
Executive Summary

Over the past twenty years or so, Australia has seen the demise of hundreds of small grocery stores, butchers, bakers, florists, greengrocers, pharmacists, newsagents, liquor outlets and other small retailers as a direct result of the continuous expansion of major supermarket chains and major speciality retailers, often subsidiaries of the same conglomerate.

Thus, the market is heavily concentrated and oligopolistic in nature, where a small number of major chains (Woolworths, Coles and Franklins) each have a significant degree of economic influence or market power. This has placed significant pressures on small and independent retailers, leading to calls for legislative remedies to be imposed by government.

Not only is economic survival at stake, but so too the health and well-being of many small retailers, brought about by longer working hours and stressful dealings with the ‘big end of town’.

Retirement plans have been put on hold, family members have had to seek employment elsewhere, and lifetime commitments to grocery retailing have now come down to two options – to sell or to close.

Despite the growth of the major chains, consumers appear to be benefitting from the competitive forces of the current market structure. The evidence revealed that, since 1986, prices have fallen on average for baskets of foods and individual foods at supermarkets. Although there are some exceptions, the Committee accepts that economies of scale and scope have driven prices down in major supermarkets across Australia. Furthermore, surveys have revealed that there has been a shift in shopping habits from late in the week (Thursday to Friday) to Sunday. As a consequence, the ability of supermarkets or other stores to open on a weekend is a factor welcomed by many consumers.

By its recommendations, the Committee does not seek to invoke protectionist measures for small independent retailers. Rather, it provides for measures which it believes will enhance competition in the market place.

Market share

The market share of the three major chains amounts to around 80 per cent of the dry/package goods market. Woolworths suggested that this was not a correct measurement, arguing that the share should be measured against the ‘stomach market’, which includes food and groceries to take home, liquor to take home, and food catering (cafés and restaurants). This definition would effectively lower Woolworths’ level of concentration dramatically. The Committee is of the view that this argument is irrelevant to the issue at hand, and has concluded that the major chains enjoy a substantial degree of market power.

This market power is enhanced by vertically integrated structures, which enable the major chains to gain commercial advantages over the independents. High levels of efficiency, superior technology and buying power has lead the Committee to conclude that consumers are voting with their feet, deciding to frequent the supermarkets because of their price, range of products, extended trading hours, and the convenience of one-stop-shopping.

Despite this consumer satisfaction, the Committee is concerned about the activities of the major chains with respect to small retailers. Some of the evidence brought to the Committee's attention indicates that their behaviour is inconsistent with their public image of being good corporate citizens.

Market cap

The National Association of Retail Grocers of Australia (NARGA) called for the market share of each major chain to be capped at 25 per cent, with divestiture taking place within 5 years where any one chain exceeds that figure. This would see Australia as being the only country throughout OECD economies to introduce a market cap specifically for the grocery retailing sector.

NARGA's proposal would require Woolworths, a company owned by around 240,000 ordinary Australian shareholders, to shed one third of its stores, while Australia's largest private sector employer, Coles Myer, would be required to sell off around 100 of its Coles/Bi-Lo supermarkets. In addition, around 36,000 jobs may be placed 'on the market', although many might simply be transferred to new owners.

The Committee heard compelling evidence that a market cap would be unworkable, and would effectively regulate the consumer.

Australian Competition and Consumer Commission (ACCC) Chairman Professor Allan Fels believes that, in at least some cases, some areas or some product markets, a market cap would mean that Australian consumers may be condemned to being supplied by inefficient, high cost operators. Professor Fels also pointed out that there are significant mechanical problems associated with a market cap. He said that there are problems about defining it, and there are problems about policing it.

The evidence also revealed that there are some independent retailers who feel that, at some stage of their business career, they would like to be able to sell out to a major chain. The imposition of a market cap would have the likely effect of preventing them from doing so, with a consequent reduction in the value of their stores.

