

SUBMISSION*

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

Overview

We note the proposed amendments to the *Competition and Consumer Act 2010* (Cth) contained in this Private Member's Bill. In particular, we note that in his Second Reading Speech of 6 March 2014, Senator Xenophon stated:

The purpose of this Bill is to give the ACCC and the Courts another option when it comes to tackling misuse of market power. The provisions in this Bill will allow the ACCC, or any other person, to make an application to the Court for a divestiture order. The Court can choose to apply this order when a corporation has breached Section 46 of the Competition and Consumer Act.

The Court also has the option of agreeing to a consent order with a corporation, whether or not a breach of the Act has occurred. A corporation can also offer to enter into an undertaking with the Court, rather than waiting for the Court to issue an order.

Requests for orders can be made within three years of the offence occurring. The Court can order a corporation to reduce its market share or market power within two years.

The provisions in this Bill provide both punitive measures and act as a deterrent. I acknowledge that there are still many concerns about how breaches of section 46 can be proven, and I agree that section of the Act needs to be reviewed. However, it is time that more effective measures were put in place to sanction companies abusing their market power.

The proposed Section 80AD gives Courts additional power for violations of Section 46, which makes it unlawful for a corporation, having a 'substantial degree of power in a market', to take advantage of that power to the end of–

- (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.

That includes where a corporation, through taking a particular course, has incurred losses that cannot be or are unlikely to be recovered.

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Alternatively, a corporation with a 'substantial share' of a market must not offer to supply good or services, 'for a sustained period at a price that is less than the relevant cost to the corporation', for such a purpose.¹

Existing Provisions

The current *Competition and Consumer Act 2010* gives Courts a number of options to remedy breaches of Section 46(1) or 46(1AA):

- To make a pecuniary penalty under Section 76 of up to \$10m (or greater, if the Court finds the benefit to the corporation exceeded that amount). Proceedings to recover those penalties can be initiated by the ACCC on behalf of the Commonwealth under Section 77.
- To pay compensation to persons who have suffered loss and damage from the contravention, in actions under Section 82 commenced within 6 years after the cause of action has accrued. We note also that under Section 79B, the Court must give priority to making an order for compensation if the defendant is not of the means to pay both a pecuniary penalty and compensation.
- To issue an injunction under Section 80 if a person has engaged or proposed to engage in a contravention (or attempts to contravene, aids or abets, induces, is directly or indirectly concerned, or conspires to contravene). That includes power to grant a mandatory injunction – sometimes called a positive injunction, because it requires a person to do something. An interim injunction may also be made, and does not normally require an undertaking as to damages.
- To make an adverse publicity order under Section 86D if the corporation has been ordered to pay a pecuniary penalty under Section 76 (for example, disclosing certain information, publishing an advertisement at own expense).
- To make a disqualification order under Section 86E (on application of the ACCC) against a person from managing corporations, if satisfied the disqualification is justified (as permitted under Section 206EA of the *Corporations Act 2001*).
- To make, under Section 87, 'such order or orders as it thinks appropriate... if the Court considers that the order or orders concerned will compensate the [victim] in whole or in part for the loss or damage or will prevent [it]'.

¹ *Competition and Consumer Act 2010* (Cth) ss 46(1)-(1AA).

Parallels with Section 50 (Acquisitions that Substantially Lessen Competition) and Section 81 (Divesture)

The Committee notes that the aims of Section 80AD, as outlined by Senator Xenophon, have some parallels with the existing Section 50, which prohibits acquisitions that would, or be likely to, have the effect of ‘*substantially lessening competition in any market*’ (save for when clearance or authorisation is granted). It should be noted that Section 50A applies to acquisitions that occur outside Australia.

The factors determining what constitutes ‘substantially lessening competition’ are not restricted, but subsection 50(3) outlines several that ‘must’ be taken into account –

- (a) the actual and potential level of import competition in the market;
- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.

Such a list of factors is not included in Section 46, and is not proposed to be added.

Section 81 permits Courts, on the application of the ACCC or any other person, to order a person to dispose of shares and assets that were acquired in contravention of Section 50. A number of specific additional orders are included in its subsections. Application for such orders can be made at anytime within 3 years of the contravention. Such orders can also be made by the parties’ consent, without a finding being made. Alternatively, undertakings in lieu of the order can be accepted.

Proposed Section AD (Divesture for Contravention of Section 46)

Section 80AD is to Section 46 what Section 81 is to Section 50. On application of the ACCC ‘*or any other person*’, it permits a Courts to direct the corporation, *within 2 years of*

the order being made, to reduce its market power or market share. Such an application can be made within 3 years of the contravention occurring. Similar orders can be made by consent, without a finding being made. As for Section 81, orders by consent may be accepted without a finding being made, or undertakings in lieu of an order accepted.

Concerns

The LIV Young Lawyers' Law Reform Committee is concerned that proposed Section 80AD, as drafted, invites the Courts to take an overly interventionist role both in the marketplace, and more problematically in the management of certain corporations. Though no doubt intended as an extraordinary measure – we note that Senator Xenophon in his Second Reading Speech referred to the 80 per cent market share of the dry groceries market held by Coles and Woolworths supermarkets – our view is that such a measure, if taken up, would represent a drain on limited Court resources.

In theory, the broad power to grant injunctive relief under Section 80 already allows a Court to give the sorts of directions envisioned by Section 80AD, if a corporation took advantage of their market power or share for an uncompetitive purpose. No doubt it might have been considered. However, Courts have been reluctant to step into the shoes of corporate management, and play a supervisory role.

In *Wayde v NSW Rugby League* (1985) 180 CLR 459, consideration was given to Section 320 of the former *Companies (New South Wales) Code*, allowing an order 'regulating the conduct of affairs of the company in the future', where its affairs are found to be conducted in a manner oppressive, unfairly prejudicial, or unfairly discriminatory towards a member or members. Mason ACJ, Wilson, Deane and Dawson JJ made note of –
the caution which a court must exercise in determining [such] an application...in order to avoid an unwarranted assumption of the responsibility for management of the company.

In all likelihood, the courts will have similar concerns regarding Section 80AD, as despite concerning competition (rather than management), it too anticipates becoming involved in the day-to-day management of businesses, and not insubstantial ones at that, particularly because it would involve the effective creation of new businesses. While perhaps not as involved as "unbaking" a cake (separating it back into its

ingredients), it is not simply about reversing how the corporation actually built its market share. It is about reshaping the market. That will occur regardless of what resources the ACCC can make available. For a divestment to be equitable and viable, comprehensive modelling is needed for any new entities proposed, as well as an understanding of how the existing market structure, and how the realignment, would impact upon it. Analysis of how it would affect the complying entity, as well as other stakeholders in the supply chain, would also be needed.