Additional Comments by Senator Canavan

1.1 The committee notes concerns within the community about the misuse of market power by large corporations and the limitations in existing competition law in effectively deterring or addressing such behaviour (2.42). I wish to add my voice to these concerns. The important role that competition plays in promoting productivity and innovation in the Australian economy means that ensuring Australia has a strong and effective competition laws should remain an ongoing focus for policymakers.

1.2 In my view, competition in Australian markets would be strengthened through including divestiture as a potential remedy for a breach of section 46 of the *Competition and Consumer Act 2010*. This change is required because:

- the existing penalties are not sufficient to deter serious breaches of competition laws;
- claims that its introduction would introduce undue business certainty do not stack up against the extensive overseas experience of divestiture penalties; and
- a divestiture remedy would only be used in cases of serious misconduct and it was a practical remedy given the nature of the markets under consideration.

1.3 Of particular importance is ensuring regulators have a sufficient range of tools, with appropriate powers to investigate and, where appropriate, penalise and remedy situations where competition is damaged. Of relevance are the cases brought by the Australian Competition and Consumer Commission (ACCC) last year against Coles which exposed the serious nature of the misconduct that has been taking place in Australia's retail sector. The Federal Court judgement concluded that Coles gravely misused its bargaining power. It found Coles demanded payments from suppliers to which it was not entitled by threatening to harm their business and withheld money from suppliers it had no right to withhold. The Court concluded that 'Coles' practices, demands and threats were deliberate, orchestrated and relentless.'[1]

1.4 The penalty given to Coles of $10 million, the maximum allowable under the existing arrangements, was insufficient. In particular, Federal Court judge Justice Gordon stated that the penalties should have been higher in part to provide an 'important element of deterrence' to others, noting:

> I don’t regard these penalties at the top end for these proceedings at all … This conduct could have attracted considerably higher penalties. You are

1 ACCC, *Court finds Coles engaged in unconscionable conduct and orders Coles to pay $10 million penalties*, 22 December 2014, Media Release.

> dealing with a company worth $22 billion on one side and the smallest supplier worth less than 0.1 per cent of that on the other.[2]

1.5 The Coles example does not, of course, provide prima facie justification for the introduction of a divestiture power in Australian competition policy laws. For one, this case involved a breach of unconscionable conduct provisions (section 20 of the Australian Consumer Law) not the misuse of market power provisions (section 46) that Senator Xenophon's bill deals with. Nonetheless, the brazen misconduct revealed in this case highlighted the need for stronger deterrents to broader issues of anti-competitive conduct covered by the *Competition and Consumer Act 2010*.

1.6 Further, the gravity of the revelations made by the ACCC in this case raises the question as to whether the existing competition policy framework may need to be augmented either now, or in the future, so that it can respond effectively and in a manner proportionate to the significance of the infringement. The importance of regulators having a sufficient range of enforcement tools to be able to respond to compliance breaches in a proportionate way was highlighted by the Productivity Commission in a recent study.[3]

1.7 A major reason provided to this inquiry for opposition to the introduction of divestiture powers are the potential loss to economic efficiencies, in particular economies of scale, that deliver positive outcomes to consumers as well as increasing the overall productivity of the economy. This is an important point. But it does not, of itself, rule out the use of a divestiture mechanism in some instances.

1.8 Clearly any use of divestiture powers would be an extraordinary measure and would only be appropriate in the most serious circumstances and for industries with particular market structures. This is borne out by the international experience highlighted in the committee's report. The use of such powers in jurisdictions where they exist, such as the United States, highlights that, notwithstanding the deterrent effect, they are in practice not often used. And when they are, real world economic imperatives mean they are used for industries that have a high degree of vertical integration. These include telecommunications, electricity and energy markets with clear points of division within businesses.

1.9 Another point to note is that the trigger for the consideration that a misuse of market power has occurred, under section 46, explicitly rules out behaviour by a firm — even one with substantial market power — that in the normal course of events would reasonably be undertaken to improve its efficiency of operations. Hence, beneficial activities undertaken to exploit economies of scale to reduce business costs, such as consolidation etc., would be unaffected by a divestiture provision. A business

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2 Mitchell and Durkin, *Coles to settle unconscionable conduct cases with ACCC*, Financial Review, 15 December 2014.

3 Productivity Commission, *Regulator Engagement with Small Business*, Research Report, 2013.

acting in a manner consistent with competitive behaviour would not breach section 46 and therefore would not be liable to a penalty of divestiture under this amendment.

1.10 More broadly, the possible adverse impact of divestiture provisions in terms of impacts on economic efficiency, such as reductions in economies of scale, logistical difficulties in divesting particular businesses, including the potential unviability of divested parts of a business, disruption to a firm or industry's activities, as well as the impacts on investment due to regulator risk and uncertainty need to be considered against the costs to economic activity and efficiency that are already occurring due to misuse of market power.

1.11 A point that cannot be overstated is that competition is the driving force for economic growth, dynamism and innovation in any economy. The very existence of competition laws recognises this fact. Hence, a substantial weakening of competition invariably extracts a heavy price on an economy, on consumers, businesses and workers. To take one example, the potential dampening role played on the investment plans of small firms or potential new market entrants by the actions of an incumbent with extensive market power must also be considered. Firm entry and exit is an important factor in economic efficiency over time.

1.12 Analysis by the Productivity Commission confirms that productivity growth 'arises from many small, everyday improvements within organisations to improve the quality of products, service customers better, and reduce costs.'[4] The Commission highlighted three policy 'planks' for driving and stimulating innovation — incentives, flexibility and capabilities. In emphasising the crucial role of competition as providing the first of these planks, the Chairman of the Commission Gary Banks observed:

> International evidence suggests that it is market competition, rather than government assistance, that is the main driver of innovation and its diffusion throughout an economy.[5]

1.13 As always, the question of when the employment and use of pro-competition policies and instruments is appropriate hinges on the likely balance of costs and benefits in particular circumstances. These are empirical questions. And, as such, consideration of whether a divestiture power is appropriate cannot be ruled out on grounds of the potential adverse impact on economic efficiency per se. Any arguments would need to be argued based on evidence rather than asserted.

1.14 Further, some of the arguments used against divestment on practical grounds, such as the concerns raised by the Law Council about the lack of certainty about what could be achieved, are not in themselves reasons to rule out divestment as a possible policy tool. All policy actions have degrees of risk and the potential for unintended

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4 Productivity Commission, *Annual Report 2007–08*, 2008.

5 Productivity Commission, *The Productivity Challenge and Innovation,* Media Release, 31 October 2008.

consequences. Many are highly complex and involve substantial risks that must be managed.

1.15 That there are many logistical and practical issues associated with implementation of divestiture powers is not in dispute. As the committee report has highlighted, identifying the assets to be divested and monitoring outcomes following the divestiture process will not be easy. But as with other aspects areas of competition policy, these are issues that would need to be worked out over time through the courts and mediation processes.

1.16 On balance, I believe that the *Competition and Consumer Act 2010* should be amended to include a divestiture remedy for breaches of the misuse of market power provisions. Nonetheless, the bill as drafted by Senator Xenophon should be amended to take into account the issues raised during this inquiry about its impact on business certainty. In particular, the bill should be amended to ensure that the remedy would only be used for serious and repeated breaches of section 46 and that a Court applying the remedy would consider the efficiency and competitiveness of any business entities formed following a divestment notice.

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