12 February 2016

The Treasury
Langton Crescent
PARKES ACT 2600

By email to competition@treasury.gov.au

Dear Sir/Madam

Options to strengthen the misuse of market power law

Foxtel welcomes the opportunity to comment on the Government's Discussion Paper *Options to strengthen the misuse of market power law*, dated December 2015 (the **Discussion Paper**).

For the reasons explained in this letter, Foxtel is opposed to all of the amendment proposals set out in the Discussion Paper. The effective operation of section 46 of the *Competition and Consumer Act 2010* (the **CCA**) is critical to Australia's economy and Foxtel is very concerned that the Government's proposals to amend section 46 will deter pro-competitive conduct, will lead to a great deal of uncertainty for Australian businesses and will also lead to a significant increase in compliance costs. Foxtel also queries the so-called need to "strengthen" Australia's misuse of market power laws, and whether the conduct the Government is seeking to address may be better dealt with by use of other relevant existing Australian laws, such as the prohibition against unconscionable conduct.

Section 46 does not need strengthening

The title of the Government's Discussion Paper presupposes that Australia's misuse of market power law requires strengthening. Foxtel does not agree that the misuse of market power law requires strengthening, or that there is evidence that section 46 is deficient in its current form.

First, the general perception appears to be that the ACCC has a poor track record on section 46 cases when this is not the case. In the last 10 years, of the six section 46 cases commenced by the ACCC, the ACCC achieved successful outcomes in three cases, *Baxter* (finalised 2008 - contested), *Cabcharge* (finalised 2010 – by consent) and *Ticketek (*finalised 2011 – by consent). Of the remaining cases:

- there was no result in one case, *Visa*, as the proceedings were settled on the basis of section 47; and
- the ACCC was unsuccessful in two cases, *Cement Australia* and *Pfizer*, although in the former case the section 45 claims were made out and the latter case is on appeal.

Second, section 46 was amended in 2008 to clarify the meaning of "taking advantage" by setting out in section 46(6A) factors which the Court may have regard in determining whether a corporation has

Foxtel Management Pty Ltd
ABN 65 068 671 983

5 Thomas Holt Drive
North Ryde NSW 2113 Australia
GPO Box 99 Sydney NSW 2001

T: +61 2 9813 6000
foxtel.com.au

'taken advantage' of its market power. Since then, only three cases commenced by the ACCC have concerned conduct engaged in after the amendments took effect: *Ticketek*, *Visa* and *Pfizer.* The ACCC successfully secured penalties, by consent, of $2.5 million against Ticketek for contraventions of section 46. As mentioned above, Visa, was settled on the basis of section 47 (the ACCC did not press its section 46 claims), and the Pfizer case is currently on appeal. It is also worth noting that the ACCC achieved successful outcomes in the two most recent cases which concerned section 46 in its pre-amended form: Cabcharge was ordered to pay, by consent, $14 million in penalties for contraventions of section 46 and Baxter was found to have contravened section 46 and was ordered to pay penalties totalling $4.9 million.

Even if the ACCC is not successful in the Pfizer appeal, two[1] unsuccessful section 46 cases in almost ten years does not amount, in Foxtel's opinion, to evidence of a systemic issue with section 46, nor that the provision '*is not reliably enforceable and permits conduct that undermines the competitive process*'[2].

It appears that the Government's primary concern may actually be the protection of small businesses, which Foxtel understands is a focus of the current Government. However it must be remembered (as the Government has recognised in the Discussion Paper) that the object of section 46, like Australia's other competition laws in Part IV of the CCA, is the protection of competition and the competitive process generally, rather than the protection of individual competitors.[3]

If there is a concern that large Australian companies are acting unfairly or unconscionably towards small Australian businesses, there are likely to be more suitable avenues to redress this conduct, such as the unconscionable conduct provisions of the CCA. In this respect, the ACCC was successful recently in securing, by consent, combined penalties of $10 million against Coles for engaging in unconscionable conduct in its dealings with suppliers. In December 2015, the ACCC also instituted proceedings against Woolworths alleging unconscionable conduct in its dealings with suppliers. This case is ongoing. Small business will also benefit from the extension of the unfair contracts regime to standard form business contracts, which will come into effect in November this year.

