Ref: 8-10740

GROCERY PRICES INQUIRY - SUBMISSIONS
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
grocerypricesinquiry@accc.gov.au

PUBLIC SUBMISSION TO ACCC GROCERY INQUIRY BY THE HON KIM CHANCE MLC, MINISTER FOR AGRICULTURE AND FOOD, WESTERN AUSTRALIA, ON 26 MARCH 2008

I am making this submission in support of Western Australia's agrifood industry, and as such, would like to make a series of points that the Australian Competition and Consumer Commission (ACCC) should take into account in its inquiry into the competitiveness of retail prices for standard groceries across Australia.

Western Australia's food industry is located in a very isolated and highly concentrated food retailing market. These factors have increasingly led to claims by the State's food producers that they are becoming price takers from large national retailing companies, whilst their costs of production have continued to increase over time.

The large national and multi-national companies also have the ability to switch their sourcing of products to different States or even countries. This can mean that food producers are forced to compete with global prices, whilst having little ability to reduce the costs pressures of inputs into their local production system.

The disconnect between their costs of production and the prices being offered is rapidly approaching a point where many small and medium size food producers claim they are becoming unviable, or where alternative land uses to agriculture become increasingly attractive because of better returns on investment.

In addition, local consumers are becoming increasingly concerned about the high cost of food on top of other rising pressures on household incomes. Producers of our agricultural raw materials are also reaching a point where they are unable to see the basis for the large differentials they see between what they are being paid for their produce, and the prices being charged by the large retailers.

In view of the above, it is timely that a review has been established to ensure that these issues are not having an unduly negative impact on Australia's agrifood sector.

You may find it useful to review a report delivered by the Economics and Industry Standing Committee within the Western Australian Parliament entitled "Inquiry into the Production and Marketing of Foodstuffs". The Committee investigated similar issues and noted their findings and recommendations in their final report delivered in March 2006.

The report can be found at:
http://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/E53B55F6EC197763482571410010 51B4/$file/Final+Tabled+Report.pdf.

Some of the issues raised in this report were:

- the dominance of the two large national retailers and potential anti-competitive behaviour that may require changes to the *Trade Practices Act 1974*;
- the large volume requirements and centralised buying offices and distribution centres of the major supermarket chains are seen as significant impediments to accessing the food retail market for many Western Australian food producers;
- there is a sense across the local food industry that the independent sector is more likely than the national chains to support local growers and producers; and
- local growers consider that they are often forced to accept less than favourable trading terms, because they do not have a strong bargaining position with the major chains. Smaller retailers, who compete directly with the major chains, also feel they are at a disadvantage.

For your reference, I have attached an extract of the Economic and Industry Standing Committee's report with the Executive Summary and relevant chapters.

Yours sincerely

Ian Longson
DIRECTOR GENERAL
DEPARTMENT OF AGRICULTURE AND FOOD

Attachment

ECONOMICS AND INDUSTRY STANDING COMMITTEE

REPORT ON THE INQUIRY INTO THE PRODUCTION AND MARKETING OF FOODSTUFFS

Report No. 4
in the 37th Parliament

2006

EXECUTIVE SUMMARY

This is the final report of the Economics and Industry Standing Committee on the Inquiry into Production and Marketing of Foodstuffs. The Inquiry was referred to the Committee on 1 June 2005, with a requirement to report to the Assembly by 31 March 2006.

The supermarket and grocery retail market in Western Australia

Estimates of the market share of the major retail chains can be manipulated by adjusting the definition of 'market'. Using the narrowest definition of market, the 'packaged grocery market', the two major supermarket retailers, Woolworths and Coles Myer, hold close to 80 percent of the national market. If the market is expanded to include all food sales in supermarkets and grocery stores, specialty food stores, takeaway food outlets and restaurants and cafes, the so-called 'stomach market', the major chains hold around 40 percent of the market.

The major supermarket retail chains have been progressively increasing their share of the national market for a number of years. The Western Australian market differs significantly from the national market, with the two major chains holding only 62 percent of the packaged grocery market in 2004. Unlike other States and Territories, Western Australia has a strong independent supermarket sector, comprising more than 250 independently owned and operated franchise supermarkets.

The large volume requirements and centralised buying offices and distribution centres of the major supermarket chains are seen as significant impediments to accessing the food retail market for many Western Australian food producers, particularly small and medium sized businesses. There is a sense across the local food industry that the independent sector is more likely than the national chains to support local growers and producers, and for many local companies, the independent supermarket sector is seen as a vital market for their products.

A number of concerns were raised during the course of the inquiry about the experiences of local producers and suppliers in their dealings with the major supermarket chains. Local growers consider that they are often forced to accept less than favourable trading terms, because they do not have a strong bargaining position with the major chains. Smaller retailers, who compete directly with the major chains, also feel they are at a disadvantage.

In October 2005, Woolworths was cleared by the Australian Competition and Consumer Commissions to acquire 22 Action supermarkets and development sites (16 in Western Australia). Many local food producers consider the Woolworths' acquisition will have a detrimental impact on the local industry, with many suppliers losing business.

A second recent acquisition, the Metcash acquisition of the Foodland (FAL) group, might also have a significant effect on local food producers. The FAL group, a West Australian based company, was the major wholesale supplier of WA's independent supermarket sector. In November 2005, Metcash, Australia's largest grocery wholesaler, acquired FAL's wholesale and supply network, as well as 22 Action stores. Integration of FAL's WA operations into Metcash's

national IGA Distribution network will greatly increase the buying power of WA's 250 independent supermarkets, as they join forces with the 4,500 independent supermarkets already supplied by Metcash. However, the impact this merger will have on the ability of WA's independent supermarket sector to support local food producers is yet to be determined.

Health and safety of imported food

What foods does Australia import and from which countries?

New Zealand is Australia's main source of food imports. The United States, Ireland, Thailand and China are also important sources of food imports. In the four years to 2004-05, there were significant increases in the value of food imports from Ireland (640%), China (130%), New Zealand (38%) and the United States (17%).

The major food imports from each of our five main import sources in 2004-05 were: dairy products and fruit and vegetables from New Zealand; fruit and vegetables and spirits from the United States; soft drink, cordial and syrup followed by spirits from Ireland; processed seafood and flour and cereal products from Thailand; and fruit and vegetables and processed seafood from China.

How safe are food imports when they reach Australia?

The safety standards of food imports when they reach Australia will depend on, *inter alia*, the environment in which they are grown and/or produced. A highly contaminated environment will likely yield highly contaminated food.

On the basis of information available to the Committee, New Zealand appears to have a very low level of environmental contamination, compared with other countries. On the whole, Ireland and the United States also appear to have relatively low levels of environmental contamination, by global standards, although there are occasional reports of localised contamination.

The Committee considers there is cause for concern over the current status of Thailand's environment, widespread pollution of waterways and inadequate treatment and disposal of solid waste being the most pressing issues. Of further concern, high levels of organochlorine pesticides in Thai women suggests excessive environmental and/or dietary exposure.

The Committee also believes the current status of China's environment warrants concern. The weight of evidence suggests that there are continued high levels of organochlorine pesticides in some regions, and perhaps more disturbingly, continued input of some of these pesticides.

As well as being affected by the environment in which it is grown, food safety will also depend on agricultural and/or processing inputs, factors which are largely determined by the food safety regulation and monitoring regime. New Zealand's food safety system is similar to the Australian system in many respects. Driven in no small part by the desire to ensure the continued success of its food export industry, an important part of the economy, the system is characterised by stringent safety standards underpinned by a comprehensive regulatory framework and an extensive food

monitoring program. Surveillance data from the New Zealand Food Safety Authority indicate that the rate of chemical residue violations in foods is close to zero.

Similarly, Ireland, an EU Member State, has stringent safety standards and well-developed regulatory and monitoring regimes. The same is generally the case for the United States, although the Committee finds the US FDA's Food Defect Action Level List to be somewhat of an anomaly in an otherwise stringent system.

Based on available evidence at this point in time, Thailand's food safety regulatory and monitoring regime appears to be somewhat less stringent than those of New Zealand, Ireland and the United States. Further, evidence of inappropriate and/or dangerous pesticide use by Thai farmers is cause for concern. However, both government and industry appear to be moving rapidly to put in place all the necessary quality assurance and monitoring programs to underpin Thailand's valuable food export market.

China's food safety regulatory and monitoring regime has changed substantially since its accession to the WTO. Like Thailand, the impetus for strengthening of food safety standards in China appears to be driven largely by the objective of gaining and/or maintaining access to export markets. Although China appears to be making significant progress toward raising its food safety standards, the Committee believes that it may be several years, or even decades, before all of the necessary standards, regulations and surveillance programs are in place to ensure unequivocal confidence in the safety of food exports from China.

