CHAPTER 7

OECD COMPARISONS

Why don't they take note of some overseas practices which could assist in this matter, such as the antitrust laws in the United States?[1]

7.1 As the second part of its reference, the Committee was required to inquire into overseas developments with respect to industry concentration, highlighting approaches adopted in OECD economies.

Background

7.2 Levels of concentration vary widely across OECD countries, as do the methods of defining the market. For example, in Australia, the traditional measurement of market shares in the grocery sector is based on the proportion of warehouse withdrawals. In OECD countries, concentration appears to be measured in the share of overall sales.[2]

7.3 The types of products used to measure the market share also differ. In Australia, many industry participants have relied on the AC Neilsen measure of market share referred to in Chapter 4, which relates to dry/packaged groceries only. In the US, meat and fresh fruit and vegetables are included in the market concentration figures used by competition law enforcement authorities.[3]

7.4 Concentration figures may also be unclear, given that many large individual retail chains group together to form large international purchasing groups. Centralised purchasing by these buying groups is a common feature in the European market place, and failing to take account of it may understate the real extent of concentration in the retail sector.[4]

7.5 Another factor to consider when comparing concentration internationally is that market structures differ significantly for various historical and cultural reasons. Mediterranean countries tend to have more individual stores in a given area, while in Northern Europe, there is a greater level of concentration, with a small number of enterprises having control of large networks of outlets. Also, in the Nordic countries and France, retail franchises and cooperatives are a feature of grocery retail markets. These franchises and cooperatives consist of independently owned and run stores,

1 Mr Peter Wilson, Proprietor, Adaminaby Store, *Hansard*, Cooma, 6 July 1999.

2 Australian Competition and Consumer Commission, Submission 191, p 42.

3 Australian Competition and Consumer Commission, Submission 191, p 42.

4 Australian Competition and Consumer Commission, Submission 191, p 42.

which engage in joint buying and marketing. They are distinct from chains, which are characterised by centralised management and control over individual stores.[5]

7.6 The geographic nature of the relevant market also makes it difficult to compare concentration levels. For example, while concentration levels may seem relatively small at a national level in some countries like the US, the impact on competition is assessed by competition authorities at regional levels.[6]

7.7 As a consequence of these factors, the ACCC warned:

> There is a danger in comparing concentration in the Australian retail grocery sector and its treatment by competition authorities with that experienced in equivalent sectors overseas.[7]

7.8 The European Community (EC) treaty has created an independent legal system which is distinct from the legal systems of each member State. However, the two spheres interact, and are therefore interdependent. National authorities have a key role to play in ensuring competition is active across the EC. Articles 85 and 86 of the Treaty of Rome (establishing the EC) prohibit actions that inhibit competition and the abuse of dominant positions.

7.9 Where cases affect trade between member States, then it is usual for the EC to act. But even then, cooperation with national authorities can be vital to ensuring a clear understanding of the issues. Many member States have chosen to give their national authorities the power to apply the relevant articles of the EC Treaty directly. Others rely on their own domestic competition laws, often based on the EC Treaty Articles.[8]

7.10 The following outlines the concentration levels and regulatory approaches in a number of OECD countries.

Concentration and regulation in OECD economies

Canada

7.11 The Canadian food industry is a market which has some relevance in terms of comparison with the Australian sector. In Canada, food distribution is divided into three categories: retail, wholesale and foodservice.

7.12 Retail is typically supermarket chains, although there are many small independent retailers. Wholesalers operate their own corporate chains and also offer banner programs to independent grocers. Supermarkets and grocery stores account for about 83 per cent of retail food sales. Specialty food stores are the second largest with

5 Australian Competition and Consumer Commission, Submission 191, p 42.

6 Australian Competition and Consumer Commission, Submission 191, p 43.

7 Australian Competition and Consumer Commission, Submission 191, p 42.

8 Office of Small Business, Submission 285, pp 13-14.

eight per cent of the market, and warehouse clubs are the third largest, with 4.4 per cent.[9]

7.13 The food distribution sector is highly concentrated at the wholesale level. For competition law purposes, most franchisees are treated as corporate stores, except where they can establish that they are fully independent.[10]

7.14 The recent trend in Canada has been towards increased concentration by the consolidation of the wholesale and retail sectors, leading to concern over loss of consumer choice, due to the promotion of generic label products over others, and the use of prohibitive fees manufacturers may be forced to pay supermarkets to get their products onto the shelves.[11]

7.15 The companies involved in acquisitions are four of the six largest supermarket chains in Canada. As the ACCC states:

