Chapter 2

Key issues

2.1 This chapter examines the evidence received by the committee regarding divestiture orders generally and the specific proposal contained in the bill. The committee's findings can be found at the end of this chapter.

Rationale for a general divestiture power

2.2 According to the explanatory memorandum, the provisions in the bill are a response to market concentration in many retail markets, including those for groceries, fuel, liquor and hardware.[1] Although the committee did not examine the dynamics of these particular markets or assess claims about the state of competition within them,[2] it is clear that there are several markets in Australia with a small number of large firms. Treasury's submission acknowledged that comparisons of Australian markets and those in other countries indicate some Australian markets are more concentrated than in some other advanced economies.[3] The Australian National Retailers' Association (ANRA) suggested that there are many markets in Australia with a small number of firms operating at scale, and that this may be a consequence of Australia's small population dispersed across a large geographic area.[4] In any case, Treasury submitted that 'highly concentrated markets are not always detrimental to consumer welfare':

> This is particularly the case to the extent that they reflect the ability of larger firms to deliver services at lower overall cost, for example due to economies of scale associated with sophisticated logistics networks, and these savings are passed through to consumers. A range of other factors affecting market concentration include consumer preferences for variety, technologies relevant to the market, and planning and zoning regulations. Changes in technology over time, for example facilitating the uptake of

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1 Explanatory Memorandum, p. 2.

2 Although the committee has not examined these markets, the explanatory memorandum and submissions to this inquiry commented on them. The explanatory memorandum stated: 'there are significant concerns that the lack of competition in these markets is leading to higher prices for consumers and putting producers under increasing financial strain'. ANRA strongly objected to this claim. It stated that the supermarket sector is 'one of the most studied sectors when it comes to competition policy and no substantive evidence has been provided to support the claims that there is a lack of competition in Australia or that there is market failure in the grocery supply-chain'. ANRA argued that intense competition has imposed downward pressure on food prices between 2009 and 2013. Further, ANRA argued that the expansion of the international chains Costco and ALDI 'points to an increasingly competitive market'. ANRA, *Submission 2*, p. 2. The committee makes no judgment on these competing claims.

3 Treasury, *Submission 4*, p. 7.

4 Australian National Retailers' Association, *Submission 2*, p. 1.

> internet shopping, have in some sectors helped small retailers overcome diseconomies associated with their size and compete more effectively with larger incumbents.[5]

2.3 Treasury also noted that whether a market is highly concentrated is neither the only, nor necessarily the most useful, indicator of the state of competition in that market:

> When assessing the level of competition in a market, other factors besides market concentration are important, including the presence of barriers to entry or expansion, competition from imports, the level of countervailing power held by buyers, the nature of key competitors, and the availability of substitute products or services. The Productivity Commission noted in its 2011 review of Australia's retail industry that market concentration by itself provides little guidance on the extent of competition in the market, and barriers to entry and the extent of market contestability, it noted, are more important.[6]

2.4 Treasury's submission provided an overview of the arguments made to previous public inquiries in support of a divestiture power. According to Treasury, these include that such a power may provide:

- a structural remedy to conduct perceived to flow from the structure of a market, rather than attempting only to remedy the problematic conduct;
- a deterrent to firms from contravening section 46 that is potentially stronger than other remedies currently available; and
- a negotiation tool in the hands of regulators seeking non-judicial dispute resolution.[7]

2.5 The Competition and Consumer Committee of the Law Council of Australia's Business Law Section acknowledged the argument that a 'well-targeted divestiture order could eliminate market power with "one cut"…thus, so it would be said, reducing the regulatory task for the future'. However, it argued that the idea of a divestiture power, and the specific power proposed in the bill, create significant uncertainty and risks.[8]

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5 Treasury, *Submission 4*, p. 6.