How safe is Australian food?

Our own environment is generally "clean and green", by global standards, although "hotspots" of contamination do exist. At a national level, we have a comprehensive regulatory system, stringent food safety standards and an extensive program of surveillance activities. Overall, our food safety record is very good by global standards, although the rate of pesticide residue violations in domestically produced fruit and vegetables is higher than the rate reported in some of the countries from which we import fruit and vegetables.

How effectively do we ensure that imported food is safe?

Although the capacity exists to enter into certification arrangements with overseas governments, or Quality Assurance (QA) arrangements with overseas food producers, Australia currently relies almost exclusively on endpoint testing of imported foods to verify their compliance with our food standards.

Australia uses a risk-based approach to test imported food, whereby the foods that are considered to pose the highest risk are inspected more frequently than those that are considered to pose a low risk. This approach works well if (a) the assumptions about level of risk are correct, and (b) the tests that are applied are correct. Results from the Imported Food Inspection Scheme suggest a very low level of imported food failures on safety grounds - this means the food is safe, *but only with respect to the specific tests we apply*. If we don't test for a contaminant in a particular food, we have no way of knowing whether or not it is present.

Our risk based approach is skewed toward detecting food safety hazards that pose an acute health risk, the same approach that is adopted by most developed countries. Acute health effects are tangible - to some extent they can be quantified, for example in terms of the incidence of food-borne illness. Long term health effects are much more difficult to quantify. International health and environment agencies have warned that long term exposure to low levels of some chemicals, particularly the Persistent Organic Pollutants, may cause cancer or other illnesses, but setting the 'hazardous' levels is little more than educated guesswork. Demonstrating any causal relationship between long term dietary exposure to chemicals and ill-health is almost certainly impossible. It is therefore more difficult to justify prioritising resources to detecting food hazards that may cause ill-health 20 or 30 or 40 years hence. However, whilst we import foods that are grown in contaminated environments and/or where banned pesticides continue to be used, we cannot afford to be complacent about testing for these chemicals.

The Committee recommends that, given the progressive increase in food imports, AQIS testing of imported fruit and vegetables should include pesticides with suspected long term health effects, which have been banned in Australia, but may still be used in other countries.

To further enhance food safety in Western Australia, the Committee recommends that the Department of Health should take a more pro-active role in coordinating the food safety activities of local governments.

To improve the safety of locally produced fruit and vegetables, the Committee recommends mandatory training in chemical use for farm workers who use and/or handle chemicals. The Committee also recommends that pesticide residue surveys in Western Australia should target both local and imported fresh produce; they should be conducted on an annual basis; the range of chemicals tested should include banned pesticides that may still be used in other countries; and any residue violations should be traced back to the grower/supplier and appropriate action taken to minimise future non-compliance.

Origin labelling of foodstuffs

The Committee's interim report, tabled on 1 September 2005, dealt exclusively with origin labelling of foodstuffs. In its interim report, the Committee recommended a range of measures to strengthen Country of Origin Labelling and to improve food regulation in Western Australia.

Recommendation 12 from the Committee's interim report, which proposed the introduction of a voluntary State of Origin certification and marketing scheme, has been expanded on in this final report and the Committee proposes a model for Government consideration.

Based on an initial investigation of the range of origin labelling schemes currently in place, the Committee considers the creation of a 'new' State of Origin scheme would likely create confusion, by adding to the already substantial array of origin labels to which consumers are exposed. Instead, the Committee favours the reconstruction of an existing scheme, thereby leveraging off the recognition that already exists in the market place.

After careful consideration the Committee proposes that a 'Buy WA Food First' scheme, which would use a modified version of the Buy WA First logo, offers the most appropriate model for a food specific certification and marketing scheme in Western Australia.

The objectives of the Buy WA Food First certification and marketing scheme are:

- to provide unambiguous and reliable information to consumers; and
- to support local growers and producers and, in so doing, support employment and the local economy.

The proposed Buy WA Food First certification and marketing scheme would be underpinned by marketing and administrative support from Government and should include a number of essential attributes: stringent local content criteria; safety and quality certification; and registration of users and auditing of compliance.

Having identified the essential attributes of the State of Origin certification and marketing scheme, the Committee recommends that the Government, in close consultation with industry and consumers, further develop the specific details of the scheme.

Other matters of concern to Western Australia's food producers

Western Australia's food industry competing in a global market

Most industry submissions to the current inquiry commented on the fragile state of Western Australia's horticulture industry. In recent years, a number of growers have seen their profit margins decrease to the point where their business was no longer viable, and for those who have stayed in the industry, profit margins continue to decline. Western Australian growers are not alone - throughout Australia, the horticulture industry is in a precarious state.

Arguably one of the greatest threats to the continuing viability of the Australian and Western Australian horticultural industries is increasing competition from overseas growers. In recent years, a number of horticultural industries have seen their market opportunities decline sharply, in some cases to the point of industry collapse, as cheap imported products have entered the market.

China is considered by many industry groups to pose the greatest threat to local fruit and vegetable growers. In the four years to 2004-05, the value of fruit and vegetable imports from China increased by 80 percent. The sheer volume of production in China is staggering, and continues to increase - China's per capita agricultural production index increased by around 6 percent per annum over the last 20 years (compared with a global, and Australian, average of less than 1 percent per annum). Competition from overseas imports is not a transient phenomenon - the emergence of low wage, technically proficient economies will continue to place enormous pressure on the Western Australian and Australian fresh produce industries.

Competition from overseas producers not only affects the domestic market, but local growers are also increasingly competing with other countries in export markets. In recent years, China in

particular, has made significant inroads into South East Asian markets that have traditionally been Australia's strongest export markets.

There can be no disputing that a viable horticulture industry is vital to the continuing economic well-being of many rural communities in Western Australia. Perhaps of equal importance, but less apparent, is the importance of maintaining a viable production base, for both horticultural and other food products, as a means of ensuring the long term security of the State's food supply.

However, options for supporting the continuing viability of WA's horticultural and other food industries are limited. Any arrangement involving subsidies to Australian farmers, or increased tariffs on imported foods would contravene Australia's obligations as a WTO member, as well as its obligations under bilateral Free Trade Agreements, so this approach is not feasible as a means of 'levelling' the playing field.

The Committee considers that strategies aimed at exploiting non-price advantages, such as local content and high product quality, are the most appropriate to bolster Western Australia's food industries and aid in their long-term survival. To this end, a Buy WA Food First certification and marketing scheme is an appropriate means of supporting Western Australia's growers and producers.

Labour shortage in agriculture

In addition to dealing with increasing competition and declining profit margins, a number of industries, particularly horticultural industries, are also facing severe labour shortages. Labour shortages in the agricultural sector are not a new phenomenon, however, record low levels of unemployment and strong competition for labour (particularly from the resources sector) have seen shortages exacerbated in recent times. The most acute need for labour is in harvest work, both cropping and horticulture.

Attracting and retaining workers in the agriculture sector is difficult - the wages are low, the hours are long, the work is often labour intensive and may be seasonal. Skilled and unskilled migrants are considered vital to the future labour supply of the agriculture sector. A number of visa options currently exist to attract skilled workers to agriculture and rural and regional Australia, but they are not well utilised, because farmers are either not using the schemes effectively or their criteria may not be well suited to the requirements of Australian farmers. The Committee recommends an urgent review of the skilled migrant visa system to identify visa programs that could be used more effectively to address the skilled labour requirements of the agriculture sector.

Working Holiday Makers are a vital source of unskilled workers in agriculture. Regional Western Australia, however, may be missing out on its share of Working Holiday Makers. While 40 percent of all backpacker tourists, many of whom are on working holiday visas, visit Perth, less than 20 percent appear to visit regional WA. The Committee recommends that strategies should be identified to increase access to unskilled seasonal labour in the agricultural sector through increased backpacker tourism to regional Western Australia.

Market dominance and anti-competitive behaviour

The Trade Practices Act 1974

The *Trade Practices Act 1974* (TPA) is the primary Commonwealth legislation providing for fair trading and consumer protection in Australia. Part IV of the TPA prohibits specified restrictive or anti-competitive practices. Of particular relevance to the current inquiry, section 46 prohibits corporations with substantial market power from taking advantage, or misusing, that market power in an anti-competitive manner and section 50 prohibits mergers, or acquisitions, that would result in a substantial lessening of competition in a market.

