ATTACHMENT – relating to:
Section D.16 & D40 – Pages 29 & 35 of Submission

SUBMISSION TO THE SENATE LEGAL AND CONSTITUTIONAL REFERENCES COMMITTEE CONCERNING PROPOSALS TO AMEND

the

TRADE PRACTICES ACT

by

REVERSING THE ONUS OF PROVING PURPOSE IN S46

and by

ADDING A GENERAL REMEDY OF DIVESTITURE

To the Secretary,

Legal and Constitutional Reference Committee,

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Executive Summary

1. This submission addresses two proposals before the Senate Legal and Constitutional References Committee to amend the Trade Practices Act, by:

   (a) reversing the onus of proof, of a corporation's "purpose", in cases brought by the Australian Competition and Consumer Commission alleging breach of s.46 of the Trade Practices Act. S.46 prohibits a corporation, which possesses a substantial degree of power in a market, from taking advantage of that power, for one of various anti-competitive purposes. The reform proposal is to amend s.46 so that where the Commission can show that a corporation:

   - possesses substantial market power; and
   - has "taken advantage" of that power,

   the defendant corporation should then bear the onus of proof that its purpose was not an illegal purpose as prescribed under s.46.

   (b) The second proposal is that the Australian Competition and Consumer Commission be given the power to apply to the Federal Court seeking an order for the "break up" or dissolution of any corporation, where the Commission alleges that the

corporation's ownership of assets or shares is likely to substantially lessen competition.

2. This submissions argues that both reform proposals are misconceived and should not be adopted.

3. **Reversal of onus - s.46**

The proposal to reform s.46 is not warranted because:

- the proposal will not increase competition in Australian markets and, to the contrary, is likely to be damaging to the Australian economy and to regional economies throughout Australia;
- the ACCC does not need the additional power suggested, in order to effectively enforce s.46 of the Act;
- the proposal is contrary to principle, in that any government body should, like any other citizen, enjoy no privileges or preferential position before the courts of the land;
- further, a government body should bear the same burden of proving its case in any matter which it brings before the court; and
- the proposal is not workable, in the sense that, under s.46, it is not practically possible to disentangle the issue of determining the "purpose" of conduct engaged in by corporation, from the issues of whether the corporation possesses, and is taking advantage, any "substantial degree of market power" which it may enjoy in any market.

4. **Breaking up corporations**

The second proposal is novel and would go much further than any known foreign precedent. It is suggested that the Commission be empowered to apply to the court for an order breaking up or dissolving any major Australian corporation in any case where the Commission contends that the corporation's ownership of assets is anti-competitive. Such cases would not be predicated on the corporation first having been shown to have acted illegally or to have misused its position. Nor would such cases be limited to attacking only the largest corporation in any particular market - the section would allow multiple applications to break up the second largest or third largest players in a market in addition to the largest.

5. This "break up" proposal is novel and likely to raise extreme concerns to foreign investors and so be very damaging to the Australian economy. The need for such radical surgery has not

been demonstrated. Even the more limited "break up" powers of the courts in the United States under their anti-trust laws have posed a series of practical problems and have been very rarely resorted to in recent times. In the US, only a handful of cases since 1950 have resulted in break up orders and the practical benefits of these orders continue to be controversial.

6. For these reasons, neither proposal should be supported by this Committee.

Introduction

7. The object of s46 of the Trade Practices Act is to foster competition for the benefit of consumers.

8. Competition is often brutal. It is the intention of the Trade Practices Act that it should be so.

> . . . the object of s46 is to protect the interest of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. 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 s46 is designed to foster.[1]

9. Competition delivers consumers the benefits of lower prices and better service. It is accepted that competitors who are unable to meet the competition may not survive:

> Traders commonly fix prices with the intention of diverting to themselves custom which would otherwise flow to their competitors. In doing so, they realise that, if they are successful, the result will be to damage - in some cases, even to eliminate - those competitors. But such conduct is the very stuff of competition, the result which Part IV seeks to achieve.[2]

The origin of the present proposal

10. The present proposal originates from the 1999 report of the Joint Select Committee on the Retailing Sector *Fair Market or Market Failure? A Review of Australia's Retailing Sector*.

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[1] *Queensland Wire Industries Pty Limited v. The Broken Hill Proprietary Company Limited* (1988) 167 CLR 177, Mason CJ and Wilson J at 191.

[2] *Eastern Express Pty Limited v. General Newspapers Pty Limited* (1991) 30 FCR 385, Wilcox J at 409 - 410.

