# Parliament of Australia

# Senate Economics Committee

# Inquiry into the GROCERYchoice Website

## Submission
## by


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# The case for full price transparency and effective laws against anti-competitive practices by the major supermarket chains

The stranglehold that the major supermarket chains such as Coles and Woolworths have on the Australian grocery sector is a real and present threat to competition and consumers.

This threat to competition and consumers is heightened by the lack of full price transparency available to consumers as a direct result of the failure of the major supermarket chains to make available real time pricing information to consumers.

Such a failure by the major supermarket chains to provide full pricing transparency is significant as it represents a major market failure needing to be urgently addressed. In fact, the significant information asymmetries faced by consumers in relation to supermarket prices places them at a considerable and ongoing disadvantage in their dealings with the major supermarket chains. Consumers are clearly disempowered by an inability to efficiently and comprehensively survey supermarket prices before they go grocery shopping in order to find the cheapest local supermarket.

While motorists can access the *motormouth* petrol prices website[1] in order to check petrol prices in their vicinity or across metropolitan areas so as to find the cheapest petrol prices, grocery shoppers do not have access to a website that enables them to check supermarket prices before they go shopping. Accordingly, consumers, unlike motorists, cannot determine, in advance, the cheapest individual supermarket in their vicinity or across a metropolitan area.

In this regard, there is clear and urgent need to empower consumers to be able to find the cheapest local supermarket. The urgency to give consumers full price transparency arises for the simple reason that the major supermarket chains engage in geographic price discrimination whereby they charge a different price for the same product in different retail outlets they operate under the same supermarket banner. The practice of geographic price discrimination means that, for example, the local Coles supermarket may not be the cheapest Coles supermarket in the local area and, in fact, may not be the cheapest local supermarket.

In short, consumers would like the ability to discover in advance the cheapest individual supermarket in their local area. Consumers would also like to know whether or not their local supermarket is the cheapest across the metropolitan area.

Within this context, there is a undoubtedly an overwhelming case for promoting full price transperancy in relation to all products found in all supermarkets operated by the major supermarket chains. Unfortunately, for consumers and taxpayers, the ACCC's version of the GROCERYchoice

[1] www.motormouth.com.au

website failed completely to deliver any meaningful information. The ACCC's version of the GROCERYchoice contained out of date pricing data and extremely generalised information that failed to give consumers any meaningful data that consumers could seek to rely on to help reduce their grocery bill. The key failure of the ACCC's version of the GROCERYchoice was that it failed to assist consumers to find the cheapest individual local supermarket or to find the cheapest individual products they may be looking to buy during their next supermarket visit.

Ultimately, there were more fundamental concerns regarding the ACCC's version of the GROCERYchoice. These concerns relate to (i) whether the ACCC paid far too high a price for the data collection; and (ii) the serious doubts regarding the integrity of the data collected. From their evidence the ACCC has revealed that ACCC staff did not at any point go out to a supermarket to physically double check the accuracy or otherwise of the data collected from that supermarket's shelves. An actual physical spot check of the accuracy or otherwise of the primary data is a fundamental tenet of best audit practice. The ACCC has, in relation to the ACCC's version of the GROCERYchoice, failed to apply basic audit principles.

In short, the ACCC's version of the GROCERYchoice was a total waste of taxpayers' money with nothing salvageable from the ACCC's version of the GROCERYchoice and with serious doubts as to the integrity of the actual pricing information included on the ACCC's version of the GROCERYchoice.

The Federal Government's decision to pass the GROCERYchoice onto Choice was clear recognition that Choice could do better than the ACCC's version of the GROCERYchoice. Sadly, the Federal Government's initial decision to let Choice deliver a new GROCERYchoice website was totally undermined by the Federal Government's subsequent failure to do whatever it could to facilitate and, if need be, to require the involvement of the major supermarket chains in the Choice version of the GROCERYchoice website.

The Federal Government had a leadership role to play given that GROCERYchoice was part of the Government's election commitment to put maximum downward pressure on grocery prices. This leadership role was also clearly essential given that the Federal Government had spent or had committed to spend millions of taxpayer's dollars on the website.

