

Master Groccers Australia

Liquor Retailers Australia

Competition Policy Review 2014

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1. Introduction

Master Grocers Australia and Liquor Retailers Australia (MGA/LRA) welcomes the initiative of the Australian Government to undertake a comprehensive review of the Australian competition laws and policy. Approximately 20 years ago a thorough evaluation of competition laws was undertaken, known as the 'Hilmer Report'¹. The 'Hilmer Report' was successful in stimulating productivity and provided opportunities for innovative changes.

However, the economic landscape has changed in the last 20 years and MGA/LRA welcomes the opportunity to make a submission in relation to the review of the Competition and Consumer Act 2010 (Cth) ('CCA') as we are firmly of the opinion that if significant changes to our competition laws are implemented in a manner consistent with the proposed reforms contained herein, there will be opportunities for economic growth and increased productivity which will enhance innovative practices based on fairness.

MGA/LRA intends to consider how the Australian supermarket landscape has changed to the point where there are now two dominant retail giants in the marketplace. We will show that the market power of these two major retailers, namely Coles and Woolworths, has been allowed to grow without any successful challenge to the extent that smaller market participants are slowly disappearing. MGA/LRA will demonstrate that if this situation is allowed to continue unabated then competition in the supermarket industry will cease to exist, productivity will decline, and consumers will lose their diversity of choice.

Our submission will focus on how Coles and Woolworths have gradually extended their market power to an abusive level which is threatening the livelihoods of their smaller, vulnerable competitors, yet is deemed permissible due to the inadequacy of current competition laws in Australia. The evidence of the damage to small businesses and communities due to the market dominance of Coles and Woolworths is compelling.

MGA/LRA will provide numerous examples where smaller supermarkets have been forced to close their doors due to the expansion of Coles or Woolworths in their region. In many cases it is not just because of the presence of one Coles or Woolworths supermarket but often because there are two or even three in close proximity. It is not only smaller supermarkets which have been forced to shut down but also small businesses, such as butchers, bakers and local services, all of which have been driven to closure leaving behind what were once thriving business communities.

MGA/LRA submits that the smaller independent supermarkets do not fear competition; in fact they welcome it. But what they cannot combat is the exertion of power through the establishment of large, over-sized stores in areas that do not warrant such expansion. MGA/LRA intends to demonstrate that Australia needs amendments to its current competition laws that will halt the power of the two largest supermarket retail outlets in Australia, eliminate anti-competitive conduct, and promote a fair and competitive business environment.

¹Hilmer Committee, *National Competition Policy*, 1993

MGA/LRA thanks the Australian Government and the members of the Review Panel for the opportunity to present this submission for their consideration.

2. About Master Groccers Australia / Liquor Retailers Australia

Master Groccers Australia and Liquor Retailers Australia (MGA/LRA) is the peak national employer organisation representing the independent sector of the supermarket and liquor retail industry. MGA/LRA represents 2494 independently owned and operated supermarkets and liquor stores (fully paid members) throughout Australia.

These stores operate under banners such as Farmer Jacks, Foodland, FoodWorks, Friendly Groccers, Supa IGA, IGA, IGA Xpress, SPAR, Supabarn, Cellarbrations, Bottle-O, IGA Liquor, Local Liquor, Duncans and Bottlemart.

MGA/LRA is a registered employer organisation and represents its members in the areas of workplace relations, Legal and HR, training and compliance, and government relations. Australia's 4000-plus independent grocery and liquor retailers employ 115,000 people and generate annual sales of \$14 billion and together constitute the major competition for the major chains.

3. Executive Summary

The Competition Policy Review is the most significant Federal Government initiative in recent history aimed at facilitating a confident, productive, efficient and prosperous Australian economy.

The retail ownership landscape in Australia has changed dramatically over the past 30 years. Small businesses, particularly independent retailers, have been faced with the ever increasing threat and challenge of two giant supermarkets, Coles and Woolworths, growing at an unabated pace, using their ever increasing market power and dominance to crowd out existing retailers and to block out new competition. Nowhere else in the world is there such a hyper – concentration of two massive supermarket retailers!

For the small business sector, particularly independent retailers, to not merely survive but to grow, and provide the Australian economy and the communities in which they trade with prosperity through innovation, providing employment and supporting a plethora of local community businesses and community organisations, there must be Competition Law reform. The much needed changes must not hinder competition but quite the contrary, enhance robust competition on a fair and level playing field.

The independent retail sector thrives on certainty and confidence. Their incentive is to compete vigorously, drive productivity and efficiencies, make profit, and to share that profit within the communities in which they trade.

This submission gives rise to many of the serious unfair competition behaviours carried out by the duopoly, Coles and Woolworths, that are being faced by independent retailers

around Australia. The Australian Consumer and Competition Commission (ACCC), the regulator of the Consumer and Competition Act (CCA), must be given additional powers through Competition Law reform, to help drive a fairer, competitive retail sector, to enhance the productivity, efficiencies and prosperity of the Australian Independent Retail sector – particularly independent grocery, food and liquor retailers.

This submission will provide evidence of uncompetitive and unfair behaviours by Coles and Woolworths and will also provide competition law reform recommendations and solutions to drive robust competition, productivity and prosperity for the Australian economy. Summary of this submission:

1. This submission examines **the impact of the market power** of Coles and Woolworths in the supermarket industry and demonstrates the serious detrimental effects that the lack of fair competition is having on the productivity of this country.
2. MGA/LRA will point out how **the market dominance** of two major retailers is seriously affecting the ability of smaller independent retailers to compete effectively in Australia.
3. There is compelling evidence of nation- wide activities such as **market saturation, anti- competitive price discrimination, creeping acquisitions and predatory capacity** by Coles and Woolworths that will eventually destroy competition in the supermarket industry in Australia.
4. The Competition and Consumer Act 2010 (Cth) is not suited to the competitive environment that exists in Australia today. MGA/LRA submits that **competition laws need to be amended** to provide for more robust and fair competition for all Australians.
5. In response to the request by the Panel for information relating to State issues, MGA/LRA will **demonstrate the anti-competitiveness** that exists at the federal level also exists at the state level. There is evidence of anti-competitiveness flowing from issues such as trading hours, licensing laws and planning laws which impact on the supermarket industry.
6. MGA/LRA is **seeking amendments to the Competition and Consumer Act 2010 (Cth)** that will hopefully redress the inadequacies in the law that are preventing all supermarket retailers, both large and small, from **competing on a level playing field** in the best interests of fair competition.

4. Competition Policy

In 1992 the Federal Government established a National Competition Policy Review Committee, chaired by Professor Fred Hilmer, to consider changes to the former Trade Practices Act 1974 (Cth). In a recent address to the Business Council of Australia, Professor

Hilmer² referred to his involvement in the 1992 review of Australia's competition policy framework and how things have changed after 22 years. He said, "The challenges we have as an economy are different and the shape of our economy has changed".

Australia needs a competition policy that provides opportunities for large and small businesses to compete with each other in a truly fair and competitive environment. To achieve this objective we need to eliminate any anti-competitive conduct and provide opportunities for innovation and efficiencies. One of the major impediments to the future of Australian competition is the existence of opportunities for larger businesses to dominate and eventually eliminate their smaller opponents.

Over the years Australian competition laws have allowed larger businesses to grow in strength and to crowd out smaller businesses on the premise that it is in the interests of the public. Our competition policies need to provide for a level and fair playing field, where there is no opportunity for one or two businesses to control and dominate a market to the point of exclusivity. If such a practice is condoned then there will be no competition.

In her doctorate thesis Dr Dee Margetts spoke of "the flawed nature of National Competition Policy (NCP) in Australia which claimed to create conditions for 'contestability', thereby promoting competition between companies so as to secure the public interest. The policies have favoured the large corporations and undermined smaller businesses such as family farms and family businesses in the retail sector A genuine NCP would need to be based on an understanding of the way in which the process of capital accumulation leads to a concentration of power over economic sectors and hence over society itself."³

Australia needs a competition policy that guards against the domination of market power and MGA/LRA will submit that corporate domination has been⁶ facilitated in the current landscape and therefore our competition policy and our competition laws need to change so that all businesses, large and small, are able to compete in the wealth of this country.

5. Competition Laws

5.1 What is market power?

Growing a business cannot of itself be considered an abuse of power. All businesses have the right to grow, prosper and succeed. However when the power becomes substantial and has the effect of being anti-competitive then such behaviour, MGA/LRA submits, will transgress section 46 of the CCA. The objective of the CCA is "to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".

It is highly questionable that the growth of Coles and Woolworths is simply due to the allegedly greater expertise, business acumen and skills that they exercise in the market

² Professor Frederick G Hilmer, *Competition Policy from 1992 to 2014*, Presentation hosted by Gilbert and Tobin lawyers and the Business Council of Australia, 13 February 2014.

³ Diane Elizabeth Margetts, *A Critique of Australia National Competition Policy: Assessing its outcomes in a range of major sectors*, University of Western Australia Thesis for PhD, 2013, p 167

place. It is the effect of oversaturation of areas with numerous stores that results in the crowding out of their competitors where in most circumstances there is ample room for the larger and smaller stores to compete on a level playing field.

Legislative reforms have been considered many times in the various reviews of CCA's predecessor, the former Trade Practices Act 1974 (Cth) ('TPA'), including the Hilmer Committee in 1993, the Blunt Report in 1979 and the Dawson Committee in 2003. Each of these reviews examined various aspects of the former TPA, including issues such as the reform of national competition policy and amendments to the legislation. MGA/LRA will examine several areas of the CCA which, we will submit, should be the objects of further reform in the interests of fair competition.

Section 4E of the CCA states that,

"...market means a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with the first-mentioned goods and services."

It is important for a market to remain competitive so that all businesses are able to compete fairly. Therefore, there should not be an opportunity for one or two businesses to grow in size to a level that either singly or collectively culminates in an ability to obliterate their competition simply because our laws are deficient. It is important that our laws provide for effective competition rather than permitting a situation in which one or two businesses can grow their market share to the point that competition is stifled. If genuine competition is to be sustained, the CCA must provide for the elimination of any anti-competitive practices that allow dominant brands to achieve a virtual monopoly, or duopoly as the case may be, of the market.

In 1996, the Organisation for Economic Co-operation and Development (OECD) released a document titled "International Perspectives on Abuse of Dominance" as part of a collation of documents published in a series named "Competition Policy Roundtables". In a background note to this document a definition of a "dominant" position in the marketplace", released by the European Court of Justice, stated that it is "a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately the consumers."⁴

Excessive market power can become an abuse of other businesses, particularly small businesses, due to unnecessarily duplicating the presence of one or two dominant businesses in an area. If as a consequence of this dominant position the ability of a smaller business to trade competitively is distorted then it is submitted that this constitutes an abuse of power. MGA/LRA submits that in the Australian grocery sector there has seen the

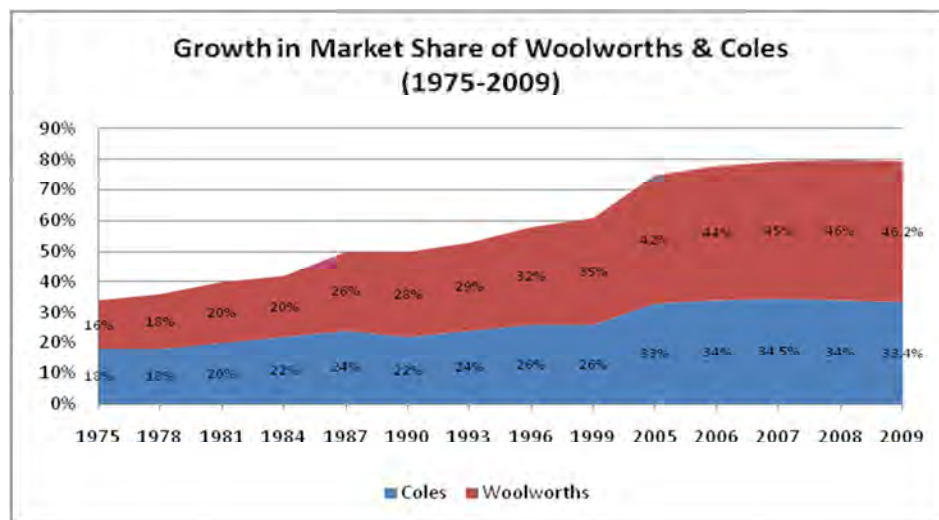
⁴ OECD Policy Roundtables, *Abuse of dominance and monopolisation*, 1996

unprecedented growth of two entities, namely Coles and Woolworths. Together, they now hold a position of market dominance that is continuing to grow, and if this growth is allowed to continue in an uncontrolled manner, then competition in the Australian supermarket industry will cease to exist. MGA/LRA will present compelling evidence of the supermarket industry power of Coles and Woolworths that we submit, amounts to an abuse of power, and which demonstrates the urgent need for legislative reform.

5.2 The growth of market power in the Australian grocery sector

Statistics reveal that Woolworths and Coles account for more than 75 per cent of the Australian grocery market. The current market share of Woolworths and Coles in Australia is conclusive evidence of the power that they together hold in the Australian supermarket industry.

The following diagram sourced by Accenture Australia illustrates the growth in market share of Coles and Woolworths from 1975 to 2009. Increased store openings and acquisition of sites by Coles and Woolworths will translate into further market share growth, pushing their market share beyond 80 per cent with the prospect of further growth in the coming years.



Source: Accenture Australia⁵

Accenture Australia noted⁶:

“Market share statistics and trends across the grocery channels and even within the key supermarket channel, are hard to stabilize, due to different methodologies and data coverage across different sources. As such, the focus is on range of market share as opposed to exact measures.

Market share rankings in the supermarket sectors are quite consistent, with Woolworths, Coles and IGA being the order of the major players.

Combined market share of Woolworths and Coles ranges between 77 and 80.4 per cent. Shares for IGA banners range from 11.3 per cent (various publication and estimates from Metcash) to 14.4 per cent (Euromonitor).

⁵ Accenture Australia, *The Challenge To Feed A Growing Nation*, November 2010, p. 27

⁶ Ibid. p. 26

The market share discussion in the supermarket sector gives rise to the much-discussed level of industry concentration in this sector. Indeed, Australia has the most concentrated supermarket sectors in the world - whether one takes the top two or top three or top five players into account in the analysis."

The following tables indicate the comparative share of the grocery markets in Australia and overseas. In Australia, although there are 4 major retailers, 80% of the market share rests with Coles and Woolworths. There are significant differences in the market share of strong retailers in other countries around the world. In the USA the largest supermarket retailer is Walmart and the chart below indicates it has 25% market share. In the United Kingdom, Tesco, which is the largest retailer, has a 28% market share and China has five large retailers holding 35% between them.



It is clear that Australian statistics show a significantly different picture in comparison with grocery sectors in the rest of the world.⁷ The unique and unprecedented duopolistic nature of the Australian grocery sector when juxtaposed against other countries indicates that the Australian landscape is rare and distinct, and immediate action is necessary to halt the unabated growth.

⁷ The Conversation Media Group, *Fact check: is our grocery market one of the most concentrated in the world?*, 12 August 2013

The growth of the power of Coles and Woolworths has taken place over many years starting approximately four decades ago when together they held approximately 34 per cent of the Australian grocery market. Their rapid growth since then has been due to various strategies, including the acquisition of greenfield sites, creeping acquisitions of smaller independent supermarkets, the development of anti-competitive covenants, the construction of oversized stores and new stores in communities which are already well serviced with retail outlets, the purchasing of land for future stores (known as land banking), and the duplication of stores.