The Committee concluded that competition in the retailing sector was delivering real benefits to Australian consumers:-

> At the consumer level, competition in the retailing sector appears to be healthy, with retailers competing with one another on price and choice. This is evidenced by declining real prices of many grocery items over the last decade, and the massive expansion in product range to the point where major supermarkets now offer over 40,000 different items in their large stores . . . In recent years, the retailing sector has had to react to changes in consumer demand patterns, brought about by shifting demographics, the ageing population and generally smaller households. In addition, the higher participation of women in the workforce has driven demand for time-saving products and longer trading hours, which has been assiduously been promoted by the major chains. Innovative retailers have reacted to these demands with consumers being the major beneficiaries from:
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> - deregulated trading hours;
> - a greater product choice;
> - lower prices; and
> - the convenience of one stop shopping
>
> Consequently consumers have not been a force in the establishment of this inquiry.[3]

11. The matter at issue in the Committee's inquiry was the growth of the large supermarket chains, and the implications this had for the ongoing viability of small and independent retailers, particularly those in rural and regional Australia.[4] Submissions to the inquiry claimed that the growth of the major chains over the last 20 years had been at the expense of the independents whose market share and profitability had declined. The viability of the independent sector was said to be at risk.[5] The independents were, therefore, seeking to change the policy underpinning the Trade Practices Act so that they would be protected from the full force of a

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[3] *Fair Market or Market Failure? A Review of Australia's Retailing Sector* paragraphs 1.7 - 1.9.

[4] Ibid paragraph 1.1.

[5] Ibid paragraph 3.1.

competitive market.

No examination of the structural family changes in the retail market place as a result of lifestyle/income or working hours changes was undertaken. Nor was the success of new format retail outlets to service these new developments considered.

12. Whilst the Committee made a number of recommendations, it deferred consideration of two of the independents' more radical proposals. The first was a proposal to reverse the onus of proof in all s46 cases. The second was a proposal to include divestiture of assets as an additional remedy for contravention of part IV, IVA, IVB or V of the Trade Practices Act. The Committee recommended that the Parliament reconstitute the Committee in three years time to review the progress of its recommendations and to determine whether further legislative changes were required.

13. On 8 August 2001, when the Senate instructed its Legal and Constitutional References Committee to inquire and report by April 2002:-

> Whether the *Trade Practices Act, 1974* should be amended to:
>
> (a) provide for a reversal of the onus of proof under section 46 in actions brought by the Australian Competition and Consumer Commission (ACCC) where it can first be shown that the corporation has a substantial degree of market power and has taken advantage of that power;
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> (b) give the ACCC a power to order divestiture where an ownership situation exists that has the effect of substantially lessening competition.[6]

14. Whilst the Joint Committee had originally considered a proposal to reverse the onus of proof in all s46 cases, the proposal now under consideration is that it be reversed only in s46 cases brought by the ACCC.

Operation of s46

15. Section 46 acknowledges that, along with the benefits which flow to consumers from competition, there are circumstances in which market power can be misused. The section operates when a corporation with a substantial degree of power in a market takes advantage of that power for one of three proscribed purposes:

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[6] *Hansard* 8 August 2001 page 25809

(a) eliminating or substantially damaging a competitor of the corporation in a relevant market;

(b) preventing the entry of a person into a relevant market; or

(c) deterring or preventing a person from engaging in competitive conduct in a relevant market.

16. The section seeks to distinguish between competitive conduct by which competitors legitimately seek to "injure" one another and competitive conduct by which an established competitor seeks to take advantage of its market power to prevent a competitor competing effectively. The former is "the very stuff of competition"[7]; the latter undermines competition.[8]

17. The concepts of market and market power are intertwined. Too narrow a description of the relevant market creates the appearance of more market power than in fact exists; too broad a description creates the appearance of less market power than in fact exists.[9] The question of market definition looms large where the relevant market is taken to be a typical Australian country town, which was the focus of much of the inquiry of the Joint Select Committee on the Retailing Sector.

18. An example illustrates the problem. If a country town and its surrounding area are taken to be the relevant market for the services provided by stock and station agents, and there are two stock and station agents in the town, agent A with 40% of the market and agent B with 60%, both may be taken to have a substantial degree of market power, and it may fairly be said that their every competitive act is done with a view to damaging one another.

19. If, after two years, agent A has built its market share to 60%, leaving agent B with 40%, does B have a claim to invoke s46 to secure relief from the competition provided by agent A? Is the position different if A moves to 80% of the market and B looks certain to be eliminated? Is this a case of legitimate competition eliminating an ineffective competitor or is it an illegitimate use of market power?

