Law Council
OF AUSTRALIA
Business Law Section

Mr Mark Fitt
Committee Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: economics.sen@aph.gov.au

9 January 2017

Dear Mr Fitt,

Inquiry into the *Competition and Consumer Amendment (Misuse of Market Power) Bill* 2016

Introduction

The Law Council of Australia is the peak national body representing the legal profession in Australia.

The Small and Medium Enterprise Business Law Committee of the Business Law Section of the Law Council of Australia (***SME Committee***) makes this submission to the Inquiry into the *Competition and Consumer Amendment (Misuse of Market Power) Bill* 2016.

The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (***SMEs***) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

Please note that the SME Committee's submission may differ from those made by other Committees of the Law Council of Australia because of our Committee members' perspectives and experiences as advisers to SMEs.

Response

Thank you for the opportunity to provide a submission to the Inquiry into the *Competition and Consumer Amendment (Misuse of Market Power) Bill* 2016.

The SME Committee supports the proposed Bill. The Committee has always supported the Competition Policy Review (***the Harper Review***) recommendations in relation to section 46 of the *Competition and Consumer Act 2010* (Cth) (***CCA***).

The SME Committee has had some concerns that making a breach of the misuse of market power provision subject to a substantial lessening of competition test may

leave a vacuum in relation to small business concerns where a business with market power deliberately damages a small business or businesses.

The SME Committee's concern is now heightened with the recent Federal Court decision in ***ACCC v Woolworths Limited***,[1] where conduct by Woolworths aimed at the supplier was held not to be in breach of the unconscionable conduct provisions of the *Australian Consumer Law* 2010. It was previously felt that the unconscionability provision would assist small business against undue corporate conduct that would not fall within the Harper recommendations to reform section 46. One consequence of the Woolworths decision is that the utility of the unconscionable conduct provisions in terms of protecting small business from undue conduct by larger businesses is less clear.

The SME Committee also notes that the above Bill has a change from the draft Bill circulated for discussion in 2016. That change relates to excluding impact in "any market". This differs from other CCA provisions. Accordingly, the SME Committee has concerns about the ramifications of that change. The SME Committee believes that the reasons for the change, as set out in the Explanatory Memorandum, are unconvincing.

The SME Committee would be happy to appear before the Senate Economics Legislation Committee to expand on this short submission.

It may be that members of the Senate Economics Legislation Committee may suggest other amendments. The SME Committee would be happy to comment on any proposed amendments.

Attached is the SME Committee's earlier submission to The Treasury, dated 12 February 2016, which outlines the reasons for our Committee's support of the Harper Review's proposed reforms of section 46 – **Attachment A.**

Further discussion

The SME Committee would be happy to discuss any aspect of this submission. Please contact Coralie Kenny, the Chair of the SME Committee, on if you would like to do so.

Yours sincerely,

Rebecca Maslen-Stannage, Acting Chair
Business Law Section

[1] *ACCC v Woolworths Limited* [2014] FCA 364.

Attachment A

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

Submission by the SME Business Law Committee of the Business Law Section of the Law Council of Australia

12 February 2016

SME Committee Position on the Discussion Paper

The SME Committee would first like to repeat a number of comments which it made in its earlier submissions to the Harper Review.

Policy Objectives of the Competition and Consumer Act 2010 (CCA)

The SME Committee expressed a concern in its earlier submissions that the Harper Review appeared to have accepted the claim that the sole policy objective of the CCA is to "protect competition and not competitors". However, in the SME Committee's view, when one more carefully considers this question it becomes apparent that the policy objectives of the CCA are much broader and more multifaceted.

Section 2 of the CCA states:

> *The object of this Act is to enhance the welfare of Australian through the promotion of competition and fair trading and the provision of consumer protection.*

The CCA is aimed at the promotion of both competition and fair trading. In the SME Committee's view it is implicit in the term "fair trading" that the CCA is aimed at preventing companies from engaging in unfair trading practices towards both consumers and their competitors.

