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12 February 2016

Scott Rogers
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By email: competition@treasury.gov.au

Dear Scott

Submission to Treasury

Discussion paper on options to strengthen the misuse of market power law

We enclose our submission in response to the discussion paper issued by Treasury on 11 December 2015 on options to strengthen the misuse of market power law. Allens welcomes the opportunity to comment on proposed reforms to s46 and would be happy to discuss its views further with Treasury.

Yours sincerely

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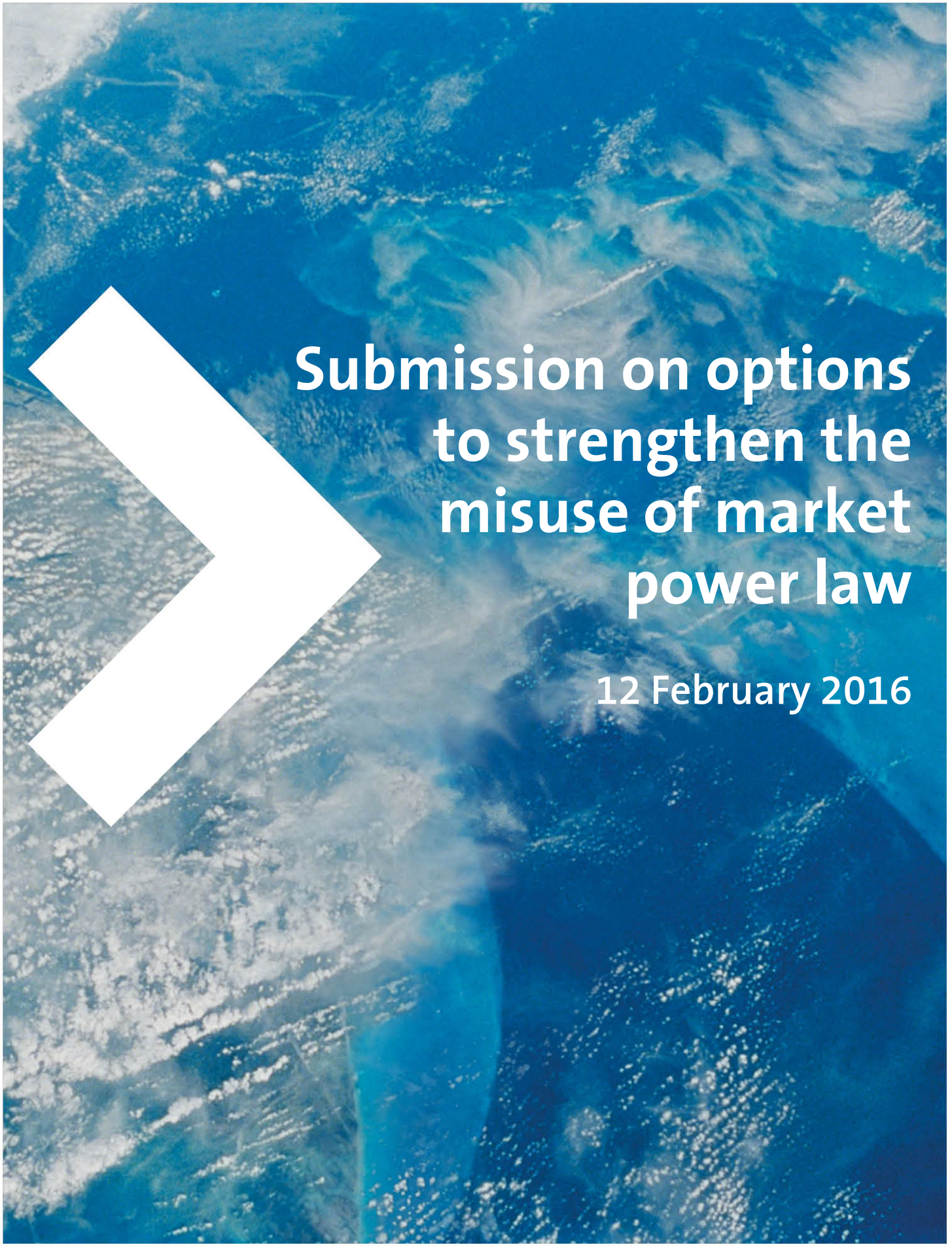

Submission on options to strengthen the misuse of market power law

12 February 2016

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1 Introduction

Allens welcomes the opportunity to comment on proposed reforms to s46 of the *Competition and Consumer Act 2010* (Cth) (the ***Act***).

