Build something great™

Boral Limited

ABN 13 008 421 761
Level 3
40 Mount Street
North Sydney NSW 2060

GPO Box 1228
North Sydney NSW 2059

T:+6 (02) 9220 6300
F:+6 (02) 9233 6605

www.boral.com.au

7th May 2015

Mr Ben Dolman
General Manager
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600
Email: competition@treasury.gov.au

Dear Mr Dolman,

Treasury Submission re Harper Review – Final Report

Boral welcomes the opportunity to comment on the Final Report of the Competition Policy Review[1]. Boral commends the Review Panel (**Panel**) in producing the Final Report. It reflects considerable effort on the part of the Panel to address varied and complex issues, many of which have a direct effect on the productivity of the Australian economy.

Boral supports many of the proposed measures for simplification and clarification of the competition law provisions in the *Competition & Consumer Act* (**CCA**). For example:

- Boral supports the Panel's conclusions calling for amendments to the joint venture defence. Boral, like many Australian companies, is involved in joint ventures. Its joint ventures contribute to economic efficiency and overall competitiveness. Proposed changes to the CCA, which reduce the risk that *bona fide* joint venture activity is mischaracterised as cartel conduct, are welcome (Recommendation 27).

- Boral supports the recommendations in relation to reform of the Merger Clearance process. The proposed new combined formal merger review process has significant potential to increase efficiencies for parties seeking merger clearance and creates a viable avenue for consideration of public benefit in the merger clearance process (Recommendation 35).

- Boral supports subjecting the prohibition on third line forcing to the 'substantially lessening competition' test. We agree with the shift away from a *per se* test in relation to this conduct (Recommendation 32).

- Boral supports the simplification of the authorisation and notification processes. Boral agrees with the Panel that the current practice imposes unnecessary costs on business (Recommendation 38).

- Boral supports the recommendations relating to Part IIIA. We believe these recommendations would provide private enterprise with more confidence when making long-term, strategic infrastructure investment decisions (Recommendation 42).

Boral also supports the removal of the cabotage restrictions that currently impede competition, and, consequently, drive up shipping costs for companies transporting goods in our coastal shipping routes (Recommendation 5).

[1] Review Panel, Competition Policy Review, Final Report (March 2014) (Final Report)

There are two recommendations in particular that Boral would like to address in more detail:

- Recommendation 30 – which involves a reframing of the primary prohibition in section 46 of the CCA; and
- Recommendation 36 – regarding the prohibitions on secondary boycotts in section 45D-45DE of the CCA.

1 Recommendation 30 - Section 46 – Misuse of Market Power

- The Final Report proposes a significant and unwarranted change to the CCA's misuse of market power provisions. The policy objective of Section 46 of the CCA is generally regarded to be the promotion of competition, and not the promotion of any individual or other interest group, including large enterprises or small business[2]. Boral considers that the proposed changes are not consistent with this policy objective.
- The proposed removal of the 'take advantage' element in the current prohibition and the introduction of an 'effects test' will create uncertainty as to scope of the prohibition. There is a real risk that legitimate competitive conduct will be captured by an amended prohibition, and that there will be a chilling effect on businesses in circumstances where they will need to second guess commercial conduct.

1.1 The argument for change has not been made

- The Final Report notes that the small size of the Australian economy frequently leads to concentrated markets[3]. The implication appears to be that relatively high levels of concentration is a reason for reform. Boral disagrees with any such implication.
- In Australia there are a number of companies, operating in a variety of sectors, that some might argue have market power. These companies are often some of Australia's most significant in terms of employment and investment. Uncertain and overbroad regulation of these companies is likely to be economically costly, not just to these companies but to the Australian economy as a whole. Consequently, a substantive change in the law should be supported by a strong case for change. Boral submits that the case for change has not been made out. Consequently, the Final Report's recommendations regarding section 46 should be approached with caution.

In Boral's view the Final Report overstates the alleged difficulties associated with the application of section 46, and does not properly consider the likely consequences of the proposed amendments.