Part IVA of the TPA prohibits corporations from engaging in unconscionable conduct with other businesses or with consumers, during negotiations or within the terms of a contract.

The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the *Trade Practices Act 1974*. A significant proportion of the ACCC's work relates to informal compliance activities, including education, advice and persuasion. The ACCC also undertakes formal enforcement actions, although these are less common than voluntary compliance activities.

If the ACCC considers the Act has been contravened, but not in a deliberate manner or in a manner that involves considerable consumer detriment, the matter may be resolved through an informal administrative arrangement or by the offender providing a formal undertaking under section 87B of the Act.

In the event of a more serious breach of the Act, the ACCC may litigate on behalf of the public. As with any other litigant, the onus rests with the ACCC to prove to the Court that there has been a breach of the Act. Litigation is always a last resort, and the ACCC will only litigate if it considers there is likelihood that the case will be upheld. In practice very few cases go to Court.

Recognising that under certain circumstances, the detrimental effects of anti-competitive conduct may be outweighed by benefits to the public, the ACCC performs an important adjudication role, assessing applications for *authorisation* to engage in conduct that might otherwise breach the anti-competitive provisions of Part IV of the Act. Once granted, authorisation provides protection from legal proceedings by the ACCC or any other party for potential breaches of the TPA. Authorisation is not available for misuse of market power (s.46).

For a party wishing to engage in exclusive dealing conduct, immunity from legal proceedings takes effect immediately upon lodgement of *notification* with the ACCC (or, in the case of third line forcing, a prescribed period after receipt of notification). The immunity remains in force until and unless the ACCC advises in writing that it considers the conduct constitutes a substantial lessening of competition that is not outweighed by any benefit to the public.

Recent Reviews of the Trade Practices Act 1974

In January 2003, the Trade Practices Act Review Committee (the Dawson Committee) recommended amendments to the *Trade Practices Act 1974* that would streamline the processes of merger clearances and authorisations, provide for increased penalties for anti-competitive conduct and provide for notification of collective bargaining arrangements. The Committee did not support amendments to section 46 or to section 50 in relation to creeping acquisitions.

The *Trade Practices Legislation Amendment Bill (No. 1) 2005*, which implements the recommendations of the Dawson Committee, was introduced in the Australian Parliament in February 2005. The Bill was passed with amendments in the Senate in October 2005 and returned to the House of Representatives for further consideration, where it remains.

In June 2003, the Senate Economics References Committee began an inquiry into the effectiveness of the TPA in protecting small businesses from anti-competitive or unfair conduct. The inquiry focussed on the effectiveness of s.46 (misuse of market power), Part IVA (unconscionable conduct) and Part IVB (codes of conduct) of the Act. The Committee's report, tabled in March 2004, made 17 recommendations to provide for greater protection for small businesses in their dealings with large corporations.

The Australian Government supported three of the seventeen recommendations of the Senate Economics References Committee and indicated its partial support for a further five. The *Trade Practices Legislation Amendment (Small Business Protection) Bill*, which implements some of the recommendations, was proposed for introduction in 2005, but has yet to be introduced.

The case for further changes to the TPA

A number of submissions to the current inquiry argued for further changes to s.50 of the TPA to capture 'creeping acquisitions', the term used to describe the gradual acquisition of assets or businesses over time.

The Charter for Competitive Sales of Independent Supermarkets, introduced on 1 July 2005, was formulated by the ACCC to address concerns about creeping acquisitions. The stated objective of the Charter is to ensure "that any acquisition of a Supermarket owned or operated by an Independent Supermarket Retailer takes place under a competitive bidding process", although doubts have been expressed as to whether it will achieve its stated objective.

A number of submissions also argued for further changes to s.46 of the TPA to strengthen its ability to capture 'misuse of market power'. Although the ACCC itself has previously advocated changes to s.46, recent comments by the ACCC Chairman argue that small business with a genuine grievance against a more powerful business may be better served by the unconscionable conduct provisions of the Part IVA of the Act.

In light of the two recent reviews of the TPA, and the amendments currently before the Australian Parliament, the Committee is of the view that further changes to the TPA would be imprudent at the present time. The current raft of changes has yet to be implemented and it may be some time before their full impact is known.

The Committee notes, however, that the progress of the aforementioned Bills has been slow and therefore recommends that the Australian Government prioritise the passage of these Bills through the Australian Parliament to promote certainty in the market.

CHAPTER 2 THE MARKET DOMINANCE OF MAJOR RETAIL CHAINS IN WESTERN AUSTRALIA AND THEIR IMPACT ON ALL SECTIONS OF THE MARKET, INCLUDING PRODUCTION AND WHOLESALING

The following chapter considers the major supermarket chains in Western Australia and their relationships with other participants throughout the food retail supply chain. Section 2.1 begins by examining the supermarket and grocery retail market, both nationally and in Western Australia, exploring the different definitions of 'market share'. Section 2.2 considers the relationships between the major supermarkets and others in the supply chain. Section 2.3 explores some of the barriers faced by West Australian growers and producers in securing supply contracts with the major supermarkets. Finally, section 2.4 examines the recent Woolworths acquisition of a number of Action stores and its expected impact on all sections of the Western Australia food market.

2.1 The Supermarket and grocery retail market

(a) Company profiles – the national supermarket chains

There are currently three major national chains in the supermarket arena - the two retailers, Coles Myer and Woolworths, and the wholesaler Metcash. A fourth company, Aldi, recently entered the field and is rapidly gaining market share on the eastern seaboard, although it has yet to enter the West Australian market. The following section provides a brief overview of each of these companies.

(i) Coles Myer Ltd

The Coles Myer company was formed in 1985 when the retailing group Coles merged with The Myer Emporium Limited.[2] The group is now one of Australia's largest retailers:

- operating around 2 600 stores in Australia and New Zealand;
- has over 400 000 shareholders;
- is Australia's largest non-government employer with over 190 000 employees; and
- is Australian owned, with a head office in Melbourne.

The Coles Myer group recorded sales of $36.2 billion in 2004-05, up $4.1 billion (12.8%) on 2003-04. Their food and liquor operations accounted for 53.3% of total sales at $19.3 billion, up

[2] The company has recently announced the divestiture of the Myer department store business and Myer Melbourne. A new name for Coles Myer Ltd is yet to be announced. Available at http://www.colesmyer.com.au/library/NewsMedia/20060314_Myer_Myer_Melbourne_Sale.pdf.

6.9% on 2003-04. Before tax profit on food and liquor sales were up 12.6% from $650.4 million in 2003-04 to $732.6 million in 2004-05.[3]

Coles supermarkets carry an average of 25-35 000 product lines, and Bi-Lo, Coles Myer discount supermarket chain, carry 16-22 000 lines. During 2004-05, 30 new supermarkets opened,[4] taking the total to 710 nationally (500 Coles and 210 Bi-Lo). A further 25-30 supermarkets are expected to be added in 2005-06.[5]

Forty-seven new or re-badged liquor stores were added to the Coles Myer portfolio in 2004-05,[6] taking the total to 673 (including hotels). A further 15 stores will be added in 2005-06.[7]

(ii) Woolworths Limited

Woolworths Limited has been trading in Australia for over 75 years, having opened its first store in Sydney in 1924. It is considered to be the largest grocery retail group in Australia.[8] Woolworths:

- operates 1 600 stores Australia wide;
- has over 300 000 shareholders plus 50 000 employee shareholders;
- employs around 145 000 people; and
- is Australian owned, with a head office in Sydney.

Woolworths Ltd recorded sales of $31.3 billion in 2004-05, up $3.4 billion (12.2%) on 2003-04. Their Food and Liquor operations accounted for 76% of total sales at $23.6 billion, up 7.1% on 2003-04. Before tax profit on Food and Liquor sales were up 14.4% from $941.7 million in 2003-04 to $1,077.2 million in 2004-05.[9]

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3 Coles Myer Ltd, *Underlying profit up 17.6%*, News Release, 22 September 2005, available at http://www.colesmyer.com/library/NewsMedia/20050922_full_year_profit_result.pdf, accessed on 28 March 2006.

4 *Ibid*.

5 Coles Myer Ltd, *2005 Full Year Results*, 22 September 2005, available at http://www.colesmyer.com/library/Investors/FinancialReports/2005/full_year_presentation_slides_2005.pdf, accessed on 28 March 2006.

6 Coles Myer Ltd, *Annual Report 2005*, October 2005, available at http://www.colesmyer.com/library/NewsMedia/20051019_annual_report.pdf, accessed on 28 March 2006.