We consider that s46 plays an important role in protecting competition. Accordingly, a key objective in this review is to ensure that the prohibition remains effective in detecting anti-competitive unilateral conduct. However, in doing so, the Act should not operate in a manner which discourages vigorous competitive conduct by existing, efficient competitors.

Treasury's Discussion Paper canvasses five options for amending s46, each based on adopting various elements of the recommendations made by the Harper Panel. Each option involves removing the requirement that a firm 'take advantage' of its market power, and two options involve replacing the existing 'purpose' element with a more general requirement that conduct have the 'purpose, effect or likely effect' of substantially lessening competition.

We consider that adopting any of these options is likely to result in 'over-capture', and deter firms with market power from engaging in legitimate competitive conduct. This is because, removing the 'taking advantage' limb, would eliminate the requirement that conduct be causally connected to a firm's market power in order to be prohibited, and would lead to significant uncertainty regarding the types of conduct that are covered by the section.

One reason for reform identified by the Harper Panel is that the existing 'take advantage' requirement is subtle and difficult to interpret. We consider this concern to be overstated. There now exists case law clarifying the operation of this requirement, and the ACCC has been able to prove this element in multiple cases. While the ACCC has also been unsuccessful in a number of cases, this does not mean that the prohibition is not working. Discerning anti-competitive conduct from vigorous competitive conduct is one of the most complex issues in competition law; the dividing line is not always clear and reasonable minds may differ on which side of the line conduct falls.

We do not consider that replacing the 'taking advantage' element with a 'purpose, effect or likely effect of substantially lessening competition' test would resolve the uncertainty. It still requires the courts to determine which side of the line conduct falls. The benefit of the 'taking advantage' element is that it at least posits a test for determining where the line should be drawn. The 'substantial lessening of competition' test leaves the question at large for the courts to determine.

The role played by the 'taking advantage' element is best encapsulated by the following comments of McHugh J in the context of considering the application of s46 to predatory pricing allegations:[1]

> How then can price-cutting *per se* - even price-cutting below marginal or average variable cost - constitute a "taking advantage of" market power? Section 46 would be a vehicle for anti-competitive conduct if the most efficient firm in the market had substantial market power and by reason of its efficiency could not take market share from its rivals without contravening the section. This makes little sense from the perspective of achieving an efficient economy with efficient resource allocation or for the benefit of consumers who can be provided with quality goods or services at lower prices. In a competitive market, the more efficient firms can produce more (because their average costs are lower) and obtain a greater share of the market with the result that they substantially damage their less efficient competitors. Such firms can expand their production until their marginal cost equals the market price. No one would suggest that an efficient firm with market power breaches the section because it increases its output to the level of its marginal cost. Yet the firm has market power, has substantially damaged its competitors and by intentionally increasing its output must have acted for a proscribed purpose. It does not breach s46, however, because it has not "taken advantage of" its

[1] *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at [280]

market power. It has not sought to act in a manner "free from the constraints of competition". Its market power is irrelevant. Similarly, when a firm cuts prices, it does not act "free from the constraints of competition". Its market power, if it has any, is not connected with its conduct. On the other hand, if it has substantial market power and cuts prices below cost for a proscribed purpose with the intention of later recouping its losses by using its market power to charge supra-competitive prices, it has taken advantage of its market power to cut prices below cost to damage competitors.

2 Structure of submission

This submission is structured as follows:

- Section 3 describes the role played by the 'taking advantage' element and, in particular, the importance of the concept in seeking to ensure that the Act does not discourage vigorous competitive conduct.
- Section 4 describes the reasons why a 'purpose or effect or likely effect of substantially lessening competition' test would not adequately replace the 'taking advantage' element.
- Section 5 addresses the compliance burden of a 'substantial lessening of competition' test for unilateral conduct.

