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Via email: competition@treasury.gov.au

General Manager
Market and Competition Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear General Manager

VACC Submission – Options to strengthen the misuse of market power law

Please find attached the VACC Submission to the options to strengthen the misuse of market power law discussion paper.

In making the Submission, VACC acknowledges the current Federal Government's commitment to ensuring that Section 46 of the *Competition and Consumer Act 2010* (CCA) offers a commercially and legally robust, yet practical, approach to preventing the misuse of market power. The automotive retail, service and retail industry also faces many challenges in regards to misuse of market power and believes that the implementation of an 'effects test' as identified in Option F of the Discussion Paper, is the most effective approach in preventing misuse of market power.

VACC's recommendations are intended to assist Government during this consultation process to reach a decision on the Harper Review's recommendation to strengthen the misuse of market power provision. VACC encourages the Federal Government to consider Option F of the discussion paper which supports the implementation of an effects test for reasons outlined in the Submission.

VACC, on behalf of its members, and the industry more generally, thanks the Federal Government for the opportunity to make this Submission, and remains available to assist Government in reaching its decision.

Please do not hesitate to contact the undersigned should you require any additional clarity or further information.

Yours sincerely

A handwritten signature in black ink, appearing to read 'G. Gwilym', is written over a white background.

GEOFF GWILYM

Attach

VACC Submission

Options to strengthen the misuse of market power law

February 2016



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About VACC

The Victorian Automobile Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors that employ over 50,000 Victorians.

VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialist, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), and automotive dismantlers and recyclers. In addition to VACC, its sister organisations – the Motor Trade Associations, represent the automotive industry for their respective states.

Background of the automotive industry

The automotive industry contains approximately 65,000 businesses nationally, the vast majority of which (95%) are small and family owned and operated businesses.

For the year ended June 2014, aggregate employment for the industry was recorded at 383,806 persons.¹ In gross domestic product (GDP), the automotive industry as a whole accounted for approximately \$38.3 billion or 2.5% of Australia's annual GDP in current prices in 2012-13.²

The industry is very competitive with small profit margins, consumer behaviour limits capacity of industry to raise prices, large multi-nationals (insurance companies, the oil industry, supermarkets, vehicle manufacturers) heavily influence consumer behaviour and/or price. The cost of doing business is high due to rapid vehicle technology advances requiring high-level skills and expensive technology in the repair service process.

¹ Auto Skills Australia, Automotive Environmental Scan 2015

² Ibid

Executive Summary

In regards to section 46 of the Consumer and Competition Act (CCA) 2010, relating to the misuse of market power, the VACC strongly supports the full set of amendments as outlined in Recommendation 30 of the Harper Panel, which is identified as Option F in the Government Discussion Paper, Options to Strengthen the Misuse of Market Power Law.

The VACC supports Option F for the following reasons:

- There is evidence of systemic abuse of market power within the automotive industry that is damaging competition, service provision and consumer welfare;
- Legal advice provided to VACC suggests there is little chance of undertaking successful action against such market conduct within the current framework of law contained in section 46;
- Adoption of the Harper Panel's amendments as detailed in Recommendation 30 would harmonise section 46 with other sections of the CCA, namely section 45, section 47 and section 50;
- The Harper Panel amendments contained in Recommendation 30 would harmonise section 46 with international competition laws as evident in the EU, USA and Canada.

Anti-competitive conduct within the automotive industry

The following are examples of anti-competitive and damaging business conduct within the automotive industry, for which there is little redress for affected businesses within the current framework of the law. The full details of these cases are discussed within the body of this submission.

Vehicle Body Repairs

Widespread and extensive reports from VACC member business indicate that the vertical integration of vehicle body repair activity within the operations of insurance companies is damaging the overall health and competitiveness of the vehicle body repair market.

This is manifested through vastly reduced work allocations by insurers to established vehicle body repair businesses, thereby reducing their viability and resulting in the closure of many hundreds of body repair businesses nationally. This also has negative implications for consumer choice and the quality and diversity of repairs that are available within the market.