The regulatory framework that has allowed this market share growth includes vesting the responsibility for controls of land-use zoning and development at local and state government levels, whereas the overarching CCA is handled at the federal level.

It is inconsistent for governments to purport to foster genuinely competitive markets, and yet allow the hyper-concentration of the Australian grocery market to continue in the name of competition. This issue is central to the interpretation of 'competition'.

While National Competition Policy was introduced in the mid-1990s, 'competition' was not defined in Australian competition law. It is therefore difficult to engage in productive discussion of many competition issues because for each 'competition' there are often differing views as to what constitutes "competition". Some hold the view that unfettered development is sufficient to ensure competition, while others see that same conduct as leading to further market concentration, greater market power to Woolworths and Coles, and a consequent lessening of competition.

Furthermore, economists tend to interpret "competition" solely in terms of price competition. Marketers and the general public have a more practical definition of "competition" which includes considerations of range, service and convenience. Viewed in this way, the current situation in the Australian grocery sector is not one of vigorous competition but rather one of decreasing competition with two centrally planned and practically identical retail offers being rolled out across the nation, thereby stifling the opportunity for diversified offers to compete in the market.

In this way, the pro-competition spirit of the CCA is being frustrated in many places by State, Territory and local government planning decisions which, in general, take no account of competition issues, resulting in a net anti-competitive result. Additionally there are other areas such as trading hours and liquor licensing that are inhibiting fair competition.

MGA/LRA submits that the dominant power of Coles and Woolworths, particularly in small country towns, has led to the death of smaller businesses and consequent economic decline. Despite arbitral attempts in tribunals by independent supermarkets and complaints to the Australian Consumer and Competition Commission (ACCC) it appears that existing competition laws are inadequate for the protection of smaller businesses. As a consequence the law is allowing Coles and Woolworths to grow and consolidate their dominant role in the supermarket industry and packaged liquor industries.

MGA/LRA submits the following examples as evincing the continued unabated growth of power of Coles and Woolworths in the Australian supermarket industry:

5.3 Market dominance through use of market saturation

5.3.1 Examples of Market Saturation

Coles and Woolworths saturate a local market with multiple supermarkets and liquor stores. These stores are often in close proximity to each other: there may be two Coles stores not too distant from each other, or a Coles and a Woolworths close together. This places great strain on the smaller stores in the area which eventually squeezes out them out of business. Examples of these situations are shown below in Figure 1 in townships such as **Bathurst (NSW)**, **Karingal (Victoria)**, **Hurstville (NSW)** and **Water Gardens (Vic)**.

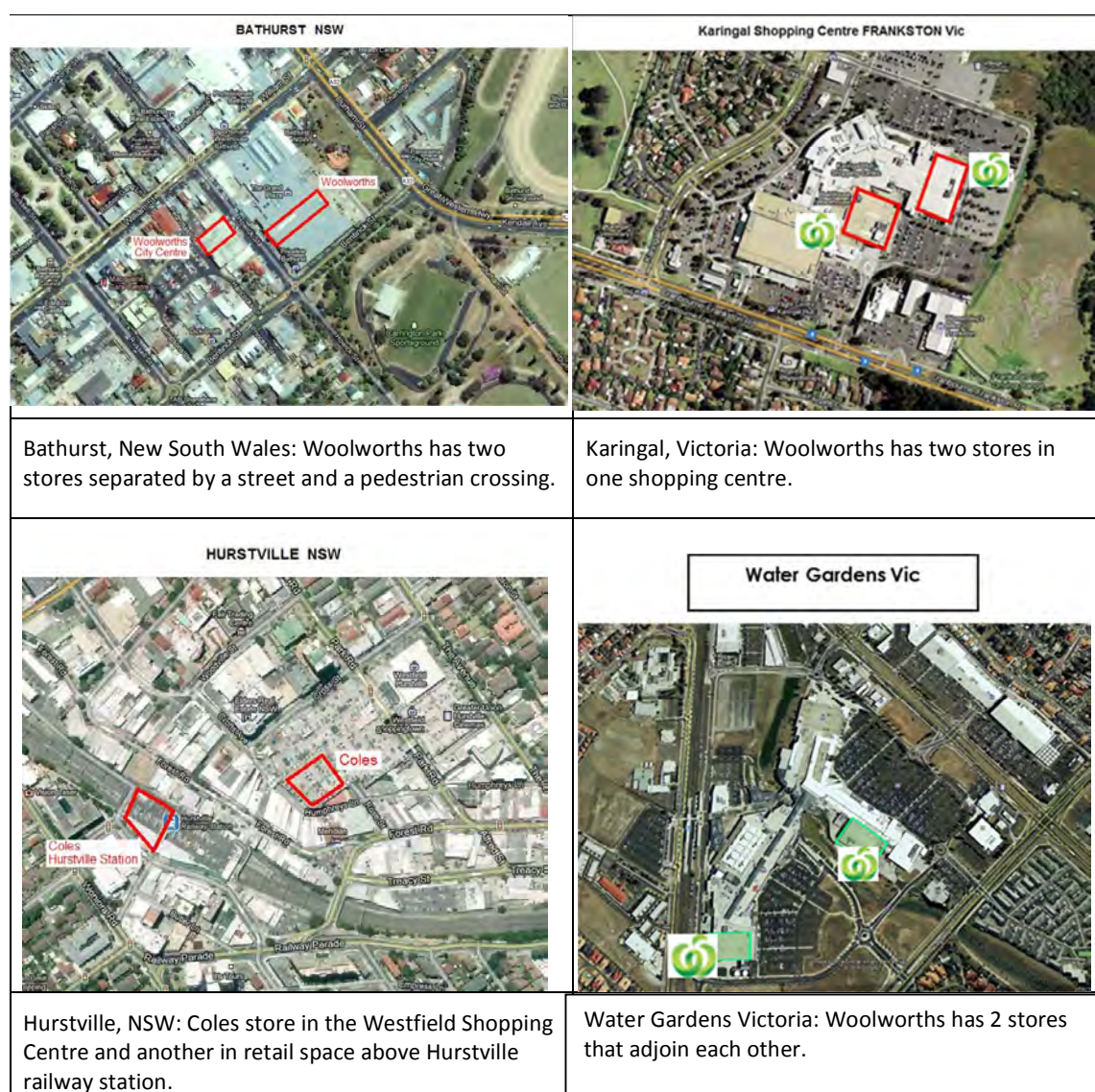


Figure 1

In Launceston, Tasmania, the combined market share of Coles and Woolworths exceeds 90 per cent and it is difficult to drive around the State on major arterial roads without passing major chain supermarkets every few minutes. The population of Launceston is 65,000 and that of the Greater Launceston catchment is 100,000, yet it is serviced by four Woolworths supermarkets, six Coles supermarkets and one Supa IGA (see Figure 2), all within a circle with a five kilometre radius (see Figure 2). A seventh and eighth Coles supermarket are each pending at Prospect and Riverside respectively, and a potential fifth Woolworths supermarket in Launceston City.

There will effectively be 13 Coles and Woolworths stores within a 5 km radius of the Launceston CBD. This is erroneous and inconsistent with sound competition policies.

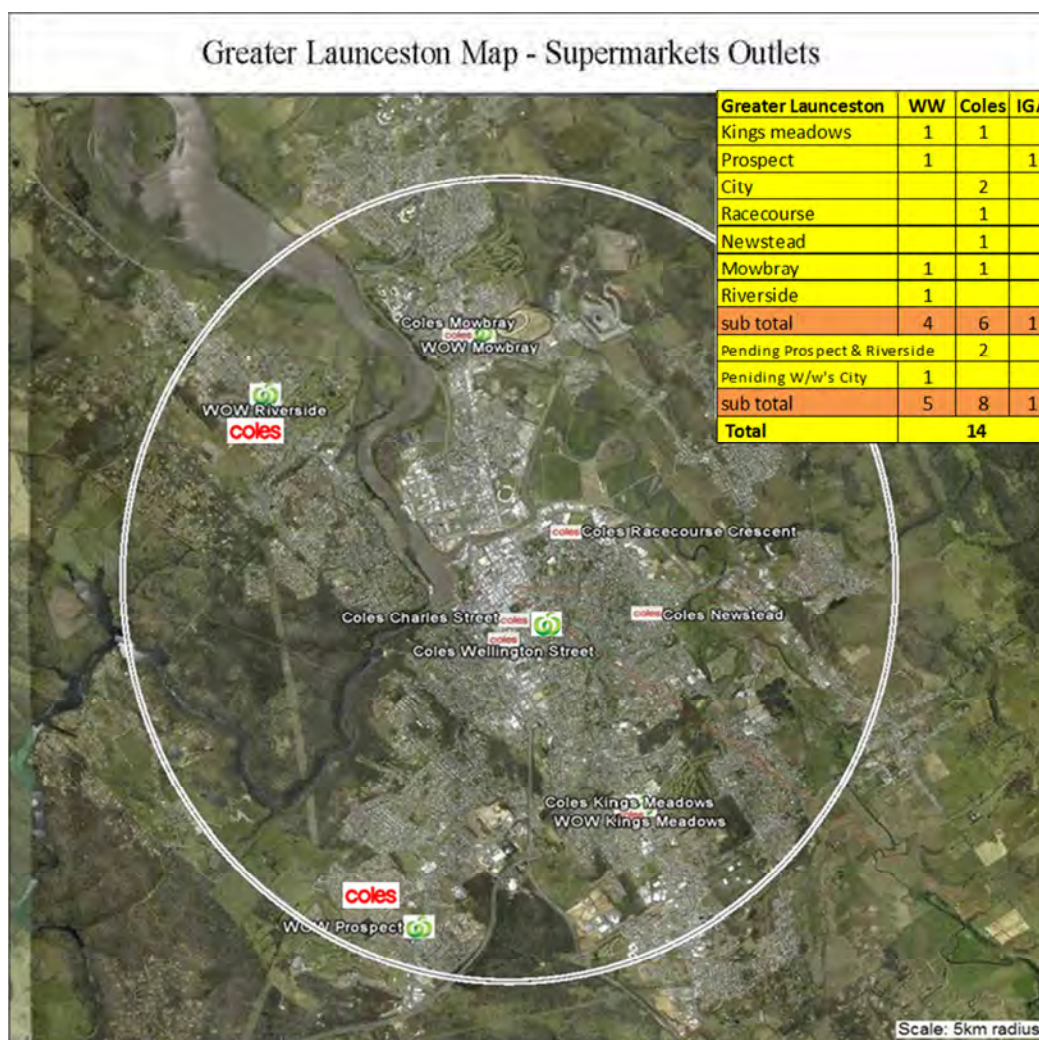


Figure 2

The “hyper concentration” of the retail supply of grocer supermarkets in the Launceston sector can be readily demonstrated quantitatively by evaluating a market concentration

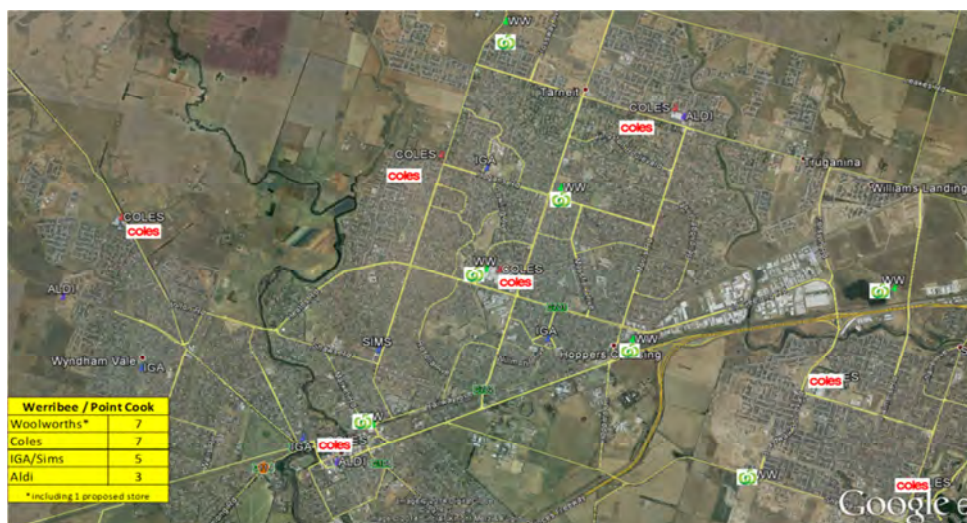
algorithm, such as the commonly used Herfindahl-Hirschman Index (HHI)⁸. Indeed, evaluation of the HHI in these markets confirms that the overall market for groceries is becoming further concentrated with the development of oversized stores in small local markets as a result of local government planning decisions.

Other examples of market saturation (as shown below in Figures 3 - 9) include the areas around Pakenham/Officer (Victoria), Werribee/Point Cook (Victoria), Narre Warren/Berwick (Victoria), Toowoomba (Queensland), Northern Gold Coast (Queensland), Sunshine Coast (Queensland) and Robina (Queensland).

