Supplementary Remarks to the Report by the Joint Select Committee on the Retailing Sector

Senator Andrew Murray : Australian Democrats : August 1999

This postscript to the Report is written because the Committee as a whole has gone as far as it could, and I thought it appropriate to indicate some additional conclusions that I have come to. This should not however be taken as an expression of dissent.

I support the Main Report, which is unanimous and has my endorsement as a member of that Committee.

I wish to thank the Chair, Deputy Chair, and Secretariat for the professional and thorough way in which this inquiry has been conducted.

A. SUMMARY AND ADDITIONAL RECOMMENDATIONS FOR CONSIDERATION

1. The market

This inquiry has been dominated by a war of words between the supermarket superpowers of retailing, and the opposing coalition of independent supermarket and independent wholesaler interests. However, the terms of reference refer to all retail sectors, and it is important that the Main Report's recommendations, and these recommendations, are seen in that light.

To a single supermarket owner in a country town, the market **is** that town, and its catchment area. To one of the major chains, the market ranges from that very town to the whole country. Along with these geographical distinctions go sectoral distinctions. The various specialist categories of retail compete with each other in each retail sector, be they butchers or florists. They also compete with multi-sectoral retail conglomerates covering all retail categories.

The evidence before the Committee was persuasive – that in certain markets and retail sectors, the independent retail sector is under threat. Without detracting at all from the strengths, professionalism and consumer benefits offered by the major retailing chains, we have to face the fact that if a viable independent sector is to be retained in each of the retailing sectors, then competition policy must be tightened up.

I accept the evidence that in a few regional markets within the supermarket sector, the expansion of major retailers has probably reached saturation point. In one or two regions it might even have exceeded it. In other regional markets it is also evident that there are still opportunities for the major retailers to

expand. On the evidence before the Committee, it is difficult to argue that the national market is saturated by the majors, with the logical corollary therefore that *national* country-wide divestiture of the major supermarket chains is required, or that there should be no opportunity for their further growth in *any* regional market.

However, to deal with any retail market concentration problem the regulator needs to have an ability to appropriately define the retail market. The Australian Competition and Consumer Commission (ACCC), has made it clear that the Trade Practices Act (TPA) makes the definition of a market somewhat difficult. Section 50 of the TPA does for instance clearly state that the market can be determined for Australia as a whole, or by State or Territory. Under that definition, a few hundred thousand people in the Northern Territory or Tasmania can be easily categorised as a market. A defined retailing market in smaller geographical areas such as Darwin or Hobart or any sizeable country town, or even areas with very large populations such as defined areas of Melbourne and Sydney do not, strictly speaking, fall within Section 50's definition. This does not make sense for retail markets. Retail markets always relate to particular catchment areas or regions, and market definitions should attend to that fact.

The Main Report provides a very helpful recommendation to address this problem.

It is essential the retail industry markets are identified both geographically and sectorally as those where substantial impacts of competition can be readily identified.

2. A Viable Independent Retail Sector

In designing competition policy we have to determine a set of values and principles which should guide our laws and behaviour. First amongst these should be the recognition that monopolies or oligopolies inherently contain within them a capacity for the abuse of market power, and should usually be resisted where they emerge, or monitored where they already exist. Therefore a situation such as we have in the Australian supermarket industry, where an oligopoly is present, has to be acted upon.

Secondly, we must acknowledge that a viable and thriving independent sector in the retail industry is desirable of itself and that it has an economic and social value that should not be lost.

In retailing, this independent sector is most at threat in Australia in the supermarket sector, where the critical mass essential to its survival is under threat. However the trend is also emerging in non-supermarket retail sectors,

and that problem needs to be addressed to prevent such crises emerging there too.

The Main Report addresses these points, but does not include a formal recommendation. It is desirable that the Government find a device - legislative, regulatory, or a direction of some sort - to formally require the ACCC to address the need for a viable independent retail sector, when considering issues relevant to that need.

Recommendation One

That the Australian Competition and Consumer Commission be required to include in its considerations: to ensure the preservation of a viable independent sector in retailing.

3. Market Power - (horizontal integration or market concentration).

Market concentration entails the dominance of the market by the few. In other words fewer competitors result. At the heart of this trend lies the danger that the destruction of competitors will result in the destruction of competition.