> Unlike the concerns expressed in the Australian retailing sector which relate to individual acquisitions that have an insignificant impact on national market shares, the acquisitions in Canada will significantly increase concentration, even on a national scale.[12]

7.16 The issue of growing concentration in the retail grocery sector has been dealt with by application of the merger provisions of the *Competition Act*. The anti-competitive threshold for mergers provides that a quasi-judicial Competition Tribunal may make an order, such as divestiture, in respect of a merger where it finds that the merger 'prevents or lessens, or is likely to prevent or lessen, competition substantially'.[13]

7.17 The approach is similar to that of the ACCC with respect to market definition and the evaluative criteria used to assess whether such a substantial impact on competition is likely to flow from a particular merger. Like the ACCC, the Canadian Competition Bureau uses concentration thresholds to assess whether further examination of a merger or acquisition is required.[14]

7.18 The *Competition Act* reflects the European Union concept of market power abuse, and the US law on monopolisation under the *Sherman Act*. The provisions incorporate a threshold element of market dominance or control, which must be present before the provisions are applicable. The Canadian provisions focus mainly on

9 Australian Competition and Consumer Commission, Submission 191, p 48.

10 Australian Competition and Consumer Commission, Submission 191, p 48.

11 Australian Competition and Consumer Commission, Submission 191, pp 47-48.

12 Australian Competition and Consumer Commission, Submission 191, p 47.

13 Australian Competition and Consumer Commission, Submission 191, p 47.

14 Australian Competition and Consumer Commission, Submission 191, p 47.

exclusionary conduct that harms the competitive process rather than actions that affect consumers, such as charging higher prices. Thus, it is more similar to the US law.[15]

7.19 The Competition Tribunal is empowered to make a range of orders forcing parties to undertake or not undertake certain actions in order to overcome the effects of uncompetitive acts.[16]

7.20 In cases determined to date, the Competition Tribunal has not indicated a minimum market threshold which would provide a *prima facie* indication of market power, although in one case the Tribunal noted that a market share below 50 per cent would ensure that no such *prima facie* finding would be made.[17]

7.21 The ACCC notes that it is unclear at this stage whether the recent consolidation in the Canadian wholesale and retail sectors will proceed unchallenged.[18]

United States (US)

7.22 Concentration is low at the national level in the US. The top twenty supermarkets account for only 38 per cent of sales.[19] As there is no national supermarket chain in the US, retail acquisitions are measured regionally, or on a metropolitan basis. Some regional concentration levels are sometimes as high if not higher than those that exist in European countries.[20]

7.23 Because regional and local markets tend to form the basis for competition analysis in supermarket chain acquisitions, divestments will often be part of negotiated settlements, where the merger would unduly concentrate one or more of those markets. These cases do not involve creeping acquisitions, but instead involve the acquisition of the chains themselves.[21]

7.24 US competition law had its origins in the anti-trust *Sherman Act* of 1890. This Act renders illegal any restraint of trade, monopoly or attempted monopoly. The courts have the power to order the structural reorganisation of a monopolist. This structural reorganisation will usually involve the monopolist divesting itself of part of its business so as to create other competitors in the market. The most celebrated uses

15 Office of Small Business, Submission 287, p 17.

16 Australian Retailers Association, Submission 57, p 47.

17 Australian Retailers Association, Submission 57, p 46.

18 Australian Competition and Consumer Commission, Submission 191, p 48.

19 Australian Competition and Consumer Commission, Submission 191, p 43.

20 Australian Competition and Consumer Commission, Submission 191, pp 43-44.

21 Australian Competition and Consumer Commission, Submission 191, p 49.

of the power involved the break-up of Standard Oil early in the century, and the break-up of the AT&T (telecommunications) monopoly in the 1980s.[22]

7.25 In an article published in 1995, Professor Scherer of the Harvard School of Economics argued that the application of the *Sherman Act* to break-up Standard Oil in 1911 had been effective in shaping a more competitive environment, and hence had a decidedly positive long-term effect. By contrast, in the 1920 case of US Steel, which was held not to have monopolised the industry (and hence was not forced to break up), it was argued that an appropriate break-up would have left the industry in a better position to compete against Japanese and European steel companies which rose to prominence in the post-war decades.[23]

> Although it cannot be conclusively demonstrated, we believe that a carefully executed dissolution of that company – into several entities, each with efficient plants – would have led to a more competitive industry in the inter-war period and would have averted the tragic failures that occurred more recently.[24]