The Federal Government's leadership role was particularly critical given the growing recalcitrant behaviour by the major supermarket chains towards Choice's work on the new GROCERYchoice website. There can be no doubt that the failure of the major supermarket chains such as Coles and Woolworths to provide Choice with pricing data directly undermined the efforts by Choice to deliver a revamped GROCERYchoice website with meaningful pricing data.

Indeed, efforts by Choice to provide meaningful pricing information to consumers through a revamped GROCERYchoice website were undoubtedly frustrated by the unwillingness of the major supermarket chains to engage in a

dialogue directly with Choice. Clearly, the major supermarket chains' decision to agree that their industry association – the Australian National Retailers Association – be the only channel of communication with Choice was designed to ensure a united front in dealing with Choice. This coordinated behaviour between Australian National Retailers Association and the major supermarket chains raises serious concerns under the *Trade Practices Act*.

The Federal Government's decision to prevent Choice launching their revamped version of the GROCERYchoice website represents a more fundamental failure by the Minister for Competition Policy and Consumer Affairs, Dr Craig Emerson, to work with Choice in developing and fine-tuning a website with meaningful pricing information that consumers could use to find the cheapest individual local supermarket or to find the cheapest individual products they may be looking to buy during their next supermarket visit. After all, it was the Federal Government that turned to Choice when it became obvious that the ACCC's version of the GROCERYchoice website was failing to deliver any relevant information to consumers. It was only fitting, therefore, that the Federal Government would seek to use its best endeavours or even its legislative powers to ensure that the taxpayer funded Choice version of GROCERYchoice had every chance of success in delivering meaningful and comparative pricing information to consumers.

Overall, the GROCERYchoice debacle reveals that in the absence of any leadership from the major supermarket chains themselves in providing full pricing transparency to their customers, there is an urgent need for strong Federal Government leadership so as to deliver full price transperancy to consumers. Of course, full price transparency is only part of what is needed to deliver a vigorously competitive supermarket sector for the benefit of Australian consumers.

Within this context, the submission will make a number of recommendations aimed at promoting consumer welfare by protecting and facilitating a more transparent and competitive supermarket sector for the benefit of Australian consumers.

# List of recommendations

**(1)** **In the absence of the major supermarket chains voluntarily providing full price transparency to their customers, the Federal Government to legislate to require that supermarkets of a size greater than 2000 square metres make publicly available a website containing real time pricing information on all products sold in such supermarkets;**

**(2)** **Immediate removal of the remaining 20% of restrictive lease terms relating to shopping centres, with the ACCC to secure a commitment from shopping centre landlords to make space available in the shopping centre where a restrictive lease term relating to the shopping centre has been removed;**

**(3)** **Removing all restrictive covenants relating to land that prevent the entry of new competitors to the major supermarket chains.**

**(4)** **The ACCC to immediately undertake a formal inquiry into "land banks" held by the major supermarket chains, as well as the ACCC undertaking ongoing regular reviews of land banks held by the major supermarket chains;**

**(5)** **Enacting the *Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009* (the Blacktown Amendment) to deal effectively with the anti-competitive practice of geographic price discrimination;**

**(6)** **The ACCC to review all objections pursuant to planning and zoning laws lodged by the major supermarket chains and shopping centre landlords against developments involving retail proposals intended to compete with the major supermarket chains and/or the shopping centre;**

**(7)** **The ACCC to review all land acquisitions by the major supermarket chains and shopping centre landlords;**

**(8)** **Amending s 50 of the *Trade Practices Act* to prohibit any merger or acquisition that "materially" lessens competition;**

**(9)** **Amending the *Trade Practices Act* to deal with creeping acquisitions by prohibiting a firm with substantial market share from making an acquisition that would lessen competition in a market;**

**(10)** **Amending 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.**

## The ACCC's version of the GROCERYchoice website a complete failure

The ACCC's version of the GROCERYchoice website was a complete failure in that it offered no meaningful information to consumers. The information was out of date, extremely generalised and did not give consumers information they really need to make informed decisions as to where to shop in order to get the lowest possible prices. Contrary to its stated objective, the ACCC's version of the GROCERYchoice website failed to empower consumers to be able to find the lowest possible supermarket prices.

