IT'S HOW WE CONNECT

TELSTRA CORPORATION LIMITED

Submission to Treasury in response to the Competition Policy Review's Final Report

26 May 2015

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Executive Summary

Telstra welcomes the release of the Competition Policy Review Final Report of 31 March 2015 (**Final Report**). We are grateful for the opportunity to provide our views, and to contribute to identifying and advocating for reforms that will reinvigorate competition, help raise Australia's productivity levels and living standards, and meet the economic challenges and opportunities in the decades ahead.

Telstra commends the Harper Panel's (**Panel**) efforts to develop a set of recommendations that will achieve this goal by ensuring regulation is proportionate and transparent, and our competition laws are made clearer and more predictable.

We strongly support a number of the Panel's recommendations including:

- Establishing of a new national competition body, the Australian Council for Competition Policy (**ACCP**);
- Simplifying the cartel provisions;
- Subjecting third line forcing conduct to the substantial lessening of competition test rather than being prohibited per se;
- Extending the notification process to resale price maintenance (**RPM**) conduct and exempting conduct between related bodies corporate from this prohibition.
- Simplifying the authorisation and notifications procedures to allow one application for each business transaction or arrangement and extending the immunity test to include an 'unlikely to substantially lessen competition' test.

While we support these recommendations, how they are implemented will have a significant bearing on whether they are successful. For example, if the market studies power is created but not given to the ACCP but rather to the ACCC, this would risk creating regulatory uncertainty and chilling investment and innovation. In this instance, it would be critical to make clear this power is not a regulatory function and does not permit use of regulatory powers to conduct the inquiries or implement any findings.

Regarding other recommendations in the Final Report, we have limited our comments to recommendations that are most relevant to our business and our position that Australia's regulatory settings need to support technological advancement and innovation, as well as stimulate competition and investment in Australian markets.

Panel recommendations relating to regulator governance and processes:

Section 155 power – Telstra supports amending section 155 of the *Competition and Consumer Act 2010* (**CCA**) to include a reasonable search defence.

We do not believe there is a need to extend the ACCC's section 155 power to cover the investigation of alleged contraventions of court-enforceable undertakings. In Telstra's experience, this is unnecessary because court-enforceable undertakings invariably include audit and reporting obligations which would provide the ACCC with sufficient information to determine whether an undertaking has been breached. However, if the section 155 power is extended in this way Telstra notes that it is essential that the reasonable search defence apply to this power as well.

Merger process - Telstra supports the Panel's recommendations for reform of the formal clearance process to (1) remove unnecessary restrictions such as prescriptive information requirements; (2) make the process subject to strict timelines; (3) make decisions of the ACCC subject to Tribunal review also governed by strict timelines; and (4) give the Tribunal discretion to allow further evidence or call and question a witness.

Telstra believes these reforms are essential to making the formal merger process workable in practice and to supplement the informal clearance process which does not work as well for more complex mergers.

Telstra supports the Panel's recommendation that there should be further consultation between the ACCC and business representatives in relation to the informal merger review process. Telstra believes it would be of assistance for this consultation to be given some definition by the Government, for example to specify the general issues the consultation will address and the need for the ACCC to report back to the Government on how it will address those issues in the informal merger review process going forward.

The Panel has recommended the formal merger clearance and authorisation processes be combined, but we do not see a clear benefit in combining these two processes as the current separate authorisation process appears to be working well.

In addition, Market participants have only recently begun to use the authorisation process in its current form and it would be sensible to give the Tribunal and businesses more time to use, understand and refine the process before deciding whether it is in need of reform.

Proposal for a new national access and pricing regulator: Telstra notes the Panel's recommendation for the ACCC's access and pricing functions for all industries to be transferred to a new Access and Pricing Regulator (**APR**). Telstra does not have a specific view on this recommendation as we remain of the view that structure is secondary to decision-making rigour, accountability and transparency.