1.2 Summary of Boral's position

Boral makes the following two submissions:

(a) Section 46 should remain in its current form because:

- the core concern of any market power provision should be to prevent the exclusion of equally or more efficient competitors other than by competition on the merits. The current provision, with its focus on the 'use' of market power, is well adapted to regulating and preventing this economic harm; and
- the 'effects test' proposed by the Panel is over-inclusive. It would not be beneficial for competition or economic welfare.

(b) If there is to be a change in the legislation, section 46 must continue to direct the Court to establish a causal connection between conduct and market power.

---

[2] Melway Publishing Pty Ltd v Robert Hicks Pty Ltd (2001) 205 CLR 1 at 13, "[s]ection 46 aims to promote competition, not the private interest of particular persons or corporations." (para 17).

[3] Final Report, page 340.

2 Section 46 should remain in its current form

2.1 Section 46, which requires the use of market power, is well adapted to the relevant economic harm it addresses

Section 46 is designed to address exclusionary conduct in circumstances where market power is exercised to inhibit or prevent competition from equally or more efficient competitors. Vigorous competition 'on the merits' should not be subject to the prohibition.The changes proposed in the Final Report make it less likely that success 'through competition' can be pursued.

A key way in which to distinguish between competitive and anti-competitive conduct is to consider whether or not market power has been 'used'. The 'taking advantage' element of the current prohibition focuses on this question. As noted by Richard Posner:

> *Only when monopoly power is used to discourage equally or more efficient firms and thus perpetuate a monopoly not supported by superior efficiency should the law step in. Even then, it should be alert to the possibility that the exclusionary effect of the monopolist's practice is offset by efficiency gains.* [4] [emphasis added]

While these comments were made in the context of US antitrust law a similar conclusion that 'we should condemn dominant firm conduct that excludes rival firms that the market would not otherwise exclude' has been recently made in the context of the Australian experience.[5]

The Final Report omits any express requirement to find a causal connection between the corporations conduct and its market power. That raises significant concerns.

In order to best ensure that companies, including large companies, can succeed through competition, the law must require a causal connection between market power and any alleged exclusionary conduct. The concept of 'taking advantage of market power' is the correct concept to establish the relevant causal connection. For example, one issue with the so called 'Birdsville Amendment' (section 46(1AA)) was that it removed the causal connection between market power and the impugned conduct (i.e. does not require the use of market power). This deficiency was recognised by the OECD in its 2010 report on Competition Policy in Australia:

> *This 'Birdsville Amendment'... deviates from Orthodox economic theory by adopting a threshold based on market share rather than market power, and removing the element of taking advantage (and thereby the requirement of showing a connection between the market share/power and the offending conduct).*[6]

While the Final Report appropriately recommends that the Birdsville Amendment be repealed, it does so in circumstances where its recommended amendment incorporates Birdsville's deficiencies into the core misuse of market power provision.

When section 46 was first introduced, the second reading speech recognised that the 'taking advantage' filter was key[7]. This was emphasised again in 1985, when section 46 was amended to its current form. The Explanatory Memorandum acknowledged that, without requiring a causal connection with market power, the prohibition could 'unduly inhibit competitive activity in the market place'[8].

Removing the causal connection between market power and impugned conduct means that conduct which does not require the use of market power will be caught by the prohibition. This creates a substantial risk that legitimate, pro-competitive behaviour, will be prohibited by virtue only of a particular company's position in the market.

2.2 There is a body of existing case law that provides sufficient certainty

In reference to the 'taking advantage' limb of section 46, the Final Report describes the issue as 'whether the 'take advantage' limb of section 46 is sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct'. While acknowledging some debate within the relevant jurisprudence, Boral considers that the 'taking advantage' element of section 46 is not sufficiently difficult to apply such that the causal nexus between conduct and market power should simply be abandoned.

---

[4] Richard A Posner, *Antitrust Law* (University of Chicago Press, 2nd ed, 2001) 196.

[5] George Raitt, 'Misuse of Market Power: Why Policy Objectives Matter' (2014) 22 *Competition and Consumer Law Journal* 85, 103.

[6] OECD, *Review of Regulatory Reform: Competition Policy in Australia*, Report (2010) 22.

[7] Commonwealth, *Parliamentary Debates*, Senate, 14 August 1974.