In short, the ACCC's version of the GROCERYchoice website failed on so many levels that it represented a total waste of taxpayers' money. These failures included:

- The ACCC's version of GROCERYchoice website failed to excite consumers. Consumers won't return to a website that fails to give them meaningful information that they can readily use. The number of visits or "hits" to the ACCC's version of GROCERYchoice website fell sharply in the space of just a few months. This provided overwhelming evidence that consumers had abandoned the ACCC's version of GROCERYchoice website for the simple reason that consumers could not see any practical value in revisiting the ACCC's version of GROCERYchoice website.

- Consumers wanted something new and original from The ACCC's version of GROCERYchoice website. To consumers, The ACCC's version of GROCERYchoice website only provided a general impression about "general" grocery prices across very large regions of Australia. Consumers already have a "general" feeling about grocery prices. What consumers want is specific pricing information that they can use to identify the cheapest products in the cheapest individual supermarket in their local area;

- The ACCC's version of GROCERYchoice website failed to tell consumers which was the cheapest individual supermarket in their local area in a timely and regular manner. Instead, The ACCC's version of GROCERYchoice website only gave very generalised, out of date monthly pricing information covering large regions of Australia. Consumers want to know on a regular (preferably real time) basis which is the cheapest individual supermarket in their local area;

- The ACCC's version of GROCERYchoice website failed to give consumers up to date pricing information. The ACCC's version of GROCERYchoice website only provided a very limited monthly "snapshot" that was out of date as soon as it is put on the website. As supermarket shoppers will typically shop on at least a weekly

basis they want the most up to date information possible about the cheapest local supermarket and products in their local area;

- The ACCC's version of GROCERYchoice website failed to survey all major supermarket stores. The ACCC's version of GROCERYchoice website only surveyed 600 stores Australia-wide to cover 61 regions. This was an average of just 10 individual supermarkets in each region. With all of the regions covering large areas of Australia, The ACCC's version of GROCERYchoice website's sample was far too small to generate any meaningful pricing information. As the sample of individual supermarkets used was very small, the pricing information was distorted even further given that, for example, the particular Coles and Woolworths supermarkets used in the sample for The ACCC's version of GROCERYchoice website may not have been representative of the pricing structure used at other Coles and Woolworths supermarkets in the region. As Coles and Woolworths vary their pricing structures across their stores (ie they engage in geographic price discrimination), the small sample size used in ACCC's version of the GROCERYchoice was a fundamental flaw in its design;

- The ACCC's version of GROCERYchoice website failed to tell consumers that Coles and Woolworths charge different prices for the same products at their different individual stores. This practice of geographic price discrimination means that the major supermarket chains charge higher prices on products where there is lack of independent competition in the local area and charge lower prices where they are forced to do so by independents. So when the ACCC's version of GROCERYchoice website said, for example, that Coles is the cheapest "overall" in a region that did not mean that all of the individual Coles supermarkets were the cheapest in that region. In fact, the particular Coles supermarket nearest the consumer may not have been the cheapest in the region. Consumers were being misled by ACCC version of the ACCC's version of GROCERYchoice website as the information did not name individual supermarkets. As a result, consumers may not have been shopping in the cheapest individual supermarket in their region;

- The ACCC's version of GROCERYchoice failed to separately identify the role of particular independent supermarkets in keeping grocery prices down. The ACCC version of GROCERYchoice gave the false impression that independents are more expensive, but this may not be true of the independent supermarket in the consumer's particular area. The ACCC version of the GROCERYchoice website was misleading consumers as they did not know the prices charged at individual independent supermarkets. The ACCC version of the GROCERYchoice website was also misleading as it generally lumped all independents together despite independent

supermarkets being of different sizes and having different pricing structures;

- The ACCC version of the GROCERYchoice website failed to give consumers the opportunity to compare prices from month to month. In the ACCC's version of the GROCERYchoice website the products included in each month's survey were rotated, which meant that consumers had no ability whatsoever to compare prices month to month. Not only were the numbers used on the ACCC's version of the GROCERYchoice website so generalised as to be meaningless in the first place, but there was not even the ability for consumers to compare prices month to month as each month's basket was different from the previous month's basket. As a result, the methodology underlying the ACCC's version of the GROCERYchoice website was random and unscientific.