Members of the independent supermarket and independent wholesale sector have argued that a cap should be put on the majors acquiring any further market share in the supermarket sector. This is a difficult concept to accept because no-one is able to determine the precise percentage of market share, after which the critical mass essential for the survival of the independent sector is lost. It is also the case that in some markets the majors are under represented and in others possibly over represented. It is only through attention to the Main Report's recommendation for a proper retail market assessment by appropriate geographic and population markets, that excessive concentration could be identified.

Competition in any retail sector is best served by a diversity of competitors and a lowering of real barriers to entry. Barriers to entry include the difficulty independents have in securing prime sites, particularly in regional shopping centres.

Creeping acquisitions have allowed the majors to achieve a market size which might have been prohibited by the ACCC if those acquisitions had been aggregated into one purchase, which could therefore have fallen foul of existing merger provisions in the TPA.

The corollary of the ACCC power to prevent mergers, has to be a power to order divestiture. Divestiture is already accepted as a trade practices principle (for instance, in Section 50 of the TPA). However, the ability for the ACCC or

the Courts to order a major to divest in just one over concentrated retail market region, as opposed to within an entire state, is missing. Of course any such action would not prevent the Majors continuing to have the opportunity for further expansion in under represented market areas.

Recommendation Two

That the TPA be amended to specifically empower the ACCC to order divestiture in regional markets which are overconcentrated. (In this regard the Main Report's recommendation on market definition will need to be accepted.)

Retailing industry sectors need a 'trigger' market share percentage at which the ACCC takes formal and public note of potential danger, similar to that used in Europe. Such thresholds do not constitute an automatic declaration of market dominance. Nor are they an automatic signal as to the existence of anti-competitive prices, or of an abuse of power. They act instead as a trigger to the regulator to maintain a watching brief on the company concerned.

I consider the figure of 25% used under the United Kingdom Fair Trading Act, as constituting a fair market power measure. If such a measure were adopted in Australia, the ACCC would thereafter notify a company so identified that it needed to keep the ACCC advised on all market acquisitions activity, with a specific requirement to report to the ACCC annually, on the concentration of market power in the markets it operates in. The ACCC could then, on its own volition, review the company or the industry concerned. (ie the UK model).

Recommendation Three

That the ACCC be given a power similar to that in the United Kingdom Fair Trading Act, to keep a specified 'watching brief' on companies that reach 25% market share in substantial retail markets.

4. Secrecy of pricing of retail space

Running right through the evidence by retail witnesses was a theme of leasing arrangements with landlords, and how that affected market behaviour.

I am concerned at the existence of secret markets in Australia, namely secrecy of the pricing of retail space made available by landlords, particularly in shopping centres. Landlords, who may also be described as 'retailers of space', often have absolute market knowledge as sellers, in contrast to the buyers of their products, who are generally in the dark.

A prospective consumer of almost any product can take himself or herself to the market place for the goods they are considering purchasing, and easily obtain the different prices of the various different products that are on offer. A customer in a shoe shop is made aware of every price of all the shoes in the shop. In contrast, a retailer customer wanting to rent a shop almost always has no idea at all of the prices at which space has been sold to other retailers in the centre.

Open access to pricing information does not exist in the market place for retail space. That market is the very antithesis of an open and transparent market place, and the consequences are typical of closed and controlled markets – high returns to the sellers, and inequitable pricing practices.

Rental pricing has two parts; rent and outgoings. Rent is nearly always secret, a matter between that particular tenant and landlord, while outgoings are often on a common formula basis and are therefore also known to all tenants of that landlord. Concern with pricing and with secrecy has to deal separately with these two areas.

A problem arises where landlords distinguish between the pricing of their premises to tenants on an arbitrary basis. Discrimination in prices of retail premises are profitable to the landlord discriminator where he or she possesses market power, can distinguish classes of possible customers/tenants who can be obliged to pay more than others or where that customer/tenant may find it difficult or impossible to relocate elsewhere. The net result is inevitably an increase in rents, which are in turn inevitably passed on to consumers.

When looking at land pricing and rental practices, it is helpful to regard landlords not as a special commercial category, but as another type of retailer. Landlords are in fact simply retailers of space. Their goods are square metres and the services that go with them. Landlords are just one more supplier to tenants, but a supplier with unusual power.

As a principle, secret pricing is generally a stratagem which allows the vendor (in this instance the landlord), and those with unusual or exaggerated market power, to maximise their returns and to unjustifiably discriminate between similar buyers with similar needs, but differing abilities to negotiate or pay. If those same pricing stratagems were used against customers buying houses, cars, financial services, white goods, consumables and so on – there would be political, social and regulatory uproar. The prices of such goods and services is rightly non-discriminatory and public. The market badly needs the methodology of rent pricing to also become open and widely understood. It needs an end to secret pricing.

