BCA
Business Council of Australia

19 April 2024

Senate Select Committee on Supermarket Prices
By email: supermarketprices.sen@aph.gov.au

To whom it may concern,

Inquiry into the Competition and Consumer Amendment (Divestiture Powers) Bill 2024

The Business Council of Australia (BCA) appreciates the opportunity to make a submission to the Senate Select Committee on Supermarket Prices (the Committee) regarding the Competition and Consumer Amendment (Divestiture Powers) Bill 2024 (the Bill).

This submission is in addition to the BCA's earlier submission to the Committee's inquiry into supermarket prices. The BCA's previous submission to the Committee highlighted the complex factors contributing to supermarket prices.

The BCA recognises that a well-functioning market-based economy is supported by effective competition and consumer law, and Part IV of the *Competition and Consumer Act 2010 (Commonwealth)* (CCA) serves as the cornerstone for protecting against anticompetitive conduct and protecting consumer welfare.

Many Australians are struggling with cost-of-living pressures and the introduction of a divestiture power has been proposed as a solution to address this. The BCA is opposed to the Bill noting that successive reviews of Australia's competition laws have concluded that not only would a general divestiture power be unhelpful, but that such a power is likely to lead to adverse consumer outcomes. That is, consumers are unlikely to benefit, and are in fact more likely to experience fewer choices and higher prices, if a general divestiture power was adopted and deployed.

The Harper[1], Dawson[2] and Hilmer[3] Reviews all rejected the introduction of such a power as did the Griffiths and Cooney Reports due to its unpredictable results, including that the target could be left less productive, efficient, profitable or even viable[4] – and so reducing rather than enhancing consumer welfare.

[1] Commonwealth of Australia, 2015, Competition Policy Review – Final Report, 'Harper Review', Canberra, p 347.
[2] Commonwealth of Australia, 2003, Review of the Competition Provisions of the Trade Practices Act, 'Dawson Review', Canberra, p 163.
[3] Commonwealth of Australia 1993, National Competition Policy, 'Hilmer Review', Canberra, page 164.
[4] Senate Standing Committee on Legal and Constitutional Affairs, 'Mergers, Monopolies and Acquisitions – Adequacy of Existing Legislative Controls' (1991) at 98.

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The Harper Review noted[5]:

> *...divestiture is likely to have broader impacts on the firm's general efficiency. Such changes could also have negative flow-on effects to consumer welfare. It is also possible that divested parts of a business might be unviable. Further, it would leave the redesign of a firm or industry in the hands of the court, which is generally not well positioned to make decisions about industry policy.*

The Dawson Review noted[6]:

> *...divestiture is inappropriate in this context because there is no clear nexus between the assets to be divested and the contravening conduct. For example, identifying the specific assets to be divested to preclude a corporation from taking advantage of its market power for a proscribed purpose would be difficult at best and arbitrary at worst.*

The Hilmer Review found that[7]:

> *The Committee considers that divestiture is appropriate in merger cases, but is not persuaded that the many disadvantages of providing a general divestiture power are outweighed by the possible advantages.*

Further, in setting out those disadvantages the Hilmer Review noted[8]:

> *... general divestiture remedy would give rise to a number of difficulties. It will often be arbitrary since it will not be clear what parts of a firm should be divested (contrast the case of mergers, where it is clearly the acquired assets or shares which should be divested). To break up a firm may eliminate economies of scale and/or scope or generally decrease economic efficiency. Divestiture could involve reshaping an entire industry with consequent disruption to all who deal with it. It would involve the courts in a process with inevitable political implications, something more appropriate for decision by governments than by the courts.*

More broadly, we do not support suggestions that such a power is necessary to provide a deterrent against firms breaching section 46 of the CCA as the CCA already provides for significant penalties in the event a firm is in breach. These existing penalties already provide a strong deterrent to a firm misusing their market power.

For example, a business that is found to have breached the prohibition against misusing a position of market power as set out in Section 46 of the CCA, can already be penalised to the greatest of:

- $50 million;
- Three times the benefit obtained because of the breach; or
- 30 per cent of turnover during the period in breach if a calculation of the benefit obtained cannot be determined.[9]

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[5] Commonwealth of Australia, 2015, Competition Policy Review – Final Report, 'Harper Review', Canberra, p 346.
[6] Commonwealth of Australia, 2003, Review of the Competition Provisions of the Trade Practices Act, 'Dawson Review', Canberra, p 162.
[7] Commonwealth of Australia 1993, National Competition Policy, 'Hilmer Review', Canberra, page 163.
[8] Commonwealth of Australia 1993, National Competition Policy, 'Hilmer Review', Canberra, pp 163-164.
[9] Australian Competition and Consumer Commission, Fines and Penalties, https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties accessed April 2023.

Accordingly, for large businesses, a possible penalty associated with a breach of section 46 could amount to billions of dollars.

The Harper Review shared this view noting that pecuniary penalties along with the ACCC's ability to obtain remedial orders provided sufficient deterrence[10].

Comparisons with supermarket divestiture in other jurisdictions are unhelpful as such arrangements appear to be in the context of mergers and acquisitions and are comparable to Australia's existing competition law and practice where divestiture may be agreed to by merger proponents to enable a merger to proceed or as a remedy available to the regulator for an unlawful merger or acquisition.

In this respect, and as noted by the Harper Review in reference to findings in the Dawson Review[11]:

> *...divestiture as a remedy in the case of acquisitions leading to a substantial lessening of competition is different to divestiture as a remedy for misuse of market power. Divestiture in the context of mergers involves the court 'unwinding' a transaction rather than splitting a firm that has expanded through organic growth.*

Finally, the Australian Government is actively working to review and improve Australia's competition settings both at an economy-wide level and concerning supermarkets. This includes the wide-ranging Competition Review headed by a Treasury Taskforce and Expert Panel, the Review of the Food and Grocery Code of Conduct and the Supermarket Inquiry being undertaken by the ACCC. Concerning the former, the Treasurer recently announced substantial reforms to Australia's merger control framework which will increase the ability of the ACCC to review and prevent anticompetitive mergers including in the retail sector. The latter two reviews are yet to conclude but should be afforded the time to do so to ensure any legislative changes have the benefit of full and complete information.

The BCA supports careful consideration of Australia's competition settings to enable competitive markets and a competitive Australia, however the approach of this Bill is ill-conceived and ultimately more likely to hurt the welfare of consumers than aid them and therefore the Bill should be abandoned.

Yours sincerely

Bran Black
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[10] Commonwealth of Australia, 2015, Competition Policy Review – Final Report, 'Harper Review', Canberra, p 347.
[11] Commonwealth of Australia, 2015, Competition Policy Review – Final Report, 'Harper Review', Canberra, p 346.