

Chapter 1

Introduction

1.1 On 20 March 2014, the Senate referred the Competition and Consumer Amendment (Misuse of Market Power) Bill 2014 to the Economics Legislation Committee for inquiry and report by 24 June 2014.¹ The reporting date was subsequently extended on three occasions, first to 28 August 2014; then to 4 December 2014; and finally to 26 February 2015.

Conduct of the inquiry

1.2 The committee advertised the inquiry on its website and in *The Australian*. It also wrote to relevant stakeholders and interested parties inviting submissions by 30 June 2014. The committee received seven submissions, which are listed at Appendix 1.

1.3 The committee held a public hearing in Canberra on 2 October 2014. The names of the witnesses who gave evidence are at Appendix 2.

1.4 The committee thanks all of the individuals and organisations that contributed to this inquiry.

Consideration of the bill by the Scrutiny of Bills Committee

1.5 When examining a bill or draft bill, the committee takes into account any relevant comments published by the Senate Standing Committee for the Scrutiny of Bills. The Scrutiny of Bills Committee assesses legislative proposals against a set of accountability standards that focus on the effect of proposed legislation on individual rights, liberties and obligations, and on parliamentary propriety. The bill was considered by the Scrutiny of Bills Committee in its *Alert Digest No. 3 of 2014*. No comments were made on the bill.²

Structure of this report

1.6 This report comprises two chapters:

- The remaining sections of Chapter 1 provide an explanation of the proposed amendments and background information about the legislation the bill seeks to amend.

1 *Journals of the Senate*, 2013–14, no. 22 (20 March 2014), pp. 663–64.

2 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 3 of 2014*, March 2014, p. 3.

- Chapter 2 examines the arguments for and against the proposed amendments. The committee's findings are outlined at the end of the report.

Overview of the bill

1.7 On 6 March 2014, Senator Nick Xenophon introduced this private senator's bill into the Senate. The bill proposes to amend the *Competition and Consumer Act 2010* (the CCA) to introduce a divestiture power where a corporation has misused its market power. Specifically, the bill would provide that where a corporation has been found to have contravened subsections 46(1) or 46(1AA) of the CCA, the court may make an order directing the corporation to reduce its power in, or share of, the market. The order would seek to secure the reduction in the corporation's power in, or share of, the market within two years.³ The bill would provide that an application for divestiture may be made at any time within three years after the date on which the contravention occurred.⁴

1.8 As alternatives to the court making a divestiture order following a finding that subsections 46(1) or 46(1AA) of the CCA had been contravened, the bill would also enable the court:

- to accept an undertaking by the corporation to take particular action to reduce the corporation's power in, or share of, the market;⁵ and
- if the court considers it appropriate, to make a divestiture order by consent of all parties regardless of whether the court has found that the corporation contravened subsections 46(1) or 46(1AA) of the CCA.⁶

1.9 The explanatory memorandum provides the following insight into the reasons behind the introduction of the bill:

The provisions in this Bill are a response to the high concentration of many Australian retail markets, including grocery, fuel, liquor and hardware. 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. The measures in this Bill would give the ACCC a further option in addressing these issues, as well as creating a new disincentive for corporations to abuse their market share.⁷

3 Schedule 1, item 1, proposed new subsections 80AD(1) and (2).

4 Schedule 1, item 1, proposed new subsection 80AD(3).

5 Schedule 1, item 1, proposed new subsection 80AD(5).

6 Schedule 1, item 1, proposed new subsection 80AD(4).

7 Explanatory Memorandum, p. 2.

1.10 In his second reading speech, Senator Xenophon noted that divestiture laws are in place in the United States.⁸ A general divestiture power is also available in Canada, the European Union and the United Kingdom.

