

## SUPERMARKET AND HARDWARE MONOPOLISTS IN SIGHT: BILL CONTAINING DIVESTITURE POWERS FOR UNILATERAL CONDUCT PUT BEFORE AUSTRALIAN PARLIAMENT

On 4 November 2024, a new Bill was introduced to Parliament proposing new divestiture powers for Australian courts that is aimed at deterring supermarket and hardware monopolists from engaging in anticompetitive unilateral conduct. Its passage raises critical questions about competition law and policy, and the use of targeted and sectoral structural remedies in respect of competition enforcement (as opposed to transactional) matters.

### Overview

The *Competition and Consumer Amendment (Tougher Penalties for Supermarket and Hardware Businesses) Bill 2024 (the Bill)* was recently introduced to the Australian Parliament by the conservative opposition (with support from the fringe Greens party). If passed, the Bill will provide courts with divestiture powers in cases where supermarket and hardware businesses have been found to engage in anticompetitive unilateral conduct in contravention of section 46 of the *Competition and Consumer Act 2010 (CCA)*.

Although a court would need to be satisfied that the exercise of this power will lead to a substantial improvement in competition and be subject to a public interest test, there are significant concerns around how these powers will be exercised and whether they are appropriate for the purposes of tackling conduct of concern, such as alleged price gouging, in circumstances where additional regulation of the supermarket sector has already been put forward under an enhanced mandatory Supermarket Code of Conduct.

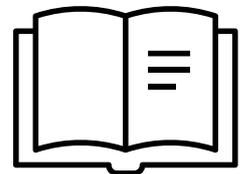
### The proposed Divestiture Powers

The Bill introduces divestiture powers under a newly added section 80B.

These powers will allow a court to order the sale or transfer of assets or shares of any supermarket or hardware business that has been found to have breached section 46 of the CCA. The Court may rely on these divestiture powers if:

- The disposal of assets will lead to a substantial improvement in competition; and
- A public interest test, which considers factors such as the impact on employment, shareholder value, and access to products, is satisfied.

A court must also ensure that the disposal would not result in an unconstitutional acquisition of property on terms other than just terms. Applications for divestiture orders must be made within eighteen months of a finding of contravention.

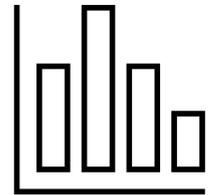


The Bill will allow a court to accept enforceable undertakings between the Australian Competition and Consumer Commission (**ACCC**) and aggrieved parties for the disposal of shares or assets, creating flexibility in how the divestiture powers are applied. This flexibility is designed to mitigate the severity of forced sales, but it does raise questions about the overall efficacy and fairness of the provision.

## Challenges in Measuring "Substantial Improvement in Competition"

The Bill does not define or provide clear guidance on what satisfies the newly introduced standard of "substantial improvement to competition". This is a novel concept in Australian jurisprudence and the Bill appears to leave it to the courts to interpret and apply. Given the complexities involved in predicting market outcomes, especially in industries as dynamic as retail, this presents a significant challenge and opens the door to uncertainty.

More specifically, the Bill will provide a court with the ability to engineer market structures without the sufficient experience or guidance around factors that could affect the competitive and commercial impact of such divestitures. The lack of precision in the Bill around what may constitute an appropriate divestiture and the need to establish a clear nexus between the contravention and assets to be divested opens the door to inconsistent application, the creation of less efficient or viable businesses (with uncertain wider competitive impacts on the functioning of relevant markets), and the risk that divestiture orders could be based on overly optimistic or unproven assumptions about future market behaviour.



## Balancing the public interest with shareholder value

Under the Bill, an assessment of the public interest will be measured by several factors, including the impact of the proposed divestiture on employment, shareholder value, and access to products or services. The Explanatory Memorandum (**EM**) indicates that the public interest test will ensure that the divestiture powers cannot be used to arbitrarily cost jobs or increase prices. However, no further guidance around the weight to be afforded to the relevant factors or the broader exercise of the public interest test is provided, including whether other factors relevant to competition in relevant market(s) can or should be considered by a court.

The EM also indicates that the inclusion of shareholder value effectively scopes the divestiture power to only be used in situations where there is a known buyer. This language of a "known buyer" does not appear in the Bill.

It therefore is unclear from the text of the Bill as to how shareholder value will be protected and competition substantially improved in circumstances where there is no known buyer for divested assets. The absence of such a requirement in the Bill itself could lead to uncertainty and potentially less competitive and commercially viable outcomes with corporates not only being forced to divest a business unit without adequate protection for shareholder interests or a pathway to a commercially viable sale, but divestitures being made to businesses that may not be in a position to operate the assets as efficiently or cost effectively (resulting in negative outcomes for competition and consumers).



Such a process would be at odds with existing ACCC processes around assessing approved purchasers for assets to be divested in the context of mergers.

The text of the Bill and EM also provide little to no guidance around how potentially competing interests should be weighed by courts and how potential conflicts between certain public interests and any apparent improvements to competition should be resolved.

### **Extraordinary measure or necessary reform?**

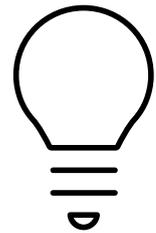
The introduction of a structural divestiture power for market misconduct is indeed an extraordinary step in Australian competition law and is one of many recent attempts to expand the number of available remedies to target the conduct of Coles, Woolworths, and Bunnings.

The associated risks and concerns associated with "targeted" or sector specific divestiture powers have been broadly canvassed over numerous reviews resulting in the introduction of such powers ultimately being rejected (repeatedly). Whilst the EM refers to Australia as being an outlier amongst comparable jurisdictions for not having such powers, such powers have been used sparingly (or only by consent) in other jurisdictions such as the US, EU and Canada. The ultimate effectiveness of the proposal would also appear to hinge on the ACCC (or aggrieved parties) successfully establishing a contravention of section 46 of the CCA, which has not occurred in some time.

The Bill appears to have emerged from the growing rhetoric surrounding large supermarket chains and hardware businesses, particularly regarding their ability to allegedly stifle competition and engage in conduct of concern such as price gouging. One of the more striking aspects of the Bill is its apparent political underpinnings and its support from an otherwise unusual alliance between the conservative opposition and the Greens party. The current centre-left Labor Government has rejected calls for such divestiture powers as an unnecessary "attack on capitalism".

In circumstances where an enhanced mandatory Supermarket Code of Conduct has been tabled and a new mandatory merger filing regime which will likely require all acquisitions in the supermarket sector to be notified, it remains to be seen whether the new divestiture powers are a necessary regulatory tool or are simply politically expedient where the Federal Election must be held in the next 10 months.

As with any significant legislative change, the Bill's passage is not guaranteed and its ability to effectively keep "Supermarkets" and others in check and improve competitive outcomes in Australia's reasonably unique market structures remains to be seen.



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