Victoria - Pakenham / Officer corridor - Figure 3



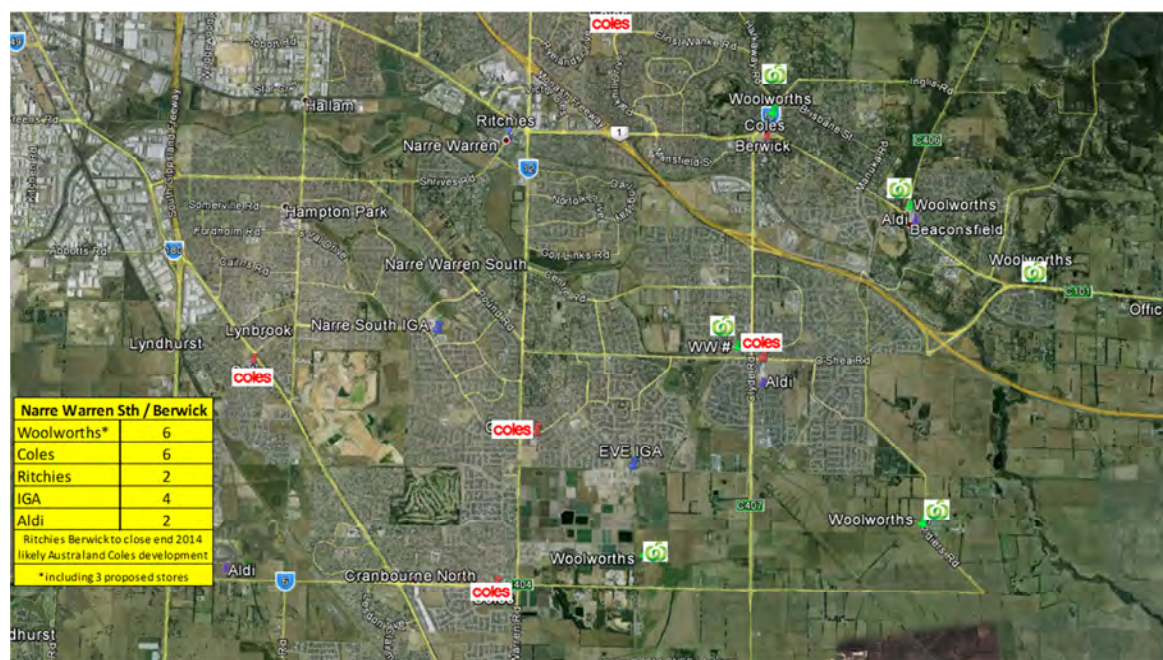
Victoria - Werribee / Point Cook area - Figure 4



Proposed additional Woolworths store at Williams Landing

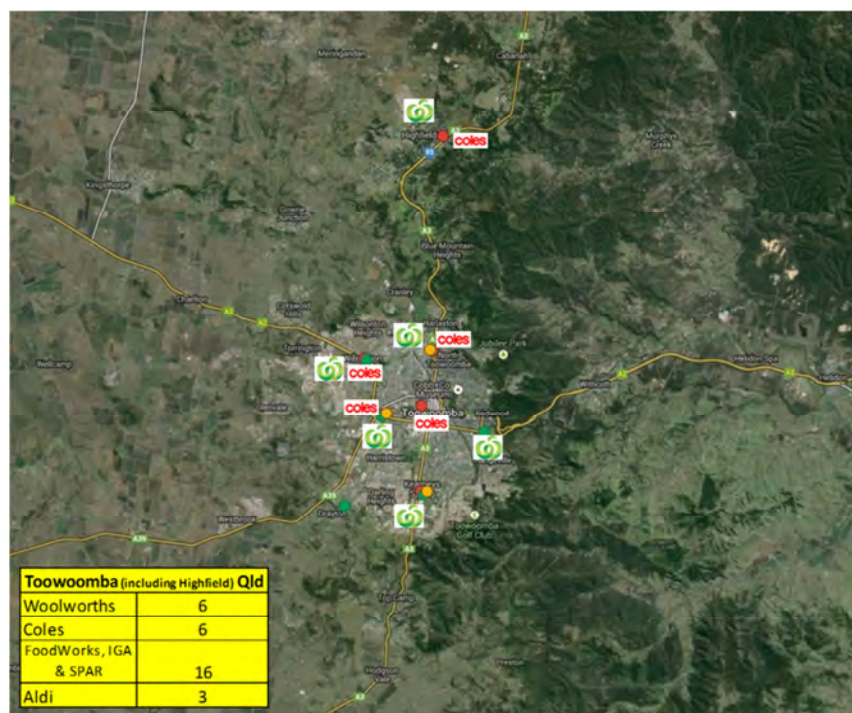
⁸ See for example Rhoades, Stephen A, 'The Herfindahl-Hirschman Index', *Federal Reserve Bulletin* 79, Board of Governors of the Federal Reserve System, USA, 1993

Victoria - Narre Warren South / Berwick area - Figure 5



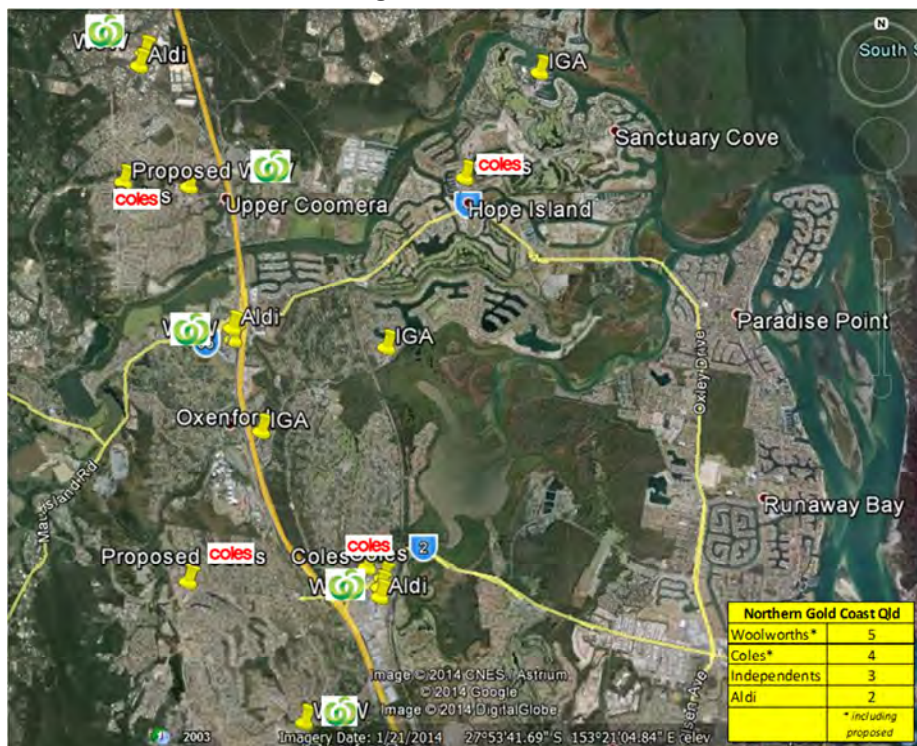
Three (3) proposed additional Woolworths stores at Clyde North, Berwick Springs & Officer
Ritchies Supa IGA Berwick will close at the end of 2014 to allow for a proposed Coles development

Queensland – Toowoomba - Figure 6



All Woolworths and Coles supermarkets are within a 4 km radius of the Toowoomba CBD.
Highfield is a satellite town of Toowoomba 10 kilometres away in which there is a Woolworths and Coles supermarket

Queensland - Northern Gold Coast - Figure 7



Queensland Sunshine Coast - Figure 8



Queensland – Robina Area - Figure 9



These graphic illustrations exemplify the oversaturation strategy of Coles and Woolworths in markets throughout Australia which does not enhance or promote competition in Australia but instead merely serves to increase market power.

5.3.2 Creeping Acquisitions - floor space as an instrument of market power

The nature of commodity retailing dictates that location and retail space are fundamentally important considerations in the success of retail businesses.

During the late 1990s and as late as 2007, Woolworths and Coles engaged in a significant programs of creeping acquisitions. According to the ACCC, from 1993 to 2007, 39 per cent of all new store openings by Coles and Woolworths arose from creeping acquisitions.⁹

Currently, Coles and Woolworths combined have more than 160 confirmed new store proposals across Australia, totalling around 375,000 square metres of additional retail floor space over the short term.¹⁰ This excludes rumoured and undisclosed proposals, as well as store expansions. Should all of these known proposals reach fruition, their current combined floor space would increase by approximately 10 per cent.

⁹ ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 428.

¹⁰ MGA/LRA calculations based on various industry sources.

A report by the Commonwealth Bank¹¹ pointed out that Woolworths was accumulating around \$1 billion worth of property per annum. While the report raised concerns about the Woolworths strategy, it pointed out that Woolworths is aiming for an exceptionally high forecast space growth rate of three per cent per annum, of which 2.5 per cent will come from new stores. By comparison, Coles' long term floor space growth target is two per cent per annum.

The number of Woolworths supermarkets is estimated to grow from 878 (present) to 1148 by 2021 which equates to approximately 31 per cent growth over the period, or 3.84 per cent per annum. This is in comparison with population growth of only 1.4 per cent per annum in Australia and the rise of online retailing which will offset the need for some retail floor space. Despite these inconsistencies, retail floor space continues to be built faster than population growth, as documented in a BIS Shrapnel study: *Retail Property Market Forecasts and Strategies, 2012-2022*¹².

The only logical conclusion drawn is that Coles and Woolworths are using their copious acquisition of sites to enforce further growth in market share and market power.

Woolworths and Coles can afford to pay significant premiums to acquire sites - either greenfield sites, existing leases, or sites for redevelopment - greater than can be afforded by an independent supermarket competitor. Their dominant positions in the market and their ability to cross-subsidise unviable large stores is supported by their extensive network of stores and/or revenue from related retail entities and gambling. The premium paid can then be offset by their ability to lessen competition and consequently not have to compete on price in the medium term.

In 2010 there was considerable debate as to whether there was a need to introduce amendments to the CCA as part of a crackdown on what was seen by many as the anti-competitive activities of both Coles and Woolworths. There was sufficient evidence that Coles and Woolworths had the ability to purchase smaller stores and potential sites for new stores which presented a threat to the survival of the smaller retailer. It may be argued that a "threat" is not a sufficient means to establish a misuse of market power. However, what needs to be taken into account is the cumulative effect of the continuing expansion of Coles and Woolworths supermarkets which is suffocating the smaller independent supermarkets to the point of extinction.

When amendments to the CCA were proposed in 2011 it was hoped that there would be a reduction in the number of acquisitions of land and small stores, therefore overcoming a lessening of competition in the marketplace. The then Minister for Competition Policy and Consumer Affairs said that "The Government is seeking to open opportunities for competition in grocery retailing by removing anti- competitive barriers to entry". The amendments to the CCA in 2011 aimed at replacing a reference to "a market" in subsections 50(1) and (2) with "any market" and removing from the definition of market in subsection 50(6) that the market be "substantial". The problem was not resolved because

¹¹ Commonwealth Bank, 'When Woolies Became an A-REIT', *Global Markets Research: Equities, Woolworths Limited*, 1 June 2012)

¹² Fielding, Z., "Shop space grows despite slow sales", *Australian Financial Review*, 11 July 2012, p. 46

the section concentrated on a single acquisition and not the cumulative effect of acquisitions.

The 2011 amendments did not amend the competition laws sufficiently and as a consequence there is still the ability of larger and powerful stores to flex their market muscles by building new stores and buying up land and therefore extending their power.

The potential for continued expansion by Coles and Woolworths remains a serious threat to the independent sector. Both larger retailers have recently opened greenfield sites, purchased existing stores and bought land with a view to greater expansion to the detriment of smaller businesses. It was recently announced that Coles is currently building six new stores and will have a further 31 stores under construction in the next two years.¹³ It is fallacious to argue that this massive expansion will have positive effects in Queensland.

The creation of such a high number of stores will have the effect of forcing smaller businesses out of existence as market saturation is enhanced. The corollary of businesses closing down will be that employees will lose their jobs, local producers will be adversely affected and small local businesses will decline. It is speculative to assume those who become unemployed will all find employment in Coles as there is no significant evidence to suggest that employment increases will result, particularly with the increased use of self-checkout facilities in larger stores.

5.3.3 The market power of oversized stores

The development by Woolworths and Coles of oversized stores in numerous small local markets has become an established predatory behavioural pattern. The building of oversized, large stores in small local markets where the population is already well serviced by other retailers, even including the same retailer, would, it is submitted, be unsustainable without cross-subsidisation.

While Woolworths and Coles dominate the Australian grocery market, their supermarket businesses are divisions within major retail conglomerates which are rated by Deloitte's 2012 *Global Powers of Retailing* study as the 18th and 21st largest retail enterprises in the world, and serve a population of less than 23 million. As such, they have the capacity to cross subsidise their overly large, loss-making supermarkets indefinitely, or until smaller competitors are driven out of the market. These competitors are not only independent supermarkets, but butchers, greengrocers, delicatessens, patisseries, milk bars, florists, newsagents, hardware and any other specialty retailer of food and grocery products.

The development of oversized, cross-subsidised stores in small local markets is a similar form of conduct to creeping acquisitions, practised by both Coles and Woolworths. The closure of independent supermarkets and other specialty food retailers following the entry of overly large Woolworths and Coles stores inevitably results in both a substantial lessening of competition in those markets and a corresponding growth in market concentration for these major chains.

¹³ Financial Review, *Property*, May 23 2014

The ACCC should have the power to determine whether there is a misuse of market power with the building of such oversized developments which result in driving out existing and future competitors. To facilitate such a process, it is submitted that the law should provide for mandatory notification by Coles and Woolworths of *any* proposed acquisitions, including existing businesses, new leases or greenfield developments.

5.3.4 Impact of oversized stores on regional economies and markets

When oversized, cross-subsidised supermarkets are built in a small local market the likely result is the closure of competing smaller businesses, leading to further market concentration and reduced competition. Currently the CCA does not provide for the ability of the ACCC to investigate the effects of building an oversized store on the economy and livelihood of the smaller businesses that are likely to be affected in a particular region.

There are numerous examples of market dominance in the Australian grocery industry and the following four examples demonstrate the dominance that can be exerted in a market by more powerful businesses in the building of supermarkets. The first example, which is a store that was proposed to be developed in Bermagui, is taken from a consultant's report. The remaining three were conducted on behalf of MGA/LRA.

5.3.4.1 Bermagui, New South Wales

Wakefield Planning, a Melbourne-based consultancy, was privately commissioned to review a proposed Woolworths supermarket development in Bermagui, New South Wales. The study was completed in June 2012.

Like many other towns dealing with supermarket developments by Coles and Woolworths, Bermagui has minimal population growth. Wakefield Planning conducted a public opinion survey in Bermagui and found that a majority of those surveyed objected to the proposed Woolworths development.

More significantly, Wakefield Planning identified the major problem with such a development in a small local market with limited growth potential¹⁴:

'Key Point: What can be drawn from this report and the context it sets, is that any future commercial development within the town of Bermagui needs to be completely justifiable on the basis of current population levels. Given that levels of growth are below the levels predicted for the initial planning period, floor space needs to not "lead demand". This is because there is highly limited ability for population growth to "take up" floor space demand provided in advance of such growth. As will be further outlined in this submission, the current business environment within Bermagui is highly fragile. In addition there are currently 3 vacancies in Bermagui, which is close to the "level of concern" of 10% vacancies. This again reinforces the importance of retail floor space trailing rather than leading population growth.'

¹⁴ Wakefield Planning, *Submission on DA 2012.0098: Proposed Woolworths Supermarket, Bermagui*, June 2012, p. 5.

The full report is available at: www.wakefieldplanning.com.au/Bermagui/Bermagui_submission.pdf

Wakefield Planning also found¹⁵:

'However on the basis of the survey work conducted, it is clear that there will be a significant impact on the viability of commercial uses within the zone. In this regard, the viability of between 30% and 50% of existing businesses in Lamont Street, in particular, would be at threat. This is considered to be one of the major significant negative points associated with the proposal.

In addition, and as indicated elsewhere in this submission, it is considered that the proposal is not complementary to existing commercial development. In particular, the proposal would replace a number of existing commercial providers, rather than complement them. These include the existing SPAR supermarket (now a FoodWorks Store), 777 store, the butcher, the greengrocer, bakery and also (in part) pharmacy and newsagent lines. In part this is as a consequence of the nature of goods sold in supermarkets, and in part it is a consequence of the inability to integrate the site with the existing main street, so as to produce synergistic effects with specialty shopping. This is a significant and major shortcoming with the development.

Wakefield Planning found deficiencies in the consideration of impact on existing local businesses¹⁶:

'Competitive Environment

The section of the report dealing with the competitive environment relies on an assumption. that the role of the SPAR (now a FoodWorks) food store is purely for top up food and grocery shopping. This is not confirmed by the random phone survey undertaken of the primary trade area indicated in the EIA which shows that the SPAR and associated food and grocery retailers within Bermagui currently account for some one third of food and grocery shopping. It is submitted that this is substantially above the "top-up" level.

Although acknowledging the existing SPAR food store and the presence of some 40 additional retailers within Bermagui, the report is flawed in that it fails to undertake a basic retail census of Bermagui and an analysis of the total quantum of floor space/number of businesses currently providing food and groceries within Bermagui. It therefore virtually ignores the commercial area that will most experience competitive impact. A retail census has been undertaken as part of the survey work conducted for this submission. The census also included Tura Beach and Bega.