7 Coles Myer Ltd, *2005 Full Year Results*, 22 September 2005, available at http://www.colesmyer.com/library/Investors/FinancialReports/2005/full_year_presentation_slides_2005.pdf, accessed on 28 March 2006.

8 Parliament of Australia, Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure? A Review of Australia's retailing sector*, August 1999.

9 Woolworths Ltd, *Full Year Profit Results 2005*, available at http://www.woolworthslimited.com.au/resources/full+year+results+fy05.pdf, accessed on 2 November 2005.

During 2004-05, Woolworths opened 22 new supermarkets,[10] bringing the total to 724 nationally (513 Woolworths, 183 Safeway, 24 Food For Less and 4 Flemings).[11] Woolworths aims to expand its supermarket operations at the rate of 15-25 new supermarkets each year for the foreseeable future.[12]

The recent acquisition of Action stores and development sites in Western Australia, Queensland and New South Wales saw shopfronts increase by 19; 14 of these in Western Australia. Woolworths has also acquired three development sites - one in Queensland and two in Western Australia [13]

Eleven new liquor stores were added to the Woolworths portfolio in 2004-05,[14] taking the total to 938 nationally. Woolworths purchased Australian Leisure and Hospitality Group (ALH), a listed hotel operator, in October 2004. When current plans are completed (in the next few years), Woolworths will have approximately 1,000 retail liquor outlets across Australia trading under the names of Dan Murphy, Woolworths Liquor and BWS.[15]

(iii) Metcash Trading Ltd

Metcash Trading Limited Australasia is the largest independent wholesaler of groceries in Australia. Metcash markets itself as, "The Champion of the Independent Retailer"[16] and considers itself the "Third Force"[17] in Australian grocery retailing. Metcash operates its grocery and liquor wholesale distribution through three divisions:

- IGA Distribution accounts for around 55% of Metcash's sales turnover. It carries around 21 000 dry, chilled and frozen grocery items, and supplies more than 4 500 independent retail grocery stores in NSW, Victoria, Queensland and South Australia;

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10 *Ibid.*

11 Woolworths Ltd, *Store locations*, available at http://www.woolworthslimited.com.au/storelocations/index.asp, accessed on 2 November 2005.

12 Woolworths Ltd, *Annual Report 2005*, available at http://www.woolworthslimited.com.au/shareholdercentre/financialinformation/annualreports.asp, accessed on 2 November 2005.

13 Australian Competition and Consumer Commission, *Public Competition Assessment, Woolworths' Proposed Acquisition of 22 Action Stores and Development Sites*, 19 October 2005, available at http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D05+63026.pdf&trimFileTitle=D05+63026.pdf&trimFileFromVersionId=711311, accesed on 28 March 2006.

14 Coles Myer Ltd, *Underlying profit up 17.6%*, News Release, 22 September 2005, available at http://www.colesmyer.com/library/NewsMedia/20050922_full_year_profit_result.pdf, accessed on 28 March 2006.

15 Woolworths Ltd, *Annual Report 2005*, available at http://www.woolworthslimited.com.au/shareholdercentre/financialinformation/annualreports.asp, accessed on 2 November 2005.

16 Metcash Trading Ltd Australasia, available at http://www.metcash.com/index.cfm?page_id=2109, accessed on 28 March 2006.

17 Metcash Trading Ltd Australasia, *Market Briefing Presentation - FAL +100 days*, 2 March 2006, available at http://www.metcash.com/index.cfm?page_id=2165, accessed on 28 March 2006.

- Australian Liquor Marketers accounts for 31% of Metcash's sales turnover and supplies 13 000 hotels, liquor stores, restaurants and other licensed premises; and

- Campbells Cash and Carry, which accounts for 14% of Metcash's sales turnover, is a network of 41 wholesale cash and carry warehouses across NSW, Victoria, Queensland and South Australia. It carries 12 000 liquor, food service, grocery, dairy, frozen, confectionery and tobacco products. Campbells specialises in distribution to the petrol and organised convenience store sector.

In 2004-05, the Metcash Trading Group announced a sales turnover of $7.0 billion, down 2.5% on the previous year, although profits were up 8.3%.[18] Falling sales were recorded in each of its three divisions.

Metro Cash and Carry South Africa (Metoz) acquired control of the Metcash Group in 1998. In March 2005, a process of capital reorganisation was concluded and Metcash Limited, a new 100% Australian owned holding company, acquired ownership of the former majority shareholder, Metoz Holdings Limited.[19]

In 2005 Metcash was successful in purchasing the Australian wholesale supply business of Foodland Associated Ltd (FAL), along with a number of Action branded stores - 38 in Queensland and 22 in Western Australia. Metcash intends to sell 10 of the stores in Western Australia and operate the remaining 12 under the IGA banner.[20]

(iv) Aldi - the newest player in the grocery market

Aldi opened its first grocery store in NSW in January 2001. By 2004, there were 44 stores in NSW, 20 in Victoria and 8 in Queensland. In less than four years, Aldi has captured 5% of the NSW packaged grocery market and accounts for 2.6% of national packaged grocery sales.

Aldi is aiming for 10 percent of the packaged grocery market and 300 stores nationwide by 2010. Aldi stocks a limited range of heavily discounted grocery and household items (see below).

From its origins in Germany in 1948, Aldi now has 5 000 stores in Europe (3 900 in Germany alone).

(b) Defining 'market share'

The following section examines the market share of each of the major supermarket chains and how this has changed in the past decade.

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18 Metcash Trading Ltd Australasia, *Annual Report 2005*, 22 July 2005.

19 Metcash Trading Ltd Australasia, *Annual General Meeting*, 1 September 2005, available at http://www.metcash.com/site_files/s1001/ files/agm_presentation_1sept2005.pdf, accessed on 28 March 2006.

20 Metcash Trading Ltd Australasia, *Market Briefing Presentation - FAL +100 days*, 2 March 2006, available at http://www.metcash.com/index.cfm?page_id=2165, accessed on 28 March 2006.

Estimates of market share will vary considerably depending on the definition of 'market'. In the broadest sense, the food sector includes supermarkets and grocery stores; other food retailers (eg fruit and veg, meat, poultry, fish, and bread retailers); takeaway food retailing; and cafes and restaurants. According to Australian Bureau of Statistics figures, around 63% of total food spending is in supermarkets and grocery stores.[21] After more than a decade of gaining market share, the supermarkets and grocery stores experienced a marginal loss of share between 2003 and 2004.[22]

Market research company ACNielsen gathers and publishes regular statistics on the market share of different companies in the food and grocery industry. The company uses a fairly restrictive measure of 'market', collecting *packaged grocery* data from supermarkets and grocery stores. A broad range of packaged food and non-food items are included, but ACNielsen's measure does not include fresh products, such as fresh fruit and vegetables, delicatessen items, fresh bakery products or fresh meat. Packaged groceries account for approximately 70 percent of supermarket/grocery store turnover.[23]

When fresh food products are included in the measure of grocery retail market share, the major chains' share is significantly lower (for example, in 2002, Coles and Woolworths held 77.2% of the *packaged* grocery market nationally, but just 66.5% of the packaged plus fresh grocery market).[24]

Estimates of market share can be 'manipulated' by adjusting the 'market'. The following figures illustrate how combined market share for Coles and Woolworths can be anywhere from 41% to 77%, depending on how the market is defined:

- Using 2002 figures (latest publicly available data), Coles/Bi-Lo held 35.6% of the packaged grocery market and Woolworths held 41.6% (ACNielsen Scan Track measure - the narrowest definition of market).[25]

- If the market is expanded to include fresh groceries, the market share of the two major retailers is considerably less as 32.5% for Coles/Bi-Lo and 34% for Woolworths (ACNielsen Homescan measure).[26]

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21 Australian Bureau of Statistics, *8501.0 Retail Trade, Australia, August 2005*, September 2005.

22 ACNielsen, *Grocery Report 2004*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

23 ACNielsen, *Grocery Report 1999*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

24 ACNielsen, *Grocery Report 2002* and *Grocery Report 2003*, both available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 October 2005.

25 ACNielsen, *Grocery Report 2002*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 October 2005.

26 ACNielsen, *Grocery Report 2003*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 October 2005.

- When the market is adjusted to include take-away food and other food retailing (the measure of food retail trade used by the ABS), Coles/Bi-Lo's share of food retail trade is around 23% and Woolworth's share around 24%.[27]

- Finally, by expanding the market even further, to include cafes and restaurants (the 'stomach market'), Coles/Bi-Lo and Woolworths account for around 20% and 21% of market share respectively. When the major chains quote their market share at around 20%, they are likely using a very broad definition of market, which considers cafes, restaurants and takeaway food outlets as competitors.[28]

Finding 1

Estimates of market share for the major supermarket chains can vary greatly, depending on the definition of 'market'. Using the narrowest definition, the 'packaged grocery' market, Coles and Woolworths held a combined national share of more than 77 percent of the market in 2002. Using the broadest definition of market, the 'share of stomach sales', which includes all food purchased in retail and catering establishments, Coles and Woolworths held an estimated 41 percent of the market in 2002.

