Senate Standing Committee on Economics

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Budget Estimates

1 June – 3 June 2010

Question: BET 115

Topic: Sherman Antitrust Act & the Clayton Antitrust Act

Hansard Page: E70-71 (03/06/2010)

Senator JOYCE asked:

Senator JOYCE—Are you aware of the Sherman Antitrust Act and the Clayton Antitrust Act in the United States?

Mr Deitz—Yes, I am.

Senator JOYCE—Are their divestiture powers stronger than ours?

Mr Deitz—Again, I would have to take that on notice.

Senator JOYCE—You would? Come on.

Mr Deitz—The one thing I would refer you to is that the 2003 Dawson review of the Trade Practices Act did consider the role of a divestiture power as a remedy for breaches of section 46, and that review did conclude that there was no such role. That comes on the back of the 1993 Hilmer review of the Trade Practices Act, which also considered these issues and, on balance, recommended against having divestiture powers in the Trade Practices Act. It also concluded on that basis that such a power was better held by governments through legislation rather than through an administrative authority such as the ACCC.

Answer:

In Australia, the *Trade Practices Act 1974* (TPA) provides for divestiture powers in relation to mergers and acquisitions (section 50). In the United States, as the Dawson Review noted, divestiture is available to redress a broader array of anti-competitive conduct than in Australia.

Although there is no express mention of 'divestiture' in the Sherman Act 1980 (US) or the Clayton Act 1914 (US), the Treasury understands that US courts have the ability to hand down equitable remedies in anti-competitive conduct cases - including

divestiture where appropriate. However, the Treasury understands that divestiture powers are used predominantly in relation to mergers and acquisitions.

The Dawson Review also noted that divestiture is a remedy which is much more suited to dealing with anti-competitive mergers which bring together initially separate enterprises, rather than dealing with the conduct of a unified enterprise, as would be the case if divestiture was applied to other breaches of competition laws, such as a misuse of market power (section 46 of the TPA).

In practice, the Treasury understands that divestiture is not frequently ordered as a remedy in US anti-competitive conduct cases other than those relating to mergers and acquisitions. The most commonly referred to non-merger case is the 'Bell System' divestiture (*United States v AT&T*), settled in 1982, in which Bell agreed to divest its local exchange service operating companies but retained its long distance service and other assets.