Mechanical Repair and servicing

Access to manufacturer technical information for the service and repair of vehicles and the installation of parts is not made available to all independent mechanical repairers, not even for a reasonable fee. This is damaging the level of competitiveness within the vehicle service and repair market by unfairly restricting the ability of independent repairers to undertake vehicle repairs. This has resulted in the closure and exit of many hundreds of independent repairers from the market.

This also negatively impacts on consumer choice, forcing consumers to seek dealership servicing and repairs to their vehicles only at businesses who have access to repair information and this can add significantly to the cost of repairs. Consumers in rural areas have limited access to choice of repairer and often must travel excessive distances for servicing or repair.

Motorcycles

VACC has received numerous reports from members of unfair and damaging business conduct from motorcycle manufacturers towards their affiliated dealerships. These practices include restrictions on the selling of product lines and the cancellation of franchise agreements with business owners with no warning. These behaviours are damaging the sustainability and competitiveness of many franchise operators, particularly in rural communities, and represent not only a misuse of market power but a severe power imbalance in the relationship between franchisees and franchisors.

Automotive Components Sector – Glass Supply

VACC has received reports from members of predatory pricing behaviour and anti-competitive conduct from businesses with substantial market share in both the importation and fitting of automotive glass. Small and independent business owners do not have the resources to combat this misuse of market power, with the likely effect being that they will exit the industry as their businesses will no longer be viable.

Fuel supply

VACC independent service station members had achieved limited success with the ACCC, in combating supermarket practices of offsetting fuel prices through store sales, with the lure of shop-a-dockets.

Summary Position

VACC strongly believes that adopting the full set of amendments to competition law as proposed by the Harper Panel in Recommendation 30, is the most practical, commercially and legally robust way forward to address systemic abuse of power of market power within the automotive industry and the broader economic environment.

VACC supports the adoption of the model section 46 provision as set out in the Competition Policy Review Final Report and as such, has included it as part of this submission.

VACC Position

In relation to section 46 of the Consumer and Competition Act 2010, relating to the misuse of market power, the VACC strongly supports the full set of amendments as outlined in Recommendation 30 of the Harper Panel, which is identified as Option F in the Government Discussion Paper, Options to Strengthen the Misuse of Market Power Law.

As a matter of policy, VACC believes that there needs to be a practical way forward, and one that is commercially and legally robust to prevent the misuse of market power in the Australian business economy. It therefore should be the case that competition law should be directed to the effect of commercial conduct on competition and ultimately consumer welfare. The current misuse of market power provision is framed in a manner that does not deter anti-competitive behaviour by firms with substantial market power, and this is reflected in the automotive industry.

Outlined in this submission are key examples of corporations with a substantial degree of market power that utilise this power not for the purpose of damaging any single competitor, but to the level of competitiveness in the market. This is not a desirable outcome, and hence a more holistic interpretation of market conduct is required, beyond the 'take advantage' and 'purpose' provisions of section 46.

VACC believes that the proposed test of 'substantially lessening competition' as recommended by the Harper Panel does not represent a radical departure from other sections of the CCA. In fact this test is identical to that already found within section 45 (contracts, arrangements or understandings that restrict dealings or affect competition); section 47 (exclusive dealings) and section 50 (mergers) of the CCA. As a matter of policy, harmonisation of competition laws across the CCA therefore should be a key government priority.

It is also the case that international competition laws as they exist in the European Union, the USA and Canada, have also been framed so as to examine the effects on competition of commercial conduct as well as the purpose of the conduct. The Harper Panel amendments would thus also better harmonise Australia's competition laws with those of the international community, which is also a desirable policy objective.

Given Australia's leading role and support for international trade agreements, it would appear incongruent should Australia also not adopt misuse of market powers legislation that already exist with many of our trading partners.

Misuse of market power within the automotive industry

Vehicle Body Repairs

VACC's Body Repair Division contains over 700 member companies whose primary operations involve vehicle body, paint and interior repair services.

VACC has received numerous reports from members of practices involving the misuse of market power and consequent damage to businesses by insurers within this sector. This in turn, has severely impacted the competitiveness of the sector.