In the context of competition and pricing and access regulation, we note that in the telecommunications sector there is some duplication of powers in parts XIB and XIC of the CCA as the same perceived concern can potentially be dealt with through either part. Overlap and duplication of regulation across regulators is inefficient, creates additional red tape and regulatory burden wherever it occurs, and would need to be addressed in this case if the recommended access and pricing regulator is created. The Government has announced a review of Part XIB will take place in the second half of 2015. Telstra agrees that it is timely to assess the continuing relevance of Part XIB and supports any reforms which will reduce inefficiency and red tape consistent with the Government's deregulation agenda.

Comments on Panel recommendations relating to Part IV of the CCA:

Price signalling – Telstra supports the Panel's recommendation that the price signaling provisions are not fit for purpose in their current form and should be repealed. We question, however whether there is an actual gap in the law which requires section 45 of the CCA to be extended to specifically include concerted practices. Further, the meaning and application of section 45 is currently well settled with a breadth of case law behind it. As a general principle any amendment to laws, particularly well settled laws, should be proven as necessary before any amendments are made.

If the Government nevertheless determines there is a gap in the law that requires amendment to section 45, certainty of application would be our key concern. Telstra believes the term 'concerted practices' needs to be clearly defined in any amendment to the CCA so that the public can clearly assess the degree of expansion to the law of this proposed amendment and to reduce the risk of businesses refraining from engaging in pro-competitive conduct for fear of contravening the law. Any definition of a concerted practice would need to require some level of mental consensus or 'meeting of minds' between competing parties to ensure that truly independent conduct of firms (such as ensure pure conscious parallelism is not captured.

Misuse of market power – Reform of this provision has been the subject of significant debate. In our experience, the law is fit for purpose, certain and well understood and there is no evidence that the section is failing to capture anti-competitive conduct. Further, Telstra is concerned that the potential changes to the law would harm consumers and small businesses that the law is trying to protect.

The Panel has proposed a number of amendments which, in our view, fundamentally alter the focus of the prohibition and we question whether the benefits of amending this law outweigh

the substantial risks of chilling competitive behaviour and imposing additional regulatory burden on businesses.

The most concerning proposal is the Panel's recommendation to remove the 'taking advantage' element from the prohibition. This element requires a causal link between the market power and the conduct in question in order for the conduct to be prohibited. Without this causal link, the proposed law would prohibit any unilateral conduct by a business with market power that has the purpose or effect of substantially lessening competition, whether or not it misuses its market power. This would create significant risk of over-capturing pro-competitive conduct which could discourage large businesses from engaging in competitive conduct that might have the effect of harming other competitors, as competition legitimately does. For instance, larger businesses with the ability to discount products, pass efficiency gains on to consumers and innovate would face a reasonable fear their conduct will be caught by this section.

It is Telstra's view that inserting factors the court must take into account in assessing this conduct does not aid in this regard, as the proposed change does not clearly state that it is the competitive process that must be protected rather than competitors, nor how the courts are to distinguish between those two different things as the current 'taking advantage' test attempts to do. Telstra suggests that if the taking advantage element is removed there needs to be an alternative means of ensuring pro-competitive conduct that may harm competitors but does not harm the competitive process be exempted from this law by default

We agree with the sentiment of the Panel's recommendation to make the focus of section 46 on harm to the competitive process rather than on harm to individual competitors. However, we do not believe it is necessary to change the current exclusionary purposes to a 'substantial lessening of competition' test given that the courts have applied section 46 consistent with the concept of protecting the competitive process not individual competitors. In addition, the categories of conduct which are prohibited are well understood and provide certainty for businesses as to which conduct which is contrary to the law.

In regards to the effects test recommendation Telstra notes the widely-held concern that introducing an effects test into section 46 risks blurring the distinction between pro-competitive and anti-competitive behaviour. It could be argued that as a matter of principle an anti-competitive purpose should be prohibited where unilateral conduct is involved, not simply an effect. Absent a clear failure of the current law to prevent and punish anti-competitive behaviour, this amendment is not required. if the effects test is to be introduced it becomes even more critical that the 'taking advantage' limb is retained in order to ensure that large businesses continue to be incentivised to engage in aggressive pro-competitive conduct to the benefit of consumers and that this conduct is not inadvertently captured by this law.