## The need for full price transparency

The failure of the ACCC's version of the GROCERYchoice website is particularly disappointing as it represents a missed golden opportunity to deliver full price transparency to consumers. With appropriate leadership and proper planning by the Federal Government from the very outset, there is no doubt that a relevant and meaningful website could have been developed. Clearly, the ACCC was ill-suited and ill-prepared given the considerable haste shown by the Federal Government to get a website – any website - up and running. Such haste, particularly by the then Minister for Competition Policy and Consumer Affairs, Mr Chris Bowen, seriously undermined any chance of success that the project may have had in delivering a relevant and meaningful website.

In fact, with clear planning and set objectives a Federal Government-funded website could have been developed to provide meaningful and accurate pricing information. In any event, given the millions of dollars of taxpayers' money that was wasted by the ACCC on the failed ACCC version of GROCERYchoice, it is clear that the money could have been much more productively spent on properly scoping the project and seeking formal industry and wider community input on what a Federal Government-funded website could and should have achieved or delivered.

In addition, there should have been careful consideration of whether the major supermarket chains themselves should have developed their own websites to deliver up-to-date pricing information as a service to their customers. The major supermarket chains are well placed to provide full price transparency to their customers. All pricing information is held electronically by the major supermarket chains and given that they have some of the most sophisticated IT systems that enable them to collect all pricing information scanned through their checkouts, it is clear that the major supermarket chains have the technical ability to implement full price transparency through their own websites in relation to all products sold in each of their supermarkets.

Importantly, since scanned pricing information through their checkouts is in real time, the major supermarket chains could provide real time pricing information to the public if they chose to do so. This would be the preferred option given that the major supermarket chains should recognise that such real time full pricing transparency should be provided as part of their commitment to customer service. Indeed, the continued failure by the major supermarket market chains to provide real time full pricing transparency represents is a considerable gap in their customer service.

In practice, the continued failure by the major supermarket chains to provide real time full pricing transparency represents a significant market failure as it is a direct cause of the considerable information asymmetries present in the supermarket sector that currently place consumers at a substantial disadvantage in their dealings with the major supermarket chains. This market failure is such that in the absence of the major supermarket chains voluntarily providing full price transparency to their customers, the Federal Government

should legislate to require that supermarkets of a size greater than 2000 square metres make publicly available a website containing real time pricing information on all products sold in such supermarket. Such a website would correct a substantial market failure in Australian supermarket sector.

## Recommendation 1:

**In the absence of the major supermarket chains voluntarily providing full price transparency to their customers, the Federal Government to legislate to require that supermarkets of a size greater than 2000 square metres make publicly available a website containing real time pricing information on all products sold in such supermarkets.**

## The need to remove all restrictive leases and covenants preventing the entry of competitors to the major supermarket chains

The immediate removal of 80% of restrictive leases involving Coles and Woolworths in shopping centres is long overdue recognition by the Federal Government and the ACCC that these restrictive leases have been detrimental to competition and consumers and have been helping to push up grocery prices.

While the removal of any restrictive lease is to be welcomed, the removal in this case is only a first step in dealing with the market dominance of Coles and Woolworths.

There are another 20% of restrictive leases that will continue to operate for upwards of 5 years. It's very disappointing that these 20% of restrictive leases will continue to operate to the detriment of competition and consumers. Given the strong competition concerns regarding restrictive leases, all restrictive leases should have been removed immediately.

With Australia consistently having some of the highest levels of food inflation in the OECD, it's critical that Minister Emerson and the ACCC take a holistic approach to dealing with the market dominance of Coles and Woolworths.

Dealing with just restrictive leases is only part of the picture. Much more needs to promote a competitive grocery sector and to push down grocery prices.

