Chapter 4

Competition in the dairy industry

4.1 There has been a trend towards increased concentration among both processors and retailers of milk in Australia. This is not just a coincidence; the increase in concentration among retailers has been an important driver of the increased concentration among processors and this looks likely to continue. The victims of this increased concentration are the farmers and the consumers.

4.2 As stated in Chapter 1, this experience raises concerns much more broadly than just in the dairy industry, as similar problems have, or could, arise in other areas given the dominance of the two large supermarket chains in the retail sales of so many products.

Competition in the retail and wholesale markets

4.3 As noted in previous chapters, the two major supermarket chains, Coles and Woolworths, sell about half the drinking milk sold to consumers, and over half of this is in the form of generic milk. Both these proportions appear to be increasing, with attendant risks to competition.

4.4 The provision of generic milk to supermarkets has become a very important component of sales for processors. As noted in the previous chapter, the large supermarket chains tend to want a single processor for each state or region, or perhaps even a single national supplier.[1] This preference encourages consolidation within the processing sector as only large processors can credibly bid for the contracts, and a processor without such a contract cannot realise economies of scale.

Possible policy responses

4.5 Removing this anti-competitive impetus requires reducing the dominance of the large supermarkets and/or reducing their use of generic milk and its impact on processors.

Reducing the dominance of the large supermarket chains

4.6 In Australia mergers which would lead to a 'substantial lessening of competition' are (supposed to be) prohibited by section 50 of the *Trade Practices Act*. This has not, however, prevented mergers such as the National Foods takeover of Dairy Farmers which, the Committee heard evidence, had substantially affected the competitive dynamics of the Tasmanian dairy market.

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1 Woolworths has a national contract, with National Foods supplying their Home Brand generic milk while Coles has tenders on a state-by-state basis; Mr O'Malley, National Foods, *Committee Hansard*, 18 January 2010, p. 87.

4.7 This is because the courts have adopted a very demanding test of what constitutes a 'substantial lessening of competition', effectively requiring that after a merger the new company must be almost a monopoly. Associate Professor Zumbo submitted:

> The "substantial lessening of competition" test requires that in order for the merger or acquisition to be considered in breach of the test, the merged entity must have the ability to raise prices without losing business to rivals.[2]

4.8 Given the test is so demanding, it is unsurprising that the ACCC approves over 95 per cent of proposed mergers and acquisitions which it considers.

4.9 Even with its shortcomings, Section 50 would presumably prevent a merger between Coles and Woolworths, and probably prevent them taking over the Australian operations of ALDI or buying up simultaneously a large number of independent grocers. But preventing a substantial lessening of competition does nothing to deal with an existing state of inadequate competition. For this additional measures are required.

4.10 The most direct approach would be 'trust busting' – requiring divestiture by chains that have an 'excessive' market share or market power. As one witness put it:

> I think Senator Xenophon suggested they split the two majors into four—bloody good idea![3]

4.11 Associate Professor Frank Zumbo would like to:

> …amend the Trade Practices Act to provide for a general divestiture power whereby a Court can, on the application of the ACCC, order the break up of companies (i) having substantial market share; and (ii) where either the characteristics of the market prevent, restrict or distort competition; or the companies have engaged in patterns of conduct that are detrimental to competition and consumers.[4]

4.12 He comments:

> Unlike the United Kingdom or the United States, Australia does not provide for a general divestiture power to deal with highly concentrated markets having characteristics that prevent, restrict or distort competition in those markets. In the United Kingdom a very sophisticated framework has been enacted to allow for highly concentrated markets to be reviewed with the purpose of assessing the level of competition in a market and for taking steps to remedy market distortions having a detrimental impact on competition and consumers.[5]

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2 Associate Professor Frank Zumbo, *Submission 34*, p. 6.