The Second Reading Speech for the *Trade Practices Act* also makes it clear that the policy objective of the CCA involves a wider range of considerations than suggested in the Draft Report. As stated by the Hon. Senator Murphy on 30 July 1974:

> *The purpose of the Bill is to control restrictive trade practices and monopolisation and to protect consumers from unfair commercial practices. The Bill will replace the existing Restrictive Trade Practices Act, which has proved to be one of the most ineffectual pieces of legislation ever passed by this Parliament. The Bill will also provide on a national basis long overdue protection for consumers against a wide range of unfair practices. Restrictive trade practices have long been rife in Australia. Most of them are undesirable and have served the interests of the parties engaged in them, irrespective of whether those interests coincide with the interests of Australians generally. These practices cause prices to be maintained at artificially high levels. They enable particular enterprises or groups of enterprises to attain positions of economic dominance which are then susceptible to abuse; they interfere with the interplay of competitive forces which are the foundation of any market economy; they allow discriminatory action against small businesses, exploitation of consumers and featherbedding of industries.*

In the view of the SME Committee, the policy objectives of the TPA/CCA are much broader than the promotion of competition, but rather extend to the removal of unfair practices including the prevention of discriminatory and exclusionary action against small businesses.

Similarly, Senator Murphy noted the policy objectives behind section 46 in his Second Reading speech:

> *The clause [46] covers various forms of conduct by a monopolist against his competitors or would-be competitors. A monopolist for this purpose is a person who substantially controls a market. The application of this provision will be a matter for the Court. An arithmetical test such as one third of the market- as in the existing legislation- is unsatisfactory. The certainty which it appears to give is illusory.*
>
> *Clause 46 as now drafted makes it clear that it does not prevent normal competition by enterprises that are big by, for example, their taking advantage of economies of scale or making full use of such skills as they have; the provision will prohibit an enterprise which is in a position to control a market from taking advantage of its market power to eliminate or injure its competitors.*
>
> *The provision will not apply merely because a person who is in a position to control a market engages in conduct within one of the classes set out in the clause. It will be necessary for the application of the clause that, in engaging in such conduct, the person concerned is taking advantage of the power that he has by virtue of being in a position to control the market. For example, a person in a position to control a market might use his power as a dominant purchaser of goods to cause a supplier of those goods to refuse to supply them to a competitor of the first mentioned person- thereby excluding him from competing effectively. In such circumstances the dominant person has improperly taken advantage of his power.*

Again, the policy objective behind section 46 was and is to prevent firms with market power from engaging in conduct which will eliminate or injure their competitors. Implicit in Senator Murphy's speech is a recognition that competition does not occur in a vacuum, but rather manifests itself in a practical sense through rivalrous behaviour between competing firms or potentially competing firms.

In the SME Committee's view, there is a need for better recognition and acknowledgement of the multifaceted policy objectives behind the CCA. Of particular importance is recognition and acknowledgement of the clear policy objective of providing competitors, particularly small businesses, with protections from unfair trading and abuses of market power. In the Committee's view, such recognition and acknowledgement is essential in considering the various proposals for amending section 46.

Having said that, the SME Committee also noted that too much focus had been placed on amending section 46 as a means of addressing small business concerns about the market conduct of larger corporations in markets. In this regard, the SME stated:

> *In the SME Committee's view, the debate concerning how to provide small businesses with a greater level of protection should focus less on ways of trying to "fix" section 46 of the CCA. In the Committee's view, section 46 at its best will only ever be a blunt instrument in terms of protecting small businesses from the abusive practices of larger firms.*
>
> *The SME Committee believes that other proposed changes to the CCA and ACL are likely to provide small businesses with a much greater degree protection than continual tinkering with section 46.*
>
> *For example, the recent cases taken by the ACCC against a supermarket chain for alleged unconscionable conduct show the ways in which these provisions may be used to provide protections to small and medium sized businesses. In the past, the ACCC was likely to have looked at the conduct described in these cases under section 46, rather than appreciating the potential of using the unconscionable conduct provisions to challenge such conduct.*
>
> *The proposed extension of the Unfair Contract Terms legislation to business standard form contracts will also provide small businesses with greater protection in their dealings with larger businesses. Indeed, in the SME Committee's view, this particular legislative change is likely to have a profound effect in terms of improving the fairness of contractual relations between large and small businesses in Australia.*
>
> *Finally, in the SME Committee's view, the introduction of a mandatory Grocery Code, along the lines of the UK Groceries Code, would also have a significant impact in terms of leveling the playing field between small/medium suppliers and the major grocery retailers.*

SME Committee submission to Harper Review re Final Report, dated 29 May 2015

The SME Committee reiterated its view that section 46 is simply one element of a suite of small business protections provided in the CCA. The unconscionable conduct provisions and the unfair contracts legislation in relation to small business standard form contracts, which will commence on 12 November 2016, will supplement section 46 in terms of providing important small business protections.