Other difficulties associated with the imposition of a market cap include:

- the likelihood of avoidance schemes arising;
- the possibility that major chain employees (if re-employed) may transfer from higher paying jobs to lower paying jobs;

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- the possible devaluation of shares owned by thousands of ordinary Australians; and
 - the opportunity for foreign retailing chains to enter the market to the detriment of Australian-owned companies – evidenced by the recent arrival of German retailing giant Aldi.

In line with the market cap proposal, the Committee did not find a compelling case for divestiture of stores in the current market structure. However, as the major chains continue to grow, the Committee considers that there may be some merit in considering divestiture as a safeguard to unchecked growth, when levels of concentration are seen to impact negatively on competitive market forces, in particular markets.

Although the imposition of a market cap has had strong support from small retailers in various parts of Australia, the Committee is of the view that the problems faced by those retailers can be effectively addressed by other means.

Strengthening the *Trade Practices Act*

A significant body of evidence alleged instances of predatory pricing, where it was said that the major chains were prepared to lose money indefinitely in certain stores to wipe out the competition. The evidence was consistent and widespread, with the common complaint being that the difficulties lie in establishing predatory conduct under the current provisions of the *Trade Practices Act*.

The major chains vigorously refuted these claims. They accepted that their pricing policies were aggressive towards each other, but not predatory in principle. Chief Executive Officer, Mr Roger Corbett, said that Woolworths does not set out to undercut others as a matter of policy, but accepted that there may be exceptions in some stores across Australia. The Committee found that there were indeed, ‘exceptions’.

The Committee believes that the evidence clearly reveals a need to address the issue of predatory pricing, with a recommendation that the ACCC be given wider powers to bring representative actions, and to seek damages on behalf of third parties under *Part IV* of the *Trade Practices Act*.

The Committee also devoted a significant amount of time examining the merits of replacing the current ‘purpose’ test in section 46 of the *Trade Practices Act* with a ‘reverse onus of proof’ test. Compelling arguments were presented from proponents on either side of the debate, leaving the Committee unconvinced that such a measure would be appropriate at this stage. However, the Committee believes that a ‘reverse onus of proof’ test may well be appropriate should the core recommendations prove to be ineffective in preventing predatory conduct. The Committee therefore leaves this issue open for review when the Committee is re-constituted in three years time.

Other strengthening measures include:

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- A recommendation that the Government give consideration to providing the ACCC with extra funding for the purpose of bringing representative actions under *Part IV*.
 - A recommendation to provide for mandatory notification to the ACCC for approval of store acquisitions by the major chains and others (such as wholesalers Davids, FAL etc), with a requirement that the ACCC consult with local authorities and other relevant parties in order to make an informed assessment of the competitive impact on local businesses of such acquisitions. The ACCC will also be required to assess new store development applications on a similar consultative basis; and
 - A recommendation to increase the \$1 million transactional threshold in section 51AC of the *Trade Practices Act* to \$3 million. This measure will enable the unconscionable conduct provisions to be available to a wider group of complainants.

The significance of the inquiry to small and independent retailers and the consistency of the evidence has lead the Committee to recommend further measures to protect small businesses from unfair conduct in the market place.

Retail Industry Ombudsman

The Committee believes that there is a significant problem to be addressed in relation to the practices of big business at the supply level, and with respect to their competitors. Furthermore, the evidence suggests that there is widespread confusion, particularly in regional and more remote parts of Australia, about the legal rights of small businesses and the opportunities that they have to take action. The consequence has been that unfair business conduct continues to undermine and damage those in less powerful positions.

The ACCC deals only with illegal behaviour. However, many complaints received during the course of the inquiry did not raise *Trade Practices Act* issues. The Committee therefore sees the need to establish a mechanism outside the ACCC through which retail industry participants can bring complaints or queries for speedy resolution.

