Additional Comments by Nick Xenophon

Competition law at the crossroads: Let's get it right

1.1 I thank the committee and secretariat for the work carried out on this very important inquiry. I broadly support the recommendations of the committee but they simply do not go far enough to resolve current key failings of competition law, particularly in relation to abuses of market power in Australia.

1.2 Two key changes to Australian Competition Laws, which are a common feature of the competition laws of the United States of America and Europe, have not been canvassed in the committee's report, and must be. A third change relating to the effects test to be applied by the Courts must also be made.

Access to Justice

1.3 As it currently stands, small to medium businesses with clear cases of abuse of market power against them are prevented, in practice, from pursuing those claims due to the impact that an adverse legal costs order would have on the business in the event their case were to fail. This 'costs order elephant in the room' may well stray into the many millions, particularly when a small company is dragged through a lengthy court process by big business with deep pockets. This scares off all but the largest of businesses from pursuing otherwise meritorious claims.

1.4 Such a problem does not exist in the United States or Europe because cost orders are not made in those jurisdictions in competition matters. It is instructive that, in the home of capitalism, the US does not exclude small businesses from access to the protection of their Competition Laws. Their laws go much further to protect competition than Australian laws do now or as proposed in this bill.

1.5 The Harper Report acknowledges the problem of access to justice but offered no practical solutions to the problem.

1.6 A practical solution to the problem is for the law to permit small businesses with market power abuse claims to pay a sufficiently large application fee (to discourage spurious cases being brought against big businesses) and additionally seek a 'cost waiver order' from the Court. The Court would, as a first step, examine the prima facie merits of a case and either deny or grant a 'cost waiver order'.

1.7 If the Court denied the order the small company applicant could 1) withdraw, losing only their application fee and own costs, or 2) proceed with the 'cost order elephant' in the shadows.

1.8 If the Court granted the order, then no costs could be awarded against the smaller company except in circumstances where, in the view of the Court, a litigant frustrated the litigation. This would make a massive difference in access to justice in competition matters, and I note the ALP is introducing its own legislation to address these issues in the Senate, which is a most welcome development.

Recommendation 1

1.9 A 'cost waiver order' should be introduced into market power abuse litigation cases to improve access to justice.

Divestiture: The Sword of Damocles

1.10 As it currently stands, in rare situations where a market power abuse finding has been made by a Court, the Court can order the company be restrained and also impose a large fine against the company. This is problematic for two reasons:

(a) No amount of restraint or fine will back to life the hundreds of small businesses that have been wiped out by a large company's misuse of their market power. Once small businesses have failed the market dominance of the big business is entrenched forever. I have witnessed this happen across the Australian business landscape in the grocery, fuel, hardware and liquor sectors.

(b) The perpetrators of market abuse can be so large that the fine may well be considered by the offending company as simply a cost of business. A monetary fine does not constrain dominant companies from misusing their market power, because they know they will rarely be caught and, if they are, the short term penalty will not be more than the longer term benefit they have obtained.

1.11 This bill proposes positive changes to the way in which market abuse is proved but does nothing with respect to enhancing the remedies.

1.12 Australia's competition laws already have the ability to require a company to divest itself of any acquisition, whether it is a single property or a whole business, if it would substantially lessen competition, under section 50 of the Act.

1.13 I propose that section 46 should have divestiture as a remedy of last resort. Divestiture, like the sword of Damocles, would serve as the ultimate threat. It makes sense that a Court should have a remedy in its tool kit that makes it impossible for a serious or repeat big business offender to offend again.

1.14 Divesture would enable the Courts to break up serious or repeat big business offenders who have grown so large their conduct is not sufficiently influenced by Australia's Competition Laws.

1.15 The remedy of divestiture has been available in the home of capitalism for nearly 100 years. The US competition laws were born out of a community call to break up Standard Oil, who was misusing their market power in the oil refinery sector.

1.16 With divestiture written into the market power abuse statutes, the boards of big businesses will think twice, indeed three times, before proceeding to misuse their market power against competitors.

Recommendation 2

1.17 A divestiture order must be made available as a judicial remedy for serious or repeat market power abuse offender cases.

A 'substantial lessening' of the effectiveness of the effects tests

1.18 Finally, and very importantly, the effects test is simply too narrow as drafted in the government's bill. The 'substantial lessening of competition' test is a test that is too hard to apply.

1.19 In its first draft in October 2014, the Harper Review[1] discussed difficulties with the current language of section 46 and suggested a broader, less restrictive test – which I support. My fear is that the current wording of the effects test is too narrow for it to be truly effective in abuse of market power cases.

Recommendation 3

1.20 As per Draft Harper Review Recommendation 25, to mitigate concerns about over-capture a defence should be introduced so that the primary prohibition would not apply if the conduct in question:

- **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.**

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

1.21 The ultimate beneficiaries of these three recommendations will be Australian consumers, because they force big businesses to compete on price instead of spending their time trying to remove small business competitors.

1.22 This will ultimately lead to lower prices for consumers.

Senator Nick Xenophon
Senator for South Australia

1 Competition Policy Review Draft Report, Commonwealth of Australia, September 2014.