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

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Competition Policy Review Secretariat
The Treasury
Langton Crescent
PARKES ACT 2600
contact@competitionpolicyreview.gov.au

Boral Limited's response to the Competition Policy Review Draft Report

I refer to the Competition Policy Review's Draft Report dated 22 September 2014 (**Draft Report**), in which the Competition Policy Review Panel (**Panel**) expressed its views, set out its draft recommendations and requested further submissions.
Boral Limited wishes to respond to two aspects of the Draft Report:

- misuse of market power (section 16.1 of the Draft Report), with particular reference to the appropriateness of an 'effects test' as the determinant of liability under section 46 of the Competition and Consumer Act 2010 (Cth); and
- secondary boycotts (sections 3.13 and 18.2 of the Draft Report).

Boral's submissions in relation to those two issues are set out at Attachment 1 and Attachment 2, respectively.

Yours sincerely

Damien Sullivan
Group General Counsel
Boral Limited

Attachment 1

Misuse of market power: the effects test

1 Overview

1.1 The Panel's view in its Draft Report

The Draft Report[1] proposes a significant, unwarranted and likely detrimental 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 submits that the proposed changes are not consistent with this policy objective.

The introduction of an 'effects test' and the removal of the 'take advantage' element in the current prohibition will create uncertainty as to scope of the prohibition. There is a real risk that legitimate competitive conduct will be captured by the prohibition, and that there will be a chilling effect on businesses in circumstances where they will need to second guess legitimate commercial conduct.

The proposed introduction of a defence does not address these concerns. As a matter of principle Boral considers it inappropriate, outside of per se conduct (e.g. cartel conduct), to require a business to bear the onus of proving in any respect that they have not contravened the CCA. The onus should be on the ACCC, or the party who has commenced the proceedings, to prove all of the elements of the contravention. The terms of the proposed defence are novel and, in themselves, will create significant uncertainty.

Boral's view is that the Panel must reconsider its overall draft conclusions regarding section 46. Consequently, Boral's comments are not restricted to the proposed defence.

1.2 The argument for change has not been made

As the Draft Report itself notes, proposals for an 'effects test' have been formally considered on a number of occasions since 1976. With the lone exception of the 1984 Green Paper,[3] none of these reviews recommended the adoption of an effects test. The Draft Report does not contain any significant justification for the proposed amendments.

In Boral's view the Draft Report overstates the alleged difficulties associated with the application of section 46, and does not properly consider the likely consequences of the proposed amendments. Statements by the ACCC[4] that cases have not been brought

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[1] Review Panel, *Competition Policy Review*, Draft Report (2014).

[2] *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1, 13 (**Melway**): '[s]ection 46 aims to promote competition, not the private interests of particular persons or corporations.'

[3] *Trade Practices Act: Proposals for Change*, Green Paper (1984) [30]. While the Government did not adopt the Green Paper's recommendation to introduce an effects test, the then Trade Practices Act was amended to lower the requirement of ' substantial control' to one requiring a corporation to have only a 'substantial degree' of market power. The heading of the section was also changed from 'Monopolisation' to 'Misuse of market power'.

[4] ACCC, Submission to the Review Panel, *Competition Policy Review*, 25 June 2014, 77 [4.2.1].

because of concerns regarding the ability to make out an anti-competitive purpose are clearly not a sufficient reason to introduce changes to the law.

1.3 Summary of Boral's position

Boral makes the following three submissions:

1. 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;
   - there is body of case law that provides the business community with *sufficient* certainty as to the meaning of the prohibition. There is no reason to abandon this certainty unless it can be shown that the current prohibition is clearly deficient; and
   - the 'effects test' proposed by the Panel is over-inclusive. It would not be beneficial for competition or economic welfare.
2. The proposed defence does not adequately address these concerns;
   - the legal burden of establishing relevantly contravening conduct should wholly rest with the party alleging that conduct; and
   - there is a real risk that firms will not engage in legitimate competitive conduct in circumstances where they cannot be confident that the defence can be made out. The novel terms of the defence will increase uncertainty.
3. If section 46 is to be amended in the manner proposed and a defence introduced, the defence should be that the corporation did not take advantage of its market power because:
   - there is a body of case law that discusses the meaning of the 'taking advantage' concept which can be used by the business community in assessing the application of a defence; and
   - the concepts set out in the proposed defence and, in particular, the concept of 'advancing the long-term interests of consumers' proposed by the Panel is inherently uncertain.

2 Section 46 should remain in its current form

2.1 Section 46 is well adapted to the relevant economic harm it addresses

Section 46, and comparable provisions in other jurisdictions, 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. As the Draft Report notes, by reference to a 1996 OECD Report 'firms are entitled, and indeed are encouraged to succeed through competition – by developing better products and becoming more efficient – even if they achieve a position of market dominance through their success.' Boral's concern is that the

changes proposed in the Draft Report make it less likely that success 'through competition' can be pursued.[5]

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.6 [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.[7]

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. The concept of 'taking advantage of market power' is the correct concept to establish the relevant causal connection. One issue with the so called 'Birdsville Amendment' (section 46(1AA)) is that it removes 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).*[8]

While the Panel appropriately recommends that the Birdsville Amendment be repealed, it does so in circumstances where its draft recommendation incorporates its deficiencies into the core misuse of market power provision.

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. This creates a substantial risk that legitimate pro-competitive behaviour will be prohibited by virtue only of a particular entity's position in the market.

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

There are three key concepts in section 46:

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[5] Draft Report, above n 1, 205.

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

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

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

- whether a corporation has a 'substantial degree of power in a market' (that is, substantial **market power**);
- whether a corporation has '**taken advantage**' of its substantial market power; and
- whether a corporation did so 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.