3 Mr Harris, *Committee Hansard*, 29 January 2010, p. 37.

4 Associate Professor Frank Zumbo, *Submission 34*, p. 11.

5 Associate Professor Frank Zumbo, *Submission 34*, p. 11.

4.13 A dissenting report by a minority of the Senate Standing Committee on Economics in 2008 suggested:

> We need to enact a divestiture power which allows the Court to break up corporations that dominate markets by acquiring a substantial market share to the detriment of small businesses and consumers…Consideration should be given to enacting a divestiture power under the *Trade Practices Act*.[6]

Creeping acquisitions

4.14 One way in which the major supermarkets increase their market share is through 'creeping acquisitions'; a series of takeovers, each of which is individually too small to 'substantially lessen competition' but which cumulatively may do so.

4.15 The Senate Economics References Committee examined this topic in the context of its report on the *Trade Practices Act 1974* in 2004 and concluded:

> The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.[7]

4.16 The ACCC's 2008 report on grocery prices noted that concerns about creeping acquisitions persisted in the supermarket sector. It conceded that its powers to prevent them may be limited:

> While s. 50 of the Act applies to individual acquisitions, the application to potential 'creeping acquisition' issues is more problematic. The ACCC takes the view that, while it can assess under s. 50 the competitive issues associated with an individual acquisition, s. 50 is unlikely to allow it to examine the cumulative impact of a series of acquisitions of smaller competitors over time that individually do not raise competition issues… The ACCC considers that the supermarket industry is one where creeping acquisitions could potentially become a concern…[8]

4.17 Shortly afterwards, the Senate Standing Committee on Economics revisited the topic while inquiring into the Trade Practices (Creeping Acquisitions) Amendment Bill. The bill sought to amend the *Trade Practices Act 1974* so that an acquisition would be deemed to lessen competition substantially if it and other acquisitions over the previous six years would have that effect. The Committee concluded:

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6 Senate Standing Committee on Economics, *Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*, August 2008, p. 11.

7 Recommendation 12, Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 64.

8 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, August 2008, pp 532, 535.

> …concerns about the impact of 'creeping acquisitions' on competition are valid. It agrees that the current provisions of section 50 of the *Trade Practices Act* are insufficient to address the problem adequately.[9]

4.18 The majority of the Committee, however, preferred to defer consideration of the bill until the Government presented its own legislation. The Government subsequently released two discussion papers canvassing various options. But so far, the only legislative change the Government has foreshadowed is to clarify that substantial lessening of competition could refer to a *local* market, not just a *national* market.

4.19 A new investigation of creeping acquisitions is now being conducted by the Senate Economics Legislation Committee as part of its inquiry into the Trade Practices Amendment (Material Lessening of Competition-Richmond Amendment) Bill 2009.[10] This bill would amend section 50 of the TPA such that a corporation which already has a substantial *share of a market* must not directly or indirectly merge with or acquire shares or an asset which would have the effect of *lessening competition* in the market.

Committee view

4.20 In recent times the Committee has increasingly been referred inquiries which seek to examine issues concerning the operation of the *Trade Practices Act 1974*. The evidence that the Committee has collected throughout those inquiries together with the information that has been uncovered during the dairy inquiry has left the Committee with concerns and questions in relation to the state of competition in the Australian marketplace.

Recommendation 5

4.21 The Committee recommends that the Productivity Commission reviews and evaluates the effectiveness of the national competition policy and requests that it publish its report by 30 April 2011.

Recommendation 6

4.22 The Committee recommends a moratorium on further takeovers and mergers in the milk processing industry until the Productivity Commission has published its report on the effectiveness of the national competition policy.

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9 Senate Standing Committee on Economics, *Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*, August 2008, p. 9.

10 Associate Professor Frank Zumbo argues that this bill would address the problem of creeping acquisitions; *Submission 34*, pp 7-8.

Misuse of market power and price discrimination

4.23 Section 46 of the TPA aims to promote competition by preventing corporations who have substantial market power from abusing that power and specifically prohibiting those entities from using their market power to eliminate or damage a competitor, prevent entry of others into the market or prevent or deter others from engaging in competitive conduct in a market.[11]

4.24 As noted in Chapter 3, the processors provide milk at a lower price to the large supermarket chains than to smaller supermarkets. To some extent, this reflects economies of scale in dealing with the larger chains. It may also, however, reflect the market power of the large chains.