[8] Explanatory Memorandum, Trade Practices Amendment Bill 1985 [48].

- '**Taking advantage**' has a *sufficiently* clear meaning. The cases disclose at least the following three key ways of testing whether a firm has taken advantage of market power:

  (a) The 'counterfactual test': a firm takes advantage of its market power if the firm would not have engaged in the conduct in a competitive market.[9]

  The nature of the 'competitive market' against which the test is applied is not one of 'perfect competition'. Rather, it only requires 'a sufficient level of competition to deny a substantial degree of power to any competitor in the market'.[10]

  This nature of this test was made clearer and more easily applied by the decision of the High Court in *NT Power*. The Court held that in assessing the counterfactual world without market power, it is permissible to make 'assumptions which are not only contrary to the present fact of uncompetitive conditions, but which would be unlikely to be realised if the monopolist were left free to operate as it wished.'[11] That is, if it is necessary to make unrealistic assumptions in order to posit the counterfactual circumstances, the Court may do so.

  (b) The 'material facilitation' test: a firm takes advantage of its market power if its market power 'materially facilitated' its conduct.[12] For example, if market power materially added to the credibility of a threat that the firm was making, a court may find that a firm has taken advantage of its substantial market power.

  (c) The 'rationale' test: a firm takes advantage of its market power if the rationale for the conduct could have been pursued absent market power.[13]

  For example, in *Safeway*, the Full Court asked whether the threat that Safeway had levelled against certain plant bakers could have been credibly deployed absent market power. It concluded that it could not have been deployed, and therefore reflected a taking advantage of market power.

The interpretation and application of section 46 is sufficiently clear and certain such that amendments are not required. In the absence of clear evidence of economic harm that cannot be remedied by the current form of section 46 or other provisions of the CCA, the case for reform has not been successfully made.

2.3 The Panel underestimates the uncertainty which will flow from its recommendations

The recommendation in the Final Report will not replace any current legal uncertainty with a bright-line test. The Panel itself acknowledges this, noting that an important change will involve 'some transitional cost' as firms become familiar with the prohibition and as the Courts develop jurisprudence on its application'[14] . In Boral's view, the Panel has significantly understated the effects of uncertainty. The Panel, in essence, recommends the abandonment of over 30 years of case law on the current prohibition. It will take many years, if not decades, before a comparable body of case law emerges in respect of any new legislation. During that period, there is a real risk that significant Australian companies may become less aggressive and less effective competitors. This is especially so in an era of increasing pecuniary penalties.

2.4 The 'effects test' proposed by the Panel is over-inclusive

The Panel proposes that conduct be prohibited where it has the purpose, effect or likely effect of substantially lessening competition in a market. This is in comparison to potential amendments where section 46 would be enlivened if the conduct had the effect of damaging a competitor. Clearly an effects test focussed on individual competitors would be overly inclusive. The Final Report makes this point noting '[i]t would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors.'[15] However, Boral is of the view that the proposed effects test may still capture legitimate competitive conduct.

---

[9] *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J), 202 (Dawson J), and 216 (Toohey J).
[10] *Melway* (2001) 205 CLR 1, 23.
[11] *NT Power Generation Pty Ltd v Power and Water Authority and Anor* (2004) 219 CLR 90, 144 (NT Power).
[12] *Melway* (2001) 205 CLR 1, 23. Also see s46(6A)(a).
[13] *ACCC v Australia Safeway Stores Pty Ltd* (2003) 129 FCR 339, 408 (Safeway); *NT Power* (2004) 219 CLR 90, 145. See also Deane J in *Queensland Wire* (1989) 167 CLR 177, 197–8.
[14] Final Report, Page 341.
[15] Final Report, page 210.

In particular, Boral considers that there may be no relevant distinction between an effect on a competitor or competitors and an effect on the market as a whole. Undoubtedly, competitors who claim that they are being 'damaged' by the conduct of a party with market power will assert that, not only are they being damaged but so is the market.

