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Article Information

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Service: Competition & Consumer

Bundling Pfizer with Baxter – does the ACCC's loss to Pfizer cast doubt on their win over Baxter?

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Earlier this year, the Full Court of the Federal Court handed down its decision on the ACCC's appeal in the Pfizer case. In dismissing the appeal, with the result that the ACCC has lost yet another case alleging misuse of market power, the Full Court may well have cast doubt on the earlier majority decision in Baxter, a 'bundling' case in which the ACCC succeeded.

The ACCC has since applied for special leave to appeal to the High Court.

The Full Court of the Federal Court of Australia delivered judgment on 25 May 2018 in *ACCC v Pfizer* [2018] FCAFC 78. It is not necessary for present purposes to consider the facts of the case in detail. It is of interest primarily for the implicit recognition the decision gives to the problem of separating self-interested competitive conduct (which necessarily harms rivals) from conduct which harms competition and consumers.

Pfizer is an 'originator' of patented medications. In the few months before expiration of a patent on one of Pfizer's 'blockbuster' drugs in mid 2012, it sought to launch its own generic version of the product and to bundle it with supply of the patented product to gain a market presence ahead of anticipated entry by generics manufacturers. It was anticipated that generics manufacturers would flood into the market seeking, in the initial period after patent expiration, considerable benefits under the subsidy provided by the government under the Pharmaceutical Benefits Scheme.

The Full Court reversed the trial judge on the question of market power, holding that Pfizer still had market power and took advantage of that power when it established the bundled offer shortly before the patent expired. Nevertheless, the Full Court held that Pfizer's substantial subjective purpose was neither an exclusionary purpose nor an anticompetitive purpose. Thus the ACCC's claim against Pfizer under both ss 46 (misuse of market power) and 47 (exclusive dealing) failed and the Full Court dismissed the ACCC's appeal.

As the 'substantial lessening of competition' (SLC) test applies under s 47 the case may offer some insights into how the SLC test might apply to misuse of market power under the new s 46 as it has now been amended following the *Harper Review* recommendations. That is, s 46 now prohibits conduct of a firm having substantial market power that has or would be likely to have the purpose or effect of SLC. It is possibly for this reason that the ACCC has announced it will seek leave to appeal the decision to the High Court to clarify the 'purpose test'. Since the *Pfizer* case was run on the basis of 'purpose without effect' it would seem to have little to offer us regarding the new 'effects test' that has been introduced into s 46.

Importantly, the Full Court recognises, in circumstances of intense competition (which is conventionally understood to refer to rivalry for the *same object*), that a dominant firm may permissibly use its market power to protect its own sales (which at the same time takes sales away from rivals), without it necessarily following that the firm has a substantial subjective purpose of excluding competitors or SLC. A key element in the court's reasoning is that upon expiry of Pfizer's patent and the entry of generics manufacturers, Pfizer had to decide whether to exit the market for the particular product or to alter its traditional business model as an 'originator' of patented medicines to become a generics manufacturer itself.

The court's decision in *Pfizer* appears to have turned on the facts of the case, as the Full Court considered in meticulous detail the findings of the trial judge concerning the 'substantial subjective purpose' of Pfizer, based on evidence of its executives in the case. It is notable that in the 2008 celebrated case of *Baxter*, the trial judge rejected evidence of Baxter's executives that their substantial subjective purpose was to protect the company's sales. In that case, Baxter argued that by offering a bundled price for various products (sterile fluids for clinical use) lower than they could be individually

purchased, Baxter maximised the volume through its manufacturing facility. However, in that case a differently constituted bench of the Full Court of the Federal Court held, by majority, that Baxter's substantial subjective purpose was to exclude rival manufacturers from the market.

The *Pfizer* decision may nevertheless invite us to reconsider the application of relevant principles by the majority of the court in *Baxter*. This is because the Full Court in *Pfizer* takes the slightly unusual course of approving the principles enunciated by Dowsett, J in his *dissenting* judgment in *Baxter*. Relevantly for our purposes, the Full Court in *Pfizer* endorses the proposition set out by Dowsett, J that one competitor always injures another by attracting away sales and that 'the effect of conduct upon competition is not to be equated with its effect upon competitors, however the latter effect may be relevant to the former'.

I suggest that this proposition (particularly the first part) reflects the true nature of competition and that the *Pfizer* case more clearly presents us with a case of competition which threatens survival of a once-dominant firm. It may well be that the ACCC takes an idealised and less realistic view of the nature of competition, since it argued that Pfizer's true purpose was to harm competition. We will see if the High Court grants leave to appeal, in which case the High Court might take the opportunity to clarify the nature of competition that the law endorses.