

The Parliament of the Commonwealth of Australia

**FAIR MARKET OR
MARKET FAILURE?**

A review of Australia's retailing sector

**Report by the Joint Select Committee on the
Retailing Sector**

August 1999

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Terms of reference

The Joint Select Committee on the Retailing Sector is asked to inquire into and report on:

- (a) the degree of industry concentration within the retailing sector in Australia, with particular reference to the impact of that industry concentration on the ability of small independent retailers to compete fairly in the retail sector;
- (b) overseas developments with respect to this issue, highlighting approaches adopted in OECD economies; and
- (c) possible revenue-neutral courses of action by the Federal Government (ie courses of action that do not involve taxation reform).

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Deputy Chair:

Mr Harry Jenkins MP (ALP, Scullin Vic)

Other Members:

Senator the Hon. Ron Boswell (NPA, Qld)
Mrs Kay Elson MP (LP, Forde Qld)
Senator Jeannie Ferris (LP, SA)
Mr Joel Fitzgibbon MP (ALP, Hunter NSW)
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Mr Gary Nairn MP (LP, Eden-Monaro NSW)
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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

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Abbreviations

AACS	Australasian Association of Convenience Stores
AIW	Australian Independent Wholesalers
ABS	Australian Bureau of Statistics
ACA	Australian Consumers Association
ACCC	Australian Competition and Consumer Commission
AFFA	Department of Agriculture, Fisheries and Forestry
CAMCD	Coalition Against Major Chain Dominance
CFN	Consumer Food Network
COSBOA	Council of Small Business Organisations of Australia
EU	European Union
FAL	Foodland Associated Limited
MGAV	Master Grocers Association of Victoria
NARGA	National Association of Retail Grocers of Australia
NCC	National Competition Council
NCP	National Competition Policy
NFF	National Farmers Federation
OFT	Office of Fair Trading (UK)
OSB	Office of Small Business
QFVG	Queensland Fruit and Vegetable Growers
QRTSA	Queensland Retail Traders and Shopkeepers Association
RTAT	Retail Traders Association of Tasmania
SBAG	Small Business Advisory Group
SDA	Shop Distributive and Allied Employees Association
TPA	Trade Practices Act



Recommendations

Recommendation 1

The Committee recommends that the *Trade Practices Act 1974* be amended to give the Australian Competition and Consumer Commission the power to undertake representative actions and to seek damages on behalf of third parties under *Part IV* of the Act.

The Committee believes that, due to this measure, the Australian Competition and Consumer Commission may be burdened by an increased caseload. The Committee therefore recommends that the Government give consideration to providing extra funding for this purpose to the Australian Competition and Consumer Commission in future Budget Appropriations.

Recommendation 2

The Committee is of the view that the Australian Competition and Consumer Commission should consider heavily concentrated regional markets, such as that which exists in South East Queensland, when assessing acquisitions or mergers under the provisions of section 50 of the *Trade Practices Act 1974*.

The Committee therefore recommends that section 50(6) of the *Trade Practices Act 1974* be amended to provide for the definition of ‘market’ to include a ‘regional market’. Thus, subsection 6 should provide that:

50(6) In this section:

‘market’ means a substantial market for goods or services in Australia, in a State or a Territory, or in a region of Australia.

Recommendation 3

The Committee recommends the establishment of an independent Retail Industry Ombudsman through which small business can bring complaints or queries relating to the retailing sector for speedy resolution. The Committee believes that the Retail Industry Ombudsman should consider, among other things, the application of the Retail Industry Code of Conduct (Recommendation 5) in his or her deliberations.

Where complaints received by the Retail Industry Ombudsman raise issues that fall within the jurisdiction of another established body, such as the Australian

Competition and Consumer Commission, those complaints should be referred to such bodies for further investigation.

The Committee recommends that the Retail Industry Ombudsman be appointed and funded by the Government.

The Committee recommends that the Retail Industry Ombudsman be required to produce a bi-annual report to the Parliament in order to increase transparency in the retailing industry.

Recommendation 4

The Committee recommends that mandatory notification of retail grocery store acquisitions by publicly listed corporations be prescribed within the mandatory Code of Conduct (Recommendation 5), and approved by the Australian Competition and Consumer Commission, with a requirement that the Australian Competition and Consumer Commission consult with local authorities and other relevant parties in order to make an informed assessment of the likely impact on local businesses of such acquisitions. The Committee recommends that the Australian Competition and Consumer Commission also be required to assess and approve new store development applications on a similar basis, and to provide a detailed response to these notifications within 30 days.

The Committee appreciates that the drafting of a mandatory Code of Conduct may take some time to complete. The Committee therefore recommends that, as an interim measure, the Minister make a direction that mandatory notification be required to take effect immediately.

Recommendation 5

The Committee recommends the drafting of a Retail Industry Code of Conduct by the Australian Competition and Consumer Commission in consultation with retail industry groups and other relevant parties for the purpose of regulating the conduct associated with vertical relationships throughout the supply chain.

The Committee recommends that the Code of Conduct be a mandatory code, and should contain a precise form of dispute resolution, with the process of resolution clearly spelled out.

The Committee recommends that the Code of Conduct be drafted to include specific provisions that address:

- (a) The general principle of ‘like terms for like customers’ – where the Australian Competition and Consumer Commission may seek information from**

corporations, on a confidential basis, revealing key terms and conditions of contracts of supply.

- (b) Transparency in ‘vulnerable’ supply markets – where growers have to deal with a range of market characteristics, including perishability, market volatility and a high degree of risk exposure.
- (c) Product labelling and packaging requirements – with a view to implementing a more equitable system than that which currently exists.
- (d) Contractual uncertainty – in particular, the passing of ownership of produce and the circumstances under which produce can be returned.
- (e) Truth in branding – so that businesses, which are subsidiaries of, or are substantially owned by, a listed public company or major retailer, note that association on shop front signage, in advertising, on stationery, and so on.

The Committee recommends that disputes falling under the Code of Conduct should not be limited to resolution by the Retail Industry Ombudsman. For example, disputes raising issues relevant to National Competition Policy or the *Trade Practices Act 1974* would be more appropriately dealt with by the Australian Competition and Consumer Commission.

Recommendation 6

The Committee considers that the \$1 million transactional limitation of section 51AC of the *Trade Practices Act 1974* hinders access by some small businesses to the unconscionable conduct provisions of the Act. The Committee therefore recommends that this limit be increased to \$3 million.

Recommendation 7

The Committee is concerned that *Recommendation 2.1* of the *Reid Report*, which deals with the Uniform Retail Tenancy Code, has not been implemented. In particular, the Committee is concerned that, in major shopping centres, there is a lack of transparency with regard to the cost of floor space rent. That is, the seller (landlord) has knowledge – the buyer (prospective tenants) has none. Prospective tenants are therefore prevented from making informed decisions in assessing the ‘market rent’ as it applies to particular areas of retail space.

The Committee therefore recommends that the Government re-visit this recommendation, with a view to implementing a Uniform Retail Tenancy Code through the operations of the Council of Australian Governments.

Recommendation 8

The Committee recommends that major supermarket chains take note of widespread community and pharmaceutical industry concerns that the nature of the role played by pharmacists is unique, as it relates to matters of public health. The Committee is therefore of the view that expansion by the major chains into the dispensing of pharmaceutical products should be discouraged.

Recommendation 9

The Committee believes that there may be anti-competitive impacts where retailers and wholesalers are operated by the same, or related, entity. For example, where a major retailer enters the independent wholesaling sector, intimate commercial details could be gained from that wholesaler's dealings with its independent retail customers. The Committee therefore recommends that future acquisitions of wholesalers by retailers, and vice versa, be subject to mandatory notification and approval by the ACCC in order to assess the likely competitive impacts of such acquisitions.

Recommendation 10

The Committee recommends that the Parliament reconstitute the Committee three years from the date of tabling this Report in order to review the progress of the recommendations, in particular the operation of the Code of Conduct, and to determine whether further legislative changes are required. Such changes may include:

(a) An amendment to section 46 of the *Trade Practices Act 1974* to provide that:

Once it has been established that a corporation with a substantial degree of market power has used that market power, the onus of proof shifts to that corporation to prove it did not use that power for a prohibited purpose (as prescribed).

(b) An amendment to section 80 of the *Trade Practices Act 1974* to include divestiture of assets as an additional remedy for contravention of Part IV, IVA, IVB or V.

CHAPTER 1

REASONS FOR THE INQUIRY

*...are we going to sustain a viable independent sector, or are we not? If we do nothing the reality is that this independent sector is on a one-way street to oblivion at some point in time.*¹

1.1 The National Association of Retail Grocers of Australia (NARGA) has raised concerns with the Commonwealth Parliament about the growth of the large supermarket chains, and the implications this has for the ongoing viability of small and independent retailers, particularly those in rural and regional Australia. These concerns were taken up by the major political parties during the 1998 election campaign, with a commitment by the Coalition parties to set up an inquiry into retail domination as soon as possible after the election. The inquiry received cross-party support.

Background

1.2 Over the past twenty years or so, the major chains have increasingly established themselves throughout Australia in competition with traditional family-run stores. The expansion of the major chains, the senior management of which may consist of outsiders coming into the town, has placed significant pressures on smaller stores, often run by well-known local identities. This has created a degree of ill feeling and resentment in the retailing sector.

1.3 At a micro level, 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 result of the continuous expansion of major supermarket chains. At a macro level, the process of globalisation has seen increased pressures placed on the supply side of the market, with primary producers having to compete for markets not only against their fellow Australians, but with others in the same business around the world.

1.4 From the point of supply to the consumer, the need to be competitive has led to an increased emphasis on cost minimisation, an important component of which is the exploitation of economies of scale. In rural Australia, this has been manifested by farm aggregation, the centralisation and closure of bank branches, and the move of retailing businesses to major regional centres.

1.5 Other factors affecting rural and regional Australia over the past decade include downward trends in world commodity prices, lower demand resulting from the economic downturn of some important trading partners and increased

1 Mr Alan McKenzie, National Spokesman, National Association of Retail Grocers of Australia, *Hansard*, Canberra, 12 July 1999, p 1040.

environmental concerns over land use. The combination of these factors appears to have eroded confidence in the prospects of many smaller towns.²

1.6 From a wider perspective, the National Competition Policy (NCP) aims to improve the efficiency of the Australian economy through competition, leading to lower prices and higher living standards. The NCP recognises that economic efficiency arising from increased competition must be balanced against other factors, such as protection of the environment, employment and regional development. In theory, the benefits of this policy reform should be able to be distributed so that all members of the community benefit. For this reason, there is a public benefit requirement built into the NCP, with the aim of spreading the gains from increased competition across the country to assist in those places where the policy may otherwise have an adverse local impact.

1.7 At the consumer level, competition in the retailing sector appears to be healthy, with retailers vigorously competing with one another on price and choice. This is evidenced by declining real prices of many grocery items over the last decade, and a massive expansion in product range to the point where major supermarkets now offer over 40,000 different items in their larger stores.³ Table 1.1 shows the percentage increases in nominal prices of a range of grocery items, and the percentage increases in average weekly earnings from 1991 to 1999.

Table 1.1

*Percentage Increases in Nominal Prices of Groceries Compared With Average Weekly Earnings *(AWE)*

	Sydney (%)	Melbourne (%)	Hobart (%)	Perth (%)
Milk	33	56	47	35
Cheese	18	15	-6	19
Bread	47	39	68	49
Cereal	9	15	14	15
Flour	25	12	29	16
Peaches	21	6	6	14
Peas	-9	-16	-10	-2
Eggs	71	73	38	21
Sugar	20	20	24	15
Coffee	41	46	39	27
Margarine	28	-2	18	46
Detergent	4	1	-5	5
Tissues	-17	-11	-11	-12
Toothpaste	23	19	11	17
*AWE (%)	24	21	17	16

2 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, May 1999, p xxiii.

3 Coles, Submission 168, Part 3, p 34.

Sources: Price increases calculated from ABS *Catalogue No 6403.0 Average Retail Prices of Selected Items*, March Quarter 1991 and March Quarter 1999, for the respective capital cities as shown. Average Weekly Earnings increases calculated from ABS *Catalogue No 6302.0 Average Weekly Earnings*, February 1991 and February 1999 (using total earnings for all employees across the relevant States).

1.8 In recent years, the retailing sector has had to react to changes in consumer demand patterns, brought about by shifting demographics, the ageing population and generally smaller households. In addition, the higher participation of women in the workforce has driven demand for time-saving products and longer trading hours, which has been assiduously promoted by the major chains. Innovative retailers have reacted to these demands, with consumers being the major beneficiaries from:

- deregulated trading hours;
- a greater product choice;
- lower prices; and
- the convenience of one-stop shopping.

1.9 Consequently, consumers have not been a force in the establishment of this inquiry.

Previous inquiries

1.10 On 14 August 1936, the Honourable John Montgomery Dunningham, the New South Wales Minister for Labour and Industry, directed the Industrial Commission of New South Wales to inquire into and report on the management, control and operations of chain stores in that State. For the purposes of the inquiry, ‘chain stores’ were defined as having four or more outlets in New South Wales, selling the same classes of goods and under central control for ‘all important matters’. The inquiry dealt separately with eight classes of chain stores, which included the ‘variety chains’ of Coles and Woolworths.⁴

1.11 The terms of reference (which are reprinted in Appendix 10) focused on the effects of the chain stores on other parties, including producers, wholesalers, storekeepers and consumers, and whether there was any evidence of unfair competitive practices or undue restraints of trade. Of particular concern was whether the proprietors of chain stores had obtained trade advantages, which were not available to small retailers, whether their profits were excessive, and whether there were any advantages over other retailers under their terms and conditions of employment.⁵

1.12 The Report was presented to the Government by Mr J.A. Browne, President of the New South Wales Industrial Commission, nearly three years later, in July 1939.

4 Industrial Commission of New South Wales, *Management, Control and Operations of General Chain Stores in New South Wales*, 1939, p 4.

5 Industrial Commission of New South Wales, *Management, Control and Operations of General Chain Stores in New South Wales*, 1939, p 1.

1.13 In relation to variety chains, the Report concluded that:

- The operations of the stores were not detrimental to the interests of other shopkeepers and storekeepers, manufacturers, producers and consumers.
- The variety chains' dispensing of wholesalers did not have a detrimental effect on consumers.
- The variety chains were often able to obtain quantity discounts, but these were almost always available to other large purchasers.
- The profits of the variety chains were not excessive, nor were they advantaged over other stores in relation to their employment practices.⁶

1.14 The Report also listed 22 grocery chains across the State, and concluded that:

- The low prices of certain goods sold in some grocery chains were detrimental to small independent retail grocers who could not make a decent living by selling at the same prices.
- There was a need to place some restriction on the extension of grocery chain stores. A method proposed was that they be required to obtain a licence for each new branch, with such a licence being refused where it was decided by the appropriate Government Department that the needs of the public were already adequately met.⁷
- The operations of the grocery chains were not detrimental to the interests of other parties such as manufacturers, producers and consumers.

1.15 Findings in relation to other matters accorded with those for the variety chains.⁸

1.16 More recently, the House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, May 1997 (the Reid Report), commented on the social and economic implications wrought by economic restructuring and the practices engaged in by big business to maintain and increase profits and market share. The Reid Report concluded that small businesses were often disadvantaged in their dealings with big business and recommended a number of specific measures to induce behavioural change on the part of big business towards smaller businesses, and to provide unfairly treated small business operators with adequate means of redress.

6 Industrial Commission of New South Wales, *Management, Control and Operations of General Chain Stores in New South Wales*, 1939, pp 57-59.

7 Industrial Commission of New South Wales, *Management, Control and Operations of General Chain Stores in New South Wales*, 1939, p 73.

8 Industrial Commission of New South Wales, *Management, Control and Operations of General Chain Stores in New South Wales*, 1939, pp 61-63 and pp 73-74.

1.17 The areas of concern identified in the Reid Report were unfair conduct, retail tenancy, franchising, misuse of market power, small business finance and access to justice and education.⁹

1.18 Many of the submissions to this inquiry dealt with issues which had already been considered in some detail in the Reid Report.

⁹ House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance towards fair trading in Australia*, May 1997. The Report's recommendations are reprinted at Appendix 7.

CHAPTER 2

THE RETAILING SECTOR

...we have a long history and we have learnt from that history, and we have certainly learnt from past experiences.¹

Overview

2.1 The retailing sector provides a vast array of products to consumers through a wide range of outlets. Table 2.1 and Figure 2.1 show the sizes of the various sectors of retailing. The figures do not include petrol retailing and retail sales of vehicles and accessories. Figure 2.2 shows the breakdown of total food retailing.

Table 2.1

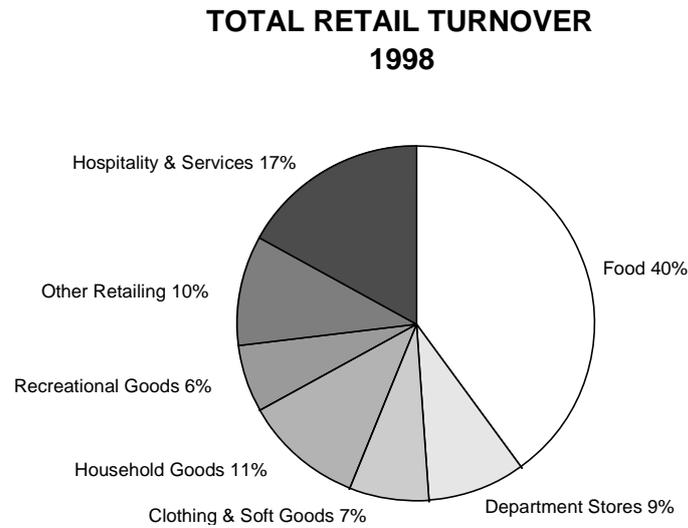
Total Retail Turnover 1998

Category	Monthly Turnover (\$m)	Per Cent of Total
Supermarkets & grocery stores	3275.5	27.44
Takeaway food	583.6	4.89
Other food	848.8	7.11
Total food	4707.9	39.44
Department stores	1150.2	9.64
Clothing & soft goods	805.4	6.75
Household goods (furniture, domestic hardware, appliances recorded music, etc)	1266.9	10.61
Recreational goods (newspapers, books, sports equipment, toys, games, etc)	692.4	5.80
Other (pharmaceutical, jewellery, garden supplies, etc)	1247.7	10.45
Hospitality & services (hotels, clubs, pubs, cafes and restaurants, etc, hairdressing, video hire)	2066.4	17.31
Total - non-food	7229	60.56
Total	11936.9	100

Source: ABS, Retail Trade Catalogue No. 8501.0, November 1998.

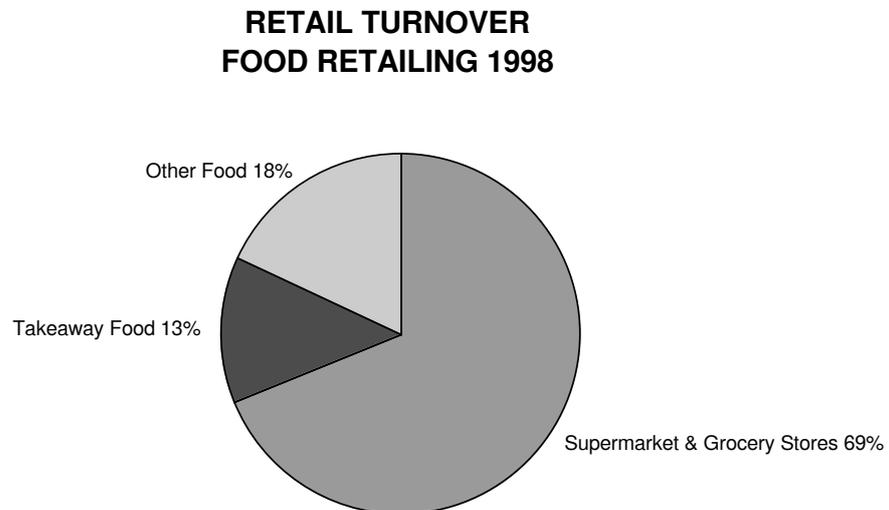
1 Mr Alan Williams, Managing Director, Coles Supermarkets, *Hansard*, Canberra, 6 April 1999, p 30.

Figure 2.1



Source: Franklins, Submission 200, p 4.1.

Figure 2.2



Source: Franklins, Submission 200, p 4.2.

2.2 While the Committee's terms of reference refer to the retailing sector in general, an overwhelming majority of submissions focused on industry concentration in the supermarket and grocery sector.

Grocery retailing

Brief history

2.3 Up to the 1940s, most grocery stores were independently owned. As suburbs developed around Australian cities, many consumers came to rely on shops that took orders and delivered to the home via a cart. Suburban houses did not have any advanced means of refrigeration, hence perishable items like milk, ice and bread were delivered daily. Experimentation with different retailing formats in the 1920s was stifled by the Depression and stagnating incomes in the 1930s, then by World War II.

2.4 In 1949 the food departments of many department stores began to convert to self-service, with the first fully self-service grocery store opening in Sydney in 1950.² Australia's rapid urban growth during the 1950s and 1960s led to these self-service supermarkets emerging as the new shopping format.

2.5 Most supermarkets were individually owned and managed or owned by small local groups, and carried a wide range of groceries and cleaning products. The introduction of large refrigeration units brought an increased range of milk, cheese, dairy and 'deli' products – although clothing and liquor had not yet been introduced.³

2.6 Woolworths and Coles already had chains of variety stores with central State-based warehouses. They each acquired small and innovative supermarket chains such as BCC in Brisbane and Flemings in Sydney, and converted many of their variety stores to a grocery and variety format. They created the first house brands in order to gain sufficient volumes of product for advertising and promotion, and focused on undercutting leading brands. Such home brands included 'Pick of the Crop' for peas and 'Flavour Joy' for cheese.⁴

2.7 By the end of the 1960s, Woolworths and Coles bought out their franchisee butchers and implemented sophisticated food processing techniques. They also built their own meat distribution facilities and began to invest in integrated supply chains through long-term contracts with suppliers.⁵

2.8 In the 1970s and 1980s, higher levels of inflation led consumers to focus more on price. Supermarkets reacted by keeping service to a minimum, narrowing aisles in order to reduce floor space rentals, and by dimming the lighting to cut electricity bills.⁶

2 Coles, Submission 168, Part 2, pp 8-13.

3 Franklins, Submission 200, p 3.1.

4 Franklins, Submission 200, p 3.1.

5 Franklins, Submission 200, p 3.2.

6 Franklins, Submission 200, pp 3.2-3.3.

2.9 Discounters Franklins became popular in NSW; Bi-Lo in South Australia; Shoeys in Victoria and Jack the Slasher in Queensland. These discounters drew market share from both Woolworths and Coles.⁷

2.10 A distinct consumer group with smaller shopping baskets emerged in the 1980s. Convenience stores became popular – despite their higher prices and limited range – with stores such as 7-Eleven opening for longer hours and positioning themselves close to main roads. Food Plus stores attached to petrol stations sold confectionary, soft drink, partly prepared meals and fast food items. State and Territory laws concerning trading hours hampered the ability of supermarkets to compete for this custom. As a result, convenience stores further reduced the market shares of Woolworths and Coles.⁸ They responded by purchasing discount chains such as Jack the Slasher, Shoeys and Bi-Lo, and began renovating their stores. Woolworths and Coles then set out to improve the quality of their fruit and vegetables (which had been introduced into the larger stores in the early 1960s)⁹ and invested heavily in technology and systems to improve efficiency.¹⁰

2.11 In order to compete with the ‘big two’, Franklins and the independent sector needed greater scale to keep their prices down. During the 1980s, Franklins expanded into Queensland, South Australia and Victoria. Davids, the major wholesaler to the independent retailers, began to merge with other independent wholesalers. Meanwhile, the range of items on supermarket shelves continued to expand into areas such as health and beauty products.¹¹

2.12 The 1980s also saw the introduction of electronic aids to selling. Front-end scanning originally appeared in an independent grocery store in Victoria in 1980. This was adopted by Coles in 1982, and by other chains during the next two years.

2.13 The use of barcodes and scanners has significantly improved efficiency across the board, linking suppliers to warehouses and ultimately, to the consumer. Barcoding allows thousands of individual items to be monitored and re-ordered after purchase.¹²

2.14 Large supermarkets continue to expand their products and services into such areas as health, magazines, pre-prepared meals and banking facilities. Coles was the first to install EFTPOS, and now has this service available at all its 6,000 checkouts. Customers now withdraw around \$2 billion in cash per year.¹³ The ability to use credit cards and the introduction of retail incentive schemes such as ‘fly buys’ adds a further dimension to shopping convenience, hence the term ‘one-stop-shopping’.

7 Franklins, Submission 200, p 3.3.

8 Franklins, Submission 200, p 3.3.

9 Coles, Submission 168, Part 3, p 15.

10 Franklins, Submission 200, p 3.4.

11 Franklins, Submission 200, p 3.4.

12 Coles, Submission 168, Part 3, p 19 and pp 41-42.

13 Coles, Submission 168, Part 3, p 42.

2.15 The major chains are now experimenting with Internet shopping, which may spur an increase in the number of consumers ordering goods and having them delivered to the home. Future developments include the provision of full banking services and expansion into retail petrol outlets (see Chapter 8).

Present day market structure

2.16 The Australian grocery retailing industry is oligopolistic in nature. That is, the market structure is characterised by a small number of firms, each of which possesses a significant degree of economic influence or market power. Those firms, Woolworths, Coles and Franklins, are commonly known as the major chains. They are wholly owned, but may consist of a number of retail ‘shopfronts’ or store brand names (see para 2.18 – 2.24). Consumers also see franchise chains or banner groups such as Foodland or IGA, as major chains.

2.17 The three major chains deal direct with suppliers, whereas the independents are generally supplied by a wholesaler. The vertically integrated structure of the major chains is geared towards highly efficient distribution systems, with new technologies enabling product to flow smoothly from the supply or production stage through to the final consumer. Independent retailers and wholesalers are not vertically integrated as such, but nevertheless rely on linkage systems for ordering and distribution. Figure 2.3 indicates the extra profit points within the independent sector with respect to the major chains.

Figure 2.3

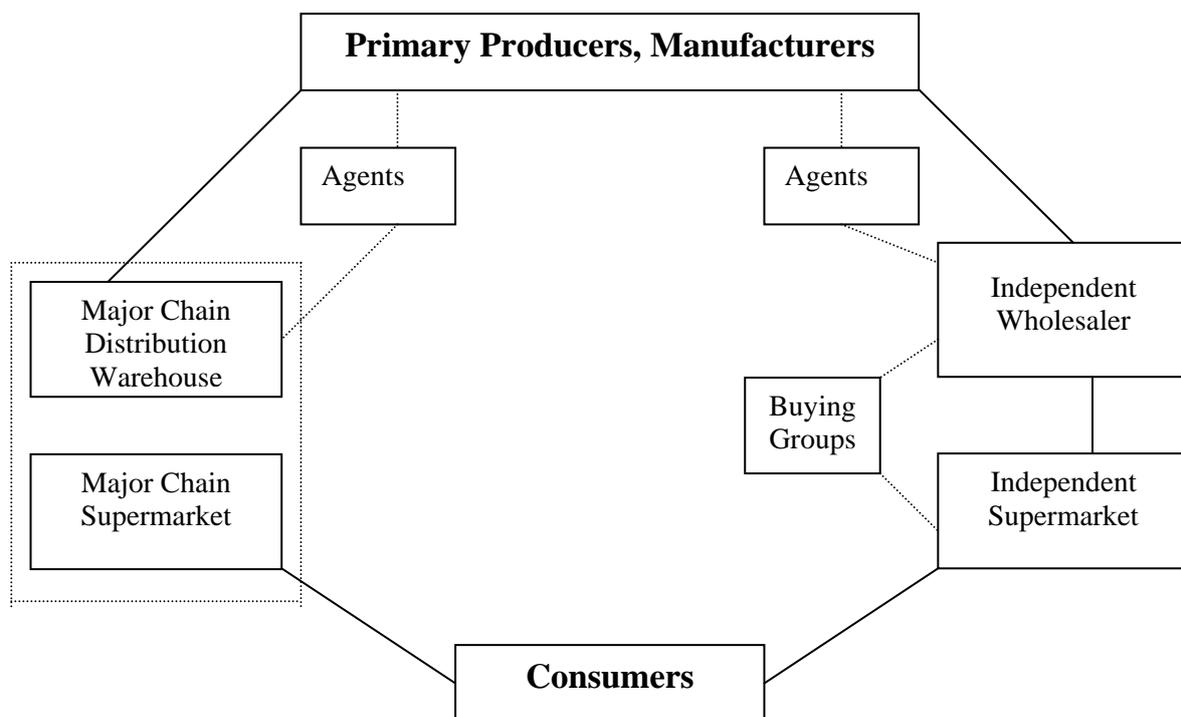
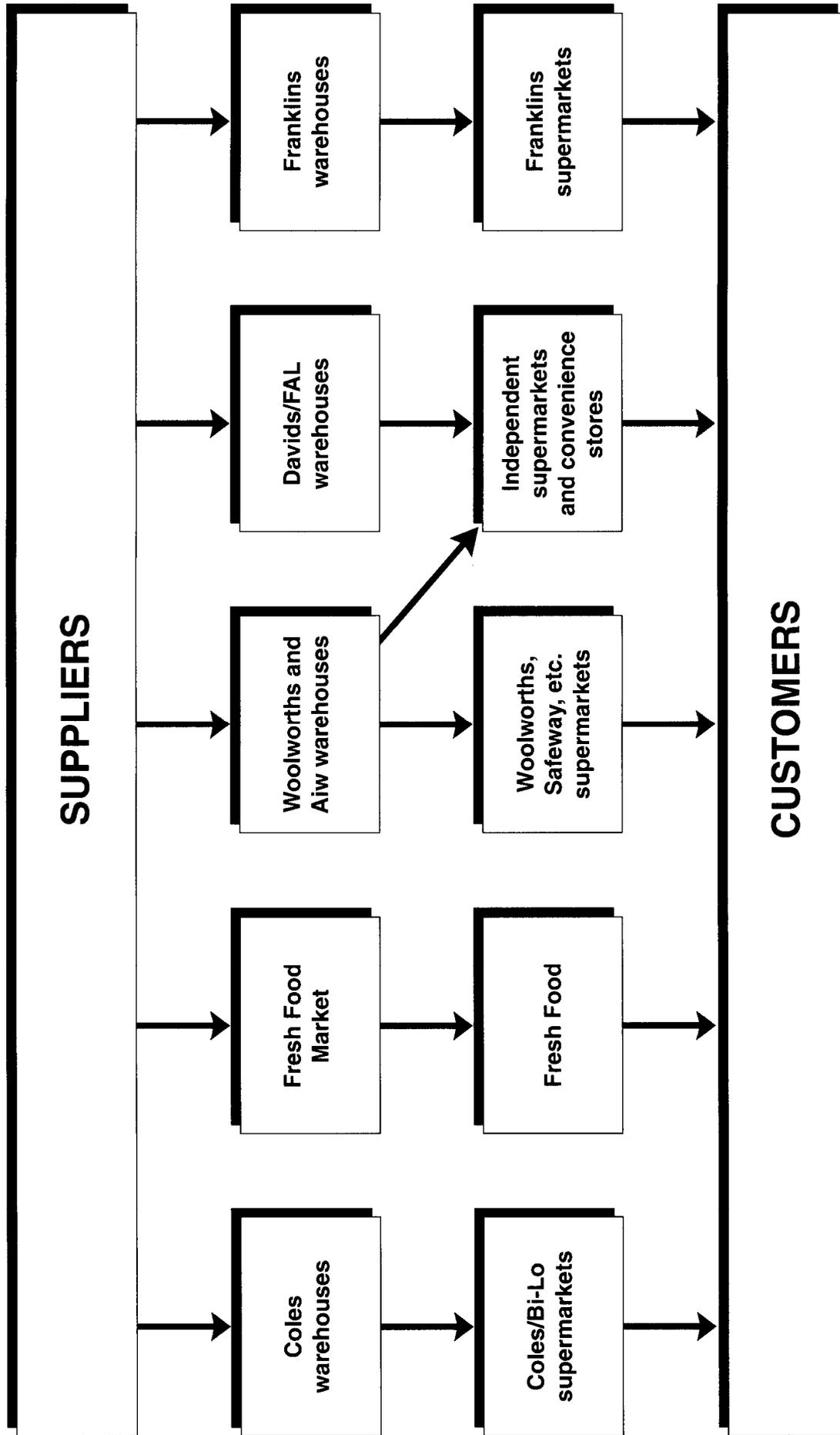


Figure 2.4 Wholesaling and retailing markets for the sale of groceries, fresh products and liquor



Source: Franklins. Submission, p 4.4

The major chains

Woolworths

2.18 Woolworths is Australia's largest grocery retailer and the second largest private sector employer with 1,460 Australia-wide stores staffed by over 110,000 employees. Its supermarkets account for over 81,000 of its employees. Woolworths is also involved in general merchandising through various discount stores. Its retail brands include Woolworths Supermarkets, Safeway, Purity, Big W, Woolworths Variety, Woolworths Metro, Crazy Prices, Rockmans, Dick Smith Electronics and Plus Petrol. Non-retail entities include Australian Independent Wholesalers (AIW) and Chisholm Manufacturing.¹⁴ In addition to servicing Woolworths retail stores, AIW supplies independent retailers in competition with Davids (see para 2.35 – 2.36 below).

2.19 Woolworths is Australian-owned with over 91 per cent being ordinary Australian shareholders. It has no connection with similarly named overseas groups.¹⁵

Coles

2.20 Coles, along with Bi-Lo, forms the grocery division of Coles Myer, which is Australia's largest private sector employer with 150,000 staff. Coles has 410 stores and employs 53,500, whereas Bi-Lo employs 11,795 people in its 156 stores.¹⁶ Coles Myer is a market participant in both traditional and discount department stores, liquor retailing, fast food outlets and women's fashion stores.¹⁷ It operates Myer Grace Bros, Target, Kmart, Myer Direct, South Cape, Red Rooster, Officeworks, Katies, Fosseys and Liquorland.

2.21 Coles Myer is Australian-owned with more than 320,000 shareholders, and trades Australia-wide.¹⁸

Franklins

2.22 Franklins is a 'no frills' food retailer and regards itself as the leading modern day discounter. It employs over 25,000 staff in 270 supermarkets and 30 LiquorSave outlets, with operations in New South Wales, Victoria, Queensland and South Australia.

2.23 Franklins has recently moved to convert many of its retail stores into full-service supermarkets, with a significant offering of fresh produce.¹⁹

14 Woolworths, Submission 229A, p 4.

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

16 Coles, Submission 168, p 2.

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

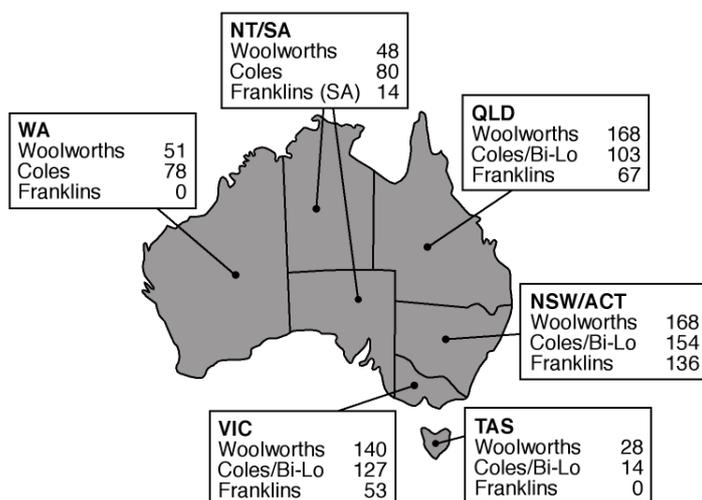
18 Coles, Submission 168, p 2.

19 Franklins, Submission 200, pp ii - 1.9.

2.24 Franklins is owned by Hong Kong-incorporated Dairy Farm International, which has supermarkets and other retail outlets throughout Asia and Australia.²⁰

Figure 2.5

Major Chains' Supermarkets in Australia



Source: Franklins, Submission, pp 1.2-1.3

The independent retailers

2.25 Independent retailers make up the remainder of the retail grocery sector. The independents vary in size from small corner stores to full-size supermarkets.

2.26 Many independents operate almost entirely in what are called ‘banner groups’, which are supplied by a wholesaler, but wholly owned, in most cases, by the independent retailer. The stores operating within a banner group typically present a common face or image to the public. They consist of similarly-sized shops, each carrying a similar product range, and backed by common signage, shared advertising and promotional funding, and coordinated pricing (for example, the pricing of ‘specials’). They cooperate, often very closely, with a particular wholesaler, seeking to match the economies of scale in purchasing and other efficiencies in distribution, which are available to the vertically integrated major chains. The IGA banner group is the most notable, with three distinct supermarket categories based on size.²¹ Most banner groups operate within their home State, with a few operating nationally.²²

2.27 The main representative body of the independent supermarket sector is the National Association of Retail Grocers of Australia (NARGA). NARGA is a

20 Franklins, Submission 200, p 1.9.

21 The three supermarket categories are IGA Supermarkets, IGA Everyday and IGA Express. IGA is supplied by wholesaler Davids.

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

confederation of State-based independent retailer organisations and directly represents around 7,300 small and independent retailers employing around 97,500 staff. Of these, the supermarket and grocery stores sector consists of 4,850 Australia-wide stores.²³

The wholesalers

Davids Limited (Davids)

2.28 Davids, which commenced wholesaling operations in 1935, is the largest Australian wholesaler and operates in all States and Territories, except Western Australia. Its core business has been grocery wholesaling and distribution, primarily in New South Wales, however, it also runs a number of stores of its own which are being sold as part of the restructuring initiated by owners Metro Cash and Carry Limited Metro.²⁴

2.29 Davids' independent retail customers range from small corner stores to full size supermarkets, which provide similar product choice as any one of the full-size major chain stores. Davids also serves independent retailers with multiple supermarkets – some with up to ten stores.²⁵

2.30 Davids employs around 3,500 people at 56 warehouses and around 6,600 people in its company-owned supermarkets throughout Australia.²⁶

2.31 In the early 1990s, Davids considered that if it could increase its size, by joining together all of the independent wholesalers in Australia, it could attain the necessary efficiencies and volume of purchases to compete with the three major chains on an equal footing. Thus, Davids undertook a program of acquisitions of regional and State-based independent wholesalers to build itself up as a 'fourth force'. It was considered that independent retailers could survive only if they were part of a larger group that could deliver the benefits of scale and scope in terms of buying and marketing, merchandising, store design, information technology, signage etc., while retaining the advantages of an owner operator at the store level.²⁷

2.32 Since Davids was floated in 1994, it has increased its market share in grocery distribution through a series of acquisitions, particularly in South Australia, Victoria and Queensland. However, it experienced considerable management difficulties, resulting partly from its acquisitions, and in 1998 Metro Cash and Carry Limited, a publicly listed South African Company, purchased a 78 per cent stake in Davids.²⁸

23 National Association of Retail Grocers of Australia, Submission 201, p 22.

24 Davids, Submission 166, pp 3-4.

25 Davids, Submission 166, pp 3-4.

26 Davids, Submission 166, p 3.

27 Australian Competition and Consumer Commission, Submission 191, pp 18-19.

28 Business Review Weekly, *Metro Buys a Warehouse of Trouble*, Neil Shoebridge, 5 Oct 1998.

2.33 Since the takeover, Davids has acted to consolidate its 29 banners into three channels (based under the IGA banner), with the aim of obtaining better marketing economies of scale.²⁹

2.34 Davids operates via four business channels, with a central corporate support division providing financial, information technology, merchandising and logistics services. The business groups are:

- Distribution/Retail: supplies groceries, meat, fruit and vegetables and general merchandise, to over 4,000 independent retailers.
- Cash/Carry: self-service grocery and liquor cash & carry distributor to smaller retailers and caterers.
- Food Service: distributor to restaurants, cafes, fast food outlets, hotels and other institutions.
- Australian Liquor Marketers (half-owned by Davids): Australia's largest wine and spirit wholesaler, it operates nationally distributing products such as spirits, wines and some packaged beers.³⁰

Australian Independent Wholesalers (AIW)

2.35 AIW is a wholesaling division of Woolworths. It was a small regional wholesaler when acquired by Woolworths in 1996.³¹

2.36 As well as servicing Woolworths, AIW supplies independent retailers in competition with Davids. It now supplies over 300 retailers in eastern Australia previously supplied by Davids.³² Its fight with Davids for market share has been reported to have been vigorous.³³

Foodland Associated Limited (FAL)

2.37 FAL is the major supplier and sole independent grocery wholesaler in Western Australia. It offers a full range of retail, financial incentives and marketing support services to FAL franchise and other independent retail customers. FAL also owns the 24-store Action Food Barns (Action) retail group, and has substantial wholesale and retail interests in New Zealand. It is the third largest retail organisation listed on the Australian Stock Exchange, and employs over 19,500 people.³⁴

29 IGA Supermarkets, IGA Everyday and IGA Express make up the 3 banner groups.

30 Davids, Submission 166, pp 3-4.

31 ACCC Submission 191, p 20.

32 ACCC, Submission 191, p 7.

33 Business Review Weekly, *A few supermarket casualties in the war of independents*, Neil Shoebridge, 8 March 1999.

34 FAL website at <http://www.fal.com.au>.

2.38 FAL was established as a grocery partnership in Fremantle in 1893, and was incorporated in Western Australia in 1926 as a supplier to small grocers. It distributes grocery and ancillary products to more than 700 retail stores.³⁵

2.39 FAL's wholesale business is based at a large warehouse in Canning Vale, south of Perth, with two smaller warehouses in the northern suburbs of Perth and Kalgoorlie. More than \$50 million in stock is warehoused at Canning Vale alone.³⁶

Differences between the major chains and the independent sector

2.40 The vertically integrated structure of the major chains facilitates a number of advantages in purchasing, warehousing and pricing practices:

- Vertical integration enables the major chains to derive their entire profitability from retail operations, while in the independent sector, both the warehouse and the retail stores make separate profits. In addition, buyer groups are also part of some independent supply chains.
- Independent wholesalers carry the debt risk for many of the retailers they supply, while deliveries to retail stores in a chain are an internal transfer.
- Compared with the centralised buying practices of the major chains, independent wholesalers may have fewer opportunities for 'investment buys', where quantities are purchased from suppliers prior to promotions or known price increases.
- Centrally co-ordinated store orders for the major chains involve larger warehouse pick-up runs, enabling them to exploit efficiencies in distribution. By contrast, the average store order from an independent wholesaler is mainly small to medium.
- Being the 'core tenant' in large shopping centres, the major chains pay substantially less rent per square metre than other small retail tenants. In addition, the major chains enjoy more flexible terms and conditions in their leasing arrangements.
- Economies of scale enable the major chains to utilise electricity and floor space more efficiently than small retailers. As a general rule, the smaller the business, the more costly and labour intensive it is to run.
- The major chains can centrally co-ordinate promotional activities and exploit generic advertising advantages.
- There can be tax benefits associated with vertical integration. Wholesale Sales Tax (WST) is generally paid on the final wholesale selling price of goods, usually a value incorporating the costs incurred up to and including that sale. Those costs could be activities such as advertising, storage and transportation of

35 ACCC, Submission 191, p 7.

36 Foodland Associated Limited, Submission 190, pp 7-8.

products. Those costs will not be within the tax base when performed by a vertically integrated retailer. However, it is likely that concerns raised by wholesalers and independent retailers in relation to the differences in the effect of WST will be resolved with the new tax system to take effect from 1 July 2000.³⁷

- Evidence before the Senate Employment, Workplace Relations, Small Business and Education References Committee' inquiry into the New Tax System notes that the GST may see significant cash flow advantages accrue to the larger firms.³⁸

37 ACCC, Submission 191, pp 10-11.

38 *Hansard*, Sydney, 23 February 1999, p 280.