7.26 By contrast, Professor Posner from the University of Chicago argued that divestiture was not a necessary remedy since firms could already be punished for engaging in tacit price collusion. Moreover, he said that a policy of deconcentration was unlikely to be effective – its social costs might well exceed its social benefits. Professor Posner argued that the Standard Oil break-up had merely substituted regional monopolies for a national one. Quoting statistics showing the time to run anti-trust cases and formulate a remedy, Professor Posner argued that:

> The characteristic delay of antitrust proceedings is at least part of the reason [that divestiture has such a poor record]. Often by the time the divestiture decree is entered or can be carried out the industry has so changed as to make such a decree an irrelevance.[25]

7.27 Professor Posner further argued that if firms in a concentrated industry were charging supra-competitive prices, this would necessarily induce competition. Other barriers to entry, which may prevent competition, such as lawful patent protection, economies of scale, and superior management, would not normally justify dissolution proceedings.[26]

7.28 According to Woolworths, divestiture orders have been made on 33 occasions, all but 8 of these occurring before 1950:

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22 Professor Allan Fels, Chairman, Australian Competition and Consumer Commission, *Hansard*, Canberra, 13 July 1999, p 1164.

23 International Journal of the Economics of Business, *Rewriting History: the Early Sherman Act Monopolization Cases*, Scherer, F and Comanor, W, Vol 2, No 2 1995, p 263-86.

24 International Journal of the Economics of Business, *Rewriting History: the Early Sherman Act Monopolization Cases*, Scherer, F and Comanor, W, Vol 2, No 2 1995, p 285.

25 Posner, R, *Antitrust Law: An Economic Perspective*, pp 87-88.

26 Posner, R, *Antitrust Law: An Economic Perspective*, pp 92-93.

> Concern over the time taken with Courts to develop plans for divestiture, as a remedy for monopolisation, and doubts about the Court's ability to best structure a plan for divestiture of a large corporation have led to very few instances being ordered since 1950.[27]

7.29 The US Department of Justice and the Federal Trade Commission's (FTC) Horizontal Merger Guidelines set the US Government's approach to dealing with mergers. These mergers have relevance from various pieces of US legislation – section 7 of the *Clayton Act*, section 1 of the *Sherman Act* and section 5 of the *Federal Trade Commission Act*. These acts are often referred to collectively as anti-trust laws. According to the Commonwealth Department of Employment, Workplace Relations and Small Business, the unifying theme of the merger guidelines is that mergers should not be permitted to create or enhance market power.[28]

7.30 One means by which the FTC determines whether to act is an index of market concentration (the Herfindahl-Hirschman Index, or HHI) based on the individual market shares of all market participants. If a merger results in the index rising by a certain amount, then it will be deemed to be anti-competitive, particularly if the index is already high.[29]

7.31 The *Robinson-Patman Act* of 1936 makes price discrimination unlawful, where it has the effect of substantially lessening competition or creating a monopoly. This Act was introduced as a result of concerns over the increasing market power of the supermarket chains and their threat to the viability of small independent retailers.[30]

7.32 Professor Michael Jacobs, Visiting Scholar at the ACCC, told the Committee that:

> It [the Robinson-Patman Act] prevents price discrimination where the price discrimination will substantially lessen competition. The law was passed to prevent ma and pa grocery stores – which is what small grocery stores were called in the United States – from supermarket chains, which in the 1930s were just starting to make their appearance and which were much feared and loathed by small business people. So this Robinson-Patman Act was put in place to prevent to what was viewed as imminent price discrimination by supermarket chains.
>
> The Robinson-Patman Act…has not been used to protect small firms from supermarkets and it has not been used by the government for pretty much any purpose in the last 15-20 years.[31]

27 Woolworths, Submission 229A, pp 145-146.

28 Office of Small Business, Submission 285, p 11.

29 Office of Small Business, Submission 285, p 11.

30 Australian Competition and Consumer Commission, Submission 191, p 50.

31 Information provided at a Committee briefing by Professor Jacobs on 8 March 1999. See also Australian Competition and Consumer Commission, Submission 191, p 50.