6 Treasury, *Submission 4*, p. 6.

7 Treasury, *Submission 4*, p. 9.

8 Competition and Consumer Committee of the Business Law Section of the Law Council of Australia, *Submission 3*, p. 3.

2.6 The Australian Competition and Consumer Commission (ACCC), the independent statutory authority charged with administering the *Competition and Consumer Act 2010* (CCA), advised the committee that in its opinion the introduction of divestiture as a remedy for the misuse of market power would be 'unnecessary at this point of time' as the other remedies already available were adequate.[9] Mr Bruce Cooper, ACCC, informed the committee that the commission recognises that section 46 has deficiencies but they 'go to the law rather than the remedy'. He explained:

> I see the divestiture as a remedy. Once a court has found that a corporation has breached section 46, if a divestiture power were in place, that would be a remedy for that; whereas the ACCC, in its submission to Harper, identified a number of shortcomings in the law which make bringing the section 46 case more difficult in the first place. So it is focused on the law.[10]

2.7 Mr Ben Dolman, Treasury, suggested that a divestiture power 'could be seen as a stronger remedy than those currently available' and acknowledged that one of the arguments in favour of such a power was that 'it would provide a negotiating tool for the regulator'. He stated further, however:

> On the other hand, it is a very different remedy from the other remedies available. When we look at misuse of market power, the current remedies are around changing behaviour and changing the way that the company uses that power, whereas a divestiture power would seek to resolve the issue by changing the market power of the company. So it is a structural remedy designed to influence the structure of the industry rather than to change how that market power is used. That is very different to the way market power has been treated previously in Australia.[11]

2.8 The existence of divestiture powers in other jurisdictions including Canada, the European Union, the United Kingdom and the United States has itself led to calls for similar powers to be introduced in Australia.[12] However, others contend that these powers are not frequently utilised—the Law Council advised that the Canadian and European Union powers have never been used, and the United States power 'has been used only sparingly', with no order other than by consent made since the 1960s.[13]

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9 Mr Bruce Cooper, General Manager, Strategy, Intelligence, International and Advocacy Branch, ACCC, *Proof Committee Hansard*, 2 October 2014, p. 13.

10 *Proof Committee Hansard*, 2 October 2014, pp. 13 and 15.

11 *Proof Committee Hansard*, 2 October 2014, p. 14.

12 For example, this was the case during the inquiry into the dairy industry conducted by this committee in 2011. See Senate Economics References Committee, *The impacts of supermarket price decisions on the dairy industry: Final Report*, November 2011, pp. 107–109.

13 Law Council of Australia, *Submission 3*, p. 4.

2.9 From the evidence received during this inquiry, the committee has identified three categories of key issues relevant when considering a divestiture power for the misuse of market power. The following sections examine these categories in turn.

Key issue 1: How to divest the assets of an established company

2.10 Submissions referred to the difficulties or risks associated with the divestiture of a company's assets. For example, the Law Council argued that divestiture orders involve a serious risk that several less efficient businesses will be created and/or 'involve divesting a part of a business which cannot then be a competitive operation itself'.[14] The following paragraphs consider the uncertainty and risks that submitters argued may accompany the introduction of a divestiture power.

Identifying the assets to be divested

2.11 Proposed subsection 80AD(2) would allow the court to give directions for the 'purposes of securing, within two years of the order being made, a reduction in the corporation's power in, or share of, the market'.[15] Some submissions questioned how the court would make this order. Ms Caroline Coops, Chair of the Law Council of Australia's Competition and Consumer Committee, argued that the proposed subsection would 'have unpredictable consequences potentially creating less efficient businesses and increasing consumer cost'. Ms Coops provided the following reasoning:

> …in reality, business assets are rarely capable of easy dissection. For example, whilst individual grocery stores are easy to identify they need to access wholesale supply and are often reliant on internal distribution centres or external third-party distributors in order to operate efficiently. A major internal distribution centre for a large grocery operation cannot practically be cut in half to keep servicing stores that may be divested; and third-party wholesalers, who are not themselves in breach of the act or a party to the proceedings, cannot be forced to supply them. Brand loyalty, for example, could account for a large market share, but a dominant brand or trademark cannot effectively be shared by two businesses operating in the same market.[16]

2.12 The difficulty in identifying assets that could be divested has also been identified by other inquiries. For example, the 2003 report of the Trade Practices Act Review Committee (the Dawson Report), considered whether a divestiture power should be introduced as a remedy for the misuse of market power. It noted that:

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14 Law Council of Australia, *Submission 3*, p. 3.