(i) Joint Select Committee Report on the Retailing Sector

In December 1998 the Australian Parliament established a Joint Select Committee on the Retailing Sector. The Joint Committee gave careful consideration to defining 'market' with respect to the food retail sector. In light of conflicting views on the matter, the Committee commissioned the Australian Bureau of Statistics (ABS) to provide market share information for three sub-groups:

- **Measure 1**: is restricted to supermarket and grocery stores, including non-petrol sales of identified convenience stores of petrol stations;

- **Measure 2:** is a measure of food, liquor and grocery retail trade and includes all retailers in Measure 1 plus liquor retailing stores, plus other food retailing stores including fresh meat, fish and poultry retailing stores, fruit and vegetable retailing stores, bread and cake retailing stores, and other specialised food retailing stores; and

- **Measure 3**: includes all retailers in Measure 2 plus takeaway food retailing stores.

On the basis of the above three measures, the ABS estimated the market share of the three major national supermarket chains (at that time Coles, Woolworths and Franklins) in 1997-98 to be 75.4% (Measure 1), 62.0% (Measure 2) and 53.9% (Measure 3).

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27 Derived from estimates of retail trade market share in: Australian Bureau of Statistics, *Retail Trade, Australia, August 2005*, September 2005.

28 *Ibid*.

The ABS considered Measure 2, which measures total Food, Liquor and Grocery retail trade, to be the most realistic measure of the market in which the supermarkets compete.[29]

Finding 2

The Australian Bureau of Statistics, commissioned by the Joint Select Committee on the Retailing Sector to estimate market share in the retail sector, considered total Food, Liquor and Grocery retail trade to be the most realistic measure of the market in which supermarkets compete. Based on this measure, the major supermarkets (at that time Coles, Woolworths and Franklins) held a combined market share of 62 percent in 1997-98.

(ii) Packaged grocery market share

Over the last decade, the major supermarket chains have steadily increased their share of the packaged grocery market. In the six years to 2002, the combined market share of Coles/Bi-Lo and Woolworths increased from 60.7% to 77.2% (see figure 2.1 below - based on ACNielsen Scan Track data).[30]

Contrasting the national trend, Coles and Woolworths have achieved only modest share gains in the Western Australian packaged grocery market in the six years to 2002. The two major chains increased their market share by more than five percent between 1996 and 1998, but have remained relatively stable since that time (see figure 2.1 below - based on ACNielsen Scan Track data).

Finding 3

In the six years to 2002, the major supermarket chains increased their share of the national packaged grocery market by more than 16 percentage points. Contrasting the national trend, the major supermarkets achieved only modest gains (5 percent) in the West Australian packaged grocery market.

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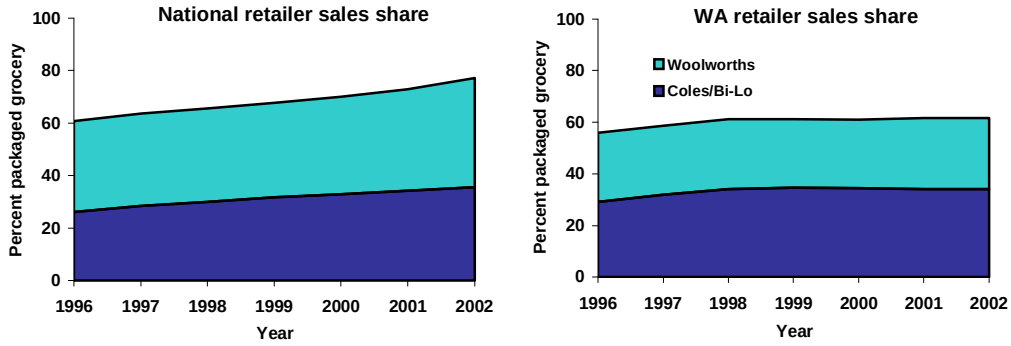
29 Parliament of Australia, Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure? A review of Australia's Retailing Sector*, August 1999.

30 ACNielsen, *Grocery Report 2002*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

Figure 2.1 National and Western Australian market share of major supermarket retailers[31]



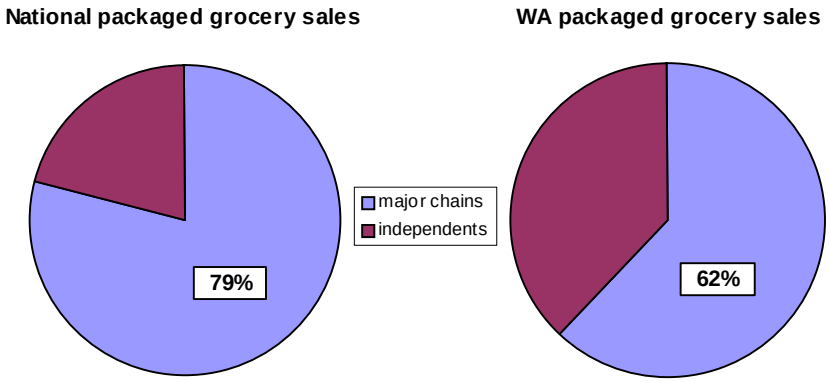
In 2004, the major chains (including Franklins, which currently only operates in NSW under the South African owned Pick 'n Pay) accounted for around 79% of the national packaged grocery market. In Western Australia, Coles and Woolworths held a combined share of 62% of the packaged grocery market, the remaining share being held by independents[32] (see figure 2.2).[33]

31 ACNielsen, *Grocery Report 1999*, *Grocery Report 2000*, *Grocery Report 2001* and *Grocery Report 2002*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

32 FAL supermarkets (Action) and franchise banner groups (Dewsons, Supa Valu and Eziway).

33 ACNielsen, *Grocery Report 2004*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

Figure 2.2 National and Western Australian share of packaged grocery sales



Finding 4

In 2004, the major chains (including Franklins) accounted for around 79 percent of the packaged grocery market nationally and 62 percent in Western Australia.

(iii) Food, Liquor and Grocery market share

National food retail turnover for 2004-05 was estimated at $71.49 billion (ABS Measure 2 - includes supermarket and grocery, liquor, fresh meat, fish and poultry, fruit and vegetable, bread and cake and other specialised food retailing).[34]

Coles Myer's Food and Liquor Division recorded sales of $19.3 billion in 2004-05,[35] which represents an estimated 27% of total national food retail turnover. Woolworths' Food and Liquor Division recorded sales of $23.5 billion in 2004-05,[36] which represents an estimated 32.8% of total national food retail turnover.

Based on the above figures, the major supermarket chains' combined share of Food, Liquor and Grocery retail sales in Australia for 2004-05 was approximately 60 percent.

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34 Australian Bureau of Statistics, *8501.0 Retail Trade, Australia, August 2005*, September 2005.

35 Coles Myer Ltd, *Underlying profit up 17.6%*, News Release, 22 September 2005, available at http://www.colesmyer.com/library/NewsMedia/20050922_full_year_profit_result.pdf, accessed on 28 March 2006.

36 Woolworths Ltd, *Full Year Profit Results 2005*, available at http://www.woolworthslimited.com.au/resources/full+year+results+fy05.pdf, accessed on 2 November 2005.

The major chains do not report their earnings by State, therefore it is not possible to use ABS retail turnover data to estimate Food, Liquor and Grocery market share for the major supermarket chains and independents in Western Australia. Their share of the Food, Liquor and Grocery market would be expected to be significantly below the 60 percent national figure, given the major chains have a reduced presence in Western Australia.

Finding 5

The major supermarkets' share of Food, Liquor and Grocery retail sales in 2004-05 was approximately 60 percent. Accurate figures on the major supermarkets' share of Food Liquor and Grocery retail sales in Western Australia are not available, but are expected to be less than 60 percent.

(iv) The Discounted Fuel Market

In recent years the food retail chains have diversified into other markets, including fuel. The move has proven a highly lucrative venture for those chains involved, with recent sales figures indicating that fuel sales have made significant direct and indirect contributions to earnings growth.

