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Boral Limited's response to the Discussion Paper December 2015 – "*Options to strengthen the misuse of market power law*"

This submission responds to the Discussion Paper released by Treasury in December 2015 entitled "*Options to strengthen the misuse of market power law",* which outlines a range of options for amending the misuse of market power prohibition in section 46 the *Competition and Consumer Act 2010* (**CCA**).

Boral welcomes the opportunity to comment on potential changes to section 46.

While Boral acknowledges the divergence of views in respect of section 46 and the options put forward in Treasury's Discussion Paper, Boral considers that no amendments should be made to section 46. We elaborate on the reasons for our position in the attached submission.

In our submission, instead of responding to each question posed in the Discussion Paper, we discuss our concerns with amending section 46 by reference to the key issues identified on pages 7 and 8 of the Discussion Paper.

Yours sincerely,

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Group General Counsel
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Attachment 1 – Boral Limited's response to the Discussion Paper December 2015 – "*Options to strengthen the misuse of market power law*"

1 The case for change has not been made out

1.1 The onus is on the proponent of change

Each of the amendment options put forward in the Discussion Paper would result in a substantive change to the current law. In such circumstances, Boral considers that the proponents of change should bear the onus of demonstrating conclusively why amending section 46 would deliver material benefits to the Australian economy. If no clear benefit can be identified, there is no benefit in subjecting business to the cost of the regulatory uncertainty that will necessarily follow a significant amendment to the law.

For the reasons that follow, Boral considers that the Harper Review Final Report does not provide any such clear case for amending section 46.

1.2 The concerns with current section 46 are misplaced

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.

The impetus for reform appears to be driven by the following three concerns:

- *First*, that the 'taking advantage' element of section 46 is "subtle and difficult to apply in practice";[1]
- *Second*, that the purpose element of section 46 is difficult to prove in practice;[2] and
- *Third*, that as a matter of policy, "competition law ought to be directed to the effect of commercial conduct on competition, not the purpose of the conduct", and that without a reference to 'effect', section 46 does not capture all potentially relevant conduct.[3]

Boral disagrees with any suggestion that the provisions of section 46 are sufficiently uncertain and difficult in their application, or limited in their reach, that a substantial reframing of the law is required.

In the absence of clear examples of economic harm or detriment that cannot be remedied by the current form of section 46 (or other provisions of the CCA), the case for reform has not been made. In such circumstances the status quo, as suggested by Option A of the Discussion Paper, should be maintained.

(a) The taking advantage element

Notwithstanding some differences in the approach between trial and appellate courts, a cohesive and consistent set of principles have emerged for interpreting and applying section 46.

With regard to the taking advantage element of section 46 in particular, which requires that a corporation has '**taken advantage**' of its substantial market power, the concept has a sufficiently clear meaning. The cases disclose three closely-related ways of establishing this element:

[1] Treasury, Discussion Paper, 5.

[2] Treasury, Discussion Paper, 5.

[3] Treasury, Discussion Paper, 5.

1 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.[4] The High Court has also established a broad scope for considering the counterfactual world without market power, finding it 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.[5]

2 The material facilitation test: a firm takes advantage of its market power if the market power 'materially facilitated' its conduct.[6]

3 The 'rationale' test: a firm takes advantage of its market power if the rationale for the conduct could not have been pursued absent market power. In *Safeway*,[7] the rationale test was successfully applied, establishing that Safeway had breached section 46 and would not have refused to stock particular breads absent its market power.

Boral considers that there is no need to amend section 46 in order to introduce greater clarity. The taking advantage element, as interpreted by the courts, is sufficiently clear.

(b) The purpose element

The purpose element requires that the corporation engaged in the relevant conduct for a relevant anti-competitive **purpose** of eliminating or substantially damaging competitors, preventing entry, or deterring or preventing a corporation from engaging in competitive conduct.

The Harper Review Final Report notes that the 'purpose' test in section 46 is "clear and capable of reliable application by the courts".[8]

As a consequence, there ought not to be a concern over difficulties in proving that a corporation has the requisite purpose under the current section 46.

(c) The lack of an effects test and alleged under reach

Boral agrees that competition law is broadly concerned with the effect of commercial conduct on competition. However, it disagrees that the law needs, in all circumstances, to directly prohibit anti-competitive effects in order to achieve this outcome.