The morality of land or space pricing must catch up with established moral pricing standards of other goods and services. The very essence, the very

nature of a market, is that the range of goods and prices on display are publicly available and known. When rent reviews are under way it is nonsense to talk of a rental market or market values, when the market's prices are secret. Tenants are not even aware of other rents in the same shopping centre, never mind elsewhere.

I endorse the comments and recommendation in the Main Report concerning tenancy. However, that recommendation needs to be taken further.

Recommendation Four

That open and transparent market principles be applied to the retail property sector, just as they do for Australian markets in general. Through the Council of Australian Governments, the States should consider measures to implement provisions for prospective tenants to have access to relevant tenancy schedules of shopping centres. These should show the total occupancy costs for each tenant in the centre and the value of any concessions or rebates given, for the purpose of informing prospective retailer customers, for valuing retail property, or providing advice on market rent reviews.

5. Predatory Pricing and reversing the onus of proof under section 46 of the TPA

The Committee received significant evidence as to the difficulty in bringing a successful action under section 46 (which deals with misusing market power) for predatory pricing. Witnesses consistently complained of the difficulty in proving predatory pricing. I refer to paragraphs 6.28 to 6.35 of the Main Report for a summary of some of the evidence received on this issue. I would like to reiterate the comments of Professor Allan Fels, Chairman of the ACCC, on the merits of the reversed onus of proof test. Professor Fels said:

> There may be scope for some further strengthening of section 46 in terms of that kind of thing; that, if the effect can be shown, then there is a reverse onus of proof on purpose. That would essentially keep it to purpose. There is a problem at the moment with the test, in that the Commission or private litigants have to embark on a cops and robbers type search for purpose in particular cases. They are just not going to succeed in that, even though one has a fair idea that the purpose is anti-competitive. So there is a case for reversing the onus without departing from the underlying notion that, in the end, it would be a purpose test.[1]

Despite the fact that reversing the onus of proof is not uncommon in Australian law, under both this Government and its predecessors, I understand that it may

[1] *Hansard*, Canberra, 13 July 1999, p 1163.

still be seen as a big step to reverse the onus of proof in cases brought under section 46. However, the nature of the claims of predatory pricing are invariably going to take the form of a small retailer alleging misconduct on the part of a major retailer. Proving that the purpose of a corporation is to damage a competitor or prevent entry into a market requires a person to prove a state of mind on the part of the directors or employees of a corporation. That is exceptionally difficult, and results in people of such persuasion being able to ignore the present law as of no effect.

I would like to emphasise that a reversal of the onus of proof would only occur after a plaintiff/applicant had established that the defendant has a substantial degree of market power.

In recognition of the fact that there may be apprehension as to potential for abuse of this measure, I would see it as appropriate that the reversal of the onus of proof would only occur in cases brought by the ACCC. That should abate concerns that the provision could be used by vexatious or frivolous litigants to merely put the defendant to the expense of defending the claim without substantive wrong having been committed.

The Committee has decided to reconsider this issue at the time of a possible review in three years. The question is, what is expected to occur during the next three years to either confirm or deny the need for strengthening section 46, or that will alter the evidence the committee already has? There is nothing to suggest that the predatory pricing practices will change or that the number of claims of predatory pricing will decrease, or that it will somehow become easier to prosecute a claim.

Legislating for reversal of the onus of proof in cases brought by the ACCC will provide a substantial disincentive for retailers to engage in that conduct whilst at the same time ensuring that retailers are not the subject of frivolous claims.

Recommendation Five

Section 46 of the *Trade Practices Act 1974* should be supplemented to provide for a reverse onus of proof test where, once the Australian Competition and Consumer Commission has established that the firm with a substantial degree of market power has used that power, on the motion of the ACCC the onus of proof shifts to that firm to prove it did not use that power for a prohibited purpose (as prescribed).

6. Divestiture

I have not adopted the suggestion by NARGA that there should be a cap on the market share of the major retailers.

However, I do believe that there is value in giving the ACCC a power to break up retail monopolies which substantially inhibit competition, or (as is more likely in the Australian market situation), to reduce their market power in particular regional markets by requiring limited and selective divestiture. I take the view that this power is a natural corollary to and extension of the ACCC's power under Section 50 of the TPA to prevent acquisitions which would result in a substantial lessening of competition.