20. Section 46 answers this question by reference to the purpose of agent A's conduct which enabled it to win market share from agent B, and by reference to the nature of that conduct. If A's conduct was the routine conduct of an efficient competitor, there should be no cause for

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[7] *Eastern Express Pty Limited v. General Newspapers Pty Limited* (1991) 30 FCR 385, Wilcox J at (insert page number).

[8] *Queensland Wire Industries Pty Limited v. The Broken Hill Proprietary Company Limited* (1988) 167 CLR 177, Mason CJ and Wilson J at 191.

[9] Ibid, Mason CJ and Wilson J at 187 -188.

complaint, but if the conduct was undertaken for the purpose of eliminating or substantially damaging B, or for the purpose of deterring or preventing B from engaging in competitive conduct, - and A used its market strength - B will be entitled to protection under s46 of the Trade Practices Act.

The policy behind s46

21. This example highlights a policy dilemma which the High Court recognised in *Queensland Wire*, namely that it is difficult to distinguish "vigorous competition" from "monopolistic practices". As Dawson J said, "both here and in the United States the search continues for satisfactory basis upon which to make the distinction".[10]

22. The proposal now under consideration is that the distinction should henceforth be made on the footing that A's conduct will be deemed to be a misuse of market power unless A proves that its conduct was not for one of the proscribed purposes.

23. The proposal would be a radical change. It would require successful competitors to be in a position to justify all of their competitive conduct against the three s46 criteria, so as to prove that the conduct was directed at competitors generally and not at harming individual competitors. This will not help A, since B is the only competitor in the market in which A operates. A's conduct must, by definition, therefore, be directed at "injuring" B.

24. The proposal which the independent retailers originally made to the Joint Select Committee on the Retailing Sector was not intended to promote competition for the benefit of consumers. It was intended to secure the position of the independents against the major retailers. It was intended to arm them with a weapon to attack the major retailers and so curtail their competitive conduct. The effect of the proposal then made could only have been to reduce competition generally to force all retailers to operate at the level of the least efficient and least competitive in terms of price, service, value and convenience and hence to reduce the benefits which flow to consumers from a healthy, competitive market.

25. Not surprisingly, that proposal has been put aside.

26. The proposal now under consideration is limited to s46 actions brought by the ACCC. It will give the ACCC an “anti-competitive” forensic advantage in such actions which will not be available to other potential applicants.

27. Is there any justification for such a proposal?

The view of the ACCC

28. The Chairman of the ACCC gave evidence to the Joint Select Committee on the Retailing Sector. His support for the proposal was lukewarm:-

> There may be scope for some further strengthening of section 46 in terms of that kind of thing; that, if the effect can be shown, then there is a reverse onus of proof on purpose. That would essentially keep it to purpose. There is a problem at the moment with the test, in that the Commission or private litigants have to embark on a cops and robbers type search for purpose in particular cases. They are just not going to succeed in that, even though one has a fair idea that the purpose is anti-competitive. So there is a case for reversing the onus without departing from the underlying notion that, in the end, it would be a purpose test. [11]

Proof of purpose under the present law

29. The ACCC already has an extensive armoury of forensic weapons available for use in what Professor Fels describes as the "cops and robbers type search for purpose".

30. The power of its armoury is enhanced by the device of treating a contravention of s46 as giving rise to "pecuniary penalties" under s76 of the Trade Practices Act, and not to fines.[12] Although the penalties for corporations and individuals directly involved in contraventions of s46 are enormous ($10 million and $500,000 per offence, respectively)[13], the legislation sets up the fiction that the process by which the penalties are imposed is not a criminal process.

31. This means that when the ACCC takes action alleging a contravention of s46, the action is not a criminal prosecution. It takes the form of a civil action. The rules of civil procedure apply. Proof is on the lower standard of the “balance of probabilities” (ie “more likely than not to have occurred”). The ACCC may take advantage of all the procedures available in civil litigation when attempting to prove a contravention of s46. These include access to all the defendant's relevant internal files and workings, and the elimination of any right to silence. The defendant is compelled by the intrinsic rules of a civil trial to give evidence and to be cross examined about the purposes of the conduct. In addition, it has unique powers to obtain information, documents and evidence before trial conferred by s155 of the Trade Practices Act.

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[10] Ibid, Dawson J at 202.

[11] *Fair Market or Market Failure? A Review of Australia's Retailing Sector* paragraph 6.31.

[12] Contrast s79 of the Trade Practices Act, which imposes criminal sanctions for offences against Part V of the Act.