1. Introduction and general comments

Telstra welcomes the opportunity to provide our views to Treasury on the Harper Panel's recommendations in the Final Report.

Competition in markets is key to improving the economic welfare of Australians. In the competitive telecommunications market Telstra has invested billions of dollars in our network and continues to innovate to provide customers with high quality services that meet their needs. We support regulation that is pro-competitive and promotes investment, increases productivity and boosts Australia's international competitiveness.

In this context, Telstra strongly supports the Final Report's strong focus on removal of regulations which are preventing markets from operating efficiently and increasing business costs, and on proposing reforms that will reduce this red tape and enhance the competitiveness of Australian industry. If implemented, these reforms will help ensure Australia is well placed to meet its challenges and opportunities in the decades ahead.

In particular, we strongly support a number of the Panel's recommendations as follows.

1. Establishment of the ACCP

We support the recommendation to establish a new national competition body, the ACCP, and its mandate to provide leadership and drive implementation of the evolving competition policy agenda. We see the establishment of this body as being consistent with the work of the Hilmer review and driving competition policy in sectors that the Hilmer reforms have not yet reached. We agree it is important for these functions to be vested in an independent, non-regulatory body and support the recommendation that this body have the power to undertake ex post evaluations of ACCC merger decisions, including those the ACCC opposed. This is consistent with Telstra's view that best practice decision-making is encouraged by increased regulatory accountability.

To the extent that the Government believes a new market studies power is necessary Telstra supports the Panel's view that:

> *(G)iven the potential for conflicts between the ACCC's investigation and enforcement responsibilities and the scope of a market studies function, it is appropriate to vest such a power with the ACCP."*

In order to avoid regulatory uncertainty that risks chilling investment and innovation, if the ACCP is not established and the market studies power is given to the ACCC, it will be critical to make clear that this power is not a regulatory function and does not permit use of regulatory powers to conduct the inquiries or implement their findings.

2. Simplification of the cartel provisions

We agree the cartel provisions as drafted are overly complex and support the recommendation to simplify these provisions. We support both the specific changes proposed and removal of the prohibition on exclusionary provisions with subsequent amendment to the definition of cartel conduct to address any resulting gap in the law.

3. Third line forcing subject to the competition test

We agree that third line forcing conduct should be prohibited only where it has the purpose, or has or is likely to have the effect, of substantially lessening competition. This is a sensible reform that was recommended by both the Hilmer and Dawson reviews and, as the Final Report points out, Australia is the only comparable jurisdiction that prohibits third-line forcing per se. Removal of this requirement will contribute to the Government's red tape reduction agenda given the unnecessary costs imposed on business as a result of the per se nature of this prohibition. Telstra agrees with the Panel that any competition concerns with such conduct would be adequately dealt with through the substantial lessening of competition test.

4. **Resale price maintenance reforms**

   We support the recommendation that RPM conduct be able to be notified to the ACCC in order to provide a quicker and less costly exemption process for businesses. In addition, we support the sensible recommendation that the prohibition be amended to include an exemption for RPM conduct between related bodies corporate. These recommendations will reduce costs of compliance for businesses and do not lessen protection of consumers or the competitive process.

5. **Simplification of authorisation and notification procedures**

   We support the recommendation to simplify the authorisation and notification procedures in Part VII of the CCA to allow a single authorisation application to be submitted for a single business transaction or arrangement. This recommendation will reduce red tape and costs to businesses as well as simplify procedures for the ACCC. We also support the recommendation to empower the ACCC to grant an exemption from sections 45, 46, 47 and 50 of the CCA if it is satisfied that the conduct would not be likely to substantially lessen competition.