The SME Committee believed that the proposed section 46 should be amended, in the following manner, so that it provides greater protections for small businesses:

> *A corporation that has a substantial degree of power in a market shall not engage in conduct if the conduct has the purpose or would have or be likely to*

have the effect, of substantially lessening competition in that market or in any other market including by preventing, restricting or deterring the potential for competitive conduct in a market or new entry to a market.

The SME Committee also supported the idea of having guidance factors included in the legislation, as follows:

(a) conduct by a vertically integrated supplier in reducing or squeezing the margin available to an unintegrated customer which is in competition with the supplier;
(b) acquisition by a supplier of the business of a customer which would otherwise be available to a competitor of the supplier, or the acquisition by a customer of the business of a supplier which would otherwise be available to a competitor of the customer;
(d) the selective and/or temporary introduction of loss leader brands to the market;
(e) entering into agreements for the acquisition of scarce facilities or resources which are required by a competitor for the operation of their business, with the object of withholding the facilities or resources from the market;
(f) purchasing products to prevent the erosion of existing price levels;
(g) adoption of product specifications that are incompatible with products produced by a competitor;
(h) requiring or inducing a supplier to sell primarily or exclusively to certain customers, or to refrain from selling to a particular competitor;
(i) selling goods at a price lower than the acquisition price on a sustained basis; and
(j) the introduction of additional capacity to a market without a legitimate business rationale or justification.

Authorisation would be available in relation to section 46 where the conduct can be shown to have countervailing public benefit.

ACCC Enforcement of section 46

Prior to outlining the SME Committee's position in relation to the Discussion Paper, the Committee believes that it is important to review the ACCC's enforcement of section 46 since the enactment of the provision in 1974.

The following table lists all of the ACCC section 46 litigation in the period from 1974 to 2016:

Table: ACCC and TPC Section 46 cases – 1974 to 2016[1]

	Case	Year	Sections	Result
1.	CSBP Farmers Limited	1980	ss. 45, 46	Lost
2.	Carlton United Breweries Limited	1990	s.46	Won - consent
3.	CSR Limited	1991	ss.45, 46	Won - consent
4.	Commonwealth Bureau of Meteorology	1997	s.46	Won - consent
5.	Darwin Radio Taxi Cooperative Limited	1997	s.46	Won - consent
6.	Garden City Cabs	1997	s.45, 46	Won - consent
7.	Safeway Limited	2003	ss.45, 46	Won - contested
8.	Rural Press Limited	2003	s.45, 46	Lost s46 case but won s45 case
9.	Boral Limited	2003	s.46	Lost - High Court
10.	Qantas Limited	2003	s.46	No result – case settled with each party bearing their own costs
11.	Universal Music and Warner Music (CD's case)	2003	s.45, 46, 47	Lost ss45 and 46 cases but won s47 case
12.	FILA Pty Ltd	2004	ss.46, 47	Won - uncontested
13.	Eurong Beach Resort	2005	s.45, 46, 47	Won - consent
14.	Cardiothoracic surgeons	2007	ss.45, 46	No result – s46 claim dropped as part of the settlement
15.	Baxter Limited	2008	ss.46, 47	Won - contested
16.	Cabcharge Limited	2010	ss.46, 47	Won - consent
17.	Ticketek Pty Ltd	2011	s.46	Won – consent
18.	Cement Australia Pty Ltd	2014	ss.45, 46	Lost s.46 case, won s45 case.
19.	Pfizer	2016	ss.46, 47	Lost – contested
20.	Visa International	2015	ss.46, 47	Won s47 case, dropped s46 case

The above table discloses the following facts about the ACCC's enforcement of Section 46:

1. over the last 43 years the ACCC has commenced 20 actions which raised an allegation of a contravention of section 46 which equates to less than one section 46 case every two years;

2. the ACCC has been successful in 11 of its 20 section 46 actions, giving it an overall success rate of 55%;

3. eight of the 11 cases which the ACCC was successful in were settled by consent;

[1] Michael Terceiro, "Mythbusting: Bridging the Great Section 46 Divide", *Competition and Consumer Protection Law blog* at http://competitionandconsumerprotectionlaw.blogspot.com.au/2015/11/mythbusting-bridging-great-section-46.html

4. the ACCC dropped its section 46 allegations in two cases; and

5. the ACCC failed to establish its section 46 allegations in court in six of its 20 cases which equates to a failure rate of 30%.