CHAPTER 3

MAIN CONTENTIONS

*...there are thousands of new and specialist retail businesses in Australia, right across urban and some strong regional areas, that are prospering. But in the free enterprise economy there is always an ebb and flow.*¹

3.1 The evidence revealed that the growth of the major chains over the last two decades has been at the direct expense of the independents, whose market share and profitability continues to decline.² The viability of the independent sector was said to be at risk, with the common theme being ‘inequality in the market place’.

3.2 This chapter clarifies the main contentions put forward by retailers, wholesalers, primary producers, consumers and other interested organisations.

Retailers

3.3 Small and independent retailers rely on wholesale volumes to compete with the major chains, although some are not convinced that a strong and competitive independent wholesale sector would, by itself, ensure their survival. For example, many shoppers from small country towns now choose to travel to nearby regional centres to buy their groceries from large, modern and well-stocked supermarkets. The viability of an assortment of small country stores is said to be at risk:

While out of town buying their groceries – human nature as it is – they tend to buy their meat, milk, bread, magazines, fruit and veg, shoes, hardware, chemist lines, et cetera, on the same trip. This means there is a real possibility of a domino effect through the whole town. Soon the town has a milk bar-cum-general store and a lot of houses for sale.³

3.4 Typical large supermarket stores have traditionally offered a mixed range of products, leaving room in the market for specialist retailers and for smaller stores. The independents are now concerned that the major chains are moving into smaller store formats as well as specialising in areas such as toys, office supplies, fast food, petrol, health, liquor, beauty aids, on-line shopping and pharmaceuticals:

This leaves very little room for the independent operator to move and the chains seem to be quite content for the smaller operator to disappear.⁴

1 Mr Roger Corbett, Chief Executive Officer, Woolworths, *Hansard*, Canberra, 12 July 1999, p 1097.

2 Australian Competition and Consumer Commission, Submission 191, p 18. Also, see Chapter 4 of this report.

3 Mr Ray Veal, Proprietor, Stratford Licensed Grocery, *Hansard*, Melbourne, 7 April 1999, p 100.

4 Mr Richard Dymond, Proprietor, Toodyay Supermarket, Additional Information (Sub 11A).

3.5 The independent sector called for the market share of the major chains to be immediately capped at 80 per cent, with divestiture back to 75 per cent over five years, effectively limiting the market share of any one operator to 25 per cent.

3.6 The major chains rejected the idea of a market cap, and argued that the market place is highly competitive, with consumers voting with their feet and benefitting more now than they ever did in the past:

We have the best of both worlds: a strong and very competitive major retail sector with 40 per cent of the market and 60 per cent shared by 2,400 banner retailers and over 20,000 small retailers. It could almost be argued that, if we had a blank sheet of paper, it would be hard to have a more ideal market. The Australian consumer is a winner. Australia is a winner.⁵

National Association of Retail Grocers of Australia (NARGA)

3.7 NARGA, which presented the core case for the independents, is concerned that the three major chains have doubled their share of the national retail grocery market over the past twenty years from 40 per cent to in excess of 80 per cent. NARGA believes that the chains' oligopoly is anti-competitive, unhealthy and destructive to small business.⁶

3.8 NARGA maintains that the ongoing decline in the market share of independent retailers is irrefutable proof that the independents cannot compete fairly in the market place. Factors such as the cost of capital, business risk, acquisition of stores, access to new sites and wholesale sales tax are said to give the major chains a significant degree of market advantage over the independents.⁷

3.9 NARGA claims that over 80 stores have been acquired by the major chains since January 1995.⁸ Through their acquisition strategies, the major chains are said to be 'picking the eyes' out of the independent sector.

3.10 NARGA maintains that the major chains are able to purchase on the best terms, not only on the grocery products they on-sell, but also in relation to peripheral business inputs such as electricity, telecommunications, financial services (EFTPOS and credit card charges), rent and insurance.⁹

3.11 NARGA cited the findings of the Reid Report,¹⁰ and argued that:

5 Mr Roger Corbett, Chief Executive Officer, Woolworths, *Hansard*, Canberra, 6 April 1999, p 6.

6 National Association of Retail Grocers of Australia, Submission 201, p 8.

7 National Association of Retail Grocers of Australia, Submission 201, p 11.

8 National Association of Retail Grocers of Australia, Submission 201, p 102.

9 National Association of Retail Grocers of Australia, Submission 201, pp 87-89.

10 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance Towards Fair Trading in Australia*, May 1997.

There needs to be a recognition that the Australian commercial environment is no longer conducive to fair competition because of high levels of concentration in many industries – including retailing. It is naïve to expect small business to survive unrestrained ‘competition’ without some form of protection from the worst excesses of the exercise of economic power.¹¹

3.12 NARGA’s main recommendations are:

1. The retail grocery market share of the major chains be capped at 80 per cent with a mandatory reduction to 75 per cent within five years, with each major chain controlling no more than 25 per cent of the total retail grocery market.
2. The introduction of legislation providing stiff penalties for abuse of market power, divestiture powers and criminal sanctions where appropriate.
3. Mandatory economic and social impact statements for all new shopping centres and significant retail developments.
4. A moratorium on the implementation of National Competition Policy (NCP), including the deregulation of shop trading hours, pending the outcomes of this inquiry, that of the Senate Committee inquiry in to the Social and Economic Effects of the NCP, and the Productivity Commission inquiry into NCP and its impact on regional Australia.
5. The establishment of a new national watchdog to monitor the market share of the major chains with mandatory bi-annual public reports on retail grocery prices and anti-competitive behaviour.
6. A requirement to disclose to the Australian Competition and Consumer Commission (ACCC) manufacturers’ trading terms and conditions on a confidential basis to ensure transparent and fair pricing policies (with six-month reviews).
7. The appointment of small business representatives to all government, semi-government and statutory authorities impacting on small business, including the National Competition Council (NCC) and the ACCC.¹²

Other independent retailers

3.13 Mr Alan Jones, Chief Executive Officer of the Master Grocers Association of Victoria (MGAV), argued that a market cap will enhance competition, and referred the Committee to past events in the Victorian town of Kerang:

11 National Association of Retail Grocers of Australia, Submission 201, p 10.

12 National Association of Retail Grocers of Australia, Submission 201, p 13.

Ten years ago there were three independent supermarkets and a number of individual specialty stores. Safeway bought some land up there and developed a site and now there is one other independent supermarket and most of the smaller stores have closed. I would submit that that is in actual fact a shrinking competition – there is less choice for the consumer. Where we could have gone to three different stores that were operating under different banners with different specials, different level of service, different level of décor et cetera, now we are down to basically one of two choices.¹³

3.14 The Small Retailers Association of South Australia (SA Small Retailers) feel that governments have done little, until recently, to encourage a fair balance in the market place. It believes that, as a result, there is ‘unparalleled market domination and declining competition’. It believes that small business is being ‘slowly but very surely destroyed’:¹⁴

Further to that, in our submission we have alleged that essentially the process we have in Australia now in the retail industry is a predatory process. It is one where even the best may not survive by the very processes that go on where they are in fact being targeted for market growth by one of three major retailers. That is a major concern to us because in some cases people will be taken out of business whether they want to be or not, simply because they recognise that they may have no choice, even though they might be trading well.¹⁵

3.15 Mr Barry Hall, owner of Hope Valley Foodland, told the Committee that there is a clear trend towards decline:

Twenty years ago the South Australian independent sector had over 50 per cent of the market share. That has now come down to something like 30 per cent. Over that time it has consistently shown that the sell price to the consumers of groceries has been four or five per cent below the eastern seaboard. To my mind, all of the manufacturing locations are basically on the eastern seaboard and therefore you have got a freight component to get that product to South Australia. So why is it that we sell at a cheaper price? I believe it is simply our competition. Our strength in the independent industry ensures that competition stays at a level that the consumer will benefit from. That is being eroded now substantially...¹⁶

3.16 The market share of the independent sector is lowest in Queensland.¹⁷ Mr Ian Baldock, Executive Director of the Queensland Retail Traders and Shopkeepers

13 *Hansard*, Melbourne, 7 April 1999, pp 89-90.

14 Small Retailers Association of South Australia, Submission 215, p 1.

15 Mr John Brownsea, Executive Director, Small Retailers Association, *Hansard*, Adelaide, 8 April 1999, p 176.

16 *Hansard*, Adelaide, 8 April 1999, pp 215-216.

17 Australian Bureau of Statistics, Retail Trade Special Data Service, *Joint Select Committee on the Retail Sector – Market Share Report*, Table 4, Measure 1.

Association (QRTSA), is particularly concerned about the effect this is having on the sustainability of rural communities:

It is the independent sector, the independent retailer that is in there servicing that community, supporting that community. But because of what is happening in other areas throughout Australia the ability of that operator to be able to buy correctly, to be able to service that community, is under threat, and if the people in that community do not perceive that they are getting good value from that independent operator, they will drive somewhere else a hundred kilometres away to another centre where perhaps there is a major retailer, and take their business with them, which is a threat to the economic ability of that town to sustain itself.¹⁸

3.17 The Retail Traders Association of Tasmania (RTAT) is concerned with the expansion of the major chains into areas such as newsagents, florists, petrol, bakers, butchers, liquor, pharmacies, electrical, hardware and photolabs. In particular, Mr Paul Morgan, a pharmacist from Hobart, is concerned about health issues. His colleague Mr Tony Steven, Executive Director of the RTAT, said:

For example, there are serious implications if supermarkets were to start selling products usually reserved for pharmacies. There are concerns involving safety, expertise and even personalised service. It is more likely that a local, caring chemist will know more about the medical background of his or her customers than an attendant at a high-turnover supermarket.¹⁹

3.18 Adding to these concerns, Dubbo pharmacist, Mr John Manny, told the Committee of the difficulty in attracting pharmacists to the bush:

You will also find that doctors do not like moving into a rural area if there is not a pharmacist to back them up. It is a very big problem and one that I am sure you in your political field are very much aware of. For example, in the small settlement of Tottenham, which claims to be in the dead centre of New South Wales, the doctor there often calls me when he is in trouble. He cannot get supplies with ease. He is in a position where people who would normally supply him with his emergency medications and so on have found it financially difficult to support him. We do not want to exacerbate this sort of problem. It is very real and it is happening now.²⁰

3.19 Western Australian independent retailer Mr Neville Gale believes that the difference in trading terms is the key issue. Mr Gale said that the industry works on only two or three per cent profit margins, yet the difference in trading terms between the independents and the major chains is often as much as five, six or eight per cent.²¹

18 *Hansard*, Brisbane, 16 April 1999, p 446.

19 *Hansard*, Launceston, 5 July 1999, p 547.

20 *Hansard*, Dubbo, 7 July 1999, pp 754-755.

21 *Hansard*, Perth, 9 April 1999, p 247.

3.20 Mr Gale is also concerned that it has become nearly impossible for independents to gain the sites that the majors do:

How can an independent like me compete against all of that: the sites, the capital, the trading terms and the advertising power, which comes as a result of those trading terms, and then what I believe to be unconscionable behaviour – predatory pricing?²²

Woolworths

3.21 Woolworths believes that the Australian retail grocery industry is highly competitive, with low basic food prices, high levels of consumer choice, high levels of efficiency and moderate levels of profit.²³

3.22 Chief Executive Officer, Mr Roger Corbett, said that Woolworths has grown purely because customers desire to shop with them, and expressed grave concern over the demands for a market cap:

We disagree with those who suggest that the Government impose an artificial ceiling on the market share of a company like Woolworths. We believe that would have disastrous effects upon the direct interests of our customers and indirectly on the Australian economy. We disagree with it both philosophically and factually. Options have been put forward to meet an agenda which has nothing to do with what Australian consumers want.²⁴

3.23 Mr Corbett said that the market share figure presented by NARGA (80 per cent for the major chains) is misleading.²⁵ He believes that the relevant market shares for supermarkets should be measured against the ‘stomach market’ – which includes spending on:

- Take-home food, groceries and bottled liquor; and
- Food catering.

3.24 On this basis, Mr Corbett said that the market share of the three major chains is around 43.1 per cent.²⁶ He said that some have chosen to create an impression that the three major chains are one team which work against the rest of the market:

This is the same as claiming that the three top football teams are one rugby league team and every other team is playing against them. Woolworths is one Australian company in arguably the toughest retail market in the world. We compete absolutely vigorously with Coles and Franklins and the fact that they are a significant size only tends to heighten the competition and

22 *Hansard*, Perth, 9 April 1999, p 247.

23 Woolworths, Submission 229A, p 2.

24 *Hansard*, Canberra, 6 April 1999 p 2.

25 *Hansard*, Canberra, 6 April 1999, p 3.

26 Jebb Holland Dimasi, Submission 228, pp 26-27.

continually puts pressure on our end profit margin. We deliver an EBIT of 3.53 per cent, which is amongst the lowest in the world and is similar to our major competitors'. The winner of this competition is the Australian consumer.²⁷

3.25 Woolworths is concerned that a market cap will negatively impact upon consumers. It claims that the ability to grow sales by volume growth would not be possible, and thus, the focus would turn to higher prices and lower costs in order to generate increased shareholder value.²⁸

3.26 Woolworths submitted that the major reasons for small business failures in Australia include financial mismanagement, lack of business ability, lack of capital, and economic conditions. It suggested that the best means of assisting the small independent retailer without damaging the market's competitiveness would be to focus on management and skills, financing costs, and reduced administrative costs – especially red tape.²⁹

Coles

3.27 Coles believes that Australian consumers are well served, and cautioned the Committee against 'impeding the evolution' of the retailing sector.³⁰ Coles suggested that the issue for the inquiry should not be the level of concentration, but whether the Australian retail grocery market has remained competitive and open to new entrants.³¹

3.28 Coles believes that:

- The market remains competitive – evidenced by slim profit margins (Coles' is 3.4% compared with up to 4% in the US and 5-6% in the UK);
- The market is open to new entrants – evidenced by the success of small specialised food retailers such as Bakers Delight, Brumbies, Deli France;
- Consolidation amongst mass food chains is accelerating around the world in order to respond to technological and organisational changes that increase efficiency and bring prices down; and
- Consolidation is also occurring throughout the supply chain where growers, processors, manufacturers, wholesalers and property owners seek mergers in order to compete better in local and global markets.³²

27 *Hansard*, Canberra, 6 April 1999, p 3.

28 Woolworths, Submission 229A, p 3.

29 Woolworths, Submission 229, pp 156-158.

30 Coles, Submission 168, p 26.

31 Coles, Submission 168, p 4.

32 Coles, Submission 168, pp 4,5 and 9.

3.29 Coles is concerned that further regulation would be impractical and against the interests of the community, and maintains that adequate protection is already available to consumers, suppliers and other retailers through the provisions of the *Trade Practices Act* and the common law.³³

3.30 Coles believes that capping the market share would be extraordinarily difficult and contentious, and would vary according to how a market is defined. Mr Alan Williams, Managing Director of Coles Supermarkets, said:

From our observation, we do not believe it will fix the independent's dilemma. It will not achieve the outcome – there is the 25 per cent recommendation for the independents, but you cannot guarantee it is going to go to them. There are international operators looking at coming into the Australian market now, and already one German company has carried out job interviews. We have seen recently Caltex and IGA coming together with small and medium sized supermarkets. All of that evolution is happening now as we speak.³⁴

3.31 Mr Williams believes that Coles have acted in an ethical and fair way in achieving efficiency and innovation. He said that Coles have been able to pass those benefits onto its stakeholders, including its customers:

We have better stores, we have competitive prices, we have improved our service levels. The quality of goods that go into our stores has significantly improved, as has the food handling and safety aspects. We have a wide range of products and a wide range of offerings, and we are open at times that are convenient to the customer.³⁵

3.32 Mr Williams said that Coles are customer-driven:

Quite simply, if you do not meet the customers' expectations, they will shop elsewhere.³⁶

Franklins

3.33 Franklins, the smallest of the three major chains, believes that to compete effectively it must take advantage of economies of scale and scope.³⁷ Mr Ian Cornell, Chief Executive Officer, told the Committee that Franklins must grow to achieve the economies of scale that their primary competitors enjoy in logistics administration, information technology and advertising, to ensure that they are not placed at a competitive disadvantage:

33 Coles, Submission 168, pp 4-26.

34 *Hansard*, Canberra, 6 April 1999, p 30.

35 *Hansard*, Canberra, 6 April 1999, p 30.

36 *Hansard*, Canberra, 6 April 1999, p 31.

37 Franklins, Submission 200, p iv.

These economies of scale are critical in a small and geographically dispersed Australian market. To be able to offer customers lower prices and achieve an acceptable level of profitability we need to achieve these economies of scale.³⁸

3.34 Mr Cornell told the Committee that Franklins made major losses in 1995 and 1996 due to its delayed response to consumer demands. He said that customers have a preference for those supermarkets that allow them to shop when it suits them, and not when it suits the retailer. He said that Franklins' competitors were able to adapt to these changes brought about by 'time poor activity rich' customers quicker than Franklins because they already offered a one-stop shopping experience:

These changing consumer demands also needed to be addressed by the independent retailers. The customer does not differentiate between chain stores and independent operators. Customers will shop when they want to shop in the most convenient store.³⁹

3.35 In rejecting NARGA's proposal for a market share cap, Mr Cornell believes that legislative restrictions effectively stifle competition, ultimately leading to increased prices:

[In the liquor industry] licences are allocated on a needs basis in most States. In many areas the major liquor retailer has dominance, which precludes any further entry based on the needs test. Franklins cannot create competition in these areas because of our difficulty in obtaining licences.⁴⁰

Wholesalers

Dauids

3.36 Davids' wholesale business is inextricably linked to that of the independent retailers. Its relationship with the independents is one of mutual dependency. Without the independents, Davids does not survive, and vice versa.⁴¹ Mr Andrew Reitzer, Chief Executive Officer, said:

So whilst we could be perceived to be big business, we are totally and completely linked to the small independent retailers of Australia. We both need that certain critical mass, that certain critical volume, to survive.⁴²

3.37 Davids provide three main functions. First, it delivers goods to the independents, secondly, it does the marketing for the independents, and thirdly, it acts as 'head office' for the independents. Davids therefore provides a number of services that the independent retailers could not obtain individually, as Mr Reitzer explained:

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

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

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

41 Mr Andrew Reitzer, Chief Executive Officer, Davids, *Hansard*, Melbourne, 7 April 1999, p 116.

42 *Hansard*, Melbourne, 7 April 1999, p 116.

For example...I track the prices at Franklins, Woolworths and Coles in each State every single day of the week and I record them on our computer. I then utilise that information for what we call host support – the computers of the majority of those 4,000 independent retailers are linked to mine. And the retailer can say, ‘I’ve got a Coles next door to me, I’ve got a Safeway next door to me and I want the same selling prices as they have,’ and then that gets done automatically through the computer. So I provided that service just as one of the chains would provide their service for their stores.⁴³

3.38 Davids also have a training school, where its customers receive all levels of training, from shelf packing to cash flows and balance sheets:

We run ‘planograms’, so just as one of the major chains’ head office will tell their schools exactly how to lay their shelves out, our customers can link onto the Internet and from the Internet say, ‘I have got this sort of shelving and I am about to re-lay the coffee section,’ and we will tell them exactly from a merchandising point of view how best to re-lay that. We have re-lay teams, so that if a store is really a bit run down because the independent is not up to date and he wants to re-lay the whole store for whatever reason, we will go in there and re-lay the whole store for him.⁴⁴

3.39 In contrast to the claims of the major chains, Davids believes that the Australian grocery market is a textbook example of market failure:

To tilt the playing field in the interests of fair competition and in the public interest the Government must cap the market share of the chains through amendments to the *Trade Practices Act* or through the introduction of US anti-trust style laws to break up the monopoly power of the chains.⁴⁵

Foodland Associated Limited (FAL)

3.40 Mr Barry Alty, Managing Director of FAL, told the Committee that independent retailers do not have equal access to sites, equity capital or debt facilities at low cost, and are disadvantaged by the current sales tax system. In addition, they do not have the ability to spread risk as do the major chains, namely because they are single-site or few-site operators. They are also supplied by a wholesaler who is entitled to make a profit:⁴⁶

The result of this situation is self-evident. If you do not have equal opportunity, you cannot enjoy equal success. It is quite simple. As a consequence, the independent market share has diminished consistently for the last 20-odd years. This has led to chain domination and it continues; there is an increasing domination. The constant erosion of the independent share through unequal opportunity and through acquisition strategy places

43 *Hansard*, Melbourne, 7 April 1999, p 117.

44 Mr Andrew Reitzer, Chief Executive Officer, Davids, *Hansard*, Melbourne, 7 April 1999, p 117.

45 Davids, Submission 166, p 2.

46 *Hansard*, Perth, 9 April 1999, p 304.

the entire independent sector under threat. If growth in chain dominance continues unabated or unchecked, there will not be a viable independent sector at some time.⁴⁷

3.41 Mr Alty believes that a market cap would be the only insurance against the survival of the independent sector:

How will small stores and rural towns be supplied at any form of reasonable cost? What are the price and choice impacts in the marketplace of duopoly or oligopoly? What are the social impacts, particularly in rural Australia? Thus, in our view, there has to be a cap. There is no other way of protecting genuine public interest.⁴⁸

Primary producers

3.42 Farmers are concerned that the market power of the major chains enables them to drive very hard bargains in the purchase of produce, which is often done in an aggressive manner.

NSW Farmers Association (NSW Farmers)

3.43 NSW Farmers is concerned that there is a fundamental imbalance in market power between farmers and the major chains, with some members reporting instances of what they believe to be abuses of market power. Despite this, many farmers appreciate the professional and efficient roles played by the major chains in food distribution.

3.44 NSW Farmers said that there are better alternatives than a market cap, an action which it believes would introduce its own set of inefficiencies:

It would not solve the fundamental problem of ensuring markets remain transparent and that fair practices prevail.⁴⁹

3.45 NSW Farmers want measures put in place to ensure market transparency and fair trading practices, including the establishment of a Fair Trading Authority with comprehensive powers, including the ability to:

- identify markets ‘vulnerable’ to unfair trading;
- facilitate the development of an industry Code of Conduct;
- impose and enforce information disclosure requirements on market industry participants;
- provide information that assists in preventing unfair trading practices; and

47 *Hansard*, Perth, 9 April 1999, pp 304-305.

48 *Hansard*, Perth, 9 April 1999, p 305.

49 Mr Michael Keogh, Policy Director, NSW Farmers Association, *Hansard*, Sydney, 15 April 1999, p 342.

- recommend summary penalties for market participants engaged in unfair trading practices.⁵⁰

3.46 NSW Farmers envisage such an authority's role (with associated tribunal) as being predominantly preventative, implementing measures to ensure markets remain fair and transparent, while at the same time enabling competitive forces to generate efficiency gains.⁵¹

3.47 NSW Farmers also seek the implementation of a program aimed at encouraging farmers to combine into cooperative or collective groups, which would enable them to better match the commercial skills of major corporate organisations.⁵²

South Australian Farmers Federation (SA Farmers)

3.48 SA Farmers believe that there is an unhealthy level of competition, with most producers having few potential customers in the marketplace.⁵³

3.49 SA Farmers appreciate that the major chains are a very important part of their livelihood, but are becoming increasingly concerned at their level of concentration:

Some of what is happening in terms of the vertical linkages where they are becoming more and more involved in growers' businesses and growers in effect are becoming more involved in their businesses is actually quite healthy. It is just where the balance gets so far swung one way that effectively the supermarkets are potentially exerting an unhealthy level of control over prices, margins, and the businesses that these growers are involved in, that the situation becomes a problem.⁵⁴

3.50 SA Farmers expect that, in the future, there will be a decrease in the number of farmers growing produce uncontracted, with the increased use of patented biotechnology further extending the use of vertically integrated relationships throughout the supply chain. Increased vertical integration of this nature provides benefits, but the extent of these to primary producers depends on their ability to gain just terms in their dealings with the major chains.⁵⁵

50 NSW Farmers Association, Submission 216, p 3.

51 Mr Michael Keogh, Policy Director, NSW Farmers Association, *Hansard*, Sydney, 15 April 1999, p 342.

52 Mr Michael Keogh, Policy Director, NSW Farmers Association, *Hansard*, Sydney, 15 April 1999, p 342.

53 Mr Alexander Cameron, Chief Executive Officer, South Australian Farmers Federation, *Hansard*, Adelaide, 8 April 1999, p 203.

54 Mr Alexander Cameron, Chief Executive Officer, South Australian Farmers Federation, *Hansard*, Adelaide, 8 April 1999, p 212.

55 Mr Alexander Cameron, Chief Executive Officer, South Australian Farmers Federation, *Hansard*, Adelaide, 8 April 1999, p 214.

Queensland Fruit and Vegetable Growers (QFVG)

3.51 The QFVG also relayed mixed views from growers. Some feel that they have not been treated fairly by the major chains, while others reported good relationships, and that direct supply represented the best marketing strategy for the future.⁵⁶

3.52 In a survey of 28 growers selected from a large area, and including both those who deal directly with the major chains and those who do not, the QFVG provided a comprehensive list of ‘pros and cons’ regarding dealings with the major chains.⁵⁷ Despite its mixed views, the QFVG believes that the manner in which the major chains treat growers has improved over time:

A significant number of growers, producing a range of crops, had quite unsatisfactory experiences some years ago. It is no exaggeration to say that those early experiences created levels of fear, anxiety and hostility, which have prevented any rational reconsideration of entering into direct supply arrangements.⁵⁸

3.53 However, the QFVG believes that the major chains should recognise the ‘very considerable imbalance of market power which exists’, and exercise appropriate responsibility in ensuring that business relationships are conducted in a fair, reasonable and transparent manner. Particular recommendations include:

- Better staff training for employees who deal with growers;
- The acceptance of produce by retailers once it has entered their distribution centres and has passed quality control requirements;
- The development of specific protocols between growers and retailers to minimise the occurrence of produce return;
- The development of an industry Code of Conduct;
- The further consideration of marketing systems for the industry as a whole; and
- The encouragement of ongoing dialogue between the major chains and horticultural industries to facilitate and enhance industry development.⁵⁹

Other organisations

Council of Small Business Organisations of Australia (COSBOA)

3.54 COSBOA, established in 1979 primarily to ensure that the *Trade Practices Act* delivered on its promise for small firms, regards retail concentration as only the tip of a very large policy iceberg.

56 Queensland Fruit and Vegetable Growers, Submission 203, p 2.

57 Queensland Fruit and Vegetable Growers, Submission 203, pp 12-13.

58 Queensland Fruit and Vegetable Growers, Submission 203, p 13.

59 Queensland Fruit and Vegetable Growers, Submission 203, pp 16-17.

3.55 COSBOA believes that the underlying problem is whether, in a free market economy which wants to measure its efficiency only in capital terms, government should pro-actively support small labour-intensive firms or not.⁶⁰

3.56 COSBOA has been arguing for some years that concentration of ownership is increasing in Australia, particularly in a number of retail categories, and that this is undesirable in both its employment and social consequences. COSBOA believes that smaller operators have an important role in maintaining a wide diversity of products and services, and for maintaining a wide range of suppliers:

Experiences in many regional economies have been that concentration of ownership of retail outlets (food, for example) leads to a reduction in the amount of product sourced locally, as the bigger retailers move to centralise suppliers to maximise economies of scale. The impact of increasing firm sizes thus needs to be assessed not only in terms of price reduction and scale economies, but on the extent of displacement of other enterprises and their employees.⁶¹

Shop Distributive and Allied Employees Association (SDA)

3.57 The major chains enjoy strong support from the SDA, which is the largest trade union in Australia with more than 211,000 members. A significant proportion of its members are women, most of whom are employed by the major chains.⁶²

3.58 The SDA said in its submission that the major chains have often taken the lead in improving the pay and conditions of their employees, as well as promoting skills development within the industry.⁶³

3.59 The SDA believes that there is a range of issues hindering the growth of small business that the Government could address, instead of what it believes to be counter productive measures directed towards the major chains.

3.60 The SDA strongly opposed the idea of a market cap:

Any decision which forced the major corporations to limit or reduce their market share would, in our view, have the effect of undermining wages, working conditions, equal opportunity, occupational health and safety, skills development and sound industrial relations in the industry. It would lead inexorably to job losses and a transfer for the many workers from higher paying jobs to lower paying jobs with worse working conditions.⁶⁴

60 Council of Small Business Organisations of Australia, Submission 140, p 2.

61 Council of Small Business Organisations of Australia, Submission 140, pp 6-7.

62 Shop, Distributive and Allied Employees' Association, Submission 214, p 1.

63 Shop, Distributive and Allied Employees' Association, Submission 214, p 1.

64 Shop, Distributive and Allied Employees' Association, Submission 214, pp 1-2.

3.61 Mr Joe de Bruyn, National Secretary-Treasurer of the SDA, fears that significant job losses in regional communities would result if the major chains were required to divest stores.⁶⁵

Coalition Against Major Chain Dominance

3.62 The Coalition Against Major Chain Dominance, made up of a mixed group of small retailers and consumers, was formed after a meeting organised by NARGA in December 1998.⁶⁶ The group's purpose is to 'emphasise to the Committee the strength, breadth and depth of community concern regarding the dominance of the major chains'. It focused its attention on what it considers to be 'in the best interests of all Australians, not just selected groups'.⁶⁷

3.63 The group believes that there is a misconception that the debate is between retailers, and that consumers are either unconcerned or in favour of the present situation:

There is little doubt that a majority of Australians enjoy the one-stop shop convenience of the major supermarkets and no one is suggesting that they are not an integral part of the modern way of life. However, to suggest that the consumer is unconcerned about the ever-increasing stranglehold of the majors is both incorrect and misleading.⁶⁸

3.64 The group referred the Committee to a survey of 60,000 shoppers conducted by the KPMG Centre of Consumer Behaviour. The survey revealed that support for large shopping centres has been on the decline, with the number of shoppers preferring large shopping destinations falling from 73 per cent in 1994 to 54 per cent last year. The 'formula approach' to large shopping malls was said to be one reason for the slump.⁶⁹

Consumers

Australian Consumers' Association (ACA)

3.65 Peak consumer group the ACA did not make a substantive submission to the Committee. Rather, it referred to a number of articles published in its journal *Choice*, which indicate that prices are generally cheaper in supermarkets than in smaller convenience stores, that transportation costs are a significant factor in price differences across the nation, and that competition between supermarkets has

65 *Hansard*, Sydney, 15 April 1999, pp 332-333.

66 Coalition Against Major Chain Dominance, Submission 294, p 4.

67 Coalition Against Major Chain Dominance, Submission 294, p 2.

68 Coalition Against Major Chain Dominance, Submission 294, p 5.

69 Coalition Against Major Chain Dominance, Submission 294, p 7.

increased, contributing to lower prices.⁷⁰ Mr Mathew O'Neill, Senior Policy Officer, Australian Consumers Association, told the Committee that:

Firstly, in regard to the surveys, what we would like to say up front is that we firmly believe that this inquiry should be looking at what is benefitting or costing consumers, reflected by structures of retailing industry, not necessarily whether they are small or large businesses?⁷¹

3.66 The Committee notes that one of the *Choice* articles shows that, for a basket of household grocery items, a local convenience store charges an average of 43 per cent more than a supermarket.⁷²

Consumer Food Network (CFN)

3.67 Unrelated to the ACA, the Consumer Food Network (CFN)⁷³ has around 80 members Australia-wide, made up of groups such as the National Council of Women, some Country Women's Association State branches, the Home Economics Institute, dietitians and some community legal centres.

3.68 The CFN has concerns about the increasing dominance of the major chains.⁷⁴ Coordinator, Dr Richard Copeman, said that there is a divergence of views among consumers. He told of the concerns relating to less mobile consumers, and spoke about the non-shopping benefits that independent stores can bring to communities:

Even for those who do [have access to private transport], sometimes for the elderly it is difficult to drive and park and get to a more distant supermarket than it is to access a local food store in a suburban area or in a country town. We feel that has other impacts on the community in general, of which consumers form a part, in terms of taking away from that sense of community and knowing retailers, being able to talk to and know people in their local community. That is a very important part of the food shopping experience for a lot of consumers, and that is something that is largely dying out for Australian consumers. It is becoming a very impersonal experience. You rush in and rush out, and you really do not talk to anyone you know. It is another chore to be done, rather than what used to be a fairly pleasant community experience.⁷⁵

70 Australian Consumers' Association, Submission 245, p 2.

71 *Hansard*, Canberra, 13 July 1999, p 1119.

72 CHOICE Magazine, '*Convenience – worth any price?*', April 1999, p 52.

73 The Consumer Food Network is part of the Consumers Federation of Australia.

74 Consumer Food Network, Submission 172.

75 *Hansard*, Brisbane, 16 April 1999, pp 465-66.

Government organisations

Australian Competition and Consumer Commission (ACCC)

3.69 The ACCC is responsible for the administration and enforcement of the provisions of the *Trade Practices Act*. The objective of the *Trade Practices Act* is to enhance the welfare of Australians through the promotion of competition and fair trading, and to provide consumer protection.⁷⁶

3.70 Given the ACCC's statutory functions, the ACCC chose not to comment on the socio-economic impact of industry concentration, except to the extent it related to the competitiveness of the sector.

3.71 The ACCC believes that there may be competition issues flowing from the declining market share of the independents:

Whether or not the declining market share of the independent sector impacts on the competitiveness of that sector depends on certain factors, including the impact of that declining share on the supply costs of independents, whether it signals to them a need to respond to competition (eg in some dynamically efficient way such as changing format), and whether there is competition between the chains themselves.⁷⁷

3.72 From a competition perspective, even if the independent sector were less competitive as a consequence of its market share, the ACCC believes that an issue would only arise if there were a lack of competition between the chains:

NARGA has argued that a critical mass of independents is needed for the sector to be a viable competitive constraint on the chains. If this is true, then the declining market share of the independent sector may be compounded by the split of the independent wholesale sector because of the acquisition of AIW by Woolworths, and its subsequent successes in taking market share from Davids.⁷⁸

Department of Agriculture, Fisheries and Forestry (AFFA)

3.73 The Department of Agriculture, Fisheries and Forestry (AFFA) commented that the recent deregulation of aspects of the Australian fresh milk market has been a particular concern among producers. In most States, retail prices have increased, following post farm gate deregulation. Further, the price spreads, at constant 1997/98 prices, have also increased. The increases are most notable in:

- Victoria (from \$0.70 per litre to \$0.90), and

76 *Trade Practices Act 1974*, section 2.

77 Australian Competition and Consumer Commission, Submission 191, pp 8-9.

78 Australian Competition and Consumer Commission, Submission 191, pp 8-9.

- Tasmania (\$0.49 per litre to \$0.66), between 1995 and 1997.⁷⁹

Office of Small Business (OSB)

3.74 The OSB operates within the Department of Employment, Workplace Relations and Small Business. The OSB believes that there are many aspects of today's retailing market that need to be considered in the light of this inquiry. These include:

- an increasing consumer trend towards 'one-stop shopping', and less of a tendency for consumers to shop at several different stores for their food and grocery supplies;
- an increasingly wide-range of products and services now being offered to consumers;
- the recent policy initiatives of the major chains to employ more permanent full-time and part-time staff, with less reliance on casual staff; and
- an increased trend towards vertical integration between retailers and wholesalers.⁸⁰

3.75 The OSB believes that any recommended courses of action should also address the potential impact on other sectors which can be generally regarded as 'the broader public interest'. The OSB warns that small business, economic and employment growth should not be sought through initiatives which provide short-term support for inefficient market participants, or as a prop for tenuously viable operators.⁸¹

3.76 The OSB also emphasised the importance of an appropriate market definition against which concentration levels can be established:

If the grocery retailing market is to be analysed, the definition that accurately captures the product range and activities of all grocery retailers, and which has regard to vertical integration, should be used to establish market concentration ratios.⁸²

3.77 On this last point, much debate has occurred as to the actual level of market concentration. Depending on the definition of the market, concentration levels will vary significantly. Regardless of this, the market share of the major chains has been growing at the expense of independent retailers over the past two decades. This was said to be undermining the buying power of the independents, hence the call for a market cap.

79 Department of Agriculture, Fisheries and Forestry, Submission 256, p 3.

80 Office of Small Business, Submission 285, p 5.

81 Office of Small Business, Submission 285, p 12.

82 Office of Small Business, Submission 285, p 4.



CHAPTER 4

MARKET SHARE

...how big is too big?

Market definition

4.1 Conflicting views were put forward regarding the actual market share of the major chains. The debate centred on market definition, where the level of concentration is dependent upon how the market is defined.

National Association of Retail Grocers of Australia (NARGA)

4.2 NARGA believes that the AC Nielsen measure of market share is the correct industry standard. This covers 105 items sold through grocery supermarkets, including dairy and frozen products. On this basis, Woolworths' national share is 35.9 per cent, Coles is 30.3 per cent and Franklins is 14.2 per cent.¹ However, the AC Nielsen submission states that the market share figure of 80.4 per cent for the three major chains relates only to the dry/packaged grocery market. According to AC Nielsen, this definition is restrictive, and in order to assess the true grocery market, the definition should be expanded to include fresh meat, fresh fruit and vegetables, delicatessens, bread and liquor.² Table 4.1 represents the State and national share of the dry/packaged grocery market.

Table 4.1

*Grocery retail market shares (dry/packaged goods only)
September 1998*

	Woolworths	Coles/Bi Lo	Franklins	Total	Dauids	Others**
NSW	36.4	23.4	24.2	84.0	13.6	2.4
VIC	36.6	33.8	8.7	79.1	19.1	1.8
QLD	38.6	32.2	16.4	87.2	12.8	0
SA	29.9	38.0	7.0	74.9	25.1	0
WA	27.1	33.4	N/A	60.5	n/a	39.5
TAS	73.1*	26.9	N/A	100	n/a	0
NATIONAL	35.9	30.3	14.2	80.4	15.4	4.2

Source: AC Nielsen³

* Includes Tasmanian Independent Wholesalers

** Includes FAL and AIW

1 AC Nielsen, Submission 165, p 4.

2 AC Nielsen, Submission 165, pp 3-5.

3 Retail World Newsmagazine, AC Nielsen *Annual Report 1998*, 14 December 1998, pp 16-17.

Woolworths

4.3 Woolworths disputed NARGA's definition of the market. Mr Roger Corbett, Chief Executive Officer, told the Committee that:

...some have chosen, for whatever purpose, to use these facts incorrectly, and by doing so have created a misleading context for this inquiry and have also cast a shadow over the industry and those who lead it.⁴

4.4 Woolworths commissioned economic trend analyst, Mr Anthony Dimasi, to determine the market share based on household expenditure. Mr Dimasi believes that the relevant market shares for supermarkets are those measured as the share of total retail food and grocery spending – the 'stomach market'. This includes:

- spending on take-home food and groceries and on bottled liquor; and
- spending on food catering (cafés and restaurants).⁵

4.5 Mr Dimasi's research shows that, in 1997-98, Australians spent about \$123 billion on retail goods and retail services. This total is made up of:

- food and groceries to take home – \$47 billion;
- liquor to take home – \$5.5 billion;
- food catering (café and restaurant expenditure) – \$13.2 billion;
- non-food goods (apparel, homewares, gardening, et cetera) – \$52 billion; and
- retail services (video rental, optometry, hair and beauty etc.) – \$5.4 billion.⁶

The total market for food we can then consider, I guess, a number of different ways. If we look at all food and grocery spending in Australia, in 1997-98 that was \$65.5 billion. It comprised \$19.7 billion spent on what we call fresh food, which is meat and poultry, fresh produce, fresh seafood, delicatessen and dairy goods and bakery goods, and another \$27 billion on packaged groceries and frozen food, accounting for about 41 per cent of the total market for food and groceries.⁷

4.6 Mr Dimasi said that the AC Nielsen market share figure of 80.4 per cent relates only to some of the goods in that \$27 billion worth of packaged groceries and frozen foods. Furthermore, he disagreed that supermarkets and grocery stores compete effectively only for sales of take-home food, groceries and liquor. Rather, he argued that takeaway food stores, restaurants, hotels or taverns should also be seen as market competitors:

4 *Hansard*, Canberra, 6 April 1999, p 3.

5 Jebb Holland Dimasi, Submission 228, p 26.

6 *Hansard*, Sydney, 15 April 1999, p 359.

7 Mr Anthony Dimasi, Joint Managing Director, Jebb Holland Dimasi, *Hansard*, Sydney, 15 April 1999, pp 380-81.

My view is that, to a greater or lesser degree, they all [compete]. Some are very clearly and very obviously competitive with supermarkets, some less so. But in my view, in terms of the competitive model that supermarkets face in their day-to-day business decisions, I would take the view that they are all competitive.⁸

4.7 Table 4.2 represents Mr Dimasi's analysis of the major chains' share of all food and grocery spending.

Table 4.2

Major chain grocery retail market shares (all food and grocery spending) 1997/98

Trader	Sales (\$ Billion)	% of Total
Major Chains		
Woolworths	13.10	20.0
Coles*	11.30	17.3
Franklins	3.80	5.8
Total Major Chains	28.20	43.1
Other Traders	37.18	56.9
Total Take-home Food, Liquor and Groceries	65.38	100.0%

Source: Jebb Holland Dimasi, Submission 228, p 27.

* Includes Red Rooster sales.

Franklins

4.8 Franklins believes its market is other supermarkets, convenience stores and specialty fresh food retailers. As a result of demographic and social changes, Franklins now aims to compete with the 'ready to eat' and fresh specialty food outlets, not just the traditional supermarket. It estimates that the share of sales of groceries, liquor and fresh food (excluding takeaway food retailers) is:

- Woolworths – 35 per cent;
- Coles – 27 per cent;
- Independents – 29 per cent; and
- Franklins – 9 per cent.⁹

8 *Hansard*, Sydney, 15 April 1999, p 359.

9 Franklins, Submission 200, p iii.

Coles

4.9 Coles did not debate the issue of market concentration. Instead, it urged the Committee to focus on whether the retail sector is competitive and accessible to new entrants.¹⁰

Australian Competition and Consumer Commission (ACCC)

4.10 The ACCC defines a market as the area of close competition between firms and within which there is close price substitutability between one product and another, and close substitutability between one source of supply and another. The ACCC maintains that each market will differ as the circumstances of each case differ, and that it is inappropriate to have a pre-determined view on any dimension of a market, be it product, geographic or functional. What is crucial in the ACCC's view is that the relevant principles of defining a market are applied consistently.

4.11 One submission felt compelled to take up this point of consistency, noting that the major chains appear to want the best of both worlds:

For example, in their presentation to the Committee on Tuesday 6 April 1999, Woolworths were determined to down play the extent of their domination by quoting their market share in terms of somebody's stomach, thereby defining their share as a mere 20 per cent.

In contrast, not four weeks later, Chief Executive Roger Corbett was reassuring his shareholders that, according to AC Nielsen packaged grocery scan data, Woolworths market share had risen from 35.1 per cent to 35.6 per cent in the past twelve months.¹¹

4.12 Because of the conflicting views on market share, the Committee considered it appropriate to independently quantify the market shares of each major chain.

