Level 23, Governor Phillip Tower
1 Farrer Place
Sydney NSW 2000

12 February 2016

Mr Scott Rogers
Manager
Competition Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Mr Rogers

Chi-X Australia Submission on The Treasury Discussion Paper: Options to Strengthen the Misuse of Market Power Law

Chi-X Australia is grateful for the opportunity of providing a submission on the important issues raised in the Discussion Paper: Options to Strengthen the Misuse of Market Power Law (the Discussion Paper).

The core issue raised in any review of Australia's laws on the misuse of market power is simple: historical analysis and global benchmarking strongly suggest that the current misuse of market power provisions favour dominant market players and this needs to be addressed.

The most efficient and simple way to address this is to adopt the recommendations of the Harper Review and align Australian law with global benchmarks by removing the 'take advantage' element from the current provision and refocusing the proscribed conduct on that which has the effect or likely effect of damaging competition.

An effective regulatory regime for managing the misuse of market power is essential for an economy of Australia's nature, with its geographical isolation, small population, market capacity and the importance of innovative local businesses successfully competing globally. The incentives competition provides drives innovation in many industry sectors, including financial market infrastructure.

Chi-X Australia competes with a legacy local monopoly provider, ASX, which for many years was repeatedly criticised for failing to innovate. For example, the Johnson Report stated:

> *In the [Australian Financial Centre] Forum's assessment, [the role of ASX as market operator, central counterparty and market supervisor] has been a significant barrier to new competition and innovation. The Forum received a good deal of feedback from industry concerning the lack of equity trading platform development (see Appendix 4) and innovation*.[1]

This lack of innovation has had a real impact on Australians. For example local investors have not been able to access many of the products used by overseas investors to diversify their holdings and manage risk. In 2014, for example, the underlying assets managed by Canadian ETFs totalled nearly A$70billion, while the underlying assets managed by Australian ETFs was less than A$15million. This lack of product access has resulted in average Australian investors having to concentrate their investments in the products that are available (eg bank and resources shares).

It is also important for Australia's future as a financial centre that there is competition between market infrastructure providers. The former CEO of the Singapore Stock Exchange, one of Australia's most significant regional competitors, has remarked:

> "*If we really want to be a [major] financial centre we need to see more exchanges in town*"[2].

An effective regulatory regime for managing the misuse of market power is important for competition, innovation and making Australia a better place to do business. Unfortunately, historical analysis and global benchmarking strongly suggest that Australia does not have an effective regulatory regime for managing the misuse of market power and this needs to be addressed.

Attachment one of this submission outlines the views of Chi-X on selected questions asked in the Discussion Paper and we hope they assist in your important work in this area.

About Chi-X

Chi-X Australia is an Australian market operator and was the first stock exchange to compete in the trading of ASX listed securities with the ASX. A number of successful alternate market platforms have been launched globally under the Chi-X name, using a business model of introducing a customer focused cost efficient service to disrupt incumbent operators extracting monopoly rents. Independent studies have concluded that the introduction of Chi-X to Australia has generated hundreds of millions of dollars of benefits for local financial markets[3].

---

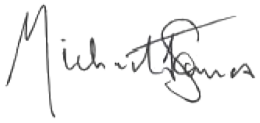
[1] See page numbered 37 of *Australia as a Financial Centre Building our Strengths*, a report by the Australian Financial Centre Forum, retrieved on 12 February 2016 from http://www.fex.com.au/media/AFCF.pdf

[2] See "SGZ and ICE signal hopes for closer ties", retrieved on 12 February 2016 from: http://www.ft.com/intl/cms/s/0/e0d21bdc-cb8f-11e3-8ccf-00144feabdc0.html?siteedition=intl#axzz34O5dijt5

[3] See for example: (a) the CMCRC study *How beneficial has Competition been for the Australian equity marketplace*?, which estimated the welfare benefits from the first year of competition alone as $36-220million, retrieved on 12 February 2016 from: http://www.cmcrc.com/documents/1372142696hascompetitionbeenbeneficialforaustralianmarketplace.pdf and (b) a study by the Strategic Intelligence Unit at ASIC, which concluded that from the commencement of competition in market infrastructure to January 2013, the benefits of competition may have been worth up to $300million per year – see page 32 of the Treasury Market

Please do not hesitate to contact us if you have any queries.

Yours sincerely



Chi-X Australia Pty Limited

Supervision Cost Recovery Impact Statement at
http://www.treasury.gov.au/~/media/Treasury/Consultations%20and%20Reviews/Consultations/2013/ASIC%20Market%20Supervision%20Cost%20Recovery/Key%20Documents/PDF/Consultation_draft_CRIS.ashx