15 Schedule 1, item 1, proposed subsection 80AD(2). However, the background discussion in the explanatory memorandum refers only to the reduction of market share. See Explanatory Memorandum, p. 1.

16 Ms Caroline Coops, Chair, Competition and Consumer Committee, Law Council of Australia, *Proof Committee Hansard*, 2 October 2014, p. 1.

> …given that ownership of assets is a passive state, it is difficult to know what the divestiture would be aimed at, whether it be the substantial lessening of competition or the degree of concentration in the market.[17]

2.13 As noted in Chapter 1, a divestiture power is available in the CCA as a remedy for acquisitions that would result in a substantial lessening of competition.[18] The Dawson Report observed that divestiture may be appropriate in this context because any contravention of the CCA would have occurred as a result of recent conduct that consists of the acquisition of identifiable shares or assets.[19] However, the report concluded that extending the remedy of divestiture in Australia to other forms of anti-competitive conduct, such as the misuse of market power, would be 'inappropriate…because there is no clear nexus between the assets to be divested and the contravening conduct'.[20] Treasury and the ACCC advised that this power is rarely used, with the most recent case dating from 1988.[21]

2.14 Courts in the United States have grappled with divestiture and the instances where its application may be appropriate. In *United States of America v Microsoft*, the United States Court of Appeal noted 'divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain'.[22] This case considered whether divestiture is an appropriate remedy for a unitary corporation. As the following extract of the court's judgment shows, however, divestiture orders in the United States have generally been a response to acquisitions:

> By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture 'has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control,' du Pont, 366 U.S.

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17 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, pp. 162–63.

18 Mergers that contravene section 50 or 50A of the CCA or occurred under clearance or authorisation that was granted on false or misleading information. See *Competition and Consumer Act 2010*, ss. 81 and 81A.

19 Similarly, in its submission to this inquiry, Treasury noted that divestiture can be a 'natural solution' to a merger that resulted in a substantial lessening of competition, as 'the pre-merger structural state of the market is a state the court can return to via use of the remedy, though it is not always possible to "unscramble" a transaction post-acquisition'. Even so, Treasury noted in that context the power has been rarely used. Treasury, *Submission 4*, p. 8.

20 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, p. 162.

21 *Trade Practices Commission v Australia Meat Holdings Pty Ltd* (1988) 83 ALR 299; cited in Treasury, *Submission 4*, p. 8. See also Mr Bruce Cooper, General Manager, Strategy, Intelligence, International and Advocacy Branch, ACCC, *Proof Committee Hansard*, 2 October 2014, p. 12.

22 *United States of America v Microsoft Corporation*, United States Court of Appeals, No. 00-5212, 28 June 2001, www.justice.gov/atr/cases/f257900/257941.htm (accessed 22 August 2014).

> at 329…and that '[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws,' Ford Motor Co., 405 U.S. at 573…
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> One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the court explained in United States v. ALCOA, 91 F. Supp. 333, 416 (S.D.N.Y. 1950), a 'corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency.' A corporation that has expanded by acquiring its competitors often has pre-existing internal lines of division along which it may more easily be split than a corporation that has expanded from natural growth. Although time and corporate modifications and developments may eventually fade those lines, at least the identifiable entities pre-existed to create a template for such division as the court might later decree. With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in United Shoe:
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> *'United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one [labour] force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts'*.[23]