[13] And will also include possible divestiture, if the second proposal under consideration is adopted.

32. The result is that, when the ACCC prosecutes an alleged contravention of s46, it has available to it a raft of powers and forensic advantages which are not available to other litigants or to other prosecutors, as the following chart illustrates:-

Power available to the ACCC when claiming breach of s46	**Available to other litigants claiming breach of s46?**	**Available in normal criminal prosecutions?**
Section 155 power to require information to be furnished	No	No
Section 155 power to require production of documents	No	No
Section 155 power to conduct oral examination under oath	No	No
Section 155 power to enter premises and inspect and copy documents	No	Yes, by search warrant
Power to require discovery of documents	Yes	No
Power to administer interrogatories	Yes	No
Advanced notification of the case of the respondent/accused	Yes	No
Proof by adverse inference if the respondent/accused does not offer evidence (i.e. no right to silence)	Yes	No
Proof on the balance of probabilities	Yes	No, proof beyond reasonable doubt is required.

33. It goes without saying that, whenever the ACCC decides to prosecute an alleged contravention of s46, it uses whichever of these powers it feels will best advance its case.

34. The suggestion that the ACCC should be armed with the additional forensic advantage which reversal of the onus of proving purpose would give must be assessed against the fact that it already has powers which far exceed those available to ordinary civil litigants and to ordinary prosecutors. If s46 litigation does seriously involve a "cops and robbers type search for purpose", the ACCC already has a huge advantage over the normal cop.

35. With all these forensic advantages, it would be natural to expected that the ACCC enjoys a high success rate in litigation under s46.

36. That is the case. Since the High Court decided *Queensland Wire* in 1988, there have been 4 cases reported in which the ACCC or its predecessor, the Trade Practices Commission, have prosecuted alleged contraventions of s46. They succeeded in all 4 cases.[14] The experience of the ACCC in the court room does not suggest that it has had any difficulty winning s46 cases.

37. Nor is there a case for arming the ACCC with special forensic powers because it is somehow at a disadvantage as a litigant. The ACCC is an experienced, well-advised and well-funded litigant, as its track record in s46 cases demonstrates. There is no sense in which the ACCC is a litigation underdog which deserves to have the scales tipped in its favour - indeed, the evidence is that the scales may already be tipped too far that way.

Need for caution

38. There are 2 further reasons why a cautious approach should be adopted to the proposal now under consideration.

39. First, the proposal surfaced because of concerns about the state of competition in the retail sector, particularly in smaller towns. The major players in the retail sector are presently large corporations and it may be tempting to think that they would not be much affected if s46 were strengthened. If the proposal is adopted, however, it will operate in every sector of the economy, often with unexpected results, particularly in smaller towns. In the example of the stock and station agents already given, the result might be that the competitive activities of the efficient agent would be curtailed. If there is a general softening of competition as more efficient competitors moderate their competitive conduct to accommodate a stronger s46, this will be to the detriment of all consumers, including the consumers in rural and regional Australia whom the proposal is intended to benefit. A further issue is that such a change will operate across the board and affect regional Australia in a range of ways. Many farmers and producers benefit by selling through or via large trading organizations which have substantial market power in respect of their commodity and which operate in both domestic and

[14] *TPC v Carlton & United Breweries Limited* (1990) 24 FCR 532; *TPC v CSR Limited* (1991) ATPR 41-076; *ACCC v Rural Press Limited* [2001] FCA 1065; and *ACCC v Boral Limited* [2001] FCA 30.

international markets. Past exemptions for these bodies from Trade Practices legislation have largely been eliminated. The dramatic change to section 46 suggested by this proposal will have significant impacts on the returns enjoyed by producers from these bodies, which would face significant risks of challenge to their market conduct by this proposal.

40. Second, although it is perhaps unfashionable to say it nowadays, the requirement that the Commonwealth bear the onus of proving in court that a citizen has contravened a statute stands as an important protection for the citizen against the power of the Commonwealth. In the case of s46 of the Trade Practices Act, that protection has already been eroded. Great caution should be exercised before any further erosion is permitted.

Summary of s.46 proposal

41. In summary:-

(a) there is nothing to suggest that the ACCC is experiencing any difficulty in proving purpose under s46 as it presently stands;

(b) it is not a sufficient reason for reversing the onus of proof of an element of an action carrying pecuniary penalties of $10 million that it will make it easier for the ACCC to carry out the "cops and robbers type search for purpose";

(c) there is no reason to suspect that the proposal will lead to increased competition in the retail sector, or in any other sector of the economy;

(d) the ramifications of the proposal are uncertain - if it is implemented, it may lead to unexpected consequences in other sectors of the economy, including those in rural and regional Australia; and

(e) it has not been demonstrated that the proposal, if implemented, would promote competition for the benefit of consumers.