Australian Bureau of Statistics (ABS)

4.13 The ABS was commissioned to provide the Committee with market share information for the following sub-groups:

Measure 1

4.14 Measure 1 includes supermarket and grocery stores, including the non-petrol sales of identified convenience stores of petrol stations. It comprises ANZSIC Class 5110, which consists of units mainly engaged in retailing groceries or non-specialised food lines, whether or not the selling is organised on a self-service basis.¹²

10 Mr Alan Williams, Managing Director, Coles Supermarkets, *Hansard*, Canberra, 6 April 1999, p 31.

11 Coalition Against Major Chain Dominance, Submission 294, p 3.

12 Australian and New Zealand Standard Industrial Classification, ABS *Catalogue No 1292.0*, 1993 edition, p 158.

Table 4.3

Supermarket and Grocery industry

Trader	1994-95 %	1997-98 %
Major Chains		
Coles	23.4	27.5
Franklins	10.6	11.0
Woolworths	34.8	36.9
Total Major Chains	68.8	75.4
Other Traders	31.2	24.6

Source: ABS Retail trade special data service report (see Appendix 5).

Figure 4.1

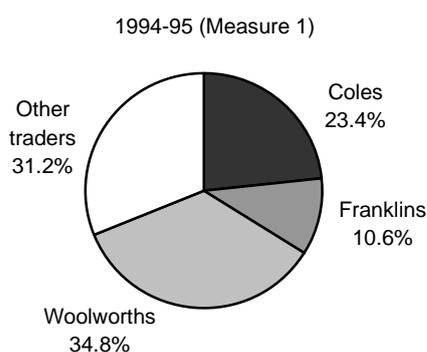
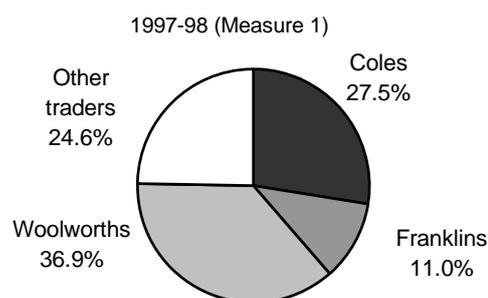


Figure 4.2



Source: ABS Retail trade special data service report (see Appendix 5).

Measure 2

4.15 Measure 2 includes items in measure 1, plus liquor retailing stores, plus other food retailing stores including fresh meat, fish and poultry retailing stores, fruit and vegetable retailing stores, bread and cake retailing stores, and other specialised food retailing stores. It comprises ANZSIC Class 5110 plus 5123 (liquor retailing), 5121 (fresh meat, fish and poultry retailing stores), 5122 (fruit and vegetable retailing stores), 5124 (bread and cake retailing stores) and 5129 (specialised food retailing).¹³

13 Australian and New Zealand Standard Industrial Classification, ABS *Catalogue No 1292.0*, 1993 edition, pp 158-159.

Table 4.4

Supermarket and Grocery industry, plus the Liquor industry and other food industry which covers bread and cakes, fresh meat, fish and poultry, fruit and vegetables and specialised food retailing

Trader	1994-95 %	1997-98 %
Major Chains		
Coles	20.3	23.9
Franklins	8.4	8.7
Woolworths	28.0	29.4
Total Major Chains	56.7	62.0
Other Traders	43.3	38.0

Source: ABS Retail trade special data service report (see Appendix 5).

Figure 4.3

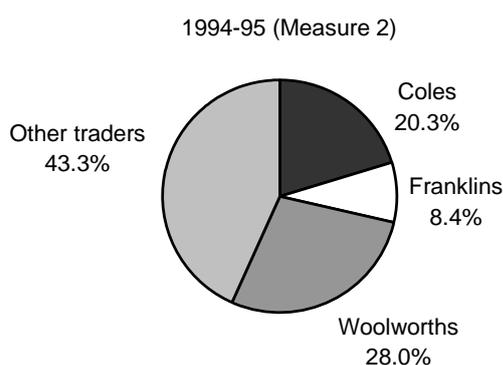
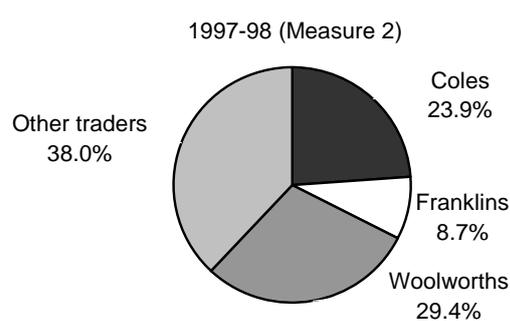


Figure 4.4



Source: ABS Retail trade special data service report (see Appendix 5).

Measure 3

4.16 Measure 3 includes items in measure 2, plus takeaway food retailing stores, which is ANZSIC Class 5125.¹⁴

Table 4.5

14 Australian and New Zealand Standard Industrial Classification, ABS *Catalogue No 1292.0*, 1993 edition, pp 158-159.

Combined Supermarket and Grocery industry, the Liquor industry, the Takeaway food industry and other food industry which cover fruit and vegetables, bread and cake, fresh meat, fish and poultry, specialised food retailing (delicatessens, tobacco and confectionary)

Trader	1994-95 %	1997-98 %
Major Chains		
Coles	17.8	21.0
Franklins	7.2	7.5
Woolworths	24.0	25.4
Total Major Chains	49.0	53.9
Other Traders	51.0	46.1

Source: ABS Retail trade special data service report (see Appendix 5).

Figure 4.5

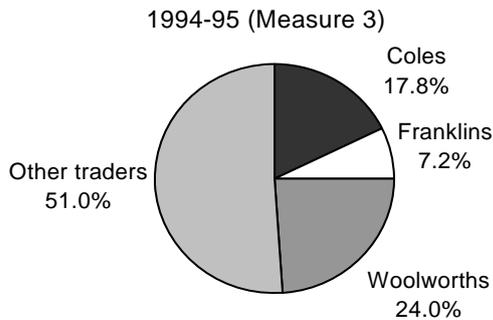
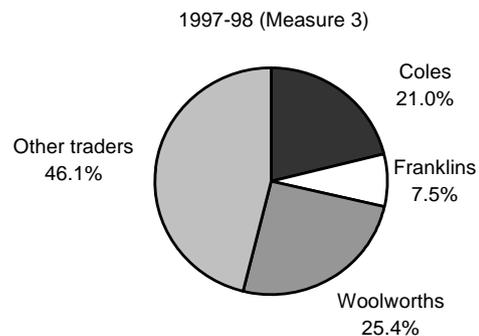


Figure 4.6



Source: ABS Retail trade special data service report (see Appendix 5).

4.17 Given that the volume of food sales in Australia remains reasonably static (subject to increases in population), the major chains have set in place a number of expansion strategies. For instance, they appear to be increasingly entering regional and rural markets, which have traditionally been uncontested by the major chains:

It is arguable that, due to a shortage of appropriate sites in urban areas, perhaps caused by maturity and/or saturation of the urban market, this is changing. It has been put to the Commission, however, that there is still ample scope for the chains to expand in major urban centres, particularly Melbourne and Sydney. While larger regional centres are likely to be attractive to the chains, smaller centres are unlikely to provide the volume to make it worthwhile, particularly in view of distribution costs.¹⁵

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

4.18 Another strategic initiative by the major chains is their development of smaller, more focused retail stores in urban areas. Coles has more than a dozen concept formats under trial, which is driving much of the group's current sales expansion.¹⁶

4.19 The ABS statistics conclusively reveal that the major chains have increased their market share at the expense of the independents. For example, Measure 2, which the ABS advises is the most realistic measure, shows that the major chains increased their market share in three years by 5.26 per cent or \$7.1 billion out of a total industry increase of \$8.1 billion.¹⁷

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

17 See Appendix 5, Table 4.

CHAPTER 5

USE OF MARKET POWER

...free competition is worth more to society than it costs.¹

Background

5.1 Market power enables 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.² That is, market power is the ability of a firm to profitably divert prices, quality, variety, service or innovation from their competitive levels for a significant period of time.³ The ACCC is of the view that the major chains have a substantial degree of market power.⁴

5.2 A firm's market power can be manifested on the supply side through increased prices and lower quality/service to consumers, or through predatory conduct with respect to its rivals. On the demand side, a firm's market power can be manifested through lower prices being paid for inputs, and reduced terms and conditions for its suppliers; or the ability to extract more favourable terms than those of its rivals.⁵

5.3 Lawful means of obtaining a powerful position in a market include taking advantage of superior efficiency, superior technology or superior products. The Trade Practices Committee of the Law Council of Australia state that the use of such means to achieve an oligopolistic position should not be illegal, nor should the legitimate acquisition or possession of any particular market share in a market be deemed to be illegal, irrespective of the causes.⁶

Market cap

5.4 The independent sector 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. The Committee therefore devoted a significant amount of time examining the merits of this proposal.

5.5 NARGA's national spokesman, Mr Alan McKenzie, said:

1 Oliver Wendell Holmes, *Vegeahn v Guntner*, 167 Mass. 92, 44 N.E. 1077, 1080 (1896).

2 Kaysen and Turner, *Antitrust policy* (1959), quoted with approval by Justice Dawson in *Queensland Wire Industries v BHP* (1989) ATPR 40-925.

3 Australian Competition and Consumer Commission, Submission 191, p 26.

4 Australian Competition and Consumer Commission, Submission 191, pp 28-29.

5 Australian Competition and Consumer Commission, Submission 191, p 26.

6 Law Council of Australia, Submission 283, p 3.

If the government fails to intervene, the market share of the independent retailers will continue to be eroded, to the point where the entire sector will be threatened with irreversible market failure due to the loss of critical mass. The consequences of such an outcome will be severe and, in particular, will bring great hardship to rural Australia. At 80 per cent of the retail grocery market, when do we say enough is enough?⁷

5.6 NARGA put forward preliminary draft amendments to the *Trade Practices Act*, requesting that they be forwarded to the ACCC for review. NARGA's proposal is based on the market share measure of 105 items taken at the point of sale scan data or warehouse and distribution centre data relating to dry/package goods (see figure 5.1) or as determined by the ACCC.⁸ Mr McKenzie said that it would be 'very representative, not highly representative, of the total volume going through distribution warehouses'.⁹

5.7 The Committee put NARGA's proposals to ACCC Chairman Professor Allan Fels. He said:

The Commission is not keen on the cap. We have quite a bit of hesitation in supporting the cap. It is, firstly, not likely to be beneficial to consumers. In at least some cases, some areas or some product markets, it does mean that they may be condemned to supply by inefficient, high cost operators. Also, it is not even necessarily good for independents because it frees them from the shackles of competition by major players who may be entering the market. On the other hand, there is certainly a group of independent people who feel that, at some stage of their business career, they would like to be able to sell out to a major.¹⁰

5.8 Successful independent retailer Mr Roger Drake owns 21 stores in South Australia. Mr Drake confirmed Professor Fels' last point:

For me, the best thing would be to have no cap, and sell to Woolworths or Coles – not a problem. Without question, I would not need to be sitting at this table today. I would not have a worry in the world. That would be my best option. My family is working in the business, my wife and my children. What is best for Australia long term? That is what we are about, surely – not what is best for Coles Myer, or Woolworths, what is best for me and what is best for Australia.¹¹

5.9 The Committee was surprised that the Australasian Association of Convenience Stores Inc. (AACS), who compete vigorously with the major chains, is not in favour of a market cap. In describing the nature of a convenience store, Mr

7 *Hansard*, Canberra, 12 July 1999, p 1031.

8 National Association of Retail Grocers of Australia, Additional Information 201B, pp 1-2.

9 *Hansard*, Canberra, 12 July 1999, p 1032.

10 *Hansard*, Canberra, 13 July 1999, p 1158.

11 *Hansard*, Adelaide, 8 April 1999, p 225.

Barry Anderson, Executive Director, said that they are ‘today’s corner store, corner supermarket, general store in the country’. Mr Anderson said that convenience stores directly compete with the major chains and the independents, and are expanding at the rate of about 11 per cent per annum.¹²

5.10 Mr Anderson told of past struggles in getting local government approval to open stores:

Local government was pretty much influenced by whom? The existing small business. What would happen is that we would put in an application to council and we would get knocked back. We would take it to the land and environment court or the court of appeal or whatever and we would win it. It was just standard. It was a political situation that existed at the grassroots.¹³

5.11 Mr Anderson raised concerns about the motives of some:

...and as we looked through the submissions that have been made and some of the statements that have been reported in the press – that is pretty much the same people, by and large, who opposed us who are now talking about doing something about the supermarkets.¹⁴

5.12 Mr Anderson is concerned that a market cap would effectively ‘regulate the consumer’:

Those people who opposed us in those days have been proven, much to their embarrassment, very, very, wrong. Our stores are exceptionally supported by the community. Each store averages about 1,000 customers a day. We are expanding at a great rate. We have tremendous support. It has just proven the fact that retailing, if it is dynamic and if it appeals to the consumer needs and if it reaches consumer needs, can fulfil those needs and be successful.¹⁵

5.13 The Committee heard evidence from two market analysts on the impact that a market cap would have on share prices. Mr Richard Cahill, a retail sector analyst at international investment bank ABN AMRO, said that:

As with any business, the profitability of the grocery retailers is a function of the volumes they are selling, and they are sensitive to the level of those volumes. Clearly, any reduction in the volumes sold by Woolworths or Coles, for example, would put some downward pressure on their margins and would tend to be a negative impact on their profitability. The opposite

12 *Hansard*, Canberra, 13 July 1999, p 1180.

13 *Hansard*, Canberra, 13 July 1999, p 1181.

14 *Hansard*, Canberra, 13 July 1999, p 1181.

15 *Hansard*, Canberra, 13 July 1999, p 1181.

clearly would apply to any of the retailers who picked up market share or volume.¹⁶

5.14 Mr Cahill said that if there were market caps and enforced shedding of volume for the major retailers, then there would be a greater uncertainty applied by potential investors to the price and rating of the shares of the major chains.¹⁷

5.15 Mr Glynn Meth, an Associate Director at Rothschild Australia Asset Management, also predicted that a cap would impact on the risk factor applied to the shares, and that this would adversely affect not just the share price, but the market as a whole.¹⁸ Mr Meth pointed out another implication if a market cap were applied:

...if there was a forced divestiture the price of outlets would obviously decrease over that period of five years. That would have a positive impact for Dairy Farmers International [the owners of Franklins] – they would be able to pick up the outlets at reduced prices. But then there would be a negative impact for essentially the other two majors – and also for the independent property owners who own the sites on which they are situated and also any independents over that period of time who were actually wanting to sell out their retail operations.¹⁹

5.16 Mr Meth told the Committee of a possible consequence of a market cap for consumers:

...if you have, further down the track, three players at the 25 per cent level and each of the players is trying to increase their returns to their shareholders, we believe there would be an incentive for there to be actually less competition, basically pushing up the prices.²⁰

5.17 According to Mr Meth, the consequence of a market cap would also see the major chains more vulnerable to foreign takeover:

...if it had an impact on the market capitalisation of Woolworths and Coles Myer, an outsider could possibly see it as an opportunity to take out one of those two chains.²¹

5.18 Mr Cahill commented on the problems associated with capping firms in a dynamic market:

Say, for example, you decide to have a maximum of 25 per cent of the market being held by one of the participants and you apply that on a State-

16 *Hansard*, Canberra, 13 August 1999, p 1243.

17 *Hansard*, Canberra, 13 August 1999, p 1244.

18 *Hansard*, Canberra, 13 August 1999, pp 1245-46.

19 *Hansard*, Canberra, 13 August 1999, p 1244.

20 *Hansard*, Canberra, 13 August 1999, p 1246.

21 *Hansard*, Canberra, 13 August 1999, p 1247.

by-State basis. In the major Australian States there tends to be only four competitors in grocery retail and wholesale, so you would always end up with a situation where it is going to be the existing four competitors with 25 per cent, each totally unable to actually increase or decrease their market share. You would achieve a situation which would be unworkable.²²

5.19 Mr Meth questioned the effectiveness of a market cap, given geographic factors, and observed the somewhat arbitrary nature of the divestiture of stores:

How does it apply geographically? Do you actually have a solution if the supermarkets have to sell down to 25 per cent yet they maintain a concentrated area in a locality and Woolworths or Coles Myer dominates a local area? Have you achieved your objective? If you have not, that creates further uncertainty in the market that you might do something again further down the track.²³

5.20 ACCC Chairman Professor Fels also pointed out that there are significant mechanical problems associated with a market cap:

There are problems about defining it. There are problems about policing it. There are problems about what happens if there is a strong case for the expansion by an established player into a particular area. Does that mean that they could only do so if they sold off some other part of their business, which might not be good for the area they are withdrawing from? It could also affect their incentives. In other words, if in going into an area you knew that you would have to give up something, then that might reduce the likelihood that you would enter a market that it would normally make a lot of sense to enter into. We also think that is the sort of law people spend a lot of time trying to think up ways around, often inefficient and artificial means of getting around the law.²⁴

5.21 The issue of a market cap has been considered in the United States (US). A White House Task Force Report, published in 1968, recommended that a combined market share of 70 per cent by four or less companies be presumed to conclusively prove anti-competitive effects, and that companies holding such a share would have the onus of proving that de-concentration would reduce the efficiency of the industry.

5.22 The Committee notes that the US legislators rejected the Report due to recognition of the need for scale efficiencies to be internationally competitive, and various practical issues, which could not be resolved.²⁵ The Committee also notes that no other OECD country has enacted legislation capping the market shares of grocery retailers.

22 *Hansard*, Canberra, 13 August 1999, p 1246.

23 *Hansard*, Canberra, 13 August 1999, p 1250.

24 *Hansard*, Canberra, 13 July 1999, p 1158.

25 Woolworths, Submission 229A, pp 139, 144.

5.23 The Committee believes that the arguments put before it in favour of a market cap must also be balanced against:

- Davids' recovery from setbacks suffered over the past few years due mainly to management problems.²⁶ Davids' share of the dry/package goods market dropped from 19.2 per cent in 1996 to 14.9 per cent in 1998.²⁷ Davids encountered considerable difficulties in becoming an effective 'fourth force' and this may be reflected in its decline in market share during that period.²⁸
- The recent entry of Caltex is seen by the ACCC as a significant development in the supermarket sector. In February 1999, Caltex announced its opening of a supermarket in Sydney under the IGA Everyday banner. It also confirmed it would launch stand-alone convenience stores, without its traditional petrol offering, within months. As with Woolworths entry into petrol retailing, the ACCC believes that the entry of Caltex may signal a prospective increase in the competitiveness in the retail sector;²⁹ and
- The arrival of German-based retail giant Aldi, which has around 4,700 stores worldwide. Aldi has recently established a head office in Sydney and, although planning is currently at an early stage, it has long-term intentions with respect to the Australian grocery market.³⁰

5.24 With new entrants beginning to position themselves in the market, the Committee is of the view that there would be no guarantee that a mandatory store sell-off by, say, Woolworths, would be taken up by the current independent sector.

5.25 Although the imposition of a market cap has strong support from small retailers in various parts of Australia, the Committee sees major difficulties, such as:

- the inconclusive and varying nature of market definitions;
- the likelihood of avoidance schemes arising;
- a restricted buyers' market for independent retailers wishing to sell their stores, with subsequent reductions in value;
- the opportunity for foreign retailers to enter the market to the detriment of Australian companies;

26 *Hansard*, Melbourne, 7 April, p 135.

27 AC Nielsen, Additional Information 165A, p 7.

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

29 Australian Competition and Consumer Commission, Submission 191, p 23.

30 Information received by the Committee, from Mr Michael Kloeters, Managing Director, Aldi (Australia), August 1999.

-
- the possibility that major chain employees would transfer from higher paying jobs to lower paying jobs;³¹
 - the possible devaluation of shares owned by ordinary Australians; and
 - negative market implications beyond the retailing sector.

5.26 The Committee views NARGA's proposal for a market cap as one that is based on figures, not on competition. With the grocery market continuing to evolve and expand, driven by consumers, the Committee is of the view that a market cap would be extremely interventionist, unworkable and detrimental to consumers.

Divestiture

5.27 The *Trade Practices Act* permits divestiture only in the context of the powers to prevent mergers and acquisitions under section 50 of the *Trade Practices Act*. The ACCC, or any party who can show that it has a relevant interest, may seek divestiture under section 81 of the *Trade Practices Act* within the first three years after a merger, but not otherwise.³² The power of divestiture is therefore limited, although the Committee is aware that there is some legal opinion to suggest that the *Trade Practices Act* already allows for divestiture under section 80, given the flexibility it gives the Court to grant 'an injunction in such terms as the Court determines to be appropriate'. However, the contrary view is that, since section 81 provides for divestiture only in merger cases, it was not intended that it should also be available as an additional remedy under section 80.

5.28 Divestiture is available to US courts to break up existing monopolies either in the context of an anti-competitive merger, or for breaches of the US antitrust laws.³³ For example, in 1911 the Standard Oil monopoly was broken up into competing units spread around the country.

5.29 Professor Fels said that the US experience on divestiture has 'not been that bad', but pointed out that opinion is divided on the merits of the US retaining their divestiture laws:

There is also a contrary view that divestiture has not really worked well. I am reporting, frankly, the views of Professor F.M. Scherer of the Harvard School of Economics who has written about this. In Chicago, they were more sceptical about the whole thing. Professor Posner, for example, was sceptical about the lengthy delays, the impracticalities, the difficulties of finding buyers and so on.³⁴

31 Mr Joseph De Bruyn, National Secretary-Treasurer, Shop Distributive and Allied Employees Association, *Hansard*, Sydney, 15 April 1999, p 331.

32 Professor Allan Fels, Chairman, ACCC, *Hansard*, Canberra, 13 July 1999, p 1165.

33 For example, the *Sherman Act* or the *Clayton Act*.

34 *Hansard*, Canberra, 13 July 1999, p 1164.

5.30 In December 1991 the Senate Standing Committee on Legal and Constitutional Affairs presented its report *Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*. That Committee considered and rejected a proposal for divestiture to be used as a remedy in cases of serious and persistent misuse of market power.³⁵ However, a dissenting report by two of the eight Committee members recommended that divestiture should be available as a remedy.³⁶

5.31 Compared to the US, the Australian economy and population is small, with goods and services linked across a geographically diverse and large continent. For this reason, the Committee acknowledges the current structure of the grocery retailing sector, and the importance of economies of scale and scope to the Australian economy. The Committee is therefore of the view that, at this stage, 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 vertical integration. The Committee notes that divestiture, as a ‘back up’ measure, has been used very sparingly in the US.

Creeping acquisitions

5.32 ‘Creeping acquisitions’ refers to the long-term strategy of a major chain increasing its market share through numerous individual acquisitions of other existing supermarkets, rather than by building new stores or expanding existing stores.

5.33 Creeping acquisitions are unlikely, under most circumstances, to breach the *Trade Practices Act*, because of the limited impact on the market caused by each individual transaction.³⁷ The ACCC has commented that the difficulties in establishing a breach of the law relate to the very small market shares generally being acquired, and the question therefore of whether the competitive effect is substantial:

Of the acquisitions that the Commission has considered, none have been found to breach the Act. Under the previous dominance test that applied to mergers, the Commission would face a similar problem in that an accretion of such a small market share would be unlikely to create a dominant position.³⁸

5.34 According to NARGA, the rise to market dominance by the major chains has been built on an aggressive program of acquisitions of successful independent stores and chain operations, with little or no intervention by the ACCC. NARGA said that

35 Senate Standing Committee on Legal and Constitutional Affairs, *Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, December 1991, p 99.

36 Senate Standing Committee on Legal and Constitutional Affairs, *Monopolies and Acquisitions: Adequacy of Existing Legislative Controls*, December 1991, p 139.

37 Section 50 of the *Trade Practices Act* generally prohibits mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services.

38 Australian Competition and Consumer Commission, Submission 191, p 32.

around 85 stores have been bought by the chains since 1995, comprising over \$1 billion of retail turnover:³⁹

Independent stores would normally change hands on 3 times EBIT or 5-8 times average weekly turnover. For acquisitions deemed strategic, the chains have been known to often pay up to 16 times turnover. In Western Australia, Woolworths recently has offered 28 times EBIT for a leading independent.⁴⁰

5.35 The Committee knows of no specific study that has been carried out on stores purchased and prices paid to determine the validity of NARGA's claims. However, anecdotal evidence suggested that the major chains do seek to acquire successful independent stores. Mr John Brownsea, Executive Director, SA Small Retailers, alleged that there is a predatory process in place, where even the best retailers may not survive:

That is a major concern to us because in some cases people will be taken out of business whether they want to be or not, simply because they recognise that they may have no choice, even though they might be trading well.⁴¹

5.36 Victorian independent retailer Mr Ray Veal told of the dilemma when faced with the option of selling out to a major chain or not:

The Festival store down there (Lakes Entrance) was offered quite a handsome sum, but it had been a family business and they said, 'No, we will keep it in the family and keep working. Thank you very much for your offer.' Safeway virtually bought the block across the road, built their own store, squeezed him out and ultimately offered him about two-thirds of their original offer as a goodwill gesture, simply to buy his liquor licence. If you do not sell out to them, they will just open up in opposition to you – squash you out.⁴²

5.37 Mr Barry Alty, Managing Director of independent wholesaler FAL, said that in recent times the major chains have found some difficulty in establishing greenfield sites, and have turned to the acquisition of successful independents to expand their market share.⁴³

5.38 Similarly, Mr John Berry, Executive Chairman of Foodlink Ltd, believes that each of the three major chains continually seek to increase their market share to satisfy investors.⁴⁴

39 Mr Alan Mackenzie, Director/National Spokesman, National Association of Retail Grocers of Australia, *Hansard*, 6 April 1999, p 57.

40 National Association of Retail Grocers of Australia, Submission 201, pp 87-88.

41 *Hansard*, Adelaide, 8 April 1999, p 176.

42 *Hansard*, Melbourne, 7 April 1999, p 104.

43 *Hansard*, Perth, 9 April, 1999, pp 304-305.

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

5.39 Despite this, Woolworths Chief Executive Officer, Mr Roger Corbett, told the Committee that store acquisitions have not been a significant factor in Woolworths' growth:

I can say to you that acquisitions have been a relatively small part of our growth...acquisition growth has been one per cent or one and a half per cent – something of that order.⁴⁵

5.40 Similarly, Mr Alan Williams, Managing Director of Coles Supermarkets, said that Coles' growth has been mainly due to store improvements and customer focus:

If our sales trend last week was 10 per cent up on last year, and we took off the sales of the small businesses that we had bought, our sales trend last week would have been about 9.5 or 9.6. So it is a very small component of what has happened in our market share build.⁴⁶

5.41 There was a degree of equivocation amongst those giving evidence as to whether there should be legislative action regarding creeping acquisitions:

I have a bit of a problem myself sitting here saying we need to do something about this because I believe in free enterprise. My personal beliefs are that, if you have got a shop, it is your shop and you should be allowed to do what you want with it...I can see big problems, particularly in the rural area of the supermarket industry, if we do not do something.⁴⁷

5.42 Currently, there is no obligation to notify acquisitions to the ACCC before they take place. The Law Council of Australia believes that voluntary notification 'has and continues to work well':

So far as the Law Council is concerned, there is no evidence of any significant problems of enforcement which has arisen for the ACCC which would justify a mandatory system of pre-notification. Such systems are inherently complex to devise and administer, and greatly increase the workload and cost to both parties considering proposals for acquisitions, as well as the ACCC. Much of the difficulty lies in devising a system which filters out those matters that do raise competition concerns, from the vast majority of proposals which do not.⁴⁸

5.43 Mr Brian Kewley, Chairman of the Law Council's Trade Practices Committee, told the Committee that:

I think it would be very unlikely that any of the major chains would make an acquisition of any size at all without notifying the Commission. I am sure

45 *Hansard*, Canberra, 6 April 1999, p 15.

46 *Hansard*, Canberra, 6 April 1999, p 42.

47 Mr Richard Dymond, Owner / Proprietor, Toodyay Supermarket, *Hansard*, 9 April 1999, p 245.

48 Law Council of Australia, Submission 283, p 10.

the Commission is watching them very closely and they would be concerned. They would look very closely at every acquisition.⁴⁹

5.44 The Committee asked the ACCC to respond to the Law Council's position on mandatory notification of acquisitions. Mr Hank Spier, General Manager, said:

The Law Council gave you a two pronged answer: firstly, they thought in most cases that there was notification; but secondly, in many cases there was no likelihood of a breach, in their view, so there was no need for notification. A fair few notifications come to us – I mentioned that Coles Myer seemed to come to us on most of those purchases, but others do not...Those that do come to us normally come fairly early in the piece but often they are urgent.⁵⁰

5.45 The major chains have indicated to the Committee that they do not want mandatory notification of acquisitions. They are concerned about long delays, and pointed out that the seller often wants to get out and do other things. When asked to comment on this, ACCC Chairman, Professor Allan Fels, said:

In the case of the particular acquisitions you have in mind, they are not done that rapidly. There are periods of negotiation, hitting a price, and all the other conditions. That usually takes quite a lot of time. They do not rush down there in the morning and buy half a dozen supermarkets that are being sold off around Australia. I would be sceptical on that time factor.

5.46 Professor Fels said that the ACCC get through easy mergers in two weeks or less, with the more complex ones taking no more than six weeks – 'unless we get held up by the parties'.⁵¹

5.47 The Committee notes that the ACCC has reviewed its merger statistics, which contain a detailed description of merger review timing. In 1997-98, 68 per cent of matters were cleared in less than 3 weeks and a further 16 per cent of matters were cleared in 4-6 weeks. In 1998-99, 58 per cent of matters were cleared in less than 3 weeks and a further 23 per cent of matters were cleared in 4-6 weeks.

5.48 More complex matters which require significant analytical work relating to the application of the Merger Guidelines can take longer to assess. The ACCC notes that in many cases the timeframe is extended because parties have delayed providing information that the ACCC has requested as being necessary for it to conduct its analysis.

5.49 The ACCC has suggested that mere voluntary notification can make it difficult for it to subsequently deal with the issue.⁵² Professor Fels said:

49 *Hansard*, Canberra, 13 July 1999, p 1151.

50 *Hansard*, Canberra, 13 July 1999, p 1171.

51 *Hansard*, Canberra, 13 July 1999, pp 1169-70.

52 Australian Competition and Consumer Commission, Submission 191, p 31.

We see some merit in having notification. A voluntary notification can happen at the present time, but it may not. So it is a question of whether one would want to make it mandatory, whether one is sufficiently concerned about this issue that it is at least looked at in advance by the ACCC.⁵³

5.50 Each acquisition of an independent store by a major chain has the effect of lessening the market share of the independent sector. This effectively reduces warehouse volumes and the buying power of the independents. The Committee considers that mandatory notification may expose more clearly whether a major chain is implementing a deliberate strategy of creeping acquisitions.

Manufacturers and trading terms

5.51 Trading terms set out various discounts and allowances paid by manufacturers to its customers. The wholesaler or major chain will negotiate specific trading terms with all manufacturers which supply it. These terms cover settlement discounts, warehouse allowance, quantity buy allowances, shelf positioning and ullage (an allowance given by manufacturers for shrinkage and damage). In addition, case deals (contributions to support a particular product promotion) are paid by a manufacturer.⁵⁴

5.52 Before the advent of the major chains goods were supplied to wholesalers at a wholesale price. As the chains developed, they used their buying power to pressure manufacturers to supply them at wholesale prices instead of retail prices. They argued that the wholesale price differential was actually a distribution allowance and as the chains operated distribution centres, just the same as wholesalers, they were entitled to get goods at the same price. The majority of manufacturers succumbed to either the logic of this argument or the market power of the major chains. Hence, the major chains use their buying power to extract the best deal possible from suppliers.

5.53 Similarly, independent wholesalers such as Davids use the combined volumes of their customers, the independent retailers, to do likewise. Wholesalers therefore compete directly with the major chains on price and trading terms.

5.54 Trading terms are also influenced by the manufacturer's brand strength. A strong brand name enables a manufacturer to negotiate from a stronger position. However, in most cases, the power derived from brand strength is modified by manufacturers' reliance on the custom of the major chains, who account for a large share of total food product purchases.⁵⁵

5.55 Mr Andrew Reitzer, Chief Executive Officer of Davids, believes that it is essential for Davids to maintain a 'critical mass', and sees the current situation as hanging in the balance:

53 *Hansard*, Canberra, 13 July 1999, p 1169.

54 Australian Competition and Consumer Commission, Submission 191, p 11.

55 Australian Competition and Consumer Commission, Submission 191, pp 11-12.

You try to put pressure on that manufacturer and then he turns around and says. 'The turnover you guys are doing as independents is marginal. I am not prepared to invest. I am not prepared to give you marketing money and I don't want to be part of your TV advertising. It is worthless because the volume you are going to do as a result of it is nothing.' I think we are very close to that in this country at the moment.⁵⁶

5.56 Mr John Cummings, Vice-President of the Western Australian Independent Grocers Association, explained to the Committee that when volume falls below the critical mass warehouse efficiencies fall, economies of scale fall and ultimately, the costs that wholesalers charge the independents rise:

If they rise, we then must put these costs on to our customers, which means that some of our customers will go to Coles or Woolworths, our competitors, and which means that the mass will fall again, the warehouse withdrawals will fall, the economies will fall, the prices will go up and it will be a self-accelerating circle down which we go. Through absolutely no fault of any individual who owns a supermarket today, he will go broke without a chance of even having a look-in. It will not be because of his inefficiencies, it will not be because he cannot run a business: it will be simply because he cannot source his product at the right price.⁵⁷

5.57 Western Australian independent retailer, Mr Neville Gale, believes that the superior buying power of Coles and Woolworths enables them to receive more favourable trading terms than the independents, which effectively tilts the playing field in their favour.⁵⁸ Mr Gale maintains that their demands are met by the suppliers out of fear of retribution – actioned by range reductions, relocation to slower selling shelves or a lack of promotional support:⁵⁹

The trading terms are remarkably different. We are dealing in an industry that works on two or three per cent profit and yet the difference in trading terms is often far greater than that. There is as much as five, six, or eight per cent difference in trading terms. How can an independent like me compete against all of that: the sites, the capital, the trading terms and the advertising power, which comes as a result of those trading terms, and then what I believe to be unconscionable behaviour – predatory pricing.⁶⁰

5.58 Mr Gale sees nothing unconscionable about the major chains' getting better trading terms from manufacturers, but maintains that a level playing field must be set in place to enable independent retailers, through their wholesalers, to negotiate exactly the same terms as the major chains. However, Mr Gale acknowledged that part of the problem is that, while the volume of stock delivered to an independent supermarket

56 *Hansard*, Melbourne, 7 April 1999, p 126.

57 *Hansard*, Perth, 9 April 1999, pp 289-290.

58 Advantage Supermarkets (WA), Submission 10.

59 Advantage Supermarkets (WA), Submission 10, p 3.

60 *Hansard*, Perth, 9 April 1999, p 247.

may be comparable to that delivered to a major chain supermarket, none of the independent wholesalers operate nationwide.

I do the same volume on a store level, but of course nationally Coles versus the total volume of Advantage is vastly different, and that is what the suppliers basically use as their argument.⁶¹

5.59 Procter and Gamble (P & G), one of the world's leading packaged goods manufacturers, maintains that it treats all customers equitably and without discrimination.⁶²

5.60 The following are specific elements of P & G's trading terms:

- List Price – P & G have one price list for all competing customers in Australia. Only cost justified streamlined logistics discounts are deducted from this common list price.
- Streamlined Logistics – This defines the way P & G manage the transactions between itself and its customers relative to physical product, information and financial flow. This program seeks to ensure that P & G's customers know all their options and that the discount structure is cost justified.

For commercial reasons, P & G were reluctant to disclose their actual discounting terms. However, the following example indicates the general discounting structure it applies:

Example: Where a truckload of goods contains 500 cases of Vicks, a customer would receive a certain percentage discount for a *minimum* order quantity of 50 cases (10 per cent of the truckload), which is sold at a list price. If the customer were to order 100 cases of Vicks (20 per cent of the truckload), the next percentage discount level would apply, and so on until a *maximum* percentage discount is reached (say, an order for 400 cases or 80 per cent of the truckload).

- Prompt Payment Discount and Payment Terms – Cash discounts and payment terms are the same across all P & G's customers in Australia.
- Business Development Fund – This fund is used to work with P & G's customers and influence shopper behaviour. It is available to all customers who meet defined participation criteria.
- Temporary Price Reduction – This is made available to all P & G's customers. It is consistent, based on a percentage of sales. P & G intend to eliminate this element of their trading terms.⁶³

61 *Hansard*, Perth, 9 April 1999, p 252.

62 Procter and Gamble, Submission 304, p 2.

63 Procter and Gamble, Submission 304, p 3.

5.61 P & G offer volume discounts equally across the board. Mr Frank Tylman, Managing Director of P & G Australia, told the Committee that:

We offer the same terms to all of our customers that meet the same criteria. When you speak of volume discounts, we have certain costs that we incur in the supply chain. For instance, it costs us more to ship 50 cases of product than to ship a whole truckload and we know what those costs are – we do activity based costing – and we will pass those on to our customers.⁶⁴

5.62 Mr Tylman said that P & G's payment terms are the same for all customers, provided they meet certain 'credit check' criteria.⁶⁵ Mr Tylman also said that P & G does not get involved in rebates to stores for shelf positioning.⁶⁶

5.63 Having received no evidence to the contrary, the Committee notes that P & G's relationship with its customers appears to be healthy and transparent.

5.64 Kraft Foods told the Committee that it operates on the philosophy of an open and transparent selling environment, with a level playing field of opportunity for all its customers. Mr Roderick Moffatt, Sales Director of Kraft Foods Ltd, said:

Our principles are: any customer may purchase any Kraft product upon meeting the criteria of our pricing policy; any customer is entitled to the applicable quantity discounts relating to order size; the discounts applicable to parcel buyers reflect the savings achieved in the economies of scale between the various order sizes; and Kraft uses our customer distribution networks to efficiently distribute goods to individual stores.⁶⁷

5.65 Mr Moffatt said that trading terms are in place with each customer, and are based on customer performance criteria, negotiated in a competitive environment:

We have developed pricing and allowance protocols which are open to all customers who have the opportunity to purchase products on the same terms meeting our purchase requirements.⁶⁸

5.66 Mr Moffatt explained that trading terms and pricing policy were two separate issues. Kraft's pricing policy is based on a volume discount, for example:

- 50 – 100 cases attracts a 5 per cent discount;
- 100 – 200 cases attracts a 10 per cent discount;
- 200 – 750 cases attracts a 12.5 per cent discount; and

64 *Hansard*, Canberra, 12 July 1999, p 1012.

65 *Hansard*, Canberra, 12 July 1999, p 1013.

66 *Hansard*, Canberra, 12 July 1999, p 1013.

67 *Hansard*, Canberra, 13 August 1999, p 1203.

68 *Hansard*, Canberra, 13 August 1999, p 1203.

- 750 cases attracts the maximum 13.5 per cent discount.⁶⁹

5.67 Trading terms are made up of many elements, including settlement discounts and promotional allowances. However, even taking all these into account, Mr Moffatt said:

...When you take them all through to the bottom line, they are basically the same with all customers.⁷⁰

5.68 Mr Bradley Alford, Managing Director of Nestle Australia Ltd, similarly advised the Committee of the volume discounts and trading terms applying to its customers:

We endeavour to offer consumers as many opportunities as possible to purchase a broad array of products, which is one of the keys to our success. Consequently, we work closely with all of our customers and treat them equitably to achieve this outcome. The existence of a vibrant, competitive retail sector in Australia is clearly in the long term interest of Nestle.⁷¹

5.69 The Commercial Director of Uncle Ben's Australia, Mr Grant Glinski, told the Committee that its trading terms and promotional agreements are uniformly available to national chains, independents, wholesalers and retailers:

Trading terms are absolutely uniformly applied. We are quite happy to supply them to anybody who comes to us and asks to buy from us. We are quite happy to provide them to you. They are completely transparent.⁷²

5.70 Mr Enzo Allara, Chairman of Unilever Foods, said that his company's relationship with customers 'relies on trust, a transparent pricing and selling environment, and equal opportunity to all customers to purchase our products'.⁷³ Mr Allara said that, depending on the food categories, such as Flora, Miracle etc., trading terms may differ, but they all are available to the same level to all customers. He added:

We will obviously try to influence where we are located on the shelf. We do not pay for being on the shelf, but we try to influence where the product is located.⁷⁴

5.71 Mr Allara believes that, because of the interdependence of retailers and suppliers, transparency is evident:

69 *Hansard*, Canberra, 13 August 1999, pp 1206-07.

70 *Hansard*, Canberra, 13 August 1999, p 1206.

71 *Hansard*, Canberra, 13 August 1999, p 1210.

72 *Hansard*, Canberra, 13 August 1999, pp 1221 and 1225. Uncle Ben's specific terms of trade are contained in Submission 332.

73 *Hansard*, Canberra, 13 August 1999, p 1233.

74 *Hansard*, Canberra, 13 August 1999, p 1235.

There is a clarity of trading terms. It is almost like self-regulation is happening in this area already. It is by default, because nobody wants to get out of bed with one big customer.⁷⁵

5.72 By contrast, many small retailers complained that the manufacturer of the biggest selling item in Australia – Coca-Cola – does not offer ‘like customers like terms’. In other words, Coca-Cola was said to be using its market power to selectively choose which of its customers gets the better deals.

5.73 During the course of the inquiry, many were reluctant to give evidence in public for fear of commercial retribution. The Committee therefore took *in camera* evidence from a number of small retailers.

5.74 One small retailer told the Committee that a 1.25 litre bottle of Coca-Cola, purchased direct from Coca-Cola, costs \$1.80, whereas Coles, Woolworths and Franklins have it on special every week or every fortnight for \$1.30. A lot of small retailers are therefore forced to buy their Coca-Cola from the major chains, where it is \$6 per box cheaper. They cannot afford not to stock it.

5.75 In addition, the major chains are said to benefit from ‘shelf space’ and promotional deals. For example, it was claimed that, whilst the base price of Coca-Cola might be, say, \$1.30, the chains get the equivalent of another 30 cents per bottle for display and promotion, so they are only paying a net price of \$1 per bottle. Small retailers argue that Coca-Cola should offer these deals to everybody, not just the major chains.

5.76 The Committee asked Mr Jeremy Lowes, General Manager of Coca-Cola Amatil’s Sales and Distribution division, whether he thought it unfair that some small retailers throughout Australia are forced to buy their supplies from Coles or Woolworths, rather than their wholesaler. Mr Lowes said:

No. We need to understand the whole business picture. In fact, I would like to say that we create a very viable commercial environment for all our customers.⁷⁶

5.77 Coca-Cola’s marketing strategy divides the market into two outlets:

- food stores; and
- cold drink.

5.78 Food store outlets include Coles, Woolworths, Franklins and the supermarket banners supplied by Davids and FAL. Cold drink outlets make up the balance of Coca-Cola’s customer base, and include convenience stores (including corner stores),

75 *Hansard*, Canberra, 13 August 1999, pp 1239-40.