2.15 During the committee's public hearing, another United States case was cited—the 1910 Standard Oil judgement that resulted in the divestiture of the oil companies within Standard Oil. Although the prosecution occurred 'under a section 46 equivalent', Mr William Reid, a member of the Law Council's Competition Committee, explained that the case is more applicable when considering anti-competitive mergers and acquisitions rather than the conduct of a unitary corporation:

> [A]s I understand the history of it, Standard Oil was an aggregation of many small oil companies and the court was really looking to disaggregate that which had been aggregated rather than to dissect an existing business which had grown organically.[24]

2.16 Similarly, the Law Council argued it would be difficult for the court to make a divestiture order in any of the section 46 cases the ACCC has previously taken.[25]

Outcomes following the divestiture process

2.17 One of the risks associated with a divestiture process is that divestiture necessarily involves some form of 'industry engineering'. The Law Council argued

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23 *United States of America v Microsoft Corporation*, United States Court of Appeals, No. 00-5212, 28 June 2001.

24 Mr William Reid, Member, Competition and Consumer Committee, Law Council of Australia, *Proof Committee Hansard*, 2 October 2014, p. 5.

25 Law Council of Australia, *Submission 3*, p. 4. These cases involved a steel manufacturer, a power distribution business, a street directory publisher and a rural newspaper publisher.

that this process would result in 'wider competitive impacts across the relevant market(s)'. In particular, the consequences of a divestiture power being applied to a market with more than one large firm were alluded to—the Law Council noted that other firms may potentially acquire substantial market power as a result of forced divestiture.[26] Indeed, the committee has previously heard that in the United States the divestiture power is a remedy for monopolisation.[27]

2.18 The previous section discussed some of the potential complications associated with the forced divestiture of a company's assets to meet a certain market power or market share threshold. However, the Law Council added that the drafting used in the bill 'introduces further uncertainty and complexity' to the general concept of what divestiture involves as the process envisaged by the bill is not clear. Proposed subsection 80AD(2) states that the court's directions must be 'for the purpose of securing' a reduction in market power or share', which the Law Council argued only indirectly provides for the divestiture of assets'. The Law Council wrote:

> How is one to tell whether a particular directed course of conduct for the corporation will have—let alone, assuredly achieve—the 'purpose of securing' the required reduction in (market) power or share?[28]

2.19 The Law Council speculated that the courts would approach this requirement by either:

- endeavouring to identify assets (physical, real or intangible) to be divested by the business, for the purpose of achieving a reduction in market power or share; or
- ordering that the corporation reduce its market share to a particular level.[29]

2.20 The first option presents the issues discussed in paragraphs 2.11–2.13. However, if the court followed the second option and left the divestiture to the corporation,[30] the Law Council questioned what the consequences of that would be:

> If [the corporation] is simply to withdraw from a market or to reduce its output, this is likely (by definition, given that the corporation has substantial market power) to result in, or to sustain, an increase in prices and/or reduced availability of the relevant product(s). These are not the usual objectives of effective competition regulation. If the corporation is to invite its competitors to win business it would otherwise pursue, the

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26 Law Council of Australia, *Submission 3*, p. 3.

27 Mr Brian Cassidy, Chief Executive Officer, ACCC, *Senate Economics References Committee Hansard*, Inquiry into competition in the Australian banking sector, 25 January 2011, p. 56.

28 Law Council of Australia, *Submission 3*, p. 5.

29 Law Council of Australia, *Submission 3*, p. 5.

30 Proposed subsection 80AD(5) would allow the court to accept an undertaking by the corporation to take particular action to reduce its market power or share as an alternative to a court order.