3 The existing provision should be retained

3.1 'Taking advantage' provides a test to distinguish between competitive and anti-competitive conduct

A key goal of competition policy, particularly relevant when considering s46, is to encourage legitimate and vigorous competitive conduct while, at the same time, protect the competitive process from the consequences of anti-competitive conduct.[2] For this reason, the High Court has commented on numerous occasions that Part IV is not about protecting competitors but protecting competition. The High Court has also cautioned against s46 operating in a manner which deters larger, more efficient competitors from competing vigorously in the market.

The 'taking advantage' limb of s46 is intended to balance the interests of smaller competitors with those of larger competitors by providing a test for distinguishing between legitimate competitive conduct and anti-competitive conduct. This test is based on whether there is a causal connection between a firm's conduct and its market power, determined by asking a series of questions, including:

- whether a profit-maximising firm operating in a workably competitive market could in a commercial sense profitably engage in the conduct in question,[3] or whether it is likely the firm would have engaged in the conduct if it did not have substantial market power;[4] and
- whether the conduct was materially facilitated by the firm's substantial market power.

As the comment by McHugh J above makes clear, the 'taking advantage' element focusses on whether the firm in issue has sought to act in a manner 'free from the constraints of competition'.

The Harper Panel recommends removing the 'taking advantage' limb on the basis that conduct should not be 'immunised' purely on the basis that firms without market power could or would engage in the same conduct. We do not agree with this view. It is only by distinguishing between conduct which a firm can engage in by virtue of its market power that allows s46 to draw a

[2] *Commerce Commission v Carter Holt Harvey Building Products Group Ltd* [2004] All ER (D) 235 (Jul)

[3] *Australian Competition and Consumer Commission v Cement Australia* (2013) 310 ALR 165

[4] Section 46(6A)(c)

principled line between competitive and anti-competitive conduct. Removing the 'taking advantage' element would mean that particular conduct could be either lawful or unlawful purely on the basis of whether the firm engaging in that conduct has substantial market power, regardless of whether the conduct was facilitated by or even related to the firm's market power. In short, a company could be found to have misused its market power without having used its market power. Such an outcome would create obvious problems:

- firms with substantial market power could be prohibited from meeting competitive challenges from smaller firms by being prohibited from engaging in the same conduct as those smaller firms; and
- firms which acquire substantial market power as a result of successful, legitimate business strategies may have to abandon those strategies on the basis that they are no longer lawful now that the firm has substantial market power. The 'taking advantage' limb operated to prevent such an outcome in *Melway* – in that case, the High Court found that the respondent had not taken advantage of its market power by refusing supply, given that the refusal reflected the respondent's distributor model which had been implemented before the respondent obtained substantial market power.[5]

A broad range of conduct, including conduct which otherwise constitutes rational commercial behaviour, would potentially be subject to s46 of the Act, including:

- aggressive discounting, such that a firm's prices are above its costs but at a level which competitors cannot meet (for example, because there are economies of scale not available to competitors);
- vertically integrating upstream into the production of an input in order to reduce costs and to secure greater control over the quality of the final product, resulting in existing suppliers of the input exiting the market but lower final prices to consumers;
- launching a better quality product with which competitors cannot compete; and
- in a market characterised by tenders – successfully competing for tenders, based on price and quality to the extent that it is no longer economically viable for a competitor to remain in the market, without there being predatory pricing involved.

We deal below with the reasons why a test which focusses on whether the conduct has the 'purpose or effect or likely effect of substantially lessening competition' is not an appropriate replacement for the 'taking advantage' element.

3.2 'Taking advantage' is now well understood

In our view, concerns that the 'taking advantage' element is difficult to interpret are overstated. The jurisprudence in respect of the 'taking advantage' limb is now well understood, with a significant body of case law having been developed over the past fifteen years. This jurisprudence suggests that the 'taking advantage' limb is not inherently difficult to prove, as has been suggested by the ACCC. Indeed, the ACCC has been successful in establishing 'taking advantage' in a number of cases, concerning anticompetitive bundling[6] and refusal to grant access to a key input[7] or to key infrastructure.[8]

[5] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1

[6] *Australian Competition and Consumer Commission v Baxter Healthcare* (2008) 249 ALR 674