Attachment One

Discussion Paper Question	Chi-X Response
Examples	
1. What are examples of business conduct that are detrimental and economically damaging to competition (as opposed to competitors) that would be difficult to bring action against under the current provision?	There are many well documented analyses of the difficulties of bringing action, under a purpose or intention based law, against business conduct that is economically damaging to competition. The current approach to enforcement of this provision requires a "smoking gun" email or something similar to prove that the purpose of the conduct was one of the prohibited outcomes. This is well known as a difficult outcome to achieve and one which significantly favours the dominant company. It is not what applies in Europe or the United States. In circumstances where competition provides the significant advantages outlined above, it is not clear why Australia should adopt a legislative approach that, relative to other leading jurisdictions, favours a dominant company at the expense of protecting and facilitating competition. The US and Europe have effects based tests for market abuse provisions in their competition law because they work to facilitate competition and the benefits competition provides to end users. Chi-X is happy to provide further details of actual cases if required.
2. What are examples of conduct that may be pro-competitive	The Chair of the ACCC has remarked that ""The ACCC really

that could be captured under the Harper Panel's proposed provision?	only has resources to chase about six competition cases a year and usually about half of those are cartel cases"[4]. In these circumstances it is difficult to contemplate practical circumstances in which pro-competitive behaviour will be "caught" by the provisions. Academic arguments intended to influence policy debates may submit that pro-competitive behaviour will be caught unintentionally but existing compliance procedures at a dominant market player may be sufficient to address any real risk of practical consequences in these circumstances.
Take Advantage	
3. Would removing the take advantage limb from the provision improve the ability of the law to restrict behaviour by firms that would be economically damaging to competition?	Removing an element of an offence provision will, all other things remaining equal, make it easier to take action under that provision. This is particularly the case for the elements of an offence that are ambiguous, open to a range of subjective interpretations and for which there are few successful case theories. In circumstances where historical analysis and global benchmarking strongly suggest that the current misuse of market power provisions favour dominant market players, the removal of the element is justified.

[4] See "Competition regulator ACCC 'light on cartel conduct'", The Australian, 28 January 2016, retrieved on 12 February 2016 from http://www.theaustralian.com.au/business/companies/competition-regulator-accc-light-on-cartel-conduct/news-story/17bb8c3f5e44770c4cf238ad46398030

4. Is there economically beneficial behaviour that would be restricted as a result of this change? If so, should the scope of proscribed conduct be narrowed to certain 'exclusionary' conduct if the 'take advantage' limb is removed?	The ambiguities and uncertainties surrounding the 'take advantage' element mean it is possible to mount arguments that its removal could stifle economically beneficial behaviour. However any risk this poses to legitimate commercial activity can be mitigated by (i) the existing steps that dominant market players should be taking to ensure their activities comply with existing obligations and (ii) the public guidance and policies implemented by regulatory authorities in respect of the provisions (iii) the simple reality that regulatory authorities are only equipped to bring a very small number of cases in this area – the overwhelming risk is that misuse of market power is not prosecuted, not that legitimate commercial activity is.
5. Are there alternatives to removing the take advantage limb that would better restrict economically damaging behaviour without restricting economically beneficial behaviour?	Chi-X is of the view that replacing the take advantage test with another element or requirement risks increasing the complexity of the offence provisions and diminishing its effectiveness.
Purpose or effect	
6. Would including 'purpose, effect or likely effect' in the provision better target behaviour that causes significant consumer detriment?	Historical analysis and global benchmarking strongly suggest that this formula would be more effective in combatting the misuse of market power.
7. Alternatively could retaining 'purpose' alone while amending other elements of the provision be a sufficient test to achieve the policy objectives of reform outlined by the Harper Panel?	Historical analysis and global benchmarking suggest this will continue the ineffectiveness of the current regime.

Substantially Lessen Competition	
8. Given the understanding of the term 'substantially lessening competition' that has developed from case law, would this better focus the provision on conduct that is anti-competitive rather than using specific behaviour, and therefore avoid restricting genuinely pro-competitive conduct?	The impact of retaining this element may be significantly influenced by whether the take advantage and purpose test are retained. "Damage to competition" and "damage to competitors" are not mutually exclusive sets of conduct: in some cases the overlap is complete.
9. Should specific examples of prohibited behaviours or conduct be retained or included?	Chi-X is of the view that non-exhaustive inclusive examples of prohibited behaviour can assist in stakeholders developing appropriate procedures to ensure compliance with their obligations.
10. An alternative to applying a 'purpose, effect or likely effect' test could be to limit the test to 'purpose of substantial lessening competition'. What would be the advantages and disadvantages of such an approach?	Historical analysis and global benchmarking suggest this will continue the ineffectiveness of the current regime.
Mandatory Factors	
11. Would establishing mandatory factors the courts must consider (such as the pro- and anti-competitive effects of the conduct) reduce uncertainty for business?	This will largely depend on the nature of the mandatory factors, which should be the subject of detailed consultation, including a cost benefit analysis, before being decided upon.

12. If mandatory factors were adopted, what should those factors be?	Chi-X is of the view that it is appropriate finalise the proposed provisions prior to considering mandatory factors to be taken into account in respect of substantially lessening competition.
Authorisations	
13. Should authorisation be available for conduct that might otherwise be captured by section 46?	Any authorisation regime would need to be entirely transparent and subject to an enhanced governance regime that ensures detailed reporting.
Other Issues	
15. Are there any other alternative amendments to the Harper Panel's proposed provision that would be more effective than those canvassed in the Panel's proposal?	Chi-X is of the view that, given the importance of competition as highlighted above, it may be appropriate for Australia to incorporate a special responsibility obligation into the law. It is accepted in Europe competition law that *"*[a dominant corporation] *has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market"* (ECJ, 9th November 1983, Michelin[5]). That is, the company in dominant position has to allow a sufficient degree of competition so that other competitors can highlight their merits in terms of consumer well-being according to parameters of prices, quality, diversity and innovation

[5] Retrieved on 16 November 2015 from http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61981CJ0322