

# Submission Guide

## Options to strengthen the misuse of market power law Discussion Paper



### Background:

Competition in business can promote efficiencies, drive innovation, and provide better service and lower prices for consumers. The ability of a business to raise its prices, for example, is usually constrained by competitors and the possibility that its customers can switch to another business. When these constraints are weak, a business is said to have market power or dominance. The misuse of this market power can be used to weaken competition and exclude rivals.

Competition Policy in Australia is governed by the [Competition and Consumer Act 2010](#). Its purpose is to enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections. The competition regulator is the Australian Competition and Consumer Commission (ACCC).

In December 2013 the Government announced a comprehensive review of competition policy. The Review was led by Professor Ian Harper and the [Final Report](#), released in March 2015, is referred to as the 'Harper Review'.

During the course of the review it emerged that the majority of submissions related to anti-competitive practices and specifically [section 46](#) of the *Competition and Consumer Act 2010* that covers misuse of market power.

The Government released their response to the Review on the 24th November 2015. Their response to the Review's recommendation relating to the misuse of market power was to consult further on options to reform this provision and release a [discussion paper](#).

Effective misuse of market power provisions have been the subject of debate in Australia for over 40 years and we are one of the few countries that does not have a fit for purpose misuse of market power provision.

The Australian Greens believe that Professor Ian Harper's report confirmed what has been known for many years – Australia's competition laws are deficient. Introducing an effects test would help to create a level playing field for small and big businesses, and put a stop to a great deal of anti-competitive behaviour.

### What is the current situation?

Section 46 of the *Competition and Consumer Act 2010* prohibits corporations that have a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market, or deterring or preventing a person from engaging in competitive conduct.

The type of anti-competitive actions that companies with market power can engage in, to the detriment of small business includes:

- Land banking – buying up land that could be used by a competitor,

- Predatory pricing – setting a price very low to drive competitors out,
- Long term contracts that lock up essential supplies,

The ACCC Chairman Rod Sims has used a football analogy to explain misuse of market power as it currently operates under section 46:

It was not about changing what happens on the playing field (where stronger teams will beat weaker teams) but rather to address “exclusionary behaviour akin to when the team with substantial market power has locked the other in their change rooms and is seeking to win by default”.

Section 46 would not catch the business equivalent to such behaviour, he asserted, “because even companies without market power can have a policy to change locks on a regular basis”

While the ACCC have successfully prosecuted a small number of companies under section 46 they have considerable difficulty in establishing misuse of market power due to the technical requirements of section 46 as it is currently interpreted by the Courts.

Currently the ACCC has to prove ‘purpose’ which is practically speaking near impossible, without access to internal company documentation or evidence from a whistle-blower.

### What is an ‘effects test’ and why do we need one?

An effects test would make it far more difficult for firms with a substantial market power to be able to engage in conduct that has the purpose or effect or likely effect of lessening competition.

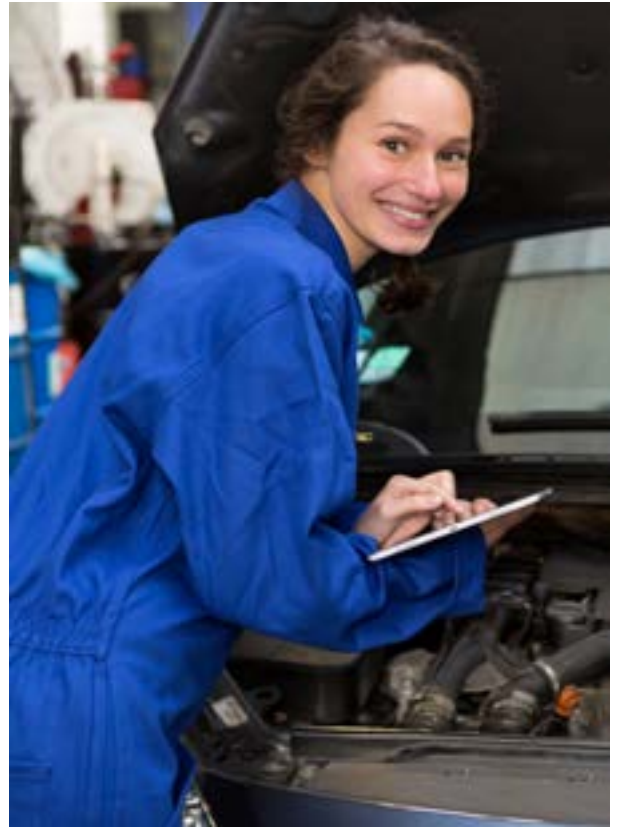
The CEO of the Council of Small Business Australia said “many large businesses, particularly in retail, strangle small business as they compete for market share. Australia needs to ensure there are safeguards in place to ensure that market power is not abused and small businesses are given equal opportunity to compete,”

**“We are not asking for a hand up, we just want to be able to compete on a level playing field.”**



Robust competition law should focus on the anti-competitive effect of conduct that causes harm.

Australia has over 2 million small businesses and collectively they employ over 4.5 million Australians. An effects test would assist in levelling the playing field for small business.



## Who supports an effects test?

The introduction of an effects test is supported by a broad range of stakeholders. These include the Council of Small Business Australia, Australian Chamber of Commerce and Industry, The Independent Business Alliance for Competition, Motor Vehicle Traders Association, Pharmacy Guild of Australia, the National Farmers Federation, Dairy Farmers Australia, CHOICE and the Australian Competition and Consumer Commission.

## How can I make a submission?

You can make a formal submission [online](#) via the Treasury website or provide comment . Comments are not considered formal submissions but they will be used to inform development of the consultation process.

The Harper Report recommendation relating to the misuse of market power can be found [here](#)



The closing date for submissions is Friday, 12 February 2016 and further information on the submission process is available on the Treasury website.

## Summary;

Australia needs competition law that is fit for purpose. The current misuse of market power provisions in section 46 of the *Competition and Consumer Act 2010* are deficient.

Deadline for comment is Friday 12th February 2016

Submissions can be made [online](#) or be emailed in Word format to: [competition@treasury.gov.au](mailto:competition@treasury.gov.au)

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