4.25 Similarly, the processors charge a lower price to the major supermarkets than they do to vendors who on-sell milk to small retailers such as milk bars, take-away food outlets and other small stores to whom milk is an ancillary line of business. One vendor told the Committee they paid around $1.40 a litre for milk.[12] This is more than the supermarket's shelf price for generic milk and more – probably considerably more – than the supermarkets pay the processors for branded milk.[13]

4.26 Similarly, another vendor submitted:

> National Foods were…responsible for the ordering, pricing, billing and collection of milk sold to customers who are delivered to by Parmalat Distributors in NSW. We can prove that these customers are paying less than our cost for product… General wholesale price for a two litre milk is $3.51…Given many coffee shops and small businesses can go to Woolies and Coles and but three litre generic milk for $3.16 – how can I compete with that?[14]

4.27 There are suggestions that the *Trade Practices Act* should be strengthened to prevent such price discrimination:

> With smaller retailers at a substantial competitive disadvantage because of the higher prices they pay for branded milk, Coles and Woolworths need not compete as aggressively on price as they would have to if the smaller retailers were able to provide a stronger competitive constraint on Coles and Woolworths… Where anti-competitive price discrimination is present, it should be dealt with under the Trade Practices Act. Given the continued ineffectiveness of s 46 it is appropriate to amend the Trade Practices Act to deal specifically with anticompetitive price discrimination. A number of

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11 Steinwall, R., *Annotated Trade Practices Act 1974*, 2004 Edition, Reed International Books Australia, paragraph 10,760.10, p. 270.

12 Mr Lawson, Amalgamated Milk Vendors Association, *Committee Hansard*, 18 January 2010, p. 15.

13 See Table 3.5.

14 Julie Gration and David White, *Submission 6*, pp 2 and 5.

> international precedents are available including the United States *Robinson-Patman Act of 1936* and s 18 of the United Kingdom *Competition Act 1998*.[15]

4.28 The TPA formerly included an explicit 'price discrimination' provision. Section 49(1) had stated:

> A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to
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> (a) the prices charged for the goods;
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> (b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of goods;
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> (c) the provision of services in respect of the goods;
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> (d) the making of payments for services provided in respect of the goods if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.

4.29 Section 49(2) had listed two defences to 49(1). The first was where the price differences reflected differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the different places to which the goods are supplied to purchasers. The second defence was where the discrimination was constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

4.30 The repeal of section 49 was recommended by the Swanson Committee (1976), the Blunt Committee (1979) and the Hilmer Committee (1995) and it was repealed in 1995. In 2003, the Dawson Review recommended that the effect of price discrimination on competition be considered on a case-by-case basis, arguing that section 46 is the most appropriate means to tackle anti-competitive price discrimination. Further, the Review considered that there are reasons for differences in wholesale prices in the grocery industry which do not involve anti-competitive practices.[16]

4.31 A review into Parts IV and VII of the TPA in 2004 examined whether section 46 required amendment to deal better with price discrimination (previously addressed by section 49) and concluded that section 46 was adequate.[17]

4.32 The Senate Economics Legislation Committee again examined the operation of section 46 as part of its inquiry into the proposed Blacktown Amendment. A

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15 Associate Professor Frank Zumbo, *Submission 34*, pp 9-10.

16 *Dawson Review*, 2003, pp. 96–97.

17 Senate Economics References Committee, *Effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 3.

number of submissions argued that, as interpreted by the courts, section 46 is ineffective in providing protection against anti-competitive conduct.[18] The Boral case, in particular, is widely seen as having vitiated section 46 by ruling that only conduct by a firm with 'substantial market power' is prohibited and then setting the standard for 'substantial market power' unrealistically high.

