Australian Government

The Treasury

Senate Economics Legislation Committee

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

30 June 2014

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INTRODUCTION

The Treasury is grateful for the opportunity to provide a submission to assist the Senate Economics Legislation Committee in its inquiry. The Submission addresses the ***Competition and Consumer Amendment (Misuse of Market Power) Bill 2014*** (the Bill).

The purpose of the Bill is to amend the ***Competition and Consumer Act 2010*** (CCA) to provide the Federal Court with a power, in response to a finding of misuse of market power under subsection 46(1) or subsection 46(1AA), to give directions to reduce a corporation's market power or market share. The Bill would provide this power only where the corporation has a substantial degree of market power, a substantial market share, or by the corporation's consent. Alternatively, the Bill provides that the Court may accept an undertaking by the corporation to reduce its market power or market share.

This process is also known as divestiture, which is commonly understood to refer to an order requiring a firm to sell particular assets or particular parts of its business. The Bill would introduce divestiture as a new, additional penalty for courts' consideration following a breach of the current misuse of market power provisions in section 46 of the CCA. Divestiture is currently only available under the CCA following anticompetitive mergers and acquisitions.

The Explanatory Memorandum accompanying the Bill explains that it is in response to the high concentration of many retail markets including grocery, fuel, liquor, and hardware. Further, it indicates concerns that high concentration in these markets is leading to higher prices for consumers and putting pressure on producers further up the supply chain.

The timing of the Committee's inquiry overlaps with that of the current Competition Policy Review. The Prime Minister and the Minister for Small Business announced the Competition Policy Review on 4 December 2013. On 27 March 2014, the Minister for Small Business released the final Terms of Reference following consultation with the States and Territories and announced the Review Panel, which is being chaired by Professor Ian Harper.

The Harper Review is an independent, public review of Australia's competition framework, the barriers to competition in Australian industries, and the institutions that support competition and sustain momentum for ongoing reform. The Review Panel released an issues paper on 14 April 2014 seeking public submissions by 10 June 2014, and had received the first 236 non-confidential submissions at 30 June 2014. It is anticipated that the Review Panel will release a draft report later in 2014 (currently scheduled for release at the end of September) and call for further public submissions at that time.

The Terms of Reference for the Harper Review, relevant sections of which are extracted below (and in full in Attachment A), ask the Review Panel to provide a final Report to the Government within 12 months. Broadly, they ask the

Review Panel to examine the competition provisions of the CCA to ensure that they are driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets.

Specific aspects of the Terms of Reference, which are relevant to the issues that the Bill seeks to address, ask that the Review Panel's work includes:

- 3.1. considering whether Australia's highly codified competition law is responsive, effective and certain in its support of its economic policy objectives;

- 3.3. ensuring that the CCA appropriately protects the competitive process and facilitates competition, including by (but not limited to):

  – 3.3.1. examining whether current legislative provisions are functioning as intended in light of actual experience and precedent;

  – 3.3.2. 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;

  – 3.3.3. considering whether areas that are currently uncertain or rarely used in Australian law could be framed and administered more effectively; and

  – 3.3.4. considering whether the framework for industry codes of conduct (with reference to State and Territory codes where relevant) and protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy—particularly in relation to small business.

- 4.2. examin[ing] whether key markets — including, but not limited to, groceries, utilities and automotive fuel — are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains;

- 4.3. consider[ing] alternative means for addressing anti-competitive market structure, composition and behaviour currently outside the scope of the CCA; and

- 4.4. consider[ing] the impact of concentration and vertical integration in key Australian markets on the welfare of Australians ensuring that any changes to the coverage and nature of competition policy is consistent with national economic policy objectives.

The Treasury seeks in this submission to provide the Committee with further information on four issues: competition law and the concepts of market power and market share; powers currently available to the court in response to findings of misuse of market power; arguments raised in previous inquiries for and against the inclusion of a divestiture power for the misuse of market power; and international experience with divestiture provisions.

COMPETITION LAW, MARKET POWER, AND MARKET SHARE

The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading, and provision for consumer protection.

The CCA provides competition laws, which apply generically across the economy, to protect the competitive process in Australia's markets. In particular, Part IV of the CCA provides a safeguard against particular types of conduct which would be anti-competitive in the sense of reducing rivalry in a market, or preventing or deterring the entry of new firms. It also contains provisions to allow authorisation by the ACCC where such conduct may nonetheless produce a net public benefit.

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.

Section 46 regulates unilateral anti-competitive conduct. Subsection 46(1) prohibits a corporation with a substantial degree of market power from misusing that power. Subsection 46(1AA) more specifically prohibits predatory pricing by a corporation with a substantial share of the market. In both sections, behaviour is prohibited where it has the purpose of eliminating or substantially damaging a competitor, preventing the entry of competitors, or deterring or preventing competitive conduct.

