Further submission by Winston Rodrigues to Senate Economics Legislation Committee on Competition and Consumer (Misuse of Market Power) Bill 2016 Provisions

1. The purpose of this further submission by me to Senate Economics Legislation Committee on Competition and Consumer (Misuse of Market Power) Bill 2016 Provisions is to assist the Committee to more conveniently assess my original submission by summarizing herein the key points in that submission as well as adding some points. My original submission was lengthy but I considered it essential that the detailed arguments and references be provided to assist the Committee's consideration, in case it felt it needed such detail.

2. For the detailed reasons in my original submission, the Bill, if enacted, would, in my view, have the following effects:

(a) permit powerful firms to prevent entry; eliminate competitors and deter competitive conduct, which is now prohibited;

(b) lead to greater concentration in markets; higher prices; and reduced quality and service;[1]

(d) transfer resources from the general population to large firms and their executives, thus increasing inequality of incomes and wealth, which in turn, reduces national economic growth, employment and living standards;

(e) allow the *non-recoupment defence,* now justifiably excluded, to be made, thus making it harder to prove a contravention;

(f) contrary to the Government's stated policy,

- stultify innovation, entrepreneurship and efficiency improvements; and
- reduce jobs and growth;

(g) put Australia out of step with leading Western economies on Misuse of Market Power prohibitions with the consequence of hampering international co-operation in competition law enforcement, particularly in relation to the Closer Economic Relations policy with New Zealand;

[1] Because of concerns about such effects of market concentration, the 1977 change in the merger test from the original 1974 test of *substantial lessening of competition* to that of *dominance*, was reversed about a decade later. Curiously, the 1977 amendment was *inconsistent with the Swanson Committee's recommendation on this point.* The Committee based its recommendations on its assessment of numerous submissions, a process which did not characterize the departure from its recommendations on the merger test.

(h) create inconsistency in treatment of firms with substantial market power in some sectors regulated for access and pricing and other firms not so regulated;

(i) by encouraging the increasing concentration of markets, tend to increase influence peddling to the detriment of the public interest.

3. For the detailed reasons in my original submission, I consider that there is no substantial issue of:

(a) undue ambiguity about whether the current provisions prevent pro-competitive conduct; or

(b) whether the objective of competition law is to protect and preserve competition or protect individual competitors and I have suggested criteria for market efficiency as the touchstone;

4. If further clarity is needed, there are better ways than rewriting the provision.

5. There are existing arrangements for assessing and pursuing small business interests under the competition law, such as the ACCC (including its Small Business Commissioner); and the Small Business Ombudsman. The enactment of the Bill would limit the ability of those agencies to take appropriate action.

6. The objectives of the Review Panel included *clarity* and *effectiveness* of the competition law The objective of clarity appears to have been interpreted as *simplicity* and the objective of effectiveness has been overshadowed by the pursuit of simplicity and, as a result, implementation of its recommendations through the Bill would neuter the objectives of section 46 .

7 A key problem with the Bill is that it rewrites the existing provisions with the consequent loss of accumulated jurisprudence from decades of case law and would lead to extensive litigation to create a body of law which adequately interprets the new provisions.

8. I submit that the Committee should recommend:

(a) acceptance of the introduction of the *effects* leg of the test of culpability;

(b) acceptance of replacing the phrase *taking advantage* by the phrase *engage in conduct*;

(c) rejection of the replacement of the current substantive prohibition in section 46 with the sole test of *substantial lessening of competition*;

(d) rejection of the repeal of amendments to the section made since 2007.

7. If the Committee considers that there may be some ambiguity in s. 46 that could require clarification, I suggest that it recommend that a Queen's Counsel/Senior Counsel with extensive

experience in competition law litigation and an excellent understanding of the economics of industrial organization, be tasked to examine the current provisions *within a tight time-frame,* engage in public consultation and, if considered appropriate, make recommendations which resolve any such ambiguity by building on the existing provisions.

8. Although the Committee's consideration is limited to this Bill which deals with s.46, I suggest that the Panel's recommendation for the repeal of the specific provisions applicable to primary boycotts (defined in section 4D as *exclusionary provisions*) which are part of the general prohibition in section 45, should also be examined by the Committee for consistency with the proposals for section 45D, 45E and 45EA, when the relevant Bill is presented to the Parliament.