7.33 An alternative view was propogated by Mr Bradley Alford, Managing Director of Nestle Australia, based on his experiences in the United States:

> The Robinson-Patman Act in the US, I would say, works fairly well. To relate that back to Australia: having worked for Nestle in the US, our trade philosophy is no different in the US than it is here. So, when I talk about like terms for like performance for like customers, it would be no different. There are some fine tuning differences in terms of how the trading terms are set up and negotiated. But the basic trading philosophy is very similar and would be consistent with what the Robinson-Patman Act tries to do in the US.[32]

7.34 Mr John Berry, Executive Chairman of Retail Services Ltd, argued that the US price-discrimination legislation was more effective:

> …Nobody can sell to a reseller at a different price to what every other reseller has the opportunity of buying at. The only variation you have is volumes but any retailer who buys at that volume, regardless, therefore buys at the same price throughout the United States. In Australia we think we have that in our restrictive trade laws but we do not have the bite or anything that the antitrust laws have in America. It is through this *Robinson-Patman Act* and ongoing antitrust laws that we have that we see the strengthening of the various markets.[33]

7.35 The US Supreme Court has interpreted the prohibition on discrimination only to the extent to which it threatens to injure competition. According to the ACCC, it has been suggested that the legislation has been less than effective in its ability to protect small independents from price discrimination. It is a little-used piece of legislation whose repeal has been widely recommended.[34]

7.36 Mr Michael Keogh, Executive Director of NSW Farmers, pointed out two further pieces of important US legislation relevant to the issue of market power and food markets: the *Perishable Agricultural Commodities Act* of 1930, and the *Packers and Stockyards Act* of 1921 (see para 5.93).[35]

7.37 The Committee notes that, until 1995, section 49 of the *Trade Practices Act* contained similar provisions to the *Robinson-Patman Act*. However, pursuant to reforms introduced in the *Competition Policy Reform Act 1995*, section 49 was repealed. It was reasoned that anti-competitive price discrimination could be adequately dealt with through other sections of the *Trade Practices Act*.[36]

32 *Hansard*, Canberra, 13 August 1999, p 1216.

33 *Hansard*, Brisbane, 16 April 1999, p 453.

34 Australian Competition and Consumer Commission, Submission 191, p 50.

35 *Hansard*, Sydney, 15 April 1999, p 342.

36 Australian Competition and Consumer Commission, Submission 191, p 51.

United Kingdom (UK)

7.38 In the UK, the top four retail firms share 65 per cent of the market, holding between 10 and 20 per cent each. Approximately six others holding about four to five per cent make up the second tier competitors.[37]

7.39 In some areas, notably in south and east England, concentration is higher.[38] In 1992, the five largest enterprise groups accounted for 43 per cent of food sales, while the top ten accounted for 58 per cent. Increased concentration and the growth in average chain supermarket size has been another feature. [39]

7.40 Competition policy in the UK is based on the *Fair Trading Act 1973*, and the *Competition Act*, originally enacted in 1980 and revamped in 1998 to, among other things, bring the UK's domestic competition laws into line with those operating elsewhere in the EC, and in accordance with Articles 85 and 86 of the Treaty.[40]

7.41 Under the *Fair Trading Act*, the Director General of Fair Trading, via the Office of Fair Trading (OFT), has a general duty to review commercial activities in the UK, so that monopoly situations or uncompetitive practices can be identified. The OFT may initiate an inquiry on their own volition or in response to a particular complaint. The OFT's focus is on whole markets rather than individual companies.[41]

7.42 According to Professor Tim Lang of Thames Valley University, England:

> Very strongly now in Britain there is a feeling – and that is why the Labor Government that was elected two years ago has changed the Monopoly and Mergers Commission into a competition authority, and I think the Conservatives would have done exactly the same – that we need to have tougher, more interventionist competition policy in order to be able to cope with the growth of oligopolistic behaviour right across different sectors. It is not just food, but cars – you name it – the same phenomenon is occurring. Essentially the economy, in different sectors, is looking like an hourglass where it is dominated by a relatively small number of companies.[42]

7.43 The *Competition Act 1998* prohibits the abuse of market dominance by:

- imposing unfair purchase or selling prices or other conditions;
- limiting production, markets or technical development;

37 Australian Competition and Consumer Commission, Submission 191, p 44.

38 Professor Tim Lang, *Hansard*, Brisbane, 16 April 1999, pp 472-473.

39 London Economics, Competition in Retailing (Prepared for the Office of Fair Trading), Research Paper 13, September 1997, Chapter 1.

40 Office of Small Business, Submission 285, p 9.

41 UK Office of Fair Trading, Press Release 11/99, 8 April 1999.

42 *Hansard*, Brisbane, 16 April 1999, p 471.

