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By email: [competition@treasury.gov.au](mailto:competition@treasury.gov.au)

12 February 2016

Dear Mr Rogers

### **OPTIONS TO STRENGTHEN THE MISUSE OF MARKET POWER LAW**

The Insurance Council of Australia<sup>1</sup> (Insurance Council) appreciates the opportunity to provide its views on the Treasury's discussion paper of 11 December 2015, '*Options to strengthen the misuse of market power law*' (the Discussion Paper). We are pleased that the Government is consulting further on this matter, given the diverse range of views on the effectiveness of the current section 46 of the *Competition and Consumer Act 2010* (section 46) and the potential for any change to have serious consequences on conducting business in Australia.

The Insurance Council strongly supports Option A that no amendment be made to the current provisions. It does not endorse the Harper Review's conclusion that section 46 is deficient in its current form. The Insurance Council submits that section 46 is well understood and operates effectively in its current form to restrict egregious anti-competitive conduct. Importantly, the Insurance Council considers that neither the Competition Policy Review nor the Discussion Paper has provided a clear or sufficient rationale for changing section 46.

This submission sets out the Insurance Council's position and builds upon the arguments made in our previous submissions to the Competition Policy Review in May 2015 and June and November 2014, all of which opposed the Harper Review's proposed changes to the misuse of market power provisions and incorporation of an 'effects test'.

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<sup>1</sup>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 2015 Australian Prudential Regulation Authority statistics show that the private sector insurance industry generates gross written premium of \$42.8 billion per annum and has total assets of \$121.3 billion. The industry employs approximately 60,000 people and on average pays out about \$115.6 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).

### **Retain the current section 46 – Option A**

The Insurance Council submits that the case to amend section 46 has not been made out. Any deliberation on changing section 46 should be undertaken in light of clear and specific evidence of anti-competitive conduct that is damaging to economic growth and cannot be addressed under section 46 or competition law more broadly. We are pleased that the Discussion Paper sought this evidence, but we are unaware of any specific examples that have been identified. Furthermore, we note that the Australian Competition and Consumer Commission (ACCC) regularly pursues section 46 cases and is often successful in proving a contravention of the provision.

In addition to being designed to address a clearly defined problem, any proposed change to section 46 should identify whether the intended public benefits – such as enhanced consumer welfare through improved product/service quality, or more competitive pricing and greater consumer choice – exceed the potential costs of change. However, the Insurance Council considers that such benefits have not been identified in the Competition Policy Review or the Discussion Paper.

On the potential detriments, the Insurance Council submits that the Competition Policy Review and the Discussion Paper fail to address the possible severe impact of the mooted changes on business and ultimately consumer welfare. In particular, the Insurance Council is concerned that such changes would lead to greater uncertainty for business and a chilling of competition. This would be in stark contrast to the Competition Policy Review Panel's objectives.

In addition, an 'effects test' would be unable to distinguish pro-competitive from anti-competitive conduct which would inhibit strong but fair conduct by efficient businesses and have the effect of protecting other participants in a market – as opposed to promoting competition. The Insurance Council notes that even the Draft Report of the Competition Policy Review acknowledged there would be a risk of an 'effects test' capturing pro-competitive conduct.

In relation to the option canvassed to remove 'take advantage' from the wording of section 46, the Insurance Council submits that this would disconnect the market power from the conduct and deter pro-competitive behaviour. In a similar vein, the proposal to include a 'substantially lessening of competition' test would impede legitimate, agile business conduct. A number of unintended consequences could result from the implementation of these proposed amendments. For instance:

- Consider a regional centre with three suppliers in operation. A business with a substantial degree of market power undertakes a tender process to procure services from these suppliers with the aim of lifting quality, efficiency and standards of service for consumers. Suppliers unsuccessful in the tender eventually go out of business. Is the business who initiated the tender liable under an amended section 46?

### **The possible chilling effect on innovation**

The options for changing section 46 may severely harm business innovation; depending on the market situation possibly impacting behaviour by small as well as large businesses. This would have damaging repercussions for consumer welfare, as consumers would miss out on consumer product and service innovations. This would also undermine the Government's National Innovation and Science Agenda. The role of Government should be to help support and encourage business innovation, particularly by ensuring that businesses are not

constrained by any unnecessary regulatory impediments. Businesses should not be discouraged from innovating, enhancing the quality of their goods and services and contributing to national productivity growth. Australia is in its 25<sup>th</sup> year of economic growth, but faces considerable challenges as mining investment winds down. Innovation is therefore critical to building on that growth and improving Australia's competitiveness and standard of living.

The Insurance Council continues to oppose any proposed legislative or regulatory reform that would constrain legitimate competitive conduct and innovation by general insurance companies. For instance, it would be damaging if changes were made to section 46 which affected general insurers' smash repairer networks.

General insurers typically are acquirers of smash repairer services. They rely on a supply network of smash repairer businesses across Australia to undertake repairs. These businesses – of which many are small operations – are generally made up of paint and panel repairers, mechanics, paint less dent repairers, windscreen suppliers and fitters.

There has been some recent natural consolidation in the smash repairer market from declining accident rates, increasing repair efficiency rates and changing consumer preferences and demands. There has been speculation about the role and motivation of general insurers in those developments.

However, it is in the general insurance industry's long term interest to ensure that spirited competition in the smash repairer market is upheld. Changes to section 46 would create a risk of pro-consumer conduct (e.g. business enhancements to repair efficiency) being prohibited; subject to uncertainty; or unnecessarily contingent on further analysis, to the ultimate detriment of consumer welfare.

Therefore, in the absence of a clear and valid problem being defined, the material detriment associated with changing section 46 and the lack of any identified pro-competitive or pro-consumer benefits all support a clear preference to leave section 46 unchanged.

Furthermore, as highlighted in the Insurance Council's previous submissions to the Competition Policy Review, the vast majority of independent public reviews (ten out of eleven reviews) into competition legislation over the past 40 years before the Harper Review did not recommend an 'effects test'. For instance, the Hilmer Competition Policy Review handed down in 1993 also noted the diverse views raised on section 46 before concluding:

*“The Committee sees a need to strike a balance between deterring undesirable unilateral conduct, encouraging business certainty and minimising the regulatory interference in daily business decisions. The Committee is not satisfied that any perceived difficulties with the current operation of s.46 are sufficient to warrant an amendment that would create additional uncertainty and thus potentially deter vigorous competitive activity<sup>2</sup>.”*

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<sup>2</sup> National Competition Policy Review (The Hilmer Review), 1993.

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](mailto:janning@insurancecouncil.com.au).

Yours sincerely



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