The Parliament of the
Commonwealth of Australia

THE SENATE

Competition and Consumer Amendment (Misuse of
Market Power) Bill 2017

(Amendments to be moved by Senator Xenophon, on behalf of the Nick Xenophon Team, in committee
of the whole)

(1) Schedule 1, page 5 (after line 7), after item 1, insert:

1A After section 80AC

Insert:

80AD Divestiture where contravention of section 46

Circumstances when this section applies

(1) This section applies if the Court finds, or has in another proceeding instituted under this Part found, that a corporation that has a substantial degree of power in a market has contravened subsection 46(1).

Reduction of corporation’s market power

(2) The Court may, on the application of the Commission or any other person, by order, give directions for the purpose of securing, within 2 years of the order being made, a reduction in the corporation’s power in the market.

When application must be made

(3) An application under subsection (2) may be made at any time within 3 years after the date on which the contravention occurred.

Order by consent

(4) Where an application under subsection (2) has been made, the Court may, if the Court determines it to be appropriate, make an order by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsection (1).
Alternative to order under subsection (2)

(5) Where an application is made under subsection (2) for an order to give directions for the purpose of securing a reduction in the corporation’s power in the market, the Court may, instead of making the order, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the corporation to take particular action to reduce the corporation’s power in the market.

Section does not limit Court’s powers.

(6) This section does not limit the Court’s powers under any other provision of this Act.

[misuse of market power; divestiture]

Page 13 (after line 8), at the end of the Bill, add:

Schedule 3—Adverse costs orders

Australian Small Business and Family Enterprise Ombudsman Act 2015

1 At the end of section 7

Add:

; and (h) conduct within the meaning of subsection 4(2) of the Competition and Consumer Act 2010.

2 At the end of section 15

Add:

; (c) to give assistance under Division 3A of Part 4 in advising on and preparing a person’s case for a no adverse costs order under subsection 82(4) of the Competition and Consumer Act 2010.

3 After subparagraph 23(h)(ii)

Insert:

(iiia) assistance being given under section 74B (assistance in relation to a no adverse costs order in proceedings to recover the amount of any loss or damage as a result of contraventions of the Competition and Consumer Act 2010);

4 At the end of section 65

Add:

; (g) conduct, within the meaning of the Competition and Consumer Act 2010, that:

(i) may be in contravention of a provision of Part IV of that Act; and

(ii) affects, or may affect, a small business or family enterprise.

5 After Division 3 of Part 4

Insert:
Division 3A—Assistance where there may be a contravention of the Competition and Consumer Act 2010

74A Application of this Division

This Division applies if the relevant action in relation to which a person requests the Ombudsman to give assistance is conduct, within the meaning of the Competition and Consumer Act 2010, that:

(a) may be in contravention of a provision of Part IV of that Act; and
(b) affects, or may affect, a small business or family enterprise.

74B Ombudsman may give assistance in relation to costs order

(1) The Ombudsman may assist the person by doing either or both of the following:

(a) advising the person on the arguments that might be made, and the evidence that might be adduced, to satisfy a court that an order under subsection 82(4) of the Competition and Consumer Act 2010 should be made (a no adverse costs order in proceedings to recover the amount of any loss or damage as a result of contraventions of that Act);

(b) preparing arguments that might be made in satisfying a court that an order under that subsection should be made.

(2) Nothing in this section limits the functions, duties and powers of the Ombudsman under this Part in relation to the relevant action.

6 At the end of Division 2 of Part 5

Add:

91A Disclosure for the purposes of a no adverse costs order under the Competition and Consumer Act 2010

(1) This section applies if the relevant action in relation to which a person (the applicant) requests the Ombudsman to give assistance is conduct, within the meaning of the Competition and Consumer Act 2010, that:

(a) may be in contravention of a provision of Part IV of that Act; and
(b) affects, or may affect, a small business or family enterprise.

(2) A person assisting a small business or family enterprise may disclose to the applicant any document or information obtained by the person assisting the small business or family enterprise in the course of performing functions or duties, or exercising powers, in relation to assistance given to the applicant under section 74B.

Note: Section 74B allows the Ombudsman to give assistance in relation to a no adverse costs order in proceedings to recover the amount of any loss or damage as a result of contraventions of the Competition and Consumer Act 2010. This assistance may include advising the applicant on the arguments that might be made, and the evidence that might be adduced, in pursuing a no adverse costs order, and preparing arguments.
No adverse costs orders

(3) A person who brings an action under subsection (1) in relation to a contravention of a provision of Part IV may at any time during proceedings on the matter seek an order under subsection (4) from the court hearing, or that will hear, the matter.

(4) The court may order that:
   (a) a respondent in the proceedings is liable for any of its costs in relation to the proceedings; or
   (b) two or more respondents in the proceedings are jointly and severally liable for any of their costs in relation to the proceedings.

(5) The court may only make an order under subsection (4) if the court is satisfied that:
   (a) the action has a reasonable prospect of success; and
   (b) the action raises an issue that is not only significant for the applicant, but may also be significant for other persons or groups of persons; and
   (c) the disparity between the financial position of the applicant and the financial position of the respondent or respondents is such that the respondent or respondents could use the possibility of a costs order that does not favour the applicant as a means to deter the applicant from pursuing the action.

(6) A person who appeals a decision of the court under section (4) is liable for any costs in relation to the appeal.

8 Application

The amendment of the *Competition and Consumer Act 2010* made by this Schedule applies in relation to actions under subsection 82(1) of that Act brought on or after 1 July 2017.

[adverse costs orders]