Neither of these provisions prohibits a large market share or a high degree of market power per se, even a monopoly. Rather they are designed to protect the competitive process in markets, rather than individual competitors.[1] They 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. This is described by the High Court in an oft-cited passage:

> ***"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.***

1 See ***Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd*** (1989) 167 CLR 177; ***Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*** (2001) 205 CLR 1.

> ***Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective 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."***[2]

Market power is a distinct economic concept to market share. 'Market power' has been interpreted by the courts as: the ability to behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm; or, alternatively, the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, the supply cost being the minimum costs an efficient firm would incur in producing the product or service.[3] Subsection 46(3C) clarifies that a corporation may have market power even if it does not have substantial control of the market and does not have absolute freedom from constraint by the conduct of competitors, suppliers or customers. The Federal Court has previously imposed penalties for misuse of market power where a corporation had only around 16-20 per cent of the share in the relevant market.[4]

Market share is a measure of the proportion of a market that is served by a single company. Highly concentrated markets are not always detrimental to consumer welfare. This is particularly the case to the extent that they reflect the ability of larger firms to deliver services at lower overall cost, for example due to economies of scale associated with sophisticated logistics networks, and these savings are passed through to consumers. A range of other factors affecting market concentration include consumer preferences for variety, technologies relevant to the market, and planning and zoning regulations. Changes in technology over time, for example facilitating the uptake of internet shopping, have in some sectors helped small retailers overcome diseconomies associated with their size and compete more effectively with larger incumbents.

In certain circumstances, however, large market shares can contribute to companies having a large amount of market power, potentially allowing them to raise prices above what would prevail in a more competitive market, to the detriment of consumers. When assessing the level of competition in a market, other factors besides market concentration are important, including the presence of barriers to entry or expansion, competition from imports, the level of countervailing power held by buyers, the nature of key competitors, and the availability of substitute products or services. The Productivity Commission noted in its 2011 review of Australia's retail industry that market concentration by itself provides little guidance on the extent of competition in the market, and barriers to entry and the extent of market contestability, it noted, are more important.[5]

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2 ***Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Company Limited*** (1989) ATPR 40-925 at 50,010.

3 ***Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd*** (1989) 167 CLR 177.

4 ***Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited*** (No 4) [2006] FCA 21 (31 January 2006).

5 Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry, No. 56, 4 (2011), page 38.

Different parts of the retail industry have different levels of market concentration. In the groceries sector, there is a range of different estimates of the market share of Coles and Woolworths in different grocery product groups — from approximately 70 per cent for packaged groceries to 50-60 per cent for dairy and deli products; around 50 per cent for fresh meat, and up to 50 per cent for fruit and vegetables, bakery products, and eggs.[6] In 2012-13 the top two petrol retailers (Coles Express / Shell, and Woolworths / Caltex) held 48 per cent of retail petrol sales.[7]

Comparisons across countries suggest that some markets in Australia are more concentrated than in some other advanced economies. Between 2005 and 2007, the top two grocery retailers' market shares of grocery and supermarket sales were 54 per cent — in the United Kingdom they were 42 per cent; in Canada 51 per cent; in New Zealand 100 per cent; in Ireland 35-45 per cent; and in the Netherlands around 45 per cent.[8] However, the supermarket industry is evolving over time, with international competitors such as ALDI and Costco emerging as new sources of competition in recent years.

POWERS CURRENTLY AVAILABLE IN RESPONSE TO FINDINGS OF MISUSE OF MARKET POWER

The CCA provides a range of sanctions for misuse of market power under section 46 (see Attachment B).

Public enforcement — pursued by the ACCC — can be by way of the courts imposing:

- Civil pecuniary penalties (section 76);[9]
- Injunctions (section 80);[10]
- Non-punitive (section 86C) and punitive (section 86D) orders;[11]
- Disqualifying orders (section 86E);[12] and
- On behalf of other persons, various other orders as the Court thinks appropriate to compensate for, or prevent, or reduce loss or damage (section 87).

6 Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry, No. 56, 4 (2011), page 38.
7 ACCC Report into the prices, costs and profits of unleaded petrol in Australia (December 2013), page lv.
8 Productivity Commission Inquiry Report into the Economic Structure and Performance of the Australian Retail Industry, No. 56, 4 (2011), page 38.
9 The maximum civil penalty payable for a corporation is $10 million or three times the value of the conduct (whichever is greater), and if the value cannot be determined, then the fine may be up to 10 per cent of the corporation's annual turnover for involvement in that conduct
10 An injunction can restrain current or future conduct, or require respondents to take certain action.
11 Where warranted, action may be taken in the courts to obtain orders which punish the wrongdoer and deter others from breaching the Act.
12 An order can be made disqualifying a person from managing corporations.