Divestiture and "Breaking Up" Large Corporations

42. The second proposal would give the ACCC power to seek the break up or dissolution of large companies. Companies such as Telstra, Qantas or the major banks and many others could be affected. The proposed section 50AA of the *Trade Practices Act* will enable the ACCC to apply to the Federal Court for divestiture orders if a corporation "owns" shares or assets resulting in a substantial lessening of competition. The proposed new section states:

"If a corporation:

(i) *owns shares in the capital of a body corporate; or*

(ii) *owns assets of a person,*

and the ownership has the effect of substantially lessening competition in a market, the ACCC may apply to the court for an order that the corporation divest itself of the shares or assets."

43. It is important to note, from this proposal, the following features:

(a) an ACCC application may be made at any time, that is, irrespective of whether the company which is the subject of the application recently acquired any shares or assets or not. Hence unlike the current provisions of Trade Practices Act, divestiture may be the subject of an application by the ACCC merely from circumstances of "ownership" of assets, no matter how long those assets may have been owned by the relevant corporation.

(b) the proposal is that the Court may order that the corporation divest itself of "the shares or assets" which are the "shares or assets" which, have "the effect of substantially lessening competition in a market".

The effect of such a provision is that <u>all</u> of the shares and assets of the corporation which lead to the relevant effect on competition must be disposed of. The section does not propose that the Court may order divestiture of "part of" the shares or assets or "so much of" the shares or assets of a corporation as may be necessary to ameliorate the effects of ownership; rather the entire asset structure, or all the shares of a relevant subsidiary may be the subject of an application. This could have startling consequences - for the first time anywhere in the world, a company which has a monopoly could be broken up, irrespective of whether it acted illegally or engaged in any "good" conduct or bad.

(It is unclear what is meant by the expression that the corporation must divest itself of "assets of a person", - presumably the assets are owned by a corporation and are not the assets of a third person?)

44. It may also be noted that the section 50AA does not address itself to "control" of assets or shares but rather "ownership". This has a number of consequences - arrangements regarding "control" would lie outside section 50AA. The Court would be faced with an inquiry as to whether the mere fact of "ownership" of assets or shares, of itself, has the "lessening effect" on competition in a market. It would be more natural to expect that it is the method of control and management of assets and shares that is likely to lead to the effects on competition and a market, not the fact of ownership. As such in its present form, the section is unlikely to achieve the (radical) means advocated for by its proponents.

45. **Overseas Experience**

Of more fundamental concern however, is that the history of similar powers held by the courts in the United States under anti-trust legislation have shown the substantial difficulties that arise when a court is faced with a decision whether to order a divestiture of an asset. These difficulties include the damage that can be carried out to the efficient operation of businesses; the time delays, costs and difficulty of attempting to devise divestiture order; and the fact that on the evidence there has often been little likelihood of a viable competitor "arising from the ashes".

46. In Australia, under section 81 of the *Trade Practices Act*, a court is permitted to order divestiture, upon application by the ACCC, if a *merger or acquisition* is in breach of section 50. Even in these cases, Australian courts have been reluctant, or unable, to fashion divestiture orders which satisfactorily resolve competition issues arising from such breaches.

47. The *Australia Meat Holdings* decisions[15] illustrate the problems inherent in divestiture. Sheppard J stated:

> *"I refer also to an article, 'Aspects of the Trade Practices Bill 1973' by Ms JR Levine, 47 ALJ 679 (1973), in which the author said (p709):*
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> *'Once a merger has been completed, it is very difficult, costly, and time-consuming to 'undo' it. During the course of litigation, the acquiring firm may be in a position to strip the acquired firm of key assets and management, thus rendering divestiture of the acquired firm as a viable entity highly unlikely. Even if divestiture is finally achieved, U.S. experience demonstrates that it is unlikely to prove a successful remedy. For one thing divestiture or dissolution remedies provide great opportunities for delaying tactics. Enforcement officials, at least in the U.S., generally seek divestiture of specific assets, or of lines of commerce, rather than a 'going concern'. In this kind of partial divestiture there is little likelihood of a viable competitor arising from the ashes. This has led a number of commentators to conclude that 'comprehensive implementation of meaningful structural*

[15] *Trade Practices Commission v. Australia Meat Holdings Pty Ltd & Ors* (1988) 83 ALR 299; *Australia Meat Holdings Pty Ltd v. Trade Practices Commission* (1989) 11 ATPR 40-032.