The Committee believes that an appropriate dispute resolution mechanism should take the form of an independent Ombudsman, to be funded by government, who could attempt to resolve all sorts of complaints brought to it by businesses in the retailing sector. Where the complaints received by the Ombudsman raise issues that fall within the jurisdiction of another established body, or which it cannot resolve on its own, or where an issue of systemic breach of the law is raised, the Ombudsman could refer businesses for further assistance in appropriate cases, to the relevant industry, Commonwealth, State or Local government body (including the ACCC in respect of competition and consumer protection issues).

The Retail Industry Ombudsman would have the power to receive complaints, the expertise to give advice, and would be required to make all efforts to deal with them

quickly and through mediation or referral. Compliance systems in industry would also ensure complaints are handled quickly and responsibly.

The Committee believes that support should be made available to the Retail Industry Ombudsman through an advisory panel made up of representatives of various relevant Commonwealth and State agencies that can then provide a network of assistance.

The Committee wishes to emphasise that the Retail Industry Ombudsman should be an independent officer, however, the Committee sees a link with the ACCC as being crucial, particularly in light of the fact that many of the complaints emanating from the retailing sector relate to competitors as well as suppliers, which may raise competition law concerns.

Code of Conduct

The Retail Industry Ombudsman would be backed by a mandatory *Code of Conduct*, which would regulate conduct in vertically integrated relationships throughout the supply chain. Being mandatory, the *Code of Conduct* would enable the courts to take into account provisions of the code in determining whether or not business conduct has been unlawful.

The Committee believes that a Retail Industry Ombudsman, together with the underpinning of the mandatory *Code of Conduct* into the *Trade Practices Act*, would bring behavioural change and increased transparency in the retailing sector, and has recommended that the Ombudsman produce a bi-annual report to Parliament.

Summary

The Committee is of the view that a viable independent retailing sector is essential to the overall well-being of the Australian economy. Viable independent retailers maintain competitive forces, and bring social benefits to Australian consumers. The Committee urges the Australian Competition and Consumer Commission to give consideration to these factors when applying the provisions of the *Trade Practices Act 1974*, the object of which is to enhance the welfare of Australians through the promotion of competition and fair trading.

The Committee has noted that, during the course of the inquiry, the major chains appear to have re-evaluated their relationships with small retailers, who have signalled this improvement in relations to the Committee. However, the Committee believes that the success of its recommendations will require the Retail Industry Ombudsman and the ACCC to adopt a vigorous approach in dealing with the systemic and ongoing problems raised during the course of the inquiry.

The committee also believes that an ongoing education program should be implemented by the ACCC to ensure that small retailers are made aware of their rights and obligations under the provisions of the *Trade Practices Act 1974*, and the overall benefits and safeguards provided by competition policy.

As a final measure, the Committee has recommended that the Parliament reconstitute the Committee three years from the date of tabling this Report in order to review the recommendations, and to determine whether further legislative changes are required to maintain a fair and competitive market.

Hon Bruce Baird MP

Chair

August 1999

Table of Contents

Terms of reference	iii
Membership of the Committee	v
Executive Summary	vii
Market Share	vii
Market Cap	viii
Strengthening the <i>Trade Practices Act</i>	ix
Retail Industry Ombudsman	x
Code of Conduct	xi
Summary	xi
Abbreviations	xix
Recommendations	xxi

1 REASONS FOR THE INQUIRY

Background	1
Previous inquiries	3

2 THE RETAILING SECTOR

Overview	7
Grocery Retailing	9
Brief history	9
Present day market structure	11
The major chains	13
Woolworths	13
Coles	13
Franklins	13

The independent retailers	14
National Association of Retail Grocers of Australia	14
The wholesalers	15
Davids Limited	15
Australian Independent Wholesalers	16
Foodland Associated Limited	16
Differences between the major chains and the independent sector	17