Food, grocery and liquor currently constitute approximately 13% of shop front premises within Bermagui although as a proportion of retailing, this figure would be closer to 20%. The figure is higher when considered on a floor space basis, and would be close to 30%. These figures indicate that a substantial number of existing premises would be in direct competition with a new supermarket and liquor outlet. Key Point: The economic impact assessment overlooks the existing business communities in Bermagui and does not assess the impact on them. Substantial business failures are likely.'

¹⁵ Ibid. p. 16

¹⁶ Ibid., pp. 28-29

Bermagui is typical of many of the other towns referenced in this submission. The choice for competition regulators and local government planners is between maintaining a diverse and genuinely competitive local commercial environment, or allowing a dominant national player with practically unlimited resources to destroy smaller competitors and leave such markets with moribund commercial centres.

5.3.4.2 *Bright, Victoria*

Previous Situation

Bright is located 30 kilometres from the nearest town and is over one hour's drive from the regional centre. It serves a local community of about 2,100 residents and approximately 1,700 from surrounding districts. It has a strongly seasonal demand from tourists passing through which helps to support the local traders, particularly with liquor sales. Two independent supermarkets (one of 1,000 m² and the other of 250 m² of total leased area) operated in the town for many years, both selling packaged liquor. The larger independent supermarket was refurbished and expanded to 1,500 m² in 2006 with emphasis on an expanded liquor section and fresh produce sourced locally. The combined impacts of the global financial crisis, a severe downturn in the tourism industry upon which the local economy was reliant, and the announced entry of Woolworths to the Bright market resulted in the closure of the smaller independent supermarket.

Coles Supermarket Store Entry

A proposal was made in 2007 to convert a local hotel with its off-street car park into a shopping development anchored by a Coles supermarket of 2,382 m², an associated liquor store of 132 m², and four other specialty retail stores. Following a protracted series of planning objections and a business review by its new owner Wesfarmers, Coles withdrew from the proposal. The developer proceeded with the same proposal but substituted Woolworths for Coles. The new Woolworths store began operations in early 2011.



Market Impact

The opening of the Woolworths supermarket and Woolworths Liquor increased the town's supermarket/liquor retail area by 168 per cent. The independent supermarket sales immediately fell by more than 50 per cent which resulted in the application severe operating cost reduction strategies: employee numbers were cut by one-half and donations and community support were heavily reduced. Because Woolworths buys very little from local suppliers, the adverse impact of its introduction extended to local suppliers: the local dairy which supplied the independent supermarket lost almost half of its volume and local fresh produce suppliers lost sales. These lost sales have not been replaced. The independent supermarket continues to trade in very marginal conditions and is reconsidering its business strategy, including possible closure. It is understood the Woolworths store has been trading below sustainable levels.

The site of the new Woolworths store on the edge of the town has resulted in a decline in pedestrian and vehicular traffic in the Bright town centre and many local businesses have also experienced serious decreases in sales.

As at May 2012, 23 local businesses were for sale or lease, some other retail businesses were operating only part time, and other shops and offices have remained empty for considerable periods.

5.3.4.3 Churchill, Victoria

Previous Situation

This town of 4,600 people, with a declining population, is a specific-industry township located 15 minutes (by vehicle) from a major regional centre. It was served by two independent supermarkets, one of 1,800 m² and the other of 700 m². The smaller of these stores closed down in 2007. In 2008 the larger of the two was expanded to 3,000 m².



Woolworths Store Entry

Woolworths made an application in late 2006 for a supermarket of 2,382 m² and some adjoining specialty shops at a nearby location within the town's business zone. This was refused by the council on the basis that it was disproportionately large and incompatible with its local planning scheme.

Woolworths appealed the refusal and lost. The VCAT determination reads in part:

"We are not persuaded having regard to the policy frameworks and the evidence of ... that from a retailing perspective there is any justification for additional floor space of 3200 square metres in Churchill."

Subsequently, the planning scheme was amended and a permit for the Woolworths supermarket was granted. The Woolworths store opened in 2009.

Market Impact

The opening of the Woolworths supermarket and Woolworths Liquor store increased the town's supermarket/liquor leased area by 79 per cent. The independent store's sales were immediately cut by approximately 40 per cent. Reductions to part time and some full time staff were made to reduce the wages bill by one-quarter in order to remain viable. The range of fresh foods was also reduced, impacting local fresh produce suppliers severely, but reductions in the grocery range were resisted initially. Sales have stabilised at a level that makes the store's profitability questionable and vulnerable to aggressive discounting in staple lines.

In May 2012, because of the decline in grocery sales, the independent supermarket allocated a substantial part of its floor space to the sale of hardware.

5.3.4.4 Macksville, NSW

Previous Situation

This small rural town of 2,700 people is located 15 kilometres from the nearest main town with a Woolworths and two other large independent supermarkets, and 60 kilometres from the nearest regional centre. Population growth is projected to be about 1.0 per cent p.a. The town has been served by a 1,350 m² independent co-operative supermarket for almost 100 years, together with a small convenience grocery store plus specialist food stores (two bakeries, two butcher shops, and one greengrocer).

Woolworths Store Entry

Woolworths opened a 3000 m² store outside the town centre in March 2010 in a new shopping centre, which also included five specialty shops and a 145 space off-street car park, on land previously zoned residential/tourism.

The approval of the development by the Shire Council in June 2009 drew opposition from residents and local businesses objecting to the effect a large development, claiming the new out-of-centre complex would split the town's commercial heart



Market Impact

The opening of the Woolworths supermarket and Woolworths Liquor increased the town's supermarket/liquor leased area by 194 per cent.

Sales by the independent store have fallen by 40 per cent, a result moderated by the loyalty of the store's co-operative members. This necessitated a reduction of 70 staff even though it has actually increased its grocery range to further differentiate itself from Woolworths and it reduced number of national brands. It has also introduced a 'parcel pick-up' service. However, trading remains difficult as Woolworths aggressively undercuts prices on the most frequently purchased items, with its staff price checking daily in the independent store. Local suppliers of bananas, lettuce, potatoes, citrus and dairy products have also lost a major outlet for their produce.

5.4 Additional contributing factors to the market power of Coles and Woolworths

5.4.1 Shopper Docket Schemes

Prior to amendments to the CCA, the ACCC was required to issue authorisations for Coles and Woolworths to promote shopper docket, by which grocery purchases earned discounts from specified outlets for motor fuel purchases.

"Bundling" schemes were designed to increase the willingness of consumers to purchase not only products from either Coles or Woolworths but also to purchase fuel from specified

service stations where the credits could be claimed i.e., these schemes allowed for the 'inter-temporal' and 'inter-regional' bundling of products, which generated further economies of scope. That is, they were intended to alter patterns of consumption in favour of Coles and Woolworths and their associated service stations, even though these outlets were not necessarily the most efficient suppliers of the goods and services.

The ACCC has never validated the supposed public benefit which were to be delivered by shopper dockets and probably could not, since it would be nearly impossible to identify whether the prices of some or all of a large supermarket's 30,000 product lines might have been increased to cover the petrol discount.

Economists Joshua Gans and Stephen King argued that in the long run consumers would pay more for both petrol and groceries because of the anti-competitive effects of the shopper docket schemes.¹⁷

The fuel outlets used by Coles and Woolworths for their shopper dockets schemes are owned by either one of these large supermarket retailers¹⁸ and because they are "related entities" therefore the shopper docket schemes do not require authorisation from the ACCC. MGA/LRA submits that the practice remains anti-competitive in effect and not in the public interest. There has been positive progress made in relation to the limitation on the use of shopper dockets as a result of undertakings entered into between the ACCC and Coles and Woolworths. However, in the interests of fair competition in the future, MGA/LRA is seeking legislative changes.

There was a massive increase in the value of fuel shopper docket discounts by Coles and Woolworths which seriously threatened the viability of many independent supermarket retailers. After the ACCC indicated its intention to challenge the actions of Coles and Woolworths with respect to the serious damage caused by the petrol shopper discounts on the industry, a compromise on the future provision of the petrol shopper docket discounts to customers was reached in 2014 between the ACCC and Coles and Woolworths.

The two major supermarket retailers gave undertakings to the ACCC that they would voluntarily cease making fuel saving offers that were wholly or partially funded by any part of their enterprise other than their fuel retailing business, and limit fuel discounts which were linked to supermarket purchases such discount being capped at a maximum of 4 cents per litre.

The voluntary cooperation of Coles and Woolworths on the damaging effects of the petrol shopper dockets was welcomed by the ACCC as the issue was resulting in a lessening of competition in markets for the retail sale of fuel.

MGA/LRA welcomed this news as a major breakthrough for the independent retail sector because many independent supermarkets had suffered heavy losses as a result of the predatory fuel discounting that had been underway throughout the country. It was an example again of the larger retailers being able to exert their market power and therefore inflict serious harm on their smaller retail competitors.

¹⁷ Gans, J. S. and King, S. P. 'Paying for Loyalty: Product Bundling in Oligopoly', *The Journal of Industrial Economics*, Volume 54, March 2006

¹⁸ Coles purchased the retail business of Shell Australia's multi-site franchisees in 2003. In 2003 Woolworths Limited entered into a joint venture with Caltex Australia

5.4.2 Anti-Competitive Price Discrimination

Anti-competitive price discrimination occurs when a supplier sells to certain customers at one price, and to other customers at higher prices, unrelated to economies of scale. Anti-competitive price discrimination is prohibited by competition laws in every OECD country except Australia and New Zealand.

The TPA initially contained a provision in section 49 which prohibited anti-competitive price discrimination, however it was repealed in 1995. This price discrimination section of the former TPA had been the subject of considerable debate and review over a number of years.

In 1976, the Federal Government was prepared to repeal section 49 because it was argued that it was detrimental to the economy by limiting price flexibility. However, the provision was left undisturbed at that time as it was strongly felt in some quarters that it offered protection to small businesses. Section 49 was based on the Robinson-Patman Act 1936 (USA) and according to some United States authorities, such as Professor Stephen Breyer of the Harvard Law School, that law has hindered rather than promoted competition.

The Blunt Report¹⁹ recommended that section 49 be repealed and stated that:

"it is a misconception to regard section 49 as a provision designed principally to assist small business. Rather it is a provision designed principally to protect competition which incidentally and only rarely protects firms from some pricing discriminatory conduct. We do not think section 49 should be amended to bring it closer to the Robinson Patman Act (and hence protect competitors).However, our recommendation should have the effect of ensuring regulation under section 46 of much predatory price discrimination that small businesses seeks to have regulated under section 49"

The report concluded that the abolition of section 49 would have the effect of ensuring that the regulation of predatory price discrimination would be better regulated under section 46. The Hilmer Report on National Competition Policy in 1993 recommended that section 49 of the TPA be repealed. Section 49 was repealed in 1995 without parliamentary debate on the merits of maintaining a prohibition on anti-competitive price discrimination.

The abolition of section 49 has not delivered any apparent benefits to small businesses, although that might have been the intent of the abolition of the section. Instead, there are still massive competitive advantages to Woolworths and Coles which demonstrates and solidifies their continued market power. To this day, suppliers who refuse to deliver anti-competitive discriminatory (lower) prices to the big retailers are at risk of retribution such as having a product line or their entire range deleted.

MGA/LRA submits that in circumstances where small independent retailers are unable to compete with Coles and Woolworths on prices derived from the relationships of these large

¹⁹ Trade Practices Consultative Committee, "Small business and the Trade Practices Act", Volume 1, Australian Government Publishing Service, Canberra, 1979, p. 71

stores with suppliers, there should be provision for recourse in the inclusion of an “effects test” under the heading of misuse of market power in section 46.

In an attempt to redress this, the non-government senators of the Senate Economics References Committee recommended on November 2011 made the following recommendation²⁰:

'Recommendation 1

- 1 Amend section 46 of the Competition and Consumer Act 2010 to effectively prohibit anti-competitive price discrimination. Consideration should be given to relevant legislation in place in the United States and United Kingdom, and the reintroduction of an 'effects test' as per section 49 of the Trade Practices Act 1974.'*

The price advantage flowing from anti-competitive price discrimination - say, eight per cent in better terms of trade - delivers a benefit at the beginning of the retail supply chain which can never be recovered by a competitor. For example, if an individual chain supermarket has inputs totalling \$10 million in wholesale value, this equates to an extra \$800,000 in better trading terms than is available to an independent store of similar size.

MGA/LRA also submits that this anti-competitive advantage also extends beyond goods purchased for resale. It applies also to all other associated costs of doing business, such as but not limited to, transport, electricity, refrigeration and air-conditioning installation and maintenance, cleaning services, staff training, staff uniforms, store fit out, and in-store consumables.

This advantage erodes driving for true productivity and efficiency gains. Even though the larger chain stores are advantaged with better prices and discounts these savings are not necessarily transformed into increased productivity and efficiencies. In fact there could a negative impact on the economy – with smaller retailers developing initiatives to increase productivity and efficiencies purely to survive whilst the larger operators absorb their lower prices into profit, distorting the Australian economy.

6. Previous attempts to stop anti-competitive behaviour

6.1 ACCC intervention to prevent lessening of competition

It is acknowledged by MGA/LRA that there have been attempts by the ACCC to restrain anti-competitive behaviour by larger supermarkets. In 2008, the ACCC used its powers under section 50 of the (then) TPA to block a proposed Woolworths supermarkets at Wallaroo, South Australia, and another at Karabar, New South Wales. The use of section 50 of the TPA demonstrated a change from earlier narrower interpretations of that section and highlights broader adverse impacts on competition.

²⁰ The Senate Economics References Committee, *The Impacts of Supermarket Price Decisions on the Dairy Industry*, Report, 2011

As the Martin report²¹ observed:

The ACCC decision in 2008 to oppose a proposed Woolworths acquisition of an independent store site at Karabar in Queanbeyan, NSW (just over the south east border of the ACT) demonstrated the extent of market and competition analysis applied to the 'with and without' testing of independent acquirer alternatives for the site.

An implication for ACT region supermarket competition is that two earlier ACCC clearances are likely with the benefit of hindsight, to have been rejected under current intensive analyses. In these instances Woolworths acquired, firstly four group centre independent Cannons store sites in 1996 (three in Tuggeranong and one at Kippax) and, secondly an IGA store site at Charnwood group centre in 2004. This has created the situation where the ACT currently has only three independent full line supermarkets compared to 21 run by the two major chains.

However, while the action by the ACCC in these cases attempted to address the substantial lessening of competition – as discussed below in the examples of the townships of Wallaroo (South Australia), Karabar (New South Wales) and the proposed acquisition by Woolworths of the Glenmore Ridge site (New South Wales) – these actions did not set a new direction.

It seems section 50 has been successfully used only on a few rare occasions and to be successful in the future it should be amended to take into consideration the cumulative effect of more than one store being established in a particular area.

6.1.1 Wallaroo, South Australia

In 2008 the ACCC undertook a review of the proposed acquisition of a 3,200 m² supermarket lease in Wallaroo in South Australia by Woolworths.²² Wallaroo is a small regional town about 160 kilometres from Adelaide. An independent supermarket of 1400 m² serviced the town. The incumbent supermarket operator had also declared an interest in acquiring the lease and planned to open a new 2,500 m² supermarket.