reorganisation seldom occurs'. For these reasons, it appears vital to attack questionable mergers before completion.' "[16]

48. Heydon also notes the difficulty with ordering divestiture:

"The remedy of divestiture is easier to administer where companies have been kept apart and managed separately (Brown Shoe Co Inc v US 370 US 294 (1962)). It is harder where the companies are fused and time has passed (US v E I Du Pont de Nemours & Co 366 US 316 (1961)) In these circumstances making a divestiture order amounts to creating a new firm; this is a hard task without the constraints imposed by s 81 in requiring that the order must relate to the shares or assets acquired. It may be hard to find a buyer for the divested shares or assets. Or it may be that the would-be buyer is a firm not independent of the acquirer, or a horizontal competitor, or vertically related to it, or a firm incapable of successfully operating what it acquires. The complexity, cost and time employed in enforcement of divestiture orders in the United States has been great. Divestiture may damage the acquirer's efficiency and injure those who deal with it: indeed it may injure the whole economy. It may result in supervision by the Commission or the courts of a firm for long periods, and this is inconsistent with the intention of the Act to promote private competition as against a system of regulation of industries or nationalised industries."[17]

49. The United States' experience is instructive and also indicates the difficulty of ordering divestiture and the severity of the remedy.

"Since 1890, the courts have ordered structural reorganisation in only 33 section 2 (of the Sherman Act) cases - all but 8 of them before 1950.[18]

A few of the orders were drastic, such as the separation of Bell

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[16] *Australia Meat Holdings Pty Limited v. Trade Practices Commission* (1989) ATPR ¶40-932

[17] Heydon JD, *Trade Practices Law*, p 4711

[18] See Richard A Posner, "A Statistical Study of Anti-Trust Enforcement" Journal of Law and Economics, Vol. 13 (October 1970), p406; and US Department of Justice, Report of the Attorney-General's Committee to Study the Anti-Trust Laws (Washington: USGPO, 1955), p354n.

local operating companies from AT&T, the division of New Jersey Standard Oil into 33 pieces, and the splitting of du Pont into 3 separate powder manufacturing enterprises, but most have been mild, such as the order requiring Alcoa shareholders to shed their stock interest in Aluminium Ltd of Canada or the dissolution of A&P's food brokerage subsidiary. One reason for the relative paucity of major reorganisations is a natural reticence by the Federal Courts to impose what were considered harsh remedial measures without compelling cause.[19]"

50. It is important to note that most divestiture orders have been made in the context of anti-competitive mergers and acquisitions. However, section 50AA will operate to require divestitures by single, unitary companies, far removed from any merger or acquisition. Indeed, in the recent Microsoft decision[20], the Court of Appeals noted the difficulty of splitting up a unitary company:

> *"On remand, the District Court must reconsider whether the use of the structural remedy of divestiture is appropriate with respect to Microsoft, which argues that it is a unitary company. By and large, cases upon which plaintiffs rely in arguing for the split of Microsoft have involved the dissolution of entities formed by mergers and acquisitions. On the contrary, the Supreme Court has clarified that divestiture 'has traditionally been the remedy for Sherman act violations whose heart is inter-corporate combination and control' (du Point 366 US at 329), and that '[c] complete divestiture is particularly appropriate where asset or stock acquisitions violate the anti-trust laws' (Ford Motor Co, 405 US at 573).*
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> *One apparent reason why courts have not ordered the dissolution of unitary companies is logistical difficulty. As the Court explained in United States v. Alcoa, 91F Supp 333, 416 (SDNY 1950), a 'corporation, designed to operate effectively as a single entity, cannot readily be dismembered of parts of its various operations without a marked loss of efficiency'. ... With reference to those corporations that are not acquired by merger and acquisition, Judge Wyzanski accurately opined in United Shoe:*

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[19] Scherer & Ross "Industrial Market Structure and Economic Performance", 3rd Ed (Boston, 1990), p480.

[20] *United States of America v. Microsoft Corporation,* United States Court of Appeal, No. 00-5212, 28 June 2001.

> *'United conducts all machine manufacture at one plant in Beverly, with one set of jigs and tools, one foundry, one laboratory for machinery problems, one managerial staff, and one labour force. It takes no Solomon to see that this organism cannot be cut into three equal and viable parts.' "*

51. There are numerous other difficulties in splitting up a unitary company.

52. For example, a divestiture order may have adverse effects on third parties, such as creditors, minority shareholders and employees, if a corporation is required to divest itself of significant assets.

