or deterring rivals or potential rivals from competing on their merits. Sometimes this is broadly referred to as '**exclusionary conduct**'. The*

⁴ The Insurance Council of Australia's 30 September 2016 [submission](#) to the Commonwealth Treasury, refers.

⁵ Paragraph 1.29 of the [Explanatory Memorandum](#) to the Bill, refers.

objective is not to protect individual competitors. Conduct by a corporation with a substantial degree of market power that harms an individual competitor should only be prohibited if it has a broader detrimental impact upon the competitive process itself.”⁶ (Our emphasis).

The ACCC also provides⁷ in its draft framework that some types of conduct have been regarded by competition agencies and courts as having greater potential to involve the misuse of market power, either in isolation or combined, and that these include refusal to deal, predatory pricing, tying and bundling and margin/price squeeze.

Supplementing this, we note that the ACCC Chairman, Mr Rod Sims, has stated in public that, “*Section 46 is about excluding your competitors*” and “*Obviously the law is meant to stop very large companies excluding their competitors*”⁸.

For the reasons outlined above, the Insurance Council considers that that it would be important to explicitly clarify in the Bill the type of conduct that would be targeted.

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 (02) 9253 5121 or janning@insurancecouncil.com.au.

Yours sincerely



Robert Whelan
Executive Director and CEO

⁶ The Australian Competition and Consumer Commission's [draft framework for misuse of market power guidelines](#), refers.

⁷ Section 4.5 of the Australian Competition and Consumer Commission's [draft framework for misuse of market power guidelines](#), refers.

⁸ Australian Broadcasting Corporation, 29 March 2016, ‘*Effects test: ACCC's Rod Sims slams mistruths from big corporates*’, transcript of [interview](#) between Ticky Fullerton and Rod Sims.