Private enforcement can be pursued by a person (or corporation) who has suffered loss or damage due to conduct contravening section 46. That person (or corporation) can bring proceedings against that other person in the Federal Court seeking compensation, injunctions, declarations, and orders declaring all or part of a contract void.

Divestiture is not currently available to the courts as a remedy for breaches of section 46. If it were, it would likely be perceived as sitting at the high end of this framework of remedies, being a more severe penalty than most pecuniary penalties, compensation orders or injunctions.

Divestiture is available for mergers under section 81 of the CCA within three years of an acquisition having been successfully completed, if the acquisition had the effect of substantially lessening competition in a market.

Divestiture for mergers provides a natural solution to a substantial lessening of competition, as the pre-merger structural state of the market is a state the court can return to via use of the remedy, though it is not always possible to 'unscramble' a transaction post-acquisition. In the merger context, divestiture is appropriate, the Dawson Review noted, as "it deals with recent conduct (the acquisition of identifiable shares or assets) that has given rise to a breach of the Act."[13] In particular, divestiture under section 81 is not seen as a penal provision.[14]

The divestiture power for mergers has been rarely used. An example, from 1988, saw Australian Meat Holdings (AMH) ordered to divest the shares it had acquired in a competitor.[15] AMH was found to have contravened section 50 (based on a dominance test at that time) by acquiring shares in a company operating abattoirs at Bowen and Mackay. The acquisition was said to put AMH in a position of dominance in the North Queensland market for fat cattle.

The ACCC currently also has the ability to accept undertakings from companies to divest assets prior to proposed acquisitions to remedy competition concerns identified by the ACCC.[16] A recent example was the acquisition by Caltex Australia Limited of the fuel division of the Scotts Group, following the ACCC's acceptance of undertakings from Caltex to sell four retail fuel sites in South Australia and Victoria. In the absence of the undertaking, Caltex would have controlled the majority of sites in Mount Gambier including on key transport routes into and out of Mount Gambier, and two of the three retail sites in Nhill. In both towns, the ACCC concluded that the remaining independent retail sites would not have provided a strong competitive constraint on Caltex absent the undertaking.[17]

13 Review of the Competition Provisions of the Trade Practices Act (2003), page 162.
14 ***Trade Practices Commission v Australia Meat Holdings Pty Ltd*** (1988) 83 ALR 299.
15 ***Trade Practices Commission v Australia Meat Holdings Pty Ltd*** (1988) 83 ALR 299.
16 Section 87B of the ***Competition and Consumer Act 2010***.
17 <http://registers.accc.gov.au/content/index.phtml/itemId/1178514>.

ARGUMENTS FOR AND AGAINST THE INCLUSION OF A DIVESTITURE POWER

A number of previous inquiries have considered whether a divestiture power should be introduced for contraventions of section 46 of the CCA (Table 1). Arguments that have been made against a divestiture power include that divestiture:

- may eliminate economies of scale, with the courts constructing smaller firms that are less efficient and perhaps not even economically viable, detracting from economy-wide productivity;[18]
- may be seen as arbitrary, with its effects unrelated to the nature of the contravention;[19]
- may be seen as unpredictable, increasing the risk of doing business;[20]
- may "involve reshaping an entire industry with consequent disruption to all who deal with it;"[21]
- would "involve the courts in a process with inevitable political implications, something more appropriate for decision by governments than by the courts;"[22] and
- may be administratively expensive and lack timeliness, particularly as companies accused of misuse of market power may be expected to defend allegations and appeal decisions vigorously.[23]

Arguments that have been made for a divestiture power include that divestiture:[24]

- may provide a structural remedy to conduct perceived to flow from the structure of a market, rather than attempting only to remedy the problematic conduct;
- may provide a deterrent to firms, potentially stronger than other remedies currently available; and
- may provide a negotiation tool in the hands of regulators seeking non-judicial dispute resolution.

18 National Competition Policy Review (1993) page 164.
19 Review of the Competition Provisions of the Trade Practices Act (2003), page 162.
20 National Competition Policy Review (1993) page 164.
21 National Competition Policy Review (1993) page 164.
22 National Competition Policy Review (1993) page 164.
23 National Competition Policy Review (1993) page 164.
24 National Competition Policy Review (1993) page 163.