76 *Hansard*, Canberra, 12 July 1999, p 976.

take away food shops, quick service restaurants, petroleum outlets, cinemas, catering, licensed premises etc.⁷⁷ Mr Lowes said:

In food stores the primary products sold are what we call multiserve packages, or packages from which multiple servings can be made, and these packages are sold primarily at ambient temperature or warmth; 97 per cent of volume sold through food stores is sold warm. Alternatively, in the cold drink market, most of the business is in immediate consumption packages, individual serving packages, and more than 90 per cent of this business is sold ice-cold for immediate refreshment.⁷⁸

5.79 Coca-Cola's pricing is therefore structured by pack and retail channel. In essence, it has two net prices, and has a different pricing attitude towards wholesalers, preferring to deal directly with all of its customers:

Wholesalers supplying our customers is not our preferred option and the pricing reflects that. That is the issue of Davids per se.⁷⁹

5.80 Mr Lowes explained that the Coca-Cola system invests significant money in driving category growth or creating new business, and he believes that everyone benefits:

We benefit of course, the Coca-Cola company benefit and in turn our retailing partners. That investment extends to advertising, et cetera, but also to a significant investment in cold-drink equipment in the marketplace, primarily outside of food stores. We have 140,000 pieces of cold-drink equipment – vending machines, glass fronted refrigerators, fountain equipment – and that the investment at purchase cost is valued at half a billion dollars.⁸⁰

5.81 However, Cooma small retailer Mrs Terry Edwards said:

Coke have given me a fridge, and I have to stock it with 80 per cent of their goods. Coke knows that I do not buy my Coke from them, and I have told them that I cannot afford it because their prices are too high.⁸¹

5.82 With regard to shelf positioning, Mr Lowes said that it occurs 'through the influence we can bring to the table in our negotiations':

The value of the brand, the potential the brand has to grow their business. We bring that potential to the table.⁸²

77 Coca-Cola Amatil, Submission 314, p 1.

78 *Hansard*, Canberra, 12 July 1999, p 974.

79 *Hansard*, Canberra, 12 July 1999, p 975.

80 *Hansard*, Canberra, 12 July 1999, pp 974 - 975.

81 *Hansard*, Cooma, 6 July 1999, p 692.

82 *Hansard*, Canberra, 12 July 1999, p 977.

5.83 At the Perth hearing, small independent retailer, Mr Richard Dymond, told the Committee of his past experience as an employee of one of the major chains:

I was managing a major chain store at one stage and a particular product – a Coca-Cola product – was on special at a price that they felt was too cheap in another store. It was actually an Action store that had this product out too cheap. We, as store managers – and this was every store manager in every store in the state – were instructed to move that product to the top shelf with a minimal facing so that it would not sell until the supplier saw sense and did not sell the product to the Action supermarket at the cheaper price.⁸³

5.84 The evidence suggests that there is a lack of transparency on the part of some manufacturers in their dealings with customers. A number of witnesses were not prepared to give evidence in public, fearing a commercial backlash. This, together with the inherent advantages enjoyed by the major chains due to their vertically integrated structure, prompted debate on whether there was any evidence of market failure.

5.85 Dr Darryn Abraham, Senior Economist with Access Economics, believes not:

The fact that you have a small number of relatively large companies with what would probably be argued as a reasonably large share or broad definition of the market does not necessarily mean the market is failing. In fact, the fact that we see an evolution of larger firms evolving and changing the composition of small firms probably says that the market is working extremely well, that it is not failing.⁸⁴

5.86 Dr Abraham said that market shares must first be examined to establish a *prima facie* case of potential abuse of market power; then things like behaviour, the existence of potential competitors, the actual rates of entry and exit turnover into the industry and many other factors:

...all of which, we argue in our supporting submission to Coles' paper, would point to retailing being one of the most open and competitive industries in Australia.⁸⁵

5.87 Mr Barry Alty, Managing Director of independent wholesaler FAL, disagrees. Commenting on the economic rationalism argument, Mr Alty said:

This argument has as its basic tenet that the market is fair, that there is equal opportunity for all players, so let the market sort it out. It implies a perfect market and I have not seen those since Economics 1 and Samuelson at university. In other words, we are saying let the law of the jungle prevail; let the strongest survive.

83 *Hansard*, Perth, 9 April 1999, p 238.

84 *Hansard*, Canberra, 6 April 1999, p 33.

85 *Hansard*, Canberra, 6 April 1999, p 33.

I do not know how we can allow this to happen. It is a bit like saying, 'We should apply the same principles to society. Let the strongest survive,' but we are civilised and we have rules that protect the weak and the economically disadvantaged. There are also rules in business, rules that are supposed to provide fair competition, rules that are supposed to allow customers the opportunity to choose between competing offers – and the offer is not just the price. There are many other things, among them convenience of location, convenience of access, range, service, quality, presentation, hygiene, food safety, general ambience. 'Choice' is the operative word in a competitive market, but the current rules are not working. Choice is being diminished.⁸⁶

5.88 Mr Alty told the Committee that cutting out the wholesaler was not the answer:

How, pray tell, would hundreds of manufacturers then manage to get goods to thousands of retailers in rural Australia, at what cost and with what regularity of supply? Frankly, all the arguments about level playing fields and fair and equal competition leaves me cold. The playing field is tilted very severely against the independent sector and it is actually of credit to the tenacity and the resilience of wholesalers and independent retailers that we have held up against overwhelming odds. We do not, in appearing before this committee or making submissions, seek protection but we seek a fair go that there is a competitive market, so that consumers have choice and so that rural Australia is adequately serviced at low cost.⁸⁷

5.89 Evidence taken at the Melbourne hearing suggests that the independent sector is at least buoyant and sustainable. The Committee notes the following exchange between Davids' Chief Executive Officer, Mr Andrew Reitzer, and Senator the Hon. Ron Boswell:

Senator Boswell: Andrew, you have said that you do a lot for the independents: you do their buying, advertising and store refurbishment. Why can't you cut the mustard? Why aren't you up there with [the major chains]? Why are they beating you off the pace? What advantages have they got?

Mr Reitzer: There are two reasons – one is evident; it is in the press. Davids, over the last three or four years, was not a well-managed business. Our bottom line is the result of all those decisions and bad management, or whatever you want to call it, which we are trying to rectify. The real issue is critical mass.

Senator Boswell: So your critical mass is at a break-even level?

Mr Reitzer: Yes. We believe we can still make money, which is why we made the investment, and we think we can still run a healthy wholesale

86 *Hansard*, Perth, 9 April 1999, p 306.

87 *Hansard*, Perth, 9 April 1999, p 306.

distribution company. With that, we can get the retailers that we have to grow. In terms of critical mass, it is touch and go.⁸⁸

5.90 As mentioned earlier in this Report, the Committee notes that Davids has recently undertaken a program of acquisitions of independent wholesalers to build itself up as a 'fourth force' in grocery retailing, with the aim of matching the scale economies of the major chains.⁸⁹ The Committee is therefore of the view that these recent acquisitions will result in Davids having greater buying power, enabling it to at the very least maintain its current trading terms and prices.

5.91 However, the Committee remains concerned that, during the course of the inquiry, a significant number of small retailers were fearful of commercial retribution from big business if they were to raise their concerns in public. The Committee is therefore of the view that small and independent retailers are entitled to seek immediate and timely redress to unfair practices from big business, without fear of retribution, and has recommended that a Retail Industry Ombudsman and a mandatory Code of Conduct be established to deal with this recurring problem.

Primary producers and supply contracts

5.92 The NSW Farmers Association (NSW Farmers) told the Committee that the increase in concentration presented its members with a dilemma. Although farmers appreciate the professional and efficient role that the major chains play in food markets, members have nevertheless reported instances where some major chains appear to have used their power to influence the operations of the marketplace.⁹⁰ The NSW Farmers told the Committee of:

- significant added costs being imposed on suppliers via enhanced labelling and packaging requirements;
- the use of various tactics to limit the establishment of brand names by suppliers;
- breaches of contract;
- the 'flexible' use of quality standards as grounds for product rejection;
- the use of what is said to be exclusive supply agency arrangements in certain markets; and
- unfair negotiating practices.⁹¹

5.93 In calling for transparency measures to be implemented via the establishment of an industry Code of Conduct, NSW Farmers cited US legislation⁹², requiring:

88 *Hansard*, Melbourne, 7 April 1999, p 135.

89 Office of Small Business, Submission 285, p 7, and see paragraphs 2.31-2.33 of this report.

90 Mr Michael Keogh, Policy Director, NSW Farmers Association, *Hansard*, Sydney, 15 April 1999, p 348.

91 NSW Farmers Association, Submission 216, p 1.

92 The *Perishable Agricultural Commodities Act* of 1930, and the *Packers and Stockyards Act* of 1921.

- post-farm market participants to be licensed and to enter into financial arrangements that provide security for farmers' proceeds;
- comprehensive record keeping and disclosure provisions to facilitate investigations of unfair market activities;
- summary powers to enable government agencies to investigate and penalise unfair practices; and
- a reliance on free and open information flows to ensure that the market remains transparent and efficient.⁹³

5.94 The Queensland Fruit and Vegetable Growers' (QFVG) main concern is the imbalance in market power between the major chains and growers. While some growers have reported good business relationships, others feel that they have not been treated in a fair and businesslike manner:

One thing is certain: there is no question that there is a huge imbalance of market power between the major chain stores and growers. Our economic study indicates that many of our growers are financially on the borderline. Their problems are compounded by the fact that they are dealing in perishable commodities and if their product is rejected for whatever reason after initial acceptance, the financial impacts can be devastating. In many cases, because of 'seasonality', they only get one chance to profitably market their product. An example of that is mangos, where there might be a three- or four-week period in which their product can be picked and marketed.⁹⁴

5.95 Mr Paul Ziebarth, Chairman, QFVG, told of ill feeling among some growers regarding loss leader initiatives, and relayed instances where growers, in the negotiation phase of price setting, are told:

'Oh, by the way, we intend to go special with this product next week at such and such a price in such and such a place; therefore we will offer you X amount for this product,' which is always a discounted price. The issue that the growers have is to say, 'Wait a minute. You're on special, not us. If you choose to use our product on a special, you should pay the growing market price that's set by the supply and demand thing, and what you choose to do with it once you own it is your business. If you want to use that as a loss leader, go for your life, but it's not our loss that you're leading, it's yours.'⁹⁵

5.96 The major concerns of the QFVG are:

- Frequent changes of staff in key positions in large retailing organisations, resulting in inconsistent interpretation of produce quality.

93 Mr Michael Keogh, Policy Director, NSW Farmers Association, *Hansard*, Sydney, 15 April 1999, p 342.

94 Mr John Pritchard, Deputy General Manager, Queensland Fruit and Vegetable Growers, *Hansard*, Brisbane, 16 April 1999, p 498.

95 *Hansard*, Brisbane, 16 April 1999, p 503.

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- Return of product to growers or cancellation of orders as a result of what appears to be over-ordering. In these situations, growers are often left with little opportunity to re-consign the product to alternative outlets.
 - Demands for very high levels of quality assurance, which take little account of the high cost of these requirements and the ability of growers to implement them. In addition, growers believe that these high standards are often not adhered to by the large retailers themselves.
 - For a range of products, rigid specifications demanded by the retailers means that a substantial proportion of the crops grown are not acceptable to them. This in turn means that 'out of size' and lower quality products are consigned to central markets and other outlets. The effect of this lowers the average quality of throughput and places downward pressure on prices received. In some situations, those reduced prices are quoted as benchmarks by the retailers in negotiating prices.⁹⁶

5.97 Mr Bill Bishop, market analyst with SA Farmers Federation, described how the individual labelling of produce, demanded by the chains, places added pressure on growers:

Once the supermarkets – in the interests of their efficiency, not ours – decided that they needed individual labels on the fruit so that the checkout people, rather than being trained to understand what they were handling, were able to read it on the side of the apple and thus be able to tell the difference between a Granny Smith and a Red Delicious. I have heard that because squash did not have a label on the side of them, a checkout lass was confused and thought it was a mushroom.⁹⁷

5.98 The price look-up number for Woolworths is different to that of Coles. Growers are therefore tied to the supermarket after the labels are applied:

If the supermarket rejects that and somebody else makes an offer for it, what do you do with the damn labels? Are they the property of the supermarket or can they sell them to a Torrens Island Sunday market and get rid of them that way or what do you do with them? Yesterday I was watching a guy in one of the stores in Adelaide, out at Pooraka, picking the labels off tomatoes in trays because he wanted to sell them to a greengrocer. Unfortunately the Vietnamese grower had put the wrong labels on the tomatoes. They were not only price look-up numbers that were wrong but it was the wrong variety and so forth, so what the hell he was going to do with them anyway I don't know. This is a problem and it is one way that the supermarkets tie you in – if you have to have price look-up numbers, they are exclusive to them.⁹⁸

96 Queensland Fruit and Vegetable Growers, Submission 203, p 14.

97 *Hansard*, Adelaide, 8 April 1999, pp 208-209.

98 Mr Bill Bishop, SA Farmers Federation, *Hansard*, Adelaide, 8 April 1999, p 209.

5.99 The Committee notes that in the US, the opposite occurs, where the supermarkets pay growers to label their produce.⁹⁹

5.100 The evidence suggests that a commercial relationship with a major chain may constitute more than 70 per cent of a farmer's business.¹⁰⁰ Mr Bishop expressed concern about this, and the methodology that supermarkets use in obtaining produce, He believes that, over the years, the major chains have encouraged producers to grow exclusively for them:

They can encourage them to produce more, which means greater infrastructure. They have to have more land perhaps but they certainly have to have better package facilities, put in more irrigation and so on, and it is a tremendous amount of money that is spent on behalf of the supermarket – I emphasise – by some of these people. At the end of it all they are thoroughly in the hands of the particular supermarket and should they wish to get out, they are unable to do so – because what do they do with their product? There is no profitable market for it because the alternate market for that product is already catered for, yet there are plenty of suppliers who are ready to fill the breach for the supermarket if they choose to drop off a particular supplier.¹⁰¹

5.101 Coles maintains that it does not demand exclusive access to the produce of individual suppliers:

It is a free market out there. What we look for from a consumer's point of view is quality and whether the value proposition is right from a consumer's point of view – quality, price, the whole network of getting the product in front of the consumer. We do not demand exclusivity.¹⁰²

5.102 Coles believes that its relationships with suppliers must be 'open, fair and ensure a reasonable return for all parties'.¹⁰³ Mr Alan Williams, Managing Director, said that it was of absolutely no advantage to Coles if a supplier does not have sufficient funds to continue to develop, and highlighted the need for the whole chain to be strong, to be innovative and to go forward.¹⁰⁴ However, Mr Williams also acknowledged that Coles' relationship with suppliers a few years ago was 'very, very poor':

Over the last four or five years, we believe we have addressed those issues. We have several procedures which are in place. We have a Coles Myer Code of Conduct which covers the whole ambit of the Coles Myer

99 *Hansard*, Adelaide, 8 April 1999, p 209.

100 NSW Farmers Association, Submission 216, p 1.

101 *Hansard*, Adelaide, 8 April 1999, p 201.

102 Mr Peter Scott, General Manager (Perishable Merchandise) Coles, *Hansard*, Canberra, 6 April 1999, p 37.

103 Coles, Submission 168, p 18.

104 *Hansard*, Canberra, 6 April 1999, p 32.

organisation. We have our own buying guidelines. We have dispute mechanisms in place and we are happy to supply the Committee with copies of all of that documentation.¹⁰⁵

5.103 Mr Peter Pokorny, General Manager (Fresh Foods) Woolworths, believes that relationships with suppliers must be consumer-focused. Mr Pokorny said that both parties first seek to identify a common objective, which relates to customer wants and needs. Mr Pokorny said that, in developing a formalisation, a contract arrangement or a memorandum of understanding, Woolworths seek to ensure that primary producers understand the needs of consumers:

We then work together to implement the appropriate standards and practices to achieve those objectives. It is very important to us that our suppliers are profitable, and part of ensuring profitability is to take the risk out of the business. Quality assurance, food safety programs, long-term planning and supply scheduling are all activities that take the risk out of the business and allow our suppliers to plan with more confidence and plan effectively, and to access finance at more acceptable rates.¹⁰⁶

5.104 The Committee was surprised to learn that there is a general lack of formality attached to agreements between growers and the major chains. Mr Ziebarth (QFVG) said that he did not know of anybody who has got a 'signed, sealed, legal contract to supply'.¹⁰⁷ This lack of contractual formality also concerns Mr Michael Keogh, Policy Director, NSW Farmers:

...contracts are often verbal, or at best, very rudimentary, so there may be situations where there are more detailed contracts entered into, but certainly the most frequent comment from our members was that there is almost a discouragement from going to too formal a contract.¹⁰⁸

5.105 The Committee notes that primary producers are mindful of the benefits of direct relationships with the major chains, although some problems still persist. These include:

- inconsistent interpretation of product quality;
- over-stringent demands for quality assurance, with risk attached to the grower; and
- over-ordering, leading to return of product and little opportunity for producers to sell elsewhere.¹⁰⁹

105 *Hansard*, Canberra, 6 April 1999, p 32.

106 *Hansard*, Canberra, 6 April 1999, p 24.

107 *Hansard*, Brisbane, 16 April 1999, p 503.

108 *Hansard*, Sydney, 15 April 1999, p 345.

109 Queensland Fruit and Vegetable Growers, Submission 203, p 14.

5.106 The Committee appreciates that fruit and vegetable growers have to deal with a range of market characteristics, including perishability, market volatility and a high degree of risk exposure, which collectively contributes to an unhealthy degree of vulnerability with respect to the major chains.¹¹⁰ In addition, individual farmers may be reluctant to place their businesses at risk in attempts to redress what some claim to be unfair treatment at the hands of the major chains. The Committee is therefore of the view that the power of individual growers in the market place is limited, and believes that a mandatory Code of Conduct will address the problems raised.

Capital

5.107 South Australian independent retailer, Mr Keith Powney, identified the cost of capital as a major barrier to the growth of small independent retailers:

Another problem we have is that we want to grow all the time; we want to expand. Because we are a partnership and because of all the uncertainty in the retail sector at the moment, banks do not want to know us unless we own our own homes or we have got solid collateral. The banks are not prepared to support us to grow. One of our stores has a Coles seven-day store nearby which does not trade as Coles – it just trades with no name – which is open extremely long hours, as we are. They recently did a \$300,000 refurbishment. They will not recoup that money for probably 10 years. If I went to the bank and said, ‘Give me \$300,000 and I’ll pay that back over 10 years,’ they would laugh at me. We do not have that level playing field. We do not have access to that sort of money, which just gets very frustrating, because we want to compete; we want to grow.¹¹¹

5.108 The evidence suggests that independent retailers may be paying up to three per cent more for finance than the major chains, effectively limiting their scope for expansion. However, when finance is available to independents, it generally comes with a heavy onus to succeed. Mr John Cummings of the Western Australian Independent Grocers Association said:

In our business there are three partners. We have between us some \$2.5 million invested. We have borrowings of \$1.2 million and, like most small businesses, our borrowings are fully secured by our personal homes, our wives’ assets, our families assets – and the dog’s paws on one of the documents. I am sure. It just goes on and on and on. So everything we own is invested in our business.¹¹²

5.109 Foodlink Ltd (Foodlink) services around 320 independent retailers throughout Queensland. Foodlink use their members’ combined purchasing power to negotiate with suppliers and wholesalers. Mr John Berry, Executive Chairman, noted the importance of access to capital:

110 Queensland Fruit and Vegetable Growers, Submission 203, p 13.

111 *Hansard*, Adelaide, 8 April 1999, p 182.

112 *Hansard*, Perth, 9 April 1999, p 289.

Senator, I can tell you now that if you get a good retailer who is an independent who can get hold of finance, we can put him in a marketplace and he will definitely not only survive but will take on the big ones and fight. The reason is that you get personal, hands-on retailing – as Jeff Antcliff could say, having come from the chains – versus an instruction that comes out to managers. They really do not have that same personal approach.¹¹³

5.110 Mr Berry explained why he thought it was now so difficult for independent retailers to access finance:

Let me just say this to you – and it is a very real thing: following the 1987 crash, by 1991 it was impossible for us to obtain any leasing for new plant and equipment for an independent retailer unless they had more than twice the value that they wished to borrow in bricks and mortar – more than twice – because every time you spoke to a banker, they all lost money during the 1987 crash on leasing, because they were leasing to everybody prior to the rush of the eighties. Consequently, there are those sort of problems.¹¹⁴

5.111 Mr Berry believes that, if independent retailers had access to finance over a longer period of time, and at an acceptable rate, then this would go a long way towards helping them to compete against the major chains.¹¹⁵

Rent

5.112 The issue of retail tenancy in shopping centres was examined in detail in the Reid Report, and is largely a matter under the jurisdiction of State governments.¹¹⁶ However, a number of submissions again raised some concerns.¹¹⁷

5.113 In large shopping centres, independent retailers pay more per square metre for rent than the major chains. According to market analyst Mr Bill Bishop, the smaller you are, the more you pay:

[The major chains] get cheaper rental space in their shopping centres. Every shopping centre has to have a supermarket in it to attract custom; that is the first thing a new shopping centre looks for. Small businesses in the shopping centre are paying up to three times and more per square metre space.¹¹⁸

113 *Hansard*, Brisbane, 16 April 1999, p 457.

114 *Hansard*, Brisbane, 16 April 1999, pp 457-58.

115 *Hansard*, Brisbane, 16 April 1999, p 456.

116 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance Towards Fair Trading in Australia*, May 1997.

117 See, for example, Mr Charles Stewart, State President, Queensland Hotels Association, *Hansard*, Brisbane, 16 April 1999, pp 414 -15.

118 *Hansard*, Adelaide, 8 April 1999, p 202.

5.114 The Small Retailers Association of South Australia claimed that the two major chains often pay only 20 per cent of the going rate.¹¹⁹

5.115 Mr Colin Otto runs a small butcher shop within a regional shopping centre in Queensland. He said that the old rule of thumb 10 years ago was that the major chains rent 60 per cent of the space and pay 40 per cent of the rent:

I suspect that this has now risen to be more like 70:30. In other words, small retailers are subsidising the rentals per square metres of the major stores.¹²⁰

5.116 A number of transparency issues were also raised during the course of the inquiry. Mr Otto suggested that State-based public lease registers should include information on the cost per square metre of rent paid by lessees:

Confidentiality in my opinion is not a concern in this because, if someone can find out how much I paid for my particular dwelling or farm or whatever, I cannot see any difference in details of the lease being made public. I think that would give small retailers a much better leverage and more argument to try to negotiate more suitable rentals – this is especially in shopping centres. The secrecy of these rentals under the name of ‘confidentiality’ is like trying to break into ASIO.¹²¹

5.117 NARGA maintains that only the major chains have the countervailing power to command prime sites at favourable rentals. It believes that developers want the financial strength and marketing of a major chain behind a 20-30 year lease.¹²²

5.118 The Committee took evidence from Mr Mark Baillie, Chief Executive Officer of CountryWide Retail Trust (CRT), Australia’s largest owner of supermarket centres with 60 properties located across Australia. Thirty-four of these are freestanding supermarkets, 25 are supermarket-based shopping centres, and one is a stand-alone department store. Of these, 32 are anchored by Coles, 26 by Woolworths and two by Franklins. Its properties are mostly located in rural and regional Australia.

5.119 Mr Baillie said that CRT had invested a large amount of capital in its refurbishment of supermarket centres, which he believes provides economic benefits to smaller communities:

Refurbishment and expansion of supermarket-based centres supports local businesses at different levels, from the construction, the refurbishment works...through to providing new specialty space available for local businesses outside the major chains...Anchor tenant leases act as a catalyst for retail development in rural Australia, without an anchor tenant

119 Small Retailers Association of South Australia, Submission 215, p 3.

120 *Hansard*, Kingaroy, 8 July 1999, p 930.

121 *Hansard*, Kingaroy, 8 July 1999, p 930.

122 National Association of Retail Grocers of Australia, Submission 202, p 88.

committed to a long-term lease, any proposed major retail development will flounder.¹²³

5.120 Mr Baillie confirmed that the major chains do receive cheaper leasing rates as the anchor tenant over the specialty shops:

It is obviously cheaper, but it is again reflective of the value that an anchor tenant brings to the property development. Not only are they renting a very large area of space...they are spending quite a considerable amount of money on the inside of their property...It is reflective of the relative contributions: the length of the lease – obviously, a 20-year lease with a credit quality tenant who has the financial security to honour the obligations of that lease over the long term – the area, the amount of value that they invest in the centre themselves and the marketing dollar that they bring.

...With all these factors, there is no doubt that anchor tenants do get a cheaper rent than specialty tenants, but it is reflective of those factors.¹²⁴

5.121 In responding to questions about how the quality of support services and security is provided to supporting tenants, Mr Baillie said:

When we write an anchor tenant lease, on a large number of occasions it will define the range of products that are offered there...The worst thing for us is to build a new centre and because the range of products offered within the existing supermarket we cannot lease up the specialty shop space because they just cannot compete. So we are very mindful of that. It is a case of striking the right balance between the two and ensuring there is no overlap. It is no good for us as the landlord having empty space in our centres.¹²⁵

5.122 The security of specialty tenants in large shopping centres came to the attention of the Committee at the Melbourne hearing. Anecdotal evidence revealed that one specialty tenant, a florist, had been forced out of business when the anchor tenant, Safeway, decided to stock pre-made bunches of cut flowers. It was alleged that the florist went out of business within 3 months.¹²⁶ Mr Baillie said:

We are on about providing retail offers that complement the anchor tenant. We want to provide somewhere that the customer can get into, buy what they need from the newsagency, the drycleaners, the chemist and so on, and get out again. It is all about time efficiency of shopping. At the end of the day, we put in as broad a clause for the anchor tenant as we think is

123 *Hansard*, Cooma, 6 July 1999, p 646.

124 *Hansard*, Cooma, 6 July 1999, p 652.

125 *Hansard*, Cooma, 6 July 1999, p 650.

126 Mr Ray Veal, Owner/Manager, Stratford Licensed Grocery, *Hansard*, Melbourne, 7 April 1999, pp 106-107.

reasonable, without being to the detriment of specialty shops, because again it is not in our interest to have empty specialty shops sitting in our centre.¹²⁷

5.123 Despite this, Mr Baillie agreed that there may be overlaps:

To our knowledge, we understand that the anchors quite like some of those specialties outside the entrance of their store because they actually attract customers to the centres as a whole. At the end of the day it is about competition, with all businesses competing for increased sales revenue.¹²⁸

5.124 The Committee notes that the cost of floor space is probably the largest business cost, after labour and product costs, for any retail business. The evidence clearly indicates that specialty shops in shopping centres often pay a substantially higher rate for their floor space than the anchor tenant. The Committee accepts that there may be good reasons for this. However, so that prospective specialty shop tenants can make a proper assessment of their ability to compete with other tenants, the Committee believes that they should be able to access information about the net rental being paid by other tenants.

Electricity and EFTPOS

5.125 Situated in country Victoria, small independent retailer, Mrs Barbara Murdoch, raised a number of concerns, one of which was the cost of electricity:

With regard to the contestability of electricity, we are the last on the line. Therefore, we are not competing at the same rate as what the major chains are at the moment because our electricity is costing us a lot more.¹²⁹

5.126 Consumers now demand the EFTPOS facility wherever they shop. The evidence suggests that independent retailers are charged between \$100 and \$130 per month by the banks.¹³⁰ Mrs Murdoch said:

At the present moment, we pay \$100 a month to have the EFTPOS in the shop, which is \$25 a week. Plus, if we have credit, which we are getting on, we have to pay about 1.5 per cent. That is a rather difficult thing because if somebody buys on credit that is 1.5 per cent of your profit down the drain. Often when somebody stops for petrol at the garage across the road and they don't have any money, they come to us to use the EFTPOS machine. At times I really feel quite angry that we are providing a service for the banks and are paying for it.¹³¹

127 *Hansard*, Cooma, 6 July 1999, p 650.

128 *Hansard*, Cooma, 6 July 1999, p 651.

129 *Hansard*, Melbourne, 7 April 1999, p 157.

130 *Hansard*, Melbourne, 7 April 1999, p 158, *Hansard*, Perth, 9 April 1999, p 241.

131 *Hansard*, Melbourne, 7 April 1999, p 172.

Access to new sites

5.127 Mr Neville Gale, Advantage Supermarkets (WA), believes that the difficulties associated with access to new sites is stifling competition:

In the marketplace of supermarkets it has become nearly impossible for independents to gain the sites that the majors do. I think that the gaining of sites is the major impediment to the growth or the independent situation.¹³²

5.128 It appears to be increasingly difficult for the major chains to find sufficient 'greenfield' sites for expansion and growth. Because of this, the independent sector is concerned that the major chains have developed and introduced new medium-sized format stores, such as the Woolworths Metro and the Coles Express stores, which are expected to be rolled out over the next few years.¹³³

Access to new product lines

5.129 Mr Keith Powney, Committee Member of SA Small Retailers, raised concerns about access to new product lines:

One of the problems we have is that we cannot get to new lines. If you see something advertised on television there is a good chance that we will not be able to get it for three or four weeks after its release. I cannot bring any proof, but from speaking to representatives from the companies they say Coles have said, 'If you want us to stock that line then it won't be available to the independents until after say two or three weeks after the initial release.'¹³⁴

5.130 Mr John Brownsea, Executive Director, SA Small Retailers, made the comment that:

From time to time Davids do make comments as to the unavailability of certain stock and it is a matter of concern to them, and from time to time I have seen them listing companies that they have trouble getting stock from. That is not to say it is deliberate, but why should some get it and not others? Obviously if there are not enough stocks, some have to miss out, I suppose, but certainly Davids do have that as a concern that in some cases they really cannot supply when there is high expectation.¹³⁵

5.131 In addition to concerns over EFTPOS and electricity, Mrs Barbara Murdoch said that it is becoming increasingly difficult to find out about new products, as manufacturers' representatives no longer travel throughout the country displaying merchandise:

132 *Hansard*, Perth, 9 April 1999, p 247.

133 Foodland Associated Limited, Submission 190, p 20.

134 *Hansard*, Adelaide, 8 April 1999, p 182.

135 *Hansard*, Adelaide, 8 April 1999, p 190.

Travelling salespeople used to come around in vans with a lot of stationary and odds and sods that we could not pick up in the warehouse. I cannot remember the last time I saw those. And the other van sales such as Dandy, which is our wholesale smallgoods salesman, who has just gone to phone sales. Theoretically, he has not lost a job yet, but how long is it going to be before he does? Peters ice-cream is the same. We had a man delivering Mrs Harrison's cakes but it is not worth it. The smaller businesses are getting smaller. Those sort of things are affecting small country towns because the bulk of it is going into the big three.¹³⁶

5.132 Western Australian independent Mr Neville Gale noted that the failure rate of new products is around 80 per cent. He therefore sees access to new products as an issue to be determined by the manufacturers themselves:

...if I were a manufacturer I would certainly be looking for the support of the chains initially because without it the product would certainly fail. Then sometimes the product is so popular that the off-take outstrips the ability of the company to produce it.

5.133 Mr Gale believes that, for most of the time, the manufacturers try to be fair. However, he believes that the chains do try to have sole distribution of the product:

...but of course that is of no benefit to the companies, so really in the vast majority of cases that does not apply. But where it can apply, particularly at Easter for example, then this duck with a chook sitting on top of its head is only sold at Coles they have exclusivity of that particular product and they can have it too! We might on the other hand have a rabbit.¹³⁷

Employment

5.134 The major chains claimed that they are leading the way with regard to wages and working conditions. Coles, Woolworths and Franklins all have industrial agreements with Australia's largest trade union – the Shop Distributive and Allied Employees' Association (SDA).

5.135 Mr Joe de Bruyn, National Secretary-Treasurer of the SDA, voiced strong support for the major chains. He told the Committee that these agreements provide for pay rates which are in the order of \$40 to \$50 in excess of the award rate, and that they also provide, in certain respects, better employment conditions.¹³⁸

5.136 About six years ago, Coles met with the SDA and stated that it wanted to become the preferred employer in the supermarket section of the retail industry.

136 *Hansard*, Melbourne, 7 April 1999, p 159.

137 *Hansard*, Perth, 9 April 1999, p 266.

138 *Hansard*, Sydney, 15 April 1999, p 331.

Subsequent negotiations led to the first full nationwide industrial agreement between Coles and the SDA.¹³⁹

5.137 The SDA maintains that Coles has displayed a commitment to convert a substantial proportion of its casual employees to part-time employment, leading to a consolidation of working hours and more substantial employment. In describing the effects of the industrial agreement, Mr de Bruyn said:

Part-time employment is more secure than casual because you have the entitlement to a week's notice, rather than a casual where there is, under the terms of the agreements, no security at all, and also it had the effect, because of the greater security, of reducing the turnover of employees in the company. That agreement was put in place and in the period that followed there was a substantial conversion of casual jobs to part-time, which had a beneficial effect on employees and on employment, because it provided people generally with more hours and it provided people with greater security in their jobs.¹⁴⁰

5.138 An example of this was seen in 1998, when Coles opened a new store at Langwarrin.¹⁴¹ Rather than staffing it under its traditional structure, it decided to substantially increase the number of full-time employees. Table 5.1 compares how the store would have been staffed under the traditional staffing structure.

Table 5.1

Coles Employment Structure

Employees	Traditional staffing structure	Langwarrin trial
Full-timers	57	97
Part-timers	80	38
Casuals	113	10
Total	250	145

Source: SDA, Additional information 214A, p 4.

5.139 Mr de Bruyn believes that this initiative is a revolutionary change for the better in retailing employment:

It was initiated by the company of its own volition. The union is absolutely delighted with this new employment structure because it puts into effect what we have been seeking for, I would say, the last 20 years or more:

139 *Hansard*, Sydney, 15 April 1999, p 333.

140 *Hansard*, Sydney, 15 April 1999, p 333.

141 Langwarrin is near Frankston, Victoria.

greater full-time employment, more hours for part-timers, and the reduction of casual employment to the absolute minimum that can be achieved.¹⁴²

5.140 Mr de Bruyn believes that an 80 per cent cap on the market share of the major chains would effectively place a limit on the number of higher paying jobs in the retail industry:

We say that this is not in the public interest, it is not in the interests of the retail industry and it is not in the interests of the employees in the industry.¹⁴³

5.141 Mr de Bruyn cites a number of regions across New South Wales as evidence that the independent sector is in good shape, and that independent stores can exist in regional areas with or without competition from the major chains. Mr de Bruyn provided the Committee with the following figures in support of his contentions:

Table 5.2

Western New South Wales

Town	Population	Supermarkets
Bourke	3,779	Bourke Riteway Welcome Mart
Cobar	5,437	Cobar Supermarket Burgess Tuckerbag Baldi's Festival
Condobolin	7,379	Chamen & Co
Dubbo	37,030	Coles Woolworths Riverdale Woolworths Orana Mall Franklins No Frills Franklins Fresh Payless West Dubbo Foodtown
Forbes	10,300	Woolworths Bernadi's IGA
Gilgandra	4,759	Gilgandra Department Store Johnson's Family Store
Narromine	6,663	Bi-Lo (Coles Myer)
Nyngan	3,227	Khan's Fitzalan's Foodtown
Parkes	15,145	Woolworths Franklins No Frills Cunningham's
Warren	3,374	Warren Festival 5 Star
Wellington	8,955	Payless

142 *Hansard*, Sydney, 15 April 1999, pp 333-334.

143 *Hansard*, Sydney, 15 April 1999, p 331.

Source: SDA, Additional information 214A, p 1.

Figure 5.1

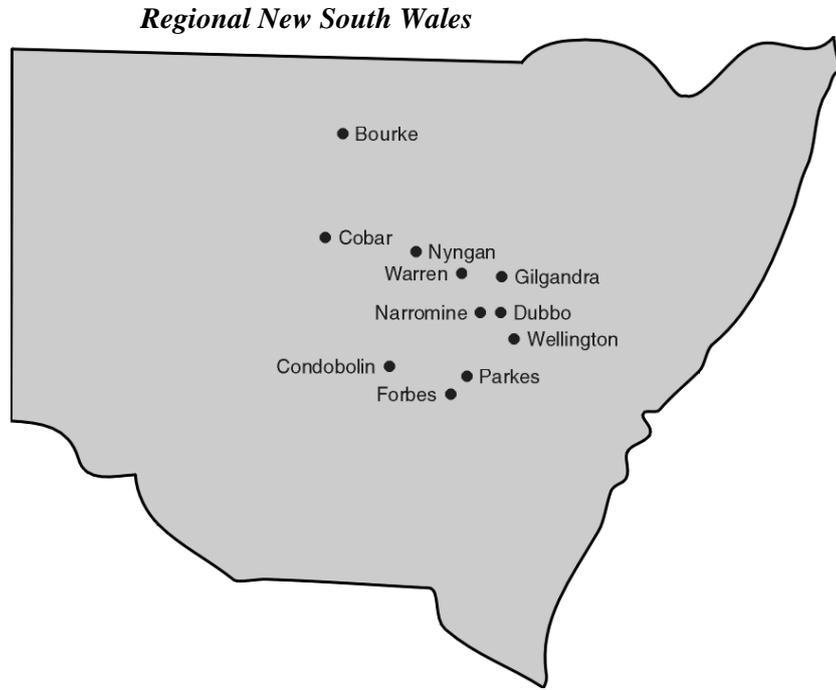


Table 5.3

Summary of Stores in Western New South Wales

Company	Number of Stores
Woolworths	4
Coles/Bi-Lo	3
Franklins	3
Independents	<u>18</u>
Total	28

Source: SDA, Additional information 214A, p 2.

5.142 Mr de Bruyn accepts that the number of stores is not the only consideration – obviously turnover is another – but believes that, nevertheless, the independents in this region are flourishing:

There are a significant number of them. Eighteen of the 28 are independents. Obviously, because the majors have been in these towns for many years, these independents continue to exist and to flourish. If they were not

flourishing they would be out of business and would have been out of business long ago.¹⁴⁴

5.143 The major chains argue that scale economies allow them to offer a broader range of product to consumers at lower prices. The independent retailers say that this comes at a cost – employment.

5.144 According to the Council of Small Business Organisations of Australia (COSBOA), every job provided by a large supermarket would have provided 1.7 jobs in a small supermarket, based on the relative number of jobs provided per dollar turnover. This calculation suggests that, for each shift of one per cent of market share from small to large stores, there is a net loss of 1,800 jobs:¹⁴⁵

The turnover/employment ratios imply that every job provided by a large supermarket would have provided 1.7 jobs in a small supermarket. By some measures, this would be a sign of ‘economic inefficiency’ in small retailers. But in a country with persistent high rates of employment despite prolonged economic growth, it is a source of precious jobs too important to squander.¹⁴⁶

5.145 COSBOA’s figures reveal that large store turnover has been growing at around 7-8 per cent per year while small store turnover has been growing at 1-2 per cent per year. COSBOA has calculated that if small store turnover grew at the same rate as the large stores they would be employing an additional 6,350 people by the end of the 12 months – well above the 1,270 more they are employing when growing at the lower rate.¹⁴⁷

5.146 By contrast, Access Economics argued that every job created in a smaller supermarket would replace 1.05 jobs in a larger one, and disputed the legitimacy of using jobs per dollar turnover as a measure. Access Economics concluded that:

In the absence of clear evidence of market failure, intervening in the processes that determine the structure of retailing with the intention of increasing employment is most likely to reduce the efficiency of the industry, raising prices to consumers and reducing the contribution of the industry to national income.¹⁴⁸

5.147 The Committee notes the ability of COSBOA and Access Economics to reach the opposite conclusion – on the basis of statistical evidence – regarding the relative employment effects of the major chains and independent retailers. The indecisiveness of their respective arguments makes the Committee reluctant to recommend measures purely with the aim of shifting employment from one size retailer to another.

144 *Hansard*, Sydney, 15 April 1999, p 332.

145 Council of Small Business Organisations of Australia, Submission 140, p 8.

146 Council of Small Business Organisations of Australia, Submission 140, p 8.

147 Council of Small Business Organisations of Australia, Submission 140, p 8.

148 Coles, Submission 168, Part 4, Access Economics, pp 51-52.

5.148 Nevertheless, the Committee appreciates that there may be regional disparities in the employment effects of the major chains gaining market share at the expense of the smaller retailers. In particular, COSBOA's contention that the net benefit of the shift is negative in terms of employment may well hold true in many rural and regional areas.

5.149 The Committee does not dispute COSBOA's contention in relation to employment within the retailing industry, and the implication that small retailers are more labour intensive than larger ones. However, in accord with the view of Access Economics, the Committee is of the view that it does not necessarily follow that the economy as a whole would benefit from policies which assist small businesses at the expense of larger ones.

Social impacts

5.150 During the course of the inquiry, the Committee heard of the contributions made outside of the normal retailer-consumer relationship by the major chains and the independent retailers. This was of particular import in rural and regional communities.

5.151 According to Mr Alan Mackenzie, NARGA's national spokesman, small business underpins the infrastructure of local communities in that they buy, invest and employ, locally. As a result, they are a vital part of each of those local communities' infrastructure.

We believe that at the end of the day, that [major chain dominance] is bad news for the consumer, because it will affect the provision of services in country towns where we have the elderly, the disadvantaged and low income earners who often do not have the mobility to travel to major centres. In some cases they will lose their local shopping and the convenience that that local shopping provides.¹⁴⁹

5.152 Mrs Barbara Murdoch, Proprietor of Chiltern Supermarket in north-east Victoria, said that small retailers in small towns are committed to the community:

My children have gone to school in the town. They have gone to Brownies. I have lived in other small country towns. I have been in Lions. I have been on the kinder communities and the school councils. Often I help if they have got a stall on. We often refrigerate their drinks for them, put their cakes in the fridge and all of that sort of stuff. It is all helping the community to survive. It is a small pie and we have all got to take a piece of it.¹⁵⁰

We give what we can. We usually give in kind a box of vegetables for the raffles. I mostly sell them soft drink at cost price, so that they cannot get it out of town any cheaper.¹⁵¹

149 *Hansard*, Canberra, 6 April 1999, pp 57-58.

150 *Hansard*, Melbourne, 7 April 1999, p 158.

151 *Hansard*, Melbourne, 7 April 1999, p 164.

5.153 Others told of the service to the elderly and the infirm in small communities:

[I] go down once a week to the old people's home in town and drop off the groceries. That is a necessary thing in these small country towns and it is something that we will continue to do.¹⁵²

5.154 Mr Grant Sommerville, General Manager, Foodlink Ltd said:

We provide service for young people in terms of providing them jobs. We provide a service for the older people, people that cannot get to the large supermarkets; they ring and we drop round the litre of milk because they cannot get to the store...So basically, we need the fabric of the smaller operators to maintain the services to the community.¹⁵³

5.155 Mrs Joanne Antcliff, Director, of Retail Enterprises Ltd, told the Committee of her husband's excuse when he arrived home late one night:

His reason was that he had to drop one one-litre carton of milk to one of our regular customers who is housebound; she had forgotten on her phone-up order that week to add milk to her list. So he did this and when he got to her door she asked him to change a light bulb. In fact he changed three light bulbs for her. And there is no way that a major chain is going to go to the customer's house for one litre of milk, charge no delivery fee – just the cost of the milk – and change her light bulbs for her.¹⁵⁴

5.156 Mr David Wilkes, Managing Director of IGA Supermarket, Beaconsfield said:

We are more than the products we sell. We help the elderly. A visit to our store represents a social outing as much as a chore – catching up with friends and news is important. Consequently we never rush them. Our staff assist them with their purchases to the car or transport. We make free deliveries to elderly citizens in the Beaconsfield area.¹⁵⁵

5.157 Mr Bryan Randall, a partner of Randall's Supermarket, Bendigo, said that his store offers a delivery service to any of those who want it – the sick, the elderly, the young mothers:

We put their stuff in their fridge for them if need be. My sister, who also works in the business, has often put their light globes in and tied up their shoelaces. We carry their parcels to the car. We know most of our customers by name. The deregulation [of shopping hours] has just about destroyed our business.¹⁵⁶

152 Mr Richard Dymond, Owner / Proprietor, Toodyay Supermarket, *Hansard*, Perth, 9 April 1999, p 238.

153 *Hansard*, Brisbane, 16 April 1999, pp 450-51.