Given the significant risk and uncertainty which the Government's section 46 proposals encompass, Foxtel submits that there should be clear evidence of the need for reform before any changes to section 46 are introduced. The Government must also keep at the forefront of its mind the objects of section 46 and of Part IV of the CCA.

Taking advantage

Each of the Government's proposals to amend section 46 set out in the Discussion Paper involves removing the 'taking advantage' limb of section 46. Foxtel is strongly opposed to this proposal and believes removing 'taking advantage' is hugely problematic for a number of reasons.

As the Government has acknowledged, 'taking advantage' is the causal connection between market power and conduct[4] and it currently plays an important filtering role. The

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[1] The two cases in which the ACCC has been unsuccessful are *Cement Australia* and *Pfizer*. There was no result on s46 in *Visa* as the proceedings were settled on the basis of s47.

[2] Discussion Paper, page 4.

[3] Section 2 of the CCA. See also page 3 of the Discussion Paper.

[4] Discussion Paper, page 7.

'taking advantage' requirement ensures there is a distinction between vigorous, pro-competitive conduct and anti-competitive conduct, such that only the latter falls within the ambit of section 46. The 'taking advantage' element provides lawyers with a useful, practical tool to help identify and advise on whether conduct is likely to contravene section 46 or whether the conduct has a rational purpose and amounts to vigorous competition on the merits.

Without the 'taking advantage' element, all conduct of firms with a substantial degree of power in a market could be caught by section 46, including pro-competitive conduct that is unrelated to the existence of market power. Without the 'taking advantage' limb, section 46 could be contravened even if there is a commercially rational and legitimate business reason for the proposed conduct (particularly if an effects test is introduced, as discussed further below), which would make the provision extremely difficult to advise on. Accordingly, removal of the 'taking advantage' element is likely to lead to a conservative approach to section 46 given the significant penalties for breach. Foxtel is also concerned that given every action by a company with a substantial degree of market power would be in scope, effective section 46 compliance processes will be difficult (if not impossible) to implement, which will no doubt lead to increased compliance costs.

There is also no demonstrated need to remove or amend 'taking advantage'. As noted above there have been only three[5] cases commenced by the ACCC under the current form of section 46, since the 2008 amendments which clarified the meaning of taking advantage were introduced. Of those, only *Pfizer* was contested, and it is currently on appeal. Relevantly, the trial judge made findings that Pfizer took advantage of its substantial degree of power in a market in two instances, but not in a third instance.[6] Moreover, the Court drew from both the case law and section 46(6A) factors and, contrary to the view of the Harper Panel[7], had no apparent difficulty in finding that Pfizer had taken advantage of its substantial market power.

In such circumstances, the proposed removal of taking advantage is not justified.

Effects test

As Foxtel submitted to the Harper inquiry, Foxtel is strongly opposed to the introduction of an effects test, which forms part of the Government's proposals E and F. Foxtel believes that, as the vast majority of previous section 46 reviews have recognised, it is critical that an anti-competitive purpose is retained as a mandatory element of a section 46 breach.

If an effects test is introduced, Foxtel is concerned that it will be extremely difficult to predict the effect of a corporation's unilateral conduct on a market, as companies are typically not well placed to assess the effect of their unilateral conduct on unrelated third parties. As with the removal of taking advantage, compliance processes for an 'effects' test under section 46 will also be challenging to implement and administer effectively, because there is no trigger event (such as entry into a contract or arrangement with a third party) at which to assess the potential effect of the conduct, where as there is a clear trigger for assessing the effect of conduct under, for example, section 45 or section 50 of the CCA.

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[5] Those cases are *Ticketek*, *Visa* and *Pfizer*.