> corporation will contravene the cartel prohibitions. Ultimately also, reduced market share is a relative concept—to achieve it, the corporation's competitors, practically, must respond with increased output if demand remains constant.[31]

2.21 The Australian National Retailers' Association (ANRA) argued that a divestiture provision could not guarantee the business being divested would be purchased. It remarked that 'divestiture forces sales; it cannot compel purchases'.[32]

Implications for the courts and ACCC

2.22 Submissions questioned the role that the courts and the ACCC would be expected to perform under the proposed amendments. ANRA expressed two key concerns. First, ANRA emphasised that the courts and the ACCC 'have no experience in how to split up companies'. Second, ANRA argued that a range of factors in addition to competition need to be considered:

> Divestiture can result in significant economic harm through the loss of economies of scale and scope, which in turn could flow through to consumers in the form of higher prices. It can impose significant losses on investors, and jeopardise jobs and wage levels. There is a real risk that the outcomes of forced divestiture would be at the worst end of the scale for shareholders, employees, customers and communities.[33]

2.23 Ms Caroline Coops, Law Council of Australia, maintained that 'the way markets operate and the assets that businesses need to operate effectively can be complicated. Further:

> …it is difficult to predict in any given circumstance whether an order to divest an asset or a store will in fact give rise to a more pro-competitive environment than existed previously. We see it as quite difficult for a court to craft orders that have that effect or to supervise the ongoing outcomes of those orders so as to achieve the objective of the bill.[34]

2.24 Elaborating on this matter of supervision, the Law Council claimed that a divestiture order would involve the imposition of 'ongoing, supervising behavioural orders on the firm(s) involved' such as orders in relation to how the newly formed businesses may deal with one another and/or their former parent corporation.[35] Mr Joe Silver, a co-chair of the Law Institute of Victoria's Young Lawyers' Law Reform Committee, advised that his organisation is concerned the amendment proposed by the bill (i.e. the insertion of a subsection 80AD) 'invites the courts to take

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31 Law Council of Australia, *Submission 3*, pp. 5–6.

32 Australian National Retailers' Association, *Submission 2*, p. 3.

33 Australian National Retailers' Association, *Submission 2*, p. 4.

34 *Proof Committee Hansard*, 2 October 2014, p. 3.

35 Law Council of Australia, *Submission 3*, p. 4.

an overly interventionist role both in the marketplace, and more problematically in the management of certain corporations'. Mr Silver continued:

> In all likelihood, the courts will have similar concerns regarding section 80AD, as despite concerning competition (rather than management), it too anticipates becoming involved in the day-to-day management of businesses, and not insubstantial ones at that, particularly because it would involve the effective creation of new businesses. While perhaps not as involved as 'unbaking' a cake (separating it back into its ingredients), it is not simply about reversing how the corporation actually built its market share. It is about reshaping the market. That will occur regardless of what resources the ACCC can make available. For a divestment to be equitable and viable, comprehensive modelling is needed for any new entities proposed, as well as an understanding of how the existing market structure, and how the realignment, would impact upon it. Analysis of how it would affect the complying entity, as well as other stakeholders in the supply chain, would also be needed.[36]

2.25 In addition to the challenges that the court would likely face in developing feasible divestiture orders, there are also possible implications for the court process. Treasury noted that the report of the 1993 inquiry into competition policy (Hilmer Report) concluded divestiture would affect the court process by involving the courts 'in a process with inevitable political implications' that was 'more appropriate for decision by governments than by the courts'.[37] At the committee's public hearing, a representative of the Law Council's Competition Committee similarly argued that, in his personal view, although he was not against divestiture in principle, such a decision should be made by the Parliament rather than by the judiciary.[38]

2.26 If the bill were passed, the ability of the court to consider in a timely manner both the questions before it regarding section 46 and then, in the event of a contravention being found, any divestiture proposals that may follow was also queried. Treasury noted that the Hilmer Report believed a divestiture process 'may be administratively expensive and lack timeliness, particularly as companies accused of misuse of market power may be expected to defend allegations and appeal decisions vigorously'.[39] It is evident that section 46 cases are already likely to be considered over a prolonged period of time—a witness from the ACCC advised that litigation generally takes 'several years' to reach the judgment stage. As a specific example, the witness noted that in the ACCC's current section 46 litigation against

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36 Mr Joel Silver, *Submission 1*, pp. 4–5

37 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy*, 1993, p. 164; cited in Treasury, *Submission 4*, p. 9.