Table 1: Previous reviews that considered divestiture

Inquiry	Purpose of Inquiry	Favoured a broader divestiture power?	Rationale
Griffiths Report 1989[25]	The Committee was to 'examine and inquire into the adequacy of existing legislative controls over mergers, takeovers and monopolisation', particularly with respect to the extent of merger and monopolisation control necessary to safeguard the public interest.	No	The Committee did not favour the extension of divestiture to section 46 matters. It stated that as section 46 cases do not involve acquisitions, divestiture as a remedy for contraventions of section 46 would most likely involve an arbitrary decision about which part of the offending corporation should be divested. Such a decision could result in corporation having to divest a part of its operations that may have had little to do with the circumstances of the contravention in question.
Cooney Report 1991[26]	The Committee was to review the adequacy of merger regulation and look at the appropriate substantive test and whether compulsory notification should be introduced. They were also to examine the scope of section 46 (market dominance) and the unconscionable conduct provisions of the Act.	No	In addition to concerns about decreased efficiency as a result of divestiture, the Committee stated that in contrast to most other remedies, structurally separating a corporation would not have a predictable result.
Hilmer Review 1993[27]	The Committee was to review whether the scope of the then *Trade Practices Act 1974* should be expanded to deal effectively with anti-competitive conduct; alternate means for addressing market behaviour and structure; the transition of government regulatory arrangements to	No	The Committee considered that divestiture is appropriate in merger cases, but was not persuaded that the many disadvantages of providing a general divestiture power are outweighed by the possible advantages.[28] The advantages include: it provides a structural remedy to a structural problem, rather than attempting to merely redress particular conduct; it

25 Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs on ***Mergers, takeovers and monopolies: Profiting from competition*** (the Griffiths Report) (1989).

26 Report of the Senate Standing Committee on Legal and Constitutional Affairs on ***the Adequacy of the existing legislative controls in the Trade Practices Act over mergers and acquisitions*** (1991).

27 National Competition Policy Review (1993).

28 National Competition Policy Review (1993) page 163.

Inquiry	Purpose of Inquiry	Favoured a broader divestiture power?	Rationale
	more competitive and nationally consistent structures; the best structure for regulation including price regulation; and justification for exemptions from application of the then *Trade Practices Act 1974*.		provides a deterrent to firms; and it provides a strong negotiation tool in the hands of regulators seeking non-judicial dispute resolution.[29] However, the Committee noted that a divestiture power for misuse of market power differs from its usage in the mergers context, 'where it is clearly the acquired assets or shares which should be divested.'[30] Further, it stated that 'the severity of the remedy is such that firms facing divestiture proceedings could be expected to strenuously oppose the proceedings using every legal means to impede the enforcement agency and try to obtain a political settlement or abandonment of proceedings. In a long case the market situation can undergo fundamental changes and the original reason for bringing the case may become irrelevant'.[31]
Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the *Trade Practices Act 1974* (2002)	The Committee was established to inquire into the *Trade Practices Amendment Bill (No. 1) 2000*, which proposed amendments to section 46 and section 50 of the then *Trade Practices Act*, including a wider divestiture power.	No view indicated	The Committee did not make a recommendation as to whether there should be a wider divestiture power, due to the Dawson Review proceeding simultaneously. The Committee cited submissions noting that the proposed amendments could have adverse effects on certainty, business confidence, foreign investment, and the ability of Australian companies to compete globally.[32] Submissions also drew attention to the fact that divestiture could apply regardless of how long a company has owned the assets which have resulted in a substantial lessening of competition[33] and that it may be difficult to find suitable buyers for divested properties.[34]

29 National Competition Policy Review (1993) page 163.
30 National Competition Policy Review (1993) page 163.
31 National Competition Policy Review (1993) page 164.
32 Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the Trade Practices Act 1974 (2002), page 30.
33 Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the Trade Practices Act 1974 (2002), page 32.
34 Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the Trade Practices Act 1974 (2002), page 34.

Inquiry	Purpose of Inquiry	Favoured a broader divestiture power?	Rationale
			The Committee also noted submissions that divestiture may be useful for repeated and flagrant anti-competitive conduct, and provided a useful deterrent.[35]
Dawson Review 2003[36]	It inquired into Part IV (and associated penalty provisions) and Part VII of the then *Trade Practices Act 1974.*	No	The Review stated that divestiture was appropriate in a merger-specific context as it deals with recent conduct that has given rise to a breach of the Act. In the broader context of misuse of market power in section 46, however, it stated that divestiture was inappropriate. It stated that '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.' It continued: 'the prohibited conduct is the taking advantage, for a proscribed purpose, of that market power. Conceptually, divestiture is inappropriate in this context because there is no clear nexus between the assets to be divested and the contravening conduct.'[37]
Senate Economics References Committee Inquiry into the Effectiveness of the *Trade Practices Act 1974* in protecting Small Business (2004)	An examination of whether the then *Trade Practices Act 1974* adequately protects small businesses from anti-competitive or unfair conduct.	Yes	The Committee recommended that that divestiture be introduced for any breaches of section 46, section 46A, or any new section introduced to regulate creeping acquisitions.[38]