3 MAIN CONTENTIONS

Retailers	19
National Association of Retail Grocers of Australia (NARGA)	20
Other independent retailers	21
Woolworths	24
Coles	25
Franklins	26
Wholesalers	27
Davids Limited	27
Foodland Associated Limited	28
Primary producers	29
NSW Farmers Association	29
South Australian Farmers Federation	30
Queensland Fruit and Vegetable Growers	31
Other organisations	32
Council of Small Business Organisations of Australia	32
Shop Distributive and Allied Employees Association	32
Coalition Against Major Chain Dominance	33

	Australian Consumers' Association	34
	Consumer Food Network	34
	Government organisations	35
	Australian Competition and Consumer Commission	35
	Department of Agriculture, Fisheries and Forestry	35
	Office of Small Business	36
4	<u>MARKET SHARE</u>	
	Market definition	39
	National Association of Retail Grocers of Australia	39
	Woolworths	40
	Franklins	41
	Coles	42
	Australian Competition and Consumer Commission	42
	Australian Bureau of Statistics	42
5	<u>USE OF MARKET POWER</u>	
	Background	47
	Market cap	47
	Divestiture	53
	Creeping acquisitions	54
	Manufacturers and trading terms	58
	Primary producers and supply contracts	67
	Capital	72
	Rent	74
	Electricity and EFTPOS	77

Access to new sites	77
Access to new product lines	77
Employment	79
Social impacts	83
Corporate benevolence	87

6 MISUSE OF MARKET POWER

Predatory pricing	91
Unconscionable conduct	101

7 OECD COMPARISONS

Background	105
Concentration and regulation in OECD economies	106
Canada	106
United States	108
United Kingdom	112
France	114
Germany	115
Netherlands	115
Belgium	116
Scandinavia	116
Southern Europe	117
Japan	117
New Zealand	118
Overall regulations across OECD economies	119
Overall trends across OECD retailing sectors	120

8	<u>THE FUTURE OF THE RETAILING SECTOR</u>	
	New entries	123
	Wal-Mart	123
	Aldi	124
	Developments in Retailing	125
	Petrol	125
	Caltex	125
	Mobil	125
	Woolworths	125
	Banking	126
	Technological developments	126
	Electronic Commerce and the Internet	126
	 SUPPLEMENTARY REMARKS TO THE REPORT BY SENATOR ANDREW MURRAY: AUSTRALIAN DEMOCRATS	 129
	 SUPPLEMENTARY REMARKS TO THE REPORT BY SENATOR THE HON RON BOSWELL: LEADER OF THE NATIONAL PARTY OF AUSTRALIA IN THE SENATE	 145
	 <u>APPENDICES</u>	
	Appendix 1 Conduct of the Inquiry	149
	Appendix 2 List of Submissions	151
	Appendix 3 List of Additional Information	166
	Appendix 4 Witnesses at Public Hearings	169
	Appendix 5 Australian Bureau of Statistics Special Data Service Report	181
	Appendix 6 Time Line of Retail Grocery Trends	196

Appendix 7	House of Representatives Standing Committee on Industry, Science and Technology – Report: <i>Finding a balance towards fair trading in Australia</i> , May 1997 – Recommendations	199
Appendix 8	Productivity Commission – Draft Report: <i>Impact of Competition Policy Reforms on Rural and Regional Australia</i> , May 1999 – Comments relating to the retailing sector	210
Appendix 9	Legislative Assembly of the Northern Territory Select Committee on Territory Prices – Report: <i>Price, Quality and Choice: Striking a Fair Balance</i> , Vol. 1, August 1999 Terms of Reference, Summary of Findings and Summary of Recommendations	212
Appendix 10	Industrial Commission of NSW – Report upon matters relating to the <i>Management, Control and Operations of General Chain Stores in NSW</i> , August 1939 – Terms of Reference	221
Appendix 11	Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy – Terms of Reference and Executive Summary from the Interim Report: <i>Competition Policy: Friend or Foe – Economic Surplus, Social Deficit?</i> , August 1999	223
Appendix 12	Small Business and the Australian Competition and Consumer Commission	229