38 Mr William Reid, *Proof Committee Hansard*, 2 October 2014, p. 5.

39 Treasury, *Submission 4*, p. 9.

Cement Australia,[40] the conduct occurred in 2003 with the final court hearing expected in December 2014.[41] Similarly, Mr Silver of the Law Institute of Victoria's Young Lawyers' Law Reform Committee noted that although the proposal is 'no doubt intended as an extraordinary measure', if enacted and pursued it 'would represent a drain on limited court resources'.[42] The United States experience appears to support this reasoning; the Law Council provided the following example indicating that even in instances where a divestiture order was made by consent the process was not straightforward:

> In the 1980s, AT&T was broken up into the 'Baby Bells' by consent decree, to end long-running litigation with the US government. However, then followed years of litigation (over 900 petitions) in relation to the 'line of business' restrictions in the consent decree.[43]

Other potential adverse economic consequences

2.27 The Dawson Report suggested that making a corporation with market power susceptible to forced divestiture would 'create an uncertain business environment'.[44] Treasury also cited relevant findings of the Hilmer Report that highlighted potential broader economic consequences. They included that divestiture may 'involve reshaping an entire industry with consequent disruption to all who deal with it' and eliminate economies of scale, with the smaller firms constructed by the courts 'less efficient and perhaps not even economically viable, detracting from economy-wide productivity'.[45]

2.28 ANRA argued that 'artificial and arbitrary limits' on market share in the grocery sector would 'most likely mean ownership would be taken up by new entrants from overseas, with profits going offshore'.[46] ANRA suggested, however, that this reasoning may not apply to regional areas, and that these areas could be disadvantaged if a divestiture order was made in relation to the grocery sector. Depending on the nature of the divestiture order, ANRA argued that 'smaller regional stores would probably be sold first, and would be more unlikely to be purchased by any new entrants'. According to ANRA, this is because the operation of regional stores involves higher transport costs and lower turnover, and does not appear to otherwise

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40 *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2014] FCA 148.

41 Mr Bruce Cooper, General Manager, Strategy, Intelligence, International and Advocacy Branch, ACCC, *Proof Committee Hansard*, 2 October 2014, p. 12.

42 Mr Joel Silver, *Submission 1*, p. 4.

43 Law Council of Australia, *Submission 3*, p. 4.

44 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, pp. 162–63.

45 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy*, 1993, p. 164; cited in Treasury, *Submission 4*, p. 9.

46 Australian National Retailers' Association, *Submission 2*, p. 3.

fit into the strategies of the two large international operators Aldi and Costco, which are focused on large population centres.[47]

Key issue 2: Would a divestiture power be a justified and proportionate response to a contravention?

2.29 It is clear that divestiture would be a serious penalty. Treasury stated that if a divestiture power was introduced into the current CCA 'it would likely be perceived as sitting at the high end of this framework of remedies, being a more severe penalty than most pecuniary penalties, compensation orders or injunctions'.[48]

2.30 It is useful to consider whether the current penalties are inadequate. The current penalties were outlined in Chapter 1 (see paragraphs 1.18–1.19). ANRA noted that these penalties were significant, and suggested there 'is no demonstrated evidence that Australian courts have had insufficient remedies available to address misuse of market power'. Further, ANRA argued that a divestiture power 'would not be consistent with the concept of a proportional penalty being imposed for breaches of competition law'.[49]

2.31 Another suggestion was that a divestiture power could be considered arbitrary. Treasury noted that this is one of the arguments commonly made against a divestiture power as the effects of a divestiture order are 'unrelated to the nature of the contravention'.[50] The Law Council argued that 'in the absence of a clear and direct nexus between the contravention and the assets to be divested', there would be a risk the divestiture would not appropriately address the conduct which led to the contravention.[51] ANRA also noted that the bill does not detail or limit the extent of divestiture that the court could order.[52]

2.32 The potential repercussions for individuals not directly involved in the contravention were noted. ANRA argued that divestiture 'unambiguously destroys shareholder wealth' and could affect 'millions of Australians [who], through superannuation funds, have investments in prominent and successful Australian-owned companies'. ANRA also suggested that divestiture would have implications for employees. It cited the the grocery sector, maintaining that disruption to employment 'would be significant and severe if major supermarkets were forced to close stores to reduce their market share'. ANRA argued this was possible because:

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47 Australian National Retailers' Association, *Submission 2*, p. 3.