In addition, the introduction of an effects test may require businesses to conduct a broad reaching, and inherently uncertain study as to the impact of potential conduct on competitors and therefore on competition in the market. Even where a business has a legitimate and commercially sound rationale for engaging in particular conduct it will need to consider, and potentially alter, its conduct by reason of a possible alleged effect on competitors. Under the current law a corporation needs to assess its motivation/purpose in pursuing a particular course of conduct. This is information that is generally ascertainable by a corporation. The difficulties in a business ascertaining the competitive effects of unilateral conduct means legitimate competitive conduct may give rise to legal risk and, as a result, may not be pursued to the detriment of consumers and the economy as a whole. Further, this type of uncertainty can hardly be seen as fostering innovation, which is clearly in the long-term interests of consumers and the broader economy.

Boral acknowledges that the Panel has sought to address issues of overreach by recommending new interpretive provisions be included in section 46. Amongst other things, a Court would need to consider the extent to which conduct enhances efficiency, innovation, product quality or price competitiveness in assessing any purpose, effect or likely effect of substantially lessening competition. Boral considers that these interpretive provisions are an improvement on the defence proposed by the Panel in the Draft Report. Relevantly, the onus for demonstrating a contravention of section 46 will rest with the ACCC or a third party alleging a contravention. In particular, Boral considers that a specific requirement to consider the role of efficiencies in assessing any lessening of competition is a positive step.

Nevertheless, how the Courts will consider these interpretive provisions is highly uncertain. The proposed guidance suggests that conduct can encourage efficiency, innovation, increase quality and price competitiveness but, nevertheless, be considered to have an effect of substantially lessening competition. This uncertainty is unlikely to encourage investment at a time where the Australian economy needs large corporations to be confident, investing, and creating jobs.

An amended section 46 should, at a minimum, include the 'take advantage' limb

Boral's principal submission is that the case for change has not been made out. As such, Boral does not consider that any changes should be made to the current section 46. At a minimum, if the section is to be changed the 'taking advantage' filter should be retained. Removing the causal connection between market power and a corporation's conduct is a radical change. It threatens to outlaw the mere existence of market power and restrict *bona fide* competition on the merits.

3 Boral supports the Final Report's recommendations regarding secondary boycotts

Boral welcomes and supports Recommendation 36 of the Final Report that the prohibitions on secondary boycotts in ss 45D – 45DE of the CCA be maintained and effectively enforced, including that:

- the ACCC 'should pursue secondary boycott cases with increased vigour';
- the ACCC should publish in its annual report the number of complaints made to it about secondary boycotts, and the number of such complaints investigated and resolved; and
- the civil penalties for breaches of the secondary boycott provisions be increased from $750,000 to $10 million, consistent with the penalties applicable for other breaches of the CCA.

Boral's experience highlights the importance of the recommended reforms, in particular the proposed increased penalties.

For over two years, the Victorian branch of the Construction and General Division of the Construction, Forestry, Mining and Energy Union (**CFMEU**) has orchestrated an illegal secondary boycott of Boral concrete in Melbourne.

The CFMEU has been impervious to court injunctions, the risk of contempt findings, damages awards and the current civil penalties contained in the CCA.

Boral's experience illustrates that the existing enforcement regime and penalties provided for in the CCA are inadequate to combat the misuse of union power and ensure the detection and enforcement of

secondary boycotts on building and construction sites. That view was confirmed by the Royal Commission in its interim report tabled in Parliament on 19 December 2014, which concluded that:

> *[260] A legal system which does not provide swift protection against the type of conduct which Boral alleges it has suffered at the hands of the CFMEU, and which does not have a mechanism for the swift enforcement of court orders, is fundamentally defective. The defects are so great as to make it easy for those whose goal is to defy the rule of law. The defects reveal a huge problem for the Australian state and its numerous federal, State and Territory emanations. The defying of the Victorian Supreme Court's injunctions for nearly two years, and the procedural history outlined above, will make the Australian legal system an international laughing stock*

Boral will continue to pursue the long and expensive path for justice in relation to the actions of the CFMEU. In the meantime, Boral welcomes recommendations to increase the speed and vigour of enforcement and legislative change that will appropriately align the penalties in the CCA and heightenthe deterrent for illegal secondary boycotts.

Yours faithfully,

Damien Sullivan
Group General Counsel