



Dr Kathleen Dermody
Committee Secretary
Senate Standing Committee on Economics
The Senate
P O Box 6100
Parliament House
Canberra ACT 2600
Via email: economics.sen@aph.gov.au

30 June 2014

Dear Dr Dermody,

Competition and Consumer Amendment (Misuse of Market Power) Bill 2014

I have pleasure in enclosing a submission on the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014. The submission has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Michael Corrigan

Yours sincerely,

John Keeves
Chairman, Business Law Section

Enc.

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Law Council
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Business Law Section

Submission to the Senate Economics Legislation Committee concerning the Competition and Consumer (Misuse of Market Power) Bill 2014

**Submission by the Competition and
Consumer Committee of the Business Law
Section of the Law Council of Australia**

30 June 2014

1. Section 46 – an introduction

Subsection 46(1) of the CCA sets out the primary prohibition of misuse of market power under the Australian competition law. In short, it prohibits a corporation with substantial market power, from taking advantage of that market power, for the purpose of:

- (a) eliminating or damaging a competitor;
- (b) preventing entry into a market;
- (c) deterring or preventing competitive conduct in a market.

Subsection 46(1) is reasonably settled, having endured in largely the same form since 1986.¹ It is supported by a growing body of case law, including authoritative guidance from the High Court on several occasions.

The substance of the prohibition is broadly in line with international standards in relation to anticompetitive, dominant firm conduct.

Much of the remainder of section 46 (other than subsections 46(1AA) and (1AB)) is explanatory of subsection 46(1). In each case, the statutory provision has picked up or expanded upon the prevailing case law (in relation to issues such as factors relevant to a finding of market power², the necessity of a finding of "recoupment" and the sale of products at prices below cost in a predation case³, in what circumstances a corporation may take advantage of market power⁴, and the purpose of the corporation⁵). Subsections (5) and (6) set out limited and sensible exceptions.

The Law Council has recently made submissions to the Harper Review of Australia's competition law and policy in relation to

¹ The words "in that or any other market" were introduced in 2007 – largely to settle uncertainty as to whether market power had to be taken advantage of in the same market from which it had sprung.

² Subsections 46(2), (3), (3A), (3B), (3C), (3D) and (4).

³ Subsection 46(1AAA) and (4A)

⁴ Subsection 46(6A)

⁵ Subsection 46(7).

section 46, among other issues.⁶ Those submissions propose that ss46(1AA) be repealed.

2. Divestiture orders generally

A contravention of s46 may result in any of a wide variety of sanctions – including damages, injunctions, civil penalty, and others. However, neither the ACCC nor a private litigant may seek an order to break up a firm which has misused its substantial market power.

Previous reviews of Australia's competition laws and policy have considered whether the Australian law should include a power to require divestiture by a firm which has misused substantial market power.⁷ Each of the Dawson review, the Hilmer review, the Cooney Committee and the Griffiths Committee came to the conclusion that no such power should be introduced. Several reasons underpinned this view:

- (a) "Conceptually, divestiture is inappropriate in this context (a contravention of s46) because there is no clear nexus between the assets to be divested and the contravening conduct" – per Dawson Committee report of January 2003.
- (b) "Structurally separating a corporation will not have a predictable result" – per Hilmer Committee report of 1993.

More broadly, it may be contended 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, a divestiture order involves:

- a serious risk that it will create several less efficient businesses, and/or involve divesting a part of a business which cannot then be a competitive operation itself;⁸

⁶ To be available at <http://competitionpolicyreview.gov.au/issues-paper/submissions20140620/>

⁷ Such a power is not to be confused with the existing power, under s81 of the CCA, of the Court to require divestiture (where relief is sought within 3 years) of shares or assets acquired in contravention of s50 of the CCA.

⁸ Business assets rarely invite easy dissection: for example a major distribution centre for a large grocery operation cannot practically be "cut in half", and the stores reliant on it for supply of products will not be efficiently operated without it. A dominant "brand" cannot effectively be shared by two businesses in the same market. Divestiture of part of the operations of a steel manufacturer, a power distribution business, a street directory publisher, or a rural newspaper publisher (see *Queensland Wire v BHP*; *NT Power*

- imposing on-going, supervising behavioural orders on the firm(s) involved, which are necessary to give effect to the divestiture order (such as orders in relation to how the divested businesses may deal with one another and/or their former parent);
- industry "engineering" with uncertain wider competitive impacts across the relevant market(s) – which may result in other firms acquiring substantial market power; and
- in the absence of a clear and direct nexus between the contravention and the assets to be divested, the divestiture not appropriately addressing the conduct which contravened s46.

In the United States, such a power exists – a contravention of section 2 of the Sherman Act may provoke an order to divest assets. However, it has been used only sparingly, and (other than by consent) no such order has been made since the 1960's.⁹ In the 1980's, AT&T was broken up into the 'Baby Bells' by consent decree, to end long-running litigation with the US government.¹⁰ However, then followed years of litigation (over 900 petitions) in relation to the "line of business" restrictions in the consent decree.

Such a power also exists in the European Union¹¹ and Canada¹² – in neither case has it been used.

On this record, the Law Council's Competition and Consumer Committee urges the Senate Standing Committee on Economics to be cautious about suggestions that any such power be introduced in Australia.

Generation v Power and Water Authority; Melway Publishing v Robert Hicks; ACCC v Rural Press Holdings) will be similarly difficult.

⁹ See *US v Grinnell Corp* 384 U.S. 563 (1966) – a contravention of section 2 of the Sherman Act, based on an approach to market definition which would not be applied today. In 1911, the US Supreme Court required Standard Oil to be broken up into 34 independent businesses, each a local geographic monopoly.

¹⁰ *US v AT&T*, filed in 1974.

¹¹ Changes to the structure of a dominant firm may be applied where "there is a substantial risk of a lasting or repeated infringement that derives from the very structure of the undertaking" – paragraph 12 of Council Regulation 1/2003.

¹² Section 79 of the *Competition Act* prohibits dominant firm conduct and provides for the Competition Tribunal to "take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market", where an order prohibiting the illegal conduct is "not likely to restore competition".

In the Law Council Competition and Consumer Committee's view, the current sanctions upon a contravention of s46 are sufficient.

3. The Competition and Consumer (Misuse of Market Power) Bill 2014.

The Bill provides that, upon a contravention of s46, the Court may:

"... on the application of the Commission or any other person, by order, give directions for the purpose of securing, within 2 years of the order being made, a reduction in the corporation's power in, or share of, the market."¹³

In this way, the Bill provides only indirectly for the divestiture of some of the business assets of a corporation which contravenes s46. Instead, the directions to be made by the Court must be "for the purpose of securing" a reduction in (market) power, or a reduction in (market) share.

That these objectives are at the heart of the provisions in the Bill introduces further uncertainty and complexity. 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?

The Law Council's Competition and Consumer Committee speculates that this might be attempted by a court in one of two ways:

- First, the court might endeavour to identify assets (physical, real or intangible) which are to be divested by the business, for the purpose of achieving a reduction in (market) power or share. This raises the difficulties and issues referred to in paragraph 2 above.
- Secondly, the court might order that the corporation reduce its market share to a particular level (either as a means to reduce its market power, or as a direct requirement towards the outcome of a reduction in market share). But how is the corporation to do this? If it 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*

¹³ See s80AD(2) of the Bill.

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 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.

The Law Council Committee has not found a further alternative approach which would directly go to the reduction of market "power" by a contravening corporation.

4. Conclusion

For these reasons, the Law Council Committee recommends that the proposed s80AD not be introduced to the *Competition and Consumer Act 2010*.