48 Treasury, *Submission 4*, p. 8.

49 Australian National Retailers' Association, *Submission 2*, pp. 2–3.

50 Treasury, *Submission 4*, p. 9.

51 Law Council of Australia, *Submission 3*, p. 4.

52 Australian National Retailers' Association, *Submission 2*, p. 3.

> There is no guarantee the business model of any new entrants to the sector would replicate the jobs currently provided by the major supermarkets, or that existing retail outlets would necessarily be bought up.[53]

Key issue 3: Are the proposed amendments the best remedy to perceived market issues?

2.33 In his second reading speech, Senator Xenophon drew attention to the fact that that the grocery retail sector was one of the sectors noted in the explanatory memorandum. Submissions also referred to the grocery retail sector. For example, SPAR Australia, a grocery wholesaler supplying independent retailers, contended that the grocery market is not operating effectively. SPAR argued that small businesses are one of the biggest employers and wealth creators in Australia, yet 'in the retail sector they are becoming increasingly extinct, with anti-competitive, market abuse behaviour a key driver of their extinction'.[54] SPAR concluded:

> Coles and Woolworths continue to dominate the retail sector and Metcash continues to dominate the wholesale independent sector, with the ultimate loser being the Australian consumer with small independent family owned business being collateral damage along the way.[55]

2.34 ANRA expressed an opposing view. It rejected concerns about the current state of the grocery sector and suggested recent inquiries that have considered the sector have found competition 'is vibrant and vigorous'.[56]

2.35 A potential benefit of a divestiture power for the misuse of market power is that corporations with substantial market power (or share) may be deterred from engaging in misconduct due to the risk of the serious penalty of mandatory divestiture being imposed. Nevertheless, those who consider that the competition law has not prevented abuses of market power from occurring, were unconvinced that the proposed amendments contained in the bill would assist. This is because the proposed amendments only address the penalties available for a contravention of section 46; any difficulties associated with the investigation and successful pursuit of a section 46 case remain.

2.36 Indeed, the one submission the committee received in support of the bill, from SPAR Australia, observed that while it considers providing the courts with an additional remedy would be 'a good thing', the amendments 'would appear to be

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53 Australian National Retailers' Association, *Submission 2*, p. 3.

54 SPAR Australia, *Submission 5*, p. [4].

55 SPAR Australia, *Submission 5*, p. [2].

56 Australian National Retailers' Association, *Submission 2*, p. 1.

potentially meaningless given the enforcement actions taken by the ACCC under section 46 have been minimal'.[57] SPAR explained that between 1974 and 2012, the ACCC had only prosecuted 18 cases alleging a contravention of section 46 and was only successful in 11 of these cases. SPAR concluded:[58]

> …either the law is deficient in regards to section 46, or the ACCC is deficient in not seeking to litigate more cases under 46.[59]

2.37 Accordingly, SPAR encouraged the committee to consider 'the issue of the failure of section 46 to prevent ongoing market abuse practices in the Australian marketplace'.[60] Similarly, the chief executive officer of Master Grocers Australia and Liquor Retailers Australia, Mr Jos de Bruin, described section 46 as 'inadequate'. Mr de Bruin also argued that specific provisions targeting anti-competitive price discrimination should be reintroduced, in an amended form.[61]