- applying dissimilar conditions to equivalent transactions with different trading partners; and
- making the conclusion of contracts subject to the acceptance by other parties of supplementary obligations, which have no connection with the subject of the contracts.[43]

7.44 The OFT has issued guidelines on what constitutes abusive behaviour, recognising that particular problems can arise in specific industries. For example:

- Exclusive distribution – where a manufacturer supplies only one retailer in a particular geographic areas;
- Selective distribution – where a manufacturer supplies a limited number of retailers;
- Tie-in sales – where a manufacturer makes the purchase of one product conditional on the purchase of a different product;
- Full-line forcing – where a retailer is required to stock the entire range of the manufacturer's product;
- Quantity forcing – where the retailer is required to purchase a minimum quantity.[44]

7.45 In 1997, the OFT commissioned a study into retail competition, to determine whether the UK competition authorities needed to follow a different approach when assessing competition issues in retailing. The Report concluded that competition problems are likely to be particularly prevalent in retailing, and secondly that while there are differences between retailing and other areas of the economy, these differences were a matter of degree rather than exclusive to retailing.[45]

7.46 In April 1999 the OFT determined, using detailed information from the top four firms covering five years of performance, that there was a level of profitability in the grocery retailing sector which warranted further investigation by the Competition Commission. The OFT raised several competition issues, the most important of which were:

- the nature, extent and existence of barriers to entering the market on a competitive scale;
- the extent to which land is increasingly impacting on the cost structure of competing firms;
- the intensity of price competition at local, regional and national levels; and

43 Office of Small Business, Submission 285, p 10.

44 Office of Small Business, Submission 285, p 10.

45 London Economics, Competition in Retailing (Prepared for the Office of Fair Trading), Research Paper 13, September 1997.

- the nature of the relationship between the major grocery retail chains and their suppliers, including agricultural producers and the ways in which buyer power is exerted.[46]

7.47 The Commission is now inquiring into whether a monopoly exists in the sector, and if so, whether the situation is against the public interest.[47]

7.48 For the purpose of the Competition Commission's inquiry, grocery retailing includes food, drink (alcoholic and non alcoholic), cleaning products, toiletries and household goods.[48]

7.49 The Committee has been advised that the Competition Commission will be conducting hearings involving peak industry groups, consumer groups and Government departments. The Commission is also issuing questionnaires to the main supermarket chains of more than 10 stores of a certain size, and suppliers. The intention is to cover issues such as the market, pricing distribution, new stores, and relationships with suppliers. The questionnaires will then be analysed to consider the issues and possible remedies. The Commission is scheduled to report in April 2000.[49]

France

7.50 In France, the top two retailing chains account for just over 30 per cent of the national market, but their operations are concentrated in different regions where their market power is significantly more substantial.[50]

7.51 French competition law is similar to the EC treaty provisions, which are applied by the courts alongside the French laws. Both basically derive from the principle of 'an open market economy with free competition'.[51]

Germany

7.52 In 1992 the five largest retailers in Germany accounted for 37 per cent of the grocery sector, yet the five largest buying groups actually controlled 79 per cent of the market.[52]

7.53 German retailers such as Rewe Zentral and Edeka have been actively strengthening their market position in Europe. The ACCC notes one interesting example, where the EC approved the acquisition by German food retailer Rewe Zentral of Austria's Julius Meinl stores, subject to significant changes by the parties.

46 UK Office of Fair Trading, Press Release 11/99, 8 April 1999.

47 UK Office of Fair Trading, Press Release 11/99, 8 April 1999.

48 UK Office of Fair Trading, Press Release 11/99, 8 April 1999.

49 UK Office of Fair Trading, Press Release 11/99, 8 April 1999.

50 Australian Competition and Consumer Commission, Submission 191, p 44.

51 Office of Small Business, Submission 287, p 17.

52 Australian Competition and Consumer Commission, Submission 191, p 42.

To avoid a prohibition decision, the parties proposed to limit their operation to the acquisition of 162 outlets (rather than all 343 of Meinl's outlets). One of the factors in the EC's assessment was that the increase in concentration would further increase the existing high entry barriers to the Austrian food retail market.[53]

7.54 German courts make extensive use of the EC Treaty provisions, which are directly applicable, and more stringent, than the German domestic law[54]. These provisions allow the authority to not only prohibit the abuse of market power, but to declare any contract that is the manifestation of such abuse to be of no effect.[55]

7.55 NARGA states in their submission that:

> Moreover, under German Competition Law, small and medium-sized retailers, in particular, are permitted to make joint purchasing arrangements in order to offset the structural disadvantages they suffer, vis-à-vis large retailers, and to limit the horizontal market power of the large retail groups.[56]

Netherlands

7.56 The *Economic Competition Act* is concerned with restrictive agreements and dominant positions, which applies with respect to whether they are 'contrary to the public interest'. The burden of proof rests with the authorities.