Telstra supports these recommendations because we believe these reforms will benefit Australia's competitive landscape and will help achieve greater proportionality of regulatory burden in competition regulation.

As stated above, regarding other proposals included in the Final Report, we have limited our comments to proposals or issues under the Review that are most relevant to our business and our position that Australia's regulatory settings can better support technological advancement and innovation, and stimulate competition and investment in Australian markets.

Accordingly, the remainder of this submission is structured as follows:

- **Section 2**: Comments on Panel recommendations relating to regulator governance and processes
- **Section 3**: Comments on Panel recommendations relating to Part IV of the CCA

2. Comments on Panel recommendations relating to regulator governance and processes

As stated in Telstra's submissions to the Harper Panel, the extent to which market participants can operate efficiently and dynamically, and are incentivised to invest and innovate, is directly impacted by the regulatory framework under which they operate. In particular, regulatory predictability is required to provide investors with the right environment to invest in Australia in the longer term, across political cycles. A regulatory framework that lacks predictability and transparency fails to facilitate best practice regulatory decision-making and can result in sub-optimal market conduct. This is invariably detrimental to economic growth and consumer welfare.

As set out above, Telstra applauds the Panel for a number of its recommendations which will help to ensure regulatory accountability, transparency and predictability in the administration of competition law and policy. Telstra makes a few comments below on the Panel's recommendations in relation to reform of the ACCC's section 155 investigative power, the merger review process and creation of a new access and pricing regulator.

2.1 Section 155 power

Telstra supports the Panel's recommendation that the ACCC's compulsory evidence-gathering power in section 155 of the CCA be amended to include a defence to a 'refusal or failure to comply with a notice' (under paragraph 155(5)(a)) where it can be demonstrated that a reasonable search was undertaken in order to comply with the notice. We agree with the Panel's assessment that it is important that the scope of the legal obligation imposed by section 155 be contained in the legislation and it is not enough that the reasonableness requirement be contained in the ACCC's section 155 guidelines.

We do, however, question whether there is a need to extend the section 155 power to cover the investigation of alleged contraventions of court-enforceable undertakings as recommended by the Harper Panel. In Telstra's experience, court-enforceable undertakings invariably include audit and reporting obligations which would provide the ACCC with sufficient information to determine whether an undertaking has been breached. Failure to comply with these audit and reporting obligations is, in itself, a breach of the undertaking.

Therefore, extending the section 155 power in this manner appears to be unnecessary and simply an increase of regulation and red tape contrary to the Government's current deregulation focus and the rest of the Panel's recommendations. If the section 155 power is extended in this way, Telstra notes that it is essential that the reasonable search defence apply to this power as well.

2.2 Merger process

We welcome the Harper Panel's acknowledgement of the strong concerns expressed by market participants about the timeliness and transparency of the informal merger clearance process and its view that improvements can be made to the administration of the merger law.

a) Telstra supports reform of the formal clearance process

Telstra supports the Panel's recommendations for reform of the formal clearance process which is generally thought to be too prescriptive and burdensome with the potential for delays making the process commercially impracticable in some cases. Telstra believes the Panel's recommendations will remove the unnecessary restrictions and requirements of the formal process to make it more accessible and effective, and reduce compliance costs on businesses. In particular, we strongly endorse the Panel's recommendations that:

- The formal process not be subject to any prescriptive information requirements but the ACCC should be empowered to require the production of business and market information;

- The formal process be subject to strict timelines that cannot be extended except with the consent of the merger parties;
- Decisions of the ACCC should be subject to review by the Tribunal under a process that is also governed by strict timelines; and
- The Tribunal's review should be based upon the material that was before the ACCC, but the Tribunal should have the discretion to allow a party to adduce further evidence, or to call and question a witness, if the tribunal is satisfied there is sufficient reason.

These reforms are essential to ensure the formal merger process is a workable alternative to the informal clearance process, which market participants find works better for less complex mergers. In particular, Telstra believes that the inclusion of strict timelines which cannot be extended without merger parties' consent will help to address concerns around the timeliness of merger decisions.