The other important facts not disclosed in the above table are the grounds on which the ACCC failed to establish its section 46 case in Court. With the exception of the Pfizer case, the ACCC has been successful in establishing a proscribed purpose in each of its contested cases.

In the five other section 46 defeats for the ACCC, it failed to establish taking advantage in three cases (ie CSBP Farmers, Rural Press, and Cement Australia) and failed to establish a substantial degree of market power in two cases (ie Boral and Universal).

Harper Recommendation

As you are aware, the SME Committee's Deputy Chair, Michael Terceiro attended the Section 46 Roundtable held in Melbourne on 27 January 2016. The following is a summary of the SME Committee's position in relation to the Harper Section 46 Recommendation, as outlined by Mr Terceiro at the Roundtable.

The SME Committee sees two main problems with the existing section 46.

The first is the "taking advantage" test. In our view, prior to *Melway* and *Rural Press*, the taking advantage test simply required a causal connection between a firm's market power and their proscribed conduct.

Unfortunately, the High Court in *Melway* and *Rural Press* introduced a new and problematic interpretation of the taking advantage test. As explained in the Discussion paper, this test allows firms with market power to engage in particular business conduct if the court forms the view that firms without market power could also commercially engage in that conduct; in effect a "safe harbour".

The negative effect of this test on the enforcement of section 46 cannot be underestimated. In our view, Justice Kirby in his dissent in *Rural Press* clearly identifies the seriousness of the problems created by this new approach to taking advantage. In that case Kirby stated:[2]

> *"In my view,* the approach taken by the majority *is insufficiently attentive to the object of the Act to protect and uphold market competition. It is unduly protective of the depredations of the corporations concerned. It is unrealistic, bordering on ethereal, when the corporate conduct is viewed in its commercial and practical setting.* The *outcome cripples the effectiveness of s 46 of the Act. It undermines this Court's earlier and more realistic decision in* Queensland Wire*. The victims are Australian consumers and the competitors who seek to*

[2] *Rural Press v ACCC* (2003) 216 CLR 53, para. 139.

engage in competitive conduct in a naive faith in the protection of the Act. Section 46 might just as well not have been enacted for cases like these where its operation is sorely needed to achieve the purposes of the Act. Judicial lightning strikes thrice. A novel doctrine of innocent coincidence prevails. Effective anti-competitive threats can be made without the redress which s 46 appears to promise. Once again I dissent."

In the Committee's view, the High Court's approach to taking advantage has crippled the effectiveness of section 46. As a result, there have only been 20 section 46 cases commenced by the ACCC in the last 43 years.

The SME Committee considers that the second significant problem in the section is that it looks solely at purpose rather than the effect or likely effect of conduct. It is more appropriate for a provision seeking to prevent the misuse of market power to look at the effects of particular conduct as well as the purpose of such conduct. This focus on purpose in section 46 puts Australia out of step with many other anti-trust and competition regimes around the world.

Claims by some groups that the inclusion of an effects test would threaten competitive conduct and innovation are not convincing given that purpose or effects tests exist almost everywhere else around the world. For example, purpose or effects tests exist in the monopolisation provisions in both the US and Europe. However, we have not seen any negative impacts on competitiveness or innovation in those places due to the inclusion of an effects test in their monopolisation provisions.

Some have also suggested that having a purpose and effects test would be novel in terms of the Competition and Consumer Act 2010. However, the purpose or effect or likely effect test is clearly the dominant test in Part 4 of the CCA – for example each of sections 45, 47 and 50 have a purpose or effect test. In our view, Australian businesses already have a great deal of exposure and understanding of a purpose or effects test.

Finally, the purpose or effects test already applies to unilateral conduct by a firm, so there is nothing novel about Harper's proposed inclusion of this test in section 46. Both sections 47 and 50 already apply to unilateral conduct by a firm.

The only aspect of the Harper Committee Recommendation we do not support are the mandatory factors. Therefore, the SME Committee supports Option E but does express a concern about difficulties in proving a "substantial lessening of competition "in a market.