[7] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177

[8] *NT Power Generation v Power and Water Authority* (2004) 219 CLR 90

Further, although there have been a number of cases where the ACCC has been unsuccessful in establishing the 'taking advantage' element, this failure has often not been determinative of the overall proceedings:

- in *Boral Besser Masonry Ltd v ACCC* (2003),[9] the High Court concluded that Boral did not have a substantial degree of market power and therefore the question as to whether Boral was 'taking advantage' was not determinative of the case;
- in *Rural Press Ltd v ACCC*[10] and *ACCC v Cement Australia,*[11] while the court found that there was no 'taking advantage' on the particular facts (and therefore no contravention of s46), the court ultimately concluded that the anticompetitive conduct in question contravened s45 of the Act;[12]
- in *ACCC v Pfizer*,[13] the Court concluded that the key element of Pfizer's conduct which was central to the ACCC's case – namely, the terms of its offer to pharmacies – did not involve a taking advantage of market power. However, this finding was not determinative: the Court concluded that Pfizer did not have substantial market power and did not engage in the impugned conduct for the proscribed anti-competitive purpose.

Recent judicial experience suggests that the 'taking advantage' element is not inherently difficult to prove. While it is fair to say that the test posited by the element is not necessarily intuitive, this is not unexpected given that there is usually no clear dividing line between competitive and anti-competitive conduct. This is a point recognised by the US Department of Justice:[14]

> Courts and commentators have long recognized the difficulty of determining what means of acquiring and maintaining monopoly power should be prohibited as improper. Although many different kinds of conduct have been found to violate section 2 [of the Sherman Act], "[d]efining the contours of this element . . . has been one of the most vexing questions in antitrust law." As Judge Easterbrook observes, "Aggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers. Courts should prize and encourage it. Aggressive, exclusionary conduct is deleterious to consumers, and courts should condemn it. The big problem lies in this: competitive and exclusionary conduct look alike.

Finally, any contention that the taking advantage element should be removed because the ACCC was unsuccessful in establishing a contravention of s46 but was successful in proving a contravention of s45 of the Act in *Rural Press* and *Cement Australia* is logically unsound. If s46 covered the same ground as ss45 or 47, why would s46 be required at all? Further, this contention ignores the role the 'taking advantage' element seeks to play: it seeks to ensure that large firms compete on an equal footing with smaller firms and do not advance their position by misusing their market power.

[9] *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374

[10] *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53

[11] *Australian Competition and Consumer Commission v Cement Australia* (2013) 310 ALR 165

[12] In *Cement Australia*, Greenwood J concluded that there was a contravention of s45 of the CCA and in *Rural Press* the majority of the High Court (Gummow, Hayne, Heydon JJ and Gleeson CJ and Callinan J) found that there had been a contravention of s45

[13] *Australian Competition and Consumer Commission v Pfizer Australia Pty Ltd* (2015) 323 ALR 429

[14] http://www.justice.gov/sites/default/files/atr/legacy/2008/09/12/236681_chapter1.pdf

4 Relying solely on a 'substantial lessening of competition' test will result in over-capture

4.1 There is no clear dividing line between competitive and anti-competitive conduct

The Harper Panel recommends that the existing 'taking advantage' limb be removed and the current purpose test replaced with the test of whether conduct has the 'purpose, effect or likely effect of substantially lessening competition'. This recommendation is reflected in Options E and F of the Discussion Paper. This version of s46 would prohibit any unilateral action taken by a firm with substantial market power which results in a substantial lessening of competition.

We consider that there is a high degree of uncertainty about the type of conduct such a provision would capture, and the provision is therefore likely to result in capturing and deterring legitimate competitive conduct.

As mentioned above, the dividing line between vigorous competitive conduct and anti-competitive conduct is not always clear. Commercially, vigorous competitive conduct may lead to the same outcome as anti-competitive conduct such as the removal of a competitor or competitors and/or a substantial increase in market share by existing competitors. The 'substantial lessening of competition test' does not contain any mechanism for distinguishing between competitive conduct and anti-competitive conduct. By contrast, the 'taking advantage' element posits a test which businesses may apply in determining whether conduct is likely to fall within s46.