Further, given the significance of merger decisions on the economy and our belief that decision reviews should be investigatory rather than adversarial in nature, it is critical that the Tribunal have the power to allow a party to adduce further evidence or call and question a witness if the Tribunal is satisfied there is sufficient reason to do so. This will ensure the Tribunal has all the information necessary to ensure it reaches the correct decision. Telstra also respectfully submits that the Tribunal review process would be most effective if measures are taken to ensure costs and delays are minimised.

b) If the formal clearance process is not reformed, the informal clearance process will need to be reviewed

Noting that previous recommendations relating to enhancement of the formal merger clearance process have failed to gain traction in the past, without these reforms, market participants will continue to face real challenges with the informal clearance process for more complex transactions. Specifically, Telstra's concerns with the informal clearance process are that it does not adequately deal with complex mergers given the lack of transparency, clearly defined time frames and timely review mechanisms available to the merger parties.

Telstra supports the Panel's recommendation that there should be further consultation between the ACCC and business representatives in relation to the informal merger review process. We believe it would be of assistance for this further consultation to be given some definition by the Government, for example the general issues which the consultation address, and for the ACCC to report back to the Government on how it will address those issues in the informal merger review process going forward.

In this context, we believe merger parties would benefit from the following as an alternative set of reforms if the formal merger clearance process remains substantially in its current form:

- More transparency in the informal review process such as providing merger parties with access to more information regarding the basis for the position adopted by the ACCC.
- More clearly defined timeframes and less opportunities for delay (on both sides) to give merger parties better certainty and predictability in the process.
- Availability of a timely, accessible and cost effective review mechanism (as an alternative to the Federal Court process) to increase ACCC accountability for its decisions and ensure the correctness of these important decisions. Telstra believes that an effective review mechanism would have characteristics such as being timely, transparent, inquisitorial rather than adversarial and may be conducted as an internal or external peer-review rather than a judicial review.

c) Telstra does not support the recommendation to combine the formal clearance and authorisation processes

While the Panel has recommended the formal merger process and the merger authorisation process be combined, we do not see any clear reason to combine these two processes. As we submitted to the Harper Panel, the separate Tribunal authorisation process appears to be

working well for market participants as an alternative to the formal clearance process. In addition, market participants have only recently begun to use the authorisation process in its current form and it would be sensible to give the Tribunal and businesses more time to use, understand and refine the process before deciding whether it is in need of reform. No case has been made out for the removal of the authorisation process as an alternative option for businesses.

2.3 Access and pricing regulator

Telstra notes the Panel's recommendation that certain regulatory functions of the ACCC, including its telecommunications access and pricing functions, be transferred to a new, dedicated, national access and pricing regulator. Telstra does not have a specific view on this recommendation as we remain of the view that structure is secondary to decision-making rigour, accountability and transparency.

In the context of competition and pricing and access regulation in the telecommunications sector, competition concerns are dealt with through Part XIB of the CCA while pricing and access concerns are dealt with through Part XIC. In Telstra's experience there is some duplication of powers in these parts of the CCA as the same perceived concern can potentially be dealt with through either part. Overlap and duplication of regulation across regulators is inefficient, creates additional red tape and regulatory burden wherever it occurs, and would need to be addressed in this case if the recommended access and pricing regulator is created.

Telstra notes that a recent review in the telecommunications sector, the Vertigan review recommended that Part XIB be reviewed to assess the continued utility and effectiveness of its provisions.[1] The Government has announced that this review will take place in the second half of 2015.[2] Telstra agrees that it is timely to assess the continuing relevance of Part XIB as the intention was always that 'competition rules for telecommunications will eventually be aligned, to the fullest extent practicable, with general trade practices law.'[3] As stated above, Telstra supports any reforms which will reduce inefficiency and red tape consistent with the Government's deregulation agenda.