7.57 Following consultation with the Committee on Economic Competition, the Minister for Economic Affairs may intervene once breach of the public interest test is established. The intervention may take the form of:

- Publishing information concerning the dominant position;
- Imposing obligations on the dominant firm or firms, such as preventing them from undertaking certain conduct, forcing them to supply certain goods or services, or making them charge certain prices or apply other conditions of sale; and
- Applying penalties, which may include fines or closing all or part of a business in which the offence was committed.[57].

7.58 In addition, interested parties may bring civil actions to compel compliance with these decisions.[58]

53 Australian Competition and Consumer Commission, Submission 191, p 52.

54 Office of Small Business, Submission 285, p 15.

55 Australian Retailers Association, Submission 57, p 51.

56 National Association of Retail Grocers of Australia, Submission 201, p 146.

57 Office of Small Business, Submission 285, p 16.

58 Office of Small Business, Submission 285, p 16.

Belgium

7.59 The ACCC notes that regulations on the establishment of large stores throughout Belgium have slowed down structural change in the retail/distribution sector. These regulations may have contributed to the rapid development of franchising in Belgium, as the large retailers used this strategy to circumvent the legislation and expand their sales.[59]

7.60 Belgium's *Economic Competition Act* is based on the EC Treaty, the principle being that all restrictive practices and abuses of dominant positions are prohibited.[60]

Scandinavia

7.61 In Scandinavian countries, concentration is very high in the retailing sector.

7.62 In Sweden, 90 per cent of grocery sales are accounted for by three groups of retailers, each tied to a wholesaler.[61]

7.63 In Finland and Norway, the three leading retail firms control over 85 per cent of sales.[62] In Norway, there has been a process of increasing concentration driven by small retailers joining chains, and chains integrating vertically with wholesalers over the past decade.[63] The *Competition Act* prohibits price fixing, bid rigging and market sharing. The Competition Authority has the power to exempt arrangements from these provisions if their effects on competition or efficiency are positive or inconsequential, or if the exemption would be in the public interest. For example, collaboration between small and medium enterprises to generate scale economies and allow competition against larger rivals may be exempt from the laws.[64]

7.64 In Denmark, the four largest retailers supply about 70 per cent of the total food market.[65] Their *Competition Act* seeks to eliminate restrictions on competition, other than the many cooperation agreements which may have beneficial effects. The main criterion is whether the agreement has a damaging effect on competition.[66]

7.65 Danish law is less prescriptive than the EC Treaty provisions, so the parties in Denmark need to ensure compliance with EC law before entering into any sort of restrictive agreement which effects trade between member states.[67]

59 Australian Competition and Consumer Commission, Submission 191, p 45.

60 Office of Small Business, Submission 285, p 14.

61 Australian Competition and Consumer Commission, Submission 191, p 43.

62 Australian Competition and Consumer Commission, Submission 191, p 43.

63 Australian Retailers Association, Submission 57, p 53.

64 Australian Retailers Association, Submission 57, pp 52-53.

65 Australian Competition and Consumer Commission, Submission 191, p 43.

66 Office of Small Business, Submission 285, p 15.

67 Office of Small Business, Submission 285, p 15.

Southern Europe

7.66 Concentration is relatively low in southern European countries, such as Italy, where none of the joint purchasing groups holds more than 15 per cent of the grocery market.[68]

7.67 Concentration is increasing rapidly in Spain, Portugal and Greece, partly due to the growing influence of the major French retailers.[69] One reason given for this apparent industry reorganisation is concern over potential competition from larger North American discount operators such as Wal-Mart, combined with a view that the market is already saturated.[70]

Japan

7.68 Japan's *Anti-Monopoly Act* prohibits private monopolies. There is no uniform measure of market share or particular threshold at which monopolisation is held to occur. According to the Australian Retailers Association, cases appear to occur infrequently, and it is argued that they have played little role in influencing the structure of the retail industry.[71]

7.69 During the 1990s Japan has taken a number of measures to streamline the procedures and regulations (see para 7.77). Combined with changes in the environment for retailing services (eg changes in consumer behaviour and price consciousness), these reforms are said to have increased the efficiency of the retailing sector and lowered prices for consumers.[72]

New Zealand

7.70 Independent retailers hold a grocery market share of over 50 per cent in New Zealand. The independents are supported by a co-operative; Foodstuffs Ltd, Progressive and Woolworths (NZ) (a sister company of Franklins) have about a quarter of the market each. An attempt by Coles-Myer to gain a substantial market share failed in the 1980s, and they sold their interests.[73]

7.71 Foodstuffs, one of New Zealand's largest companies, runs a warehousing, distribution, advertising and administrative support operation. It seeks out suitable sites for retailers, carefully selects and trains operators, and supports new supermarkets until they become profitable.[74]

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68 Australian Competition and Consumer Commission, Submission 191, p 43.