4.33 The ACCC Chairman, for example, commented:

> The High Court decision in the Boral case, in our view—and in the view of senior counsel—has given a legal interpretation to the wording of section 46, which indicates that parliament did not achieve its intention. The use of the words 'substantial degree of market power' did not lower the threshold below that of dominance…[19]

4.34 The restoration of an explicit provision against price discrimination in the TPA would empower the ACCC to act and the Australian Competition Tribunal to review. It is advocated by former senator Margetts:

> To remove the prices discrimination, as an example, from the *Trade Practices Act* and then have so much evidence provided to the ACCC grocery price inquiry about price discrimination that related to branded products, home brand products and the pressure that has been put on suppliers shows, in my view, that there is a clear problem with the removal of the prices discrimination provision.[20]

Committee view

4.35 From evidence taken during the course of its inquiry the Committee takes the view that the current operation of section 46 is inadequate and is not providing protection against price discrimination. The major supermarkets appear to be using their dominant market positions to drive down the farmgate price through the sale of generic products which puts pressure on processors who are forced to compete with their own products.

4.36 The Committee takes the view that this will negatively affect competition and therefore consumers as it will lead to less product choice and fears that the current interpretation of section 46 will enable these large players to escape allegations of misusing their market power.

4.37 The Committee considers that this situation needs to be addressed to ensure the long term viability of Australia's dairy industry.

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18 Senate Economics Legislation Committee, *Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009*, November 2009, pp 20-21.

19 Mr Graeme Samuel, cited in Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 9.

20 Ms Dee Margetts, *Committee Hansard*, 29 January 2010, p. 43.

4.38 The precursor to the Committee has weighed the advantages and disadvantages of using market share as a proxy measure of market power in an earlier report, concluding that it was justified.[21]

4.39 It is a matter for judgement what market share might be regarded as raising potential concerns about market power. The European Commission takes the view that a firm would *generally* have a *dominant* position once it reaches a market share of 40-45 per cent and *may* achieve a dominant position in the region of 20-40 per cent.[22]

4.40 This is broadly consistent with approaches in some individual European countries. The Austrian Cartel Act places the burden of proof on a company to show it is not dominant where its market share exceeds 30 per cent. In Germany a market share of a third is taken as indicating dominance. The corresponding threshold in Bulgaria is 35 per cent and in Croatia, Estonia, Lithuania, Poland and Serbia 40 per cent. In Malta a company with a 40 per cent market share is deemed dominant unless it provides evidence to the contrary. In Sweden a market share of 40 per cent is regarded as indicative of dominance. Latvia and Slovakia have removed their previous 40 per cent thresholds for defining dominance.[23] A firm would, of course, have some market power well before reaching dominance.

4.41 The US Department of Justice's benchmark for challenging mergers is where the sum of the squared percentage market shares of the merging companies exceeds 1800.[24] This would occur if two firms each having a 30 per cent market share wanted to merge; or a firm with a 40 per cent market share wanted to take over a competitor with a 14 per cent market share.

Recommendation 7

4.42 The Committee recommends that the Trade Practices Act be amended to reinstate specific anti-price discrimination provisions and inhibit firms achieving market power through takeovers or abusing market power and that 'market power' be expressly defined so that it is less than market dominance and does not require a firm to have unfettered power to set prices. A specific market share, such as, for example, one third (based on international practice), could be presumed to confer market power unless there is strong evidence to the contrary.

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21 Senate Standing Committee on Economics, *Trade Practices Legislation Amendment Bill 2008 [Provisions]*, August 2008, pp 4–6.

22 Source: the widely cited study by Richard Whish, *Competition Law*, 1989, who cites the European Commission's *10th Report on Competition Policy*, p. 294.

23 The information in this paragraph is based on Institute of Competition Law, http://www.concurrences.com/nr_one_question.php3?id_rubrique=578#ancre12.

24 This criterion is based on the Herfindahl-Hirschman Index; Richard Whish, *Competition Law*, 1989, p. 697.

Contracts for generic milk

4.43 The Greens believe there is a strong case for banning large supermarket chains from selling generic milk (and other generic products). This should lead to branded products from a wider range of processors, large and small, jostling for space on the shelves and a more competitive processing industry.

4.44 The knee-jerk reaction to such a proposition is that it would be denying consumers access to the cheaper products. But this would only be an immediate reaction. Over time, the same price discrimination tactics applied by the supermarkets would be applied by (some) processors with some milk being packaged in a 'cheap and tatty' way and sold at a lower price and more prestigious brands (even if they are actually the same milk) being sold at a higher price. Consumers may end up in much the same position but with some of the profits from price discrimination being shifted from the supermarkets to the processors (and possibly on to the farmers). In the longer term, consumers may benefit by avoiding a situation where there is little competition as each supermarket offers only its own generic products.