154 *Hansard*, Brisbane, 16 April 1999, pp 463-64.

155 *Hansard*, Launceston, 5 July 1999, p 523.

156 *Hansard*, Bendigo, 6 July 1999, p 630.

5.158 Mr Peter Creigh, Owner of Creigh's Kingaroy Foodstore, said that stores like his are expected to provide a number of facilities that the chains do not, and these are vital to the community. The most notable of these is account facilities for government institutions such as hospitals and schools, and community groups such as Meals on Wheels and Respite, and welfare organisations such as St Vincent de Paul and the Salvation Army. Mr Creigh said that this is costly and time consuming:

But it is to the benefit to the institution – not so much for the business – because they need the paperwork for the way they operate. But we provide the facility and try to remain price competitive at the same time.¹⁵⁷

5.159 Small retailer, Mr Dennis Scott, believes that, unlike the major chains, small supermarkets and stores play an integral part in the running of the town, whether they donate to or sponsor sporting clubs or service clubs. Mr Scott said that the locals see small business as part of the town:

We are there to help those clubs and to support them. We get support back from them, but we really play that integral part in the town, which cannot be said for the major chains.

Our business supports other businesses in the town, and that certainly cannot be said for the major chains. When they build the buildings, a lot of the contracts are done by external people and a lot of the materials are brought in by external people. When we do something in the town, we are actually benefiting the town because we are spending in the town, and that money goes around.

We are an ear for elderly or sick people and for mothers who cannot get down with their babies. We play a human part in the community, which I do not think the larger chains can.¹⁵⁸

5.160 Country shoppers are increasingly travelling to nearby regional centres to buy their groceries. This is seen as having a negative effect on smaller outlying towns:

As people move out of town to where there is a larger range of commodities available, so the footy club can only field a senior team for want of players; then the cricket club loses its identity by having to merge with another town – that is the start of the slide because they lose their identity; they lose their parochial support – and then the combined club folds. I was in a town where that happened. The churches are cut back to only a visiting minister on Sundays or they rely on lay preachers to conduct the services – and then they have combined denomination services; then the CFA cannot get a crew for the truck in case of a fire. The town is dead.¹⁵⁹

157 *Hansard*, Kingaroy, 8 July 1999, p 943.

158 Mr Dennis Scott, Owner / Manager, Scotty and Spanas IGA Everyday, *Hansard*, Melbourne, 7 April 1999, pp 97-98.

159 Mr Ray Veal, Owner/Manager, Stratford Licensed Grocery, *Hansard*, Melbourne, 7 April 1999, p 100.

5.161 The major chains argued that their size can lead to major benefits for smaller towns. Woolworths believes that its stores underpin the commercial component in many country towns, and act as a major employer and anchor tenant.

There are many country towns in Australia where I would suggest there would be no retail heart if there was not a Woolworths or a Coles or a Franklins or a Bi-Lo supermarket anchoring that community where they provide the range, the choice, and the price that keeps the shopping in that community and they provide an opportunity for other shops to trade very effectively off the volume and traffic that they create.

My experience is that, in most of those country towns, those stores have maintained that spending in that town, the retail wages are retained in the town and the jobs are retained in the town.¹⁶⁰

5.162 A useful point was made by Mr Lionel Richardson, a Director of NARGA:

I was sitting here today listening to other people putting their submission, and their definitive view of a country town is certainly not mine. I am talking about real grassroots rural and regional towns, not large population centres that these people are only interested in.¹⁶¹

5.163 The Committee believes that the major chains could be more pro-active in implementing measures that complement the social environments in which they operate their stores. The Committee notes the independents' valuable contributions to their communities, something from which the major chains could indeed take heed.

Corporate benevolence

5.164 There is a general perception that the major chains are not good corporate citizens within the communities in which operate. Many small business operators believe that they contribute a disproportionate amount of sponsorship dollars compared to the major chains. In their view, the major chains also have a community responsibility and can afford to give more, particularly when they are generally taking a significant proportion of the town's trade.

5.165 Mr Neville Gale, Managing Director, Advantage Supermarkets WA, who estimated his contributions to the community to be about \$30,000 a year, said:

In terms of supporting the community, there is no doubt that I think the independent does much more for his local community than does the chain. We certainly make sure that sporting groups and organisations and individuals are assisted to a large degree.¹⁶²

160 Mr Roger Corbett, Chief Executive Officer, Woolworths, *Hansard*, Canberra, 6 April 1999, pp 11 and 18.

161 *Hansard*, Canberra, 6 April 1999, p 61.

162 *Hansard*, Perth, 9 April 1999, p 265.

5.166 When asked whether corporate philanthropy was important to the consumer, Mr Gale responded:

No. When the consumer goes to do their shopping, they will look at where they are getting the best deal, not who was the good bloke who supplied the rugby club with a set of jumpers.¹⁶³

5.167 Mrs Jennifer Cameron, Member, Catholic Social Welfare Committee, Dubbo, told the Committee of a fundraising night in Dubbo:

...I was involved with a function here at the Civic Centre last night – a major function for the city of Dubbo – and we sought donations from the business sector of Dubbo. The big three were all approached. Two of them did come forward with small donations, which we gratefully acknowledged. The third one responded that they had to send the application off to head office...It has been my experience in the past when this has happened that it goes on for so long that you just do not bother any more. But the smaller business operators were extremely generous, and I believe that they are hounded every day of the week for donations.¹⁶⁴

5.168 Mr David Bernardi, an independent supermarket proprietor in Forbes, was highly critical of the major chains:

...In our town I cannot think of a cent that our chain store has contributed to the local community. There are a lot of other things that we do: we sponsor three junior soccer teams – we pay for their shirts; we have donated a spa bath to the local hospital; we sponsor junior rugby league, senior rugby league, junior netball and softball; we donate to the Forbes Cancer Assistance Society, school fetes, hospital fetes, Camp Quality; there was a carpathon; sportsperson of the year. I did not go through and list them all out; they were just some of the things that came to mind.¹⁶⁵

5.169 In a similar vein, Mrs Roslyn Creigh, owner of Creigh's Kingaroy Foodstore, said that her store tries to do their part for the community:

We have between six and ten people knock on our door every day asking for donations. We are to the point now where we are saying, 'Go and ask [the Manager of Woolworths]. If he will give you something, I will give you something too,' because they do not give a bloody cent to this town – nothing. We are the ones that are expected to do it.¹⁶⁶

5.170 Adelaide small retailer, Mr John Symons, told of Foodtown's support for Kids with Cancer:

163 *Hansard*, Perth, 9 April 1999, p 265.

164 *Hansard*, Dubbo, 7 July 1999, pp 726-27.

165 *Hansard*, Dubbo, 7 July 1999, p 743.

166 *Hansard*, Kingaroy, 8 July 1999, p 953.

We have donated at this stage, I believe \$20,000 but we have collected that by selling products for the charity itself within stores and also donating, through our promotions, a certain percentage of what we sell.¹⁶⁷

5.171 Woolworths argued that it plays an important anchor role in the support of local community activities. It donates significant sums of money to the various children's and regional hospitals every year, which are Woolworths' main focus for charitable donations. It also donates to the Smith Family Appeal, the Guide Dogs for the Blind, and assists many other smaller charities. From 1995-1998 Woolworths has donated over \$10 million to needy organisations.¹⁶⁸

5.172 In its supplementary submission, Woolworths stated that it has made donations across both country and metropolitan Australia, to various rural fire services, Lions clubs, Rotary clubs, Chambers of Commerce, schools, hospitals and Country Women's Associations¹⁶⁹. It states that in NSW alone, donations ranging from \$25 to \$1,000 have been made to 328 separate associations, schools and charities over the past 6 months.¹⁷⁰

5.173 Coles pointed out in its supplementary submission that it has not publicised its philanthropic activities widely. Last year, its philanthropic and fund raising activities generated \$7 million which was distributed to such organisations as WA Flying Doctor Service, Peter McCallum Cancer Institute, Camp Quality, Brisbane Children's Hospital, local hospitals, fire brigades, school fairs, football teams, Country Women's Associations, the Salvation Army and many others.¹⁷¹

5.174 Franklins also provided additional information regarding its corporate philanthropy program. It maintains that it gives generously to charitable and sporting bodies using three broad methods:

- a nationally structured program and policy for donations;
- a less structured policy and program operated by the Corporate Division; and
- less structured policies and programs operated by individual retail stores.¹⁷²

167 *Hansard*, Adelaide, 8 April 1999, p 195.

168 Woolworths, Submission 229A, p 85.

169 The Committee received a letter from Mrs Margaret Smith, National President of the Country Women's Association of Australia, dated 11 July 1999, stating how the majors were not meeting their corporate/community responsibility in terms of sponsorships in smaller, rural towns. As an example, she pointed out that Woolworths did not support the local town of Cootamundra when it conducted celebrations for Sir Donald Bradman's 90th birthday.

170 Woolworths, Additional Information 229C, p 13.

171 Coles, Additional Information 168B, pp 5-6.

172 Franklins, Additional Information 200A.

5.175 In response to the criticisms that had been levelled against the major chains in relation to donations to local communities, Mr Roger Corbett, Chief Executive Officer of Woolworths, conceded that it was a valid point:

I think we have not made as much public about what we have done, as we should have done...I think we might not be as sensitive as we could be in some of those country towns. That is an issue we have taken from this committee and we intend to redress.¹⁷³

5.176 Similarly, Mr Alan Williams, Managing Director of Coles Supermarkets, responded by saying :

...Last year Coles Myer donated in excess of \$7 million to the community. I accept the criticism that that is not widely publicised, and I also accept the criticism that there is a bureaucracy in place that ensures that the donations are properly accounted for, et cetera. We have already got a process in place that will alleviate that and the store managers will be given significantly more autonomy to respond to the local communities.¹⁷⁴

5.177 The Committee commends the generosity of small and independent retailers throughout Australia in supporting their local communities. The Committee also notes the generosity displayed by the major chains in implementing their particular benevolence programs. However, the Committee is of the view that the major chains could enhance their corporate image at local level, and notes their assurances in this regard.

173 *Hansard*, Canberra, 12 July 1999, p 1090.

174 *Hansard*, Canberra, 12 July 1999, p 1103.

CHAPTER 6

MISUSE OF MARKET POWER

*...unrestricted business gives an advantage to the strong, the clever, the selfish and the unscrupulous. It is the rule of the jungle.*¹

Predatory pricing

6.1 A significant amount of anecdotal evidence alleged instances of predatory pricing by the major chains.

6.2 Predatory pricing occurs where a firm temporarily reduces its prices below the level justified by competitive conditions in order to force a competitor from the market, and having achieved this purpose, then expects to be able to raise prices above the competitive level.²

6.3 Where a corporation which has a substantial degree of market power is found to have engaged in predatory pricing, then that will be evidence of a breach of section 46 of the *Trade Practices Act*.

6.4 Predatory pricing may be established in a number of ways:

- By express admission;
- By inference from facts other than the extent of the price cuts themselves; or
- By analysis of the effects of the price cuts, giving rise to an inference as to the purpose behind their adoption.³

6.5 The ACCC believes that the present market structure of the grocery industry and the pressures on the retailers to cut costs may result in conduct which is anti-competitive:

A supply side market power issue that can arise in this respect relates to the possibility of the chains exercising their market power by engaging in predatory conduct. That is, conduct may be engaged in whereby a particular chain will drive out independent competition in its locality through low cost pricing. Specialty stores and independent retailers engaging in discount pricing may face very aggressive responses from those with deep pockets.⁴

1 Clarence Darrow, 1857-1938, Arthur and Lila Weinberg, *Verdicts Out of Court*, 1963.

2 *Section 46: Oligopoly and Predatory Pricing*, Rhonda Smith and David Round, 6 (1998) *Competition and Consumer Law Journal*, p 112.

3 *Wilcox, J Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1991) ATPR 41-128 at 52, 895.

4 Australian Competition and Consumer Commission, Submission 191, pp 35-36.

6.6 Mr John Brownsea, Executive Director, SA Small Retailers, sees predatory pricing as a major problem in the industry:

My concern about predatory pricing is that recently in one Adelaide suburb a major supermarket was selling cans of Coke for 50c. My member was buying cans of Coke for 97c. How predatory was that pricing?⁵

6.7 Mr Brownsea said that the problem lies with the fact that the major chains are prepared to lose money indefinitely in certain sites to wipe out the competition:

So there is a difference, I think, between fair competition, which is where something should be capable of being matched without a trader going broke, and a predatory price which is meant to destroy people if they do try and compete.⁶

6.8 Fellow South Australian small retailer, Mr Jon Symons, said that Coles and Woolworths ‘have got products on their shelves which we cannot even buy at through our warehouse’:

There is a huge problem. We would be better off going and purchasing the goods from these stores than buying them from our warehouse.⁷

6.9 At the Melbourne hearing, small retailer, Mr Ray Veal, told of one instance at the Gippsland Centre, Sale, where Safeway started ‘aggressively pushing pre-made bunches of cut flowers’:

Within three months, the florist at the other end of the complex – within the same complex, not out in the general shopping centre – was out of business because they could not compete with the cut flower arrangement and there was not enough income to sustain the business in the complex.⁸

6.10 Mr Veal said that, after the demise of the florist, the prices ‘have gone back up’.⁹

6.11 In Western Australia, Mr Neville Gale, Managing Director of Advantage Supermarkets, told of his experiences with Coles:

The sales were two to one in Advantage’s favour. To say that this got up the nose of Coles is an understatement. They put every resource that they possibly had, including the Melbourne office, to assist them to fight Advantage. One of their tactics was that, no matter what price I set on meat, they would meet my specials and then they would undercut it by five per cent. That is still the policy today. I can put rump steak out at \$5 per kilo

5 *Hansard*, Adelaide, 8 April 1999, p 183.

6 *Hansard*, Adelaide, 8 April 1999, p 183.

7 *Hansard*, Adelaide, 8 April 1999, p 181.

8 *Hansard*, Melbourne, 7 April 1999, pp 106-107.

9 *Hansard*, Melbourne, 7 April 1999, p 107.

when the rest of the market is \$10 and they will go under by five per cent under the \$5. They will not be beaten.¹⁰

6.12 Tobacconists also came forward with complaints of what they believed to be predatory pricing. Mr Trevor Beynon, Managing Director of Free Choice Stores, said that where tobacconists work on a five per cent gross profit, the major chains are working on minus one and minus two:

...so it is very difficult for an independent, especially when you have a situation right across Australia where the major chain and grocery stores come into every store two or three times a week, take your prices, and go back.¹¹

6.13 Mr Roger Drake owns 21 stores in South Australia and employs around 1,200 people:

I find it difficult when you have got a store that is alongside and wants to gain market share that it can sell a product for 89c and the rest of the chain can sell it for \$1.69. If they are going to have a pricing it should be right across Australia and subject obviously to freight, which covers the country stores and covers the freight component.¹²

6.14 During the first stage of the inquiry, the Committee asked Woolworths to explain their pricing policy. Mr Roger Corbett, Chief Executive Officer, assured the Committee that Woolworths did not engage in predatory pricing, and that it does not set out to undercut others:

We would match pricing from competitors. We would vigorously compete with Coles and Franklins. If it were a small retailer, we would never reduce our selling price as a matter policy. I cannot say there is not an exception across all our stores in Australia, but as a policy we would never reduce our price below their selling price of a particular item.¹³

6.15 Mr Corbett said that Woolworths endeavour to deliver to country Australia at prices which are 'very comparable to city prices'. Mr Corbett said that the only differential is freight, which applies in limited examples. Mr Naum Onikul, Chief General Manager of Supermarkets, explained Woolworths' pricing policy as it applies to country New South Wales:

10 Mr Neville Gale, Managing Director, Advantage Supermarkets WA, *Hansard*, Perth, 9 April 1999, p 248.

11 *Hansard*, Brisbane, 16 April 1999, p 513.

12 *Hansard*, Adelaide, 8 April 1999, p 216.

13 *Hansard*, Canberra, 6 April 1999, pp 10-11.

In a majority of rural areas right throughout New South Wales we sell at the same price as we do in metropolitan areas. We do not recover freight around New South Wales.¹⁴

6.16 During the second stage of the inquiry the Committee took *in-camera* evidence at Dubbo, and tabled newspaper advertisements, which revealed a marked difference between Woolworths' Sydney and Dubbo prices for Wednesday, 7 July 1999. Table 6.1 compares like items advertised in Sydney and Dubbo on that day.

Table 6.1

Woolworths Sydney/Dubbo prices, Wednesday, 7 July 1999

Sydney	Item	Dubbo
\$3.49/kg	Pork Forequarter Roast	\$2.99/kg
\$2.99/kg	BBQ Blade Steak	\$2.79/kg
\$5.99/kg	Beef Roasting Pieces	\$5.49/kg
\$4.49/kg	Roasting Leg of Pork	\$3.99/kg
\$3.29	500g Bega Cheese Slices	\$2.47
\$2.77	Sargents Frozen Meat Pies	\$1.99
\$0.99	1.25 litre Pepsi	\$0.79
\$5.99	McCain Frozen Pizza	\$4.99
\$3.99	800g Corn Flakes	\$2.99

Source: Sydney Daily Telegraph (7 July 1999), Dubbo Daily Liberal (7 July 1999).

6.17 When asked to explain this pricing differential at the second round of Canberra hearings, Mr Corbett said:

I cannot comment, without doing some homework, on individual marketing situations that may have existed. There might have been a promotion in that town: there might have been a competitive situation in that particular town. There might have been promotional activity for a reason that I am not aware and I cannot, I am sure you would understand, be aware of each individual situation.¹⁵

6.18 On 2 August 1999, Woolworths provided the Committee with additional information on this matter. This additional information stated that, each week, there is a State-wide 'pricing specials' advertising package produced for Woolworths' stores, which is customised for particular areas. This means that some State-wide standard prices may be reduced in some stores to reflect competitor activity, and in addition, for 'special occasions' such as new store openings and the re-opening of refurbished stores:

14 *Hansard*, Canberra, 6 April 1999, p 22.

15 *Hansard*, Canberra, 12 July 1999, p 1082.

The example provided by Mr Nairn at the recent Canberra hearing concerning discrepancies between advertised meat prices in Dubbo and Sydney on the same day fits into the 'special occasion' category. Woolworths Dubbo store was recently closed to enable it to be renovated and refurbished and was offering some special prices to attract customers back to the store following its re-opening.¹⁶

6.19 The Committee conducted further investigations into this matter. Those investigations revealed that:

- Woolworths Supermarket at the Riverdale Centre, Macquarie Street, Dubbo, was never closed prior to, during, or after the period of extensive renovations at the Centre; and
- During the period between 7 July 1999 and 4 August 1999, price discrepancies continued to occur between Woolworths' Dubbo stores and other State-wide stores as evidenced by Tables 6.2, 6.3, 6.4 and 6.5 below.

Table 6.2

Woolworths Sydney/Dubbo prices, Wednesday, 14 July 1999

Sydney	Item	Dubbo
\$8.99/kg	Prime quality rump steak	\$7.99/kg
\$4.99	Nestle Milo	\$3.99
\$3.49/kg	Lamb forequarter chops	\$2.99/kg
\$5.29/kg	Roasting leg of lamb	\$4.99/kg
\$2.49/kg	Country style thick sausages	\$1.99/kg
\$10.99/kg	Double smoked leg ham	\$8.99/kg
\$0.99 each	Chicken kebabs	\$0.79 each
\$2.59/kg	Chicken drumsticks	\$2.29/kg
\$6.99/kg	Sliced silverside	\$5.99/kg
\$3.97	Daily juice fruit juice	\$3.47
\$2.47	McCain Frozen Pizza	\$1.99
\$1.87	Lucky dog food	\$1.79
\$3.95	Sorbent toilet tissue	\$3.49
\$1.97	Spree laundry powder	\$1.69

Source: Sydney Daily Telegraph (14 July 1999), Dubbo Daily Liberal (14 July 1999).

16 Woolworths, Additional Information, 229D, p 2.

Table 6.3

Woolworths Sydney/Dubbo prices, Wednesday, 21 July 1999

Sydney	Item	Dubbo
\$0.99	Campbells tomato soup	\$0.79
\$4.49/kg	Roasting leg of pork	\$3.99/kg
\$3.49/kg	Pork forequarter roast	\$2.99/kg
\$5.89	Family roast chicken	\$5.79
\$8.99/kg	Chicken breast fillets	\$7.99/kg
\$8.99/kg	Sliced honey ham	\$7.99/kg
\$8.99/kg	Sirloin T-bone steak	\$7.99/kg
\$3.49/kg	Bacon bones	\$2.99/kg
\$7.49/kg	Pork midloin or rib loin chops	\$6.99/kg
\$1.97	Arnott's chocolate biscuits	\$1.75
\$1.39	Flora spread	\$1.37
\$0.95	Birds eye frozen peas	\$0.79

Source: Sydney Daily Telegraph (21 July 1999), Dubbo Daily Liberal (21 July 1999).

Table 6.4

Woolworths Sydney/Dubbo prices, Wednesday, 28 July 1999

Sydney	Item	Dubbo
\$9.99/kg	Sliced lite leg ham	\$8.99/kg
\$7.99/kg	Chicken thigh fillets	\$6.99/kg
\$3.99/kg	Thin frankfurts	\$2.99/kg
\$5.99/kg	Diced bacon	\$4.99/kg
\$5.99/kg	Australian fetta cheese	\$5.49/kg
\$7.99/kg	Prime grilling boneless rib steak	\$7.49/kg
\$3.49/kg	Chuck steak	\$2.99/kg
\$8.99/kg	Prime veal leg steak	\$7.99/kg
\$1.99/kg	Tangelos	\$1.89/kg
\$0.99each	Lettuce (Iceberg)	\$0.89 each
\$2.97	Sorbent toilet tissue (pkt 4)	\$2.69
\$1.37	Yoplait yoghurt (2x200g)	\$1.17
\$5.99	Size 21 frozen chicken	\$4.99

Source: Sydney Daily Telegraph (28 July 1999), Dubbo Daily Liberal (28 July 1999).

Table 6.5

Woolworths Sydney/Dubbo prices, Wednesday, 4 August 1999

Sydney	Item	Dubbo
\$2.69/kg	Honey murcott mandarins	\$1.99/kg
\$0.99/kg	Loose carrots	\$0.89/kg
\$1.49/kg	Butternut pumpkin	\$1.29/kg
\$9.99/kg	Sliced premium leg ham	\$7.99/kg
\$5.99 each	Large roast chicken	\$4.99 each
\$4.99/kg	Roasting leg of lamb	\$4.49/kg
3.99/kg	Cocktail frankfurts	\$2.99/kg
\$2.39/kg	Country style thick sausages	\$1.99/kg
\$4.99 each	Fresh No. 15 chicken	\$3.99 each
\$3.49	Large block carrot cake	\$2.99
\$5.99/kg	Diced ham	\$4.99/kg
\$1.67	Meadow Lea Margarine 500g	\$1.19
\$2.67	Sargents Frozen Meat Pies	\$1.99
\$9.97	Moconna Freeze Dried Coffee 200g	\$8.99
\$2.79	Symphony Ultra Toilet Tissue	\$1.99
\$9.99	44 litre container	\$8.99

Source: Sydney Daily Telegraph (4 August 1999), Dubbo Daily Liberal (4 August 1999).

6.20 Mr Alan Williams, Managing Director of Coles Supermarkets, said that there is only one time when Coles would go down on price:

If you are selling ten cartons of bananas a day and, for whatever reason, yesterday you only sold three and you have got three cartons left over, you need to move them through. So the floor manager does have the flexibility to take them down from \$2.99 to \$1.99 and to clear that stock before it gets thrown out.¹⁷

6.21 In 1993, South Australian retailer, Mr Mark McLauchlan, saw an opportunity in Alice Springs to open an independent store in competition with Woolworths and Coles. Mr McLauchlan said that his price checks of Woolworths and Coles revealed that there were 'very healthy margins and that perhaps we could go in there and make a statement about price and get a share of the business':

So we went in with a 35,000 square footer. I guess the mistake I made was making a big noise about how much cheaper we were going to be than Coles

17 Hansard, Canberra, 6 April 1999, pp 40-41.

and Woolworths. We applied what was a normal retail margin in an Adelaide metropolitan store but with a freight component added in. We thought, 'We know we can run a business on these costs and that at that margin we will make a dollar'. We found that that was substantially cheaper than Coles and Woolworths, so we thought, 'Here's an edge', and we really pushed it. Of course, what happened was that Coles and Woolworths overnight dropped their across-the-board pricing on every product in the store to a level that was equivalent to our cost price into the warehouse in Adelaide.¹⁸

6.22 Mr McLauchlan said that the store is now owned by Coles.¹⁹

6.23 Mr Ian Cornell, Chief Executive Officer of Franklins, said that if Franklins are undercut by a competitor then they will drop their price to match, but will not initially set out to undercut a competitor:

We set our price; we set it on the basis of having a discount strategy. That means being marginally cheaper, and if someone then is undercutting us, as a policy we will go out and match them. I do not see that as predatory pricing, I see that as trying to maintain your competitive situation and your business.²⁰

6.24 Mr Joe Natoli, who operated fruit and vegetable stores in the Maroochy Shire not long ago, told the Committee of his experiences with Franklins 'Big Fresh':

I can remember one day we advertised sultana grapes at \$1.79 a kilo, only to find that Big Fresh had them at \$1.99 a kilo. What an embarrassment it was for them to be seen in the paper to have a price that was higher than ours, because their policy was it had to be lower. When I got back they had already dropped their price to \$1.69 and I said, 'Lets have it out. Let's see how far we can take it'. We did and within two hours they had their sultana grapes at 49c a kilo. I paid \$1.20 a kilo for those sultana grapes and they were selling them for 49c a kilo. By the end of the afternoon they went up to 69c a kilo.²¹

6.25 The Committee has raised these concerns and others relating to pricing by the major chains with the ACCC in private hearings. The Committee notes that the ACCC intends to actively investigate allegations of predatory pricing, and that it is currently reviewing information provided by South Australian retailer Mr Roger Drake (see para 6.13) with a view to re-opening an investigation into a matter raised by him in the past.

6.26 The current state of the law with regard to predatory pricing was also criticised by some industry participants. Mr Alan McKenzie, Director/National

18 *Hansard*, Adelaide, 8 April 1999, p 221.

19 *Hansard*, Adelaide, 8 April 1999, p 222.

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

21 *Hansard*, Brisbane, 16 April 1999, p 487.

Spokesman of NARGA, said that the problem with predatory pricing is getting hard evidence:

You hear a lot of anecdotal evidence about predatory activity, but the hard thing is getting someone to stand up and give the commission the evidence because the commission will not undertake cases unless they believe they are on very strong grounds.²²

6.27 Mr Chris Rankin, Executive Officer of the Newsagents Association of South Australia, called for a less onerous test of proof to be set in place in section 46 of the *Trade Practices Act*, such as a reverse rebuttal or reverse onus test:

The difficulty you have with predatory pricing is if you look through the Act nobody wants to touch it because it is really hard to prove. It is exceedingly difficult to prove.²³

6.28 With regard to a reverse onus test, instead of the applicant having to prove its case, the onus shifts to the defendant or respondent to show that it is not guilty. Mr Brian Kewley, Chairman of the Law Council of Australia's Trade Practices Committee, said that this suggestion is 'contrary to the whole tradition of our law and is most unreasonable'.²⁴ The Law Council Committee believes that reversing the onus of proof would add little to section 46, particularly in light of section 46(7), and the existing rules about onus of proof in litigation.²⁵

6.29 In 1989, the High Court decision in *Queensland Wire Industries Pty Ltd v Broken Hill Propriety Co Ltd (QWI v BHP)*²⁶ clarified the operation of section 46, which seeks to prevent large companies from misusing their market power to the detriment of smaller companies. The Committee therefore sought the views of the Law Council Committee as to why, during the course of the inquiry, so many witnesses consistently complained of the difficulty in proving predatory pricing under section 46. Mr Kewley said:

...I have not done an update but, in a submission in 1991 when similar issues arose, we said that, where section 46 was pleaded as a primary basis of relief, five of the cases were successful out of nine. This is obviously out of date now; it is quite a long time ago. But it is some indication that it is not true to say that there are not many cases and they all fail.²⁷

22 *Hansard*, Canberra, 6 April 1999, p 87.

23 *Hansard*, Adelaide, 8 April 1999, p 234.

24 *Hansard*, Canberra, 13 July 1999, p 1148.

25 Law Council of Australia, Submission 283, p 6. In addition, section 46(7) enables a court to look at all the surrounding circumstances in relation to the particular matter. If it is by inference drawn from those circumstances that misuse of market power (eg. predatory pricing) can be found, then that is enough to prove a case.

26 (1989) 167 CLR 177; [1989] ATPR 40-925.

27 *Hansard*, Canberra, 13 July 1999, p 1150.

6.30 The Committee referred Mr Kewley to an Australian Law Journal article of January 1998 titled: *QWI v BHP: A Flash in the section 46 Pan?*,²⁸ which argued that the early promise of *QWI v BHP* had not been realised. Out of 29 cases brought under section 46, five had been successful – a failure rate of around 80 per cent.²⁹

6.31 The Committee therefore sought the views of Professor Allan Fels, Chairman of the ACCC, on the merits of a reverse 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.³⁰

6.32 The merits of supplementing the present ‘purpose’ test of section 46 with an ‘effects’ test was also considered during the course of the inquiry. One view is that an ‘effects’ test would not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct. In order to avoid frivolous and capricious actions, any such change to section 46 might require only the ACCC or the Minister to bring actions in highly concentrated markets. Once proved, in order to protect private rights, damages claims would be open to affected parties. In conjunction with this, it was also considered that it may be appropriate to provide for authorisation in respect of conduct which is likely to breach the ‘effect’ provisions, but not the ‘purpose’ provisions (where the anti-competitive conduct would have been intentional and thus ought not be able to be authorised). However, the Committee is of the view that such far reaching changes to the law may create much uncertainty in issues dealing with misuse of market power.

6.33 Further consideration was given to recommending a reversal of the onus of proof, whilst maintaining the current ‘purpose’ test in section 46. For example, if the ACCC could establish that a firm, which has a substantial degree of market power, has used that power, the firm would bear the onus of proving that it did not have one of the requisite purposes. Another alternative would be to remove ‘purpose’ as an element, but make the absence of purpose of defence. This would involve the firm, which has used its market power, to be presumed to have used it for an anti-competitive purpose, but with such a presumption able to be rebutted.

6.34 The Committee also considered the merits of recommending that the ACCC be empowered to undertake representative actions and to seek damages on behalf of

28 The Australian Law Journal, Volume 72, January 1998, p 53, by Mr Peter J Shafron (LLM, General Counsel, James Hardie Industries Ltd).

29 *Hansard*, Canberra, 13 July 1999, pp 1150-51.

30 *Hansard*, Canberra, 13 July 1999, p 1163.

individuals under Part IV of the *Trade Practices Act*. Mr Hank Spier, General Manager of the ACCC, said:

We have been on the record as strongly supporting moving from a fairly odd situation, where we can get representative action for some of the Act, especially Part V, but not for the competition provisions. We can use witnesses in court for a price fix or a misuse of market power case. We can say, ‘Thank you very much for helping us. As to damages, you have to take your own action’. Telling people that is not easy and it is not very efficient. We think strongly that there should be an amendment.³¹

6.35 The Committee notes that the Law Council Committee supports the view that the ACCC should be given additional powers to bring representative actions on behalf of small business to enforce the provisions of Part IV of the *Trade Practices Act*.³² The Committee agrees. Litigation is extremely expensive, long running and disruptive to small retailers. The Committee considers that their interests in this regard would be best served by the ACCC.

6.36 With regard to reversing the onus of proof in section 46 of the *Trade Practices Act*, the Committee notes the arguments presented from proponents on either side of the debate. However, the Committee believes that its core recommendations will address predatory conduct, but as a safeguard, intends to revisit the ‘reverse onus of proof’ test when the Committee is re-constituted in 3 years time.

Unconscionable conduct

6.37 Conduct is deemed unconscionable where it can be seen in accordance with the ordinary concepts of humanity to be so unfair and against conscience that a court would intervene,³³ or so unreasonable and oppressive so as to affront minimum standards of fair dealing.³⁴ A transaction will be set aside as being unconscionable wherever one party by reason of some condition or circumstance is placed at a special disadvantage vis-à-vis another, and unfair or unconscionable advantage is then taken.³⁵

6.38 The new unconscionable conduct provision of the *Trade Practices Act* – section 51AC – is designed to give small business the same legal protection available to consumers under the *Trade Practices Act*. However, it applies only to transactions of less than \$1 million.

31 *Hansard*, Canberra, 13 July 1999, p 1171.

32 Law Council of Australia, Trade Practices Committee, Submission 283, p 1.

33 *Zoneff v Elcom Credit Union Ltd* (1990) 94 ALR 445; ATPR 41-058.

34 *Commonwealth v Verwayen* (1990) 170 CLR 394; 95 ALR 321.

35 *Commercial Bank of Australia Lt v Amadio* (1983) 151 CLR 447; 46 ALR 402; *Blomley v Ryan* (1956) 99 CLR 362.

6.39 The ACCC recently launched its guideline, *Fair game or fair go?* ACCC Chairman Professor Allan Fels said that the guideline reflects real life issues that have arisen in the course of 'settling in' the new 51AC provision:

The guideline will help small business to get a fuller understanding of whether or not they have been subjected to unconscionable conduct under the Act. Importantly, it also provides practical advice on avoiding problems in commercial relationships and tips on maintaining such relationships and resolving differences.³⁶

6.40 Professor Fels said that in the first six months of this year, 552 inquiries/complaints that included allegations of unconscionable conduct had been received by the ACCC. Of these, 161 have received further action by the ACCC, while some are now with legal counsel for further advice.³⁷

6.41 Professor Fels believes that the ACCC is liaising more actively with small businesses, which he believes is one of the reasons why more complaints are coming forward. However, Professor Fels said that many of the complaints do not raise *Trade Practices Act* issues, and therefore the ACCC does not take them further:

So the strength or weakness of the ACCC is that it will only really deal with illegal behaviour.³⁸

6.42 The National Farmers Federation (NFF) raised concerns that the ACCC have been inactive in the area of grocery retailing.³⁹ Professor Fels said that the ACCC acts fast when the law is clear:

But the reason for the delay is, first and foremost, that the law is somewhat complicated. Typically, you are dealing with big business represented by such excellent people as those we heard from the Law Council today, who usually can think up a few reasons why anything is lawful. We then have to bring in heavier guns.⁴⁰

6.43 In May 1997, the Reid Report recommended that:

The Australian Competition and Consumer Commission be proactive in promoting compliance with the proposed new unfair conduct provision of the *Trade Practices Act 1974*.

Due to the ineffectiveness of the Australian Competition and Consumer Commission in small business matters in the past, the Committee believes

36 Australian Competition and Consumer Commission, Media Release, *Fair Game or Fair Go?*, 9 July 1999.

37 Australian Competition and Consumer Commission, Media Release, *Fair Game or Fair Go?*, 9 July 1999.

38 *Hansard*, Canberra, 13 July 1999, p 1173.

39 National Farmers Federation, Submission 225, p 2.

40 *Hansard*, Canberra, 13 July 1999, p 1173.

there is an urgent need to establish a body of precedents under the new provisions as quickly as possible.⁴¹

6.44 Professor Fels said that the ACCC was not applying any special attention to ‘create’ section 51AC cases:

There has been some anxiety about a Ministerial Direction, and special funding, for cases relevant to section 51AC and small business. But the Ministerial Direction does not force the Commission to run a section 51AC case to conclusion even though it could be better settled administratively. Nor does it require a case with little merit to be run by the Commission.⁴²

6.45 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.

6.46 Despite this, the Committee acknowledges that many of the complaints and concerns raised during the course of the inquiry may not raise competition-related issues under the *Trade Practices Act*. The Committee is therefore of the view that there is a lacuna, or gap, with respect to ‘remedies’ available to small retailers in their dealings with big business. The Committee believes that the establishment of a Retail Industry Ombudsman through which small business can bring complaints or queries for speedy resolution will address this problem. In order to enhance transparency, the Committee sees the need for the Retail Industry Ombudsman to produce a bi-annual report to the Parliament.

41 House of Representatives Standing Committee on Industry, Science and Technology, *Finding a balance: towards fair trading in Australia*, May 1997, p xv.

42 Australian Competition and Consumer Commission, Media Release, *Fair Game or Fair Go?*, 9 July 1999.

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 Nielsen measure of market share referred to in Chapter 4, which relates to dry/package 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:

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.

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- 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 Meidl'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 law⁵⁴. 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

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; what 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 Chadzyska, 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.

CHAPTER 8

THE FUTURE OF THE RETAILING SECTOR

*What is the consumer getting out of the current structure? Are they missing out on anything that they should have or in the future would they miss out on something?*¹

8.1 A common theme which emerged from both the submissions and evidence was the pace at which the retailing sector is evolving. This evolution is being driven both by input factors such as technological developments, and demand factors such as changes in consumer preferences.

8.2 Factors identified as being likely to change the landscape of the Australian retailing sector over the next few years include:

- the entry of foreign players;
- the expansion of retailers into new areas; and
- the use of technology to expand market reach, reduce prices, increase the range of products available to consumers, and improve the convenience by which they can be delivered.

New entries

8.3 Two large international retailers which are often mentioned as possible entrants into the Australian retailing sector are Wal-Mart and Aldi.

Wal-Mart

8.4 The first Wal-Mart store opened in Arkansas in 1962. Today there are around 2,900 Wal-Mart stores and associated outlets in the US, with more than 780,000 employees.²

8.5 The company began to expand internationally in 1991, and now operates over 700 stores across Mexico, Argentina, Brazil, Canada, Germany, Puerto Rico, China and Korea. Employment at the international stores stands at 130,000.

8.6 Many Wal-Mart stores are 'Supercentres' which include over thirty departments including electronics, toys, fabrics and crafts, gardening, jewellery, shoes, pharmacies, and restaurants. The grocery areas generally feature a bakery, delicatessen, frozen food, meat, dairy and fresh produce departments. Products available from Wal-Mart via the Internet include books, CDs, videos, sporting goods and computer software.

1 Mr Matthew O'Neill, Senior Policy Officer, Australian Consumers Association, *Hansard*, Canberra, 13 July 1999, p 1119.

2 <http://www.wal-mart.com/corporate/>. The Wal-Mart Annual Report 1999 is also available at this site.

8.7 Wal-Mart reported annual net sales of US\$137 billion in the year ending 31 January 1999. In their submission NARGA, quoting from a book by Mr Bob Ortega, referred to the market power exercised by Wal-Mart:

Ortega correctly notes that Wal-Mart's size and scope...[sales of] US\$440 from every person in the US – gives the company vast influence over what the US consumers buy and the way they buy it...Ortega blames Wal-Mart, at least in part, for the undesirable social outfalls of mega stores.³

8.8 The 1999 Annual Report notes that plans are to develop a further 75 to 80 new retail units outside of the US. In an interview published in that Report, Wal-Mart's Chairman Mr Rob Walton stated:

Over the next five years the international division should represent up to one-third of total sales and earnings growth of the company. In addition to being the largest retailer in Canada and Mexico, we now have stores in Asia, Europe and South America and will continue to grow those markets as by the acceleration in the sales well as look for other areas where we can build on the Wal-Mart name.⁴

8.9 In June 1999, Wal-Mart launched a takeover bid for Asda, Britain's third largest supermarket chain, with 229 stores.⁵ On the basis of its expansion strategies, the Committee notes Wal-Mart's potential to expand into markets such as Australia.

Aldi

8.10 Aldi, which first opened in Germany over 40 years ago, now has over 4,000 stores throughout Europe and the US. Aldi commenced operations in the UK in 1990, and now has some 230 stores in that country.

8.11 Aldi's stores offer a limited range, including dry groceries, fresh fruit and vegetables, chilled and frozen foods, beers, wines and spirits, and household goods.⁶

8.12 As indicated in Chapter 5, Aldi has given a very strong indication that it intends to enter the Australian grocery market at some stage in the future.

Developments in Retailing

Petrol

8.13 The boundary between grocery and petrol retailing is becoming increasingly blurred. While Woolworths expands its petrol retailing network, two of the major oil companies, Caltex and Mobil, are increasing their involvement in grocery retailing,

3 National Association of Retail Grocers of Australia, Submission 201, p 127.

4 Wal-Mart Annual Report 1999, p 5.

5 'Wal-Mart Announces Recommended Cash Offer for ASDA', Press Release, 14 June 1999.

6 <http://www.aldi-stores.co.uk>

and two others, BP and Shell, are also likely to expand their retailing offerings over the next few years.⁷

Caltex

8.14 In February 1999, Caltex, which already own a network of 110 convenience stores, opened a supermarket in Sydney under the IGA banner. Open around the clock, the supermarket is about three times the size of a convenience store and includes petrol retailing, a fruit and vegetable section, a serviced delicatessen and a bakery.⁸

8.15 In April 1999, Caltex opened its first stand-alone convenience store in Brisbane (without its traditional petrol offering). The store sells a wide range of products including fresh salads, pastas, soups, sandwiches, produce, and other items typically available at convenience stores.⁹

8.16 Caltex has a further five supermarkets in the planning stages, and the total network of convenience stores (including stand-alone stores without petrol) is projected to grow to 200 by May 2001.¹⁰

Mobil

8.17 In late 1998 Coles commenced a joint venture trial with Mobil Oil, combining Mobil fuel with groceries, fruit, vegetables, meat, bakery drive-through café and a Red Rooster store. This has been reported to be a six-month joint venture trial, and will be replicated in three other sites, with a review taking place in mid-2000. If successful, it is anticipated that a national rollout will then proceed.¹¹

Woolworths

8.18 Woolworths Petrol Plus has been expanding the number of its petrol retailing sites since the opening of its first in 1996. By early 1999, there were around 90 outlets.

Banking

8.19 A development which has attracted some publicity in recent times is the expansion in the range of banking services on offer in the major chain stores.

8.20 During the course of the inquiry, Woolworths announced their Ezy Banking joint venture with the Commonwealth Bank, which will allow customers to undertake

7 The Australian, *Pumping out profits*, Michael McGuire, 12 February 1999.

8 Caltex Australia, *Caltex announces service station supermarket chain*, Media Release, 5 February 1999.

9 Caltex Australia, *Caltex launches its first stand alone convenience store without petrol*, Media Release, 13 May 1999.

10 Caltex Australia, *Caltex launches its first stand alone convenience store without petrol*, Media Release, 13 May 1999.

11 Australian Financial Review, *Coles and Mobil get a fuel for the market*, Bill Pheasant, 1 December 1998, p 21.

a wide range of banking transactions, including making deposits and withdrawals and checking account balances, either at the check-out or in dedicated banking centres inside the store. Customers will have access to more fee-free transactions than is currently the case.¹²

8.21 In contrast to the Woolworths-Commonwealth Bank venture, the banking facilities being rolled out at Coles stores will not be tied to one particular financial institution, and are likely to vary across the country. By the middle of 1999 there were 30 stores nationally with banking services, with plans to roll out another 50 within six months.¹³

Technological developments

8.22 The Committee recognises that technological change has had an important impact on recent developments in the retailing sector, as both retailers and wholesalers exploit new means of achieving lower inventories, a wider range of goods, higher product turnover and faster receipt of goods. New technologies such as self-scanning are also on the horizon.¹⁴

8.23 Enterprises are increasingly using technology to learn more about their customers in order to optimise their sales. Better information has, for example, allowed firms to match inventories closer to customer needs, and thus reduce the need for mark-downs and discount sales.¹⁵

Electronic Commerce and the Internet

8.24 Electronic commerce between business and consumers is a rapidly developing area of economic activity, with the potential to substantially change the structure, conduct and performance in the retailing sector. Of particular import is the ability of small and medium specialty retailers to benefit from Internet trade by offering their goods to an international audience.¹⁶

8.25 In principle, entry barriers to electronic commerce are low, and costs (and thus prices) are likely to be lower than for standard shops.¹⁷ By increasing competition and reducing the costs of establishing and running a retailing business, electronic commerce may serve to maintain downwards pressure on consumer prices.