In any event, in the case of section 46, it is not the case that the current provision merely focusses on the purpose of a corporation's conduct. Critically, section 46 requires a causal connection between market power and any alleged exclusionary conduct through the concept of 'taking advantage' of market power. This causal connection properly separates exclusionary conduct which may have an anti-competitive effect from benign or pro-competitive conduct of firms that have market power.

[4] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co. Ltd* (1989) 167 CLR 177, 192, 202, 216.

[5] *NT Power Generation Pty Ltd v Power and Water Authority and Anor* (2004) 219 CLR 90, 144.

[6] *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1, 23.

[7] *Australia Safeway Stores Pty Ltd* (2003) 129 FCR 339

[8] Final Report, 339.

The concern that a lack of an effects test in section 46 results in under-reach is also misplaced. There have been a number of successful cases in which a firm with substantial market power has been demonstrated to have 'taken advantage' of this power.[9]

While there have been cases where section 46 claims have not been successfully established, it does not follow that the CCA was inadequate to address any relevant economic problem. Specifically, in such cases, there usually was either:

- no substantial market power established, in which case there is unlikely to have been an anti-competitive harm that needed to be addressed;[10]
- another section of the CCA that the conduct contravened, in which case the CCA was sufficient to deal with the economic problem at hand;[11] or
- even if substantial market power was established, no economic problem requiring redress. For example in *Melway*, the High Court found that while Melway possessed a substantial degree of market power, the 'taking advantage' limb had not been satisfied and there was a business justification for the conduct in question with the distribution system it had established determined to be an economically efficient means of organising its supply chain.[12]

Accordingly, Boral considers that section 46, and the manner in which it has been interpreted and applied to date, is sufficiently clear and properly targeted to the harm of exclusionary conduct by firms with market power that amendments are not required.

2 The proposed amendments are likely to result in overreach

Boral considers that, in addition to no positive case for amending section 46 having been made out, all of the reform options canvassed in the Discussion Paper would carry a significant risk of over-reach by prohibiting, to varying degrees, competitively benign or pro-competitive conduct.

2.1 Removing 'take advantage' would lead to over reach

The principal reason why the reform options canvassed in the Discussion Paper risk over-reach is because all of them involve the removal of the 'take advantage' limb.

As noted above, Boral questions the assertion that the 'taking advantage' element of section 46 is "subtle and difficult to apply in practice",[13] and considers that 'taking advantage' does have sufficiently clear meaning. There is no pressing reason why this important causal connection between the conduct and market power should simply be removed.

Boral also endorses the statement in the Discussion Paper that "firms are entitled, and indeed encouraged, to succeed through competition, even if they put competitors out of business and achieve a position of market dominance through their success. This 'Darwinian' process of aggressive rivalry is what drives efficient

[9] See e.g. *Queensland Wire Industries v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177; *Australia Safeway Stores Pty Ltd* (2003) 129 FCR 339; *NT Power Generation Pty Ltd v Power and Water Authority and Anor* (2004) 219 CLR 90; *ACCC v Baxter Healthcare* [2008] FCAFC 141; *ACCC v Cabcharge Australia* [2010] FCA 1261 (by consent); ACCC v Ticketek Pty Ltd [2011] FCA 1489 (by consent).

[10] See e.g. *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 374; *Universal Music Pty Ltd v ACCC* (2003) 131 FCR 529.

[11] See e.g. *ACCC v Cement Australia* [2013] FCA 909; *Rural Press v ACCC* (2003) 216 CLR 53; *Universal Music Pty Ltd v ACCC* (2003) 131 FCR 529.

[12] *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1, 23.

[13] Treasury, Discussion Paper, 5

outcomes and benefits to consumers. The law should keep markets contestable so that innovative Australian businesses or new entrants from overseas have the opportunity to compete on their merits."[14]

Accordingly, "[t]he role of section 46 is to distinguish vigorous competitive activity, which is desirable, from economically inefficient, monopolistic practices that may exclude rivals and harm the competitive process."[15]

Boral considers that 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. Boral considers the concept of 'taking advantage of market power' to be the correct concept to establish the relevant causal connection. Removal of this important limb will make the 'misuse' of market power element redundant and undermine over forty years of jurisprudence. Importantly, Boral considers that removing this causal connection between market power and impugned conduct means that conduct which does not require the use of market power will be caught. This creates a substantial risk with each of the amendments proposed that legitimate pro-competitive behaviour will be prohibited by virtue only of a particular entity's position in the market.