Each of these concepts has been interpreted by the courts, including the High Court, in a number of cases. Notwithstanding the differences in approach between trial and appellate courts, a reasonably cohesive and consistent set of principles has emerged. In particular, Boral disagrees with any suggestion that the provisions of section 46 are so uncertain and difficult in their application that a radical reframing of the law is required. Changes to the law are likely to introduce, rather than remove, uncertainty.

In particular, Boral questions the Panel's suggestion that the 'taking advantage' element of section 46 is sufficiently difficult to apply such that the causal nexus between the conduct and market power should simply be removed.[9]

In interpreting the three key concepts in section 46, Boral makes the following observations:

- **Market power** is a relatively simple concept. Kaysen and Turner described it as follows:

  A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.[10]

  Dawson J cited this definition with approval in *Queensland Wire*.[11] It was also approved by Gleeson CJ, Gummow, Hayne and Callinan JJ in Melway, where their Honours said '[t]he notion of market power as the capacity to act in a manner unconstrained by the conduct of competitors is reflected in the terms of s 46(3).'[12]
- **'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:

  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.[13]

     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'.[14]

[9] See the Draft Report, above n 1, 208–9.

[10] Carl Kaysen and Donald F Turner, *Antitrust Policy: an Economic and Legal Analysis* (Harvard University Press, 1959) 75, quoted in *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co. Ltd* (1989) 167 CLR 177, 200 (**Queensland Wire**).

[11] *Queensland Wire* (1989) 167 CLR 177, 200.

[12] *Melway* (2001) 205 CLR 1, 21.

[13] *Queensland Wire* (1989) 167 CLR 177, 192 (Mason CJ and Wilson J), 202 (Dawson J), and 216 (Toohey J).

[14] *Melway* (2001) 205 CLR 1, 23.

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.'[15] That is, if it is necessary to make unrealistic assumptions in order to posit the counterfactual circumstances, the Court may do so.

2. The 'material facilitation' test: a firm takes advantage of its market power if its market power 'materially facilitated' its conduct.[16] 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.

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.[17]

   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.

To the extent that there is a concern that no taking advantage of market power was established in cases such as *Rural Press*[18] and *Cement Australia*,[19] it should be remembered that the conduct in question in those cases was held to contravene other prohibitions in the CCA. That is, Part IV of the CCA as a whole was sufficient for addressing the matters in issue in those cases.

For example, in *Rural Press*, the High Court held that the 'method' that Rural Press employed to eject Waikerie Printing from its market was not one that relied on market power. Specifically, the method that Rural Press employed was the offer of an arrangement containing an exclusionary provision (that is, a promise not to enter Waikerie Printing's market). No business needs market power to offer and commit to an exclusionary or cartel arrangement. Accordingly, it was proper that the conduct was dealt with under section 45 / 4D of the Trade Practices Act (as it then was), instead of section 46.

- **'Purpose**', as it is defined in section 46(1). As the Panel correctly observes, 'purpose' is 'at least clear and capable of reliable application by the courts'.[20]

In light of these observations, Boral's view is that the interpretation and application of section 46 is sufficiently clear and certain such that amendments are not required. In the

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

[16] *Melway* (2001) 205 CLR 1, 23. Also see s46(6A)(a).

[17] *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.

[18] *Rural Press Limited v ACCC* (2003) 216 CLR 53 (**Rural Press**).

[19] *ACCC v Cement Australia Pty Ltd* [2013] FCA 909 (**Cement Australia**).

[20] See the Draft Report, above n 1, 209–10.

absence of clear evidence of economic harm or detriment that has not been 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 '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 Draft Report makes this point noting '[i]t would not be sound policy to prohibit unilateral conduct that had the effect of damaging individual competitors.'[21] However, Boral is of the view that the proposed effects test may still capture legitimate competitive conduct.

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.

The Draft Report appears to assume that conduct by an efficient competitor which drives other parties out of the market would not be caught by the amended section 46. Presumably this would be because the competitive process is not necessarily diminished in circumstances where conduct results in market exit.

While Boral accepts that damage to a competitor should not necessarily entail harm to the competitive process, there can be no certainty that competitors, the regulator or a court will make such a distinction. For example, assume a situation where a major retailer, because of economies of scale, can price lower than its smaller competitors. This causes some of these competitors to exit the market. On one view of the proposed amendment, this conduct should not be caught by the prohibition, because it is pro-competitive price competition which is to the benefit of consumers. However, even then, it could be asserted that there is a substantial lessening of competition as the exit of a business will result in less choice in the market, especially in circumstances where there might be said to be some differences in the offerings provided by exiting retailers. As the proposed amendments raise questions as to whether a business may deploy efficiencies to the benefit of its customers as well as its market position, the proposed amendments clearly risk preventing legitimate competition from occurring.

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

[21] Ibid 210.

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.

3 The introduction of a defence does not address concerns regarding 'over-capture'

Even if the Panel remains of the view that an effects test should be adopted, then the Panel should not recommend removing the 'taking advantage' element of section 46. The introduction of a defence and the removal of the 'taking advantage' element, introduces an inappropriate burden for businesses which will be forced to establish that their conduct does not contravene the CCA. That new burden will also risk economic harm and, consequently, does not address concerns about 'over-capture'.

3.1 It is inappropriate to put the onus of establishing no use of market power on the respondent

As the Panel is aware, the CCA currently contains a defence/exception in respect of cartel conduct.[22] Boral considers that a defence / exception to per se conduct may be appropriate. It may be reasonable to expect parties who otherwise have entered into a cartel provision to demonstrate the application of the joint venture defence.

However, in circumstances where the policy of competition law is to encourage vigorous competition, the onus of demonstrating that unilateral conduct is anti-competitive is properly borne by the person making the accusation.