69 Australian Competition and Consumer Commission, Submission 191, p 43.

70 National Association of Retail Grocers of Australia, Submission 201, pp 149-50.

71 Australian Retailers Association, Submission 57, pp 47-48.

72 Australian Retailers Association, Submission 57, pp 47-48.

73 John Ragg & Co Chartered Accountants, Submission 295, p 31, and Franklins, Submission 200, pp 4.6-4.7.

74 Franklins, Submission 200, p 4.11.

7.72 Mr Ian Cornell, Managing Director of Franklins, referred the Committee to the New Zealand supermarket industry as being an example of how a successful independent sector can exist:

> How have the independent retailers adapted to consumer changes in New Zealand and achieved a 50 per cent market share? How have independent stores overcome procurement disadvantages? How has the independent sector been able to build large, modern, highly competitive supermarkets over the last decade? What role have the wholesalers played in the success of the independent operators in New Zealand? It is our belief that an independent sector is viable in Australia provided that it continues to reinvent itself and that collaboration takes place between wholesalers, suppliers and retailers, as has happened in New Zealand.[75]

7.73 The basis of New Zealand's competition laws is the *Commerce Act*. Restrictive trade practices prohibited under the *Commerce Act* include:

- contracts, arrangements or understandings which contain provisions or in their entirety substantially lessen competition in a market;
- contracts, arrangements or understandings between competitors which contain provisions or in their entirety reduce the competitiveness of another rival; and
- contracts, arrangements or understandings which contain provisions or in their entirety lead to prices being fixed among competitors.

7.74 The *Commerce Act* prohibits collective pricing agreements, and agreements which are likely to have an anti-competitive purpose or effect.[76]

Overall regulations across OECD economies

7.75 Most of the discussion on international policy issues in the submissions and evidence focused on laws made for the purpose of promoting competition in the industry. Examples of other measures which can significantly affect the industry structure and levels of concentration include zoning laws and planning restrictions, and trading hour laws. For example, many countries have extended their shopping hours in recent times in response to consumer demand, store size limitations and other requirements which only affect developments of a certain size.

7.76 Several OECD countries, such as Japan, France, Italy, Belgium and Spain have specific national legislation with regard to the development of large scale retailing sites, largely as a result of pressure from smaller retailers and municipalities.[77]

75 *Hansard*, Sydney, 15 April 1999, p 367.

76 Guide to the Commerce Act, on Commerce Commission of New Zealand web pages.

77 Australian Competition and Consumer Commission, Submission 191, p 44. Also OECD Working Papers, Vol.V, Economics Department Working Papers No 180, *Regulation and Performance in the Distribution Sector*, No 75, Paris 1997.

7.77 For example, Japan enacted legislation in 1974 which resulted in reducing the number of large stores being established. However, this has been liberalised in the years since, with the consequence of gains in efficiency leading to lower costs and prices.[78]

7.78 The ACCC notes that French laws controlling the establishment of large stores are considered less restrictive than those previously in Japan. They are nonetheless considered to have imposed an additional burden on the retail sector in favouring existing large stores, reducing potential benefits to consumers.[79]

7.79 Italy enacted legislation in 1971 regulating the establishment of larger stores, which has been criticised by that country's monopoly commission for its adverse impacts.[80]

7.80 Spain introduced legislation to restrict the establishment of larger stores in 1996 in response to four companies (three of which were French-owned) controlling a large portion of supermarkets.[81]

7.81 In the UK, the regulation of supermarket sites is a critical issue. According to Professor Tim Lang, Professor of Food Policy, Thames Valley University:

> …in my own country there are now 1,000 hypermarkets, defined as over 25,000 square feet or about 4,000 or 5,000 square metres of selling space, now sell over half the food sold to the British. In other words, if you think about it, 57 million people are actually only shopping in 1,000 units. This completely restructures economic activity. It means whole townscapes are being physically restructured. In Britain—and I do not think it is quite the same here but it has echoes—there is now an immense debate going on, started by the last Conservative government and carried on by the present Labour government—into what sort of townscapes do we want; want sort of urban and rural space do we want; what do we mean by civic life.[82]

7.82 An OECD paper points out that, while the evidence is scattered and further research on the link between regulation and performance in the retailing sector is required in several areas, much appears to point in the same direction. A wide range of regulations, including restrictions on large stores, opening hours and zoning, appear to have slowed down structural change in the distribution (retailing and wholesaling) sector. These regulations have sometimes affected the efficiency of the distribution