[6] (2015) 323 ALR 429; [2015] FCA 113.

[7] At page 5, the Discussion Paper states that '*the Panel noted the meaning of the expression 'take advantage' that has emerged from case law is subtle and difficult to apply in practice*'.

Foxtel therefore believes that the introduction of an effects test will lead to increased costs in terms of compliance, with corporations having to regularly commission both legal advice and the advice of economists. In turn, this is likely to significantly delay decision making and potentially result in innovative and pro-consumer decisions not being made.

Companies are also likely to define the market in question very narrowly, so as to assess the effect of their conduct on the narrowest market possible. This approach is likely to have a chilling effect with respect to conduct which benefits consumers but may also potentially have an impact on other participants in the relevant market.

By way of example, in its recent Foxtel-Ten merger considerations the ACCC formed the view in its Statement of Issues that Foxtel participates in a narrow market for the supply of subscription television (**STV**) services, as well as a broader market for the supply of television viewing services[8]. While Foxtel does not agree with the ACCC's narrow market definition, for the purposes of compliance with section 46, if an effects test is adopted, Foxtel may have little alternative but to assess the effect of its conduct in this narrow market, which currently has very few participants. When considered in such a narrow market, there are a number of examples of past competitive conduct that Foxtel arguably may not have implemented if an effects test were in place, including reducing Foxtel's monthly subscription price for its basic package by almost half in November 2014 and the introduction of bundles of Foxtel's broadband services with Foxtel's STV services when Foxtel launched its broadband offering. Foxtel believes these examples are clearly pro-competitive, but that the effect of this conduct on a narrow STV market would have been difficult to predict.

More broadly, Foxtel is also concerned about the proposal to move to a "substantial lessening of competition" test in section 46, even if it is limited to a purpose of substantially lessening competition. While many argue the substantially lessening of competition test is a well understood test, Foxtel's view is that it is not at all clear what it means in the context of section 46, where a corporation has a substantial degree of power in a market. Foxtel therefore does not agree with the Government that the proposed substantial lessening of competition test '*is the same as that found in sections 45…, 47… and 50… of the CCA*'[9].

Mandatory Factors

For the reasons explained above it is clear that the Government's amendment proposals will have a chilling effect with respect to pro-competitive conduct. While proposals D and F include mandatory factors that the Court would be required to consider in determining whether a corporation has breached section 46, it is unclear what legal effect the proposed factors will have.

The mandatory factors proposed by Competition Policy Review do not include any statutory guidance as to how the two factors are to be balanced, and Foxtel believes that this is likely to lead to uncertainty and inconsistency in their application. For example, what weight will the Court give to the mandatory factors in the event that each points to a conflicting conclusion as to whether there has been a misuse of market power. The

[8] The ACCC's Statement of Issues dated 14 September 2015 in relation to Foxtel and Ten's proposed acquisitions, available at: http://registers.accc.gov.au/content/index.phtml/itemId/1190276/fromItemId/751043

[9] Discussion Paper, page 6.

mandatory factors are therefore unlikely to provide much comfort to a company with a substantial degree of market power, or to deter a conservative approach to section 46.

Authorisation and ACCC Guidelines

Although Foxtel does not support the Government's amendment proposals, if section 46 is to be amended in some form, Foxtel would welcome both an authorisation regime and a requirement for the ACCC to issue guidelines regarding its approach to the amended provision. As the time taken to obtain authorisation may mean this is not a practical option in many instances, clear ACCC Guidelines are likely to be of great utility to Australian businesses.

In conclusion, Foxtel submits that Australia's competition laws must continue to encourage Australian companies to innovate and to invest in high quality products and services for Australian consumers. For the reasons explained above, there is a real risk that the Government's amendment proposals B, C, D, E and F will have precisely the opposite effect, and they are strongly opposed by Foxtel. Foxtel submits that the Government should adopt proposal A and make no changes to section 46.

Yours sincerely

Lynette Ireland
Chief General Counsel