Accordingly, businesses ought not to have to bear the onus of proving that their conduct was rational competitive behaviour as opposed to anti-competitive behaviour. There is a risk of economic harm if respondents need to make out a defence

The proposal set out in the Draft Report will require, as a practical matter, that a company assess the competitive effects of its conduct on the market, and also whether the conduct meets the requirements of the defence. In this respect the introduction of the defence is likely to compound, rather than overcome, the 'chilling' effect resulting from the change to the primary prohibition. Uncertainty as to whether the defence is likely to be made out to the satisfaction of the ACCC or a court may preclude parties from engaging in beneficial competitive conduct. Furthermore, the requirement to undertake such an analysis prior to making any business decision comes with significant cost and diversion of time and resources away from the productive focus of the enterprise, driving up the cost of doing business.

[22] *Competition and Consumer Act 2010* (Cth) (**CCA**) ss 44ZZRO and 44ZZRP.

4 If section 46 is to be amended in the manner proposed, the defence should be 'no taking advantage'

Boral's principal position is that the misuse of market power provisions should not be amended, and that the introduction of a defence does not overcome relevant concerns. However, if the Panel continues to recommend that section 46 is amended and that a defence is introduced, Boral considers that the defence should be for the defendant to show that the conduct did not involve the use of market power, that is, that the concept of 'taking advantage' be incorporated into the defence. This would have the advantage of allowing a business to make use of the existing case law in considering whether the defence can be made out and avoids the uncertainty which will necessarily follow the introduction of novel and untested language into the CCA.

4.1 There is a body of case law that makes the taking advantage concept certain

While not described by the Panel in such terms, the first limb of the proposed defence has some parallels to the approach taken by the court in considering the concept of taking advantage.

Nevertheless, the proposed defence does not use the term 'take advantage'. As such the application prior jurisprudence is not clear. Boral considers that if a defence is to be introduced the defence should not simply bear a passing resemblance to the matters considered by a court in assessing the use of market power. In Boral's view a complete defence to a revised prohibition should be that the corporation did not take advantage of its market power.

4.2 The concept of 'advancing the long-term interest of consumers' is inherently uncertain

As to the second limb of the defence, it is inherently uncertain and existing jurisprudence is even less likely to provide any assistance. While the term 'promote the long-term interest of end users' is used in the context of the telecommunication provisions of the CCA,[23] those provisions are unlikely to be of assistance in interpreting the second limb of the defence. The term 'long term interests of end users' is, in effect, explicitly defined in the telecommunications provisions of the CCA.[24] No similar definition is proposed in respect of the amendments recommended by the Panel. There are, accordingly, inherent problems in both interpreting and applying an undefined notion of 'long term interests of consumers'.

Putting to one side the problems in interpreting 'long-term', it is not clear how the 'interests of consumers' is to be determined. For example, are the interests of consumers served where conduct results in better prices, or is it necessary to consider other elements of potential consumer interest (i.e. service, choice, etc)? More fundamentally, Boral is of the view that where a corporation demonstrates that it did not take advantage of its market power there should be no necessity for it to also demonstrate that the conduct is in the long-term interest of consumers.

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[23] *CCA* Pt XIC.

[24] *CCA* s 152AB.

Attachment 2

Secondary boycott sanctions and enforcement

1 Overview

1.1 The Panel's view in its Draft Report

In its Draft Report, the Panel considered the adequacy of the secondary boycott prohibitions in the *Competition and Consumer Act 2010* (Cth) (the **CCA**).

The Panel noted the Australian Competition and Consumer Commission's (**ACCC**) submission that a number of features make enforcement of the secondary boycott prohibitions challenging, including:

- difficulties in obtaining documentary evidence;
- lack of cooperation of witnesses; and
- potential overlaps between the ACCC, Fair Work Commission and Fair Work Building and Construction.

Nevertheless, the Panel expressed the view that "a sufficient case has not been made for changes to the secondary boycott provisions of the CCA".[25]

Boral notes that Counsel Assisting the Royal Commission into Trade Union Governance and Corruption has recently expressed a contrary view that there may be a number of deficiencies with the existing legal and regulatory framework in relation to secondary boycotts.[26]

1.2 Boral's direct experience of sustained secondary boycott

Boral has been subject to a damaging and ongoing secondary boycott perpetrated by the Victorian branch of the Construction and General Division of the Construction, Forestry, Mining and Energy Union (**CFMEU**). Boral's experience illustrates that, contrary to the view of the Panel in its Draft Report, the existing law and enforcement procedures are inadequate to combat the misuse of union power and ensure the detection and enforcement of secondary boycotts.

The CFMEU has engaged in an orchestrated illegal campaign against Boral for the past 20 months, impervious to injunctions and the risk of contempt findings, damages awards and civil penalties.

Since the implementation of the black ban, Boral has been hindered and prevented from supplying concrete to CFMEU controlled construction sites in the greater Melbourne metropolitan area and had suffered an estimated loss of Earnings Before Interest and Tax of approximately $8 to $10 million to the end of June 2014.

[25] Draft Report at page 49.

[26] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 618-9.

The CFMEU's secondary boycott of Boral has been the subject of evidence to the Royal Commission into Trade Union Governance & Corruption (**Royal Commission**), led by Commissioner Dyson Heydon AC QC:

- nine Boral employees, including managing director and CEO Mike Kane, have given evidence of the existence of the black ban and its impact on Boral's business; and
- ten witnesses from eight of Boral's key customers have given evidence confirming the existence of the secondary boycott of Boral.

Boral's submissions in relation to the reform of the secondary boycott provisions are made against this backdrop.

1.3 Summary of Boral's proposed reforms

Accordingly, Boral considers that there are two principal areas where the existing law is inadequate, and where there is a clear basis for principled reforms:

- sanctions; and
- enforcement.