[1] Independent cost-benefit analysis of broadband and review of regulation report, June 2012 (**Vertigan report**) at 23.
[2] Australian Government 2014, *Telecommunications Regulatory and Structural Reform*, Commonwealth of Australia, Canberra, at 14.
[3] Trade Practices Amendment (Telecommunications) Bill 1996, Explanatory Memorandum at 7.

3. Comments on Panel recommendations relating to Part IV of the CCA

As previously submitted to the Harper Panel, Telstra believes that any reform to Part IV of the CCA should be consistent with the following principles:

- Clarity and predictability in the operation of the law is vital.
- Competition laws should have a benefit that outweighs the burden imposed on the business sector.
- Competition law should be cross-sector in application.

Against this background we comment below on the Panel's recommendations in relation to reform of the price signaling and misuse of market power provisions.

3.1 Price signalling

Telstra supports the Panel's recommendation that the price signaling provisions are not fit for purpose in their current form and should be repealed.

Telstra however, questions whether there is an actual gap in the law which requires section 45 to be extended to specifically include concerted practices. The Panel acknowledges in its Final Report that it "might be debated" whether there can realistically be concerns about practices such as exchanges of price information between competitors not being able to be captured by section 45 of the CCA. Despite a view that this conduct may already be adequately captured by the current law, the Panel recommends amending section 45 to specifically capture concerted conduct.

The meaning and application of section 45 of the CCA is currently well settled with a breadth of case law behind it. As a general principle, any amendment to laws, particularly well settled laws, should be proven as necessary changes are made. While there is still significant debate as to whether this law should be amended, if amended Telstra's principle concern would be that any change to section 45 be clear and well defined to ensure certainty of application. As stated above, Telstra believes that clarity and predictability in the operation of the law is vital.

We note that the Panel's recommended model legislation does not include a definition of the term 'concerted practices'. While the Panel considers it has a 'clear and practical meaning and no further definition is required for the purposes of legal enactment', we believe that it is essential for the public to be able to clearly assess the degree of expansion to the law of this proposed amendment. Defining the conduct intended to be captured would also meaningfully aid businesses in ensuring their compliance with the law. This would also serve to reduce the risk of businesses refraining from engaging in pro-competitive or benign conduct for fear of contravening the law.

If the Government finds that section 45 should be amended to include concerted practices, a more considered legislative definition of "concerted practice" should be developed through public consultation. It is critical that any definition of concerted practices would need to require some level of mental consensus or 'meeting of minds' between competing parties about the practices they are engaging in and their intention for this to facilitate a coordinating or collusive effect on the parties' respective conduct. This would be essential to ensure that truly independent conduct of firms (such as pure conscious parallelism) not be captured, and to focus any extension of section 45 on relevant horizontal conduct only. It should also be an essential element of proving a contravention that the concerted practice did not have a legitimate business justification and was not in the ordinary course of business.

3.2 Proposed reforms to section 46

The Panel has suggested three major reforms to section 46 of the CCA:

- Removing the 'taking advantage' element and introducing factors the court must take into account in relation to the extent to which the conduct enhances efficiency, innovation, product quality or price competitiveness in the market or whether it prevents, restricts or deters competitive conduct or new entry.
- Clarifying that the requisite purpose (or effect/likely effect) of relevant conduct is a 'substantial lessening of competition' (as opposed to the current exclusionary purposes);
- Incorporating an 'effects test' rather than focussing only on the purpose of relevant conduct by a business with substantial market power;

a) The case for change on section 46 and the proposed reforms has not been made out

Telstra notes there has been, and continues to be, significant debate as to whether a compelling case has been made out to change the core wording of the misuse of market power prohibition.[4] Many would argue, the law is fit for purpose, certain and well understood and there is no evidence that the section is failing to capture anti-competitive conduct. Despite this continued debate, the Panel has proposed a number of amendments which fundamentally alter the focus of the prohibition.

b) Removal of the 'taking advantage' element fundamentally alters the prohibition

The amendment of most concern is the Panel's proposal to remove the 'taking advantage' element from the prohibition. This is a critical element of the prohibition as it requires a causal link between the market power and the conduct in question. Without this causal link, the proposed law would prohibit any unilateral conduct by a business with market power that has the purpose or effect of substantially lessening competition, whether or not it misuses any market power. This would prevent businesses with market power from engaging in such conduct even if there was a legitimate business justification for doing so. This fundamentally changes the focus of the section and the conduct which is prohibited.