Discussion Paper – "Issues for Discussion"

The Government has identified several "Issues for Discussion" in its Discussion Paper. In the following table, we have sought to addresses each of these issues:

"Issues for discussion"	Committee Responses

"Issues for discussion"	Committee Responses
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?	The complexities created by the High Court's treatment of "taking advantage" has made it difficult for the ACCC and private litigants to take action under the existing provision. Litigants are required to prove that a corporation without market power would not have been able to engage in the particular conduct before being able to establish their case. It is arguable that the current provision is inadequate to combat anti-competitive price discrimination. Whilst price discrimination is often pro-competitive, in some cases it can be used to damage competition.
2. What are examples of conduct that may be pro-competitive that could be captured under the Harper Panel's proposed provision?	The SME Committee does not believe that the new provision will capture any pro-competitive conduct, given that the ACCC and private litigants will have to prove that the purpose or effect of the conduct was to substantially lessen competition.
Take advantage	
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?	As stated above, the SME Committee agrees with Justice Kirby's comments in Rural Press, quoted above, that the current interpretation of taking advantage has limited the effectiveness of section 46.
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?	The SME Committee does not believe that the new provision will restrict any economically beneficial behaviour, given that the ACCC and private litigants will have to prove that the purpose or effect of the conduct was to substantially lessen competition. The SME Committee also notes that Harper has proposed that Authorisation be available in relation to section 46. Therefore, businesses will be able to have economically beneficial behaviour approved by the ACCC or the Tribunal.
5. Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?	A significant criticism of the removal of the taking advantage element is that there will no longer be any need to prove a causal connection between the corporation's substantial degree of market power and their conduct. While this is true, it should also be acknowledged that taking advantage has been interpreted by the High Court in such a way that it does much more than simply require a causal connection. Rather taking advantage has now become a significant defence which corporations can seek to rely on to defeat a section 46 action.

"Issues for discussion"	Committee Responses
Purpose or effect (or likely effect)	
6. Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?	Yes. The SME Committee believes that many ACCC investigations are not pursued to litigation because the ACCC believes that it is unable to establish a proscribed purpose. If the provision is enacted, the ACCC will be able to pursue cases where it is able to prove conduct has or is likely to have the effect of substantially lessening competition.
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 SME Committee believes that the inclusion of purpose and **not** effect or likely effect in a monopolisation statute is incongruous and out of step with major antitrust and competition law regimes.
Substantially lessening competition	
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, although the SME Committee notes that it will be extremely difficult for private litigants to establish the substantial lessening of competition element of the new section 46. Even the ACCC has had great difficulties in proving an SLC in relation to unilateral action.
9. Should specific examples of prohibited behaviours or conduct be retained or included?	The SME Committee sees no need to include specific examples of prohibited behaviours in the provision, subject to the inclusion of guidance factors.
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?	As stated above, the SME Committee believes that the inclusion of purpose and not effect or likely effect in a monopolisation statute would be incongruous and out of step with major antitrust and competition law regimes.
Mandatory factors	
11. Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?	The SME Committee does not support mandatory factors, but rather guidance factors as currently existing in section 50 of the CCA.
12. If mandatory factors were adopted, what should those factors be	As stated above, the SME Committee does not support mandatory factors.
Authorisations	
13. Should authorisation be available for conduct that might otherwise be captured by section 46?	Yes – the Committee supports this proposal.

"Issues for discussion"	Committee Responses
Other issues	
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 SME Committee supports the inclusion of guidance factors such as the following: (a) conduct by a vertically integrated supplier in reducing or squeezing the margin available to an unintegrated customer which is in competition with the supplier; (b) acquisition by a supplier of the business of a customer which would otherwise be available to a competitor of the supplier, or the acquisition by a customer of the business of a supplier which would otherwise be available to a competitor of the customer; (d) the selective and/or temporary introduction of loss leader brands to the market; (e) entering into agreements for the acquisition of scarce facilities or resources which are required by a competitor for the operation of their business, with the object of withholding the facilities or resources from the market; (f) purchasing products to prevent the erosion of existing price levels; (g) adoption of product specifications that are incompatible with products produced by a competitor; (h) requiring or inducing a supplier to sell primarily or exclusively to certain customers, or to refrain from selling to a particular competitor; (i) selling goods at a price lower than the acquisition price on a sustained basis; and (j) the introduction of additional capacity to a market without a legitimate business rationale or justification.