4.45 A milder step would be to continue allowing supermarkets to sell generic milk but require them to have multiple tenders, accepting bids from more and smaller processors.

4.46 The ACCC told the Committee they had not looked into generic milk contracts in depth.[25]

Committee view

4.47 The Committee is concerned by the growing market share being acquired by supermarkets through the sale of their own brand generic products. The Committee recognises that this trend is occurring across the majority of grocery items, not just drinking milk, and given the evidence it has heard from dairy farmers throughout this inquiry believes the effect this practice is having on other primary industries should be thoroughly investigated.

Recommendation 8

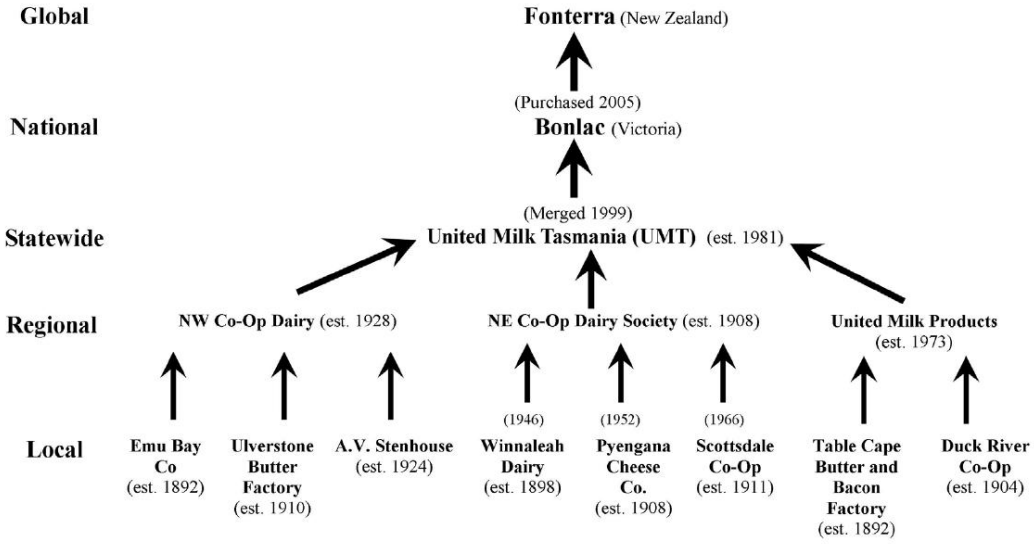
4.48 The Committee recommends that the ACCC conducts further study into the implications of increasing shares of the grocery market being taken by the generic products of the major supermarket chains. The Committee recommends that the terms of reference of any such inquiry include not just the current and future impact on prices paid by consumers but also the needs of Australia in terms of food security and economic and environmental sustainability, as well as the economic viability of farmers and processors. The Committee requests that the findings of these reviews be reported by 30 April 2011.

25 Mr Mark Pearson, ACCC, *Committee Hansard*, 18 January 2010, p. 84.

Competition in the market for raw milk

4.49 As described in Chapter 2, the number of processors has reduced over time. From a variety of local processors, often co-operatives, the market is now dominated by subsidiaries of international corporations (Chart 4.1).

Chart 4.1: Consolidation of dairy processing operations



Source: Dr Shane Broad, *Submission 5*, p. 3.

4.50 This has left some farmers facing an effective monopsony:

> In the south of the state, Fonterra will not come down and pick up our milk…We have one option in the south of the state—National Foods.[26]

> There really are only two processors for liquid milk in Tasmania, National Foods and Betta Milk. Betta Milk were supplied by Lactos, the cheese makers, prior to National Foods buying Lactos. So we had a situation where the only competitor to National Foods was being supplied with its liquid milk by National Foods…the fewer the number of processors in Tasmania the greater is their power.[27]

4.51 The vastly unequal bargaining power that results leads to problems in negotiating price. The negotiations themselves are discussed in the following chapter. This chapter is concerned with trying to even up the bargaining power.

