

ARA SUBMISSION

THE COMPETITION AND CONSUMER AMENDMENT (DIVESTITURE POWERS) BILL 2024

APRIL 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments on the Competition and Consumer Amendment (Divestiture Powers) Bill 2024.

The ARA is the oldest, largest, and most diverse national retail body, representing a \$420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects, and unifies our independent, national, and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate across the country and in all categories - from food to fashion, hairdressing to hardware, and everything in between.

This submission has been informed by consultation with the ARA membership base.

EXECUTIVE SUMMARY

The ARA appreciates the opportunity to provide feedback on the proposed Bill, which grants the Federal Court, upon application by the Australian Consumer and Competition Commission (ACCC), the authority to issue orders reducing a corporation's power or market share within a specific market.

We have identified issues with the Bill's provisions that will have the opposite effect of what is intended, and we have concerns about the lack of clear thresholds for intervention, unproven efficacy in reducing grocery prices, potential job losses, oversight of supplier relationships and international comparisons.

The ARA is therefore opposed to this Bill.

There is a need for careful evaluation and transparent decision-making to ensure the long-term viability and competitiveness of Australia's food and grocery industry. The ARA emphasises the importance of evidence-based policies that promote competition while safeguarding jobs and economic stability.

ISSUES WITH THE BILL

1. Lack of clear threshold

The Act, as currently written, does not provide an objective test as to what constitutes "a substantial degree of power" in a market and the proposed Bill fails to clarify this ambiguity. While the Bill aims address market imbalances, the ambiguity surrounding this crucial term raises significant concerns.

Without a precise definition of "a substantial degree of power," there is a lack of clarity on when the Court should intervene in market dynamics. This ambiguity leaves room for arbitrary or inconsistent decision-making, which could result in confusion and uncertainty among businesses and consumers alike.

For example, in a competitive market segment like the food and grocery sector, it is unclear how the Federal Court would determine whether a corporation holds "a substantial degree of power."

Moreover, the absence of a defined threshold for market power raises questions about fairness and due process. Without clear criteria for assessing market power, businesses may find themselves subject to legal proceedings without a clear understanding of the grounds for intervention.

In addition to concerns about fairness and due process, the lack of definition also undermines investor confidence and economic stability. Businesses rely on stable and predictable regulatory environments to make informed investment decisions. The uncertainty created by the Bill's vague language could deter investment and innovation, ultimately hindering economic growth and Australia's competitiveness on the global stage.

2. Failure to prove divestiture will reduce the price of groceries

Divestiture powers have been considered by numerous reviews into competition policy, including the Hilmer and Harper reviews, as well as assessments by a Senate committee in 2015. These reviews uniformly rejected divestiture as an appropriate response to market imbalances, citing unpredictable consequences.

Former independent Senator Nick Xenophon's proposal, the Consumer and Competition Amendment (Misuse of Market Power) Bill 2014, aimed to provide the ACCC and the Courts with another option to tackle misuse of market power, particularly focusing on supermarkets. However, this legislation was scrutinised by the Senate Economics Legislation Committee, which recommended against its passage in February 2015. The committee highlighted the absence of a convincing case and noted that evidence had not demonstrated that the potential advantages of divestiture would outweigh the likely disadvantages.

Similarly, there is no evidence indicating that divestiture would lead to lower food and grocery prices. In 2019, the Australian Government, upon recommendation by the ACCC (Treasury Laws Amendment (Prohibiting Energy Market Misconduct) Bill 2019), passed laws for divestiture powers on the energy market. Despite these powers, energy costs remain high for households and businesses. This illustrates that the mere presence of divestiture powers does not guarantee positive outcomes for consumers. The government's focus should be on creating an environment in Australia that is highly attractive for businesses to establish themselves.

Examining the United States' experience with divestiture powers reveals that they have not led to lower grocery prices. According to the "Consumer Price Index Summary" released by the United States Bureau of Statistics in August 2023, food prices in the US continued to rise with a 4.9% increase year over year through July 2023.

The proponents of the Bill should provide a comprehensive rationale outlining how the proposed divestiture will result in reduced prices for consumers and offer fairer deals for farmers. It is imperative for them to substantiate their claims with detailed evidence, considering that similar measures have not yielded the desired outcomes both internationally and within the energy market.

The ARA contends that the implementation of divestiture powers in the food and grocery sector should be approached with caution. The lack of evidence demonstrating their effectiveness in reducing prices, coupled with consumer trends indicating continued price inflation, highlights the need for government to explore alternative strategies to promote competition and affordability in the grocery market.

3. Potential job losses

The ARA believes there is significant concern regarding the potential job losses associated with the proposed divestiture powers outlined in the Bill. Our members are some of Australia's largest private employers and

invest heavily in the welfare of their employees and communities. However, the lack of clarity surrounding how divestiture would impact job security raises pressing questions about its feasibility and potential consequences.

If supermarkets are compelled to divest to reduce their market share, there is uncertainty about which stores will face closure. There are cases where profitable stores in metropolitan areas often offset the operations of less profitable stores in regional areas. Thus, any indiscriminate closure of stores could have potentially acute effects on regional employment and economic stability.

In regional areas where major corporations are primary employers, the potential for job losses due to forced divestiture is concerning. These communities heavily rely on supermarket chains not only for employment but also for essential goods and services. Any reduction in market share or closure of stores could exacerbate existing challenges faced by regional communities, leading to further economic hardship and social dislocation.

The Bill's proponents must address critical questions regarding job security in the event of divestiture. How will job losses be minimised and affected communities be supported through the transition? Will the business entities that take over divested stores – should there be any – be obligated to hire existing staff with comparable benefits and hours? These are essential considerations that demand transparent and comprehensive answers.

There must be a prioritisation of policies that promote job security and economic stability, particularly in regional areas where the impact of divestiture could be most acutely felt. Without adequate safeguards and assurances, the Bill risks exacerbating existing inequalities and undermining the livelihoods of countless Australians.

4. Comparison with international standards

The proposed divestiture powers in the Bill prompt an examination of international practices, particularly in jurisdictions like the United States, the European Union, and Canada. In the US, divestiture serves as a remedy for violations of section 2 of the Sherman Act, aimed at addressing monopolies and monopolistic behaviour.

However, divestiture has been rarely utilised, with the last major instance occurring in 1982, when the American Telephone and Telegraph Company was broken up via a consent decree. Similarly, while divestiture powers exist in the EU and Canada, they have never been invoked. The Law Council of Australia highlights that divestiture powers in the US have only been sparingly used, with no such order made since the 1960s, except by consent.

The limited usage of divestiture powers internationally raises questions about their effectiveness as a regulatory tool. There must be consideration to whether divestiture is an appropriate response to market dynamics, given the absence of compelling evidence demonstrating its efficacy in promoting competition and consumer welfare.

CONCLUSION

In conclusion, the proposed Bill presents significant challenges and concerns for the Australian retail sector. The lack of clear thresholds, the failure to prove the effectiveness of divestiture in reducing grocery prices, potential job losses, oversight of supplier relationships and international comparisons all highlight the need for careful consideration and thorough evaluation of the Bill's provisions.

Any regulatory intervention in the grocery market must prioritise transparency, fairness and evidence-based decision-making to ensure the long-term viability and competitiveness of Australia's food and grocery industry.

Thank you for the opportunity to provide a submission to this inquiry. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.