35 Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the Trade Practices Act 1974 (2002), page 29.
36 Review of the Competition Provisions of the Trade Practices Act (2003).
37 Review of the Competition Provisions of the Trade Practices Act (2003), page 162.
38 Senate Economics References Committee Inquiry into the Effectiveness of the Trade Practices Act 1974 in protecting small business (2004), page xix.

INTERNATIONAL EXPERIENCE

Some jurisdictions have a broader divestiture power than Australia, including the UK, USA, and Canada, and the experience in these countries is summarised in Table 2. However, these powers tend to be rarely used. In summarising the international landscape in 2006, the OECD noted that divestiture provisions for misuse of market power are "not available under the competition laws of many other OECD countries, and where they are available, they are treated somewhat sceptically by the legal frameworks in place there."[39]

39 OECD Policy Roundtable, Remedies and Sanctions in Abuse of Dominance Cases (2006), page 33.

Table 2: International experience

Jurisdiction	Type of divestiture power	Usage
United Kingdom	Under the *Enterprise Act 2002*, the Competition and Markets Authority (CMA) can conduct market investigations where there are reasonable grounds for suspecting that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts, or distorts competition in connection with the supply or acquisition of any goods or services in the UK or a part of the UK. A market investigation reference, for the conduct of such an investigation, can be made by the CMA itself or by a sectoral regulator with concurrent power. The Competition Commission (CC) and competition and certain consumer functions of the Office of Fair Trading were, on April 1 2014, transferred to the new CMA.[40] As with the CC before it, if the CMA finds one or more adverse effects on competition (AEC) in the course of a market investigation, it is under a duty to take such action as it considers reasonable and practicable to remedy, mitigate, or prevent an adverse effect on competition, or any detrimental effects on customers resulting from such AEC. It has the power, among other things, to require divestiture.[41]	The CMA's predecessor, the CC, rarely used its divestiture power after market investigations in the ten years it was available. Following its 2008/09 market investigation into BAA, the CC ordered the statutory monopoly operator of airports in the UK, to divest its airports at Gatwick, Stansted, and either Glasgow or Edinburgh.[42] In January 2014, after an investigation into the aggregates, cement and ready mix concrete markets in the UK, the Competition Commission ordered Lafarge Tarmac and Hanson to divest production plants to remedy perceived 'adverse effects on competition' caused by the concentrated market structure.[43] Recently, the CMA ordered healthcare group HCA International to sell either the Wellington Hospital together with the Wellington Hospital Platinum Medical Centre, or the London Bridge Hospital and the Princess Grace Hospital, due to structural features of weak competitive constraints and barriers to entry and expansion. This aims to introduce new competitors into the London healthcare market or strengthen existing competitors with a minor presence.[44] UK usage of divestiture differs from the one proposed by the Bill, in that the power to order divestiture follows the competition authority's market investigation into structural and/or behavioural issues in the market, with divestiture typically directed at remedying structural features adversely affecting competition, rather than a court's decision that a company engaged in anticompetitive behaviour.

40 Under Schedule 5 to the Enterprise and Regulatory Reform Act 2013 and the Schedule to the Enterprise and Regulatory Reform Act 2013 (Commencement No. 6, Transitional Provisions and Savings) Order 2014.

41 See: ***Enterprise Act 2002***, Sections 138, 161(3)(a), and Schedule 8, paragraph 13.

42 BAA Airports Market Investigation: A report on the supply of airport services by BAA in the UK (March 2009).

43 Competition Commission, Final Report on Aggregates, cement and ready-mix concrete market investigation (2014).

44 Competition and Markets Authority, Private healthcare market investigation, Final Report (2014), at 11-2.

Jurisdiction	Type of divestiture power	Usage
United States	The *Sherman Act 1890* prohibits anti-competitive mergers and monopolies.[45] Structural remedies include divestiture, a penalty used by US courts in anti-competitive conduct cases.[46]	The most commonly referred to non-merger divestiture case is the 'Bell System' divestiture (*United States v AT&T*), in which AT&T Bell entered a consent decree to divest its local operating companies but retain its long distance service and other assets.[47] The Department of Justice alleged that the Bell System companies were engaging in anticompetitive conduct to stifle competition in the telecommunications industry. The structural features of the company made divestiture a practical option. However, US cases have shown when a divestiture is carried out there can be a very long and protracted appeals process, and an industry may have changed so much in the intervening period as to render the divestiture irrelevant.[48] Courts in the US have also referred to the logistical difficulty of 'unscrambling' comingled assets following a misuse of market power.[49] Further, the effectiveness of divestitures in increasing competition has also been questioned: an academic study of divestiture in monopolisation cases in the US, concluded that 'with the lone exception of the AT&T case, there is very little evidence that structural relief was ever successful in increasing competition, raising total output, and reducing prices.'[50]

