

Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 116

Topic: Dawson & Hilmer Reviews

Hansard Page: E71 (03/06/2010)

Senator JOYCE asked:

Senator JOYCE—I looked at the Dawson and Hilmer reviews and they both said ‘do nothing’. Do you think we should still do nothing or do you think we should get to a point some day where we actually do something?

Dr Kennedy—I do not think we would accept your characterisation that we do nothing. I presume these are matters you might have discussed with the ACCC in the past. While there is always scope for reform and review of the improvement of the Trade Practices Act, as seen through these rather substantial reforms around the Australian Consumer Law, I would not characterise the current situation as: we do nothing about our competition concerns. I do not think the ACCC would accept that characterisation either.

Senator JOYCE—I was talking about divestiture. I know we do so from trade practices law. With regard to divestiture there is a glaring difference between our Trade Practices Act, the UK’s trade practices act, the United States trade practices act and, I imagine, a number of other trade practices acts throughout the world. That would be a fair statement, wouldn’t it?

Mr Deitz—Again, I would prefer to take that on notice and give you an answer.

Senator JOYCE—You have read the report, though, haven’t you?

Mr Deitz—Which report?

Senator JOYCE—The OECD report.

Mr Deitz—Not recently, but yes.

Answer:

While differences do exist in the applicability of divestiture powers in Australian, US and UK competition laws, the *OECD Reviews of Regulatory Reform: Australia* makes no recommendations in regard to extending the divestiture power.

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Australian competition law does not provide for a general divestiture power. Section 81 of the *Trade Practices Act 1974* provides that the Federal Court can order divestiture within three years of an acquisition having been successfully completed, if the acquisition had the effect of substantially lessening competition in a market, in breach of section 50.

Successive reviews of this matter, which have considered divestiture laws in operation in other jurisdictions, have examined whether Australia's competition law should provide for a divestiture remedy outside the context of mergers.

- The 1993 *Report on the Implementation of a National Competition Policy* (the Hilmer Review) recommended against extending the application of the divestiture power, noting that the application of a general divestiture power would involve decisions more appropriate for governments than the courts.
- The *Review of the Competition Provisions of the Trade Practices Act 2003* (the Dawson Review), in the context of misuse of market power in section 46, considered that the option of applying divestiture orders to a concentration of ownership that substantially lessens competition was inappropriate given that it would create an uncertain business environment.