The power should however be regarded as largely a reserve power, and as international precedents indicate, would be seldom used. Its great virtue is as a cautionary power, making oligopolies careful of abusing their market power.

The Committee remarks that:

> The Committee is therefore of the view that the break up of economies of scale and scope, such as an order for Woolworths, Coles or Franklins to divest stores, would lead to an unpredictable result, and may undermine the benefits and efficiencies brought about by vertically integrated chain stores.

This statement is presented as a concluding statement and as some sort of reason as to why a power of divestiture is not appropriate. In my view, there is no possibility whatsoever that a power of divestiture, such as is proposed here, would result in the break up of the economies of scale and scope of Woolworths or Coles.

Recommendation Six

That the ACCC be given the power to order divestiture where an ownership situation exists which has the effect of substantially inhibiting competition.

7. Trading hours

The Committee received a substantial amount of evidence in relation to the deregulation of trading hours. This issue has played a major role in making the independent sector vulnerable and less viable. The theme was that small independent retailers are being pushed out of the grocery retailing market as the majors extend their trading hours and the public gravitate towards the majors away from the small independents.

What is more, the Majors have been leaders in the lobbying campaign for deregulated trading hours, expressed at its most extreme by the push for twenty-four hour seven day trading.

There is also a considerable social impact to the extent that owner/operators of independent grocers are forced to maintain longer hours just to keep up with the major retailers.

It should not pass unnoticed that the State with the largest independent sector, Western Australia, has managed the issue of trading hours better than the rest of Australia. In my view, there is a clear link between the dominance of the majors, and the extent of trading hours deregulation.

State governments need to take much greater account of the social and economic impacts of deregulated trading hours than has previously occurred.

B. SOME SUPPLEMENTARY REMARKS TO THE MAIN REPORT, ON COMPETITION

The Main Report itself has very useful analysis of many components of competition theory and practice. Consequently these supplementary remarks are confined to a number of discrete areas, and of course, remain supportive of the Main Report.

The role of competition in the market place is not just the improvement of prices, products and choice, but the preservation of a diversity of competitors, even where some are identifiably less efficient than others. Economists, such as those of the University of Chicago[2], tell us that "societies that promote vigorous competition among private companies have lower prices, better products, and greater consumer choice"[3]. These characteristics are not altruistic, but arise from enlightened self interest. Those same economists also accept that not every successful competitor needs to be at the same standard of economic efficiency.

Lower prices are an effort on the part of a company to gain new customers or retain existing customers through offering goods or services at cheaper prices than their competitors. Better quality products, or new products are an effort on the part of the company to maintain their present customer base or obtain new customers through a reputation for quality service or product. Greater choice is the product of competition in any given market, with a number of companies offering a range of products or services in an attempt to attract and satisfy the customer.

While the most important measure of effective competition is whether the market satisfies the needs of the consumer, that can in some circumstances be provided by a benevolent monopoly. However, society as a whole would be

[2] "The Economics of Antitrust", article from *The Economist*, May 2nd 1998, pp 66-68.
[3] Federal Trade Commission (US), "Promoting Competition, Protecting Consumers: A plain English Guide to Antitrust Laws", web-site, http://www.ftc.gov/bc/compguide/index.htm

very much the poorer if it did not have the diversity and opportunity that many competitors bring to the market place.

When one company begins to dominate any given market, or when a small group of companies work themselves into a position of dominance, this is not necessarily an example of market failure in the formal sense of that phrase, but it can still be an undesirable social and economic outcome. Dominance of a market occurs when a company, or a group of companies, are able to exercise excessive market power.

The ACCC, in their submission, defined market power as:

> "The ability of a firm to behave persistently in a manner different from the behaviour that a competitive market would enforce on a corporation facing otherwise similar cost and demand conditions. That is, market power is the ability of a firm or firms profitably to divert prices, quality, variety, service or innovation from their competitive levels for a significant period of time[4].

This type of market power, in a situation of dominance, is beyond the reach of other competitors in the market, leaving them at a serious disadvantage.

There are three areas in which market dominance and the exercise of market power can be exercised, one relating to the competitors in the market, one to the suppliers, and the other relating to the consumers.

With regard to competitors, the dominant group or company in a marketplace can wipe-out or buy-out its smaller competitors, and effectively eliminate their competition, creating a situation of market monopolisation, or in the case of a group, market oligopoly. In other words, they don't just eliminate competitors, but in the end they can eliminate competition itself.