The ACCC rejects this point in its submissions to the Harper Review by asserting that:

- the 'substantial lessening of competition' test only protects the *process* of competitive rivalry between firms, as distinct from the 'structural characteristics which affect competition in a market', such as market shares, the number of competitors and barriers to entry; and
- 'competition on the merits' (or 'pro-competitive' conduct) cannot ever substantially lessen the *process* of competition, even where such conduct lessens the 'structural characteristics' affecting competition, including by resulting in the elimination of competitors or the creation of a monopoly. Examples of such conduct given by the ACCC include offering new and better products or services, undertaking successful promotional campaigns, and passing savings on to consumers through lower prices.

Two short points can be made in relation to these submissions:

- it is artificial to distinguish between the *process* of competitive rivalry and the structural characteristics of the market. The two are interrelated. Further, and in any event, the courts do not readily draw a distinction between the two when applying the substantial lessening of competition test; and
- the concept of 'competition on the merits' is not a principle that exists under Australian competition law. Further, it is an unhelpful concept as it does not have a precise meaning. Ultimately, it remains a matter for the courts to determine the boundaries between vigorous competitive conduct and anti-competitive conduct.

We deal with each of these points in greater detail below.

4.2 The distinction between the *process* of competition and the structural characteristics of the market

The ACCC's arguments assume that that the *process* of competitive rivalry between firms is separate and independent from the 'structural characteristics' affecting competition such as the number of competitors. We do not agree with this proposition. While it is true that the *process* of competitive rivalry is not necessarily determined by characteristics like the number of competitors, it is not independent of them. The *process* of competitive rivalry between firms can be lessened by the elimination of competitors or the creation of barriers to entry.

More importantly, it is not clear that the courts draw this distinction between process and the structural characteristics of the market. Certainly, there are cases where the ACCC has not drawn that distinction in submissions made by it to the court.

ACCC v Baxter Healthcare

For example, in *ACCC v Baxter Healthcare Pty Ltd*,[15] the ACCC argued that Baxter's conduct substantially lessened competition in two alternative respects. First, it lessened competition by inhibiting Baxter's competitors from acquiring a greater market share, and so longer term, to impede them from competing in the market. This included, by way of example, investment in production facilities. Second, it lessened competition by precluding Baxter's competitors from being able to compete effectively for tenders for sterile fluids.

The trial judge (affirmed by Mansfield and Gyles JJ on appeal) concluded that, on the facts of that case, the conduct did not substantially lessen competition in the first manner alleged by the ACCC. This was because it was clear that, despite the immediate impact of the conduct on the tender process, both of Baxter's competitors would remain in the market to supply PD fluids. Further, the Court did not find that any of the competitors was deterred from establishing a manufacturing plant for some sterile fluids in Australia by reason of Baxter's conduct. In other words, there was no structural effect on the market. However, it is clear from the judgment that, had there been an effect on the structural characteristics of the market, this would have sufficed as a substantial lessening of competition.

Ultimately, the trial judge held that the conduct did substantially lessen competition in the second manner alleged by the ACCC (affirmed by Mansfield and Gyles JJ on appeal). This was because, by reason of Baxter's conduct, Baxter's competitors were unable to make offers which were realistically capable of being accepted by the State Purchasing Authorities.

'Competition on the merits' can lessen the process of competition

Further, the type of conduct described as 'competition on the merits' does not enhance the *process* of competitive rivalry between firms so much as it enhances the *competitiveness* of the particular firm engaging in the conduct. Conduct which increases a firm's competitiveness can substantially lessen the *process* of competition, including by lessening the 'structural characteristics' affecting competition in a market, such as by causing the exit of rival firms. Indeed, the more that conduct 'enhances competition' (i.e. increases a firm's competitiveness), the more likely it is to have an anti-competitive effect. Conduct which constitutes competition 'on the merits' can therefore lessen the process of competitive rivalry between firms.