4.52 The Committee heard a lot of criticism of the ACCC for allowing National Foods to take over Dairy Farmers. Notwithstanding some required divestitures, this has resulted in a significant reduction in competition, notably in Tasmania:

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26 Mr Grant Rogers, *Committee Hansard*, 5 November 2009, p, 3.

27 Mr Phil Beattie, Tasmanian Suppliers Collective Bargaining Group, *Committee Hansard*, 5 November 2009, p. 15.

> Who in their right mind would approve National Foods taking over Dairy Farmers? …That would have to be the biggest blunder that has ever happened to the Australian dairy industry.[28]
>
> …it seems extraordinary to us as ordinary dairy farmers that the ACCC allowed the takeover of Dairy Farmers by National Foods, which in a sense is almost creating a monopoly.[29]
>
> …that Dairy Farmers acquisition which really leaves huge questions for the ACCC to answer.[30]
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> …quite frankly I think the ACCC, through Mr Graeme Samuels, was really asleep at the wheel in allowing National Foods to buy Dairy Farmers in the first place, as it was a direct competitor to them in the marketplace… He was also asleep at the wheel when he allowed National Foods to buy Lactos.[31]
>
> We never envisaged, because of the dominance of National Foods and Dairy Farmers in that state, that the ACCC would allow one to buy the other.[32]

4.53 Asked about this approval, the ACCC replied:

> We conducted a very extensive review into that matter and found that there were going to be substantial competition problems that would breach the act in South Australia and in New South Wales in a number of markets, including the supply of fresh whole milk, the supply of flavoured milks and also in relation to a market for the acquisition of milk from dairy farmers in central New South Wales and South Australia. So we would have opposed that merger but for a divestiture that was forced upon National Foods. It was required to divest some processing facilities, depots, brands and licences to enable another competitor to restore the competition that would have otherwise been lost in those markets…Following the undertaking, the commission was satisfied that there was not going to be any substantial lessening of competition in those markets where it found that it would have otherwise occurred.[33]

4.54 After the Committee's public hearings were concluded, the ACCC released a 'statement of issues' concerning the proposed acquisition of Warrnambool Cheese and Butter by Murray Goulburn Co-operative, expressing the view that it would be likely

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28 Mr Grant Rogers, Tasmanian farmer, *Committee Hansard*, 5 November 2009, p. 11.

29 Mr Phil Beattie, Tasmanian Suppliers Collective Bargaining Group, *Committee Hansard*, 5 November 2009, p. 24.

30 Mr Bovill, *Committee Hansard*, 6 November 2009, p. 6.

31 Mr John Oldaker, Chairman, Cadbury Suppliers, *Committee Hansard*, 6 November 2009, p.7.

32 Mr Lawson, *Committee Hansard*, 18 January 2010, p. 17.

33 Mr Grimwade, ACCC, *Committee Hansard*, 18 January 2010, p. 74.

to substantially lessen competition and estimating that 'establishing a new plant of a size that could constrain the merged entity would cost in excess of $100 million'.[34]

4.55 Some of those who criticise the National Foods takeover of Dairy Farmers want legislative changes that would prevent any such mergers in the future. Associate Professor Frank Zumbo recommends amending the TPA so that instead of preventing takeovers which *substantially* lessen competition, the bar be lowered to preventing mergers which *materially* lessen competition.[35]

4.56 Professor Zumbo's suggestion is encompassed in the Trade Practices Amendment (Material Lessening of Competition-Richmond Amendment) Bill 2009, which is currently the subject of an inquiry by the Senate Economics Legislation Committee. Some evidence before that inquiry raises doubts about whether courts may distinguish between 'material' and 'substantial' changes to competition; suggesting that either an alternative wording may be needed or the intention spelled out very clearly in the legislation and/or explanatory memorandum.