The ACCC expressed a number of concerns with respect to the proposed acquisition by Woolworths, in particular that:

- in the absence of the proposed acquisition by Woolworths, it was likely that another supermarket operator would be willing and able to operate a supermarket on the site;
- it was likely the incumbent independent supermarket would exit the market if the proposed Woolworths acquisition proceeded; and
- the catchment for local supermarkets was commonly taken as a three to five kilometre radius but consumers in regional areas had a greater willingness to travel

²¹ Martin, J., *Review of ACT Supermarket Competition Policy*, September 2009, p. 17

²² ACCC, *Statement of Issues – Woolworths Limited – proposed acquisition of a supermarket lease in Wallaroo, South Australia* (26 Nov 2008)

for the purpose of grocery shopping as well as a greater need to travel between towns for other purposes.

In this case the ACCC considered the relevant market included the neighbouring town of Kadina, about nine kilometres from Wallaroo. It expressed the view that, if the transaction proceeded, Woolworths would operate two large full line supermarkets at Wallaroo and Kadina and, since it was unlikely that another supermarket operator would open another new full line supermarket within two to three years, Woolworths would then operate the only two supermarkets in the district, resulting in a substantial lessening of competition.

Woolworths subsequently decided not to proceed with the proposed acquisition and the ACCC did not proceed to a final view on the proposed acquisition. The ACCC's *Statement of Issues* was a departure from earlier decisions and indicated a new approach by the ACCC in reviewing local supermarket competition issues.

6.1.2 Karabar, New South Wales

In 2008, the ACCC²³ opposed the acquisition by Woolworths of the Karabar NSW Supabarn supermarket. The Karabar Supabarn was an independent supermarket and retail liquor outlet located about two kilometres from the town centre of Queanbeyan in New South Wales.

Some of the key issues of relevance contained in the ACCC's Public Competition Assessment included the following:

- The Karabar supermarket was approximately 1,250 m² and the ACCC did not consider that it provided a strong competitive constraint on the major supermarkets in neighbouring Queanbeyan and Jerrabomberra.
- The ACCC considered there was strong evidence that in the absence of the proposed acquisition by Woolworths, the supermarket would be acquired by another independent operator and upgraded to a full line supermarket. The ACCC also considered that such an upgraded supermarket was also likely to draw customers from further away.
- The ACCC also noted that many consumers shopped at more than one supermarket each week and there were consumer benefits in having access to a larger number of separately owned supermarkets in a local market.

The ACCC also concluded that it was unlikely any other site would be available in time to prevent a substantial lessening of competition in the local market. The likely purchase and expansion of the Karabar supermarket by an independent group was deemed to "entail a

²³ ACCC, *Statement of Issues – Woolworths Limited – proposed acquisition of the Karabar Supabarn supermarket* (4 June 2008)

higher level of competitive tension in the market” than if it had been purchased by Woolworths, which also owned the nearby Jerrabomberra supermarket.

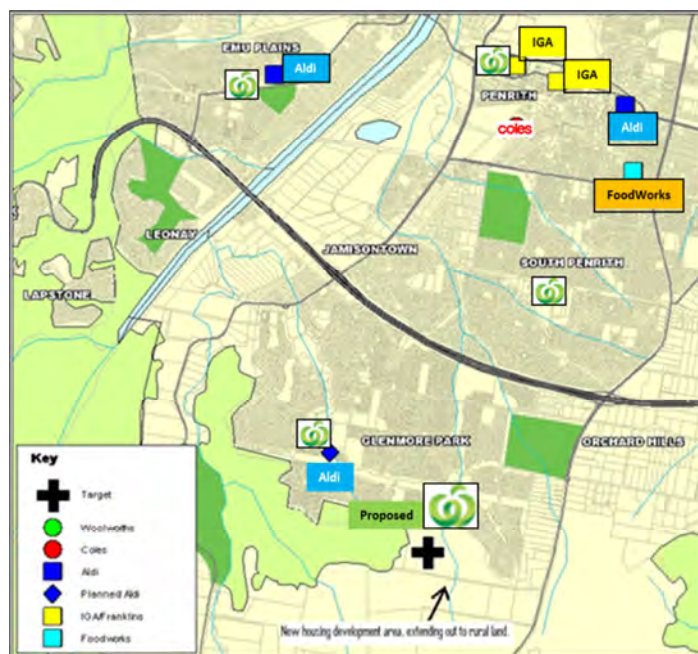
The ACCC found that if both supermarkets were operated by Woolworths “*there would be no incentive for competition between them.*”

6.1.3 Proposed acquisition of the Glenmore Ridge site - NSW

Woolworths operates a supermarket in Glenmore Park, NSW and also a supermarket in nearby Penrith. When Woolworths proposed to acquire a site in nearby Glenmore Ridge to establish another supermarket, the ACCC decided to oppose the acquisition on the basis that the proposed acquisition would be likely to result in a substantial lessening of local supermarket competition. An Aldi supermarket retail store will open in the area in 2014. Mr Rod Sims of the ACCC stated that consumers in the area would have only two Woolworths stores and one Aldi store instead of the competition that would be afforded by having three different stores. Mr Sims said, “The ACCC believes that loss of choice would be significantly detrimental to local consumers.”²⁴

A public review of the Woolworths application commenced in June 2012 and after the ACCC completed its review in October, the ACCC then allowed Woolworths to provide additional information. After a public assessment of the proposed acquisition, the ACCC stated that it would oppose the application by Woolworths.

The diagram below shows the various established supermarkets in the area surrounding **Glenmore Park**. It is clear that this is another indication of the oversaturation of an area with supermarkets. If the Glenmore Ridge supermarket was established it would undoubtedly adversely affect the continued existence of the smaller supermarkets in the same area.



²⁴ Press release Mr. Rod Sims Chairperson ACCC 13 June 2013

6.2 Predatory Capacity

On its website, the ACCC defines the meaning of predatory pricing as “one way in which a business may misuse its market power” and refers to how it may occur. It states that predatory pricing occurs:

“when a company with substantial power or share of a market raise sets its prices at a sufficiently low level with the purpose of:

- eliminating or substantially damaging a competitor;
- preventing the entry of a competitor into that or any other market;
- deterring or preventing a competitor from engaging in competition.

This leaves the company with less competition so it can disregard market forces, raise prices and exploit consumers.”

MGA/LRA submits that predatory capacity operates in a similar manner to predatory pricing. Coles and Woolworths have the ability to exert their strength by building oversized supermarkets in areas that are already well serviced, resulting in large numbers of smaller stores being forced to close. The high street that was once a hub of activity in a regional community, becomes a wilderness and finally when any semblance of competition is removed, the control by the larger retailer is complete. As the ACCC website states, the powerful company can “disregard market forces, raise prices and exploit customers.”

The concept of predatory pricing and the harm it causes is well understood in competition law. In essence, the practice involves a corporation with a substantial degree of market power selling a product or a service at a very low price so as to damage a competitor, or force it from a market, or deter it from entering a market. The practice can be a breach of the CCA under subsections 46(1) or 46(1AA); however, proving such an anti-competitive practice remains problematic due to the initial signs of predatory pricing seemingly appearing pro-competitive, and the inherent difficulty in acquiring clear, cogent evidence of an anti-competitive purpose to uphold such an allegation.

The concept of predatory capacity is somewhat more novel in Australian law. It involves a corporation with a substantial degree of market power increasing its manufacturing, distribution or retailing capacity to a greater extent than is reasonably required in a market, so as to damage a competitor in that (or another) market, force the competitor from the market, or deter a potential competitor from entering that market.

In the case of Coles and Woolworths in relation to Australian supermarkets and packaged liquor stores, predatory capacity involves the acquisition by one of those corporations of an existing business, or of a freehold or leasehold site for construction of a new store, where Coles or Woolworths, as the case may be, already have good representation in or near the proposed new outlet. While strategic competition necessarily involves the incumbent acting

to improve and consolidate its future position in a market, there is no such conceivable purpose for Coles and Woolworths given their strong representation in or near the proposed new outlet. The cumulative effect of this pre-emptive behaviour prevents, eliminates and deters competition, but continues to be justified under the current version of the CCA.

An example of such predatory capacity is well demonstrated in the township of Shearwater in Tasmania.

6.2.1 Shearwater, Tasmania

The township of Shearwater consists of a population of approximately 4000 people located in North Western Tasmania. The local community is serviced by a number of small stores including a medium sized independent supermarket of 850 m². Following a planning application by Woolworths to build a supermarket of 2000 m², a survey was conducted of the 2800 residents, and more than 50 per cent of those surveyed were opposed to the proposal. Despite this response, the local council approved the application, following its local planning laws. As of April 2014 a new Woolworths store has opened with 2,000 m² of extra space. The decision means that many small businesses will not survive.



As at 5th June 2014 – 8 weeks after the Woolworths store opened, the Village centre retailers are all facing extreme commercial hardship – the Local Village Butcher shop closed its doors on 4th June 2014, Baxter's Supa IGA is down by 60% in sales and faces closure. A new Woolworths owned BWS liquor store and service station are imminent, further crowding out existing retailers.

The investment in an area which is so small by a business the size of Woolworths seems incongruous. It is difficult to comprehend that given the size of that investment in an area the size of Shearwater with such a small population it could be a profit making concern for them. The impact on the community is predictable. The loss of business, and eventually closure, for the independent supermarket is inevitable and other small, family-owned businesses such as the butcher, the baker, the newsagent, and the chemist, are facing the same inevitable consequence. The future for Shearwater is grim: as other businesses close down there is a lack of confidence and those who have struggled to establish a thriving rural community will be forced to move on.

The small independent network of Tasmanian supermarkets works on economy of scale and when one of the independent stores is forced to close down it results in the network of stores losing a small piece of the market. This leads to a lower volume of sales for the network and therefore less money overall. It also becomes increasingly difficult for the small independent supermarket owners to achieve competitive deals with suppliers, resulting in higher prices for consumers. If increasing numbers of stores within the independent supermarket network are forced to close, the network becomes weaker until it collapses and disappears. The elimination of competition will then be complete.

MGA/LRA submits that Shearwater is only one example of how a small business will succumb under the weight of a more powerful competitor, with its decline impacting on surrounding businesses. It is acknowledged that the local council in Shearwater had the decision making power in the planning application by Woolworths, but it is submitted that there is a need for the ACCC to be able to intervene where it is apparent that there will be an overall impact on competition. Although an application may be initially determined by local government or state laws, it is submitted that federal laws should provide the ability for the ACCC to intervene in cases where competition is likely to be adversely affected.

The words of the owner of Shearwater Supa IGA, Mr Michael Baxter, illustrate the effects of the opening of the Woolworths store on him and his staff:

"Imagine what it's like to wake up one morning and find your superannuation's gone and you have to lay off half of your staff?"

7. Economic consequences of market power and dominance

7.1 The overall economic effects

It is inevitable that where one or two businesses gradually extend their control to the extent that their competition is eliminated then the effects are likely to be detrimental across a broad spectrum of the market. An examination of the impact of growth in market power on consumers, business costs and local businesses is considered below.²⁵

²⁵ 'Australian FMCG Market, Exploring Treasure Island - Mach II', UBS Investment Research, Ben Gilbert, UBS, 1 June 2012

In addition, MGA/LRA submits that the growth in the market dominance of Coles and Woolworths has serious consequences on the welfare of all Australians by exploiting economies of both scale and scope. There are subsequent adverse consequences of market concentration on social welfare, economic efficiency and distributional equity. These will also be examined below.

7.2 The impact of market power on consumers

UBS reported on 22 November 2011²⁶ that as a business Woolworths achieved one of the highest profit margins in the world for FMCG retailers (EBIT %), coming second only to Walmart in the US. UBS noted that the high margins achieved by Coles and Woolworths were highly unusual and were the outcome of their significant market concentration. UBS also identified that this level of market concentration has resulted in:

- *Less competitive grocery prices (due to less need to reinvest in price); and*
- *Lower levels of innovation (including in marketing, loyalty and private label development compared to offshore peers).*

Woolworths and Coles supermarkets operate practically identical business models. As their combined market share continues to increase beyond 80 per cent, competition and diversity in the Australian grocery market will decrease towards a point where the market can no longer be deemed “workably competitive”. Consumers will be left with no genuine choice and at the mercy of a duopoly with no effective real downward pressure on prices. Additionally, producers, suppliers and service providers will also face very limited buyers for their products and services ('monopsony').

Once competitors are driven out of a market or they are significantly weakened, prices will increase because there will be no competition.

7.3 The economic impact of market power on business costs

The UBS study (see above) also confirmed that the high level of market concentration resulted in pressure on suppliers, allowing the major chains to extract more advantageous trading terms from suppliers.

Market share growth has also contributed to the related vertical integration of other services, such as but not limited to, freight, banking services including EFTPOS, IT and utilities. Woolworths is the biggest user of freight services in Australia. When Woolworths or Coles negotiate with any supplier of goods or services they demand and receive the best price due to their size. While suppliers of goods or services are able to use the chains' volume to gain economies of scale within their own sectors, they then have to make their profits on the balance of goods and services sold to other customers at higher prices. Thus the gain to Woolworths and Coles is in fact borne by other businesses.

²⁶ Vide supra

7.4 The economic Impact of market power on local business communities

As competitors are eliminated or replaced on a cumulative basis it will have the aggregate effect on local businesses, resulting in their eventual elimination, according to the UBS Study referred to above. This may have the same effect as creeping acquisitions.

There have been many examples around Australia which illustrate the adverse consequences of such developments. The effect on local businesses includes the loss of livelihood not just for the business owners but also for those who have been employed in these businesses. There is loss of local jobs, not only in competing grocery businesses, but among unrelated retail businesses and suppliers of goods and services, because of significant changes to customer traffic flows. A new large supermarket can draw the majority of pedestrian traffic away from established retail outlets in the central business district. This is particularly so when the new development is of such a size that it can be located at some distance from the existing town centre. Occupancy levels, employment, commercial rents and commercial property values in the local high street are likely to fall significantly as a consequence.

The demise of local independent supermarkets benefits the major chains but at the same time it has a detrimental effect on small suppliers. Independent supermarket retailers provide small suppliers with the opportunity to market new products and services. Small suppliers often do not have the ability to supply the major chains, as they cannot produce the necessary volumes or meet other supply requirements. Local service providers (e.g. accountants, community banks, cleaners, transport providers) and local producers and manufacturers lose an important trading partner when an independent supermarket closes.

Often the arrival of a new major supermarket forms part of a new retail centre. Typically these new centres are supported by national chain specialty shops. As a result towns lose their local and often unique independent retail offerings, reducing choice and diversity for local communities. Recently at Cooloom in Queensland, Coles bought a shopping centre and refused to renew the lease of an independent competitor who had been trading there for many years, effectively acquiring his market share and 'good will' without compensation of any kind.²⁷

8. The effects of key sources of market power - economies of scale and scope

The major supermarket chains in Australia have been able to achieve a significant increase in their market share by exploiting economies of both scale and scope and also there are significant impacts according to John Wallace.²⁸

²⁷ Courier Mail, 'Cooloom Up In Arms As Coles Shuts Out IGA Store', 23 May 2010

²⁸ John Wallace, the Economist Network Pty Ltd

8.1 Exploitation of Economies of Scale

As outlined in the ACCC's 2008 report into the retail market for groceries, the major supermarket chains have been able to significantly reduce their unit costs by exploiting 'economies of scale' in:

- the purchasing of supermarket produce;
- the warehousing and distribution of that produce to their outlets around Australia; and
- the display and sale of those goods and services in large 'one stop shop' outlets, which has helped spread capital costs over a much larger volume and range of products.