2.38 The effectiveness of section 46 is a debate already occurring elsewhere as part of the current Harper Review. In its submission to the Harper Review's issues paper, the ACCC called for amendments to subsection 46(1) to ensure the prohibition 'is effective in prohibiting anti-competitive conduct by firms with substantial market power'. The ACCC endorsed the insertion of an 'effects' test to complement the 'purpose' test, as well as amendments to overcome limitations with the application of the 'take advantage' concept.[62]

The Harper Review's September 2014 draft report

2.39 The Harper Review's draft report was released on 22 September 2014. In this draft report, the review panel did not express support for a divestiture power for contraventions of section 46; rather it concluded that the existing range of remedies is sufficient. The following comments were made:

> While reducing the size of a firm may limit its ability to misuse its market power, divestiture is likely to have broader impacts on the general efficiency of the firm. Such changes could also have negative flow-on

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57 SPAR Australia, *Submission 5*, p. [6].

58 SPAR Australia, *Submission 5*, p. [6]. Private enforcement of section 46 is available and has occurred in a number of cases.

59 SPAR Australia, *Submission 5*, p. [6].

60 SPAR Australia, *Submission 5*, p. [7].

61 Mr Jos de Bruin, Chief Executive Officer, Master Grocers Australia and Liquor Retailers Australia, *Proof Committee Hansard*, 2 October 2014, p. 9.

62 It is envisaged an effects test would capture conduct that had the effect or likely effect of substantially lessening competition, but could not be shown to have been for one of the three proscribed purposes. See ACCC, Submission to the Competition Policy Review, June 2014, http://competitionpolicyreview.gov.au/files/2014/06/ACCC.pdf (accessed 20 August 2014), pp. 76–80. See also *Proof Committee Hansard*, 2 October 2014, p. 13.

> effects to consumer welfare. It is also possible that divested parts of a business might be unviable.
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> The Panel considers that the existing range of remedies is sufficient to deter a firm from misusing its market power and to protect and compensate companies that have been harmed by such unlawful conduct.[63]

2.40 The Harper Review is, however, considering whether the current misuse of market power prohibitions are adequate. The review's draft report indicated support for the insertion of an effects test in section 46 subject to a defence that the action 'would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market' and 'the effect or likely effect of the conduct is to benefit the long-term interests of consumers'.[64]

2.41 The Harper Review panel's final report to the government is expected to be finalised by the end of March 2015.

Committee view

2.42 Australian consumers benefit when the competitive process in markets functions well and practices that harm competition are addressed. The committee understands that some parts of the community are concerned about the market power or share certain firms have in the markets in which they operate. The committee also understands that some consider the competition law is not effectively deterring or addressing misuses of market power. Indeed, the ACCC was of the view that there were deficiencies in section 46.[65]

2.43 Even so, the committee does not consider a convincing case has been made for the introduction of a divestiture power as a remedy for the misuse of market power. Evidence has not demonstrated that the potential advantages of such a power would outweigh the likely disadvantages. In particular, the evidence received by the committee was compelling in questioning the courts' ability to 'fix' perceived problems with a market by ordering that certain assets of a large, complex and unified business organisation be divested. The committee is concerned that court-ordered divestiture would risk significant disruption and economic damage, with unpredictable consequences for competition.

2.44 In the committee's view, the evidence available suggests that the debate about section 46 should be focused on whether the prohibitions contained in it are effective, not whether further penalties need to be available. The committee notes this is the approach that appears to have been taken by the current independent review of

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63 Competition Policy Review, *Draft Report*, http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf (accessed 22 September 2014), p. 211.

64 Competition Policy Review, *Draft Report*, http://competitionpolicyreview.gov.au/files/2014/09/Competition-policy-review-draft-report.pdf (accessed 22 September 2014), p. 44.

65 *Proof Committee Hansard*, 2 October 2014, pp. 13 and 15.

competition policy being chaired by Professor Ian Harper. The Harper Review provides an opportunity for a thorough and holistic examination of competition policy, and the committee awaits the Harper Review's final report with great interest.

Recommendation 1

2.45 The committee recommends that the Senate not pass the bill.

Senator Sean Edwards
Chair