12 Commonwealth Bank web site at <http://www.commbank.com.au/Today/ShareholderInfo/def-prism.htm>

13 Foodweek (and Liquor Week), *Banking just part of Coles' improvement of services*, Simone Zenoni, 26 July 1999.

14 OECD Working Papers, Vol V, Economics Dept Working Papers, No.180, *Regulation and Performance in the Distribution Sector*, No. 75, Paris 1997, p 14.

15 OECD Working Papers, Vol V, Economics Dept Working Papers, No.180, *Regulation and Performance in the Distribution Sector*, No. 75, Paris 1997, p 14.

16 Department of Foreign Affairs and Trade, *Putting Australia on the New Silk Road*, web site at <http://www.dfat.gov.au/nsr/>

17 Australian Retailers Association, Submission 57, p 30.

8.26 Internet shopping for groceries is still in its infancy in Australia. Woolworths' Homeshop is currently available in many Sydney suburbs, centred on their stores in Parramatta and Warringah.¹⁸ Coles On-Line is currently available in a limited number of suburbs across the south-east of Melbourne.¹⁹

8.27 Other retailers and service providers in Australia such as banks, bookshops and computer stores already have a well-established presence on the Internet. *Greengrocer.com.au*, which delivers fruit and vegetables across Sydney on the basis of ordering via the Internet, demonstrates how the Internet can be used by small specialty food retailers to provide competition in markets where the major chains are established.

8.28 In their submission, the Australian Retailers Association referred to a poll taken at an international food convention in 1998, which revealed that over 40 per cent of food retailers believed that 20 per cent of food sales would be transacted via home shopping by the year 2010. If translated to today's market in Australia, the amount of food transacted on the Internet would be equivalent to the whole of the independent grocery sector or a quarter of the major chain's sector.²⁰

8.29 There is widespread evidence that the retailing sector is dynamic and responsive to consumer preferences. The expansion of two of the major chains into petrol retailing, mirrored by the expansion of some of the oil companies into grocery retailing, demonstrates the extent to which retailers are aiming to increase convenience for consumers. Joint ventures between the major chains and the banks are geared towards saving consumers both time and money, via a reduction in transaction fees.

18 Woolworths web site at <http://www-ets.woolworths.com.au/ets/owa/entry>

19 Coles web site at <http://www.colesonline.com.au/new.htm>

20 Australian Retailers Association, Submission 57, p 30.

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 Chicago², 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 time⁴.

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 competitors⁶.

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 market⁸, 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 quality⁹. 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:

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 position¹².

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 competition¹⁵. 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 market¹⁶.

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 competition¹⁷.

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 taken¹⁸.

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 consumers¹⁹.

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 companies²⁰.

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 definition²¹. 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.

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 innovation²³.

Senator Andrew Murray

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>

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

Senator the Hon Ron Boswell, Leader of the National Party of Australia in the Senate and Parliamentary Secretary to the Minister for Transport and Regional Services: 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.

Throughout this inquiry the Committee heard extensive evidence on the loss of market share from small independent retailers to the large grocery chains, across a range of retailing sectors.

As stated in Chapter 3 “the evidence revealed that the growth of the major chains over the last two decades has been at the direct expense of the independents, whose market share and profitability continues to decline.”

Across Australia, and specifically in rural and regional Australia the committee received evidence of the closure of many small independent retailers due to the operations of shopping centre developments, anchored and occupied by the chains and their associated businesses. This covered a broad range of retailing including grocery, florists, stationery, butchers, greengrocers, tobacconists, hardware and petrol retailing.

Evidence was given of the closures and business losses of locally owned small businesses and of the impact on their country towns and regions. In relation to grocery retailing, evidence was received of the threat from the loss of the crucial critical mass necessary for an independent wholesale sector to serve these independent retailers.

In response to one of the proposals of NARGA to place a cap on market share of the majors, very strong reasons were given to the Committee against imposing a market cap on the grocery retailing sector, as outlined in the Executive Summary.

Past closures and losses of small businesses cannot be undone. However, there are grounds for concern in the present situation facing the independent retailer as to how to sustain a sufficient critical mass for the continuation of the independent retailing sector.

A strong independent sector is essential to provide increased competition for both consumers and suppliers. This leads to increased opportunity for the introduction of new and innovative products into the market and for the growth of further small business opportunities which is of significant importance in rural and regional communities. In our existing oligopolistic market place dominated by three majors, there needs to be a range of buyers to counter the weak market power of suppliers, such as primary producers and small manufacturers.

Amongst the small business sectors, evidence was given of the equitable and specific provision of health services by pharmacies in rural and regional Australia. It is also noted that some significant retail areas are currently the subject of decisions reached under National Competition Policy reviews.

Various State Governments have reached decisions on trading hours and liquor stores, and arrangements have been reached by the industry on newsagencies. There is currently a Federal Government inquiry into pharmacies.

I believe that the recommendations of the relevant State Government reviews under National Competition Policy should be accepted without monetary penalty imposed on the states from the National Competition Council for their review conclusions.

In addition to the Committee's recommendation I propose the following recommendation :

Recommendation

It is recommended that restricted licensing arrangements in certain retail areas including trading hours are maintained at the discretion of the State or Federal Governments without any imposition of penalty from the National Competition Council.

Senator Ron Boswell

Appendix 1 **Conduct of Inquiry**

Appointment and terms of reference

1.1 On 8 December 1998, the House of Representatives agreed to a resolution appointing the Committee and setting out its terms of reference and its powers. The following day the Senate agreed to the resolution after making an amendment relating to the membership of non-Government Senators. On 10 December, the House agreed to the Senate amendment.

1.2 The resolution appointed the Committee to inquire into and report on:

- a) the degree of industry concentration within the retailing sector in Australia, with particular reference to the impact of that industry concentration on the ability of small independent retailers to compete fairly in the retail sector;
- b) overseas developments with respect to this issue, highlighting approaches adopted in OECD economies; and
- c) possible revenue-neutral courses of action by the Federal Government (ie courses of action that do not involve taxation reform).

1.3 The Committee members were not all appointed until the Senate first met after the summer break on 15 February 1999.

1.4 The Committee met on 16 February 1999 and decided that submissions should be lodged by 26 March 1999. It also decided that it would adopt a wide interpretation of its terms of reference. It agreed that an examination of the purchasing practices of the major retailers, especially those relating to purchases from primary producers, came within the scope of the inquiry, as did the impact of concentration in the retailing sector on rural and regional communities and on consumers. However, it decided that it would not consider the issues relating to retail tenancies in shopping centres. These were addressed in detail in the May 1997 report of the House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance Towards Fair Trading in Australia* (the Reid Report), and have been the subject of on-going reform at the State and Territory level.

1.5 The Committee issued a press release on 16 February 1999 outlining its intention to give a broad interpretation to the terms of reference. In the release it also said that it was prepared to receive submissions in confidence and hear witnesses in private session if necessary. It noted that some individuals wishing to criticise the purchasing practices of major retailers might be concerned that, if they did so publicly, they might be subject to some adverse response in the marketplace.

Advertising the inquiry

1.6 Advertisements seeking submissions were placed in the national press and in the main rural paper in each State on various days between 19 and 25 February 1999. In addition, the Committee wrote to over one hundred organisations and individuals advising them of the inquiry.

1.7 A wide range of individuals and organisations made submissions. This, along with a substantial degree of media publicity, reflected the level of interest throughout the broad community.

Evidence to the inquiry

1.8 The Committee received 332 written submissions (see Appendix 2), including one submission endorsed by over 500 signatories. In addition, it received two pro forma letters, consisting of 70 and 410 letters, respectively. Most of the submissions were authorised for publication, but some were accepted in confidence.

1.9 During the course of the inquiry, the Committee also received additional information relating to the written submissions, details of which are listed in Appendix 3.

Course of the inquiry

1.10 The first stage of the inquiry sought to establish and analyse the main contentions put forward by industry participants and other organisations. Public hearings were held in Canberra, Melbourne, Adelaide, Perth, Sydney and Brisbane. Those who appeared before the Committee included representatives from the major chains, independent industry associations and their members, independent wholesalers, primary producers, manufacturers, and the retail employees' union.

1.11 The second stage of the inquiry sought the views of regional Australia. The Committee held public hearings in Launceston, Bendigo, Cooma, Dubbo, Bundaberg and Kingaroy.

1.12 The final stage of the inquiry included three days of public hearings in Canberra, where the major chains were given the opportunity to respond to the concerns raised during the first stages. The Committee also heard evidence from manufacturers, market analysts and the Australian Competition and Consumer Commission.

1.13 A total of 183 witnesses gave evidence (some appearing twice) with 19 of those appearing *in camera*. Details of the witnesses appearing are at Appendix 4.

1.14 *Hansard* recorded 1,379 pages of evidence (including 127 pages of *in camera evidence*) at the Committee's hearings. The transcripts of evidence are available on the Parliament's Internet website at :

<http://www.aph.gov.au>

1.15 The Committee wishes to acknowledge the assistance provided by the Australian Consumer and Competition Commission, in particular, Chairman, Professor Allan Fels, General Manager, Mr Hank Spier, and Director of Mergers and Acquisitions, Mr Tim Grimwade.

1.16 The Committee wishes to thank all those who contributed to the inquiry.

Appendix 2 List of Submissions

Sub	Name	Company	State	Received
1.	Wicks, G and V	Hillsborough Limousins	QLD	22/1
2.	Davies, Mr K	Kyogle Council	NSW	19/2
3.	Vezzaro, Mrs R & others	Patricia Florist	QLD	4/3
4.	Confidential			
5.	Rowan, Mr I	Riverview Deli	SA	9/3
6.	Johnson, Ms L	Gateway Travel	QLD	11/3
7.	Hall, Mr B	Hope Valley Foodland	SA	11/3
8.	Fisher, Mr A	Fishers Stores Consolidated P/L	VIC	11/3
9.	Peluma, C		NSW	11/3
10.	Gale, Mr N	Advantage Supermarkets	WA	12/3
11. (263)	Dymond, Mr R	Toodyay Supermarket	WA	12/3
12.	Stow, Mr T	Stow's Authorised Newsagency P/L	VIC	16/3
13.	Lehninger, Mr R	Dymel Distributors P/L	QLD	16/3
14.	Mitchell, J & T	Arcadia Newsagency	QLD	16/3
15.	Davey, Mr D	The Pines Newsagency	QLD	16/3
16.	Dwan, Mr D	Allora News	QLD	16/3
17.	Cox, L & B	Texas Newsagency	QLD	16/3
18.	Silver, Mr J	Pacific Fair Newsagency	QLD	17/3
19.	Stapledon, Dr G	Faculty of Law, Oxford University	UK	18/3
20.	Pengilley, Prof W	Faculty of Law, Newcastle University	NSW	18/3
21.	Connolly, Mr J	Connolly's News	QLD	18/3
22.	Sherman, Mr D		QLD	18/3
23.	Wright, Ms L	Cunningham's Newsagency	QLD	18/3

Sub	Name	Company	State	Received
24.	Drake, Mr R	Drake Food Markets	SA	19/3
25.	Edwards, Mr M	Independent Vending Machine Operators Assoc (Australia) Inc.	NSW	22/3
26.	Robertson, Mr D	Aliant Foodservices	QLD	22/3
27.	Nielsen, Mr B	Toowoomba CBD Task Force Inc	QLD	22/3
28.	Bracher, Mr P J	Walls Convenience Store	NSW	22/3
29.	Fanetti, Ms J	Gold Rush Lunch Bar & Deli	WA	22/3
30.	Hiscock, D	Golden Sands News	QLD	22/3
31.	Odorico, F & D	Ravenshoe Cut-Price Supermarket	QLD	22/3
32.	Chandler, R E	Wynum News	QLD	22/3
33.	McCallum, Mr A	Foodstore Nerang	QLD	22/3
34.	Hughes, W and L	Rolley's Newsagency	QLD	22/3
35.	Nicholls, B J	Forest Glen News	QLD	23/3
36.	Antcliff, J & J		QLD	22/3
37.	Ross, Mr I	Lindfield News	QLD	23/3
38.	Probert, Mr R B	Parkwood Plaza News	QLD	23/3
39.	Tognela, Mrs R	Country Women's Assoc. of WA (Inc)	WA	23/3
40.	Ullio, Mr L	Strawberry Growers Assoc. of NSW	23/3	
41.	Costigan, Mr LJ		QLD	23/3
42.	Hussy, Mr P	Enmore News	QLD	23/3
43.	Lynch, Mr R	Donut King Maitland	NSW	23/3
44.	Evans, Mr P	Evans Riteway Supermarket & General Store	TAS	22/3
45.	Durrand, L & M	Downs Street News	QLD	23/3

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Sub	Name	Company	State	Received
46.	Heinz, Mr P	Winston Glades Hardware	QLD	23/3
47.	Hombsch, C & M	Bellara News	QLD	23/3
48.	Saunders, Mr R	Eastcoast Office Supplies	QLD	23/3
49.	McKeown, Ms K	Foodstore Supermarket	QLD	23/3
50.	McLaughlan, Mr P	The Palace Hotel	QLD	23/3
51.	Hytch, Mr T	J Hytch & Son	QLD	23/3
52.	Bradley, Mr R	Marlin Coast Newsagency	QLD	24/3
53.	Isaac, G & H	Hazel's Hardware Pty Ltd	QLD	24/3
54.	Mcnaughtan, Mr G,	Lumley Street Foodmarket	QLD	24/3
55.	Nichols, Mr G	Nichols Pharmacy	QLD	24/3
56.	Rankin, Mr C	Newsagents Assoc. of South Australia	SA	24/3
57.	Naylor, Mr P	Australian Retailers Association	NSW	24/3
58.	Bowly, Mr R	Qld Hotels Assoc. Toowoomba Div.	QLD	24/3
59.	Luke, M & G	Luke's IGA Supermarket	QLD	24/3
60.	Sullivan, Ms L	Cooktown Cut Price Supermarket	QLD	24/3
61.	Confidential			
62.	Witten, Mr I		QLD	24/3
63.	Kluck, Ms R	Newsagent	QLD	24/3
64.	Algaba, Ms R		WA	24/3
65.	Conduit, Mr B	The Dolphin News	QLD	24/3
66.	Miller, Mr JF	Kenmore Tavern Plaza News	QLD	24/3
67.	Muir, Mr G	Welcome Mart Bonalbo	NSW	24/3
68.	Aggis, Mr D	Garradunga Hotel	QLD	24/3
69.	Illidge, J	Springwood Mall News	QLD	24/3
70.	Brock, D & B	Brock's Food Store	QLD	24/3
71.	Young, Mr C	Bunbury Chamber of Commerce & Industries Inc.	WA	24/3

Sub	Name	Company	State	Received
72.	Leijer, Mr R		NSW	25/3
73.	Langdon, G & S	The Sun Palms Hotel and Motel	QLD	25/3
74.	Morgan, Mr R	Morgan's Supermarkets	VIC	25/3
75.	George, W & I	Buy-Rite Fresh Foodmarket	QLD	25/3
76.	Teed, Mrs K	Bli Bli Pharmacy	QLD	25/3
77.	Sutton, Mr D	Hallmark Hourglass Jewellers	WA	25/3
78.	Slade, Mr D	Slade's Painters Paradise	QLD	25/3
79.	Bosch, Mr J	Bridgewater Service Station and Video Shop	SA	25/3
80.	Barnett, Mr V	Allenstown News	QLD	25/3
81.	Green, P & L	Deepwater Supermarket	NSW	25/3
82.	Sheehan, Mr T	Charleville Newsagency	QLD	25/3
83.	Stevens, Mr G	Parkwood Home Hardware	QLD	25/3
84.	Johnston, Mr G	National Meat Assoc. of Australia	NSW	25/3
85.	Barber, Mr J		QLD	25/3
86.	Tidswell, Ms D	Oakey Pharmacy	QLD	25/3
87.	Brook, Ms M	Commercial Road News	QLD	25/3
88.	Atfield, Mr W	Mt Julian Store	QLD	25/3
89.	Rae, Mr I	Coastal True Value Hardware	QLD	25/3
90.	Lawson, Mr G	Lawson's Meathall	QLD	25/3
91.	Goodson, Mr H	Toowoomba Day & Night Pharmacy	QLD	25/3
92.	Confidential			
93.	Rickwood, Mr R	Wynnum Chamber of Commerce	QLD	25/3
94.	Germano, Mr P	Phillips and Stone	VIC	25/3
95.	Buck, F	West End Hotel	QLD	25/3
96.	Guzzi, Mr T	SupaValu Joondalup	WA	25/3

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Sub	Name	Company	State	Received
97.	Ramm, Mr J	Ramm's Retravision	QLD	25/3
98.	Jury, P & O	IGA Everyday	NSW	25/3
99.	Withers, Mr R	7-Eleven Stores P/L	VIC	25/3
100.	Woolford, R & P	GameXpress Browns Plains	QLD	25/3
101.	Shelton, Mr T	Burleigh Heads	QLD	25/3
102.	Kelsey, R	Thompson's Deli	SA	25/3
103.	Sabdia, H	Sabdia's Mitre 10 & Sabdia's Retravision	QLD	25/3
104.	Baxt, Mr B		VIC	25/3
105.	Buglar, B	Glamorgan Vale Hotel	QLD	26/3
106.	Beynon, Mr T	Free Choice Stores	QLD	26/3
107.	Lun, Mr G	The Exhibition Driveway	QLD	26/3
108.	Person, P & P	Person's Yamaha	QLD	26/3
109.	Novatscou, Mr J	Douglas Hi-Fi	WA	26/3
110.	Tanner, Mr D	Brendale Building Supplies	QLD	26/3
111.	Leong, Mr G	5 Star Supermarket	QLD	26/3
112.	Morgan, Mr K	Tandara Hotel Motel	QLD	26/3
113.	Lally, Mr J	Stradbroke Island Beach Hotel	QLD	26/3
114.	Dowdall, Mr C & Jom, Mr H	Payless Supermarket	NSW	26/3
115.	Kernbach, Mr H	Shell City Cabs	QLD	26/3
116.	Churchill, Mr M	Churchill's IGA Supermarket	QLD	26/3
117.	Duffy, Mr J		SA	26/3
118.	Badenoch, Mr M & Siwicki, Mr E	Eatons Hill 7 Day Hardware Shop	QLD	26/3
119.	English, Mr T	Malanda Hotel Motel	QLD	26/3
120.	Goldstein, Mr F	Goldstein's Bakery	QLD	26/3
121.	Saunders, G & K	St Marys Top Shop Supermarket	TAS	26/3
122.	Blee, Mr W	The Maroochydore Pharmacy	QLD	26/3
123.	The Manager	5 Star Supermarket	QLD	26/3
124.	Pardon, Cllr F	Noosa Shire Council	QLD	

Sub	Name	Company	State	Received
125.	The Staff	Pine Rivers Supermarket	QLD	26/3
126.	Cerinich, Mr A		WA	26/3
127.	Vandore, Mr J		NSW	26/3
128.	Airport Unit Trust	Airport Unit Trust	QLD	26/3
129.	Thornton, Mr A	Buderim 2000	QLD	26/3
130.	Vallianos, N & J	5 Star Supermarket	QLD	26/3
131.	Tang, Mr B	Hyperdome News	QLD	26/3
132.	Satterley, Ms P	Manly News	QLD	26/3
133.	Fanning, R & C	Capalaba Park News	QLD	26/3
134.	Bowden, Mr W	WH Bowden Pty Ltd	QLD	25/3
135.	Schouten, L	L & D Schouten 727 Store	QLD	26/3
136.	Thompson, Ms C	The Snack Shack Deli	SA	23/3
137.	Cobbin, Mr J		NSW	26/3
138.	Italiano, Mr D	Italiano Brothers	WA	26/3
139.	Metcalf, Ms S	Chittering Shire Council	WA	26/3
140.	Bastian, Mr R	Council of Small Business Organisations of Australia	ACT	26/3
141.	Murdoch, Ms B	Chiltern Goodfellows	VIC	26/3
142.	Gibson, Mr P	Gibson's Newmarket Hardware	QLD	26/3
143.	Sulcs, Mr G	Art Framers	WA	26/3
144.	Violi, Mr S		VIC	26/3
145.	White, J & H		QLD	26/3
146.	Smith, Mr I	Gift Shop	QLD	26/3
147.	Chippendale, Cllr G	Caboolture Shire Council	QLD	4510
148.	Shea, Mr J	John Shea Chemist	QLD	26/3
149.	Byard, Mr D		TAS	26/3
150.	Heard, Mr D	Paint Specialists Assoc. of Australasia	VIC	

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Sub	Name	Company	State	Received
151.	Cummings, Mr J	Western Australian Independent Grocers' Association (Inc)	WA	26/3
152.	McLauchlan, Mr M	Foodland Supermarkets	SA	26/3
153.	Mancini, G	Supa Valu Kelmscott	WA	26/3
154.	McDonald, Mr S	The Manly Hotel	QLD	26/3
155.	Earle, D	Earle Paints and Wallpaper Pty Ltd	QLD	26/3
156.	Pippos, Mr G	Mr Corks Liquor Group	QLD	26/3
157.	Carmody, Mr K	Port Pirie Chamber of Commerce and Industry	SA	26/3
158.	Domelow, Mr D	Magnetic Island Supermarket	QLD	26/3
159.	Stewart, Mr C	Queensland Hotels Association	QLD	26/3
160.	Miller, Mr S	Country Fruit Distributors	NSW	26/3
161.	Ricciardello, Mr K	Porter's Liquor	WA	26/3
162.	Burness, Mr R	Burrob P/L	QLD	26/3
163.	Roberts, Mr M	The Sands Hotel	QLD	26/3
164.	Stanton, Mr B	WA Tobacco Retailers Assoc. Inc	WA	26/3
165.	Griffin, Mr M	AC Nielsen Australia Pty Ltd	NSW	26/3
166.	Reitzer, Mr A	Davids Limited	NSW	26/3
167.	Green, R	Victoria Point News	QLD	27/3
168.	Williams, Mr A	Coles Supermarkets	VIC	26/3
169.	Brackenrig, Mr A	Mudgee Co-Operative Meat Supply Ltd	NSW	28/3
170.	Morris, Mr W	Winnellie 5 Star Supermarket	NT	28/3
171.	Dubiel-Smith, Mr G	National Federation of Independent Business Inc	QLD	29/3

Sub	Name	Company	State	Received
172.	Copeman, Mr D	Consumer Food Network	QLD	29/3
173.	Boyle, Mr R	Australian Banana Growers' Council	QLD	29/3
174.	O'Connor, Mr L	Vegetable Growers' Ass. of Victoria	VIC	29/3
175.	Lobb, Mr T	Weddin Shire Council, Grenfell	NSW	29/3
176.	Kerp, Mr C	Shire of Goomalling	WA	29/3
177. (246)	Cox, L	Cowra Decor	NSW	29/3
178.	Heffernan, Cllr P	Hervey Bay City Council	QLD	29/3
179.	Coney, Ms T	Marsden Park Deli	QLD	29/3
180.	Ford, Mr G	Tradetools (Qld) P/L	QLD	29/3
181.	Frost, Ms C	N T Chamber of Commerce and Industry	NT	29/3
182.	Ferguson, P & S	Burpengary Paint Supplies	QLD	29/3
183.	Waldren, Mr R	Bicheno General Store	TAS	29/3
184.	King, Mr R	Cardwell Pharmacy	QLD	29/3
185.	Brock, Mr G	Grand View Hotel	QLD	29/3
186.	White, Mr D	Dicel Nominees Pty Ltd	VIC	29/3
187.	Whitehead, Mr & MsT	Clancys Supermarket	NSW	29/3
188.	Simpson, I & L	Grantham News, General Store & Take Away	QLD	29/3
189.	Proprietors	Gawain Road Shopkeepers Assoc.	QLD	29/3
190.	Alty, Mr B	Foodland Associated Limited	WA	29/3
191.	Fels, Professor A	Australian Competition and Consumer Commission	ACT	29/3
192.	Force, Mrs S		QLD	30/3
193.	Sommerille, Mr G	Foodlink Ltd	QLD	30/3

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Sub	Name	Company	State	Received
194.	Lenzo, Mr J	Rite-way Supermarket	NSW	30/3
195.	Murphy, Mr K	Narrandera Shire Council	NSW	30/3
196.	Fontana, Mr F	Bedford Furniture Co.	WA	30/3
197.	Anderson, Mr B	Convenience Stores Australia	NSW	30/3
198. (234)	Paranthoiene, Mr B	Macleay Island	QLD	30/3
199.	Etrelezia, Mr G	Small Business Development Corp	WA	30/3
200.	Charalambous, Mr C	Franklins Ltd	NSW	30/3
201.	McKenzie, Mr A	National Association of Retail Grocers of Australia	NSW	31/3
202.	Jones, Mr A	Master Grocers' Association of Victoria	VIC	31/3
203.	Pritchard, Mr J	Queensland Fruit & Vegetable Growers	QLD	31/3
204. (233)	de Hayr, Mr B	Tasmanian Farmers & Graziers Association Meat Council	TAS	31/3
205. (240)	deVries, Ms L	Tasmanian Council of Social Service	TAS	31/3
206.	Bourne, Mr T	Countrywide Australasia Ltd	NSW	31/3
207.	Scanlon, Mr J	News Extra	NSW	31/3
208.	Strohfield, Cllr, N	Rosalie Shire Council	QLD	31/3
209. (239)	Wilson, Mr N	Launceston Community Legal Centre	TAS	31/3
210.	Clowes, Ms J	Cresthaven Pharmacy	VIC	31/3
211. (237)	Burge A & C	SPAR Supermarket	QLD	31/3
212.	Hamilton, Mr P	Queensland Chicken Growers Assoc. Inc	QLD	31/3

Sub	Name	Company	State	Received
213.	Tambling, Senator the Hon G	Senator for the Northern Territory	ACT	31/3
214.	de Bruyn, Mr J	Shop, Distributive & Allied Employees' Association	VIC	31/3
215.	Brownsea, Mr J	Small Business Association of SA	SA	31/3
216.	Warden, Ms K	NSW Farmers	NSW	31/3
217.	Kerr, Hon D, MP	Member for Denison	TAS	31/3
218.	O'Dea, Ms M	South Australian Farmers Federation	SA	1/4
219.	Parnell, Mr G	Food Retailers Association of NSW	NSW	1/4
220.	Harrison, Mr J	MFC Pty Ltd	NSW	1/4
221.	McCormack, Mr A	Parkes Shire Council	NSW	1/4
222.	McLoughlin, Mr J	Caboolture Shire Council	QLD	1/4
223.	Bourne, Mr T	Foodservice Distributors Australia	NSW	1/4
224.	Slinger, Mr J		WA	1/4
225.	Fisher, Mr K	Spar Laidley	QLD	1/4
226.	Ritchie, Mr T	National Farmers Federation	ACT	1/4
227.	Stephenson, Mr P	Liberty Liquors	WA	29/3
228.	Dimasi, Mr T	Jebb Holland Dimasi	VIC	1/4
229.	Confidential			
229A.	Jeffs, Mr R	Woolworths Limited	NSW	7/4
230.	Duncan, Mr I	Mitre 10	TAS	6/4
231.	Baker, Dr R	University of New England	NSW	6/4
232.	Daly, Mr M	Koroit IGA Everyday & Cellars	VIC	7/4
233. (204)	Rance, Mr G	Tasmanian Farmers & Graziers Assoc. Meat Council	TAS	7/4
234. (198)	Paranthoienne, Mr B	Macleay Island General Store	QLD	7/4
235.	Sosinka, Mr J	MC Australia	NSW	7/4

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Sub	Name	Company	State	Received
236.	The Proprietor	Wilkes Supermarket	TAS	7/4
237. (211)	Burge, Mr A	SPAR Supermarket	QLD	7/4
238.	Confidential			
239. (209)	Wilson, Mr N	Launceston Community Legal Centre	NSW	7/4
240. (205)	de Vries, Ms L	Tasmanian Council Of Social Service	TAS	7/4
241.	Scanlon, Mr J	FoodWorks Supermarket Group Limited	VIC	12/4
242.	Ashton, Mr G	United Star Supermarket	QLD	7/4
243.	Smith, Mr H	PMF P/L	TAS	7/4
244.	Turner, Ms L	Cut Price Store	QLD	7/4
245.	Bun, Ms M	Australian Consumers' Association	NSW	7/4
246. (177)	Cox, Mr L	Cowra Decor	NSW	8/4
247.	The Proprietor	Wm L Wells & Sons	TAS	8/4
248.	Harris, Mr D	Harris Farm Markets	NSW	8/4
249.	Delaney, Mr M	Motor Trades Assoc. of Australia	ACT	9/4
250.	Whalen, Mrs A		NSW	9/4
251.	Baldock, Mr I	Queensland and Retail & Shopkeepers Assoc.	QLD	12/4
252.	Viney, Mr A		NSW	12/4
253.	Bawden, Ms J		VIC	12/4
254.	Bourne, Mr B	The Independent Liquor Group Co- operative Ltd	NSW	14/4
255.	Natoli, Mr J	Small Business Operator	QLD	14/4
256.	Quang, Ms P	Department of Agriculture, Fisheries and Forestry	ACT	15/4

Sub	Name	Company	State	Received
257.	Keenan, Ms Ella	Australian Federation of Business and Professional Women Inc	VIC	15/4
258.	Schoondergang, W	Radio House	WA	15/4
259.	Tomlins, Mr G	The Tobacco Station	QLD	19/4
260.	Allen, Mr A	Denison Hotel & Motel	QLD	19/4
261.	Hewlett, P & L	Hewlett's Record Bar	NSW	20/4
262.	Vallianos, Mr G		QLD	20/4
263. (11)	Dymond, Mr R	Toodyay Supermarket	WA	8/4
264.	Jones, Hon. R, MLC	Member Legislative Council	NSW	23/4
265.	Howie, Mr J	Australian Newsagents' Federation Ltd	NSW	23/4
266.	Roberts, D & H		QLD	27/4
267.	Wilkinson, Mr P	The Wine Barrel	VIC	28/4
268.	Cocker, Mr J	Midland Rubber Stamps	WA	29/4
269.	Sky, Ms D	Mitre 10	NSW	29/4
270.	Ell, Mr A	Investment Ell Pty Ltd	NSW	3/5
271.	Steven, Mr T	Retail Traders Assoc.of Tasmania	TAS	4/5
272.	Brennan, Mr T	Stanthorpe Shire Council	QLD	3/5
273.	Liddy, Mr K	Liddy's Engadine Tavern	NSW	4/5
274.	Mr Bob Bloffwitch, Mr B, MLA	Member for Geraldton	WA	5/5
275.	Sundermann, F & W		VIC	6/5
276.	Confidential			
277.	Richardson, Mr S	Tasmanian Independent Wholesalers	TAS	10/5
278.	Fairweather, Mr D	Shopping Centre Council of Australia	NSW	11/5

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Sub	Name	Company	State	Received
279.	Randiah, Mr V	Daily Planet Newsagency	WA	10/5
280.	Nosworthy, Mr D		NSW	10/5
281.	Paterson, Mr M	Australian Chamber of Commerce and Industry	ACT	13/5
282.	Confidential			
283.	Levy, Mr P	Law Council of Australia	ACT	18/5
284.	Maidment, Ms B		WA	18/5
285.	Tannahill, Mr L	Dept of Employment, Workplace Relations and Small Business	ACT	21/5
286.	Tulloch, Mr C	Dallas Cellars	VIC	21/5
287.	Wilson, Mr S, MLC	Sorell & Midway Point Traders	TAS	24/5
288.	Kydd, Mr R		NSW	27/5
289.	Adams, Mr D, MP	Member for Lyons	TAS	28/5
290.	Moule, Mr B	DA Hall	QLD	28/5
291.	Baillie Mr M	CountryWide Retail Management Limited	NSW	1/6
292.	Przibilla Ms S	National Independent Liquor Wholesalers Association	NSW	3/6
293.	Horne, Ms S, AM		VIC	3/6
294.	Keenan, Ms E	Coalition Against Major Chain Dominance	VIC	4/6
295.	Ragg, Mr J	Food Retailing & Distribution Industry	VIC	9/6
296.	Milson, Mr B	Healthcare Council of Australia	ACT	10/6
297.	Confidential			
298.	Seymour, Ms L		QLD	22/6
299.	Tsicalas, Mr	Howard Smith Ltd	NSW	22/6
300.	Bate, Mr G	Yatala Business Supplies	QLD	22/6
301.	Confidential			

Sub	Name	Company	State	Received
302.	Shearman, Ms A	Narromine Small Business Traders	NSW	25/6
303.	Confidential			
304.	Tylman, Mr F	Procter & Gamble	NSW	30/6
305.	Carty, Mr J	Bendigo Wholefoods & Bulkfoods	VIC	30/6
306.	Sides, Mr H	City of Greater Bendigo	VIC	30/6
307.	McRae, Mr G	Fine Furniture	VIC	30/6
308.	Mackenzie, Ms K	City of Greater Bendigo	VIC	30/6
309.	Athorn, Mr N	Sandhurst Trustees	VIC	30/6
310.	Thompson, Mr J	Bendigo Trust	VIC	30/6
311.	Jordan, Mr T	Welcome Mart	NSW	30/6
312.	Casey, Mr T	IGA	QLD	1/7
313.	Ryan, Mr B	Ryan's Foodworks Supermarket	VIC	1/7
314.	Wagstaff, Mr A	Coca-Cola Amatil	NSW	6/7
315.	Smith, Mr A	Smithies Supermarket	VIC	6/7
316.	Randall, Mr B	Randall's Supermarket	VIC	6/7
317.	Jenkins, Ms M	Women's Electoral Lobby	WA	12/7
318.	Mercer, Mr J	Snowy-Monaro Business Enterprise Centre Inc	NSW	6/7
319.	Wilson, Mr P	Adaminaby Store	NSW	6/7
320.	Bernardi, Mr D	Bernardi's SuperFresh Supermarket	NSW	12/7
321.	Meredith, G	Meredith's IGA Supermarket	NSW	7/7
322.	Wielinga, Mr A	Warren Shire Council	NSW	6/7
323.	Wagstaff, Mr O	GP's Garden Centre	NSW	19/7
324.	Olsen, Mr R	The Camera Spot	NSW	21/7
325.	Liu, Mr G	Royal Exposure	NSW	20/7
326.	Hall, Mr R	Clickers	NSW	20/7

Appendix 2

Sub	Name	Company	State	Received
327.	Gore, Mr S	The Rubber Stamp Manufacturers' Association of Australia	NSW	26/7
328.	Ivanov, Dr G	Macquarie University	NSW	26/7
329.	Rogers, J	North Coast Low- Chill Stonefruit Growers' Association & Northern Rivers Horticulture Branch of NSW Farmers Association	NSW	3/8
330.	Matthews, PF	Burnie City Council	TAS	6/8
331.	Meth, Mr G	Rothschild Australia Asset Management Limited	NSW	10/8
332.	Glinski, Mr G	Uncle Ben's of Australia	VIC	12/8

Appendix 3 List of Additional Information

Document No.	Submitter	State	Relates to Submission
11A	Toodyay Supermarket	WA	11
24A	Drake Food Markets	SA	24
57A	Australian Retailers Association of Sydney	NSW	57
73A	G & S Langdon	QLD	73
106A	Free Choice Stores	QLD	106
129A	A Thornton, Buderim 2000	QLD	129
140A	Council of Small Business Organisations of Australia Ltd	ACT	140
151A	WA Independent Grocers' Association (Inc)	WA	151
152A	Foodland Supermarkets	SA	152
159A	Queensland Hotels Association	QLD	159
164A	WA Tobacco Retailers Assoc. Inc	WA	164
166A	Dauids Limited	NSW	166
168A-D	Coles Supermarkets	VIC	168
190A-F	Foodland Associated Limited	WA	190
200A	Confidential		
200B	Franklins Ltd	NSW	200
201A-C	National Association of Retail Grocers of Australia (NARGA)	NSW	201
214A-B	Shop, Distributive & Allied Employees' Association	VIC	214
215A-B	Small Retailers Association of SA	SA	215

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227A-C	Confidential		
228A	Jebb Holland Dimasi	VIC	228
229B, D	Confidential		
229C, E	Woolworths Limited	NSW	229
241A	Confidential		
243A	PMF Pty Ltd	TAS	243
249A	Motor Trades Association of Australia	ACT	249
254A	Independent Liquor Group Co-operative Ltd	NSW	254
255A-H	Joseph Natoli, Small Business Operator, Councillor Maroochy Shire Council	QLD	255
267A	Independent Liquor Retailers Alliance	VIC	267
271A	Retail Traders' Association of Tasmania	TAS	271
277A	Tasmanian Independent Wholesalers	TAS	277
282A	Confidential		
282B-C	Joe Goldsmith, FoodWorks	NSW	282
287A	Tasmanian Independent Wholesalers	TAS	287
291A	CountryWide Retail Trust	NSW	291
291B	Confidential		
294A	Coalition Against Major Chain Dominance	VIC	294
301A	Chickenfeed Bargain Stores	TAS	301
303A	Confidential		

305A	Bendigo Wholefoods and Bulkfoods	VIC	305
308A	Kathryn Mackenzie	VIC	308
318A	Cooma-Monaro Shire Council	NSW	318

Appendix 4 Witnesses at Hearings

Canberra, Tuesday 6 April 1999

Coles Supermarkets

- Abraham, Dr Darryn, Senior Economist, Access Economics
- Scott, Mr Peter, General Manager, Perishable Merchandise
- Williams, Mr Alan, Managing Director

National Association of Retail Grocers of Australia (NARGA)

- Barnett, Mr Guy, Consultant
- Kovas, Mr Michael, President, Food Retailers Association of NSW
- McKenzie, Mr Alan John, Director/National Spokesman
- Richardson, Mr Lionel (Sam), Director and General Manager Tasmanian Independent Wholesalers

Woolworths Limited

- Corbett, Mr Roger, Chief Executive Officer
- Dunn, Mr Ian, National Business Manager Grocery and Perishables
- Jeffs, Mr Rohan, Company Secretary
- Onikul, Mr Naum, Chief General Manager, Supermarkets
- Pokorny, Mr Peter, General Manager, Fresh Foods
- Reid, Mr Robert, General Manager Property

Melbourne, Wednesday 7 April 1999

Chiltern Supermarket

- Murdoch, Mrs Barbara Joan, Proprietor

Dauids Ltd

- Reitzer, Mr Andrew, Chief Executive Officer

Friarun P/L Trading As Jefferies Family Supermarket

- Jefferies, Mr Gary, Owner/Manager

Master Grocers Association of Victoria Ltd

- Jones, Mr Alan, Chief Executive Officer

Mitre 10 (Australia) Pty Ltd

- Barnett, Mr Guy, Consultant
- Berwick, Mr John, General Manager
- Rutherford, Mr John, Director and Chief Executive

Phillips and Stone, Bairnsdale

- Germano, Mr Paul, Owner and Managing Director

Scotty And Spanas IGA Everyday

- Scott, Mr Dennis Anthony, Owner/Manager

Stratford Licensed Grocery

- Veal, Mr Raymond John, Owner/Manager

Adelaide, Thursday 8 April 1999

Foodland

- Drake, Mr Roger, Chairman, and Owner, Drake Food Markets
- Hall, Mr Barry , Manager/Owner, Hope Valley Foodland
- McLauchlan, Mr Mark, Chief Executive, Foodland Supermarkets

Newsagents Association of South Australia Ltd

- Rankin, Mr Christopher, Executive Officer

Small Retailers Association

- Brittain, Ms Jennifer, Member and Proprietor, Lockleys Topz Shopz Convenience Store
- Brownsea, Mr John, Executive Director
- Powney, Mr Keith, Committee Member
- Symons, Mr Jon, Member and Proprietor, Collinswood Foodtown

South Australian Farmers Federation

- Bishop, Mr William, Market Analyst (Horticulture)
- Cameron, Mr Alexander, Chief Executive Officer

Appendix 4

- O'Dea, Ms Marie, Executive Officer, Commerce and Community Services

Perth, Friday 9 April 1999

Advantage Supermarkets WA Pty Ltd

- Gale, Mr Neville, Managing Director

Foodland Associated Ltd

- Alty, Mr Barry, Managing Director

Toodyay Supermarket

- Dymond, Mr Richard Owner/Proprietor

Western Australian Independent Grocers Association

- Cummings, Mr John, Vice-President

Western Australian Retailers Association and Western Australian Council of Retail Associations

- Catania, Mr Nick, Executive Officer
- Crawford, Mr Ian, President, Western Australian Council of Retail Associations, and Vice-President, Western Australian Branch, Pharmacy Guild

Western Australian Tobacco Retailers Association Inc.

