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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Sir/Madam

Competition and Consumer Amendment (Misuse of Market Power) Bill 2016

Thank you for the opportunity to provide comments on the *Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*.

We have particular concerns with the proposed amendments to section 46 of the Competition and Consumer Act 2010 (the "Act") and the potential for these and further foreshadowed amendments to have significant negative consequences for import-competing domestic manufacturers.

BlueScope's Australian markets:

BlueScope is a leading Australian trade-exposed manufacturer. BlueScope is the only manufacturer of flat steel products in Australia, including steel slab, plate, hot rolled coil and cold rolled coil. It is also the country's largest manufacturer of coated and painted flat steel products, including well-known brands such as COLORBOND® steel and ZINCALUME® steel. The technology and intellectual property that underpins these brands was developed in Australia and has been applied across the company's global manufacturing footprint (COLORBOND® steel is this year celebrating its 50th anniversary).

The company operates major manufacturing plants at Port Kembla and Erskine Park in NSW, Hastings in Victoria, and Acacia Ridge in Brisbane. It also operates a network of smaller processing and distribution facilities across the country. BlueScope employs approximately 6,500 people in Australia.

In Australia, BlueScope services customers in the building & construction, engineering, manufacturing, agriculture & mining, and automotive & transport sectors. Of these domestic markets, building & construction is the largest and accounts for approximately 70 per cent of the company's Australian domestic sales.

The building & construction market is supplied by BlueScope both directly – through its wholly-owned BlueScope Lysaght rollforming (building products manufacturing) business – and indirectly through the company's sales to third-party rollforming businesses and distributors, many of which are small and medium sized enterprises (SMEs).

BlueScope Lysaght, and the third-party rollformers and distributors, sell the steel building products they manufacture to end-users, such as builders and home owners. In this end-user market, BlueScope's steel products compete with:

- (a) imported steel products, including both imported finished steel building products and imported steel feedstock used by some third-party rollformers and processors; and
- (b) a range of non-steel substitute building products such as clay bricks, terracotta and concrete tiles, timber and aluminium, which are both domestically manufactured and imported.

BlueScope is highly exposed in Australian markets to competition from imports and substitutes. Overcapacity continues to put severe pressure on the global steel industry. BlueScope has already shut down one of its two blast furnaces at Port Kembla to reduce its exposure to uneconomic export prices. It now needs to sell as much as possible of the fixed output of its remaining blast furnace on the domestic market, in order to maintain the viability of steel production in Australia.

To maximise its domestic volumes and maintain a viable scale, BlueScope needs to compete against imports and substitute materials by offering superior product features and benefits for our customers. Our competitive offer includes: market-leading warranties; reputable brands; products optimised for local conditions; technical and after-sales support; shorter lead times and smaller order volumes than imports; and volume and loyalty discounts.

BlueScope's marketing efforts to find domestic demand for the production from the remaining blast furnace at Port Kembla do not harm consumers or competition in any end-user market.

But BlueScope is now concerned that its commercially legitimate and pro-competitive activities directed at these objectives may be impacted inadvertently by the proposed changes to section 46. This could perversely lead to higher prices for consumers and threaten BlueScope's continued viability as a domestic steelmaker.

Proposed amendments to section 46:

One of the key changes proposed that is of concern to BlueScope is the introduction of an "Effects Test" in section 46 of the Act (Misuse of Market Power). The amendment proposes to prohibit a corporation which has a substantial degree of power in a market from engaging in conduct if the conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in a market. Currently, section 46 only prohibits conduct in circumstances where a corporation:

- (a) has power in a market;
- (b) takes advantage of that market power; and
- (c) does so for an anti-competitive purpose.

Significantly, the new prohibition in the Bill before the Senate does not require any "taking advantage" of market power and it is sufficient to show an anti-competitive effect, without the need for any element of anti-competitive purpose.