In respect of sanctions, Boral supports three specific reforms to the existing law in this area:

1. the clarification of existing cartel conduct laws to explicitly include market sharing arrangements dictated by a party who is not a competitor of the other parties to the arrangements;
2. the reconsideration of the enforcement of the cartel conduct provisions, in terms of both the appropriate prosecuting agency and the incentive for private civil actions; and
3. the clarification of existing secondary boycott laws to explicitly prohibit a supplier from knowingly supplying a product or service in substitute for another supplier affected by a secondary boycott.

In respect of enforcement, Boral supports five reforms:

1. the reinstatement of the Australian Building & Construction Commission (**ABCC**) with shared jurisdiction to enforce secondary boycott laws;
2. the provision of a power for the ACCC and reinstated ABCC to access information held by other enforcement agencies relating to potential breaches of the CCA;
3. an appropriately funded industry information campaign to ensure awareness that businesses which comply with a union's secondary boycott campaign may themselves breach section 45D, section 45E, the cartel conduct prohibitions, or all three;
4. the establishment of a clear statutory obligation to report suspected breaches of section 45D or 45E of the CCA (for ease of reference described generally here as 'secondary boycott conduct'), together with appropriate penalties. Secondary boycott conduct in the form of threats and incentives to customers, contractors and/or competitors to comply or assist is by its nature difficult to prove, as those with direct knowledge of that conduct have a reason not to report it. A positive reporting obligation would expose more conduct, thereby deterring offending. This accords with the positive reporting obligation imposed by both section 14(4) of the *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* (Cth), which is currently before the Senate, and

section 11(b)(ii) of the Victorian Code of Practice for the Building and Construction Industry. Breach of those codes can render offending industry participants ineligible to secure government contracts. If the ACCC or ABCC could penalise builders and suppliers who fail to report suspected secondary boycott conduct, the law would be in line with the expectations of those codes, bringing further significant incentives for industry participants to comply with those standards; and

5. the provision of immunity protection from proceedings under sections 45D and 45E for industry participants who report secondary boycott conduct.

Boral also considers that the relevant enforcement agencies should more actively seek penalties against industry participants for breaches of section 45D and 45E, whether customers, head contractors or competitors engaging in or assisting secondary boycott conduct.

These issues are considered more fully below.

2 Sanctions

2.1 Extension of cartel conduct definition

The uncontested evidence before the Royal Commission was that the CFMEU believes it has the power to determine how the Victorian construction market will be shared amongst contractors. Through its black ban, the CFMEU has already engaged in such conduct by determining along with Boral's customers firstly that those customers will not acquire concrete from Boral and secondly that those customers would be allocated to a particular class of suppliers, namely those suppliers which the CFMEU has approved.[27] Boral submits that such market fixing conduct falls within the intended scope of the cartel provisions of the CCA.

However, the CFMEU may argue that no cartel exists because the CFMEU is not in competition with contractors and Boral's customers.

Although Boral believes that the current law does capture the CFMEU's conduct in the present circumstances, it submits that for clarity and ease of prosecution, the CCA's definition of cartel conduct should expressly include conduct such as that engaged in by the CFMEU to ensure the provisions accomplish their intended prohibition of anti-competitive conduct carried out collusively for the benefit of a group of market participants.

Unlike a secondary boycott *simpliciter*, the targeted conduct aims at undermining free competition in the marketplace by not only effecting a boycott of a target business, but artificially fixing who may operate within a sector of the market.

The definition of cartel conduct should therefore include conduct that breaches section 45D or section 45E engaged in for the purpose of determining that a particular competitor or competitors will or will not supply a particular customer or customers.

[27] Transcript of Royal Commission Public Hearing CFMEU Boral (Day 1), Wednesday 9 July 2014 at 10.00am, page 5 lines 30-33.

To this extent and in this instance, Boral disagrees with the Panel's view that "the cartel prohibition should only apply to corporations that are in competition with each other or are likely to be in competition with each other".[28] It is artificial to say that a non-competing orchestrator of a market fixing arrangement amongst competitors is not a member of the resulting cartel. Such an orchestrator is just as, if not more, culpable than those competitors for the conduct.

The clear, indisputable inclusion of such conduct within the legislative scope of cartel conduct has several practical deterrent and enforcement advantages, including:

- the much higher levels of sanctions available for a cartel boycott than for a pure secondary boycott offence (maximum of *at least* $10,000,000 compared to $750,000);
- the application of sanctions against individual parties to such conduct, for example, against those who ordered the cartel boycott. Pecuniary penalties for pure secondary boycott conduct currently may only lie against a body corporate (section 76(2));
- individual penalties that include the possibility of imprisonment for up to 10 years, as per section 79(e) of the CCA;
- strengthened investigatory powers directed to secret conduct, which are of particular importance here where those with knowledge of the conduct are unlikely to report it, including:
    - executing search warrants from a magistrate on union premises and the premises of union officers; and
    - notifying the Australian Federal Police, who may collect evidence using phone taps and other surveillance devices in certain circumstances. The ACCC has acknowledged that it is hindered in gathering evidence by the lack of power to use telecommunication intercepts, or access information obtained by other agencies' investigations, in relation to secondary boycotts;[29] and
- the application of the cartel immunity policy and leniency policies to parties to such conduct. These policies are considered further in 3.5 below.

As noted above, the maximum penalty for a corporation convicted of cartel conduct, as established by section 76 of the CCA, is the greater of:

- $10,000,000;
- three times the value of the benefits obtained that are reasonably attributable to the contravention; and
- where benefits cannot be determined, 10 per cent of the corporation's annual turnover (including related corporate bodies) in the preceding 12 months.

There is no practical or market-manifested difference between cartel conduct orchestrated by a union or a corporation. The effects on competition within a market can be equally

[28] Draft Report at Page 223.

[29] ACCC's Supplementary Submission to the Competition Policy Review dated 15 August 2014 at pages 6-7.

dramatic. Further, the level of penalty required to effectively deter corporations from illegal conduct applies equally to unions.