For example, the introduction of a new, innovative product or offering lower prices, albeit above marginal costs, by the most efficient operator in the market, can still lessen competitive rivalry between firms. The challenge for regulation is to distinguish between anti-competitive conduct and conduct which is 'competition on the merits', even where that conduct lessens the process of

[15] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2005) ATPR 42-066; and *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd* (2008) 249 ALR 674

competition. The 'substantial lessening of competition' test is not capable of making this distinction – it will prohibit all conduct which results in a substantial lessening of competition, regardless of whether that conduct was competition 'on the merits' or not.

4.3 'Competition on the merits' is not part of Australian competition law and is not inherent in a 'substantial lessening of competition' test

In short, the term 'competition on the merits' does not appear in the Act and the courts have not unambiguously accepted that it is part of Australian competition law. Further, to the extent it is relevant, there is no generally accepted definition of the expression.

It is true that the term 'competition on the merits' has been used loosely in Australian jurisprudence from time to time to refer to conduct which does not or should not raise concerns from an anti-trust perspective, on the basis that it reflects the ordinary workings of vigorous effective competition. For example, in *Rural Press Ltd v ACCC*,[16] the High Court was required to consider Rural Press' actions in seeking to prevent a new entrant from expanding into Rural Press' territory, by itself threatening to expand into the new entrant's territory. Gummow, Hayne and Heydon JJ, in the context of determining whether the conduct substantially lessened competition, made the following comments:

> The Rural Press parties did not answer a fundamental question. If they had not seen the competitive impact of the River News as actually or potentially substantial, why did they fear it? They paid extremely close attention to the new activities of the River News, they recorded them, they communicated about them orally and in writing and they exhibited adamantine opposition to them. In itself that can be the conduct of a bona fide competitor, and in limited respects the Rural Press parties did respond competitively, but they coupled this with much conduct which was not ***bona fide competition on the merits***. (***emphasis added***).

While the High Court referred to the concept, it did not provide such guidance that would support the ACCC's contention that it forms part of Australian competition law.

Seven Network Limited v News Ltd

In *Seven Network Limited v News Ltd*,[17] the parties specifically addressed in their submissions the question of whether 'competition on the merits' was relevant under Australian competition law. In that case, the Federal Court was required to consider (among other things) whether the acquisition of broadcast rights to AFL and NRL matches had the purpose or effect of substantially lessening competition.

In its written submissions, the applicant submitted that Australian competition law does not recognise a concept of 'competition on the merits' and that s45 does not require the use of anti-competitive means for a provision to have the effect or likely effect of substantially lessening competition. Therefore, according to the applicant, a 'subjectively innocent arrangement' that was not the result of anti-competitive conduct such as predation, tying, refusing to deal or price discrimination, may nonetheless still contravene s45 if it had the effect or likely effect of substantially lessening competition. By contrast, the respondents argued that something more was required than merely competing successfully for an input such as broadcast rights. In this respect, the respondents argued that where a firm engages in legitimate competitive conduct, any consequences flowing from that conduct cannot amount to a substantial lessening of competition. The respondent sought to invoke a 'competition on the merits' principle.

The trial judge did not expressly address the issue of whether the concept of 'competition on the merits' was part of Australian competition law. However, it is clear from the decision that the

[16] *Rural Press Ltd v Australian Competition and Consumer Commission* (2003) 216 CLR 53

[17] *Seven Network News Ltd v News Ltd* [2007] FCA 1062

means by which the respondents secured the AFL and NRL broadcast rights were largely irrelevant – it did not matter whether the respondents' conduct was competition 'on the merits'. What was relevant was simply whether the acquisition of the broadcast rights by the respondents had an anti-competitive effect. This was notwithstanding the fact that the respondents, according to the trial judge (and accepted on appeal): (1) sought to acquire what were clearly commercially valuable rights for their business; (2) paid a reasonable price for those rights; and (3) the applicant, the Seven Network, was largely 'the author of its own misfortune' by failing to put forward its best bid to secure the rights.[18] This important judgment is consistent with the view that there is no principle of 'competition on the merits' within Australian competition law. That is, the Court did not assess the nature of the conduct engaged in by the respondent, but rather only looked at whether the outcome of the conduct amounted to a substantial lessening of competition.