8.2 Exploitation of Economies of Scope

In addition to reducing their costs by exploiting economies of scale, the major supermarket chains have also been increasing their profitability by exploiting 'economies of scope' in order to:

- further reduce their costs by using their existing purchasing, distribution chains and sales outlets to source, distribute and sell a much wider range of goods and services (i.e. by exploiting economies of scope in 'production'. Just as it is possible to reduce unit costs by purchasing, distributing and selling a much larger volume of products, it is also possible to achieve further unit cost reductions through the purchase, distribution and sale of much wider range of products); and
- increase the willingness of consumers to pay for the goods and services they supply by offering their customers a wider range of goods and services from which they could choose their optimal 'bundle' (i.e. by exploiting economies of scope in 'consumption'. Consumers are willing to pay more for the convenience of being able to purchase a wide range of related products from a single outlet that either has all of those products under the one roof, or at a discount from related outlets nearby, such as liquor outlets and petrol stations that accept discount vouchers). This has been achieved by offering their customers:
 - a wider range of goods and services to choose from within the store including liquor (e.g. through the inclusion of liquor outlets either within the store, or in the immediate vicinity of the store), flowers, clothing, newspapers and magazines, office supplies, household goods and appliances (e.g. crockery, cutlery, small white good appliances) and rental of carpet cleaning equipment; and
 - credits that provide customers with a discount they can use to purchase other goods and services (e.g. shopper dockets to purchase fuel and loyalty points that can be used to purchase other goods and services. In effect, this offers customers a bundle of goods and services that do not have to be purchased at the same time or

at the same place – that is, it enables 'inter-temporal' and 'inter-regional' bundling of goods and services).

8.3 The adverse effects of market concentration on social welfare

It is widely recognised that by exploiting economies of scale and scope in the purchasing, distribution and sale of goods and services, the major supermarket chains have been able to deliver benefits to consumers in the form of a wider range of products at lower prices.

Unfortunately, there is much less recognition that the exploitation of these economies of scale and scope by the major supermarket chains can also impose a cost on Australians (i.e. reduce 'social welfare') as a result of its:

- adverse effects on 'economic efficiency' (section 3.2.1) – that is, the adverse effects that is has on the overall efficiency with which Australia uses its scarce resources; and
- adverse effects on 'distributional equity' (section 3.2.2) – that is, the adverse effects that is has on the overall 'fairness' with which the benefits arising from the use of Australia's resources are distributed throughout the community.

8.4 Adverse effects of market power on economic efficiency

The overall welfare of Australians depends heavily on how well the nation's resources are used – that is, the overall efficiency with which those resources are allocated and used throughout the economy (i.e. 'economic efficiency').

In theory, it is possible to demonstrate that 'perfect' competition between a large number of very small firms that cannot influence the prices of their outputs or inputs will result in an efficient allocation and use of the nation's resources.

In practice, however, competition between firms is rarely 'perfect' and this 'imperfect' competition can impose a cost on the nation as a whole by encouraging a less than efficient allocation and use of the nation's resources (i.e. 'imperfect' competition can result in 'market failure' which reduces social welfare by reducing 'economic efficiency').

While the exploitation of economies of scale and scope has the potential to increase the welfare of Australians by improving economic efficiency, it also has the potential to reduce the welfare of Australians by reducing the extent of competition by firms in the markets for both the products they sell and the resources they buy to supply those products (e.g. land, labour, capital, and inputs of intermediate goods and services).

In particular, such 'imperfect competition' reduces economic efficiency by:

8.4.1 Distorting patterns of consumption

The major supermarkets can use the profits and market power they derive from exploiting economies of scale and scope to cross subsidise other goods and services (e.g. provision of 'loss leaders' such as heavily subsidised milk to attract customers into their stores, subsidised parking areas, subsidised fuel and other goods and services through the provision of 'shopper docket' and rewards points schemes that can be used to get a discount on goods and services purchased from other participating outlets). These schemes:

- are designed to increase the profitability of the major supermarket chains by 'bundling' the goods and services presented to customers in such a manner as to increase their willingness to pay for those goods and services (i.e. while the consumer might be still willing to pay for those goods and services, the major supermarket chains are seeking to 'bundle' their goods and services in such a manner as to extract more of their 'consumer surplus' – that is, the difference between what they were willing to pay for those goods and services and what they actually paid);
- distort patterns of consumption in the economy away from those that would exist in the absence of those cross subsidy schemes (e.g. the major supermarkets cross subsidise certain products as a means of attracting customers to their stores). This distorts the relative prices of those products in relation to other related goods and services and encourages less efficient patterns of consumption. In particular, it encourages an overconsumption of the subsidised goods and an under consumption of other substitutable products. That is, these cross subsidies have much the same adverse effects as would the imposition of different rates of consumption tax on products that are substitutes in consumption – it distorts patterns of consumption and imposes a 'deadweight cost' on the community by encouraging a less efficient pattern of consumption;

8.4.2 Distorting patterns of production

For example, the profits and market power that the major supermarket chains derive from exploiting economies of scale can also:

- distort the types and quantities of goods and services supplied by the major supermarket chains (e.g. it enables them to produce, distribute and display their own 'in house' brands of products, even though they may not be the most efficient producers of those products);
- distort patterns of production in other sections of the economy (e.g. as noted below, it gives the major supermarkets an unfair advantage in competing for the

inputs they require, which include the land, labour, capital and enterprise they use. This enables them to attract those resources away from other industries that would have made a more efficient use of those resources. This, in turn, reduces the ability of those industries to provide the goods and services they supply);

8.4.3 Distorting patterns of investment

For example, the profits and market power of the major supermarket chains can:

- Distort patterns of investment by those major supermarket chains (e.g. they may choose to cross subsidise their construction of over-large supermarkets in regional areas to drive out competitors even though this is a relatively inefficient investment from the point of view of the welfare of the community);
- Distort patterns of investment in other areas of the economy (e.g. the market power exerted by the major supermarket chains has the potential to 'crowd out' investment by other businesses, for example, innovative specialty food growers and manufacturers);

8.4.4 Distorting patterns of resource use

For example, the profits and market power of the major supermarket chains can:

- Distort the pattern of resource use by those major supermarket chains (e.g. to the extent that they have sufficient market power to alter the prevailing relative market prices of their key inputs); and
- Distort the pattern of resource use in other areas of the economy (e.g. the market power of the major supermarket chains gives them the ability to compete resources away from other more efficient, but smaller and less competitive businesses, including independent grocers and other businesses competing for similar resource inputs).

When assessing whether or not the competition within the supermarket sector is 'workable', the ACCC needs to determine whether or not the gains in economic efficiency arising from the exploitation of economies of scale and scope by the major supermarket chains are more than sufficient to offset the losses in economic efficiency arising from their 'misuse' of the significant market power the major supermarkets have in the markets for both their outputs and their inputs.

8.5 Adverse effects of market power on distributional equity

In addition to reducing economic efficiency, the high degree of concentration in the supermarket sector also has the potential to reduce the overall welfare of Australians by

reducing 'distributional equity' – that is, the welfare of particular groups of Australians and residents of particular regional areas.

In particular, it is important to recognise that while the exploitation of economies of scale and scope may have enabled the major supermarket chains to increase the range of goods and services they provide to their customers and reduce the prices of some goods and services, there is no guarantee that this will have improved 'distributional equity'. On the contrary, the profits and market power of the major supermarket chains are more likely to have reduced distributional equity by:

- improving the welfare of some of their consumers while reducing the welfare of others (e.g. by cross subsidising some goods and services and the construction of some regional supermarkets at the expense of the prices charged for consumers of other goods and services and in other regional areas of Australia); and
- altering the welfare of Australians in a manner that is inconsistent with the equity objectives of the Australian, state and local governments (i.e. the objectives that governments have for the welfare of the residents of their specific regions of responsibility. This includes the objectives that local government councils have for the economic development of their respective regions).

Indeed, there is no reason to expect that any redistribution of income and wealth within in the community that has arisen from the activities of the major supermarket chains are likely to be consistent with:

- improving the welfare of all Australians. Rather, it is more likely that the major supermarket chains will engage in activities that redistribute income in a manner that is consistent with their own profit-making objectives, rather than in the best interests of the welfare of each and every Australian; and
- improving the welfare of Australians in a manner that is consistent with the particular social welfare objectives of the Australian Government, and the state and local governments that are responsible for the welfare of the residents in the regions in which their supermarkets are located. Once again, it is highly unlikely that any redistribution of welfare between Australians and the residents of different regional areas of Australia, will necessarily be consistent with the equity objectives of Australian governments.

9. Part 2 - State issues that impact on competition in the supermarket industry

The Panel has requested information in respect of any significant State issues that affect competition in Australia. There are three areas which are particularly significant to smaller retailers in the grocery industry: trading hours, liquor licensing laws and planning laws.

9.1 Trading Hours

Trading hours in Australia vary across the States and Territories. In Victoria, New South Wales, Tasmania, ACT and the Northern Territory trading hours have been deregulated. A number of specific restrictions on trading hours are still exercised by the various State and Territory governments on certain occasions throughout the year, such as Christmas and Easter.

In South Australia and Western Australia the respective State Governments determine the trading hours laws which restrict the times that stores are allowed to trade. In Queensland, the Queensland Industrial Relations Commission has the power under the *Trading (Allowable Hours) Act 1990*, to determine the store trading hours in that State.

State	Mon- Fri	Saturday	Sunday	Public Holiday
South Australia	Until 9pm	Until 5pm	11 am to 5 pm	Exempt stores only and partially exempt
Western Australia	8am to 9pm	8am to 5pm	11 am to 5pm in Perth -restricted outside Perth	11 am to 5pm in Perth – restricted outside Perth
Queensland	8am to 9pm	8am to 5pm	Restricted	Restricted

It should be noted that the trading hours listed in the above table apply to stores which due to their size, location or number of employees, are unable to trade outside the hours specified in the governing laws or regulations of their particular States.

In South Australia there are unrestricted trading hours for stores classified as “exempt”. These are generally speciality shops or stores that meet the criteria of not exceeding a floor space of 200 square metres and that do not adjoin a building used as a storeroom with an area greater than half the size of the shop. There are also “Proclaimed Shopping Areas” in South Australia that do allow larger shops to trade at specified times and again, subject to the retail floor area, there are prescribed times for opening the stores.

In Western Australia, provided that the store has no more than 18 employees on the shop floor at any one time, retailers may open their store on an unrestricted basis.

In Queensland, provided a store qualifies as an “independent shop”, it may trade free of any restrictions. In Queensland, to qualify as an “independent shop” the business must

- be operated by an individual, partnership or a proprietary company (does not include a public company or a related corporation) and/or
- the number of people engaged at any one time in the shop including the owner must not be over 20; and/or
- the number of people engaged by the owner of the business in all shops throughout the State must not be more than 60 at any one time.

Larger stores of the size of Coles or Woolworths are strong proponents for the deregulation of trading hours. The 2010 Productivity Commission Inquiry into the Retail Industry referred specifically to the regulation of trading hours in Australia in Chapter 10²⁹, and as a consequence recommended the full deregulation of trading hours in Australia, including on public holidays. There was strong input to the Commission from sources such as the Australian National Retail Industry Association (ANRA), representing Coles and Woolworths, pointing out the need for deregulation. Despite the Productivity Commission's recommendation four years ago, there remains a reluctance in States such as South Australia, Queensland and Western Australia for wholesale change, and with some minor amendments they have resisted total deregulation.

In its findings the Productivity Commission examined whether there were any benefits to be gained from the deregulation of trading hours, including whether consumers wanted deregulation and the effect on retail employment following deregulation.

The Productivity Commission found that there have been many surveys undertaken in order to determine the views of consumers in respect of deregulation. It referred to the Hebb Holland Demasi Report in 2000 which found that between 60 to 70 percent of consumers supported an increase in trading hours as did an ANRA Report that found 83 per cent of respondents supported the view that shop opening times should be for the convenience of customers.³⁰ However, the 2005 referendum in Western Australia on this issue revealed an entirely different view, with the Western Australian population voting firmly against changes to trading hours. Furthermore, a study recently undertaken on behalf of independent retailers in Western Australia revealed that 88 per cent of consumers in the metropolitan area of Perth are satisfied with the current trading hours.³¹ The survey revealed that nine out of 10 consumers were satisfied with the trading hours, and 75 per cent of survey participants in the 18-39 age group also found the trading hours satisfactory.

In line with what it sees as a more contemporary approach, the WA Government has slightly modified its views on the extension of trading hours over recent years to the point that in 2011, it altered the definition of a "small retail shop" to allow 18 persons to work on the retail floor, compared with the previous number of 13. This consequently increased the number of businesses able to trade by approximately 7,000 stores.

Current retail employees are inevitably affected by any extension of trading hours in that many full time employees could find themselves working on Sundays and during other time frames when they have never been required to work previously. Many of them value their family time and they prefer not to work during any extended trading hours. In Queensland the National Retailers Association (NRA), representing Coles and Woolworths, consistently makes applications to introduce extended trading hours in various regions of that State. The Shop, Distributive and Allied Employees' Association (SDA) consistently opposes any

²⁹ Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Report no. 56, Canberra

Productivity Commission, 2011

³⁰ Ibid., p 292

³¹ Patterson Research Group, April 2014

proposed changes to the trading hours legislation on behalf of their employee members. However, there is no valid data to indicate that deregulation of trading hours necessarily results in an increase or decrease in employment levels. The one significant change as a result of an extension of trading hours in Queensland was a structural change in the work force with an increase in part time employment and a reduction in full time and casual employment.³²

The independent supermarket industry currently employs 115,000 employees which demonstrates that this sector of the industry is a valuable contributor to the economy, especially in the area of offering employment to young people starting their careers. It has been claimed that if there is a continued deregulation of trading hours then there will be a decrease in employment because there will be fewer jobs available due to the decline in the number of smaller businesses.³³

The Trading (Allowable Hours) Act 1990 (Qld) clearly defines the meaning of an “independent retail shop” which affords such stores the opportunity to trade within an extended span of hours. The larger stores, such as Coles and Woolworths, are vigorously opposed to the restriction imposed on them due to their size and magnitude as large retailers. This provides smaller independent retailers with an advantage to which they cling tenaciously for the survival of their businesses.

There is a determination by Coles and Woolworths to pursue their ongoing quest to gain uniform deregulated trading hours in Queensland. This relentless pursuit is yet another mission objective to dominate the retail supermarket industry. The independent retailers have been equally dogged in their determination to oppose each application. If Coles and Woolworths succeed they will undoubtedly extend their market share and be able to undercut their smaller competitors, resulting in the extinction of independent retail shops.

9.2 Restrictive State liquor laws

The ability to participate in the sales of packaged liquor in the State of Queensland operates in favour of Coles and Woolworths. There are significant legislative constraints in the Queensland Liquor Act 1992 (the Liquor Act) which prevent independent supermarkets from participating in the packaged liquor industry in Queensland.