The past 18 years have witnessed enormous rationalisation in the Australian insurance market. Eleven of the largest insurers have amalgamated into just two large insurance businesses. In 1998 the following insurers were each fundamentally independent of the other:

- Suncorp
- AMP
- RACQ *acquired and subsequently sold*
- RAA *acquired and subsequently sold*
- RACT
- Promina Group (AAMI, Vero, APIA, Shannons, Just Car, Bingle)
- IAG
- SGIO
- RACV
- CGU
- Swann
- Wesfarmers

For the body repair industry this change has been savage. In 1998 a 'Many-To-Many' market existed. Many insurers competed for many body repairers, meaning the actions of one could not unduly affect the other.

Now however the market is essentially "One-To-Many". While many body repairers remain, for market purposes the current duopoly effectively represents one insurer. The actions of the insurer can and do affect large swathes of the body repairers. This has seen unfair practices employed, where repairers are forced to undercut each other on price to an unprofitable level, with the ramifications being loss of all work. In order to achieve such a low price point, the consumer is the party losing out, as work must be completed in an overly-expedient manner, using the lowest price parts and the cheapest possible labour. Pressures by large insurers to quickly and cheaply perform complex vehicle repairs has had a disastrous effect on many body repairers, many of which will exit the industry in the coming few years.

The sheer scale of the current duopoly has also seen experimentation with various vertical integration schemes, including the full-scale production of a new self-owned body repair model. This model has seen numerous customer issues relating to suitability and appropriateness of repair and proximity of repair centres. It has also decimated much of the

market, removing the workflow for businesses who have invested heavily in infrastructure, skills and education in order to service the Australian consumer. This has resulted in the closure of many hundreds of businesses within a very short time period.

This is supported by ABS data (Table 1) which shows there has been a total net loss of almost 500 automotive body repair businesses nationally between 2012 and 2014. The majority these losses are small family owned and operated businesses.

Table 1 Counts of Automotive Body, Paint and Interior Repair Businesses

Year	Non Employing	1-19 Employees	20-199 Employees	200+ Employees	Total
2012	5354	6040	215	3	11612
2013	5004	5881	219	3	11107
2014	5005	5854	260	3	11122

Source: ABS Counts of Australian Business Entries and Exits, June 2012 to 2014

A comparison can be drawn to the duopoly existing in the Australian supermarket sector, with many examples of predatory tactics creating devastating implications for the small supplier with many of them unable to sustainably supply goods, meaning the ultimate loser is the Australian consumer.

The Australian automotive industry is the most diverse per capita in the world, with over 60 manufacturer brands represented. Australia also has one of the highest rates of car ownership and is one of the least densely-populated countries in the world. These three points alone make the need for a robust, diverse and flexible body repair marketplace more important than virtually anywhere else. It is the consumer who suffers and will continue to suffer with the significant reduction of body repairers.

The 18 year explosion of the insurance duopoly has provided them with significant financial benefits, and with this duopoly comes a moral argument for appropriate controls to ensure a fair consumer experience and marketplace.

Legal advice provided to VACC and its member businesses is that there is very little that can be done within the current framework of the law to reduce this anti-competitive conduct.

The reframing of section 46 to include the addition of an 'Effects test' as proposed by the Harper Panel, allows this fairness to be enforced.

While VACC acknowledges the competition in the insurance industry, the current situation allows insurers to place unreasonable pressures on the repair industry and removes consumer choice. Further, consumer interests are ignored as this pressure reduces safety, quality assurance and exposes repairers to litigation, as repairers are forced into reduced guarantee of quality work.

VACC therefore wholeheartedly supports the full set of amendments as proposed in Recommendation 30 of the Harper Review. This would reframe section 46 of the CCA and prohibit corporations with substantial market power from engaging in conduct that substantially lessens competition in the market.

Mechanical Repair and Servicing

VACC has received numerous reports across its membership base, of unfair and damaging business practices within the automotive servicing and mechanical repair market.

The conduct is associated with vehicle manufacturers and their affiliated dealerships and the fair provision of technical repair and servicing information to the automotive repair market more broadly.

