

12 February 2016

Mr Scott Rogers  
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Dear Mr Rogers

**Re: Discussion Paper: Options to strengthen the misuse of market power law**

Sydney Airport welcomes the opportunity to provide comments and feedback on the *Discussion Paper: Options to strengthen the misuse of market power law* (the discussion paper), as released by the Treasurer in December 2015.

We note that the Government's purpose in releasing the discussion paper is to reinvigorate the debate on the Harper Review's recommendation to amend section 46 of the *Competition and Consumer Act 2010* (CCA).

Sydney Airport provided detailed comments on the Harper Review's original recommendation to amend section 46 in a letter to the then Minister for Small Business, Hon. Bruce Bilson, MP, dated 3 June 2015.

By and large, the concerns and comments we outlined in that letter remain valid because all of the options to amend section 46 of the CCA shown in the discussion paper – save Option A, the “no change” option – envisage the repeal of the so-called ‘take advantage’ test.

Sydney Airport's starting point when considering reform of section 46 of the CCA is that innovative and competitive behaviour should be encouraged because increased competition is key to improving economic performance.

However, as outlined in our earlier letter, we remain of the view that a causal connection is required between the entity with market power and the questionable conduct which, in our view, the ‘take advantage’ test addresses. A test that deals only with market outcomes and does not require such a connection could result in unintended consequences and, paradoxically, see innovative and competitive behaviour by firms *discouraged* rather than encouraged. Such an outcome would clearly be undesirable and the opposite of that intended by the Government.

Sydney Airport therefore supports Option A in the discussion paper, that is, retain the existing section 46 of the CCA.

## Reasons

The rationale behind the misuse of market power provisions in the CCA is to ensure that smaller firms are protected from unilateral anti-competitive conduct while at the same time preserving the ability of firms with market power to compete vigorously. The 'take advantage' test included in the existing section 46 seeks to achieve an appropriate balance between the interests of firms with market power and the interests of those without market power. It enables those firms with market power to engage in conduct which a firm without market power could also engage in. In our view, the CCA's current provisions appropriately balance these competing policy objectives by targeting particular forms of anti-competitive conduct that may not otherwise be caught by sections 45 (Contracts, arrangements or understandings that restrict dealings or affect competition) and 47 (Exclusive dealing) of the CCA.

The Final Report of the Harper Review concluded that section 46 is deficient in its current form and its recommendation to government that the provision be extensively amended is reflected in options B to F of the discussion paper.

We understand that there has been discussion around how a Court would likely interpret a test that does not require a nexus between a firm's market power and a market outcome. In particular, we understand that it has been suggested that the Court will consider whether the firm is competing on the merits and that this consideration is a protection against perverse outcomes that stifle innovation as outlined in the example provided below. We note that Courts are required to interpret and apply the law as it is written. Without an express direction to Courts to consider competition on the merits, no such protection can be guaranteed.

In our opinion, maintaining the causal connection between the conduct and the firm's market power is key to ensuring innovative and competitive behaviour by firms is encouraged not discouraged. This would be achieved by retaining the 'take advantage' test. Other provisions in the CCA operate to prevent inappropriate conduct.

## Example

To give an airport-related example (which is applicable to all major Australian airports), Sydney Airport provides on-site car parking in both our T1 and T2/T3 passenger terminal precincts. These car parks are operated on a 24-hour, 365 day basis and, as they are on the airport site, are located very close to the passenger terminals and are therefore very convenient for airline passengers using those terminals.

For well over a decade, signage on the Departures roadways in both terminal precincts has made it clear that the area is a set down area-only and cannot be used to pick up passengers. This restriction is in place for security reasons and to ensure traffic volumes are properly managed, particularly at busy times. This means that anyone travelling to the airport by private car to pick up a passenger has no option but to park their car in one of Sydney Airport's on-airport car parks (whether they use the free pick up area or the regular car parking location). However, they can also choose to park their car in one of the many off-airport car parks. There are numerous competitors who provide car parking in areas near the airport and run passengers from their premises to the airport with a shuttle service. These competitors to Sydney Airport actively promote themselves as providing "airport car parking". The car parking market at and around Sydney Airport therefore is, and always has been, highly competitive.



In response to customer feedback on the price of our then range of on-airport car parking products, Sydney Airport decided several years ago to develop and offer to consumers a range of new innovative online parking products. Our specific aim was to provide consumers with the option of booking their on-airport car parking in a variety of different ways at significantly discounted rates when compared to our “drive up” rates. This innovation responded directly to customer feedback. It has also assisted our planning for the future delivery of infrastructure to meet growing demand for on-airport car parking. This, in turn, has had very real and lasting benefits for consumers, including the ability to access, at a lower price, on-airport car parking. The possible deferral of capital expenditure to provide new car park infrastructure, in turn, is good for consumers and other aviation stakeholders.

However, our advice is that, were section 46 of the CCA to be amended as recommended in the Harper Review’s Final Report, and as outlined in the discussion paper, it is conceivable that one or more of the many off-airport suppliers of car parking services could allege that Sydney Airport’s discounted car parking inhibits its ability to compete, despite contrary arguments that the conduct enhances price competitiveness. From the consumer’s point of view, this is clearly not a desirable outcome and would discourage any attempt to provide on-airport car parking products more competitively.


### **Conclusion and recommendation**

In summary, the options outlined in the discussion paper, with the exception of option A, would all remove the existing 'take advantage' test in section 46 of the CCA and replace it with a test that would, in our view, stifle competitive behaviour. As a result, conduct that can be pro-competitive in some aspects could adversely affect some competitors and therefore be said to affect the competitive process.

We therefore support option A in the discussion paper.

Should you require further information, please feel free to contact Mr Ted Plummer – Head of Government and Community Relations and on (02) 9667 6182 or [ted.plummer@syd.com.au](mailto:ted.plummer@syd.com.au).

Yours sincerely,



**Sally Fielke**

General Manager Corporate Affairs