The Act does not allow independent supermarkets to compete on a level playing field with the larger retailers, namely Coles and Woolworths, which have, over a number of years, systematically established themselves in a strong, dominant position within the liquor industry in Queensland.

³² Price R. (2005) “Extended retail hours – more retail jobs?”, *International Journal of Employment Studies*, 13(1), 133-156, .referred to in Huddleston V. and Huddleston P., “The Impacts of Retail Trade Deregulation: A Review of Evidence from Other Jurisdictions”, *FACTBase Bulletin* 7, University of Western Australia, June 2012

³³ Huddleston V. and Huddleston P., “The Impacts of Retail Trade Deregulation: A Review of Evidence from Other Jurisdictions”, *FACTBase Bulletin* 7, University of Western Australia, June 2012

9.2.1 Liquor licensing laws in Queensland that restrict liquor sales

Small independent supermarkets struggle every day against the domination of their giant counterparts, namely Woolworths and Coles, in all aspects of grocery sales. In addition, in Queensland, they helplessly watch as their retail competitors are able buy up a hotel and then open three detached bottle shops within a 10 kilometre radius, thereby seizing a profitable commercial opportunity simply because of their extensive wealth.

Despite previous lobbying to remove restrictions in respect of providing licences to sell packaged liquor in supermarkets, the laws remain discriminatory and prejudicial against small businesses.

Under the Liquor Act, a commercial enterprise is able to apply for a commercial hotel licence which authorises the licensee to sell liquor (under section 60 of the Liquor Act) on the licensed premises. Once a commercial liquor licence has been granted, a Commissioner may approve additional premises, such as a detached bottle shop, to the holder of that commercial licence.

The consequence of the current legislation has led to an increase in the number of hotels purchased by the monolithic duopoly, Coles and Woolworths, with an inevitable increase in the number of standalone bottle shops in Queensland. The law permits wealthy retailers to purchase hotels at significant costs and then take advantage of their ability under section 7 of the Liquor Regulation 2002 (Qld), to acquire additional approved premises for the sale of liquor.

In 2005, Woolworths acquired the ALH group for a total cost of \$1.3 billion through which they acquired 130 pubs and 400 liquor stores. The following year Coles obtained the Hedley Group which included 36 hotels and 103 bottle shops in Queensland.³⁴

Currently in Queensland, as a result of the current liquor licensing laws, the major supermarket retailers, Coles and Woolworths, jointly own around 200 hotels and 400 bottle shops and are dominating the Queensland packaged liquor market. Woolworths Liquor store brands include “Dan Murphy” and “BWS” whilst Coles store brands include “First Choice” and “Liquorland”.

Coles and Woolworths already have the overwhelming majority (80 per cent) of the packaged liquor market share in Queensland even though they have not acquired the majority of hotels and bottle shops. This is brought about by the fact that when the chains purchase a hotel it is generally one of the largest in volume: they have the funds readily available to renovate and can turn a relatively small bottle shop into one of their big-box stores such as a “Dan Murphy” store or a “First Choice” store. Due to the massive size of these big-box venues, which are around 1,000 m² to 1600 m², they are able to obtain sales of up to 10 to 15 times that of one of their smaller competitors.

³⁴ IBISWorld, Liquor retailing in Australia September 2012-2013, Report, page 8

As far back as June 2009, Nielson predicted, based on the data they had at hand, that Coles and Woolworths would grow their store numbers until they reached 45 per cent market share which in fact they have now exceeded. The Nielson data includes Dan Murphy stores in the “Rest of the Market” data and is estimated to be around 4.9 per cent.

The question independent retailers are asking is at what point will Coles and Woolworths cease to increase their respective market share, and will there be any independent businesses left to compete?

Based on the dominance of the Coles and Woolworths liquor outlets there is conclusive evidence that the liquor licensing laws in Queensland are currently discriminatory, anti-competitive, and a distinct barrier to the entry of independent supermarket competitors to the packaged liquor sales market. The rules protect larger businesses which have been able to establish themselves as the main retail distributors of packaged liquor in Queensland.

Unless the law is changed to accommodate the needs of keen and enthusiastic independent supermarket operators who can offer real competition and challenge to the market, the growth of Coles and Woolworths in this area of retail will continue unabated.

There can be no doubt that Coles and Woolworths will continue to dominate and swallow up the packaged liquor market in Queensland unless the laws are changed. Coles and Woolworths have spent the last few years systematically buying hotels so as to firmly place their indelible imprint on the market. The two companies make no apology for their aggressive tactics and they have made it clear that they will continue to impose themselves on the markets wherever they can in order to establish their stranglehold on the retail industry. This was emphasised by Professor David Hughes in relation to Woolworths and Coles when he said, “When you have a great deal of market power in the hands of one or two retailers you will have abuses of power. That’s in the nature of things.”³⁵ In a recent IBIS report it was pointed out that Woolworths and Coles are expected to continue their market dominance with more “big-box retail outlets” expected to open in the liquor industry. The report said:

*“Independent liquor retailers will continue to feel the squeeze and some will be forced to exit the market. However, opportunities still exist for independent retailers that are well located, customer driven and focus on higher margin, high quality niche products and services”*³⁶

This is exactly what small independent supermarket operators are prepared to offer their customers and given that opportunity, they are ready and able to provide customers with the quality products and service they deserve.

³⁵ Professor David Hughes, University of Kent, quoted in Washington S., “It’s war but how low can they go?” *Sydney Morning Herald*, 26 November 2011

³⁶ IBISWorld, Liquor retailing in Australia September 2012-2013, Report, page 4

9.3 Restrictive State Planning laws

Reference was made earlier in this submission to the opening of new supermarkets by Coles and Woolworths throughout Australia which have resulted in the various parts of Australia being flooded with supermarket floor space that, MGA/LRA submits, cannot always be economically justified. The net result of these oversized supermarkets in centres is the closure of smaller independent supermarkets and other smaller retailers, and the consequent demise of the local high street.

It has been accepted in the past that it is not the role of planning laws to regulate competition.³⁷ It is the concept of '**Net Community Benefit**' (NCB) that has been central to considerations of planning proposals by virtually all state and local government authorities³⁸.

The application of the NCB concept varies in form, but in substance it invariably includes weighing up the positive and negative impacts on the local community of a planning proposal. This may include, but is not limited to, such issues as choice in retail goods and services; diversity and breadth of retail competition; employment (both potential increases and decreases in regional employment); loss of sales at existing shops/centres; traffic circulation; and parking demands.

These factors are readily quantifiable and are directly relevant to the local community's economic and social welfare. Some local authorities are considering the application of formal objective 'tests' of the NCB concept.³⁹

MGA/LRA submits that the NCB test should be expanded to include an assessment of competition. This would apply where a new development has the potential to result in a level of market dominance that could have detrimental impacts on the business community and/or the social environment.

Many planning outcomes would fail any NCB test on several or all of the above listed criteria. This means that local communities are disadvantaged by a reduction in retail diversity, damaged by a contraction of the local economy, employment and the loss of environmental amenity.

With the current rate of urban and regional expansion due to population growth, the number of retail planning proposals involving supermarkets is ever increasing. The increasing incidence of resident action groups and the consistently high ranking of planning issues among voters' concerns reaffirm expectations that developments should yield a net benefit to the community as well as developers.

³⁷ Kentucky Fried Chicken Pty Ltd v Gantidis (1979) 140 CLR 675; Fabcot Pty Ltd v Hawkesbury City Council (Unreported, 10 April 1997)

³⁸ See for example 'Retailing Victoria Report', Victorian Government 1996, 'Davids v Maribyrnong CC (Appeal No. 1997/38010)' VCAT.

³⁹ NSW Government Department of Planning, 'Draft Centres Policy: Planning for Retail and Commercial Development', 2009.

The state planning laws in many cases result in giving the larger retailers an opportunity to obtain approvals at the state level for their applications. The laws provide an opportunity for larger retailers to gain an advantage predominantly because their presence is perceived as beneficial to the community. However, when the planning applications are weighed against the criteria of the NCB test, this is shown not to be the case.

10. Suggested recommendations for amendments to the CCA

10.1 Section 46 – Misuse of Market Power

10.1.1 What amendments should be made?

Historically and practically, section 46 is at the heart of Australian competition law and a fundamental means of protection for consumers and businesses alike. However, this submission has already identified the perilous state of the Australian grocery sector and the inadequacies of existing competition laws to curtail the problems. As such, section 46 of the CCA should be amended in several simple respects:

- I. the addition of an effects test;
- II. the addition of a prohibition on predatory capacity; and
- III. a reversal of the onus of proof in the case of a corporation with market power as great as that of the supermarket duopoly.

There has been much debate over the years in relation to this section which is now termed “misuse of market power” and under which it is only necessary to show that a corporation has a “substantial degree of power”. Prior to the inclusion of this term in the CCA there was provision for the term “monopolisation” in a manner similar to the Sherman Act in the United States. It is not an easy task to prove that market power is being misused because in addition to establishing the degree of power, the original form of section 46 also referred to whether there were any related companies and whether the behaviour of the corporation is inhibited by competitors, suppliers and consumers.⁴⁰

Since 1976 there have been numerous attempts to overcome the problems that exist in section 46 and the inclusion of an effects test has been proposed on numerous occasions; in fact, this proposal occurred on no less than 10 occasions between 1976 and 2003. Neither the Dawson Committee (2003) or overseas experience supported the inclusion of an effects test.⁴¹

⁴⁰ OECD, *The OECD Reviews of Regulatory Reform – Competition Policy in Australia* (2010), p. 21

⁴¹ *Ibid.*, p. 21

10.1.2 How and why an “Effects Test” should be included in the CCA

10.1.2.1 *Effects Test – section 46(1) – misuse of market power*

Currently section 46 proscribes certain conduct by a corporation *“that has a substantial degree of market power”*, where the conduct is undertaken *“for the purpose of”* damaging a competitor or preventing entry into that market or deterring a person from engaging in competitive conduct.

Unlike other prohibitions on conduct in the CCA – such as those contained in sections 45, 47, 49 and in the cartel conduct provisions, as well as similar prohibitions overseas – section 46 does not prohibit conduct that *“has the purpose or would have or be likely to have the effect”* of damaging or deterring a competitor or potential competitor.

This could be achieved by substituting, *“for the purpose of”* in the second line of section 46 (1) with *“for the purpose of or with the effect or likely effect of”* as follows:

Section 46

Misuse of market power

- (1) *A corporation that has a substantial degree of power in a market shall not take advantage of that power in that or any other market for the purpose of or with the effect or likely effect of.....***

Due to the immense strength of Coles and Woolworths and the difficulties in attributing any anti-competitive “purpose” to comparatively minor expansions by either of them, it is submitted that it would be desirable to include an effects test in the case of conduct by those corporations. As stated above, this could be achieved by amending the wording of section 46 in similar terms to other prohibitions of the CCA.

An alternative way of achieving this would be to include an additional provision in section 46 explaining that states purpose is to be implied from the effect of such conduct in a market. This would necessarily encompass and capture a corporation with a substantial degree of power comparable to the combined power of Coles and Woolworths.

It is submitted by some that adding an “effects” test would make the distinction between harm to competition and harm to competitors more difficult, and may deter pro-competitive behaviour. Proponents of this point of view believe the current “purpose” test adequately serves the objective of the CCA. However, the perilous market concentration in the supermarket and liquor industry is such that if the current format of the CCA persists, there will no longer be any competition to protect.

10.1.2.2 *Effects Test – section 46(1AA) – anti competitive price discrimination*

The overwhelming focus on price to gauge the effect of local competition on consumer welfare is not sufficient, particularly given the absence of an effects test under section 46(1AA).

Currently, section 46(1AA) **prohibits anti-competitive price discrimination** if the conduct has the *purpose* of eliminating, preventing or deterring competition. Whilst the duopoly may be providing products at heavily discounted prices, there is an insurmountable detriment incurred as a result of such conduct; namely to the quality, range and service levels in the local area. With the diminishment of independent supermarkets, diversity suffers and customer satisfaction declines. This point is exemplified in the main findings from research conducted by Clarke et al in the UK grocery sectors which indicated that consumers are more satisfied if they have more grocery stores available, and if they have a greater variety of formats and brands available.⁴²

A prohibition on anti-competitive price discrimination was introduced as section 49 in the original Trade Practices Act in 1974, which followed the US model found in the Robinson-Patman Act of 1936. However, there were various subsequent calls for repeal of the provision in reviews of the legislation. In one of the early reports, that of the Trade Practices Consultative Committee in 1979, in connection with a proposal for repeal, the Committee observed:

We think the primary thrust of any price discrimination law should be towards the promotion of efficiency in firms through the elimination of anti-competitive behaviour.⁴³

Ultimately, section 49 was repealed in 1995 when it was suggested that price discrimination would be able to be dealt with under other provisions of the legislation. It still has been seen as a problem for the smaller independent stores, such as those represented by MGA/LRA and anti-competitive behaviour in relation to price discrimination has not been eliminated or properly dealt with otherwise under the CCA. Accordingly, the CCA should be amended by reintroducing an “effects” test in determining anti-competitive price discrimination. This could be achieved by substituting, “*for the purpose of*” in section 46 (1AA) with “*for the purpose of or with the effect or likely effect of*” as follows:

Section 46

Misuse of market power

(1AA) A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services, for the purpose of or with the effect or likely effect of....

⁴² Clarke I, M. Kirkup and H Oppewal (2012), “Consumer satisfaction with local retail diversity in the UK: effects of supermarket access, brand variety, and social deprivation” *Environment and Planning A*, 44: 1896-1911

⁴³ Trade Practices Consultative Committee, *Small Business and the Trade Practices Act*, Australian Government Publishing Service, Canberra, 1979, p. 84

10.1.3 Predatory Capacity

A prohibition on predatory capacity should be inserted into section 46 along with the existing prohibition on predatory pricing. This would deem it to be a breach of the section in the case of the acquisition of an existing store, the building of a new store, or the acquisition of land (freehold or leasehold) which is far greater than would be required in a particular area, or where the corporation is already reasonably represented. This is a logical change and is being conducted overseas.

It is submitted that this should take the form of a new subsection after section 46 (1AA) in the following manner:

A corporation that has a substantial share of a market in Australia must not acquire an existing retail outlet or open a new outlet in any market where that corporation already has a reasonable degree of retail representation, if that acquisition or store opening has the purpose or would have the effect or be likely to have the effect of:

- (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.***

10.1.4 Reversal of the onus of proof

Having regard to the size and market power of Woolworths and Coles it is submitted that section 46 is an adequate forum for implementing a reversal of the onus of proof. In the context of these two large supermarket powers, this amendment would entail placing a requirement on both Coles and Woolworths, when either entity is proposing to acquire a store or planning a new one, of proving that such an acquisition or store opening would not offend the prohibition. This may not be necessary if it is to be enshrined under the suggested Industry Code.

10.2 Section 50 - Creeping Acquisitions and Mergers

10.2.1 Prohibition of Cumulative Acquisitions that Would Result in a Substantial Lessening of Competition

A deficiency of section 50 is its inability to empower the ACCC to investigate the cumulative effect of creeping acquisitions on the local market. Such behaviour ultimately eliminates competition and increases market share in a clandestine manner – a form of behaviour which essentially contravenes the object of the CCA but escapes legislative intervention.