45 ***Sherman Act 1890***, Section 2.
46 ***Sherman Act***, section 4, gives courts the jurisdiction to prevent and restrain violations of section 2.
47 ***United States v AT&T***, 552 F. Supp. 131 (D.C. Circuit 1982) at page 162-3.
48 See for example ***United States v IBM (1969)*** which ran for almost 15 years before being abandoned by the Department of Justice. Over this period, there were fundamental changes in the structure of the computer industry, which made the original remedy irrelevant to the market concerned.
49 Review of the Competition Provisions of the Trade Practices Act (2003), page 162.
50 OECD Policy Roundtable, Remedies and Sanctions in Abuse of Dominance Cases (2006), page 33.

Jurisdiction	Type of divestiture power	Usage
Canada	Section 79 of the Canadian *Competition Act* (1985) prohibits a firm in a position to 'control … a class or species of business' from engaging in 'anticompetitive acts' which 'have the effect of preventing or lessening competition substantially in a market'. Where an order prohibiting illegal conduct is 'not likely to restore competition', the same provision under subsection 79(2) empowers the Competition Tribunal to make an order 'to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market'.	The divestiture power under section 79 has not been used.[51]

51 The Dominance and Monopolies Review, Law Business Research (2013), page 65 <http://www.bakermckenzie.com/files/Uploads/Documents/Publications/bk_canada_dominancemonopolies_jun13.pdf>; The Internationalisation of Unilateral Conduct Laws, ***Antitrust Law Journal (***2008), Vol 75 No 2, Campbell et al.

ATTACHMENT A — TERMS OF REFERENCE FOR THE HARPER REVIEW

Overview

An effective competition framework is a vital element of a strong economy that drives continued growth in productivity and living standards. It promotes a strong and innovative business sector and better outcomes for consumers.

The Government has commissioned an independent 'root and branch' review of Australia's competition laws and policy in recognition of the fact that the Australian economy has changed markedly since the last major review of competition policy in 1993.

The key areas of focus for the review are to:

- identify regulations and other impediments across the economy that restrict competition and reduce productivity, which are not in the broader public interest;
- examine the competition provisions of the ***Competition and Consumer Act 2010*** (CCA) to ensure that they are driving efficient, competitive and durable outcomes, particularly in light of changes to the Australian economy in recent decades and its increased integration into global markets;
- examine the competition provisions and the special protections for small business in the CCA to ensure that efficient businesses, both big and small, can compete effectively and have incentives to invest and innovate for the future;
- consider whether the structure and powers of the competition institutions remain appropriate, in light of ongoing changes in the economy and the desire to reduce the regulatory impost on business; and
- review government involvement in markets through government business enterprises, direct ownership of assets and the competitive neutrality policy, with a view to reducing government involvement where there is no longer a clear public interest need.

Scope of the review

1. The Review Panel is to inquire into and make recommendations on appropriate reforms to improve the Australian economy and the welfare of Australians, not limited to the legislation governing Australia's competition policy, in regard to achieving competitive and productive markets throughout the economy, by identifying and removing impediments to competition that are not in the long-term interest of consumers or the public interest, having regard to the following principles and the policy priorities:

1.1. no participant in the market should be able to engage in anti-competitive conduct against the public interest within that market and its broader value chain;

1.2. productivity boosting microeconomic reform should be identified, centred on the realisation of fair, transparent and open competition that drives productivity, stronger real wage growth and higher standards of living;

1.3. government should not be a substitute for the private sector where markets are, or can, function effectively or where contestability can be realised; and

1.4. the need to be mindful of removing wherever possible, the regulatory burden on business when assessing the costs and benefits of competition regulation.

2. The Review Panel should also consider and make recommendations where appropriate, aimed at ensuring Australia's competition regulation, policy, and regulatory agencies are effective in protecting and facilitating competition, provide incentives for innovation and creativity in business, and meet world's best practice.