With regard to suppliers, in a market where market power exists, suppliers face problems when the company possessing market power uses this power to demand selective discriminatory discounts on purchases. Small or vulnerable suppliers may fall victim to changes in contract or trading terms with little to no negotiation in the process.

With regard to consumers, with the elimination of competition and the establishment of monopoly or oligopoly, the benefits of competition of lower prices, better products, and greater choice that flow on to the consumer are eliminated or reduced. This is because the monopolist "can restrict output and raise prices so as to increase their own profitability at the expense of

[4] The Australian Competition and Consumer Commission (ACCC), Submission to the Joint Select Committee on the Retail Sector, Submission no. 191, p 26.

consumers"[5], who are left with little choice but to purchase from the monopolist.

Looking at this scenario, dry economic theorists might claim that this is the market at work, with inefficient players being eliminated and the more efficient companies expanding their share of the market as they defeat their competition. In their eyes, any dominance or monopoly that one player is able to exert in the market is purely temporary because the high profits that they are able to extract from an anti-competitive market will attract new competitors[6].

They would also claim that market forces serve to eliminate "firms that are inefficient or fail to respond to the changing wants and needs of consumers (which) will be replaced through the entry of more efficient and responsive firms"[7].

Under this theory, free markets will themselves erode monopolies, and serve to keep the market efficient through the elimination of those companies that cannot capitalise on efficiency gains and adapt to the changing needs of the market.

The Chicago theorists make the further claim that a company may not actually seek to raise prices once they have established a dominant position, because this would attract other competitors to the market. (Over the long run that may indeed occur, but in the real world barriers to entry act to stop or delay this happening.) They may instead seek to forestall competition by setting prices, which while still high, might still be as though they were engaged in a competitive market[8], thus not obviously disadvantaging the consumer.

Perfect competition, as expressed in economic theory, does not exist in markets such as those subject to this inquiry.

The abuse of market power can result from predatory or intimidatory pricing, to fix pricing levels in a particular market. Then there is the practice of demanding prices and terms from suppliers which results in a forced differentiation between their retail customers, a differentiation the supplier would otherwise not have contemplated. Suppliers themselves may charge retail customers of similar standing different prices for goods of like grade or quality[9]. The questions that are posed by Ann Everton, law lecturer at Leeds University, become especially relevant in instances of dominance and excessive market power in the marketplace:

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[5] "The Economics of Antitrust", p 67.
[6] ibid, p 67.
[7] ACCC Submission 191, p 22.
[8] ibid.
[9] Everton, Ann R. **"***Price Discrimination – A Comparative Study in Legal Control*, Leeds University, 1976, p 1.

> "Should or should not free competition be encouraged to the point that it leads to the further increase of an already sizeable monopoly, and hence to the very destruction of competition? Secondly, should or should not some limit be set to the promotion of free competition in order to ensure that the competition also be fair?"[10]

Governments in various countries have found it necessary to adopt one of three possible broad policy approaches when dealing with the problems of market power and dominance within the marketplace. In contrast to other industries in Australia, it could be argued that retailing has mostly been subject to the laissez-faire approach – to mostly leave the market well alone. This can result in situations of dominance and subsequent oligopoly or monopoly, as well as disparities in wealth and income distribution. It leaves markets free, but it opens the door to them quickly becoming unfair.

The public supervision approach has lost favour in Australia, where strict regulation of key or sensitive markets, possibly through government ownership of key industries, has declined. Industries such as electricity, water, or telecommunications, are in this category, and restricted licensing systems such as for pharmacies and liquor.

Much of the work of the ACCC and Australian Governments covers the regulatory approach, where the government recognises the imperfections of real markets, and takes responsibility for ensuring that competition among the private firms within the market is sustained. Yet the government does not interfere with the decisions of price and output.[11]

The stated purpose of the *Trade Practices Act 1974* is to promote competition and fair trading within the marketplace, as well as providing some form of protection for consumers.

The approach adopted in Australia is very similar to that of other OECD economies, in that many countries may possess laws that have 'monopolisation', 'abuse of dominance' or 'misuse of market power' provisions which do not directly prohibit monopolies or the possession of market power, but the abuse of this privileged position[12].

At the OECD Competition Policy Roundtables in 1996, the preamble to the United States paper stated that:

> "Size or power alone is not illegal, the firm must have engaged in certain monopolistic or anti-competitive conduct; and some monopolies will escape

[10] ibid, p 2.
[11] "Antitrust Overview", by Charles E. Mueller, Editor Antitrust Law and Economics Review, web-site, http://webpages.metrolink.net/~cmueller/I-overvw.html
[12] ACCC Submission, ibid, p.44; Australian Retailers Association (ARA), Submission to the Joint Select Committee on the Retailing Sector, Submission 57, Volume 2, p 43.

condemnation under the statute because they were a consequence of success in the market, untainted by impermissible conduct"[13].