Boral notes in this context that Counsel Assisting the Royal Commission has recently expressed the view that:

- the ineffectiveness of the current secondary boycott provisions in ss 45D and 45E of the CCA to deter illegal secondary boycotts by trade unions may be a problem;[30] and
- Boral's proposal that the cartel provisions of the CCA should be clarified to explicitly prohibit market sharing arrangements dictated by a party who is not a competitor of the other parties to the arrangements is deserving of serious and detailed consideration.[31]

2.2 Enforcement of cartel conduct provisions

The Panel may also consider whether the division of responsibilities for prosecution of cartel conduct between the ACCC and the Commonwealth Director of Public Prosecutions (**DPP**) sufficiently enables a swift government response to suspected cartel conduct. According to the joint DPP-ACCC memorandum of understanding (**MOU**),[32] the ACCC is responsible for investigations and the immunity process (see 3.5 below), but is to refer serious conduct to the DPP for prosecution. The MOU states that the DPP will advise the ACCC whether, in accordance with the Prosecution Policy of the Commonwealth, it intends to commence a prosecution. This policy requires that prosecution is supported by sufficient evidence and would be in the public interest.

The issue is timeliness. Section 5.1 of the MOU states that the DPP is to make its decision "*as soon as reasonably possible*". However, Boral understands that the DPP's decision-making process can take up to a year's time. Meanwhile, the effects of the cartel conduct continue to be suffered by the market generally, and victims such as Boral particularly. Much of the process that the DPP conducts is redundant. Once the ACCC decides to commit resources to investigating the cartel and eventually to refer the issue to the DPP, it has already answered the Prosecution Policy's questions in the affirmative.

More appropriately, the investigating agency should have the power to commence proceedings and control both civil and criminal cartel conduct proceedings. This would require appropriate resourcing of the ACCC to conduct criminal proceedings. It would greatly increase the efficiency of prosecution and avoid redundancy in the application of two government agencies' resources to the single issue of the prosecution of cartel conduct.

Boral also submits that plaintiffs harmed by secondary boycott conduct should have greater incentives to bring civil actions under the CCA for a contravention of Part IV. Such private action complements the work of the ACCC, promoting the public interest in the enforcement

[30] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 618.

[31] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 1308.

[32] DPP, *Memorandum of Understanding between the Commonwealth Director of Public Prosecutions and the Australian Competition and Consumer Commission regarding Serious Cartel Conduct* (2014) DPP <http://www.cdpp.gov.au/wp-content/uploads/MR-20140910-MOU-Serious-Cartel-Conduct.pdf>.

of the law while mitigating the taxpayer's burden of investigating and litigating complex disputes. Threefold damages would incentivise plaintiffs who suffer loss due to a pattern of cartel conduct to initiate civil actions under that Act. This accords with the current pecuniary penalty scheme of the CCA, noted above, which sets the maximum penalty for a criminal or civil contravention at 3 times the total value of the benefits obtained that may reasonably be attributed to that contravention.

2.3 Extension of secondary boycott definition

The current law may be sufficient to support a breach of the secondary boycott provisions of the CCA by suppliers that knowingly step in to supply in place of a boycotted party. However, Boral argues that for clarity and ease of prosecution, the secondary boycott provisions should be amended to make it clear that a supplier (A) commits an offence where it supplies a party (B) knowing or reasonably suspecting that B is using A to replace another supplier (C) the subject of a secondary boycott. This will deter supplier A from knowingly benefitting from, or turning a blind eye to, a secondary boycott of one of its competitors. The effect of an illegal secondary boycott will thus be neutered. If A, the alternative supplier, is not available to be substituted for the boycotted supplier C, the customer B will need to use C regardless of the pressure applied by the union.

Boral notes in this context that Counsel Assisting the Royal Commission has recently expressed the view that:

- the absence of specific provisions making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target may be a problem;[33] and
- Boral's proposal that provisions should be introduced into the CCA making it unlawful for the competitors of the target of a secondary boycott knowingly to supply a product or service in substitute for a supply by the target is deserving of serious and detailed consideration.[34]

3 Enforcement

As the Panel notes in its Draft Report, "*the secondary boycott laws will only act as a deterrent to unlawful behaviour if the laws are enforced*".[35] In that light, Boral makes the following submissions regarding enforcement.

3.1 ABCC

The ACCC is currently exclusively responsible for investigating secondary boycott conduct. History would show that it has not been particularly active in this role, although Boral recognises that in the present instance the ACCC has been conducting an investigation which Boral is optimistic will lead to enforcement proceedings. As the Australian Chamber of Commerce and Industry (**ACCI**) noted in its submission to the Panel, the ACCC (and its

[33] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 618.

[34] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 1308.

[35] Draft Report at page 242.

predecessor, the Trade Practice Commission) has litigated only approximately 13 secondary boycott matters since 1988, and even fewer in the industrial context.[36]

Enforcing the secondary boycott provisions in the industrial sphere requires a pro-active regulator with industrial expertise and the impetus to thoroughly investigate anti-competitive union conduct.

The Royal Commission into the Building and Construction Industry (**Cole Royal Commission**) tabled its Final Report in Parliament in 2003. The Commissioner, the Honourable Justice Terence Cole AO RFD QC, recommended that the ABCC be given a shared jurisdiction with the ACCC to investigate and prosecute breaches of the CCA's secondary boycott provisions. The Cole Royal Commission's recommendations were as follows:

> ***Issue***
>
> *The Australian Competition and Consumer Commission presently has exclusive responsibility for investigating allegations of secondary boycotts in the building and construction industry. It has not been active in doing so.*
>
> *A question arises whether the Australian Building and Construction Commission should be given a concurrent power identical to that of the Australian Competition and Consumer Commission to investigate and prosecute breaches of the secondary boycott provisions of the Trade Practices Act 1974 (C'wth) affecting the building and construction industry.*
>
> ***Recommendation 181***
>
> *The Building and Construction Industry Improvement Act contain secondary boycott provisions mirroring ss45D–45E of the Trade Practices Act 1974 C'wth), but limited in operation to the building and construction industry.*
>
> ***Recommendation 182***
>
> *The Australian Building and Construction Commission share jurisdiction with the Australian Competition and Consumer Commission in investigating and taking legal action concerning secondary boycotts in the building and construction industry.*[37]

In 2012 the ABCC was replaced by Fair Work Building and Construction, which has no powers to investigate anti-competitive conduct under the CCA. Legislation is currently before the Senate to reintroduce the ABCC.[38]

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[36] ACCI, *Submission to the Competition Policy Review* (June 2014) Competition Policy Review <http://competitionpolicyreview.gov.au/files/2014/07/ACCI.pdf> at page 42.