Woolworths was the first of the supermarket groups to enter the retail fuel market, opening its first Plus Petrol store in Dubbo in 1996. In August 2003, it announced a joint venture with Caltex, which would provide a national network of 450 petrol stations offering a 4 cents per litre discount on fuel for customers who spent $30 or more in Woolworths supermarket or discount department stores.[37] By mid-2005, there were 458 sites. In 2004-05, Woolworths' Petrol Division achieved a 95% increase in profit over the 2003-04 financial year, partly due to expansion of its network of petrol stations and partly due to increasing sales volume.[38]

Coles Myer signalled its intention to enter the discount fuel market in May 2003, announcing its alliance with Shell. In July 2003, 151 Coles Express Service Stations across Victoria offered a 4 cents per litre fuel discount to customers who spent more than $30 at Coles/Bi-Lo supermarkets or

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37 Woolworths Ltd, *Woolworths and Caltex to Work Together in Petrol*, ASX/Media Release, 21 August 2003, available at http://www.woolworthslimited.com.au/resources/21-08-2003_a.pdf, accessed on 28 March 2006.

38 Woolworths Ltd, *Preliminary Final Report and Dividend Announcement for the 52 weeks ended 26 June 2005*, 22 August 2005. available at http://www.woolworthslimited.com.au/resources/full+year+results+fy05.pdf.

Liquorland stores.[39] By mid-2005, there were 600 fuel and convenience stores across Australia. In 2004-05, Coles Express recorded an 83% increase in profit over the 2003-04 financial year.[40]

While earnings directly attributed to fuel sales represent only a small percentage of the overall pre-tax profits for the supermarket divisions of the major retail chains (3.2% for Woolworths and 4.8% for Coles Myer), the fuel discount schemes likely contributed indirectly to growth in supermarket turnover for the two major chains. Woolworths Food and Liquor recorded a 7.1% increase in turnover and a 14.5% increase in pre-tax profit.[41] Coles Food and Liquor recorded a 6.9% increase in turnover and a 12.6% increase in pre-tax profit.[42] In its 2005 Full Year Profit Statement, Coles Myer indicated that its Fuel Offer had resulted in a 2% sales lift in its Food and Liquor Division.[43]

The FAL (now Metcash) supplied independents also operate a fuel discount scheme, whereby customers who spend more than $25 in participating supermarkets can receive a 4c per litre discount on fuel at more than 50 metropolitan service stations. As an indication of retail turnover in the independent supermarket sector in Western Australia, sales to FAL franchisees Dewsons, Supa Valu, Eziway and other independent supermarket operators increased by 7.2% in the 2005 financial year (on a par with increase in sales achieved by the major supermarket chains).[44]

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39 Coles Myer Ltd, *Fuel Discounts are Here*, Media Release, 27 July 2003, available at http://www.colesmyer.com/library/NewsMedia/20030727_fuel_discounts_are_here.pdf, accessed on 28 March 2006.

40 Coles Myer Ltd, *Underlying profit up 17.6%*, News Release, 22 September 2005, available at http://www.colesmyer.com/library/NewsMedia/20050922_full_year_profit_result.pdf, accessed on 28 March 2006.

41 Woolworths Ltd, *Preliminary Final Report and Dividend Announcement for the 52 weeks ended 26 June 2005*, 22 August 2005. available at http://www.woolworthslimited.com.au/resources/full+year+results+fy05.pdf.

42 Coles Myer Ltd, *Annual Report 2005*, October 2005, available at http://www.colesmyer.com/library/NewsMedia/20051019_annual_report.pdf, accessed on 28 March 2006.

43 Coles Myer Ltd, *Underlying profit up 17.6%*, News Release, 22 September 2005, available at http://www.colesmyer.com/library/NewsMedia/20050922_full_year_profit_result.pdf, accessed on 28 March 2006.

44 Foodland Associated Ltd, *FAL 2005 Results Announcement*, Company Announcement, 13 September 2005, available at http://www.metcash.com/site_files/s1001/files/N7TR0I8VK4PNNWW_2005_Full_Year2.pdf, accessed on 28 March 2006.

Finding 6

Diversification of supermarkets into discount petrol retailing has proven a lucrative venture, with recent sales figures indicating that sale of fuels have made significant direct and indirect contributions to earnings growth. In 2004-05, Woolworths' Petrol Division reported a 95 percent increase in profit over 2003-04. Coles Myer reported an 83 percent increase for the same period. Coles Myer indicated that its fuel offer had also resulted in a 2 percent sales lift in its Food and Liquor division.

(c) The supermarket sector in Western Australia

Following the recent Woolworths/Metcash acquisition of the FAL group, the current makeup of the supermarket sector in Western Australian is as follows:

- 78 Coles plus four Newmart (part of the Coles Myer group);[45] [46]
- 80 Woolworths (including 2 development sites); [47]
- 22 Action stores (recently purchased by Metcash Ltd); and
- 234 independent (franchise) supermarkets: Dewsons (65), Supa Valu (116) and Eziway (53).

(i) Metcash - the new player in WA from 2006

In December 2004, Metcash announced an off-market takeover offer for Foodland Associated Ltd's (FAL) Australian operations.[48] In January 2005, the Australian Competition and Consumer Commission (ACCC) announced that it would not oppose Metcash's proposed acquisition of FAL.[49]

In May 2005, a revised offer would see Metcash acquire FAL's Western Australian Franchise and Supply division, Action Retail division (excluding a number of Action Stores and development

45 Coles store locations, available at http://www.coles.com.au/frame/build.asp?url=/about/locations, accessed on 16 March 2006.

46 Newmart store locations, available at http://www.newmart.com.au, accessed on 16 March 2006.

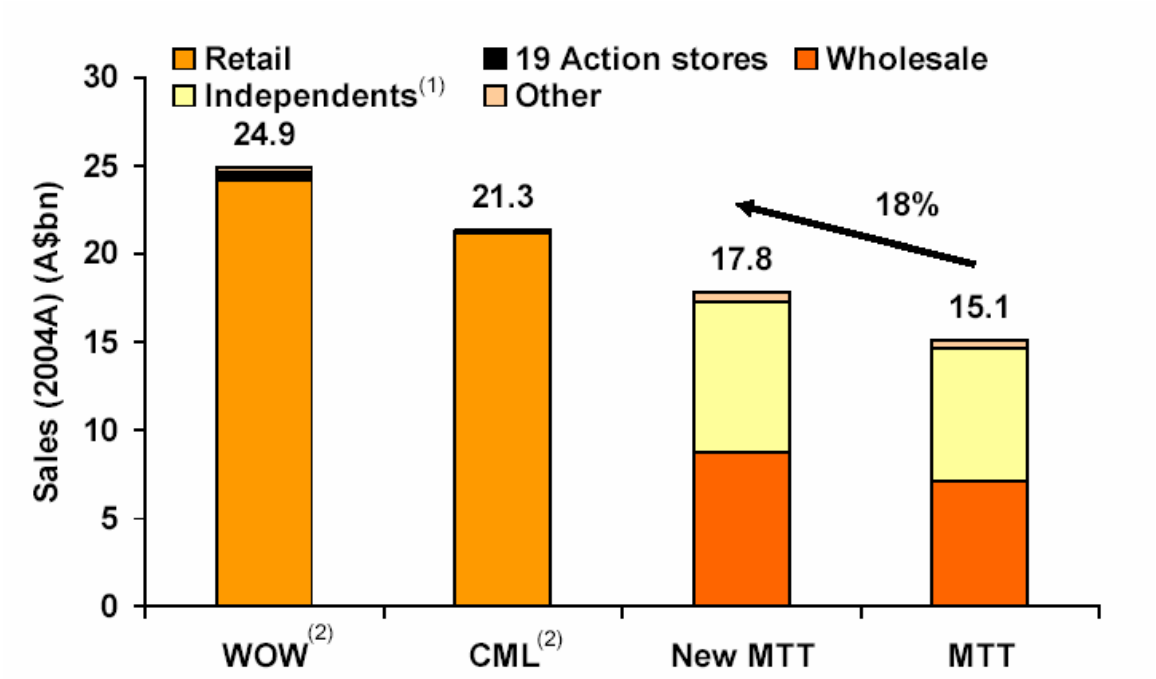
47 A number of the newly acquired Action stores are still to be re-badged.

48 Metcash Australasia Trading Ltd, *Takeover Offer for Foodland and Capital Reorganisation*, available at http://www.metcash.com/site_files/s1001/files/6dec_asx.pdf, accessed on 31 October 2005.