This concern would be particularly acute in the case of the Discussion Paper's Option B, which suggests removing the 'taking advantage' limb, but retains the existing purpose limb. Competitive conduct is often injurious by nature, as firms aim, through the process of competition, to be more successful than, which in turn likely damages, their competitors. Accordingly, Option B in particular would raise a material risk of firms with market power contravening the section through actions that are the product of normal, vigorous, competitive activity.

A significant example of where over-reach is likely to arise if the taking advantage limb is removed is the exercise of statutory or other legal or proprietary rights.

As noted in *NT Power*, "property rights can be a source of market power attracting liability under s 46 and intellectual property rights are often a very clear source of market power."[16] However, in circumstances where legal rights generate substantial market power, it is often the case that exercising those rights does not contravene section 46 because it would not constitute a taking advantage of market power. For example, when a patent confers substantial market power on a patentee, but the patentee wishes to reserve the use of the patent to itself, this would be unlikely to contravene section 46, because it is normal commercial practice for patentees to enforce their patents with or without market power.

If section 46 were to be amended by removing the 'taking advantage' element, conduct of this nature may be prohibited. This could have a chilling effect on innovation, the development of intellectual property rights, and on the nature and value of relevant legal rights.

Accordingly, Boral's principal position is that none of the options for amending section 46 canvassed in the Discussion Paper should be adopted. The misuse of market power provisions should not be amended.

However, if the Government ultimately determines that the 'take advantage' limb should be removed from the prohibition, Boral suggests that the concept of 'taking advantage' or 'material facilitation' be included as a

[14] Treasury, Discussion Paper, 3.

[15] Treasury, Discussion Paper, 3.

[16] *NT Power Generation Pty Ltd v Power and Water Authority and Anor* (2004) 219 CLR 90 at [125].

mandatory factor that the courts must take into account when determining whether there has been a misuse of market power. This would, to some extent, act as a safeguard against pro-competitive or other economically beneficial behaviour being unnecessarily caught by the removal of the 'take advantage' limb.

2.2 An 'effects' test is likely to lead to over-reach

Options E and F in the Discussion Paper suggest amending section 46 to include a prohibited purpose or effect of substantially lessening competition.

Boral considers that an effects test focussed on individual competitors would be overly inclusive. The Harper Review Final Report noted 'it would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors.'[17] The introduction of an effects test risks this outcome.

Boral further considers that a prohibition on conduct with the effect, or likely effect, of substantially lessening competition may capture legitimate competitive conduct. This is principally because there are likely to be occasions when a firm with market power engages in conduct for competitively benign purposes, or engages in competition on the merits, but competitors are disadvantaged as a consequence. Such conduct should not be prohibited.

In addition, the proposed change is too broad to distinguish what is considered to be exclusionary conduct and what is pro-competitive behaviour. Under the current law, a corporation needs to assess its motivation/purpose in pursuing a particular course of conduct. Boral considers that this is the correct question to be asked in assessing misuse of market power. This is information that is generally ascertainable by a corporation, and it is a matter that is commercially practical to assess. But the introduction of an effects test may require corporations to conduct a broad reaching and inherently uncertain study into the likely impact of their conduct or potential conduct on competitors and on competition in a market. The difficulties inherent in carrying out that task inevitably may mean that a significant risk of contravening section 46 cannot be dismissed, and as a result, the conduct 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. 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. This would not only create apprehension in the marketplace and potentially discourage pro-competitive behaviour, but also cast uncertainty over earlier jurisprudence.

Accordingly, even if the Government is minded to amend section 46 to some degree, Boral considers that it should not prohibit conduct that has the effect of substantially lessening competition. This means that Option C or Option D would be the best approach, so long as the concept of 'taking advantage' or 'material facilitation' is included as a mandatory factor that the Court must take into account in considering whether or not there has been a contravention of section 46.

2.3 Authorisation

The options for reform listed in the Discussion Paper raise the possibility of an authorisation process for conduct that might otherwise be caught by section 46.

[17] Final Report, 339.

In principle, Boral supports introducing the possibility of section 46 conduct being authorised. However, Boral is concerned that the possibility of authorisation is perceived as a solution to concerns expressed about the amendments to section 46. The process and timeframe for authorisation means that it is not a genuine solution to concerns regarding the uncertainty that amendments to section 46 would introduce. In this respect, the possibility of authorisation is unlikely to overcome the chilling effect of any section 46 amendments.