[37] Commonwealth, Royal Commission into the Building and Construction Industry, *Summary of Findings and Recommendations* (2003), Volume 1 at page 158.

[38] *Building and Construction Industry (Improving Productivity) Bill 2013* (Cth) and the *Building and Construction Industry (Consequential and Transitional Provisions) Bill 2013* (Cth).

Once re-established, the ABCC should share jurisdiction with the ACCC to enforce the CCA's secondary boycott provisions and should take on the role of pro-actively enforcing such legislation. The proposed ABCC legislation does not currently provide such powers.

Conceptually, the prohibitions on secondary boycott conduct fit within two legal paradigms: competition and industrial relations. While secondary boycott conduct by a union is at essence industrial, such conduct directly affects competition, prices and relationships within the relevant market. The ACCC has noted the complexity of the relationship between competition and industrial relations from a policy perspective,[39] and it is this complexity which warrants the joint oversight of secondary boycott conduct by both the industrial relations and competition regulators.

As the Master Builders Association noted in their submission to the Panel, when secondary boycott conduct is undertaken in the industrial sphere, it is often accompanied by and inseparable from other unlawful conduct, such as collusion, 'adverse action' and other behaviour contrary to the principles of 'freedom of association' in the *Fair Work Act 2009* (Cth) (**FW Act**). It is therefore practical and appropriate to enable the ABCC to investigate secondary boycott conduct, as it will also have the power to investigate simultaneous breaches of the FW Act.

As the Panel noted in its Draft Report, it is appropriate to 'establish protocols for enforcement and investigation where legislation confers a comparable enforcement jurisdiction on a specialist regulator to enforce such laws'[40] A clear protocol for cooperation between the ABCC and the ACCC is thus necessary to ensure that all pertinent conduct is investigated while minimising duplication of investigative resources and efforts.[41] The protocol for cooperation should establish:

- the circumstances in which the ABCC and the ACCC will investigate allegations of secondary boycott conduct and, if necessary, enforce the CCA provisions;
- how the two agencies will collect and share information, including information that may inform or enhance joint agency initiatives in the areas of training, detection and prevention of secondary boycott conduct;
- inter-agency referral mechanisms;
- a human resources sharing protocol in order to arm investigative teams with a multi-disciplinary skill set sufficient to uncover secondary boycott conduct in the industrial context; and
- feedback mechanisms regarding investigative best practice, training methods, suggested policy and legislative improvements and risk management strategies.

Alternatively, the ABCC and ACCC could establish a special shared investigative unit with seconded resources from both agencies and external resources hired specifically for this purpose to ensure that the unit has skills including the following:

- criminal investigation experience;

[39] ACCC's Supplementary Submission to the Competition Policy Review dated 15 August at page 5.

[40] Draft Report at page 243.

[41] The ACCC has acknowledged the existing potential for overlap with Fair Work Building and Construction – see the ACCC's Supplementary Submission to the Competition Policy Review dated 15 August 2014 at page 7.

- industrial relations expertise;
- corporate competition knowledge; and
- accounting knowhow, including tracing.

Boral notes in this context that Counsel Assisting the Royal Commission has recently expressed the view that the absence of a single statutory regulator dedicated to the regulation of trade unions with sufficient legal power to investigate and prosecute breaches of the secondary boycott provisions may be a problem.[42]

3.2 Information sharing regarding Part IV breaches

While conducting a secondary boycott, a perpetrator may carry out related acts which breach legislation the subject of separate law enforcement efforts. As the ACCC noted in its submission to the Panel, a power to access information held by other law enforcement agencies could usefully supplement the regulator's ability to obtain evidence of secondary boycott conduct.[43] That power could be enlivened when the ACCC (or ABCC in relation to the investigation of an industrial secondary boycott) has reason to believe that the other law enforcement agency has obtained material that may be relevant to a breach of Part IV of the CCA. This power would avoid the situation where government-held information that could assist in a secondary boycott investigation remains siloed off from the agencies that could best make use of it, namely the ACCC or ABCC.

3.3 Education regarding secondary boycott conduct

Regardless of the identity of the regulator, Boral believes that more can be done by the responsible regulator to change behaviour in this space; not just through enforcement, but also through education and information campaigns. The effectiveness of the CFMEU's black ban is in part attributable to the union exploiting Boral's customers' ignorance of the secondary boycott provisions. Boral believes that customers, contractors and suppliers may not be aware that their acquiescence to the union's boycott demands may breach the CCA.

The ACCC does not currently provide sufficient education on this point. A search of the ACCC's website for "secondary boycott" reveals no such general information, unlike that which exists, for example, for cartels, imposing minimum resale prices, predatory pricing and price signalling. This despite the ACCC's legislative function under section 28(1)(a) of the CCA to "*make available to persons engaged in trade or commerce and other interested persons general information for their guidance with respect to the carrying out of the functions, or the exercise of the powers, of the [ACCC] under [the CCA]*".