The competition regulator's (ACCC's) narrow definition of markets for Australian trade-exposed manufacturers and the implications for competition policy and its enforcement:

Australian manufacturers compete in global markets against fierce competition with negligible protection. Australian manufacturing is trade-exposed in both export markets and the domestic market.

For the Australian steel industry, competition is robust both from foreign steel manufacturers that export to Australia and producers of substitute materials. BlueScope manufactures approximately 2.8 million tonnes of steel products in Australia per year, of which about 700,000 tonnes is exported and the balance of 2.1 million tonnes sold in the domestic market. BlueScope also competes vigorously with imported steel, with approximately 440,000 tonnes of flat steel products imported to Australia in calendar 2015 in BlueScope's range (supplying 21 per cent of the markets in question), from sources including Taiwan, South Korea, Japan, China, Vietnam, Malaysia, India and the USA.

We are concerned that the reality of strong current and potential import competition is not fully appreciated by the ACCC. It has a tendency to take a narrow view of markets, disregarding actual import competition and thus overstating the market power of local trade-exposed manufacturers.

By way of illustration, BlueScope's experience in recent merger & acquisition clearances by the ACCC is that the competition regulator has a propensity to define our markets in a very narrow and sometimes immaterial manner. In particular, it has sought to define the relevant markets as being only the sale of steel feedstock to third-party rollformers and distributors, without taking into account either the end-user market for these products or the competition from imports and substitutes in this end-user market.

We understand that this narrow definition of markets by the ACCC is not peculiar to matters involving the steel industry and affects other trade-exposed sectors in manufacturing.

In practice, this narrow market view by the ACCC, which has wide discretion in defining markets and thus market power: a) discourages competition and innovation in the Australian market; and b) increases regulatory risk and costs for trade-exposed manufacturers.

We are concerned that the proposed amendment to section 46 will compound this regulatory risk and increase costs for Australian manufacturers by removing the "taking advantage" element and introducing an effects test as an alternative to the purpose test.

The definition of markets and the assessment of the state of competition in these markets, are essential elements in assessing whether a company's behaviour has had the purpose or effect of substantially lessening competition. The more narrowly markets are defined, the more likely it is that a firm will be considered to have market power, and the more significant the impact of its conduct may appear to be.

By defining markets in this very narrow way, it is inevitable that the ACCC would conclude that large domestic manufacturers with strong brands have market power, and would mistakenly restrain those firms' pricing, marketing and product innovation practices in order to protect small and medium processors and distributors. In the steel sector, many of these small and medium processes and distributors are, in effect, importer 'shopfronts' for large, overseas multinational steel manufacturers.

BlueScope's concerns about the proposed amendments to section 46:

We are concerned that an amended section 46 will give the ACCC added powers to intervene in legitimate commercial conduct in markets and constrain ordinary commercial decisions about pricing, discounting, selective distribution and product innovation.

The "take advantage" test was one which business people could apply: was the conduct of a kind in which a firm facing effective competition could rationally engage? For example, if the conduct was a decision not to supply a potential distributor, the business person responsible for the decision could make a practical assessment of whether that refusal to supply would make business sense if the firm had a number of effective competitors. This was a low-cost and reliable screening device. The removal of this element of the prohibition means that, if a company has substantial market power in one aspect of its business, all its conduct in all aspects of its business are subject to the substantial lessening of competition test.

The effect or likely effect on competition of ordinary business decisions cannot be properly measured by manufacturers but will require detailed analysis by competition lawyers and economists which will introduce unnecessary regulatory costs and risks, and dampen competition and innovation.

We are also concerned that a broader section 46 test could lead to claims by importers, backed by foreign manufacturers, that are designed to be disruptive to domestic manufacturers rather than claims of substance.

The exposure draft legislation for the *Competition and Consumer Amendment (Competition Policy review) Bill 2016* had included imports and potential imports in the definition of "competition", which we support.