4.57 A problem identified in the operation of the ACCC is that it is both umpire and player. It approves a merger and then assesses whether competition is adequate after the merger:

> Being a both a regulator and policeman is a problem but the ACCC is a peculiar policeman. The ACCC doesn't fight crime independently. It doesn't search for evidence…The ACCC is a stay-at-home policeman, only called out after the crime has been alleged or committed.[36]
>
> Senator MILNE—…that the ACCC's powers be divided so that, if they stay as the approving body for mergers, the adjudication on the impacts of mergers be taken to another administrative body. Would you support that?...
>
> Mr Oldaker—Yes, …They need to be made accountable, and if that is what you have to do then that is what has to happen.[37]

4.58 The ACCC replied:

> We would not see such a conflict of roles…In most competition law enforcement authorities there is a combination of a merger function and an enforcement function. They are necessarily different because one is forward looking and one is backwards looking. But they are two tools to achieve essentially the same goal, which is to enhance the welfare of Australian consumers. So, rather than being in conflict, they complement each other. I

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34 See especially paragraphs 70 and 84 of ACCC, 22 April 2010, http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D10+3542719.pdf&trimFileTitle=D10+3542719.pdf&trimFileFromVersionId=924920

35 Associate Professor Frank Zumbo, *Submission 34*, pp 6–7.

36 Dr McCall, cited in Select Committee on Agricultural and Related Industries, *Food Production in Australia: Third Interim Report*, November 2009, p. 26.

37 Mr John Oldaker, Chairman, Cadbury Suppliers, *Committee Hansard*, 6 November 2009, p.12.

> should say that the staff who conduct the merger reviews are wholly separate to the staff who conduct the enforcement activities of the commission. They sit in separate divisions. [38]

4.59 It has also been suggested that the ACCC should have a dedicated small business branch.

4.60 The Committee also asked the ACCC about barriers to new processors entering the market. Their view was:

> We would like to think that in general the barriers to entry are reasonably low. For a participant who is serious about entering the market there are no real legal barriers, but you have to get the plant and manufacturing processes. I think one of the biggest barriers would be getting the contracts from farmers. A lot of those are sewn up. We do not try to make light of those problems but the barriers to entry are probably not as high as we see in some of the other sectors.[39]

Committee view

4.61 The Committee expresses grave concerns about claims of anti-competitive conduct by supermarkets. In particular, it appears that the growing dominance of generic products in the retail market is having detrimental effects on both consumers and farmers.

4.62 A combination of narrow interpretations by the courts of expressions in the *Trade Practices Act 1974* and the repeal of section 49 mean that the Act fails to provide adequate protection against excessive market concentration and abuse of market power. There is inadequate assessment of whether markets have become excessively concentrated because the agency assessing this (the ACCC) is the same agency that approved the mergers leading to the high degree of concentration. The Committee is also concerned that the 'public interest' which the ACCC seeks to protect appears to be restricted to consumers and it does not pay sufficient attention to ensuring that farmers get a fair deal.

4.63 The Committee would like to see restrictions placed on creeping acquisitions by the major supermarket chains, but will leave to the current inquiry by the Senate Economics Legislation Committee whether this should be by the proposed Richmond Amendment or legislation shortly to be introduced by the Government.

4.64 The majority of the Committee is reticent to interfere in commercial decisions to the extent of banning the sale of generic products by the major supermarket chains, and would prefer its concerns be addressed by other measures to promote competition. If the large supermarket chains continue to sell generic products, the Committee would like to see smaller processors able to bid to supply them.

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38 Mr Timothy Grimwade, ACCC, *Committee Hansard*, 18 January 2010, p. 75.

39 Mr Mark Pearson, ACCC, *Committee Hansard*, 18 January 2010, p. 76.

Recommendation 9

4.65 The Committee recommends the Productivity Commission considers, in its review of national competition policy, the appropriateness of separating the functions and powers of the ACCC with the effect that separate agencies are responsible for the approval of mergers and the assessment of whether concentration is subsequently excessive.

Recommendation 10

4.66 The Committee recommends that the topic of competition and pricing in the dairy industry be again referred to the Senate Economics References Committee in May 2012 to assess whether progress has been made or whether tougher and more interventionist measures need to be adopted.