Appropriate regulator resources should be deployed to ensure that businesses are aware of the CCA's prohibition on secondary boycott conduct and its consequences. This not only fulfils part of the ACCC's legislated function, but is also a wise application of resources. Cultural change is needed in the construction industry to combat the practice of 'turning a blind eye' to secondary boycott conduct. It is more efficient to avoid secondary boycott

[42] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 619.

[43] ACCC's Supplementary Submission to the Competition Policy Review dated 15 August 2014 at page 7.

conduct and its consequent effects through the education of businesses than it is to enforce those provisions *ex post facto*.

3.4 Obligation to report

The effectiveness of the CFMEU's secondary boycott for over 18 months now can be explained in part by the difficulty that the ACCC has stated that it had for many months in obtaining sufficient evidence to bring proceedings. Those who were in the best position to give evidence, Boral's customers, likely feared retribution should they be seen to give evidence. In the ACCC's Supplementary Submission to the Panel dated 15 August 2014, the ACCC noted:

> *"In the ACCC's experience, witnesses to secondary boycott activity are often reluctant to provide information to the ACCC, even in compulsory section 155 examinations, for fear of repercussions. Typically, individuals involved in the conduct or with information regarding the conduct have ongoing personal, business or employment relationships with those alleged to have contravened the law. Fear of repercussions can persist despite the issuing of a section 155 notice".*[44]

The ACCC has noted that even section 155 compulsory examinations are often insufficient to gain cooperation from witnesses. The ACCC has suggested that Parliament should:

- increase the criminal penalties for non-compliance with a section 155 notice;
- introduce civil penalties and provisions to compel compliance with such a notice;
- increase the currently inadequate penalties for those intimidating or threatening to cause loss to a person on account of that person assisting the ACCC. This is particularly relevant in the context of collecting evidence of an industrial secondary boycott, where potential informants may rightly fear that their businesses could themselves become boycott targets; and
- provide an effective whistle-blower regime for informants within an organisation suspected of contravening the CCA, including protecting the informant from civil or criminal liability and from liability or termination arising from enforcement of contractual remedies.[45]

Boral agrees with these proposals and submits that there is clearly the need for more direct obligations and more tangible repercussions for industry participants that fail to provide evidence.

There should therefore be a clear obligation in the CCA for a person to report the circumstances of suspected secondary boycott conduct. Boral considers that a positive obligation to report is needed to overcome union pressure and to encourage reporting of unions' restrictive trade practices, and should be inserted into Part IV of the CCA. Those who fail to report ought to be subject to the same civil penalty regime and other remedies available for a contravention of Part IV.

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[44] ACCC's Supplementary Submission to the Competition Policy Review dated 15 August 2014 at page 7.

[45] ACCC's Submission to the Competition Policy Review dated 25 June 2014 at pages 97-103; ACCC's Supplementary Submission to the Competition Policy Review dated 15 August 2014 at page 7.

This approach would ensure that the CCA supports the policy approach adopted in respect of public contracting at both the Commonwealth and State level. The Commonwealth Government recognises the desirability of a reporting obligation in its draft *Building and Construction Industry (Fair and Lawful Building Sites) Code 2014* (Cth) (**Code**). Section 14(4) of the Code states that an entity subject to the Code must, in relation to building work, report to the ABCC any request or demand by a building association, whether made directly or indirectly, that the person engage in conduct that appears to be for the purposes of a secondary boycott within the meaning of the CCA. A report must be made as soon as practicable, but in any case no later than 24 hours after the request or demand is made.

Contractors that do not comply with the Code may be declared ineligible to tender for all Federal Government contracts, and may face similar consequential exclusions under State codes. This is a powerful incentive given the proportion of construction projects that involve government spending. Creating a statutory obligation to report under the CCA will harmonise the obligations of construction industry participants in relation to private and public work sites.

Similarly, at a State level, the Victorian Government has recently implemented the Victorian Code of Practice for the Building and Construction Industry (**Victorian Code**), which expressly and directly obliges the reporting of secondary boycott conduct. The Victorian Code requires participants to report suspected secondary boycotts to the Construction Code Compliance Unit (**CCCU**), a division of the Victorian Department of Treasury and Finance, in substantially the same terms as the draft Commonwealth Code.[46] Further, the Victorian Code contemplates a failure to report a suspected secondary boycott as non-compliance which may result in a sanction, including exclusion from tendering opportunities.[47]

A positive reporting obligation would also align the enforcement of secondary boycott legislation with the same policy approach adopted in other areas of Australian law. Such obligations are frequently imposed where the relevant wrong-doing is difficult to detect by conventional methods of law enforcement. For example, obligations exist for 'market participants' to report suspected breaches of the ASX 'market integrity rules' (if transactions are made in possession of insider information or in the context of other market distorting conduct) under Part 5.11 of the *ASIC Market Integrity Rules (ASX Market) 2010* and certain types of businesses must report suspicious transactions under section 41 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)).

This policy imperative applies to secondary boycott conduct. As the ACCC has recognised, the relevant wrongdoing is difficult to investigate and evidence. Witnesses to the wrongdoing may be reluctant to come forward. Consider the difficulty and delay that the ACCC has experienced in bringing secondary boycott proceedings against the CFMEU in Victoria, because, according to Chairman Rod Sims, "*[w]hen we talked to people we*

[46] Section 11(b)(ii) of the Victorian Code.

[47] Section 11(c) and 13.4(a)(iii) of the Victorian Code. The Victorian Code also reinforces competition legislation by:

- preventing Victorian Government departments or public sector bodies from contracting with any Code participant which has not fully complied with an adverse decision for a breach of the CCA (s 4.2(c)); and
- requiring participants not only to comply, but also to demonstrate past compliance with, the CCA and all court directions and decisions (ss 5(a) and 5(b)).

couldn't get them to give us much evidence or co-operation". A positive obligation to report, enforced by criminal or civil penalties, will alleviate this situation and facilitate investigation.