With all due respect, Minister Emerson’s and the ACCC’s recent announcement regarding restrictive lease terms fell well short given that:

- There was no commitment from shopping centre landlords that they will make space available to new competitors to Coles and Woolworths. It's one thing to remove lease restrictions, it's another matter for competitors to get space in shopping centres to be able to compete in the centre with Coles and Woolworths;

- There was no plan to deal with restrictive covenants which place restrictions on the use of land and which also strongly favour Coles and Woolworths. These restrictive covenants equally raise strong competition concerns and represent a clear barrier to entry. All restrictive covenants relating to land should also be removed; and

- There was no plan to deal with the substantial land banks that Coles and Woolworths have accumulated enabling them to lock up possible development sites. These land banks also prevent the entry of new competitors across existing and developing suburbs. Like restrictive leases, land banks are a barrier to entry to new competitors and raise competition issues.

The issues of (i) retail space not being made available to competitors to the major supermarket chains; (ii) restrictive covenants relating to land; and (iii) land banks held by the major supermarket chains all represent substantial barriers to entry to the Australian supermarket sector and must all be dealt with if Australia is to have the most price competitive supermarket sector possible.

## Recommendation 2:

**Immediate removal of the remaining 20% of restrictive lease terms relating to shopping centres, with the ACCC to secure a commitment from shopping centre landlords to make space available in the shopping centre where a restrictive lease term relating to the shopping centre has been removed.**

## Recommendation 3:

**Removing all restrictive covenants relating to land that prevent the entry of new competitors to the major supermarket chains.**

## Recommendation 4:

**The ACCC to immediately undertake a formal inquiry into "land banks" held by the major supermarket chains, as well as the ACCC undertaking ongoing regular reviews of land banks held by the major supermarket chains.**

## The need for an effective law against geographic price discrimination

In the absence of full price transparency, consumers will be even more severely disadvantaged because of the practice of geographic price discrimination engaged in by the major supermarket chains. Geographic price discrimination is a particular and discrete form of price discrimination. Geographic price discrimination is simply the practice of selectively charging consumers a different price for the same product in different retail outlets operated by the same retailer under the same trading name in the same geographic area. Quite simply, consumers are being charged a different price in a different location, even though the retailer is selling the product in retail outlets operating under the same trading name, in the same geographic area reflecting the same business format having the same cost structure.

While geographic price discrimination may or may not involve other anti-competitive practices such as predatory pricing in particular locations (or what can be described as "location-specific predatory pricing"), the *Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009* (to be referred to as the Blacktown Amendment) is solely concerned with geographic price discrimination as a distinct practice aimed at price gouging consumers on the basis of location.

### The rationale behind geographic price discrimination explained

For the sake of clarity, it is important to note that there is only one basic rationale for geographic price discrimination. That is, a company can, through access to price data about a competitor's pricing behaviour, ascertain the intensity of competition offered by the competitors in a local area and tailor the company's pricing behaviour to selectively cut prices only in locations where they are forced to by local competition. In short, where there is a strong price competitive independent in the local market, the company will lower its price for a product to match or undercut the independent in that local market. Conversely, the company's price for the product will be higher in those locations where the company faces little or no real competition in the local market.

Clearly, the point to be remembered in such circumstances is that the company is in fact able to selectively lower its prices in some locations where it chooses or is forced to do so. This is a significant point as the company's business model allows the company to lower its retail prices in those locations where there is a strong price competitive independent. So the question to ask is if a company's business model allows it to sustain lower retail prices in price competitive locations, why can't the company offer those lower retail prices in all other locations in the same geographic area? Well, quite simply because the company doesn't have to offer those lower prices in all other locations in the same geographic area. In short, even though a company's business model allows it to offer lower prices in price competitive locations, a company will not offer those same low prices in other retail outlets unless it is forced to

by the local competition. In this way a company can simply get away with charging different prices in different locations.

Of course, there may be a more sinister rationale for geographic price discrimination. Quite simply, a big business can lower its prices in a particular local market with the express purpose of driving out of that local market a strong price competitive independent. The big business can do this simply by cross subsidizing the lower prices used in a particular location to drive out the price competitive independent with the higher prices that the big business charges in other local markets where local competition is weak or failing to drive down retail prices. While the big business can cross-subsidize lower prices in this manner, independents generally lack such an ability making them "sitting ducks" in a concerned campaign by the big business to force them from local markets. The removal of a strong price competitive independent from the local market will have an adverse impact on the choice and retail prices paid by consumers in that local market once the independent has been removed.