53. Further, divestiture orders may require the court to supervise the long term effects of the order. For instance, the *El Paso* divestiture sage in the United States involved litigation from the early 1960s to the late 1970s. To require the court to assume such a role is undesirable from a public policy perspective. It would require a high level of economic and commercial sophistication for the courts to supervise a complex divestiture order; it would be extremely expensive and very time-consuming.

54. In Australia, the courts have signalled their reluctance to get involved in on-going supervision. In *Australia Meat Holdings*[21], Sheppard J referred to:

> *"... the Court's reluctance to become overly concerned in the supervision of orders made by it which may require some ongoing recourse to the Court if matters do not go as expected."*

55. In order to be an effective remedy, the disposal of assets or shares by a corporation depends on the existence of an appropriate purchaser of such assets or shares. It may be that in some instances the Australian economy is not large enough or is too concentrated to permit effective divestiture to occur. For instance, in the Ansett/East-West merger, the "illegal" Western Australian operation could not be sold by the merged entity. After attempts at sale were made, Ansett was allowed to retain the business despite the contravention of the *Trade Practices Act*, and no further penalty was imposed. A further example was the Allied Mills/Fielder Gillespie/Goodmans merger in which assets in the bread-baking sector could not be divested.

56. In the United States, failure to divest is likely to be a considerably less common problem than in Australia because of the size of its economy and the prevalence of large companies who are

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[21] at p 50,103

able to purchase divested assets and operate the acquired business competitively. However, in *US v Pabst Brewing Company*[22], extensive efforts had been made to sell parts of the business but this proved impossible after a considerable length of time. Eventually the orders for divestiture were vacated.

57. The Australian and American judicial experience is that divestiture is a remedy which is very difficult to satisfactorily enforce. Further, divestiture orders are more practical in the context of anti-competitive mergers and acquisitions. Such a power already exists by operation of section 81 of the *Trade Practices Act*.

Divestiture may not be an adequate remedy in the retail sector

58. The President of the American Antitrust Institute has noted that divestitures in retail sectors are not necessarily an effective cure for competition law issues:

> *"Because Ahold has a track record in mergers, the Commission can go back and evaluate whether Ahold's divestitures that were conditions of previous mergers were in fact effective. We have reviewed materials prepared by the food marketing policy centre that examine the effects of the 1996 Stop and Shop and 1998 Super G divestitures. They indicate that the divested stores experienced fairly dramatic reductions in sales after the divestitures, eg performing in Connecticut at over 25% below the stores that were not divested. A likely implication is that these stores are less competitive today than they were before the mergers and that, as a result, the divestitures were not an adequate remedy for mergers that have been illegal*[23]*."*

59. Given that such difficulties are encountered in the United States, where there is a more well-developed retail sector and a larger range of potential buyers, it is difficult to accept that divestitures in the retail sector in regional Australian markets will result in viable and efficient competitors.

The Trade Practices Act is effective

60. Senator Murray notes, in his supplementary remarks to the report by the Joint Select Committee on the Retailing Sector, August 1999, that:

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[22] (1975 - 1) Trade Cases 60-612.

[23] Letter to Robert Pitofsky, Chairman, Federal Trade Commission by Albert A Foer, President, The American Anti-Trust Institute, June 18, 1999.

"Creeping acquisitions have allowed the majors to achieve a market size which might have been prohibited by the ACCC if those acquisitions had been aggregated into one purchase, which could therefore have fallen foul of existing merger provisions in the TPA."

61. This statement, however, is contrary to the ACCC's own Merger Guidelines, which provide:

> *"5.99 A further relevant consideration is the extent of the increase in concentration. In many situations the acquisition of a small market player, resulting in a small increase in concentration, will have little effect on competition. However, in some instances a small increase in concentration may involve the removal of a market participant which played a significant role in maintaining a competitive market eg by undermining attempts to co-ordinate market conduct. In other circumstances a small acquisition may form part of a pattern of creeping acquisitions which have a significant cumulative affect on competition."*

62. Neither the ACCC 's merger guidelines nor section 50 itself make any reference to the change in market concentration caused by any merger or acquisition. The ACCC's merger thresholds simply provide that if the merging parties' market share is:

(a) greater than 40%; or

(b) greater than 15% (if the market share of the largest four competitors is greater than 75%),

the ACCC will scrutinise the merger. Unlike in the United States, the *change in market concentration* arising from an acquisition is not a relevant factor under these thresholds. Indeed, it is entirely conceivable that a corporation that has, say, 60% of the market could be prohibited from acquiring a competitor which has 2% of that market. Such an acquisition would be more likely to be prohibited if the smaller competitor played a significant role in maintaining a competitive market, or if the acquisition were a part of a pattern of creeping acquisitions.