- Hankins, Mr Jeffrey
- Stanton, Mr Robert, Chairman
- Stanton, Mr Barry, Secretary

Sydney, Thursday 15 April 1999

Australian Retailers Association

- Naylor, Mr Phillip, Chief Executive Officer

Franklins Ltd

- Charalambous, Mr Christos, Planning and Analysis Manager
- Cornell, Mr Ian, Chief Executive Officer
- Foran, Mr Gregory, Merchandise and Marketing Director

- Hallam, Mr John, Company Solicitor

Jebb Holland Dimasi

- Dimasi, Mr Anthony, Joint Managing Director

Liberty Liquors Pty Ltd

- Stephenson, Mr Patrick, Managing Director

New South Wales Farmers Association

- Holland, Mr Nevin, Executive Commissioner
- Jordan, Ms Beverley, Economist
- Keogh, Mr Michael, Policy Director
- Warden, Miss Katherine, Administration/Research Assistant

Shop Distributive and Allied Employees Association

- Blandthorn, Mr Ian, National Assistant Secretary
- de Bruyn, Mr Joseph, National Secretary-Treasurer

Brisbane, Friday 16 April 1999

Buderim 2000

- Thornton, Mr Alan, President

Consumers Federation of Australia

- Copeman, Dr Richard, Coordinator of Consumer Food Network
- Lang, Professor Tim, Professor of Food Policy, Centre for Food Policy, Thames Valley University

Free Choice Stores

- Beynon, Mr Trevor, Managing Director

Natoli, Mr Joseph (private capacity)

Queensland Fruit and Vegetable Growers

- Pritchard, Mr John, Deputy General Manager
- Robinson, Mr Ian, Consultant
- Ziebarth, Mr Paul, Chairman

Queensland Hotels Association

- Stewart, Mr Charles, State President
- Wilson, Dr Michael, Consultant

Queensland Retail Traders and Shopkeepers Association

- Baldock, Mr Ian, Executive Director
- Swain, Mr Randall, Secretary/Business Development Manager

Retail Enterprises Pty Ltd

- Antcliff, Mrs Joanne, Director
- Antcliff, Mr Jeffrey, Director

Retail Services Ltd, Foodlink Ltd, Australian United Retailers Pty Ltd

- Berry, Mr John, Executive Chairman
- Somerville, Mr Grant, General Manager, Foodlink Ltd

Warwick Shire Council

- Green, Councillor Bruce, Mayor

Launceston, Monday 5 July 1999

Beaconsfield Festival IGA Supermarket

- Wilkes, Mr David, Managing Director

Bicheno General Store and Bicheno Community Development Association

- Waldren, Mr Reginald, Co-Director

Chickenfeed Bargain Stores

- Sykes, Mr Rudi, Managing Director
- Wilson, Mr Ashley, Merchandise Manager

Launceston Community Legal Centre and Tasmanian Council of Social Service Inc

- Wilson, Mr Noel, Manager LCLC and Board Member TasCOSS

PMF Pty Ltd

- Smith, Mr Harvey, Chairman

Retail Traders Association of Tasmania

- Jackson, Mrs Mary, Member, State Executive
- Morgan, Mr Paul, Vice President
- Steven, Mr Tony, Executive Director

Sorell & Midway Point Traders

- Lawrence, Mr Christopher, Proprietor, Mobile Service Station, Sorell
- Morgan, Mr Frank, Owner/Licensee, Pembroke Hotel, Sorell
- Walters, Mr Paul Denis, Executive Director, Tasmanian Automobile Chamber Of Commerce
- Wilson, Hon Stephen John, MLC, Independent Member for Rumney

Tasmanian Farmers and Graziers Association Meat Council

- de Hayr, Mr Brett, Executive Officer

Tasmanian Independent Wholesalers

- Richardson, Mr Lionel (Sam), General Manager

Bendigo, Tuesday 6 July 1999

Bendigo Bulk and Wholefoods

- Carty, Mr John

Bendigo Tourism

- Mackenzie, Ms Kathryn, Manager Visitor Services

Bendigo Trust

- Thompson, Mr James, General Manager

City of Greater Bendigo

- Sides, Mr Hadley, Chief Executive Officer

Greg McRae Fine Furniture

- McRae, Mr Greg, Furniture Retailer

Randall's Supermarket

Appendix 4

- Randall, Mr Bryan, Partner

Sandhurst Trustees Ltd

- Athorn, Mr Neil, Manager Properties and Client Services

Smithies Supermarket Pty Ltd

- Smith, Mr Andrew, Director

Cooma, Tuesday 6 July 1999

Adaminaby Store

- Wilson, Mr Peter, Co-owner

Cooma-Monaro Shire Council

- Coombes-Pearce, Mr Gregory, Business Development Manager

CountryWide Retail Trust

- Baillie, Mr Mark, Chief Executive Officer

Snowy-Monaro Business Enterprise Centre Inc

- Mercer, Mr John, Manager

Terry's Café and Restaurant

- Edwards, Mrs Terry, Proprietor

Wonfair Pty Ltd, trading as Slaters Fuel Services

- Bartlett, Mr Stephen, Director-Manager

Dubbo, Wednesday 7 July 1999

Baker, Dr Robert, Senior Lecturer, University of New England

Bernardi, Mr David (Private capacity)

Blowes Menswear

- Blowes, Mr Warwick, Director

Catholic Social Welfare Committee

- Cameron, Mr Jennifer, Member

Challenge Office Supplies

- Shields, Mr Earle, Managing Partner

Dubbo CBD Marketing Group

- Grady, Mrs Janette, Chair

Dubbo City Council

- Brooks, Councillor Raymond
- McGrane, Councillor Anthony, Mayor

Leijer, Mr Robert (private capacity)

Manny, Mr John (private capacity)

Narromine Small Business Traders

- Bracher, Mr Peter, Member

New South Wales Farmers Association – Dubbo District Council

- Kelly, Mr John, Chairman
- Langford, Mrs Rosemary, Vice Chairman

Penrose Meats

- Penrose, Mr Brian, Proprietor

Rothmans of Pall Mall (Australia) Pty Ltd

- McLean, Mr Dale, Sales Director
- Rayner, Mr Paul, General Manager

Samios Mini Mart and West Dubbo Foodstore

- Samios, Mr Emmanuel, Owner

Scott's Auto Centre

- Scott, Mr Peter, Owner/Sole Director

Small Business People, Western NSW

- Perks, Mr Danny

Bundaberg, Thursday 8 July 1999

Bundaberg Chamber of Commerce and Industry

Appendix 4

- Wilkinson, Councillor Mary, President and Representative, Queensland Chamber of Commerce and Industry

Bundaberg City Council

- Fulton, Mr Andrew, Manager, Planning and Development

Eidsvold Foodstore and Thrifty Link Hardware

- Souvlis, Mr Micklos, Owner

Olsens Store Pty Ltd

- Learmonth, Mr John, Managing Director

The Tobacco Station – Bundaberg

- Tomlins, Mr Grant, Proprietor (Partnership)

Tom and Gloria’s Foodstore

- Powell, Mr Thomas, Owner/Operator

Kingaroy, Thursday 8 July 1999

Andersson’s Fruit Market

- Andersson, Mr Ken, Owner

Creigh’s Kingaroy Foodstore

- Creigh, Mrs Roslyn, Owner
- Creigh Mr Peter, Owner

Kingaroy Shire Council

- Nunn, Councillor Kenneth, Mayor

Mundubbera Butchering Company

- Duggan, Mr Timothy, Proprietor

Mundubbera Foodmarket, Jobhurst Pty Ltd

- Robertson, Mr Craig, Owner/Operator

Pinegrove Feedlot

- Moule, Mr Barry, General Manager

Queensland Retail Traders and Shopkeepers Association

- Daniells, Mr Warren, Member and State Committee Member IGA

Shoppingworld Butchery

- Otto, Mr Colin, Co-owner

Canberra, Monday 12 July 1999

Coalition Against Major Chain Dominance

- Keenan, Mrs Ella, Spokesperson and BPW National President
- Menzie, Ms Karena, Member

Coca-Cola Amatil

- Lowes, Mr Jeremy, General Manager, Sales and Customer Service
- Wagstaff, Mr Alec, Corporate Affairs Manager

Coles Supermarkets

- Abraham, Dr Darryn, Senior Economist, Access Economics
- Eck, Mr Dennis, Chief Executive Officer, Coles Myer
- Scott, Mr Peter, General Manager, Perishable Merchandise
- Williams, Mr Alan, Managing Director

Council of Small Business Organisations of Australia

- Bastian, Mr Robert, Chief Executive Officer

Franklins Ltd

- Charalambous, Mr Christos, Area Team Leader
- Cornell, Mr Ian, Managing Director
- Hallam, Mr John, Company Solicitor

Goldsmith's Family Supermarkets

- Goldsmith, Mr Joseph, Managing Director/Owner

National Association of Retail Grocers of Australia

- McKenzie, Mr Alan, National Spokesman

Appendix 4

- Richardson, Mr Lionel, Director
- Kovas, Mr Michael, President, Food Retailers Association of NSW

Procter and Gamble

- Tylman, Mr Frank Joseph, Managing Director

Woolworths Ltd

- Corbett, Mr Roger, Group Managing Director/Chief Executive Officer
- Dunn, Mr Ian, National Business Manager
- Jeffs, Mr Rohan, Company Secretary
- Onikul, Mr Naum, Chief General Manager, Supermarkets
- Pokorny, Mr Peter, General Manager, Fresh Food

Canberra, Tuesday 13 July 1999

Australasian Association of Convenience Stores Inc

- Anderson, Mr Barry, Executive Director

Australian Competition and Consumer Commission

- Fels, Professor Allan, Chairman
- Grimwade, Mr Timothy, Director, Mergers and Asset Sales
- Smith, Mrs Rhonda, Associate Commissioner
- Spier, Mr Hank, Chief Executive Officer

Australian Consumers' Association

- O'Neill, Mr Matthew, Senior Policy Officer

Law Council of Australia – Trade Practices Committee

- Kewley, Mr Brian, Chairman
- McComas, Mr Robert, Member

Teleconference

- Davison, Mr Kelly, Butcher, Blackall
- Seymour, Mrs Lyn, Store Owner, Blackall
- Seymour, Mr Max, Store Owner, Blackall

Canberra, Friday 13 August 1999

Coca-Cola Amatil (Australian Division)

- Lowes, Mr Jeremy, General Manager, Sales and Customer Service
- Wagstaff, Mr Alec, Corporate Affairs Manager

Kraft Foods Ltd

- Moffat, Mr Roderick, Sales Director

Nestle Australia Ltd

- Alford, Mr Bradley, Managing Director
- Kelly, Mr Peter, General Manager, Corporate Services

Uncle Ben's of Australia

- Glinski, Mr Grant, Commercial Director
- Myers, Mr James, Sales and Marketing Director

Unilever Foods

- Allara, Mr Enzo, Chairman

Lever Rexona

- Toulemonde, Mr Jean-Lin, Chairman

Dauids Ltd

- Reitzer, Mr Andrew, Chief Executive Officer

ABN AMRO

- Cahill, Mr Richard, Research Analyst – Retail Sector

Rothschild Australia Asset Management

- Meth, Mr Glynn, Associate Director (Store Analyst and Portfolio Manager)

Appendix 5 Australian Bureau of Statistics Special Data Service Report

1. Coles Myer
2. Woolworths
3. Franklins
4. Combination – Coles Myer, Woolworths and Franklins
5. Pubs, Taverns and Bars

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FOR INQUIRIES ABOUT THESE AND RELATED STATISTICS CONTACT -

Peter Batum Retail Surveys - Special Data Service Manager- ABS (W72C), P.O Box 10,
Belconnen, ACT 2616, Tel (02) 6252 5220 Fax (02) 6252 5517
Email peter.batum@abs.gov.au

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by three measures

Table 5. Sales of alcoholic beverages to be consumed off the premises by
Pubs, Taverns and Bars

Industry description and sizing table

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INTRODUCTION

Tailored Report

The purpose of this report is to enable you to evaluate the market share of the largest businesses in the food industry at a lower level than has been previously published. The tables have been designed to enable direct comparison of an enterprise's retail turnover with other enterprises in particular industry group.

The Survey

The data available in the tables are the product of a monthly retail survey conducted by the Australian Bureau of Statistics. The survey has a total of 7500 respondents (covering 20,000 outlets) with 4900 'smaller' enterprises reporting for the sample sector and 2600 classified as 'large' enterprises contributing approximately 54 per cent of the total estimate. The monthly turnover for the large enterprise group contains no expansion factors. Data for large enterprises is collected from each of the companies falling into that category while the smaller sample sizes are generated by expanding data provided from some randomly selected representative companies.

The Special Data Service

In the past the ABS only released retail turnover at the State industry level. As a special data service we are now able to provide details of the components of that level. A note of caution, while the large enterprise category is completely reliable the sample sector results can be quite volatile.

Appendix 5
Coles Myer

TABLE 1. RETAIL TRADE SPECIAL DATA SERVICE TAILORED REPORT - FOR THE JOINT SELECT COMMITTEE ON THE RETAIL SECTOR
RETAIL TURNOVER AND MARKET SHARE BY THREE MEASURES BASED ON COMBINATIONS OF RETAIL INDUSTRIES -
INDUSTRIES DETERMINED BY PREDOMINANT ACTIVITY OF RETAIL ESTABLISHMENTS

	New South Wales		Victoria		Queensland		South Australia		Western Australia		Tasmania		Northern Territory		ACT		Australia	
	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%
Coles Myer Group																		
Measure 1. Supermarket and Grocery industry																		
Financial Year 1994 - 1995																		
Coles Myer	2,058	21.17%	1,821	23.11%	1,518	26.36%	804	32.78%	763	22.97%	185	20.58%	95	18.07%	52	8.16%	7,295	23.39%
Industry Total	9,724	100.00%	7,880	100.00%	5,757	100.00%	2,452	100.00%	3,320	100.00%	900	100.00%	525	100.00%	634	100.00%	31,192	100.00%
Financial Year 1997 - 1998																		
Coles Myer	2,822	23.99%	2,762	29.03%	2,075	29.83%	1,006	34.17%	1,195	30.08%	220	22.07%	130	23.96%	73	10.42%	10,283	27.50%
Industry Total	11,759	100.00%	9,512	100.00%	6,957	100.00%	2,944	100.00%	3,974	100.00%	997	100.00%	544	100.00%	701	100.00%	37,387	100.00%
Measure 2. The combination of Supermarket and Grocery industry, the Liquor industry and the Other food industry (a).																		
Financial Year 1994 - 1995																		
Coles Myer	2,377	18.28%	1,939	20.45%	1,518	22.00%	854	28.68%	890	20.77%	185	17.47%	107	18.61%	57	7.57%	7,927	20.31%
Industry Total	13,001	100.00%	9,483	100.00%	6,897	100.00%	2,978	100.00%	4,286	100.00%	1,060	100.00%	576	100.00%	749	100.00%	39,030	100.00%
Financial Year 1997 - 1998																		
Coles Myer	3,280	20.92%	2,973	25.68%	2,099	24.97%	1,078	28.11%	1,387	27.47%	220	18.34%	151	24.97%	86	10.35%	11,273	23.89%
Industry Total	15,682	100.00%	11,575	100.00%	8,408	100.00%	3,833	100.00%	5,050	100.00%	1,200	100.00%	605	100.00%	827	100.00%	47,181	100.00%
Measure 3. The combination of Supermarket and Grocery industry, the Liquor industry, the Other food industry (a) and the Takeaway food industry.																		
Financial Year 1994 - 1995																		
Coles Myer	2,426	18.18%	1,985	17.99%	1,552	18.87%	854	24.56%	933	18.70%	185	15.22%	113	16.84%	58	6.68%	8,106	17.83%
Industry Total	14,993	100.00%	11,032	100.00%	8,227	100.00%	3,477	100.00%	4,989	100.00%	1,217	100.00%	669	100.00%	867	100.00%	45,472	100.00%
Financial Year 1997 - 1998																		
Coles Myer	3,332	18.16%	3,027	23.04%	2,135	21.47%	1,078	24.18%	1,433	25.13%	220	15.88%	157	22.73%	87	9.03%	11,469	20.99%
Industry Total	18,351	100.00%	13,138	100.00%	9,946	100.00%	4,456	100.00%	5,701	100.00%	1,385	100.00%	691	100.00%	965	100.00%	54,633	100.00%

Footnote (a) Other Food industry comprises : Bread and Cakes (5124) , Fresh meat, Fish and Poultry (5121), Fruit and Vegetables (5122) and Specialised food retailing (5129)

Appendix 5
Woolworths

TABLE 2. RETAIL TRADE SPECIAL DATA SERVICE TAILORED REPORT - FOR THE JOINT SELECT COMMITTEE ON THE RETAIL SECTOR
RETAIL TURNOVER AND MARKET SHARE BY THREE MEASURES BASED ON COMBINATIONS OF RETAIL INDUSTRIES -
INDUSTRIES DETERMINED BY PREDOMINANT ACTIVITY OF RETAIL ESTABLISHMENTS

	New South Wales		Victoria		Queensland		South Australia		Western Australia		Tasmania		Northern Territory		ACT		Australia	
	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%
Woolworths																		
Measure 1. Supermarket and Grocery industry																		
Financial Year 1994 - 1995																		
Woolworths	3,458	35.57%	2,865	36.36%	2,145	37.27%	641	26.15%	832	25.05%	475	52.75%	159	30.23%	285	45.02%	10,861	34.82%
Industry Total	9,724	100.00%	7,880	100.00%	5,757	100.00%	2,452	100.00%	3,320	100.00%	900	100.00%	525	100.00%	634	100.00%	31,192	100.00%
Financial Year 1997 - 1998																		
Woolworths	4,537	38.58%	3,583	37.67%	2,669	38.36%	771	26.20%	1,079	27.16%	517	51.90%	200	36.79%	443	63.23%	13,800	36.91%
Industry Total	11,759	100.00%	9,512	100.00%	6,957	100.00%	2,944	100.00%	3,974	100.00%	997	100.00%	544	100.00%	701	100.00%	37,387	100.00%
Measure 2. The combination of Supermarket and Grocery industry, the Liquor industry and the Other food industry (a).																		
Financial Year 1994 - 1995																		
Woolworths	3,523	27.10%	2,865	30.22%	2,145	31.11%	641	21.53%	832	19.41%	475	44.80%	159	27.55%	285	38.09%	10,926	27.99%
Industry Total	13,001	100.00%	9,483	100.00%	6,897	100.00%	2,978	100.00%	4,286	100.00%	1,060	100.00%	576	100.00%	749	100.00%	39,030	100.00%
Financial Year 1997 - 1998																		
Woolworths	4,604	29.36%	3,583	30.96%	2,669	31.74%	771	20.12%	1,079	21.37%	535	44.61%	200	33.07%	443	53.62%	13,885	29.43%
Industry Total	15,682	100.00%	11,575	100.00%	8,408	100.00%	3,833	100.00%	5,050	100.00%	1,200	100.00%	605	100.00%	827	100.00%	47,181	100.00%
Measure 3. The combination of Supermarket and Grocery industry, the Liquor industry, the Other food industry (a) and the Takeaway food industry.																		
Financial Year 1994 - 1995																		
Woolworths	3,523	23.50%	2,865	25.97%	2,145	26.08%	641	18.44%	832	16.67%	475	39.02%	159	23.73%	285	32.91%	10,926	24.03%
Industry Total	14,993	100.00%	11,032	100.00%	8,227	100.00%	3,477	100.00%	4,989	100.00%	1,217	100.00%	669	100.00%	867	100.00%	45,472	100.00%
Financial Year 1997 - 1998																		
Woolworths	4,604	25.09%	3,583	27.27%	2,669	26.83%	771	17.30%	1,079	18.93%	535	38.64%	200	28.97%	443	45.95%	13,885	25.41%
Industry Total	18,351	100.00%	13,138	100.00%	9,946	100.00%	4,456	100.00%	5,701	100.00%	1,385	100.00%	691	100.00%	965	100.00%	54,633	100.00%

Footnote (a) Other Food industry comprises : Bread and Cakes (5124) , Fresh meat, Fish and Poultry (5121), Fruit and Vegetables (5122) and Specialised food retailing (5129)

Appendix 5
Franklins

TABLE 3. RETAIL TRADE SPECIAL DATA SERVICE TAILORED REPORT - FOR THE JOINT SELECT COMMITTEE ON THE RETAIL SECTOR
RETAIL TURNOVER AND MARKET SHARE BY THREE MEASURES BASED ON COMBINATIONS OF RETAIL INDUSTRIES -
INDUSTRIES DETERMINED BY PREDOMINANT ACTIVITY OF RETAIL ESTABLISHMENTS

	New South Wales		Victoria		Queensland		South Australia		Western Australia		Tasmania		Northern Territory		ACT		Australia	
	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%
Franklins																		
Measure 1. Supermarket and Grocery industry																		
Financial Year 1994 - 1995																		
Franklins	1,815	18.66%	534	6.78%	786	13.65%	129	5.24%	0	0.00%	0	0.00%	0	0.00%	30	4.69%	3,294	10.56%
Industry Total	9,724	100.00%	7,880	100.00%	5,757	100.00%	2,452	100.00%	3,320	100.00%	900	100.00%	525	100.00%	634	100.00%	31,192	100.00%
Financial Year 1997 - 1998																		
Franklins	2,185	18.58%	672	7.07%	1,051	15.11%	160	5.42%	0	0.00%	0	0.00%	0	0.00%	26	3.67%	4,093	10.95%
Industry Total	11,759	100.00%	9,512	100.00%	6,957	100.00%	2,944	100.00%	3,974	100.00%	997	100.00%	544	100.00%	701	100.00%	37,387	100.00%
Measure 2. The combination of Supermarket and Grocery industry, the Liquor industry and the Other food industry (a).																		
Financial Year 1994 - 1995																		
Franklins	1,815	13.96%	534	5.63%	786	11.40%	129	4.32%	0	0.00%	0	0.00%	0	0.00%	30	3.96%	3,294	8.44%
Industry Total	13,001	100.00%	9,483	100.00%	6,897	100.00%	2,978	100.00%	4,286	100.00%	1,060	100.00%	576	100.00%	749	100.00%	39,030	100.00%
Financial Year 1997 - 1998																		
Franklins	2,185	13.93%	672	5.81%	1,051	12.50%	160	4.16%	0	0.00%	0	0.00%	0	0.00%	26	3.11%	4,093	8.68%
Industry Total	15,682	100.00%	11,575	100.00%	8,408	100.00%	3,833	100.00%	5,050	100.00%	1,200	100.00%	605	100.00%	827	100.00%	47,181	100.00%
Measure 3. The combination of Supermarket and Grocery industry, the Liquor industry, the Other food industry (a) and the Takeaway food industry.																		
Financial Year 1994 - 1995																		
Franklins	1,815	12.11%	534	4.84%	786	9.55%	129	3.70%	0	0.00%	0	0.00%	0	0.00%	30	3.43%	3,294	7.24%
Industry Total	14,993	100.00%	11,032	100.00%	8,227	100.00%	3,477	100.00%	4,989	100.00%	1,217	100.00%	869	100.00%	867	100.00%	45,472	100.00%
Financial Year 1997 - 1998																		
Franklins	2,185	11.90%	672	5.12%	1,051	10.57%	160	3.58%	0	0.00%	0	0.00%	0	0.00%	26	2.67%	4,093	7.49%
Industry Total	18,351	100.00%	13,138	100.00%	9,946	100.00%	4,456	100.00%	5,701	100.00%	1,385	100.00%	691	100.00%	965	100.00%	54,633	100.00%

Footnote (a) Other food industry comprises : Bread and Cake (5124), Fresh meat, Fish and Poultry (5121), Fruit and Vegetables (5122) and Specialised Food retailing (5129)

Appendix 5
Combination

TABLE 4. RETAIL TRADE SPECIAL DATA SERVICE TAILORED REPORT - FOR THE JOINT SELECT COMMITTEE ON THE RETAIL SECTOR
RETAIL TURNOVER AND MARKET SHARE BY THREE MEASURES BASED ON COMBINATIONS OF RETAIL INDUSTRIES -
INDUSTRIES DETERMINED BY PREDOMINANT ACTIVITY OF RETAIL ESTABLISHMENTS

	New South Wales		Victoria		Queensland		South Australia		Western Australia		Tasmania		Northern Territory		ACT		Australia	
	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%	\$M	%
Combination of Coles-Myer group, Woolworths and Franklins																		
Measure 1. Supermarket and Grocery industry																		
Financial Year 1994 - 1995																		
Combination	7,332	75.40%	5,221	66.26%	4,449	77.28%	1,573	64.17%	1,594	48.02%	660	73.32%	254	48.31%	367	57.87%	21,450	68.77%
Industry Total	9,724	100.00%	7,880	100.00%	5,757	100.00%	2,452	100.00%	3,320	100.00%	900	100.00%	525	100.00%	634	100.00%	31,192	100.00%
Financial Year 1997 - 1998																		
Combination	9,543	81.15%	7,017	73.77%	5,795	83.30%	1,937	65.79%	2,275	57.24%	755	75.78%	331	60.75%	542	77.32%	28,194	75.41%
Industry Total	11,759	100.00%	9,512	100.00%	6,957	100.00%	2,944	100.00%	3,974	100.00%	997	100.00%	544	100.00%	701	100.00%	37,387	100.00%
Measure 2. The combination of Supermarket and Grocery industry, the Liquor industry and the Other food industry (a).																		
Financial Year 1994 - 1995																		
Combination	7,715	59.34%	5,339	56.30%	4,449	64.51%	1,624	54.53%	1,722	40.17%	660	62.27%	266	46.16%	372	49.62%	22,146	56.74%
Industry Total	13,001	100.00%	9,483	100.00%	6,897	100.00%	2,978	100.00%	4,286	100.00%	1,060	100.00%	576	100.00%	749	100.00%	39,030	100.00%
Financial Year 1997 - 1998																		
Combination	10,068	64.20%	7,228	62.44%	5,819	69.21%	2,008	52.39%	2,467	48.84%	755	62.95%	351	58.04%	555	67.08%	29,252	62.00%
Industry Total	15,682	100.00%	11,575	100.00%	8,408	100.00%	3,833	100.00%	5,050	100.00%	1,200	100.00%	605	100.00%	827	100.00%	47,181	100.00%
Measure 3. The combination of Supermarket and Grocery industry, the Liquor industry, the Other food industry (a) and the Takeaway food industry.																		
Financial Year 1994 - 1995																		
Combination	7,764	51.78%	5,385	48.81%	4,484	54.50%	1,624	46.70%	1,764	35.37%	660	54.24%	271	40.57%	373	43.02%	22,325	49.10%
Industry Total	14,993	100.00%	11,032	100.00%	8,227	100.00%	3,477	100.00%	4,989	100.00%	1,217	100.00%	669	100.00%	867	100.00%	45,472	100.00%
Financial Year 1997 - 1998																		
Combination	10,121	55.15%	7,282	55.43%	5,855	58.87%	2,008	45.07%	2,512	44.06%	755	54.52%	357	51.70%	556	57.64%	29,447	53.90%
Industry Total	18,351	100.00%	13,138	100.00%	9,946	100.00%	4,456	100.00%	5,701	100.00%	1,385	100.00%	691	100.00%	965	100.00%	54,633	100.00%

Footnote (a) Other food industry comprises : Bread and Cakes (5124), Fresh meat, Fish and Poultry (5121), Fruit and Vegetables (5122) and Specialised Food retailing (5129)

Appendix 5
Pubs, Taverns Bars

TABLE 5. PUBS, TAVERNS AND BARS: SALE OF LIQUOR AND OTHER BEVERAGES, BY STATE OF OPERATION, 1997-98

State and Territory	Consumption off the premises
	\$ millions
NSW	525.51
VIC.	541.38
QLD.	889.68
SA	319.53
WA	246.74
TAS.	80.30
NT	16.40
ACT	2.60
Australia	2622.24

These estimates could be included in the market share tables provided for Measure 2 (line 37 of the spreadsheet) and Measure 3 (line 51 of the spreadsheet) if you wish to include the sales of alcoholic beverages to be consumed off the premise made by Pubs, Taverns and Bars. The labels for Measures 2 and 3 would need to be adjusted to include these data items.

INDUSTRY DESCRIPTION & SIZING TABLE

The monthly publication Retail Trade Australia (cat. 8501.0) is compiled from a survey of all employing enterprises with retail/service activity. The derivation of an estimate for each state and industry is the result of a monthly census of all large enterprises (where no expansion is used) with the addition of an estimate covering the sample or small retailer sector. The sample sector enterprises are classified by type of business and employment size. Enterprises are selected at random within each size category and the results expanded to produce an estimate of retail turnover for the entire category (eg NSW, Grocers, sample sector size 2).

The Retail Trade section uses employment as the method of classifying enterprises into either the large enterprise sector or into the individual size categories in the sample sector. Employment covers both full time and part time employee's. The table below details the employment boundaries used to classify retail enterprises for the industry specified.

Industry 3 : Liquor Retailing (ANZSIC class 5123)

This class consists of units engaged in retailing beer, wine or spirits for consumption off the premises.

Primary Activities

Alcoholic beverages retailing (for consumption off the premises only)

Exclusions/ references Hotels, bars and similar units (except licensed clubs) mainly engaged in selling alcoholic beverages for consumption on the premises are included in Class 5720 Pubs, Taverns and Bars.

(Sample sector boundaries)

EMPLOYMENT

	1	2	3	4	5	Large enterprise
New South Wales	1 - 4	5 - 19				>= 20
Victoria	1 - 4	5 - 19				>=20
Queensland						all
South Australia	1 - 19					>=20
Western Australia	1 - 4	5 - 19				>=20
Tasmania						all
Northern Territory						all
Australian Capital Territory						all

INDUSTRY DESCRIPTION & SIZING TABLE

The monthly publication Retail Trade Australia (cat. 8501.0) is compiled from a survey of all employing enterprises with retail/service activity. The derivation of an estimate for each state and industry is the result of a monthly census of all large enterprises (where no expansion is used) with the addition of an estimate covering the sample or small retailer sector. The sample sector enterprises are classified by type of business and employment size. Enterprises are selected at random within each size category and the results expanded to produce an estimate of retail turnover for the entire category (eg NSW, Grocers, sample sector size 2).

The Retail Trade section uses employment as the method of classifying enterprises into either the large enterprise sector or into the individual size categories in the sample sector. Employment covers both full time and part time employee's. The table below details the employment boundaries used to classify retail enterprises for the industry specified.

Industry 4 : Specialised Food Retailing

Fresh meat, Fish and Poultry Retailing	(ANZSIC Class 5121)
Fruit and Vegetable Retailing	(ANZSIC Class 5122)
Bread and Cake Retailing	(ANZSIC Class 5124)
Specialised Food Retailing n.e.c	(ANZSIC Class 5129)

Fresh meat, Fish and Poultry retailing

This class consists of units mainly engaged in the retailing of fresh meat, fish or poultry.

Primary Activities

Butchers' shop operations (retail)	Poultry, fresh retailing
Fish, fresh retailing	Seafoods, fresh retailing
Meat retailing (except canned meat)	

Fruit and Vegetable retailing

This class consists of units mainly engaged in the retailing fresh fruit or vegetables.

Primary Activities

Fruit, fresh retailing	Vegetables, fresh retailing
Greengrocery operation (retailing)	

Bread and Cake retailing

This class consists of units mainly engaged in the retailing of bread, cakes, pastres or biscuits.

Primary Activities

Biscuits retailing	Cakes retailing
Bread retailing	Pastries retailing
Bread vendors	

Specialised Food retailing

This class consists of units mainly engaged in the retailing of specialised food lines, such as confectionery or smallgoods or tobacco products.

Exclusions / References Units mainly engaged in retailing a wide range of food lines are included in Class 5110 Supermarkets and Grocery Stores.

Primary Activities

Confectionery retailing
Non-alcoholic drinks retailing
Smallgoods retailing

Specialised foods retailing n.e.c
Tobacco products retailing

{ Sample sector boundaries }

EMPLOYMENT

	1	2	3	4	5	Large enterprise
New South Wales	1 - 4	5 - 19	20 - 49			>= 50
Victoria	1 - 4	5 - 19	20 - 49			>=50
Queensland	1 - 4	5 - 19	20 - 49			>=50
South Australia	1 - 4	5 - 19				>=20
Western Australia	1 - 4	5 - 19				>=20
Tasmania	1 - 4	5 - 19				>=20
Northern Territory	1 - 19					>=20
Australian Capital Territory	1 - 4	5 - 19				>=20

EXPLANATORY NOTES

Introduction

1. This publication presents monthly retail trade series based on estimates of the value of turnover of retail establishments classified by industry, state and size. These series replace statistics based on the value of retail sales published up to JULY 1988. A more detailed description of the data definitions etc is contained in the Explanatory Notes of the publication 8501.0.

Scope and coverage

2. The Retail Trade survey covers all employing businesses, with at least one retail establishment. The scope of the survey (classified according to the Australian and New Zealand Standard Industry Classification [ANZSIC]) is detailed below:

. Food Retailing

Super markets and grocery stores (5110)
and non-petrol sales of identified convenience stores of petrol
stations

Takeaway food retailing (5125)

Other food retailing

Fresh meat, fish and poultry retailing (5121)

Fruit and vegetable retailing (5122)

Liquor retailing (5123)

Bread and cake retailing (5124)

Specialised food retailing n.e.c. (5129)

. Department Stores (5210)

. Clothing and Soft Good Retailing

Clothing retailing (5221)

Other clothing related retailing

Footwear retailing (5222)

Fabric and other soft good retailing (5223)

. Household Good Retailing

Furniture and floorcovering retailing

Furniture retailing (5231)

Floor covering retailing (5232)

Domestic hardware and houseware retailing (5233)

Domestic appliance retailing

Domestic appliance retailing (5234)

Recorded music retailing (5235)

. Recreational Good Retailing

Newspaper, book and stationery retailing (5243)

Other recreational good retailing

Sport and camping equipment retailing (5241)

Toy and game retailing (5242)

Photographic equipment retailing (5244)

- . Other Retailing
 - Pharmaceutical, cosmetic and toiletry retailing (5251)
 - Other retailing
 - Antique and used good retailing (5252)
 - Garden supplies retailing (5253)
 - Flower retailing (5254)
 - Watch and jewellery retailing (5259)
 - Retailing n.e.c (5259)
- . Hospitality and Services
 - Hotels and licensed clubs
 - Pubs, taverns and bars (5720)
 - Clubs (Hospitality) (5740)
 - Cafes and restaurants (5730)
 - Selected services
 - Video hire outlets (9511)
 - Hairdressing and beauty salons (9526)

Definition of turnover

4. Turnover includes retail sales; wholesales sales; takings from repairs, meals and hiring of goods (except for rent, leasing and hiring of land and buildings); and commissions from agency activity (e.g. commissions received from collecting dry cleaning, selling lottery tickets, etc) and net takings from gaming machines etc.

Reliability of estimates

5. There are two types of error possible in estimates of retail turnover. Non sampling error which arises from inaccuracies in collecting, recording and processing the data. The most significant of these errors are: misreporting of data items; deficiencies in coverage; non response; and processing errors. Every effort is made to minimise reporting error by careful design of the questionnaires, intensive training and supervision of interviewers, and efficient data processing procedures.

Sample error which occurs because a sample, rather than the entire population, is surveyed. One measure of the likely difference resulting from not including all establishments in the survey is given by the standard error, see Explanatory Notes of the publication 8501.0.

Appendix 6 Time Line of Retail Grocery Trends

Early 1900s	
1914	First Coles store opens in Melbourne
1920s	Suburban sprawl leads to ordering of goods and home delivery
	Experimentation with different retail formats in food departments
1924	First Woolworths store opens in Sydney
1930s and 1940s	Depression and World War Two austerity stifles retail innovation
1941	Franklins open branch stores in Sydney metropolitan area
1949	Food departments of department stores increasingly convert to self service
1950s	Establishment of independent supermarkets across expanding suburbs, stocking a wide range of groceries and cleaning products, including refrigerated goods such as milk, cheese, dairy and 'deli' products
1950	First fully self-service grocery store opens in Sydney
1954	766 self-service stores in Australia
1956	Coles and Woolworths trial self-service
1957	1700 self-service stores in Australia by end of year
1960s	Fruit and vegetables introduced in supermarkets
	Woolworths and Coles acquire small and innovative supermarket chains such as BCC in Brisbane and Flemings in Sydney, convert many of their variety stores to a grocery and variety format, and create the first house brands to undercut leading brands.
	Supermarkets buy out their franchise butchers and begin to invest in integrated supply chains via long-term contracts with suppliers. Sophisticated food processing techniques implemented.
1960	Coles opens first purpose-built free-standing supermarket in Victoria
1962	Coles has 8 supermarkets
1968	After a decade of rapid growth Franklins operates 70 supermarkets
1970s	Higher levels of inflation increase cost consciousness among consumers
	Supermarkets seek to keep prices down by keeping service to a minimum, narrowing aisles to reduce floor space rentals and dimming

	the lighting to cut electricity bills
	Supermarkets build their own meat distribution facilities
1972	Davids open fully computer-controlled warehouse in Sydney
1978	'No Frills' house brand introduced at Franklins
1979	Hong Kong company Dairy Farm International Holdings Limited buys Franklins
1980s	Discounters Franklins become popular in NSW; Bi-Lo in South Australia; Shoeys in Victoria and Jack the Slasher in Queensland, draw market share from both Woolworths and Coles.
	Convenience stores such as 7-Eleven and Food Plus, often on main roads and with longer opening hours, became popular and also draw market share from both Woolworths and Coles despite higher prices and limited range. These stores sell confectionary, soft drink, partly prepared meals, fast food items and often petrol.
	Woolworths and Coles purchase discount chains such as Jack the Slasher, Shoeys and Bi-Lo, and renovating their stores. Coles opens big new-look Super K stores. They improve the quality of their fruit and vegetables and invest heavily in technology and systems to improve efficiency, such as barcoders and scanners.
	Franklins expands into Queensland, South Australia and Victoria
	Davids, the major wholesaler to the independent retailers, begins to merge with other independent wholesalers
	The range of items on supermarket shelves continues to expand into areas such as health and beauty products, magazines, and pre-prepared meals.
	EFTPOS facilities introduced at checkouts.
1980	Scanning first appears at an independent supermarket in Victoria.
1982	Coles adopts scanning
1990s	Increasing sophistication of consumers demanding new flavours, methods of preparation and packaging
	Credit cards and retail incentive schemes such as 'fly buys' introduced

	Fall in employment of casual workers in the retail sector as proportion of national retail workforce
1990	Franklins moves into liquor sales
1991	Coles centralises buying from state to national level
1993	Woolworths Limited floats on stock exchange, adding over 330,000 new shareholders consisting mainly of small investors
1994	Store managers at Coles increasing freed to customise a portion of their offerings to suit local tastes.
1999	Major chains experiment with Internet shopping
	Announcement of fuller banking services to be provided at Woolworths

Source: Most items are sourced from Eric Jones, 'Coles Myer & Grocery Retailing in Twentieth-Century Australia', Coles Myer Submission 168 Part 2, and Franklins, Submission 200.

Appendix 7 House of Representatives Standing Committee on Industry, Science and Technology - Report: *Finding a balance towards fair trading in Australia, May 1997 – Recommendations*

RECOMMENDATIONS

1 Introduction

The Committee was asked to report to Parliament on business conduct issues arising out of commercial dealings between firms. Evidence given to the Fair Trading inquiry indicated that small businesses were vulnerable to exploitation and abuse in the following areas:

- retail tenancy;
- franchising;
- misuse of market power by larger competitors;
- and small business finance.

The Committee makes recommendations on specific policy measures to address the problems arising in each of these areas.

The Committee also recommends action to improve small business access to justice and to provide small businesses with better education and training to forestall problems arising.

The Committee also considered the need for general legislative protection for small businesses against unfair conduct and recommends a strengthening of Part IVA of the *Trade Practices Act*. The Committee considers that the success of new legislative protection against unfair conduct will require vigorous enforcement by the Australian Competition and Consumer Commission.

Recommendation 1.1 (para 1.50)

The Committee recommends that the Australian Competition and Consumer Commission be proactive in promoting compliance with the proposed new unfair conduct provisions of the *Trade Practices Act 1974*.

Due to the ineffectiveness of the Australian Competition and Consumer Commission in small business matters in the past, the Committee believes there is an urgent need to establish a body of precedents under the new provisions as quickly as practicable.

2 Recommendations on retail tenancy

Recommendation 2.1 (para 2.35)

Uniform retail tenancy legislation

The Committee recommends the drafting of a Uniform Retail Tenancy Code by the Australian Competition and Consumer Commission in consultation with industry participants including:

- (a) the Property Council of Australia;
- (b) the Australian Retailers Association;
- (c) the Australian Chamber of Commerce and Industry;
- (d) the Council of Small Business Organisations of Australia and its constituent retail bodies, including Independent Retailers of Australia;
- (e) other retail associations, including the United Retailers Association Inc;
- (f) the Australian Institute of Valuers and Land Economists; and
- (g) the Australian Institute of Business Brokers.

The Committee recommends that the Uniform Retail Tenancy Code be submitted to the Council of Australian Governments with a view to the adoption of uniform retail tenancy legislation around Australia.

Recommendation 2.2 (para 2.40)

Underpinning the Uniform Retail Tenancy Code in the *Trade Practices Act*

The Committee recommends that the Minister request the Australian Competition and Consumer Commission to approve the Uniform Retail Tenancy Code for underpinning in the *Trade Practices Act 1974*, thus providing for the courts to take into account provisions of the Uniform Retail Tenancy Code in determining whether or not business conduct in the area of retail tenancy has been ‘unfair’ and thus unlawful.

Recommendation 2.3 (para 2.60)

Dispute resolution

The Committee recommends that the Uniform Retail Tenancy Code provide for:

- (a) low cost mediation and conciliation of retail tenancy disputes; and
- (b) retail lease tribunals around Australia with jurisdiction to make binding decisions on retail tenancy disputes and affording limited rights of appeal to the courts.

The Committee further recommends that the Code explicitly exclude the option of legal representation for parties to a retail tenancy dispute, short of any eventual appeal to the courts.

Recommendation 2.4 (para 2.93)

Security of tenure

The Committee recommends that the Uniform Retail Tenancy Code provide for:

- (a) minimum lease terms of five years;
- (b) sitting tenants to have the option of lease renewal for a further five year term;
- (c) sitting tenants to have a right of first refusal of the lease for subsequent five year periods; and
- (d) the option of casual leasing in clearly defined circumstances but only at the request of the lessee.

The Committee further recommends that parts (b), (c) and (d) of this recommendation extend to tenants under existing leases.

Recommendation 2.5 (para 2.106)

Lease assignment

The Committee recommends that the Uniform Retail Tenancy Code:

- (a) require lessees assigning their leases to provide a disclosure statement to prospective purchasers, showing all relevant information on the financial position of the business and the rights and obligations of the business as a tenant, including information on rental rebates, rental holidays, and any other financial incentives applying at the time of assignment or in the previous five years;
- (b) specify the grounds on which a lessor can withhold consent to the assignment of a retail lease; and
- (c) provide that:
 - (i) purchasers of a trading retail outlet be given a new lease by the property management, when all parties agree; or
 - (ii) (as a fallback option) all rights and responsibilities pursuant to a retail lease pass to the new tenant on assignment of a lease, unless otherwise agreed in writing between the assignor and assignee.

Recommendation 2.6 (para 2.130)

Disclosure of rents paid

The Committee recommends that the Uniform Retail Tenancy Code provide for accredited retail property valuers to have access - on a non-disclosable basis - to relevant Tenancy Schedules of shopping centres, showing the total occupancy costs for each tenant in the centre and the value of any concessions or rebates given, for the purposes of valuing retail property or providing advice on market rent review.

Recommendation 2.7 (para 2.173)

Rents and rent review

Recognising rent will always be a matter for negotiation between landlord and tenant, the Committee recommends the Uniform Retail Tenancy Code provide that:

- (a) the disclosure statement set out clearly the method by which rent is to be calculated for the term of the lease without provision for review or for unpredictable increases;
- (b) market rent review only be permitted on renewal of a lease; and
- (c) the level of market rent on lease renewal be determined by an independent accredited valuer, with costs shared between the parties.

Recommendation 2.8 (para 2.197)

Outgoings and promotions

The Committee recommends that the Uniform Retail Tenancy Code provide:

- (a) for the establishment of merchants' associations in shopping centres;
- (b) that all tenants in a shopping centre belong to the merchants' association in that centre;
- (c) for Articles of Association of merchants' associations to be appended to the standard retail lease;
- (d) for the merchants' association to approve the annual budget of variable outgoings and promotions levies at an annual general meeting; and
- (e) for each tenant to be provided with detailed quarterly statements of expenditure on outgoings and promotions and audited annual statements of expenditure on outgoings and promotions.

Recommendation 2.9 (para 2.214)

Leases and disclosure statements

The Committee recommends that the Uniform Retail Tenancy Code provide for:

- (a) a standard form 'plain English' retail lease; also published in community languages; and
- (b) mandatory pre-contract disclosure of all factors likely to affect the viability of lessees - including all items currently required to be included in a statutory disclosure statement under the NSW *Retail Leases Act 1994*.

Recommendation 2.10 (para 2.228)

Tenancy mix

The Committee recommends that the Uniform Retail Tenancy Code provide:

- (a) for the merchants' association in a shopping centre to be consulted in relation to changes in tenancy mix; and
- (b) for lessors to include in disclosure statements provided prior to the signing of a retail lease the tenancy mix of the shopping centre and whether or not there are any provisions for rent reduction to apply if the turnover of the lessee falls owing to the introduction of a new competitor, or new competitors.

Recommendation 2.11 (para 2.256)

Redevelopment and relocation

The Committee recommends that the Uniform Retail Tenancy Code provide for retail tenants to be compensated according to pre-determined formulae specified in the lease or disclosure statement for:

- (a) disturbance to trading caused by redevelopments carried out at the direction of the lessor; and
- (b) any costs incurred as a result of a compulsory relocation, including pickup costs, any new fitout requirements, and compensation for disruption to trading.