So clearly the lower prices that a company offers in a price competitive location may be intended to drive out an independent competitor in the local market. In this way geographic price discrimination can have the purpose of driving out a strong price competitive independent from the local market to the detriment of competition and consumers. Once the strong price competitive independent has exited the local market, the big business can simply raise its prices to the same high levels as those high prices in those growing number of other local markets where the local competition is weak or failing to drive down retail prices.

Within this context, the Blacktown Amendment simply requires that the company charges consumers the lowest price for the same product everyday and everywhere in all retail outlets operated by the company under same trading name in the same geographic area. Under the Blacktown Amendment, so long as the company charges consumers the lowest price for the same product everyday and everywhere in the same geographic area, it is a matter for the company to choose that price, and even whether or not it chooses to sell products below cost.

## Recommendation 5:

**Enacting the *Trade Practices Amendment (Guaranteed Lowest Prices - Blacktown Amendment) Bill 2009* (the Blacktown Amendment) to deal effectively with the anti-competitive practice of geographic price discrimination**

## The anti-competitive use of planning and zoning laws by the major supermarket chains

The major supermarket chains, as well as shopping centre landlords, will seek to protect themselves from competition by seeking to prevent the entry of new supermarkets or retail space into a local market. As land is a scarce resource it is clear that the major supermarket chains and shopping centre landlords can "lock up" possible development sites as well as seeking to strategically use planning and zoning laws to delay or prevent the entry of new retail space intended to compete with the major supermarket chains and/or the shopping centre.

The legitimacy or otherwise of the objections lodged by the major supermarket chains and shopping centre landlords needs to be reviewed from a competition law and policy perspective so as to ensure that the major supermarket chains and shopping centre landlords are not acting anti-competitively to prevent entrants into the local market under the guise of planning and zoning laws.

Significantly, the lodging of objections can be a precursor to attempts by the major supermarket chains to extract an agreement with the new entrant whereby the new entrant is required to restrict the goods or services sold by the new entrant in return for the major supermarket chain withdrawing its objections. This is an area that the ACCC has previously pursued and been successful in securing pecuniary penalties under the *Trade Practices Act* against the major supermarket chains.[2]

## Recommendation 6:

**The ACCC to review all objections pursuant to planning and zoning laws lodged by the major supermarket chains and shopping centre landlords against developments involving retail proposals intended to compete with the major supermarket chains and/or the shopping centre.**

## Recommendation 7:

**The ACCC to review all land acquisitions by the major supermarket chains and shopping centre landlords.**

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[2] See ACCC media release *Federal Court penalises Liquorland $4.75 million for anti-competitive liquor deals*:
http://www.accc.gov.au/content/index.phtml/itemId/687035/fromItemId/2332
and ACCC media release *Woolworths penalised $7 million for anticompetitive liquor deals*
http://www.accc.gov.au/content/index.phtml/itemId/773813/fromItemId/622289

## Amend s 50 of the *Trade Practices Act* to prohibit any merger or acquisition that "materially" lessens competition

The growing market dominance of the major supermarket chains has been greatly assisted by Australia's weak laws against anti-competitive mergers. Indeed, Australia's weak laws against anti-competitive mergers has enabled the major supermarket chains to get away with making acquisitions that have materially lessened competition in the Australian supermarket sector and in the broader retail market.

In practice, the problem is a weak s 50 of the *Trade Practices Act* which only prohibits a merger or acquisition if it substantially lessens competition:

> (1) A corporation must not directly or indirectly:
>
> (a) acquire shares in the capital of a body corporate; or
>
> (b) acquire any assets of a person;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

Unfortunately for consumers and competition the "substantial lessening of competition" test is far too high a threshold to meet and, accordingly, explains why the ACCC approves around 97% of mergers that it considers. 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. In this way, the "substantial lessening of competition" test has come to be equated with the "substantial market power" test which also requires that it be established that the company have the ability to raise prices without losing business to rivals.

With the near perfect record of mergers being approved or escaping scrutiny under the current s 50(1) resulting in Australia having some of the most highly concentrated markets in the world, there is compelling evidence to point to the failure of s 50(1) as currently drafted to protect competition and consumers from the adverse effects of mergers or acquisitions, particularly as a reduction in genuine competition between the fewer companies remaining post merger which is increasingly likely to lead to them acting as a cosy club to the detriment of consumers.