The taking advantage of element has historically served to narrow conduct which is caught by this prohibition because unilateral conduct by a firm is generally not considered to be anti-competitive unless the firm is using an unfair advantage, such as its substantial market power, to engage in such conduct. As such, removal of this element risks over-capturing pro-competitive conduct which could discourage businesses from discounting products, passing efficiency gains on to consumers and innovating for fear their conduct may be caught by this section. This effect on competition would have a detrimental impact on consumers and small businesses who the law is trying to protect.

Further, Telstra does not agree with the Panel's view that 'the 'take advantage' limb is not a useful test by which to distinguish competitive from anti-competitive unilateral conduct'. It is our view that judicial authority has evolved to a point which provides clarity as to what is meant by 'take advantage' in misuse of market power cases. Certainty and predictability in the application of laws is vitally important to ensure businesses can operate effectively and confidently pursue market strategies. We do not think that the Panel's proposed reformulation of section 46 meets this goal.

Further, inserting the factors the court must take into account when assessing this conduct does not aid in this regard. It could be argued that these factors would be taken into account

[4] We note there is broad support for repeal of the amendments to section 46 introduced since 2007, including the specific provisions prohibiting predatory pricing, and the wording introduced to clarify the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined. We also note the Panel has itself recommended these relevant subsections of section 46 be repealed.

by the court in any case in an assessment of whether the conduct substantially lessens competition. As such, it is questionable whether including these factors successfully minimise the risk of inadvertently capturing pro-competitive conduct. If the taking advantage element is removed there needs to be an alternative means of ensuring pro-competitive conduct that may harm competitors but does not harm the competitive process be exempted from this law by default

c) Focus on competitors or competition

The Panel argues in its Final Report that the purpose test in section 46 focuses on harm to individual competitors rather than harm to the competitive process, contrary to the purpose of competition law. The Panel therefore recommends that the misuse of market power test should prohibit conduct which 'substantially lessens competition' rather than conduct which eliminates, damages or excludes competitors from entering a market.

We agree with the sentiment of the Panel's recommendation to make the focus of section 46 on harm to the competitive process rather than on harm to individual competitors. However, we do not believe changing the wording of the section to prohibit a 'substantial lessening of competition' is necessary given that the courts have applied section 46 consistent with the concept of protecting the competitive process not individual competitors. In addition, the categories of conduct which are prohibited are well understood and provide certainty for businesses as to which conduct which is contrary to the law.

d) Effects test

The Panel's proposal to include an effects test has been well debated so we will limit our comments to simply note that over the past 40 years there have been 11 reviews of this section and only one review recommended an effects test be introduced. We believe this is a result of the widely-held concern that introducing an effects test into section 46 risks blurring the distinction between pro-competitive and anti-competitive behaviour. It could be argued that as a matter of principle, conduct with an anti-competitive purpose should be prohibited where unilateral conduct is involved, not simply conduct that has an anti-competitive effect. Absent a clear failure of the current law to prevent and punish anti-competitive behaviour, we would question whether the benefits of introducing an effects test outweigh the substantial risks of chilling competitive behaviour and imposing additional regulatory burden on businesses.

If the effects test is to be introduced it becomes even more critical that the 'taking advantage' limb be retained in order to ensure that large businesses continue to be incentivised to engage in aggressive pro-competitive conduct to the benefit of consumers and that this conduct is not inadvertently captured by this law.