3. The Review Panel should also consider whether the CCA and regulatory agencies are operating effectively, having regard to the regulatory balance between the Commonwealth and the States and Territories, increasing globalisation and developments in international markets, changing market and social structures, technological change, and the need to minimise business compliance costs, including:

3.1. considering whether Australia's highly codified competition law is responsive, effective and certain in its support of its economic policy objectives;

3.2. examining whether the operations and processes of regulatory agencies are transparent, efficient, subject to appropriate external scrutiny and provide reasonable regulatory certainty;

3.3. ensuring that the CCA appropriately protects the competitive process and facilitates competition, including by (but not limited to):

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

3.3.2. 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;

3.3.3. considering whether areas that are currently uncertain or rarely used in Australian law could be framed and administered more effectively;

3.3.4. considering whether the framework for industry codes of conduct (with reference to State and Territory codes where relevant) and protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy—particularly in relation to small business;

3.3.5. whether existing exemptions from competition law and/or historic sector-specific arrangements (e.g. conditional offers between related businesses and immunities for providers of liner shipping services) are still warranted; and

3.3.6. considering whether the National Access Regime contained in Part IIIA of the CCA (taking into account the Productivity Commission's recent inquiry) is adequate; and

3.4. whether competition regulations, enforcement arrangements and appeal mechanisms are in line with international best practice and:

3.4.1. foster a productive and cost-minimising interface between the Australian Competition and Consumer Commission (ACCC) and industry (for instance, through applications for immunity or merger clearances) that is simple, effective and well designed;

3.4.2. provide appropriate mechanisms for enforcement and seeking redress including;

- whether administration and enforcement of competition laws is being carried out in an effective, transparent and consistent way;
- whether enforcement and redress mechanisms can be effectively used by people to enforce their rights—by small businesses in particular; and
- the extent to which new enforcement powers, remedies or enhanced penalties might be necessary and appropriate to prohibit anti-competitive conduct, and

3.4.3. can adequately address competition issues in emerging markets and across new technologies, particularly e-commerce environments, to promote entrepreneurship and innovation.

4. The Review Panel should inquire into and advise on appropriate changes to legislation, institutional arrangements and other measures in relation to the matters below, having regard to the impact on long-term consumer benefits in relation to value, innovation, choice and access to goods and services, and the capacity of Australian business to compete both domestically and internationally. In particular, the Review Panel should:

4.1. examine the structure and behaviour of markets with natural monopoly characteristics with a view to determining whether the existing regulatory frameworks are leading to efficient outcomes and whether there are opportunities to increase competition;

4.2. examine whether key markets — including, but not limited to, groceries, utilities and automotive fuel — are competitive and whether changes to the scope of the CCA and related laws are necessary to enhance consumer, producer, supplier and retailer opportunities in those markets and their broader value chains;

4.3. consider alternative means for addressing anti-competitive market structure, composition and behaviour currently outside the scope of the CCA;

4.4. consider the impact of concentration and vertical integration in key Australian markets on the welfare of Australians ensuring that any changes to the coverage and nature of competition policy is consistent with national economic policy objectives;

4.5. identify opportunities for removing unnecessary and inefficient barriers to entry and competition, reducing complexity and eliminating administrative duplication; and

4.6. consider ways to ensure Australians can access goods and services at internationally competitive prices, including examining any remaining parallel import restrictions and international price discrimination.

5. The Review Panel should also examine whether government business activities and services providers serve the public interest and promote competition and productivity, including consideration of separating government funding of services from service provision, privatisation, corporatisation, price regulation that improves price signals in non-competitive segments, and competitive neutrality policy.

6. The Review Panel should consider and make recommendations on the most appropriate ways to enhance competition, by removing regulation and by working with stakeholders to put in place economic devices that ensure a fair balance between regulatory expectations of the community and self-regulation, free markets and the promotion of competition.

The Review Panel should consider overseas experience insofar as it may be useful for the review.

The Review Panel may, where appropriate, draw on (but should not duplicate or re-visit) the work of other recent or current comprehensive reviews, such as the Commission of Audit and the Cost-Benefit Analysis and Regulatory Review for the National Broadband Network.

The Review Panel should only consider the Australian Consumer Law (Schedule 2 of the CCA) and corresponding provisions in Part 2, Division 2 of the Australian Securities and Investments Commission Act 2001, to the extent they relate to protections (such as from unfair and unconscionable conduct) for small businesses.

Process

The Review Panel is to ensure thorough engagement with all interested stakeholders. At a minimum, the Review Panel should publish an issues paper, hold public hearings and receive written submissions from all interested parties.

The Review Panel should subsequently publish a draft report and hold further public consultations, before providing a final report to the Government within 12 months.

ATTACHMENT B — ANTI-COMPETITIVE CONDUCT UNDER PART IV

This attachment summarises the classes of anti-competitive conduct that are prohibited under Part IV of the CCA.