This failure of the current s 50(1) to prevent mergers and acquisitions having a detrimental effect on consumers and competition can be directly attributed to the view that the present "substantial lessening of competition" test is simply too high a test to act as an appropriate filter to protect competition. In short, because the "substantial lessening of competition" test is set too high, s 50(1) as currently drafted is failing to prevent anti-competitive mergers and acquisitions.

**Proposed amendment to s 50(1) of the *Trade Practices Act***

Within this context, it would be submitted that the "substantial lessening of competition" test under the current s 50(1) is in urgent need of change to a more balanced test of a "material lessening of competition." A "material lessening of competition" test would operate to lower the threshold for determining whether a merger or acquisition is anti-competitive in a manner that would allow the merger or acquisition to be tested by reference to whether it has a pronounced or noticeably adverse affect on competition rather than on whether the merged entity would post merger be able to exercise substantial market power as is currently the case.

The following draft illustrates how an amended s 50(1) would incorporate a new "material lessening of competition" test:

> *(1) A corporation must not directly or indirectly:*
>
> *(a) acquire shares in the capital of a body corporate; or*
>
> *(b) acquire any assets of a person;*
>
> *if the acquisition would have the effect, or be likely to have the effect, of materially lessening competition in a market.*

## Recommendation 8:

**Amend s 50(1) of the *Trade Practices Act* to prohibit any merger or acquisition that "materially" lessens competition.**

## Dealing with creeping acquisitions: The importance of preventing the destruction of competition by stealth

As stated above, the growing market dominance of the major supermarket chains has been greatly assisted by Australia's weak laws against anti-competitive mergers and acquisitions. Indeed, Australia's weak laws against anti-competitive mergers and acquisitions have also enabled the major supermarket chains to get away with making small scale acquisitions over a period of time that collectively have been detrimental to competition and consumers in the Australian supermarket sector and in the broader retail market. These small scale acquisitions are referred to as "creeping acquisitions."

Dealing effectively with the issue of creeping acquisitions is essential to having a world's best competition law framework. Failure to deal effectively with creeping acquisitions undermines competition to the clear and longstanding detriment of consumers. Unless the *Trade Practices Act* effectively prevents creeping acquisitions there will be a considerable gap in the Act allowing large businesses to acquire competitors in a piecemeal manner that gets around the existing prohibition against mergers found in s 50(1) of the *Trade Practices Act*.

The issue of creeping acquisitions arises because of the current drafting of s 50 of the *Trade Practices Act*. First, as discussed above s 50(1) is far too permissive in allowing around 97% of mergers to be approved by the ACCC. Second, s 50(1) as currently drafted refers to an "acquisition" in the singular making it clear that it is each individual acquisition that needs to be assessed under s 50. Unless the particular acquisition, in itself, substantially lessens competition, it will not be in breach of s 50. As a result, the individual acquisition will be allowed under s 50(1) as currently drafted as the "substantial lessening of competition" test is too high a threshold to deal with mergers or acquisitions.

It is clear that s 50 can be easily circumvented by undertaking piecemeal or small scale acquisitions which individually don't substantially lessen competition, but which over time lead to the increased dominance of the merged entities. Indeed, while over time individual piecemeal acquisitions may, when taken together with previous acquisitions by the same entity, have the effect of collectively destroying competition, the current s 50(1) is powerless to stop the piecemeal acquisitions.

So under s 50(1), as currently drafted, the creeping acquisitions of individual competitors will not be prevented because their small scale will not be considered to substantially lessen competition and accordingly not breach s 50(1) of the *Trade Practices Act*. In this way creeping acquisitions lead to the destruction of competition over time in a manner that is not prevented by the current s 50(1) of the *Trade Practices Act*.

While, of course, those engaging in creeping acquisitions will justify the creeping acquisitions on efficiency grounds as possibly leading to greater

economies of scale, it is essential to note that the removal of individual efficient competitors over time means that there is a reduction in the very competition required to ensure that any savings from any economies of scale gained from acquisitions are passed onto consumers.