Section 46 of the Competition and Consumer Act

1.11 The overall object of the CCA is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.⁹ In its submission, Treasury provided the following explanation of the benefits associated with competition:

Competitive markets promote efficient production, delivering benefits for consumers through greater choice and lower prices. Over time, competitive pressures also drive innovation and investment in new technologies, and the development of new products that meet consumers' needs. This process of innovation is what drives economic growth and improvements in living standards in the long term.¹⁰

1.12 Anti-competitive behaviour is addressed in Part IV of the CCA. Restrictive trade practices that are prohibited include cartel conduct; anti-competitive price signalling in relation to certain prescribed goods and services; contracts, arrangements or understandings that restrict dealings or affect competition; the misuse of market power; exclusive dealing; resale price maintenance; and acquisitions that would result in a substantial lessening of competition. It is the misuse of market power prohibitions contained in section 46 of the CCA that are relevant to this bill. The following paragraphs outline the prohibitions contained in subsections 46(1) and 46(1AA) and the penalties that are currently available for contraventions of these prohibitions. As noted above, the bill seeks to introduce a divestiture power into the CCA that could be applied in relation to contraventions of subsections 46(1) and 46(1AA).¹¹

Subsection 46(1)

1.13 Subsection 46(1) of the CCA is a long-established provision that prohibits the misuse of market power. The provision is based on a purpose test—that is, it relates to conduct engaged in by a corporation for a proscribed anti-competitive purpose (there are three proscribed purposes in subsection 46(1)). Subsection 46(1) reads as follows:

A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of:

8 Senator Xenophon, *Senate Hansard*, 6 March 2014, p. 1016.

9 *Competition and Consumer Act 2010*, s. 2.

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

11 The CCA already includes a divestiture power as a remedy for 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.

- (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
- (b) preventing the entry of a person into that or any other market; or
- (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

1.14 A number of other subsections contain guidance for interpreting the concepts used in subsection 46(1). Other provisions in the CCA assist with the interpretation of 'market' and 'purpose'.¹²

Subsection 46(1AA)

1.15 Subsection 46(1AA), which is also known as the 'Birdsville Amendment', applies to corporations that have a substantial *share* of a market, as opposed to the prohibition in subsection 46(1) that refers to a substantial *degree of power* in a market. Subsection 46(1AA) prohibits corporations with substantial market share from supplying, or offering to supply, goods or services for a sustained period at a price that is less than their relevant cost. However, for the contravention to have taken place, the supply of goods or services must be for one of three proscribed anti-competitive purposes (the purposes are the same as those that apply to subsection 46(1)).

1.16 Market share is a relatively straightforward concept, defined by Treasury as 'a measure of the proportion of a market that is served by a single company'.¹³ Market power, however, is a concept that takes into account a range of considerations that affect competition, such as barriers to entry. Market power has been interpreted by the High Court as being:

...the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product.¹⁴

1.17 Treasury described market power as an ability 'to behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm'.¹⁵

Penalties

1.18 The pecuniary penalties available for each act or omission described in subsections 46(1) or 46(1AA) are the greatest of the following:

- \$10 million;

12 *Competition and Consumer Act 2010*, ss. 4E and 4F.

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

14 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 188.

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

- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the act or omission—three times the value of that benefit;
- if the court cannot determine the value of that benefit—ten per cent of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the act or omission occurred.¹⁶

1.19 Section 82 of the CCA provides that actions for damages may be taken by a person who suffers loss or damage as a result of conduct that contravened subsection 46(1) or 46(1AA).¹⁷ The ACCC may also seek to take representative action on behalf of persons who have suffered or are likely to suffer loss or damage as a result of a contravention.¹⁸ Orders disqualifying a person from managing corporations may also be sought.¹⁹

Purpose of section 46

1.20 Commentary about section 46 generally emphasises that the prohibitions are intended to 'protect the competitive process in markets, rather than individual competitors'. Treasury stated that the provisions:

...are not designed to produce or promote any particular market structure or composition. The role of section 46 is to distinguish between vigorous competitive activity (which is desirable) and economically inefficient, monopolistic practices that may harm the competitive process, which drives efficient outcomes and benefits to consumers.²⁰

1.21 In a landmark case that considered section 46, the High Court made the following observation about the object of section 46 and the nature of competition among businesses:

The object of section 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end.

Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective

16 *Competition and Consumer Act 2010*, s. 76(1A)(b). These penalties were increased in 2006 by the *Trade Practices Legislation Amendment Act (No. 1) 2006*. Prior to these amendments, the maximum penalty was fixed at \$10 million.

17 Although subsections 46(1) and 46(1AA) are cited as they are relevant to this bill, section 82 actually applies to any contravention of a provision in Part IV or IVB of the CCA. The action must be taken within six years 'after the day on which the cause of action that relates to the conduct accrued'. *Competition and Consumer Act 2010*, s. 82.

18 *Competition and Consumer Act 2010*, s. 87(1B).

19 *Competition and Consumer Act 2010*, s. 86E.

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

by taking sales away. Competitors almost always try to 'injure' each other in this way. This competition has never been a tort...and these injuries are the inevitable consequence of the competition section 46 is designed to foster.²¹

1.22 A 2003 review of the CCA (then known as the *Trade Practices Act 1974*) emphasised that section 46 'is aimed against anti-competitive monopolistic practices, not competition, even aggressive competition':

The distinction is sometimes a difficult one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency.²²

Consideration of a divestiture power by other inquiries

1.23 Proposals for the introduction of a general divestiture power have been considered during other reviews including, among others:²³

- the 1993 Committee of Inquiry into a National Competition Policy, chaired by Professor Frederick Hilmer (the Hilmer Report);
- the 2003 report of the Trade Practices Act Review Committee, chaired by Sir Daryl Dawson (the Dawson Report); and
- various inquiries undertaken by the Senate Economics References Committee between 2004 and 2011, including inquiries into the effectiveness of the *Trade Practices Act 1974* in protecting small business (2004); competition and pricing in the Australian dairy industry (2010); competition in the Australian banking sector (2011); and the impacts of supermarket price decisions on the dairy industry (2011).

1.24 The findings of these reviews are discussed in Chapter 2 where relevant.

Harper Review (2014)

1.25 A comprehensive review of competition policy is currently underway. The review was announced by the government on 4 December 2013 and is being chaired by Professor Ian Harper. Among other things, the terms of reference direct the review panel to consider whether the CCA 'appropriately protects the competitive process and facilitates competition', including by:

- 'examining whether current legislative provisions are functioning as intended in light of actual experience and precedent'; and

21 *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 191; cited in Treasury, *Submission 4*, pp. 5–6.

22 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, 2003, p. 80.

23 For a more exhaustive list of inquiries that have considered divestiture, and a useful summary of each inquiry's findings, see Treasury, *Submission 4*, pp. 10–12.

- 'considering whether the misuse of market power provisions effectively prohibit anti-competitive conduct and are sufficient to: address the breadth of matters expected of them; capture all behaviours of concern; and support the growth of efficient businesses regardless of their size'.²⁴

1.26 The issues paper released by the Harper Review noted that previous reviews have considered whether a general divestiture power should be introduced.²⁵ The issues paper invited submissions on the following question:

Are the enforcement powers, penalties and remedies, including for private enforcement, effective in furthering the objectives of the CCA?

The Panel is interested in whether there are other remedies or powers (for example, in overseas jurisdictions) that should be considered in the Australian context.²⁶

1.27 The draft report released by the Harper Review in September 2014 is discussed in Chapter 2. The Harper Review is expected to provide its final report to the government by the end of March 2015.

24 Competition Policy Review, 'Terms of Reference', <http://competitionpolicyreview.gov.au/terms-of-reference> (accessed 10 July 2014).

25 Competition Policy Review, *Issues Paper*, 14 April 2014, http://competitionpolicyreview.gov.au/files/2014/04/Competition_Policy_Review_Issues_Paper.pdf (accessed 10 July 2014), p. 40.

26 Competition Policy Review, *Issues Paper*, 14 April 2014, p. 41.