Under section 50, the ACCC can only investigate an acquisition if it would have the effect, or be likely to have the effect, of substantially lessening competition in any market. It does not provide the power to investigate or act in the case of the “cumulative effect” of a large supermarket exercising the same behaviours in multiple local markets in each State.

When the legislation was amended in 2011, there was criticism of the proposed reforms to section 50. The changes provided the ACCC with the opportunity to consider multiple markets when considering the impact of mergers over a period of time, which could include smaller mergers. However, the ACCC is not compelled to consider the impact of an acquisition in a small market. In relation to the section 50 amendment in 2011, Senator Ryan said⁴⁴

“It is to imply a clarification that it (the ACCC) indeed may do so and it is a relevant factor when a merger is being considered for other reasons. So what do we have here? In short and put simply this is a clarification of the law to reduce an ambiguity that might become a legal basis to challenge the work of the ACCC”

However, the amendment to the CCA in 2011 did very little to provide protection against the power of the chains to acquire smaller stores at will. It has also done very little to strengthen the powers of the ACCC to challenge mergers, and the chains have continued to acquire smaller outlets throughout Australia. . The ACCC does not have the powers to investigate or act in the case of the “cumulative effect” of the chains exercising the same behaviours in multiple local markets in each State. An investigation of the “macro” market is critical but unfortunately not mandatory.

As such, the inherent problem of the current wording of section 50 is that it requires assessment of whether the proposed acquisition *itself* substantially lessens competition. The current landscape in the supermarket and liquor store industry already depicts a duopoly in which the chains continue to increase their respective market power in a significant and systematic manner. Therefore, all subsequent mergers, when totalled with the current degree of market power, substantially lessen competition, however individually, would not be captured by section 50.

There is very little that can be done to stop the current process from continuing unless there are significant reforms to the CCA.

Consequently, it is submitted **that Section 50 of the CCA be amended by substituting -**

“the effect, or be likely to have the effect” in subsections 50(1), (2) and (3) with “the effect or cumulative effect, or be likely to have the effect or cumulative effect....”

⁴⁴ Senate Hansard, Senator Ryan (Victoria) Second Reading Speech, *Consumer and Competition Bill* (25 November 2011)

This would ensure creeping acquisitions, or acquisitions by stealth, are within the scope of review by the ACCC and will prevent any further incremental gathering of unhealthy market power.

11. A proposed industry code

The supermarket and liquor store industry has a strong case for the creation of a mandatory Industry Code, pursuant to Part IVB of the CCA. This may also require a minor amendment of the CCA, along the lines of section 51ACA(3), to define the nature of the industry to be regulated by the ACCC for the benefit of Australian consumers and the industry generally. An industry code would aim to alleviate the current difficulties that have been referred to in this submission and as such, it is apparent that the independent supermarket and liquor store industry has a strong case for the creation of an industry code, pursuant to Part IVB of the CCA.

11.1 Why introduce an Industry Code?

A wide ambit for the Code is critical in order to control and direct a number of activities that will consequently facilitate greater fairness in relation to supermarket and liquor store acquisitions. The state of the market is at a level in which it is necessary to initiate prescription for a code of conduct, and a voluntary code would fail to adequately address the matters raised. In essence, the current climate is conducive for the implementation of a Code, in satisfaction of the criteria used by the ACCC in determining the necessity for integrating a Code.

The Australian Government has developed “*Policy Guidelines on Prescribing Industry Codes*” (the Guidelines)⁴⁵ which clearly set out the factors that assist the Minister (the Parliamentary Secretary to the Treasurer) with the criteria for making a decision to prescribe an Industry Code.

A Code will only be prescribed where a problem is identified. MGA/LRA believes that the nature and magnitude of the problem that currently exists in the supermarket and liquor industry is overwhelming. The problems impacting the viability of independent supermarkets throughout Australia have been clearly identified in this submission and the Code would remedy the shortcomings of the legislation in failing to address the increased power of the larger supermarket duopoly by ensuring there is fair competition as per the stated policy objective in section 2 of the CCA.

MGA/LRA has identified a number of deficiencies in the current legislation and submits that short of the proposed legislative amendments described herein, a Code would be the most effective means for remedying the market failure identified and would assist in promoting fair competition. In the event that there were any costs involved in monitoring a Code, the benefits of the Code to the community as a whole would far outweigh any associated costs.

⁴⁵ The Australian Government Treasury, *Policy guidelines on prescribing industry codes under Part IVB of the Competition and Consumer Act 2010*, May 2011

There are significant and irremediable deficiencies in the existing version of the CCA to address the industry problems and drastic action is required with an overwhelming need for national application.

11.2 What should the Code include?

MGA/LRA recommends that coverage under the Code would include:

- overall scrutiny of **market conduct** of the major stores;
- a **compulsory examination** of the basis on which the duopoly could acquire an existing supermarket or liquor store or the freehold or leasehold site on which to build a new store;
- a requirement for **prior notification** to the ACCC of any such proposed acquisition;
- **disclosure** by Coles and Woolworths **of their terms and conditions of trade** with their suppliers, thereby providing independent supermarkets with a mechanism for assessing like terms of trade with suppliers, and also improving overall scrutiny of market conduct of the major chains
- greater clarity on how the ACCC would deal with **the issue of product bundling and shopper dockets** and the competition test applied;
- a **greater level of monitoring of the supermarket industry and markets** by the ACCC, including a requirement that the ACCC produces a regular report on the supermarket industry and markets (along the same lines of the report on the petrol market);
- a **procedure for divestment** of a store or site acquired in breach of the Code;
- a requirement that the ACCC **investigates the “macro” market**, given that a cumulative pattern of comparatively “minor” mergers or developments leads to more market dominance; and
- a **procedure for informal clearances** of proposed acquisitions or store openings, similar to the ACCC’s well-established procedure for informal clearance of proposed mergers under section 50 of the CCA.

11.3 Benefits of a Code

11.3.1 The incipency doctrine

Each individual acquisition by Woolworths or Coles of an existing store or the site for a new store, of itself, may be argued as having only a comparatively minor impact in the Australian market. The impact in a much more local market, of course, is far greater.

When added to the existing outlets of the major chains and all of their other “minor” acquisitions, it represents a steady inroad into the market share of the small players in the market, such as the members of MGA/LRA. The logical end result, of course, will be the total control of the grocery and packaged liquor markets by Coles and Woolworths. If the ACCC believes it is unable to act under the CCA, as presently drafted, and is unwilling to amend section 50 as suggested above, then to restrain this steady growth of the two dominant players, it should integrate a provision along the following lines, into the Code:

“in the event of any new proposal that any new site for a supermarket or liquor store would be examined under the proposed Industry Code with specific enquiry into the effect on the local community, the availability of other supermarkets or stores, and the general commercial impact.”

Incorporating the incipency doctrine into the Code will prohibit any increase in concentration even if the anti-competitive effects are not large enough or certain enough to constitute violations of the current format of the CCA. This is analogous to the situation in America with the operation of the Sherman Act and Clayton Act.

It will require careful, economically informed prediction from the ACCC, however this is a necessary step to ensuring the objectives of the CCA are met, and reducing the potential for the duopoly to engage in cross-subsidising practices.

11.3.2 Bundling (nature and consequences)

The proposed Industry Code would give greater clarity on how the ACCC would deal with the issue of product bundling and shopper dockets, and the application of the competition test.

“Shopper dockets”, as they are known, are a means of providing a consumer with a “reward discount” on other products after making a purchase in a store. They have been in existence for many years in different industries in Australia, but, unfortunately in recent times they have become a driving force of market power in the supermarket industry. They have become a major tool for the duopoly where they can make massive profits on the sales of their products, with the promise of a significant reduction on fuel purchases. The result is that this practice is not only seriously damaging the survival of smaller supermarket retailers but also the petrol supply industry, all in the name of “competition”.

As previously identified above, such “bundling” schemes are designed to increase the willingness of consumers to not only purchase products from the major supermarket chains, but also to purchase fuel from those specified service stations where the credits can be claimed. In effect, bundling alters the patterns of consumption in favour of the major supermarkets and their associated service stations, even though these outlets may not be the most efficient suppliers of those goods and services.

The CCA is deficient in that it does not provide a mechanism for immediate remedial action to stop the use of shopper dockets and consequently it has become an escalating problem. The inclusion of an effects test in section 46 of the CCA would enable action to be taken against any organisation where it can be successfully demonstrated that the conduct is in fact lessening competition, and an Industry Code would make significant inroads towards clarifying the ACCC’s approach in dealing with bundling issues and shopper dockets.

It is the “lessening” of competition which is the crux of the problem and it is incumbent on the independent supermarket industry to show that it is not just “bad for business” to have the chains continue to promote their shopper docket activities, but to show that the issue has become so enormous that independent supermarkets are being squeezed to the point where competition no longer exists. Only organisations with the market power of Coles or Woolworths can offer discounts of the enormous size that are currently available, and realistically that must be indicative of their ability to annihilate their opposition by using such anti-competitive tactics.

11.3.3 Prior Notification

There is no mandatory pre-notification requirement for mergers or acquisitions in Australia. Instead, under the current landscape, the chains are only “encouraged” to advise the ACCC of an acquisition if they meet the “notification threshold” as established by the ACCC. As discussed above, the proposed Industry Code would require prior notification to the ACCC by the major chains of any proposed acquisition of a site, lease or existing business.

In a free market it is natural that competitors take advantage of any strategy or tactic that advances their market position, usually within the bounds of regulation. As competitors grow their market share and assume greater market power, new strategies or tactics become available to them that may not be available for smaller their competitors. It is then the responsibility of the regulators to ensure that this disparity does not stifle genuine competition to the detriment of the consumer and the broad economy.

It is within the power of the ACCC to determine whether the major chains are misusing their market power by adopting anti-competitive strategies such as operating shopper docket schemes between related entities, cross-subsidising loss-making supermarkets, and building oversized developments that are designed or have the effect of driving out existing competitors and preventing the entry of future competitors.

To facilitate these determinations the ACCC should require mandatory notification by the major chains of any proposed acquisitions, including existing businesses, new leases or greenfield developments.

Acquisition of an existing supermarket or a freehold or leasehold site for a new store in breach of the Industry Code would result in the acquirer having to dispose of the store or site in a similar way to a divestiture under section 50. It would be up to the ACCC to determine whether it requires some extension of section 50 to support the Industry Code.

12. Extension of divestiture powers

Under subsections 50(1) and (2) of the CCA there is a prohibition on acquiring shares or assets of a body corporation or corporation where the acquisition *“would have the effect, or be likely to have the effect, of substantially lessening competition in any market”*.

Contravention of this prohibition can result in an order for divestiture of shares or assets wrongfully acquired, pursuant to section 81 of the CCA. As mentioned above, the Industry Code would cover all acquisitions by the major chains of existing stores or sites for new stores.

Should divestiture be extended to curb market power where it is seen as abusive?

In the past the issue of divestiture has been considered by various committees that have enquired into the competition laws in Australia. The Dawson Committee and the Hilmer Committee were both of the opinion that there were no apparent instances of abuse of market power in Australia as a result of an acquisition and therefore there was no reason to consider the inclusion of divestiture in the competition laws.

However, as we have pointed out earlier in this submission, times have changed and today there are much more compelling reasons in the 21st century to introduce divestiture into the legislation for reasons other than those that currently exist in the Act.

The growth in market power of Coles and Woolworths over the last decade, as has been demonstrated in this document, is formidable. It is submitted that divestiture should be included in the CCA as a deterrent for not pre-notifying the ACCC in circumstances where yet another supermarket is to be established. The justification for any divestiture activity should be motivated by the need to achieve fairness in the marketplace.

As Ashurst Australia in Competition Law News⁴⁶ wrote,

“Where a misuse of market power has occurred, a divestiture remedy may be intended to achieve two things:

- *first, to impose a sanction or a penalty on the infringing firm, and by doing so, deter others from infringement; and*
- *secondly, to achieve a more competitive market structure.*

In our view, the second of these is the more important objective”⁴⁷

MGA/LRA agrees that where it is established that an abuse of market power has occurred, it is in the best interests of all parties and the public generally that the objective of achieving a more competitive environment is the highest priority, should divestiture be contemplated.

13. A right of action by a private litigant

Cases that have come before the Federal Court in matters of competition law are generally initiated by the ACCC. There have been some private actions, but not many, due to the prohibitive costs associated with an application under the CCA. In most cases an independent retailer would be unable to take action either alone or as part of a group of business owners because the costs associated with such an application may well be in the vicinity of millions of dollars. The majority of independent supermarket owners do not have the financial ability to even contemplate lodging an application for relief in the Federal Court.

In some jurisdictions the rights of individuals or small businesses are safeguarded by provisions for the complainant or potential litigant to seek assistance from the Court or Tribunal where there may be a well-founded case to answer. There are legislative provisions in some jurisdictions where the tribunal will provide mediation or advice by way of assisting the parties to a resolution or at least provide an indication to the parties of a possible outcome. The reassurance of a no-costs order would be likely to encourage businesses to challenge situations where they believe an application to defend a particular right is justified.

MGA/LRA submits small businesses that fall below a determined size be provided with an opportunity to initiate an action for relief, with assurances that the applicant could seek a “no costs order”. Unless there is a provision implemented for a smaller business to take an action without the possibility that it will face financial ruin, then it is unlikely an action would be initiated by a small business private litigant.

MGA/LRA submits that the legislators give serious consideration to this proposal as a means of encouraging genuine challenges to what are perceived as unfair practices.

⁴⁶ Ashurst Australia, “Breaking up Australia’s oligopolies”, *Competition Law News* (14 August 2013)

⁴⁷ Ibid, p. 4

14. Conclusion

MGA/LRA is seeking amendments to the CCA, and the introduction of a mandatory Code of Conduct for the supermarket and liquor industry, in order to eliminate misuses of market power, anti-competitive activities, and establish a fair and competitive market place.

MGA/LRA submits that the current competition laws need amendments that provide for fairness in the supermarket and liquor industry so as to adapt to the changed industry landscape.

There has been considerable growth in the number of small businesses in Australia and they make a major contribution to the economy of this country. At the present time the competition laws do not properly assist any business to challenge the anti-competitive growth of other larger and more powerful business operations.

The CCA does not contain provisions which assist in achieving the general aims of Australia's National Competition Policy and the CCA. The ACCC simply does not have the tools necessary to successfully challenge the continued growth of Coles and Woolworths. Various authorities have expressed their dissatisfaction with the growth of Coles and Woolworths in the market place but they have also stated that without major legislative reform, their hands are tied.

MGA/LRA submits that consideration needs to be given as to how amendments to the CCA may practically be introduced in order to achieve the competition objectives of the Federal and State Governments expressed in the National Competition Policy. Unfettered development leading to further market concentration ultimately stifles diversity and compounds the lessening of competition, and the anti-competitive practices of Coles and Woolworths have provided the impetus for the proposals contained in this submission. MGA/LRA again thanks the Federal Government and the members of the Panel for this opportunity to provide information that we strongly believe provides a compelling case for the changes that are desperately needed, in order to establish a fair competitive environment in Australia.

Should the members of the Panel have any queries on any issue contained in this submission, MGA/LRA would be happy to provide further details.

Jos de Bruin

Master Groccers Australia / Liquor Retailers Australia
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