49 Australian Competition and Consumer Commission, *Metcash Trading Limited - proposed acquisition of Foodland Australia Limited*, available at http://www.accc.gov.au/content/index.phtml/itemId/638097, accessed on 31 October 2005.

sites that would be acquired by Woolworths), and all other FAL Australian assets.[50] In May 2005, Metcash estimated that its takeover of FAL's wholesale and retail operations would increase its sales by 18% nationally, edging it closer to the two major food retail chains and cementing its position as the third major force in the Australian retail food industry (see Figure 2.3 below).

Figure 2.3 Metcash/Woolworths acquisition and the predicted impact on grocery sales[51]



As a result of FAL's previously held strong market presence in Western Australia (supplying 38-39% of packaged groceries), the carve up of FAL's Western Australian interests (14 Action stores and 2 development sites to Woolworths; 22 Action stores and FAL wholesale supply network to Metcash)[52] will result in Woolworths increasing its market share by around 5%, and Metcash achieving some 33% of the Western Australian packaged grocery market.

Following the integration of FAL's Australian operations into Metcash's national IGA Distribution network, Western Australia's independent grocery sector will cease to be supplied by a West Australian company.

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50 Woolworths would acquire 19 Action stores and 3 Action development sites plus FAL's New Zealand operations.

51 WOW = Woolworths Ltd; CML = Coles Myer Ltd; and MTT = Metcash Australasia Trading Ltd; in Metcash Australasia Trading Ltd, *Acquisition Presentation*, May 2005, available at http://www.metcash.com/site_files/s1001/files/may_2505_presentation.pdf, accessed on 28 March 2006

52 Metcash Australasia Trading Ltd, available at http://www.metcash.com/site_files/s1001/files/Mar_0606_preso_1st_100_days.pdf, accessed on 28 March 2006.

In November 2005, WA's 260 independent supermarkets joined forces with the more than 4,500 independent supermarkets supplied by Metcash nationally - the impact this will have on the buying power of the W A independents, along with their ability to support local growers and producers is yet to be determined.

New owners for Metcash's newly acquired Action stores (in WA and other states) are expected to come from its existing customer base, FAL management and WA independent retailers.

Finding 7

Metcash's November 2005 takeover of FAL's West Australian operations includes 22 Action stores and the FAL wholesale distribution network, which supplies around 260 independent supermarkets. The acquisition gives Metcash an estimated 33 percent of the packaged grocery market in Western Australia. Integration of FAL operations into Metcash's national IGA distribution network will see WA's independent supermarkets join forces with 4,500 supermarkets supplied by Metcash nationally.

2.2 Relationships along the food supply chain

Drawing largely on the views expressed in evidence and submissions to the current inquiry, the following section examines the relationships between the major supermarket retailers with other market players in Western Australia - growers and producers, wholesalers and other retailers.

In order to improve efficiencies, the major retailers have increasingly moved toward vertically integrated supply chains. The obvious benefit for the supermarkets is that buyers deal with fewer businesses, with the obvious reduction in paper work and the like. The fortunes of other supply chain participants are affected by these changing supply chain dynamics, some favourably, others less so.

(a) Producers, wholesalers and the major supermarkets

For those growers and producers who are able to negotiate direct supply contracts with the major supermarkets, Coles Myer asserts that certainty of supply is a benefit:

> *Some 85 per cent of our fruit and vegetables are purchased directly. We contract a person to grow capsicum or potatoes or whatever, as opposed to somebody planting them and hoping someone will buy them. In that sense the grower has certainty and surety for their investment.*[53]

Woolworths too deal directly with growers in the vicinity of 65 to 70 percent of the time, with the balance of produce required being sourced through a market agent or consolidator. They say that

[53] Mr Chris Mara, Advisor, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p12.

their primary goal is to try to source suppliers who can deliver the volume. Supply agreements provide commitment on behalf of the parties.[54]

A recent commentary on Australia's Food Industry confirms the increasing trend toward direct relationships between suppliers and retailers, the authors commenting:

> *…food retailers are extending contractual arrangements and developing exclusive supply arrangements directly with growers, suppliers and manufacturers. This facilitates greater control over stock, quality and price.*[55]

The national supply chain arrangements and centralized distribution networks adopted by both Coles Myer and Woolworths are the gateway to around half of the Australian food, liquor and grocery market. The Small Business Development Corporation believe that the small business suppliers are significantly affected by the market power and influence of major retail chains and that access to these channels is contingent on suppliers meeting, at times, onerous trading terms and costs. The Corporation believes that small businesses are vulnerable to the changing demands of major retail chains and face significant pressure to meet the terms and conditions or face being cut from a significant part of the consumer market. They believe that the situation is exacerbated as the market dominance of major retail chains increases.[56]

Although the Committee has not been presented with any empirical evidence of the supermarkets abusing their dominant position in the Western Australian market, numerous submissions point to difficulties that arise from inequality in bargaining power, with one submitter stating that the object of the supermarkets is to seek total control of product from grower/processor to shelf sale.[57]

The Rainbow Coast Horticultural Group provided examples of a number of unfavourable outcomes for growers:

> *Supermarkets use quality as a bargaining tool. Quite rightly the Australian consumer should insist on good quality food. However the chains try to down grade prices for the top quality produce they demand, to match the price of poorer quality produce which they threaten to use unless growers accept lower prices.*
>
> *If growers want to be paid weekly, (on 30 day accounts) instead of receiving one check (sic) a month, they are regularly charged an extra 2%. Good business or unreasonable pressure?*

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54 Mr Stephen Bate, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p5-6.

55 Australian Bureau of Agricultural and Resource Economics, *Australia's Food Industry*, in: Australian Commodities, Vol 12 no 2, June Quarter 2005 p379-389.

56 Submission 53 Small Business Development Corporation.

57 Confidential submission; Submission 42, Rainbow Coast Horticulturalists; Submission 43, Great Southern Region Marketing Association; Submission 52, Handasyde Strawberries Albany; Submission 58 R Palandri; Submission 61, WA Fruit Growers Association; Submission 54, Gascoyne Development Commission; Submission 71, Perth Market Authority.

> *Chains demand better types of packaging, for example lidded or clamshell punnets. These cost much more than traditional wrap over types, and take longer to pack due to extra care required to prevent damage to soft fruit such as strawberries, as the lids are closed. The chains however will not offer the grower more for the finished product and again threaten to use cheaper imports if growers don't comply.*
>
> *There are reports of a market agent who allegedly kept prices down for a season in order to gain "preferred supplier status" to a large chain. It is alleged that in order to supply one of the chains, growers had to use a particular agent and that agent kept prices favourable to the chain in return for a long term contract.*
>
> *Some growers have expressed concern about speaking out against the chains for fear of losing their markets.* [58]

Similar comments were made by many producers, particularly those in the horticultural industry. The proprietors of Handasyde Strawberries commented:

> *Because they are only two they are dictating to the growers what the product is packaged in and also the price. They use bullying tactics to do this….If you do not conform they pass you by….We have to supply these same retailers with product at temperatures of 2-6 C and yet when this product is placed on display it is un-refrigerated. We as growers are blamed for the poor quality….*[59]

The supermarkets' involvement in product specification prompted some submitters to make the following comments:

> *"The retail chains have always held the producers to ransom by their sheer buying power. Potatoes must be a certain size, or they won't purchase….apples must be bright red. Never allowing for seasonal variations."*[60]
>
> *"….large supermarkets dictating what varieties…should be grown and how they should be presented…they also receive such a small percentage of the total price of the produce relative to the markets along the way."*[61]

The change in presentation and packaging affects a number of industries. The Committee understands that there is a move by Woolworths buyers to have wine packaged in six-bottle cartons instead of the industry standard 12-bottle; [62] adding further cost on to the producer.

The comments above reflect a high level of concern, particularly amongst growers, that they are under pressure to accept less than favourable terms of trade, and that margins for growers have not

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58 Submission 42, Rainbow Coast Commercial Horticulturalists.