The Committee further recommends that the Uniform Retail Tenancy Code require a relocated tenant to be granted a lease over new premises comparable to those vacated on like terms and conditions to the surrendered lease.

Recommendation 2.12 (para 2.261)

Economic and social impact statements

The Committee is concerned about the proliferation of retail shopping space in Australia and recommends that the Commonwealth raise through the Council of Australian Governments the possibility of local planning authorities requiring 'social and economic impact statements' to be lodged with development applications for shopping centre developments, for consideration with a view to restricting oversupply of retail floorspace.

3 Recommendations on franchising

Recommendation 3.1 (para 3.30)

The Committee recommends that the Franchising Code of Practice and any other relevant codes should provide for full disclosure of information relating to rental, outgoings, promotion expenses, tenancy mix and redevelopment proposals to franchisees who sub-let their premises from the franchisor. The code should also provide for adequate representation of franchisees in merchants' associations.

Recommendation 3.2 (para 3.79)

The Committee recommends that the Petroleum Retail Marketing Sites Act and the Petroleum Retail Marketing Franchise Act remain in force until new generic franchising legislation is enacted.

Recommendation 3.3 (para 3.112)

The Committee recommends that the Commonwealth enact specific franchising legislation providing for compulsory registration of franchisors and compliance with codes of practice. The definition of franchising under that legislation should include motor vehicle and farm machinery distribution arrangements and the oil industry.

The legislation should provide for adequate disclosure documentation, the establishment of appropriate independent code administration bodies, and dispute resolution procedures funded through compulsory registration fees.

4 Recommendations on misuse of market power

Recommendation 4.1 (para 4.59)

The Committee recommends that the *Trade Practices Act 1974* be amended to give the Australian Competition and Consumer Commission the power to take representative actions under Part IV of the Trade Practices Act which deals with various forms of restrictive trade practices, including the misuse of market power.

Recommendation 4.2 (para 4.66)

The Committee recommends that the Australian Competition and Consumer Commission make investigation of complaints, and enforcement of the law, in relation to the misuse of market power in the retail sector a top priority in light of the high degree of concentration in that sector and the disturbing evidence submitted to the Fair Trading inquiry.

5 Recommendations on small business finance

Recommendation 5.1 (para 5.16)

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The Committee recommends that small businesses be included in any client protection/dispute resolution programs established by the Treasurer pursuant to the recommendations in the report of the Financial System Inquiry (the Wallis report).

Recommendation 5.2 (para 5.48)

The Committee recommends that, in the light of the business conduct issues raised in the Fair Trading inquiry, the Commonwealth, in conjunction with State and Territory governments, examine the laws dealing with repossession and mortgagee sales with a view to providing that:

- (a) property owners have a reasonable opportunity to retire their debts by refinancing, before properties can be sold;
- (b) properties sold by mortgagee sale cannot be sold to the mortgagee or any company in which the mortgagee has an interest; and
- (c) there is a formal dispute resolution mechanism to guard the rights of unsecured creditors and shareholders against the actions of receivers/liquidators.

Recommendation 5.3 (para 5.52)

The Committee recommends that the concerns about client confidentiality raised in the Fair Trading inquiry be taken into account by any Taskforce established to review credit reporting and/or privacy of financial records.

Recommendation 5.4 (para 5.67)

The Committee recommends that the Treasury, in light of the concerns expressed in the Fair Trading inquiry, examine:

- (a) the practice of banks and other financial institutions securing business finance against real property rather than against the commercial viability of the business;
- (b) the implications of this practice for the efficient operation and survival of small businesses in Australia;
- (c) whether or not banks and financial institutions are charging excessive risk premiums for business finance given that business loans are secured against assets; and
- (d) options for promoting or ensuring small business access to finance secured against the potential commercial viability of the business.

Recommendation 5.5 (para 5.85)

The Committee recommends that:

- (a) the Code of Banking Practice be extended to cover all small business transactions instead of just applying to banking services 'for private or domestic use';
- (b) the Australian Banking Ombudsman Scheme be extended to all small businesses, not just those which are unincorporated;
- (c) the monetary limit for disputes under the Australian Banking Ombudsman Scheme be extended to 5500 000 to encompass the loan requirements of small businesses in Australia; and
- (d) if the banks are not prepared to implement part (a) of this recommendation by 30 June 1998, the Commonwealth introduce a code of conduct for the financial sector underpinned in legislation.

6 Legislative protection against unfair conduct

Recommendation 6.1 (para 6.73)

The Committee recommends that Part IVA of the *Trade Practices Act 1974* be amended by repealing the existing section 51AA and incorporating a new provision proscribing unfair conduct in commercial transactions. The section should read as follows:

Unfair conduct

New Section 51AA

- (1) *A corporation shall not, in trade or commerce, engage in conduct that is, in all the circumstances, unfair.*
- (2) *Without in any way limiting the matters to which the Court may have regard for the purposes of determining whether a corporation has contravened subsection(1) the Court may have regard to:*
 - (a) *the harshness of the result;*
 - (b) *any influence or pressure exerted on, or any tactic used against a person by the corporation or a person acting on behalf the corporation;*
 - (c) *whether or not a person suffered from any disability;*
 - (d) *whether or not there was a disparity in bargaining power between the parties;*
 - (e) *whether or not, as a result of conduct engaged in by the corporation, a person was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;*
 - (f) *whether or not the other person was able to understand any documents;*
 - (g) *the amount for which, and the circumstances under which, a party could have acquired identical or equivalent goods or services from a person other than the corporation;*

- (h) *the extent to which the conduct of the corporation is consistent with its conduct towards other persons who have entered into transactions or commercial relationships with the corporation that are the same as, or substantially similar to, the transaction or the commercial relationship between the corporation and the other person;*
- (i) *the requirements of any code of practice applying to participants in the area of trade or commerce in which the corporation is involved and which have been approved by the Australian Competition and Consumer Commission in accordance with section 51AAA;*
- (j) *the extent to which the corporation has made prior disclosure of any of its intentions affecting the interests of the other party and of the risks involved to that party;*
- (k) *in relation to a contract, the extent to which the corporation was prepared to negotiate with the other person in relation to the terms and conditions of the contract; and*
- (l) *the good faith of the parties.*
- (3) *A corporation shall not be taken for the purposes of this section to engage in unfair conduct in connection with the supply or possible supply of goods or services to a person by reason only that the corporation institutes legal proceedings in relation to that supply or possible supply or refers a dispute or claim in relation to that supply or possible supply to arbitration.*
- (4) *For the purposes of determining whether a corporation has contravened subsection (1):*
 - (a) *the court shall not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention; and*
 - (b) *the court may have regard to conduct engaged in, or circumstances existing, before the commencement of this section.*

Recommendation 6.2 (para 6.78)

The Committee recommends that Part IVA of the *Trade Practices Act 1974* be amended to incorporate a new provision (section 51AAA) providing for the Australian Competition and Consumer Commission to approve codes of practice - the section to read as follows:

Power of the Commission to approve codes of practice

New Section 51AAA

Where the Commission is satisfied that associated corporations in a field of trade or commerce have, in consultation with organisations representing other interested persons, agreed to abide by a particular code of practice for fair dealing with those interested persons, the Commission may approve that code of practice.

Recommendation 6.3 (para 6.81)

The Committee recommends that the *Trade Practices Act 1974* be amended:

- (a) to allow in section 82 the recovery of damages under Part IVA giving parties similar rights and access to remedies as are currently available under section 52; and
- (b) to make available civil penalties in Division 1 and 1A of Part V and for the proposed unfair conduct provision, as well as for section 51AB if that is retained.

7 Recommendations on access to justice and education

Recommendation 7.1 (para 7.13)

The Committee recommends that the *Trade Practices Act 1974* be amended:

- (a) to provide for mandatory pre-trial mediation of actions under the new section 51AA, prohibiting unfair conduct in commercial transactions; and
- (b) to provide that, in assessing costs for litigation under the new section 51AA, the courts should take into account the good faith in which parties have participated in any pre-trial mediation.

Recommendation 7.2 (para 7.16)

The Committee recommends the Attorney-General explore with the States and Territories low cost options for improving small business access to legal tribunals for commercial disputes.

Recommendation 7.3 (para 7.24)

The Committee recommends that the Minister for Industry, Science and Tourism develop education strategies for existing and prospective small business operators which would include targeting:

- (a) chambers of commerce;
- (b) trade associations;
- (c) local government development units;
- (d) public and private sector enterprises that may be facing restructure their activities, necessitating employee lump sum payouts for retirement or redundancy; and
- (e) financial institutions.

Recommendation 7.4 *(para 7.25)*

The Committee recommends that:

- (a) a national campaign be undertaken to raise awareness by potential small business entrants of the need to undertake adequate business education prior to committing themselves to such entry; and
- (b) the campaign be coordinated by the Commonwealth Government and delivered by State and Territory Governments.

Appendix 8 Productivity Commission - Draft Report: *Impact of Competition Policy Reforms on Rural and Regional Australia*, May 1999 – Comments relating to the retailing sector

On 31 August 1998 the Treasurer the Hon Peter Costello MP referred the impact of competition policy reforms on rural and regional Australia to the Productivity Commission for inquiry. The Commission was requested to specifically report on:

- the impact of competition policy reforms on the structure, competitiveness and regulation of major industries and markets supplying to and supplied by regional and rural Australia;
- the economic and social impacts on regional and rural Australia (including on small businesses and local governments) of the changes to the market structure, competitiveness and regulation flowing from the reforms and the effect of these impacts and changes on the wider Australian economy;
- possible differences between regional and metropolitan Australia in the nature and operation of major markets and in the economic and social impacts of the reforms promoted by national competition policy; and
- any measures which should be taken to facilitate the flow of benefits (or to mitigate any transitional costs or negative impacts) arising from competition policy reforms to residents and businesses in regional and rural Australia.

The Commission's draft report released in May 1999 observed that there was considerable concern over the exercise of market power by large corporations reducing the number of profitable business opportunities for small business.¹

The Commission heard evidence about the expansion of national retail chains into regional centres. In many regional towns and cities, the opening of a new supermarket had brought about intense competition. The businesses adversely affected often included those in smaller towns where former customers had been attracted to the new supermarkets in regional centres.²

Other issues touched on in the draft Productivity Commission report which were of interest to the retailing sector inquiry included concerns over predatory pricing, and the extent to which the major chains contributed to local

1 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, May 1999, p 282.

2 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, May 1999, p 284.

communities, for example via wages, local sourcing of produce, shareholder returns and donations to local groups.³

The Commission also considered the impact of deregulation of retail prices for milk, and found that there was a widespread belief that the supermarkets had been the main beneficiaries. For example, commenting on the effects of deregulating retail milk prices in New South Wales, the Minister for Agriculture in that state said:

The results are perfectly clear. The dairy farmers have lost out, the vendors have lost out and the consumers have lost out. The only winners are the supermarkets.⁴

In Victoria, the deregulation of the milk market beyond the farm gate in 1992 has also been accompanied by an increase in milk prices, which has been linked to the actions of supermarkets in increasing retail margins for milk.⁵

However, in the draft report the Commission disagreed that the price rises constituted evidence of abuse of market power by the supermarkets. Rather, the Commission concurred with the view expressed by the Commonwealth Department of Agriculture, Fisheries and Forestry that the purpose of regulation had been to suppress retailing margins. Therefore, the price rise, rather than indicating abuse of market power, may indicate that retailing margins had risen to more normal competitive market levels.⁶

On the question of whether of whether the national retail chains were damaging country Australia, the Commission concluded that:

In view of the expansion taking place in country areas and the benefits to consumers (evidenced by the success of the major supermarkets in attracting customers), it is not at all clear that the major supermarkets are a drain on the overall economy of country Australia. In fact, some participants from towns without a major supermarket expressed a desire to have such a store locate in their community in order to retain expenditure within the community rather than see it flow to large supermarkets in other nearby centres.⁷

3 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, May 1999, pp 284-286.

4 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, Canberra, May 1999, p 195.

5 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, Canberra, May 1999, p 196.

6 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, Canberra, May 1999, pp 196-197.

7 Productivity Commission, *Impact of Competition Policy Reforms on Rural and Regional Australia*, Draft Report, May 1999, p 286.

Appendix 9 Legislative Assembly of the Northern Territory – Select Committee on Territory Prices – Report: *Price, Quality and Choice: Striking a Fair Balance*, Vol.1, August 1999 – Terms of Reference, Summary of Findings and Summary of Recommendations

Establishment and Terms of Reference

On 18 February 1999, the Legislative Assembly established the Select Committee on Territory Food Prices.

The Select Committee was to inquire and report to the Legislative Assembly on or before 19 August 1999 on:

- (i) whether or not prices of food, groceries and household items are substantially different to those in comparable locations elsewhere in Australia; and
- (ii) if so, identify the reasons for the variations in prices.

Summary of Findings

The view of the Committee is that the findings of this inquiry are of equal importance to the recommendations outlined in Chapter 3, Summary of Recommendations.

In response to its Terms of Reference the Committee found that:

- Prices charged in Darwin appear reasonable when compared to Cairns and those charged in Alice Springs appear reasonable in comparison to Mt Isa. The Committee did not find evidence to sufficiently justify the price levels found in Katherine and Nhulunbuy.
- Food prices in the Northern Territory will only decrease, without regulatory intervention, to a comparable level to that of capital cities and other locations elsewhere in Australia when the Territory's population reaches a level where substantial economies of scale and infrastructure would allow the market to become more conducive to a higher level of competition.

The Committee also found that:

A Northern Territory 'basket of goods' and comparable locations

1. Due to the Northern Territory's relatively small population and economies of scale, it is not in a position to benefit from nationally competitive pricing that is afforded to regions elsewhere in Australia. Therefore care must be taken when comparing food prices in the Northern Territory with capital cities and other locations elsewhere in Australia, as they could be misleading.

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2. Darwin does not have many of the cost advantages of those capital cities elsewhere in Australia, including:
 - (a) the economies of scale allowed by the population size of most other capital cities when compared to Darwin;
 - (b) proximity to the major distribution centres operated by the national supermarket chains;
 - (c) proximity to major fruit and vegetable producing areas; and
 - (d) the cooler climates in other State or Territory capital cities allowing cheaper storage and longer shelf lives for perishable goods.
3. Given the differing economies of scale behind the grocery pricing regimes in capital cities and other locations elsewhere in Australia, it is far more appropriate to compare food prices in the Northern Territory with comparable locations in Australia that have similar demographics and infrastructure. The locations selected were:
 - (a) Darwin with Cairns;
 - (b) Alice Springs with Mt Isa;
 - (c) Katherine with Broome;
 - (d) Tennant Creek with Derby; and
 - (e) Nhulunbuy with Wyndham.
4. Conducting the survey of prices based only on the information provided by the major supermarket chains impacted on the inquiry in the following ways:
 - (a) the Committee was unable to perform price comparisons for Tennant Creek, as neither supermarket chain has a store in this location;
 - (b) the Committee had to compare Nhulunbuy to a location other than Wyndham because neither supermarket chain has a store in this location. The Committee therefore compared Nhulunbuy prices to Darwin, and tried to explain identified differences; and
 - (c) the Committee had to rely on the information provided by both major supermarket chains. Given the time constraints for this Committee to report by 19 August 1999 the survey was not independently checked, and much of it was historical information.
5. Price surveys conducted with a limited range of items in a 'Basket of Goods' could be open to manipulation and potentially mislead Territorians about the true nature of food prices. The Committee notes that the risk of distortions and manipulation in small sample size surveys could be largely overcome by increasing the sample size and that the cost of undertaking a regular survey of this size could be expensive.

Prices in the Northern Territory

6. Prices charged in Darwin appear reasonable when compared to Cairns and those charged in Alice Springs appear reasonable in comparison to Mt Isa. This could be partly due to the local competition between Coles and

Woolworths in these centres. The Committee did not find evidence to sufficiently justify the price levels found in Katherine and Nhulunbuy.

7. Food prices in the Northern Territory will only decrease, without regulatory intervention, to a comparable level to that of capital cities and other locations elsewhere in Australia when the Territory's population reaches a level where substantial economies of scale and infrastructure would allow the market to become more conducive to a higher level of competition.
8. One feature of the stores in Katherine and Nhulunbuy is the comparative lack of competition, where a 'non-competitive premium' appears to apply.
9. Apart from fresh food, the 'gap' in food prices between Darwin and other capital cities has decreased steadily since 1996. In the case of fresh food, the gap has increased, with a peak in March 1998, and a downward trend since.
10. Since December 1998, food prices generally have steadily dropped in all of the major centres in the Northern Territory, including Nhulunbuy where food prices have dropped marginally.
11. The remote, small and decentralised population of the Northern Territory (191,400) has the effect of increasing prices.
12. The nature of competitive pricing in the grocery industry is based upon the movement of volumes and is subject to the principles of supply and demand.

Cost of doing business in the Northern Territory

13. In terms of the food distribution and purchasing policies of the two national supermarket chains operating in the Northern Territory, the Northern Territory is not regarded as a large enough region to justify a distribution centre attracting 'free into store' (FIS) prices as occurs in capital cities and other locations elsewhere in Australia.
14. There have been instances where locally produced food has been transported to 'southern distribution centres' and subsequently returned to the Northern Territory for sale in the local supermarkets.
15. Once groceries have left a distribution centre there is still a significant range of costs to be recovered by the retailer, some of which contribute to higher food prices in the Territory. These costs include:
 - (a) Transport from warehouse to individual store;
 - (b) Stock spoilage (particularly fresh produce);
 - (c) Administration;
 - (d) Wages, superannuation, payroll tax, workers compensation insurance;
 - (e) Advertising;
 - (f) Electricity (particularly refrigeration and air-conditioning);
 - (g) Rent;
 - (h) Depreciation;
 - (i) Stock holding costs (stock/turnover ratio);

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- (j) Trolley collection and cleaning contractors;
 - (k) Security, money transportation;
 - (l) Local government rates (for garbage collection and other services); and
 - (m) Insurance, public liability cover and other occupancy expenses.
16. As a percentage of the cost of good delivered in to Northern Territory stores, freight accounts for 5.0% in Alice Springs, 7.2% in Darwin, 6.1% in Katherine, 17.3% in Nhulunbuy and higher in remote centres and communities.
17. The two national supermarket chains operating in the Northern Territory benefit from advances in electronic technology.
18. The two national supermarket chains operating in the Northern Territory have a considerable advantage over small retailers through their ability to purchase and install their own EFTPOS hardware and software.
19. In response to the comment by the ACCC that the two national supermarket chains operating in the Northern Territory are able to negotiate favourable terms and conditions with the banks over EFTPOS facilities in the following manner
- (a) the banks tend to charge small retailers 20 cents for every debit transaction;
 - (b) the chains receive around 15 cents per debit transaction from their bank.
- One chain responded that the income received from the banks for EFTPOS transactions represents an offset to the sorts of incurred by the chains in providing EFTPOS facilities.
20. Territory taxes, such as Payroll Tax, were cited as a contributor to higher food prices in the Northern Territory.
21. Wholesale Sales Tax on the freight component of certain goods was a factor that contributed to higher food prices. The Committee noted that with the introduction of the Goods and Services Tax (GST), the Wholesale Sales Tax (WST) would be phased out.
22. Based on the 'Basket of Goods' developed by the Committee, the implementation of the GST would have a minimal impact on food prices. The total basket in Darwin pre-GST costs \$141.35 and post-GST costs \$139.32, which represents a saving of \$2.03 (-1.4%). It is still unclear how the GST may impact on food prices in the remote centres and communities in the Northern Territory and warrants further investigation.
23. Electricity usage and price were cited as contributors to a higher food price in the Northern Territory. For climatic reasons, the Northern Territory requires more electricity compared with the rest of Australia for store air-conditioning and refrigeration.

Local food producers

24. Food producers in the Southern and Eastern seaboard have comparative advantages of economies of scale, lower overheads, cheaper transport costs, ready access to major markets and lower inventory costs.
25. Opportunities are limited for local food producers to compete on a 'level playing field' nationally.
26. Delivery of produce into 'Southern' stores is on a daily basis whilst into Darwin Stores is on average three times a week.
27. A number of local food producers are dependent for their livelihood upon the two major national supermarket chains operating in the Northern Territory, which results in exposure of the small local operations to the competitive advantages of the scale of economies generated elsewhere in Australia, particularly within the Southern States.
28. The sale and supply of local produce directly to the two major national supermarket chains operating in the Northern Territory is negotiated on an ad-hoc basis, with limited guarantees of continuation from the chains to receive that produce.
29. Given high costs of production, local food producers have found it difficult to compete at the national level. Produce elsewhere in Australia is provided on a more continuous basis and usually at a more favourable price to the consumer.
30. There is considerable opportunity for growth in the Northern Territory's horticulture industry, but it is fragmented in nature with a lack of infrastructure that hinders continued development.
31. Local markets are smaller and more disparate than those established in the States and the Australian Capital Territory.

The national supermarket chains in the Northern Territory

32. The two national supermarket chains operating in the Northern Territory, irrespective of the contribution they make to the local economy, are in business to make a profit and provide a return to their shareholders.
33. Only two national supermarket chains, namely Coles Myer Supermarkets Australia Ltd and Woolworths Supermarkets (SA) Division operate in the Northern Territory.
34. Should a new major supermarket competitor wish to commence operations within the Northern Territory, it would find it very difficult, principally due to the infrastructure establishment costs. The establishment of a new major supermarket competitor to the Northern Territory would be a commercial decision, determined entirely by the demands of the market.
35. The two national supermarket chains operating in the Northern Territory have acquired a significant market share. This has come at the expense of the local independent supermarkets.

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36. The competition between the two major national supermarket chains operating in the Northern Territory benefits the consumer by providing convenience through access to:
 - (a) a wide variety of goods;
 - (b) quality food, in particular meat, fruit and vegetables; and
 - (c) a consolidation of complementary retail services, for example, butchery and bakery services, newsagency and fast food outlets.
37. There appears to be adequate safeguards in respect of monitoring trading hours and market competition already in place under the authority of the Australian Competition and Consumer Commission (ACCC). The Committee noted that the ACCC would be closely monitoring the implementation of the GST.
38. Consumers want to have the services and convenience of shopping in either the major national supermarkets or at a local independent supermarket.
39. There is a lack of educational and promotional awareness programs from the grocery industry, which would assist the consumer in making an informed choice.
40. There was strong support within the community for greater consumer awareness of competitive food prices and variations in the Northern Territory, through the re-introduction and regular publication of price comparisons.

Restricted trading hours

41. The local independent supermarkets favoured restricted trading hours and a cap on market share.
42. There was strong consumer demand for retaining unrestricted trading hours as it has become a way of life in the Northern Territory.

Remote centres and communities

43. Some of the major centres and all of the remote communities in the Northern Territory are disadvantaged in terms of price, variety and quality of food supplied, particularly perishable foodstuffs.
44. Due to the absence of economies of scale in remote centres and communities in the Northern Territory, higher costs tend to be incurred for the transport of goods by sea, air and road to those centres and communities.
45. There is no significant difference in terms of stock spoilage between the major centres in the Northern Territory and stores in other comparable locations elsewhere in Australia. However, stock spoilage (particularly fresh food and meat) was a major contributor to higher prices in remote centres (including Nhulunbuy) and communities.
46. There were a number of models as to how remote Aboriginal Communities establish and maintain the running of the 'Community Store'. These models reflect the following:

- (a) Community Stores that are controlled and operated by the local community government;
 - (b) Community Stores that are established as incorporated bodies, separate from the local community government;
 - (c) Community Stores that are established as incorporated bodies, separate from the local community government but return their profits to the community; and
 - (d) Community Stores that are run as private organisations.
47. The Community Store Manager plays an important role in regard to the quality, quantity and availability of foods in remote communities, and eventually the nutritional health of a community.
48. In some remote Aboriginal communities the Community Store may not be regarded as an economic enterprise, but rather a convenient source of funds for other community interests. This may have a detrimental effect in regard to providing reasonable food prices, namely that:
- (a) the store manager may refrain from making commercial decisions that would preserve the viability of the store;
 - (b) the threat of insolvency may result in an even higher mark-up on food and other items; and
 - (c) the wholesaler when dealing with a community store may see such a store as high risk and therefore charge accordingly.
49. Higher food prices in Community Stores in remote communities do affect peoples' buying patterns.
50. The incidence of diet related ill health is higher in remote Aboriginal communities. These concerns were raised by Territory Health Services in its submission to the Committee which estimated:
- approximately 95% of food eaten in Aboriginal communities is food purchased in the store, with traditional foods now contributing only a small amount to peoples' dietary intake. Poor diet is a major risk factor for chronic diseases such as coronary heart disease, diabetes and renal disease, all of which are of higher prevalence in the Aboriginal population, along with low birth weight and undernutrition in early infancy.
51. The introduction of local food enterprises such as the development of market gardens in some of the remote centres and communities, has the potential to reduce food costs and provide food of high quality and nutritional value.

Summary of Recommendations

A Northern Territory Basket of Goods and comparable locations

1. The Committee recommends that the Government (in consultation with industry and consumer representatives) develops guidelines necessary to monitor grocery prices across the Northern Territory and that the results be published on a regular basis.

Prices in the Northern Territory

2. The Committee recommends that retailers provide consumers with the unit price of goods together with the price payable and that these be adequately reflected on the shelf label.

Cost of doing business in the Northern Territory

3. The Committee encourages the Government to continue its present policy of reducing commercial electricity tariffs, with further reductions being made as soon as possible until commercial tariffs are in line with the 'all-States' average. It further recommends that the Power and Water Authority continues to publish in its annual report, the inter-city comparisons of electricity tariffs.

Local food producers

4. The Committee recommends that the Government develops a feasibility study on the food supply system in the Northern Territory, and that in doing so the study should take into account:
 - (a) the identification of the factors influencing the distribution of food;
 - (b) the strategies to address factors that impact upon food supply;
 - (c) to identify how those strategies in item (b) above can be implemented; and
 - (d) the viability of establishing a wholesale market or food co-operative that will serve the Northern Territory and South East Asia.
5. The Committee recommends that local food producers within the Northern Territory organise themselves into coherent and representative bodies that can readily compete with major producers elsewhere, by establishing a competitive regime to sell local produce to the major national supermarkets operating in the Northern Territory and South East Asia.

Remote centres and communities

6. The Committee recommends that an inquiry be undertaken:
 - (a) to review the operation and management practices of stores within remote communities;
 - (b) to identify ways to assist those stores to effectively meet community aspirations; and
 - (c) to assess the overall impact of the GST on food prices in remote communities.

7. The Committee recommends that the Government facilitates sponsored trainee programs for remote community stores staff on all aspects of managing and handling food and produce.
8. The Committee supports the development of an award system for stores in remote communities, to foster and promote best business and management practices in meeting community aspirations.
9. The Committee recommends that the Government facilitates programs that will allow for the establishment and the development of local food enterprises and ventures, such as market gardens in remote centres and communities, that will reduce food costs and provide food of high quality and nutritional value.

Restricted trading hours

10. The Committee does not support the call to regulate prices nor restrict trading hours.

Appendix 10 Industrial Commission of New South Wales – Report upon matters relating to the *Management, Control and Operations of General Chain Stores in New South Wales, August 1939 - Terms of Reference*

On 14 August 1936 the Minister for Labour and Industry in the New South Wales State Government, the Hon John Dunningham, referred to the Industrial Commission of New South Wales the following matters for inquiry and report pursuant to section 82 of the *Industrial Arbitration Act 1912*, as amended, and section 4(i) of the *Industrial Arbitration (Amendment) Act 1926*:

To inquire into and report upon the management, purchasing, practices, or methods of any or all of such Chain Stores conducted within the State of New South Wales, and, without in any way limiting or affecting the generality of the foregoing to inquire into and report upon-

- (a) Whether the operations, management, purchasing, practices, or methods of any or all of such Chain Stores are detrimental to the interest of the State, storekeepers, shopkeepers, wholesalers, manufacturers, producers, consumers, employees in chain stores, or any other trade, business, or industry, in so far as it may produce-
 - (i) Undue restraint of trade,
 - (ii) Unfair methods of trade competition,
 - (iii) A diminution of trade, business or employment,
 - (iv) A lowering of the standard of living,or otherwise, and if so, in what manner and to what extent.
- (b) What effect have the operations of Chain Stores upon-
 - (i) Proprietors of other stores or shops who extend credit to primary producers and/or others.
 - (ii) Manufacturing, wholesale or retail chemists or druggists, or upon persons manufacturing or selling proprietary commodities.
- (c) Whether –
 - (i) Trade advantages are obtained or obtainable by the proprietors of Chain Stores which are not available to small retailers.

- (ii) The terms and conditions under which persons are employed in Chain Stores (including the respective proportions of male to female employees, and junior to adult employees) giving any advantage over other retailers.
- (iii) The profits of the proprietors of such Chain Stores are excessive.
- (d) What are the labour conditions prevailing in industries supplying the requirements of Chain Stores and what is the extent, if any, which existing conditions have been brought about by the purchasing practices of such organisations and the effect thereof upon the standard of living amongst those employed in such industries in the State?

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: *Competition Policy: Friend or Foe – Economic Surplus, Social Deficit?*, August 1999

Terms of Reference

To inquire into and report on the National Competition Policy, including:

- (a) its socio-economic consequences, including benefits and costs, on:
 - (i) unemployment,
 - (ii) changed working conditions,
 - (iii) social welfare,
 - (iv) equity,
 - (v) social dislocation, and
 - (vi) environmental impacts;
- (b) the impact on urban and rural and regional communities;
- (c) its relationship with other micro-economic reform policies; and
- (d) clarification of the definition of public interest and its role in the National Competition process.

Executive Summary from the Interim Report

Competition Policy: Friend or Foe

Economic Surplus, Social Deficit

August 1999

The Senate Select Committee on the Socio-Economic Consequences of the National Competition Policy has agreed to issue this Interim Report as a basis for discussion and further deliberation.

The Committee has found an understanding, in the main, that there are benefits flowing from National Competition Policy (NCP). The Committee has further found acceptance, in the main, of the need to review established arrangements in sectors to ensure that arrangements are efficient, equitable and transparent.

However, the Committee has found that the level of acceptance of the benefits that NCP can deliver has varied, as has the level of understanding of the policy.

Furthermore the Committee has found that NCP has become the ‘lightning rod’ for the many negative social and structural changes that are occurring in Australia, particularly in rural and regional areas. Many, but not all, understand NCP is not solely to blame in all cases.

Misconception about the policy

The concerns identified by the Committee about NCP are both related to its implementation and its effect on the ability of Governments to govern. Because the policy has at times been misrepresented and poorly applied its potential to benefit the community is being eroded.

At the higher levels of NCP administration there appears to be a good understanding that the policy is a tool that Governments can use to facilitate the efficient use of resources and to achieve the outcomes – both social and economic – that the community wants. The Committee is aware that NCP has been used as an excuse by some agencies to realise other policy objectives.

The Committee is concerned by the application of NCP as a ‘one model’ approach to all sectors. A flexible outcome ought to be sought by an application of the ‘public interest’ test that allows for changing concepts of what is in the ‘public interest’.

The Committee found that there is a need for a more directed and considered public education and consultation effort in relation to NCP in order to address the misinformation and misconception about the purpose and goals of the policy. In the Committee’s view, if real economic hardship and social dislocation, flowing from NCP reforms deemed desirable, is to be minimised or avoided, then consideration should be given to the Governments and agencies concerned becoming involved in developing adjustment packages and transitional plans consistent with the outcomes sought.

Confusion over ‘Public Interest’

The Committee has found that there is general confusion over what constitutes the ‘public interest’. This confusion then translates into confusion on how to apply the ‘public interest’ test.

The Committee is concerned that this confusion when combined with the administrative ease of simply seeking to measure outcomes in terms of price changes, risks an administrative response of application of a narrow, restrictive, ‘public interest’ test rather than one which takes account of the wider social impacts.

The Committee has found that the limited application and lack of transparency of the ‘public interest’ test is contributing to the view that NCP is a negative policy.

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Responsibility for administration/implementation of the NCP has, in all jurisdictions, been placed in Treasury or Premiers portfolios with other portfolio areas having a greater or lesser input. In the Committee's view this has led to a predominantly economic rather than multi-disciplinary approach involved in the implementation of NCP and in particular the 'public interest' test.

The Committee's concerns are reinforced by the fact that the 'public interest' test would appear to be being applied differently between jurisdictions and in an uncoordinated way across sectors.

Considerable work needs to be undertaken in the application of the 'public interest' test. This work could include improving the educational role of the National Competition Council (NCC) and the State and Territories agencies, the development of appeal processes from bureaucratic decisions, greater community involvement in assessment and increased coordinated involvement of governments.

The expanding application of NCP

The NCC is oversighting a legislative review process that is resulting in NCP being applied to areas within the community that have not been targeted as priority areas by CoAG. This means that NCP is being forcibly applied to areas of potentially low value return in terms of any gain versus costs from further reform and the provision of community welfare services by volunteer groups.

Because of the 'wholesale' or 'one policy solution fits all' application of NCP, the question is raised as to whether the benefits from NCP always outweigh the implementation costs. This approach has:

- created a risk of conflict with other government policies and objectives, for example, in the provision of medical services in rural and regional Australia;
- increased administrative costs for charities, and led to a breakdown in cooperation between welfare services; and
- left questions about the level of benefits to be derived, such as in cases where the rounding up of retail tills to the nearest five or ten cents is of greater value than the arrangements under review.

Other issues raised

The Interim Report lists a number of other key issues.

The Public Understanding of NCP

The public understanding of National Competition Policy has been a fundamental problem since the policy's inception. Concerns have been expressed at the way in which the policy has been presented with the general public being required to accept changes simply on faith. The 'top-down' mandatory approach adopted by the NCC and other Commonwealth and State/Territory CP Units, with hindsight, has not been as successful nor widely accepted as it could have been.

In the Committee's view there has been a degree of 'blind' or dogmatic application of NCP by officials. A lack of a multi-disciplinary approach to legislative reviews has exacerbated the situation, as has the lack of transparency of many of these reviews.

With respect to the consultation and information flow processes, the administration of the policy is in dire need of a 'healthy dose of sunlight'. The Committee is of the view the NCC should take up the challenge to improve the knowledge of grass roots managers of the policy, political representatives, and the general public rather than simply 'educating from the podium' as a policy advocate.

Lack of transparency of Legislative Reviews

The Committee has received evidence that the legislative reviews undertaken by State Governments are not always being undertaken in an open, transparent manner with the views of all interested parties taken into consideration. The Committee agrees with the NCC's view that there is a requirement under NCP for transparency in the review process.

Contracting Out

The Committee heard evidence of the beneficial aspects of open competition for services and projects – improved efficiency, productivity increases and higher morale, lower costs, etc. But there was also contrary evidence about poor administration of contracting processes, amalgamation of work to the detriment of local suppliers, contract determination on the basis of price alone, acceptance of unsustainably low or aggressive prices. Small towns and companies were particularly affected with the loss of human capital and reduced economic activity.

In the Committee's view, the prospect of real efficiencies and benefits being derived from NCP requires the development of informed markets and consumers. The Committee notes that again, the application of the 'public interest' test in a manner appropriate to the needs of the community goes to the heart of this issue.

Lack of benchmarks or performance criteria

The Committee found the lack of data for benchmarks or performance criteria for the evaluation of the benefits or costs of the policy to be one of the greatest shortcomings of the implementation of the NCP. Without such information, governments cannot make fully informed decisions regarding the 'public interest' of any of the reforms proposed under NCP or implement appropriate transitional and, where justified, compensatory mechanisms.

The lack of hard evidence can be blamed for much of the suspicion of NCP, as the community should not be expected to accept NCP as an article of faith. The Committee is concerned that where estimates of benefits have been provided, these estimates may have failed to identify the social impacts of the reforms or may not accurately measure the economic benefits. There were a number of differing views on the actual outcomes of NCP. The committee heard evidence that whilst the national reform and co-ordination in areas such as gas and electricity have delivered some

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benefits that the overall benefits have not been as large as was anticipated. There is clearly a need for proper quantification of the benefits – both social and economic – of the reforms.

Relative impact on urban, rural and regional communities

The lack of employment in rural centres and further decreasing employment opportunities, with the loss of youth as they move to the larger towns or cities in search of work are recognised as serious issues. In addition to their impact they compound the loss of banking, postal, shopping and other community and health services as the smaller towns gradually close.

The Committee considers that the cumulative effects of changing technology, infrastructure provision, the wide range of micro-reform policies including NCP, and globalisation of the economy, on rural and regional areas warrant greater attention. The cumulative effect of these influences, rather than solely NCP, on rural and regional Australia is creating significant social pressures and it is apparent that the impacts of these policies has been disproportionate between metropolitan and country areas. Technological and other advances are enabling regional Australia to produce more goods and services with fewer people. Because of this, people who form the human capital that supports the social fabric of small regional towns are being lost. Paradoxically, the changes in technology etc are not enabling all of the people to remain gainfully employed in these small regional centres.

Social welfare

The evidence taken to date suggests that in some cases the application of NCP principles in the health, community and aged care industry would appear to be in conflict with other service provision goals. This is apparent in the competitive tendering and contracting out process.

There is some evidence to suggest that some practices within the medical profession, for example, the entry requirements and training of medical specialists, may warrant change and the introduction of NCP principles will be of benefit.

Each jurisdiction should be carefully identifying the potential adjustment problems arising from each and every individual reform proposed and consideration should be given to whether particular transitional or, where appropriate, compensation provisions should be available.

Lack of oversight by CoAG

CoAG has not met since 1996 when the NCC work program was established and the NCC has prosecuted the 1996 agenda largely without multi-government supervision. The Committee notes that the reform agenda has both moved on and exposed some significant adjustment issues that Governments may need to address by reviewing and, where necessary, altering the NCC's work priorities.

If the CoAG process is to only occur intermittently, then the Committee recommends consideration be given to shifting responsibility for oversight of the NCC and NCP process to another, equally representative forum, to ensure more frequent review of the NCC and NCP by Governments. Ideally, CoAG must meet to consider NCP on a much more regular basis.

The dual role for the NCC in overseeing the States reviews and recommending tranche payments

The structure of NCP could benefit from a review to either separate the roles of the NCC as both the driver of reform and the judge of progress by recommendations for tranche payments. It may be sufficient to at least provide a review mechanism to the NCC's determinations that the NCP has been applied in a way consistent with the agreements.

An uncoordinated application of NCP by States and Territories rather than a coordinated national approach

In many cases, a more coordinated approach to NCP may enhance the value of the outcome for all at a national level.

The Committee is concerned that the present uncoordinated arrangements may result in a less than optimal outcome for Australia both for consumers domestically and as an exporter.

Apart from the initial agreement over water, gas electricity and roads, there has been no coordinated work to identify the second level of reform that can be approached at an agreed national level. Such an approach would maximise the benefits to Australia, and, through this, to the States and Territories.

The Committee recommends that as part of the year 2000 review of the NCC, consideration be given to what role the NCC could play in securing such a coordinated outcome.

Appendix 12 Small Business and the Australian Competition and Consumer Commission

Definition of Small Business

The Committee considered it useful to re-visit the various definitions associated with small business.

A business has traditionally been regarded as small if it has the following management or organisational characteristics:

- It is independently owned and operated;
- It is closely controlled by owners/managers who also contribute most, if not all of the operating capital; and
- The principal decision-making functions rest with the owners/managers.¹

The definition is based on the report of the House of Representatives Standing Committee on Industry, Science and Technology called *Small Business in Australia – Challenges, Problems and Opportunities 1990*. The Report qualifies these characteristics with a size component but emphasises that a size definition is a functional addition to and should not overshadow it.²

For statistical purposes, the Australian Bureau of Statistics (ABS) defines small businesses (excluding agriculture) in accordance with that Report's recommended size categories as follows:

- Non-manufacturing industries employing less than 20 employees; and
- Manufacturing industries employing less than 100 employees.³

The ABS has estimated that that there were just over 1 million small private sector businesses in Australia in 1996-97, employing around 3.5 million people. This constitutes about 97 per cent of all private sector businesses, and more than 50 per cent of all private sector business employment (including self-employment).⁴

The Department of Workplace Relations and Small Business uses the same definition as the ABS, but add two further characteristics:

- Operations (and sometimes markets) tend to be locally based; and

1 Australian Bureau of Statistics, *Small Business in Australia 1997*, ABS Catalogue No 1321.0, May 1998, p 1.

2 Australian Bureau of Statistics, *Small Business in Australia 1997*, ABS Catalogue No 1321.0, May 1998, p 1.

3 Australian Bureau of Statistics, *Small Business in Australia 1997*, ABS Catalogue No 1321.0, May 1998, p 1.

4 Australian Bureau of Statistics, *Small Business in Australia 1997*, ABS Catalogue No 1321.0, May 1998, p 1.

- ‘smallness’ is relative to the size of the largest firm in the industry. Generally speaking small firms don’t have much market power.⁵

The ACCC and Small Business

The ACCC advises on new legal issues and general trade practices enforcement matters relating to small business operations and consumer and business protection issues. Small business is now a significant constituency for the ACCC, which sees diversity of contact as the hallmark of its links with the sector.

Contact ranges from meetings with individual firms to discuss difficulties they face in the marketplace; regional business groups to acquaint them with the ACCC and its work in administering the *Trade Practices Act*; and ethnic community based organisations that have significant business interests.

A major element is regular contact with peak, national business organisations through direct consultation and collective roundtable discussion. This takes place through the Small Business Advisory Group (SBAG), which has 10 member bodies representing several hundred small business organisations and is chaired by ACCC Commissioner John Martin. Both the ACCC and the business organisations shape SBAG’s agenda with the objectives of:

- Bringing to the ACCC’s attention trade practices issues affecting small business;
- Assisting the ACCC to advise the small business community about its work; and
- Assessing the compliance burden of trade practices legislation on small business and advising the ACCC on ways to minimise the impact.

Through SBAG the ACCC has first hand access to the views of, for example, the professions, rural producers, retailers and motor traders on activity affecting their members. SBAG’s discussions also take in future directions for administering the *Trade Practices Act* and law reform matters. Members of SBAG include:

- Motor Traders Association of Australia
- Council of Small Business Organisations of Australia
- Australian Chamber of Commerce and Industry
- Law Council of Australia

5 Department of Workplace Relations and Small Business web page at http://www.dewrsb.gov.au/group_osb/smallbus/research.htm

- The Australian Council of Professions
- Australian Industry Group
- Real Estate Institute of Australia
- Australian Retailers Association
- National Farmers Federation
- Australian Federation of Business and Professional Women.

Other Commonwealth departments and agencies are invited to SBAG half-yearly meetings for briefings, and to discuss with industry representatives policy and new program development directed at small business.

Each of the ACCC's capital city offices now has small business staff. Peak consultations are held in Canberra.

Regional and local work with business chambers, professional advisors to business, and local government support networks underpin and reinforce the ACCC's ability to learn from business about cases of unconscionable conduct, franchising disputes, misleading conduct and other difficulties which regularly confront small business.⁶

The ACCC's Small Business Unit coordinates a regular program of seminars to assist small businesses to understand recent developments on trade practices issues.

In New South Wales, the ACCC is currently developing a series of regional seminars with chambers of commerce and the Department of State and Regional Development to address business issues and the *Trade Practices Act* including new country of origin labelling law.⁷

At last December's meeting the Department of Industry, Science and Resources reviewed the status of the emerging Oilcode which is aimed at improving commercial activity and relationships in the petroleum distribution sector.

6 Australian Competition and Consumer Commission, 'ACCC is listening to small business' ACCC Update, Issue 3, March 1999, p 7.

7 Australian Competition and Consumer Commission, ACCC Update, Issue 3, March 1999, pp 8-9.