Access to manufacturer information for the service and repair of vehicles and the installation of parts is not made available to many independent mechanical repairers, not even for a reasonable fee. This is damaging the level of competition with the vehicle service and repair market by pushing small independent repairers out of business, as well as forcing consumers to seek costly servicing and repairs at the service centres who are afforded access to information.

A key example of these practices includes the following:

- a. An independent repairer identifies a faulty component –a climate control module-and purchases a replacement from the manufacturer’s dealer for \$1200.
- b. The module needs to have a ‘scan tool’ plugged in to apply the correct settings, e.g. read ‘Celsius’, set car to be Right Hand Drive.
- c. The independent repairer has their own scan tool, however the manufacturer/dealer will not provide the codes to apply the correct settings.
- d. Either the customer now needs to go to the dealer to have the settings applied, or the repairer takes the car to the dealer and pay an additional fee (\$200) to have the settings applied.

Such practices have reduced the profitability and viability of the independent vehicle repair market, forcing the closure of many hundreds of businesses over a very short time period. Again this is supported by ABS data (Table 2) which shows there has been a net loss of almost 400 businesses nationally between 2012 and 2014.

Table 2 Counts of Vehicle Mechanical Repair Businesses

Year	Non Employing	1-19 Employees	20-199 Employees	200+ Employees	Total
2012	9851	12599	171	3	22624
2013	9472	12503	179	6	22160
2014	9403	12660	170	6	22239

Source: ABS Counts of Australian Business Entries and Exits, June 2012 to 2014

Legal advice provided to VACC and its member businesses is that there is very little that can be done within the current framework of the law to reduce this anti-competitive conduct. In the European and US markets, competition law exists to prevent such anti-competitive practices and abuse of company’s dominant market positions. At the very least, access to technical repair information should be made available at a fair and reasonable price to all legitimate repair businesses seeking to provide consumer services.

Motorcycle Retailing

VACC has received numerous reports from member businesses of unfair and damaging business conduct from motorcycle manufacturers towards their affiliated dealerships.

Key examples of these practices includes the following:

- a. A VACC member owns and operates a successful motorcycle dealership in a large Victorian country town

- b. The manufacturer makes an internal decision to remove All Terrain Vehicles (ATVs) from its motorcycle range and move to farm machinery
- c. The franchisee adheres to this, removing ATVs from his/her sales floor
- d. To make up for the loss of product-line, he/she takes on another smaller Chinese manufacturer
- e. Later, the original manufacturer comes back and decides to reinstate ATVs and instructs our member to remove the Chinese bikes and place ATVs there
- f. The member objects as Chinese bikes are now an established part within his/her business, but says he/she will add ATVs as well
- g. The manufacturer cancels his franchise agreement and signs another business to be the new dealer.

Such conduct is not only anti-competitive but can also ruin the social fabric within regional communities. In this situation, there is little recourse for the affected business owner under the current misuse of market power provision contained in section 46 of the CCA.

There is also evidence that these practices are reducing small business numbers within the motorcycle market as shown in Table 3.

Table 3 Counts of Motorcycle Retail Businesses

Year	Non Employing	1-19 Employees	20-199 Employees	200+ Employees	Total
2012	385	559	23	3	970
2013	341	516	25	3	885
2014	316	532	29	3	880

Source: ABS Counts of Australian Business Entries and Exits, June 2012 to 2014

It is imperative that fairer and more balanced provisions be adopted within section 46, pertaining to those with substantial market power and the damage they can inflict within a market. VACC strongly believes that adoption of the Harper Panel amendments would help restore fairness and balance in the business arrangements between franchisors and franchisees.

Automotive Components Sector – Glass Supply and Installation

VACC has also received reports from members of predatory pricing behaviour and anti-competitive conduct from businesses with substantial market share in both the importation and fitting of automotive glass.

Australia’s last automotive glass manufacturing facility closed in late 2015. All automotive glass is imported into Australia by a number of suppliers that distribute into the glass fitting sector.