Cartel conduct (sections 44ZZRF, 44ZZRG, 44ZZRJ and 44ZZRK)

- The cartel provisions prohibit a contract, arrangement or understanding which has the effect of creating a cartel between parties who would otherwise be competing against each other. A cartel is a formal (explicit) agreement among competing firms to coordinate conduct.

- The CCA definition of 'cartel provision' provides for four varieties of cartel conduct: price fixing; output restrictions; allocating customers, suppliers or territories; and bid rigging.

- There are both criminal and civil penalties available for cartel conduct.

Price signalling (Division 1A)

- Private price disclosures to competitors are prohibited ***per se***; certain other disclosures that are not in the ordinary course of business are prohibited if they substantially lessen competition.

Horizontal restraints (section 45)

- Section 45 prohibits contracts, arrangements or understandings that restrict dealings or substantially lessen competition. By colluding with one another, competitors who do not individually have market power are able to distort the competitive process. For example, competitors reaching agreement about the price to be charged for goods and services or who will supply particular segments of the market.

Misuse of market power (section 46)

- Section 46 prevents corporations with a substantial degree of market power from taking advantage of that power for the purposes of eliminating or substantially damaging a competitor, preventing the entry of a person into that or any other market or deterring or preventing a person from engaging in competitive conduct in that or any other market.

  – A business has substantial market power when its activities are not significantly constrained by competitors, suppliers or customers. Subsection 46(3C) specifies that a business may have market power even though it does not have substantial control of the market and does not have absolute freedom from constraint by the conduct of competitors, suppliers or customers.

Predatory pricing (subsection 46(1AA))

- Subsection 46(1AA) prohibits businesses with a substantial market share (having regard to the number and size of its competitors in the market) from selling goods or services for a sustained period at a price below their relevant cost of supply, for an anti-competitive purpose.

Exclusive dealing (section 47)

- Section 47 prohibits vertical restraints referred to as 'exclusive dealing'. Vertical restraints involve dealings between firms operating at different stages of the production process. Vertical restraints can be entered into for a variety of purposes, many of which will not be anti-competitive but are in fact designed to promote the competitiveness of the firm.

- The CCA prohibits per se third line forcing, which is a specific form of exclusive dealing that involves the supply of goods or services on condition that the purchaser buys goods or services from a particular third party, or a refusal to supply because the purchaser will not agree to that condition.

- All other forms of exclusive dealing conduct are prohibited if the conduct has the purpose, effect, or likely effect of substantially lessening competition.

Resale price maintenance (section 48)

- Section 48 of the CCA prohibits resale price maintenance, which is conduct by a supplier which is designed to dictate the minimum price for the resale of its goods or services by any party which acquires those goods or services. It is also illegal for a supplier to cut off, or threaten to cut off, supply to a reseller (wholesale or retail) because they have been discounting goods or advertising discounts below prices set by the supplier. It is not a contravention to state a recommended resale price so long as it is just that—recommended.

- Resale price maintenance is prohibited on a per se basis, as the prohibition refers exclusively to the conduct of the supplier of goods. The purpose or effect of that conduct is irrelevant in determining whether section 48 has been breached, as is the degree of market power held by the supplier.

Mergers and acquisitions (section 50)

- Section 50 prohibits mergers or acquisitions that would result in a substantial lessening of competition.

  – The ACCC has primary responsibility of review in regard to mergers in the Australian market. When undertaking a review the ACCC assesses each merger on its merits according to the specific nature of the transaction, the industry and the particular competitive impact likely to result in each case.

- Parties can proceed with a merger without seeking any regulatory consideration from the ACCC, however, this may put merger parties at risk of the ACCC or other interested parties taking legal action under section 50. To avoid this, there are three avenues available for firms to have their proposed acquisition or merger considered.
  - Formal ACCC clearance: enables an acquirer to apply to the ACCC for clearance of a proposed acquisition which, if granted, provides protection to the acquirer from legal action under section 50. It is rarely used in practice.
  - Informal ACCC clearance: parties may wish to seek the ACCC's informal advice on the effects of the proposed merger and, by implication, whether the ACCC is likely to challenge the merger should it proceed. It does not provide protection from legal action under section 50. In practice, informal clearance is the primary method used by firms.
  - Australian Competition Tribunal authorisation: a firm can also make an application to the Tribunal under section 95AT of the CCA. The Tribunal may grant authorisation if it is satisfied that the proposed merger is likely to result in such a benefit to the public that the merger should be allowed to occur. If authorisation is granted, neither the ACCC nor any other party may take action under section 50 in respect of the acquisition.