However, there is an important underpinning to this statement. While size or power alone are not only not illegal, but are highly desirable because of economies of scale, nevertheless size alone *is* a signal to be alert to the potential for an abuse of market power.

Section 46 of the TPA specifically states that any corporation with a substantial degree of power in a market shall not take advantage of that power for any of three enumerated purposes:

(a) *Eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;*
(b) Preventing the entry of a person into that or any other market; or
(c) *Deterring or preventing a person from engaging in competitive conduct in that or any other market.*[14]

Section 50 of the TPA prohibits acquisitions that have the effect or likely effect of substantially lessening competition[15]. By this means, the Act is attempting to curb the elimination of competition in the marketplace through the acquisition of competitors. In determining the extent to which the acquisition lessens competition in a market, a number of matters must be taken into account, such as:

- Entry barriers to the market;
- Market concentration levels;
- The power of competitors in the market;
- The likelihood the acquisition would result in the acquirer attaining market power;
- Market dynamics, such as growth, innovation and differentiation of product;
- Whether the acquisition would remove a substantial market competitor; and
- The nature and extent of vertical integration in the market[16].

When the level of concentration is taken into account, ACCC guidelines state that where the post merger market share of a merged firm is 15% or more, and the share of the four or fewer largest firms is 75% or more, the Commission

[13] ARA Submission, ibid, p 44.
[14] *Trade Practices Act 1974,* Section 46(1), Subsections a, b & c.
[15] *Trade Practices Act 1974,* Section 50(1).
[16] *Trade Practices Act 1974,* Section 50(3), Subsections b - i.

will want to investigate the merger further before being satisfied it does not result in a substantial lessening of competition[17].

Mergers are therefore readily dealt with under this law, and under ACCC guidelines. Small accumulative incremental or 'creeping' acquisitions, which have the same effect as mergers in reality, are not.

The United Kingdom Office of Fair Trading (OFT), in their *Competition in Retailing* report suggest that when trying to analyse questions of competition in retailing, a certain framework should be taken[18].

The United Kingdom, under its *Fair Trading Act 1973*, empowers the Office of Fair Trading (OFT) to investigate monopoly situations in one of two possible monopoly situations, these being:

- Scale Monopoly – one person or firm controls 25% of the supply or acquisition of goods or services of a particular kind; and

- Complex Monopoly – where a number of firms together make up 25%.

These 25% thresholds do not indicate market dominance in themselves. Instead they act as a trigger for the OFT to refer the matter for investigation by the Monopolies and Mergers Commission into the ramifications of the market share that a company holds, and whether it results in negative effects on competition or the consumers[19].

The use of national market share data is less commonplace in the United States, where competition authorities take a more local and regional focus when considering market concentration levels following the merging of companies[20].

This is markedly different from the approach of the ACCC, which has indicated in its submission that, in the retailing sector at least, the major chains are national competitors, and ACCC decisions are made at a national level. The result of the ACCC stance with regard to the major chains is that the market is defined nationally, as opposed to any statewide, regional or local definition[21]. That is a failing.

NARGA has called for a market cap. NARGA has said that in their view a market cap would be modelled on "United States anti-trust-style sanctions"[22].

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[17] ACCC Submission 191, p 27, footnote 44.
[18] London Economics, Competition in Retailing, research paper prepared for the Office of fair Trading (UK) by London Economics, September 1997, p 8.
[19] ibid, p 49.
[20] ACCC Submission, ibid, p 49.
[21] ACCC Submission, ibid, p 32.
[22] NARGA Submission, ibid, p 159.

However, United States anti-trust laws do not create artificial barriers to market expansion using market share as the only or main measure of competition levels. The point of the US anti-trust laws, as interpreted by the US courts, is to prevent unreasonable and unfair methods being employed by companies establishing a position of market power. A practice is deemed illegitimate if it restricts competition in some significant way and has no overriding business justification, as activities which are likely to harm consumers through increased prices, reduced availability of goods or services, lowered quality or service, or stifled innovation[23].

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[23] Federal Trade Commission (US), "Promoting Competition, Protecting Consumers: A plain English Guide to Antitrust Laws", web-site, http://www.ftc.gov/bc/compguide/index.htm