One supplier with a substantial market share is now engaging in predatory pricing by supplying the market with below-cost automotive glass. The perceived aim of this conduct is to strengthen its position in the market place at the expense of its competitors.

Similarly, there are reports of insurance companies engaging in behaviour that limits the policy holder’s freedom of choice to choose their own repairers for the installation of automotive glass. Specifically, they are strongly encouraging policy holders to travel to their

own insurer aligned workshops, which may be of considerable distance and inconvenience at the expense of a local independent glass fitter.

Both these examples highlight the impact on independently owned small businesses and ultimately the consumer. Small and independent business owners do not have the resources to combat this misuse of market power, with the likely effect being that they will exit the industry as their businesses will no longer be viable.

The direct impact on the consumer, in the face of reduced competition, will likely be higher costs in the long term and potentially poorer quality of repairs. The consumer's choice has been significantly reduced from this scenario and this works against an expectation in the community that consumers have the purchasing power in matters relating to the service and repair of their vehicles.

Proposed legal description for section 46

Below is the Competition Policy Review Final Report's proposed section 46. VACC believes that the Government should adopt this model provision. The introduction of an effects test will ensure a more simplified section 46 that will enhance, rather than penalise, competition.

- (1) 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 or any other market.*
- (2) Without limiting the matters that may be taken into account for the purposes of subsection (1), in determining whether conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market, the court must have regard to:
 - (a) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of increasing competition in the market including by enhancing efficiency, innovation, product quality or price competitiveness in the market; and*
 - (b) the extent to which the conduct has the purpose, or would have or be likely to have the effect, of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entry into the market.**
- (3) If:
 - (a) a body corporate that is related to a corporation has, or 2 or more bodies corporate each of which is related to the one corporation together have, a substantial degree of power in a market; or*
 - (b) a corporation and a body corporate that is, or a corporation and 2 or more bodies corporate each of which is, related to that corporation, together have a substantial degree of power in a market;**the corporation shall be taken for the purposes of this section to have a substantial degree of power in that market.**
- (4) In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court shall have regard to the extent to which the conduct of the body corporate or of any of those bodies corporate in that market is constrained by the conduct of:
 - (a) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that market; or*
 - (b) persons to whom or from whom the body corporate or any of those bodies corporate supplies or acquires goods or services in that market.**

- (5) *In determining for the purposes of this section the degree of power that a body corporate or bodies corporate has or have in a market, the court may have regard to the power the body corporate or bodies corporate has or have in that market that results from any contracts, arrangements or understandings, or proposed contracts, arrangements or understandings, that the body corporate or bodies corporate has or have, or may have, with another party or other parties.*
- (6) *Subsections (4) and (5) do not limit the matters to which regard may be had in determining, for the purposes of this section, the degree of power that a body corporate or bodies corporate has or have in a market.*
- (7) *For the purposes of this section, a body corporate may have a substantial degree of power in a market even though:*
- (a) the body corporate does not substantially control the market;*
 - (b) the body corporate does not have absolute freedom from constraint by the conduct of:*
 - (i) competitors, or potential competitors, of the body corporate in that market; or*
 - (ii) persons to whom or from whom the body corporate supplies or acquires goods or services in that market;*
 - (c) one or more other bodies corporate have a substantial degree of power in that market.*
- (8) *In this section:*
- (a) a reference to power is a reference to market power;*
 - (b) a reference to a market is a reference to a market for goods or services; and*
 - (c) a reference to power, or to conduct, in a market is a reference to power, or to conduct, in that market either as a supplier or as an acquirer of goods or services in that market.*

Alternative options in the Discussion Paper

VACC does not support the alternative options presented due to concerns that practices as described in our submission would lack legitimate recourse to legal protections, with the intention of protecting competition.

Concluding remarks

It is VACC's view that without the introduction of the effects test as outlined in the Harper Review, behaviour of the corporations as described will continue forcing small competitors from the market, reducing consumer choice and standards of repair of motor vehicles will jeopardise safety of the consumer and public. VACC is not arguing for protectionism, rather a balance to the legislation and competition in the market.