Thus, unless there is sufficient competition to force the merged entities to pass efficiency savings onto consumers, the benefits of any economies from mergers or acquisitions will simply be a windfall for the merged entity and not be passed onto consumers. More dangerously for consumer, the weakening of competition through merger activity, along with the increased dominance of the merged entities, allows the merged entities to raise prices to detriment of consumers.

**Current Federal Government proposals fail to deal with creeping acquisitions**

In a discussion paper issued by the then Minister for Competition Policy and Consumer Affairs on 6 May 2009 and entitled *Creeping Acquisitions - The Way Forward*, the Federal Government outlined the following proposal for dealing with creeping acquisitions:[3]

> *(1) A corporation that has a substantial degree of power in a market must not directly or indirectly:*
>
> *(a) acquire shares in the capital of a body corporate; or*
>
> *(b) acquire any assets of a person;*
>
> *if the acquisition would have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market.*

This proposal requires that the company would have to have substantial market power in the first place before the proposal would stop any of its subsequent acquisitions. So if the company does not have market power, then it would not be covered by this proposal at all. As discussed above, the market power threshold is a very high threshold as there is a need to prove that company has "the ability to raise prices without losing business to its rivals." Very few companies, if any, have substantial market power. In fact, only monopolists, or near monopolists, can raise prices without losing business.

Since a company needs to be a monopolist or near monopolist before it will have a substantial degree of market power, the Federal Government's creeping acquisitions proposal will, with all due respect, be ineffective in preventing the destruction of competition by stealth. Indeed, under the Federal Government's creeping proposal, few, if any, companies will have substantial

[3] The discussion paper can be accessed at: http://www.treasury.gov.au/documents/1530/PDF/Discussion_paper_Creeping_Acquisitions.pdf

market power on the basis that few, if any, companies have the ability to raise prices without losing business to rivals.

In addition to the real problem that under the Federal Government's proposal very few, if any, companies would have a substantial degree of market power, the Federal Government's proposals will also fail to prevent creeping acquisitions on the basis that the need to show an "enhancement" of market power under the proposals will be a further insurmountable hurdle to the application of the Federal Government's creeping acquisition proposals. Given that a company having substantial market power already has the ability to raise prices without losing business, it is especially questionable for the proposals to refer to an "enhancement" on the basis that there is real uncertainty as to what that would mean in practice.

Does an "enhancement" mean that under the Federal Government's creeping acquisition proposals it would need to be shown that a company already possessing substantial market power can raise prices even higher after the acquisition? How much higher? Given that the company already has the ability to raise prices in order to have substantial market power, it would be extremely unlikely, if ever, possible for a creeping acquisition, given its small scale, to "enhance" the pricing power of a company already having substantial market power.

In short, the Federal Government's proposals will fail, with all due respect, to prevent creeping acquisitions that can be so destructive of competition to the clear and longstanding detriment of consumers.

**Proposed amendment to s 50 of the *Trade Practices Act***

In view of the considerable concerns with the Federal Government proposals for dealing with creeping acquisitions, it would be submitted that an alternative approach to effectively dealing with creeping acquisitions is needed.

Given that creeping acquisitions become a very real concern where they are being engaged in by companies already having a substantial market share it would be submitted that the focus of a prohibition on creeping acquisitions should be on those companies having a substantial share of the market. It is these companies with substantial market share that can engage in a destructive, but well organised, pattern of creeping acquisitions in order to increase their strength in the market through piecemeal acquisitions in circumstances where individually those acquisitions are not prevented by the current s 50(1).

The following new subsection of s 50 would be proposed to deal effectively with creeping acquisitions:

> *(1A) A corporation that has a substantial share of a market must not directly or indirectly:*
>
> > *(a) acquire shares in the capital of a body corporate; or*

*(b) acquire any assets of a person;*

*if the acquisition would have the effect, or be likely to have the effect, of lessening competition in a market.*

## Recommendation 9:

**Amend the *Trade Practices Act* to deal with creeping acquisitions by prohibiting a firm with substantial market share from making an acquisition that would lessen competition in a market.**

**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.**

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.

## Recommendation 10:

**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.**