No clear dividing line between conduct which does and does not affect the 'process' of competition

Even if one were to accept the proposition that 'competition on the merits' cannot lessen the *process* of competition, there remains the problem that in practice, it is difficult to distinguish between conduct which constitutes 'competition on the merits' and therefore does not go to the *process* of competition. Neither the Act nor the cases spell out where the dividing line is. The Act leaves it to the courts, which historically have been unable to distinguish between the two in applying a 'substantial lessening of competition' test. Instead, the courts often look to the impact of conduct on 'structural characteristics' such as the number of competitors to determine whether the process of competition has been lessened.

In this respect, we note the work performed by the OECD in 2002 in considering the role concepts such as 'competition on the merits' play in anti-trust law. The OECD paper on the topic concludes:[19]

> Competition on the merits is a popular but vague term. The principles underlying it and any standards that are based on it need to be clarified. The concept of competition on the merits is supposed to be a helpful point of reference for distinguishing unilateral conduct that is harmful to competition from unilateral conduct that enhances competition. Lawyers, judges and competition law enforcement officials have been using this phrase for many years to explain and justify their arguments and decisions, but there is no consensus on what the term means. The same may be said of terms such as unreasonable, improper, and level playing field. The continued use of these terms despite the absence of precise, generally accepted definitions for them has led to inconsistent interpretations, and therefore to unpredictable results. Consequently, these phrases have not helped to promote a better understanding of the law and policy on abuse of dominance. There is a need for a more principled and consistent basis for determining liability in unilateral conduct cases.

4.4 Legislative guidance proposed by the Harper Panel would not reduce risk of over-capture

The Harper Panel itself acknowledges that competitive conduct can have anti-competitive effects and that relying solely on a 'substantial lessening of competition' test may therefore result in over-capture. The Panel recommended addressing this risk by amending s46 to include legislative guidance on when a firm will have substantially lessened competition, which is reflected in Option F of the Discussion Paper. The courts would be directed, in determining whether conduct has the purpose, effect or likely effect of substantially lessening competition, to have regard to the extent to which the conduct has the purpose, effect or likely effect of:

- increasing competition in the market (including by enhancing efficiency, innovation, product quality or price competitiveness); and

[18] *Seven Network News Ltd v News Ltd* (2009) 262 ALR 160 at 328 – 329

[19] http://www.oecd.org/competition/abuse/35911017.pdf

- 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).

The Harper Panel asserts that, in having regard to these factors, the court will be required to '*weigh the pro-competitive and anti-competitive impact of conduct*'.

We do not consider that this direction to the court will reduce the risk of over-capture – it only restates the question at hand, rather than providing any guidance on what constitutes a 'substantial lessening of competition'.

Further, the proposed direction requires the courts to consider a false dichotomy. As stated above, conduct which 'increases competition' (or 'pro-competitive conduct') in this context is conduct which increases the competitiveness of the firm engaging in that conduct, for example, by increasing the firm's efficiency, innovation, product quality or price competitiveness. However, such conduct can substantially lessen competition overall, for example, by causing other firms to leave the market. Indeed, the more that conduct 'increases competition' (i.e. increases a firm's competitiveness), the more likely it is to have an anti-competitive effect. The increase in a firm's competitiveness cannot be weighed against an overall decrease in competition – one does not counteract the other, rather, one can cause the other.

Finally, the amended provision does not create a defence for conduct which 'increases competition' by increasing a firm's efficiency, innovation, product quality or price competitiveness – it only requires the court to 'have regard' to whether the conduct in question had such an effect. Conduct which increases a firm's efficiency, innovation, product quality or price competitiveness would still be prohibited under s46 if it substantially lessened competition.

5 A 'substantial lessening of competition' test would impose a high regulatory burden

Existing provisions of the Act require corporations to consider, when making or giving effect to contracts and other arrangements, whether the purpose or likely effect of that contract or arrangement is to substantially lessen competition. Such consideration is typically part of a corporation's normal process of contract review and sign-off, and is a generally accepted cost of conducting business in Australia.

In contrast, there is a greater regulatory burden in complying with a misuse of market power provision which relies solely on a 'substantial lessening of competition' test. It would require corporations to assess, for any unilateral conduct (which includes acts or omissions), whether the conduct has the likely effect of substantially lessening competition.

Allens

12 February 2016