63. The Woolworths-Franklins matter demonstrates that the Joint Committee's concerns are already being heeded by the ACCC.

64. In June 2001, the ACCC accepted legally enforceable undertakings from Woolworths Limited

that related to the sale of Franklins supermarkets. The ACCC agreed to Woolworths acquiring 67 out of a total of 220 Franklins stores, half the initial number sought ,the remaining stores were acquired by independents, FAL of WA and Pick n' Pay South Africa; leaving a more effective competitive market to that prior to the Franklins break-up. This break-up was closely monitored and supervised by the ACCC. Certain divestitures of Woolworths stores were also required. These divestitures were made to independent operators. Woolworths was therefore required to divest itself of assets where such assets contributed to a substantial lessening of competition in a market.

65. The Woolworths-Franklins experience demonstrates that the ACCC, through section 50 of the TPA and the existing divestiture provisions under section 81, is fully capable of preventing anti-competitive acquisitions in the retail and regional sectors. Given the success of the ACCC in the Woolworths-Franklins matter, it is questionable whether section 50AA is required to address the issues identified by the Joint Senate Committee on Retailing and, in particular, by Senator Murray.

66. Since a regional market test was introduced into section 50 in 2001, section 50 prohibits the types of anti-competitive "smaller" acquisitions referred to by Senator Murray. The acquisition by a major retailer in a country town of its only competitor would raise issues under section 50, as amended, and may be prohibited under the existing law. The proposed section 50AA would therefore serve no useful purpose in the context of anti-competitive acquisitions.

The proposed section 50AA will have enormous ramifactions

67. Section 50AA gives the ACCC unprecedented power to seek orders for divestiture in any range of industries and against any market participant. There is no limitation expressed in the wording of section 50AA as to the markets or situations in which divestiture orders may be sought.

68. The proposed section 50AA can be contrasted with the anti-monopoly provision in United States antitrust law.

69. Section 2 of the *Sherman Act* makes it unlawful for a firm to monopolise. However, the offence of monopolisation has two elements:

(a) the possession of monopoly power; and

(b) the wilful acquisition or maintenance of that power (as distinguished from growth or development as a consequence of a superior product, business acumen, or

historic accident)[24].

70. Section 50AA permits the ACCC to seek divestiture orders, even though neither of these two elements need necessarily be present. The proposed section 50AA requires no monopoly power before a divestiture order may be sought. It is conceivable that the second or third biggest firms in a market, not in possession of monopoly power, could also be the subject of a divestiture application under proposed section 50AA if their position in the market "substantially lessens competition". This is a far lower threshold than the possession of monopoly power. Further, the proposed section 50AA makes no exception for organic growth of a company through product innovation, price efficiency or improved customer service. The ACCC would be able to seek orders under section 50AA regardless of the cause of the corporation's market position. If a corporation owns shares or assets of any person (even a subsidiary), it would be subject to the radical divestiture remedy proposed by section 50AA

71. The practical effects of such an onerous provision are not difficult to imagine. The proposed section 50AA would represent a significant obstacle in the way of foreign investment, and domestic company growth and expansion to achieve international standards of efficiency and competitiveness. Already, corporations are subject to significant penalties of up to $10M if they make acquisitions in breach of section 50 of the TPA. The proposed section 50AA would create enormous uncertainty and potentially prohibit corporations from increasing their market shares by product innovation, price competition or improved customer service. Instead of rewarding such pro-competitive behaviour, the new section 50AA would seek to deprive corporations of the increased market share resulting from their competitive and innovative conduct.

Conclusion

72. In conclusion, the proposed section 50AA of the Trade Practices Act is ill-advised for the following reasons:

(a) divestiture is a particularly difficult remedy to enforce and about which to fashion orders;

(b) divestiture is best suited to situations involving mergers and acquisitions, rather than organic company growth;

(c) the current provisions of the Trade Practices Act adequately prohibit the mischief that the proposed section 50AA is trying to prevent;

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[24] *United States v Grinnell Corp*, 384 US563, 570-71 (1966).

(d) the proposed section 50AA is, in effect, a radical de-facto prohibition on the attainment of success in a market and will have serious adverse consequences. It will act as a significant obstacle to organic business growth; and

(e) the proposed section 50AA is not confined to regional retail sector. It could be used to break up existing large Australian corporations in any number of industries, as well as small businesses in country towns;