A positive reporting obligation is also clearly desirable in the case of persons not directly engaged in secondary boycott conduct, but who knowingly and directly benefit from it. When the competitors of a business targeted by a secondary boycott knowingly step in to substitute the embargoed supply, their silence facilitates the boycott. Without clear liability under the CCA, those competitors have incentives to allow the secondary boycott conduct to continue unreported and uninvestigated. Independently of the secondary boycott conduct provisions which should apply to such competitors (see 2.3 above), an obligation to report underpinned by criminal sanctions ought to be imposed, and ought to be applied on alternative suppliers equally as on customers and other contractors.

Boral notes in this context that Counsel Assisting the Royal Commission has recently expressed the view that:

- there appears to be an inability or unwillingness by the regulatory authorities to investigate and prosecute breaches of the secondary boycott provisions by trade unions;[48]
- there may be a number of root causes for this problem: difficulties in obtaining documentary evidence, lack of co-operation of witnesses who may fear repercussions from giving evidence, the potential overlap between the roles of a number of regulators and difficulties in ensuring compliance with court orders made in relation to secondary boycott conduct;[49] and
- Boral's proposals that reporting obligations should be introduced requiring persons to report circumstances of secondary boycott conduct and that regulatory powers should be strengthened are deserving of serious and detailed consideration.[50]

3.5 Immunity protection

The CFMEU's secondary boycott conduct has only been effective due to the complicity of Boral's customers who have acceded to the CFMEU's demand to stop using Boral's products, other contractors who have encouraged them to do so, and suppliers who have stepped in to fill the void. Boral's customers and other contractors have likely acted unlawfully.

The customers' complicity, and any third party encouragement, may amount to a contravention of section 45D or 45E of the CCA. Similarly, a supplier of concrete who has agreed with the CFMEU to supply concrete in the place of Boral may be liable for a contravention of sections 45D or 45DA.

As discussed throughout this submission, it is difficult to collect evidence of secondary boycott conduct. Initially, Boral customers are unlikely to report the CFMEU's conduct due to fear of retribution by the CFMEU. As noted above, acquiescent customers and substituting suppliers may be liable under section 45D or 45E, particularly once the

[48] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 618.

[49] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 618.

[50] Submissions of Counsel Assisting the Royal Commission dated 31 October 2014 at page 1308.

secondary boycott definition is clarified as discussed in 2.3 above. Once implicated in the secondary boycott conduct, reporting is even less likely due to the fear of liability. If a perpetrator of a secondary boycott could secure immunity from prosecution by offering to give evidence against its co-perpetrators, this dynamic could be shifted.

In the cartel context, this is the purpose of the ACCC immunity policy for cartel conduct. The policy states that the ACCC will give immunity to a member of a cartel from civil proceedings if, among other things, it:

- admits its involvement;
- undertakes to give full disclosure to and cooperation with the ACCC;
- has not coerced others to participate in the cartel; and
- has ceased involvement in the cartel.

The cartel immunity policy is only available to the first cartel member to apply for immunity. This creates an urgency that increases the chances that one or more of a cartel's members might 'sell out' the others.

The purposes of the immunity policy are to encourage businesses and individuals to disclose cartel behaviour, to prevent the harm caused by such illegal conduct and to facilitate the prosecution and sanction of unrepentant (or slow to repent) cartel members. Just as important, however, is the policy's deterrent effect on the formation of cartels. Because potential participants perceive a greater risk of ACCC detection and court proceedings, they are less likely to decide to take part in a cartel.

The ACCC notes that the rationale for the immunity policy for cartel conduct is that cartels "usually involve secrecy and deception. Collusion is difficult to detect—there may be little documentary evidence and parties often go to great lengths to keep their involvement secret".[51]

That same rationale applies to the secrecy of secondary boycott conduct. Boral would submit that many of Boral's Victorian customers have participated in the CFMEU's boycott conduct, but encouraging those customers to give evidence has proved difficult.

An immunity policy for those participating in ongoing secondary boycott conduct will significantly improve the ACCC's ability to investigate and bring proceedings in relation to such conduct. This, together with the clarification of the secondary boycott provisions' application to a boycotted company's customers and competitors (see 2.3 above), will strengthen businesses' resolve against pressure to participate in the conduct or to stand by silently as it occurs. This benefits the victims of illegal boycotts, such as Boral, and all stakeholders in a free and fair market.

While noting that the Panel in its Draft Report stated that it "considers there is no evidence showing that current arrangements are failing to achieve their objective of bringing about the deterrence and disclosure of cartel conduct",[52] the Panel should consider as an issue in

[51] ACCC, *ACCC immunity and cooperation policy for cartel conduct* (10 September 2014) ACCC <https://www.accc.gov.au/system/files/884_ACCC%20immunity%20and%20cooperation%20policy%20for%20cartel%20conduct_FA.pdf>.

[52] Draft Report at 226.

the specific context of a secondary boycott conducted with a cartel purpose the effectiveness of the ACCC's immunity policy's limited availability to only the first cartel member who comes forward. Boral submits that there is a balance to be achieved between, on the one hand, penalising offenders and deterring cartel conduct by exacting sanctions against all cartel members, and on the other ensuring that the regulator has the best possible evidence to ensure successful proceedings with accurate damages awards. In the present context, the current policy would mean that a whistleblower's evidence would likely be uncorroborated and potentially incomplete. More useful evidence might be obtained, and thus a better balance achieved, through an immunity policy which is open to:

- cartel boycott members who agree to cooperate with the regulator prior to proceedings commencing;
- cartel boycott members who agree to cooperate with the regulator prior to the opening of an investigation into the cartel's conduct; or
- the first of a number of cartel boycott members (for example, 3) or of a defined proportion of the cartel (for example, one third of the cartel boycott's members) who agree to cooperate with the regulator.