However, we do not think this addition is sufficiently prescriptive to fully avoid the negative consequences of an amended section 46 outlined above. Specifically, the wide discretion given to the ACCC to define markets, and therefore market power, under the proposed amendments and the ACCC's history of defining

markets narrowly, means that we are very concerned about the added regulatory risk and negative effect of the amendments to section 46 on competition and innovation.

BlueScope's proposed amendments to the Bill currently before the Senate:

We understand that the Government may now deal with these important definitional matters in another amending Bill, which adds considerable uncertainty and concern about the proposed new laws and the scope for unintended damage to trade-exposed manufacturers.

We believe that more specific amendments to the Bill currently being considered by the Committee (*Competition and Consumer Amendment (Misuse of Market Power) Bill 2016*) are necessary in order to ensure the revised competition law does not restrict the ordinary business activities of domestic manufacturers in certain defined circumstances, such as when there is effective import and inter-material competition.

We had proposed two alternative ways in which we believe the legislation could be amended to address our concerns.

Firstly, our preferred approach is to add a new sub-section to section 46, to make clear that conduct will not be taken to have the purpose, or to have the effect or be likely to have the effect, of substantially lessening competition in any market where:

- (a) The conduct relates to products manufactured in Australia;
- (b) The body corporate, those products, or products manufactured from those products, face significant actual or potential competition from imports or substitutes in the market for the supply of those products, or products manufactured from those products, to end-users; and
- (c) The conduct does not eliminate actual or potential competition from imports or substitutes in that end-user market.

This first approach would provide explicit relief for domestic Australian manufacturers from section 46 in cases where there is significant or potential competition from imports or substitutes in the end-user market. It would provide Australian trade-exposed manufacturers with the confidence that competition from imports and substitutes in the end user market will not be ignored when the regulator or the courts define our markets and assess the state of competition in these markets.

An alternative approach, though not as effective in our view, would be to supplement the factors that contribute to a finding of substantial market power - by making amendments that include competitors outside Australia, who constrain competition in a market in Australia, and including a new reference to the constraining influence of competition for the supply of goods or services to end-users:

(4)(a)(i) competitors, or potential competitors, of the body corporate or of any of those bodies corporate in that or any related market, *including actual or potential competitors outside Australia that constrain competition in a market in Australia...*

(6) *For the purposes of this section, a body corporate will not be taken to have a substantial degree of market power in any market if the body corporate, or the goods and services produced or provided by the body corporate in that market, are constrained by actual or potential competition in the market for the supply of goods or services to end users.*

(suggested amendments marked in *italics*)

This approach would include specific reference to the constraining influence of competition from imports in section 46 itself, rather than simply referring to imports in the definition of "competition" in the second Bill we understand the Government is intending to introduce. It would also provide an explicit, legislated direction,

that firms will not be considered to have a substantial degree of market power if they are constrained by competition in the market for the supply of goods to end users.

While the second approach would not provide the same level of certainty for us as the first, it would still be a material improvement on the current Bill.

Overseas jurisdictions:

Some proponents of the proposed amendments to s.46 have put the view that the changes bring Australian law more closely into line with comparable overseas jurisdictions. However, overseas jurisdictions such as the European Union provide a defence even for exclusionary conduct that provides efficiencies so that no net harm to consumers will arise – unless the conduct eliminates all competition. This and other consumer welfare-focused tests are the model for BlueScope's proposed amendments.

In our view, both amendments we have proposed would make clear the principle identified by the Harper review, the ACCC and the Australian courts that the ultimate goal of competition law is to promote the welfare and interests of consumers rather than competitors.

Conclusion:

Thank you for the opportunity to make a submission.

We would be happy to answer questions or provide further information in support of our submission. In the first instance, the Committee secretariat should contact David Jenkins, Manager Government Relations, on
or

Yours sincerely

Gerry Tidd
EXECUTIVE VICE PRESIDENT CORPORATE AFFAIRS