78 Australian Competition and Consumer Commission, Submission 191, p 44.

79 Australian Competition and Consumer Commission, Submission 191, p 45.

80 Australian Competition and Consumer Commission, Submission 191, p 45.

81 Australian Competition and Consumer Commission, Submission 191, p 45.

82 *Hansard*, Brisbane, 16 April 1999, p 467.

system, but mostly they appear to have influenced the range of services provided to customers.[83]

7.83 In its submission, Coles stated that:

> The OECD questions whether a strong case can be made for protecting small shops from large scale outlets because developments suggest that small shops continue to play an important role in advanced retail systems (where they are more specialised and customer orientated), particularly outside the mass food market. The OECD also questions whether restrictions on large stores are a good means of protecting employment.[84]

Overall trends across OECD retailing sectors

7.84 The philosophy underpinning the competition policy regulatory regimes in most OECD countries is similar, with the abuse of monopoly power being of greater concern than the existence of monopolies themselves. Australia's competition laws have developed by adapting aspects of the US and European principles to its own system. Many jurisdictions have provisions concerning monopolisation, which do not prohibit monopolies as such, but prohibit the abuse of market power. Most jurisdictions have processes to regulate mergers, while a number use concentration thresholds as a trigger in determining whether the examination of a merger is needed.[85]

7.85 Mr Phillip Naylor, Chief Executive Officer of the Australian Retailers Association, said:

> My understanding of the competition law and the trade practices law in other OECD countries[is] that the breach is not the size of the market share but it is what you do with it when you have got it. That seems to be right across all those countries that I have looked at. I do not know that the size of the market share is all that relevant unless you have a trigger—as you have in some countries—at which an individual company's market share reaches a certain point, and that is a trigger for the regulators to say, 'Well, we'd better have a look and see what this company is doing.'
>
> **…**For most of them, judging by the case law that I have reported in our submission, there seems to be rules of thumb about it. I think Britain is 25 per cent, the USA is about 40 or 50 per cent and Canada talks about that. It is not prescribed in the Act so much, but it has come from the case law, where cases have been taken to their respective trade practices courts.[86]

83 OECD Working Papers, Vol. V, No. 180, *Regulation and Performance in the Distribution Sector*, No. 75, Paris 1997, p 52.

84 Coles, Submission 168, Part 4, Access Economics, p 43-46.

85 Australian Competition and Consumer Commission, Submission 191, p 44.

86 *Hansard*, Sydney, 15 April 1999, p 373.

7.86 There was a general consensus across many of the submissions that the international trend appears to be moving towards increased levels of concentration. Concentration is occurring both through 'organic' growth, where existing firms expand internally, and through merger activity.[87]

7.87 The major chains are concerned about the imposition of regulations that would counter their ability to follow the international trends in retailing. In their submission, Coles believes that this trend around the world is being driven by technological (for example, bar coding and scanning) and organisational changes that increase efficiency and contribute to reduced prices. For similar reasons, Coles believes that consolidation is also evident among other sectors in the supply chain, including growers, processors, and wholesalers, in order to better compete in local and global markets.[88]

7.88 Mr Roger Corbett, Chief Executive Officer of Woolworths, believes that the global reality is one of increasing opportunities for trade and foreign investment, allowing firms such as Aldi and Wal-Mart to move into different countries, and for firms already in particular locations to expand their range of products.[89] Mr Corbett, said:

> We cannot kid ourselves here. Grocery retailing is a global market and as such there are very real global pressures.
>
> Our concern is that new and unjustified regulations or limitations imposed upon us by bureaucracy could further affect the delicate global environment…further eroding the capacity of Australian players to compete on our own turf in what has become a global struggle. Our best defence lies in our capacity to meet the challenges which competitors across the globe may offer. If we are hampered in our ability to meet these challenges, then those that benefit most will not be the small players, but those huge non-Australian organisations that have their eye on this market.[90]

87 For instance, OECD Journal of Competition Law and Policy, *Recent Developments in National Merger Laws and Policies*, Clark, J and Chadzynska, H, Volume 1 No 1 1999, pp 137-47, discusses the increase in merger activity across the OECD, in which the retail sector is prominent.

88 Coles, Submission 168, pp 4-5.

89 Mr Roger Corbett, CEO, Woolworths, *Hansard*, Canberra, 12 July 1999, pp 1078-79.

90 *Hansard*, Canberra, 12 July 1999, p 1079-80.