59 Submission 52, Handasyde Strawberries Albany.

60 Submission 47, L Oldham.

61 Submission 5, K Hopkins.

62 Mr Stephen Bate, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p8.

increased compared to retailer margins.[63] The issue of price received by growers was also raised by Rainbow Coast Commercial Horticulturalists, who said that supermarket profit margins were rising. Mark ups were previously in the order of 35 to 50 percent but are now closer to 100 percent; yet growers prices are not increasing sufficiently to keep up with costs.[64] The West Australian Fruit Growers Association asserted:

> *… primary producers are the only genuine price takers in food supply chains. As a consequence of that inherent negotiating weakness, farmers' are easily exploited in respect to pricing, with that trade practice being magnified relative to the respective market share of the retailer in question.*[65]

Other submissions also point to excessive profit taking on the part of the major supermarkets.[66]

The supermarkets, however, refute claims of excessive profit margins. In evidence before the Committee, Coles Myer stated that their earnings before interest and tax for the 2005 financial year were 3.8 cents in the dollar. Mr Edward Moore, General Manager, Regulatory Affairs, referred the Committee to a Deutsche Bank report, which noted that the three to four percent net profit margins earned by Australian supermarkets are considerably lower than the five to 10 percent profit margins of comparable chains in the United Kingdom, the United States and the European Union.[67] Figures supplied by Coles Myer in its submission, which quote data compiled by IBISWorld in a November 2004 report, suggest that supermarkets and grocery stores have an average net profit of three percent on fruit and vegetables.[68]

Finding 8

There is a high level of concern, particularly amongst growers, that due to inequality of bargaining power between small suppliers and the major supermarket chains, there is considerable pressure to accept less than favourable terms of trade, and that margins for growers have not increased compared to retailer margins.

63 Submission 43, Great Southern Region Marketing Association.

64 Submission 42, Rainbow Coast Commercial Horticulturalists.

65 Submission 61, WA Fruit Growers Association.

66 Submission 30, New West Foods WA Pty Ltd; Submission 57, Western Australian Farmers' Federation; Submission 58, Great Southern Plantations; Submission 89, H Trandos.

67 Mr Edward Moore, General Manager, Regulatory Affairs, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p3.

68 Submission 72, Coles Myer Ltd.

A number of submitters considered that growers could improve their bargaining position with the major supermarkets by forming collectives.[69] On this issue, the Department of Treasury and Finance (WA) commented:

> *The possibility of buyer power being exploited is more likely to occur in industries where major retail chains are purchasing from smaller market participants, such as individual agricultural producers. Smaller producers can strengthen their market position by engaging in collective bargaining, if it can be demonstrated that such an arrangement is in the public interest.*[70]

Under the current provisions of the *Trade Practices Act 1974*, the ACCC has power to authorise collective bargaining where it is satisfied that the public benefit would outweigh any resulting lessening of competition. The Dawson Review of the Competition Provisions of the TPA recommended that the Act be amended to provide for a notification process for collective bargaining arrangements.[71] Although the Government accepted the recommendation, the Bill providing for these amendments has yet to pass through the Australian Parliament.[72]

As well as growers and producers, wholesalers have also expressed concerns about their dealings with the major supermarket chains.[73] The move toward dealing directly with growers could, in some cases, remove wholesalers from the supply chain. 'Supermarket bypass' is a major issue currently being faced by the Perth Market Authority, the primary fruit and vegetable wholesale market for Western Australia. Between 1999 and 2004, the value of produce being purchased by the major supermarkets from Central Markets around Australia fell by 26 percent, as supermarkets targeted larger growers to negotiate direct supply contracts. The Perth Market Authority contends the objective of the two major chains is to source 70-80% of produce direct from growers.

The Perth Market Authority warned that the supermarket majors' increasing propensity to bypass wholesalers in favour of direct contracts with suppliers has implications for both growers and wholesalers:

> *In the past, the supermarket duopoly took its lead on pricing from the CMS,*[74] *however, as their power increases, the relevance of the CMS in setting prices is diminishing. The reality is that the supermarket duopoly will increase their margins, by reducing the price paid to growers, through the applications of promotional levies/discounts that will be deducted from the initial purchase price (the "list price") under these "Trading Terms"*

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69 Submission 66, Department of Treasury and Finance (WA); Submission 27, South West Development Commission; Submission 69, Regional Development Council.

70 Submission 66, Department of Treasury and Finance (WA).

71 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

72 *The Trade Practices Legislation Amendment Bill (No. 1) 2005* was introduced in the House of Representatives in February 2005. It was returned to the House of Representatives in October 2005, after being passed in the Senate with amendments. It remains with the House of Representatives.

73 Submission 30, NewWest Foods; Submission 71, Perth Market Authority.

74 Central Market System

agreements. Having said that, with the supermarket duopoly forecasting their demand, and only taking what they have ordered, the ever increasing supply of produce into the CMS will inevitably reduce market prices, enabling supermarkets to in turn reduce their purchase prices (list prices) to growers over time.[75]

Finding 9

The value of fresh produce being purchased by the major supermarkets from Central Markets around Australia fell by 26 percent between 1999 and 2004 as supermarkets bypass wholesale markets in favour of direct supply contracts with growers.

(b) Other retailers and the major supermarket chains

Several submissions commented on the relationships between the major supermarket chains and smaller competitors in the food retail market.[76] The Small Business Development Corporation provided the most extensive comments on problems encountered by smaller companies competing directly with the major retail chains. On the ability of small businesses to compete on price, the Corporation offered the following observations:

It is often difficult for small retailers to compete on price with Coles and Woolworths. Stories of small retailers being able to purchase goods off the shelves at Coles or Woolworths for less than the price the goods are available to them wholesale are rife within the retail industry.

While competing against businesses with significantly greater bargaining power is a fact of life in the retail sector, concerns arise where this bargaining power is brought to bear in a predatory fashion. When the buying and marketing power of a major is strategically focused on eliminating a smaller competitor the boundaries of what constitutes fair competition become stretched. A systematic and sustained campaign by a major of advertising and heavily discounting the key product areas stocked by a competitor can often lead to the competitor's closure. There are numerous examples of where this has occurred in a shopping centre environment.[77]

The Corporation also commented on the formidable power of the major retailers in influencing tenancy arrangements, both theirs and those of potential competitors:

Landlords of shopping centres are under significant pressure to attract and retain major retail chains to ensure the shopping centre's success. Anecdotal evidence suggests that in

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75 Submission 71, Perth Market Authority.

76 Submission 53, Small Business Development Commission; Submission 66, Department of Treasury and Finance (WA); Submission 68, WA Independent Grocers' Association; Submission 77, Department of Agriculture (WA).

77 Submission 53, Small Business Development Commission.

> *some cases major retail chains have been offered lucrative arrangements to take up commercial space within a shopping centre, again demonstrating that the competition playing field is by no means level. As significant from a small business perspective however, is the influence exerted by major chains over the management of commercial premises. This influence for example, can be exercised over the retail composition of a shopping centre as major retail chains may have a preference for the presence of some retail outlets over others. Both Coles Myer and Woolworths operate other non-food retail outlets, including liquor and electrical stores, and may exert a preference for these stores to be located within shopping centres. This in turn affects the ability of smaller businesses to access retail premises in certain locations at a competitive price, if at all.*[78]

Citing the findings of a number of recent analyses of the retail grocery market, the Department of Treasury and Finance (WA) argued that, despite the concentrated market position of the major chains, the retail market is operating efficiently, with consumers ultimately benefiting.[79] In a detailed analysis of Western Australia's food retail sector, undertaken on behalf of Coles Myer, Access Economics argue that low prices and low profit margins, strong product innovation and low barriers to entry and exit all point to a competitive retail environment.[80]

Finding 10

Concerns about the major supermarkets and their dealings with other retailers focussed on predatory pricing behaviour, as well as the formidable power of the major supermarkets to influence retail tenancy agreements, both theirs and those of potential competitors.

(c) Product and Grocery Industry Code of Conduct

In August 1999, the Report of the Joint Select Committee into the Retailing Sector (the Baird Report) recommended the establishment of both an independent Retail Industry Ombudsman, through which small business could bring complaints relating to the retail sector for resolution, and a mandatory Code of Conduct which would regulate conduct associated with vertically integrated relationships throughout the supply chain.

The Australian Government's response supported the establishment of an Ombudsman scheme for the retail grocery sector only, as an alternative to costly and lengthy litigation for business in that sector. Further, the Government supported the establishment of a self-regulatory code in lieu of

78 Submission 53, Small Business Development Commission.

79 Submission 66, Department of Treasury and Finance (WA).

80 Submission 72, Coles Myer Ltd.

the Committee recommended mandatory code; with a commitment to conducting a review after three years of operation.[81]

The Code was developed by an industry-funded committee appointed by the Government, comprising of industry representatives and was introduced in September 2000.[82] [83] The objectives of the Code are to:

- promote fair and equitable trading practices amongst industry participants;
- encourage fair play and open communication between industry participants as a means of avoiding disputes; and
- provide a simple, accessible and non-legalistic dispute resolution mechanism for industry participants in the event of a dispute.

The Code provides voluntary standards in relation to produce standards and specifications; negotiation of contracts; labelling, packaging and preparation; and notification of acquisitions.

Finding 11

The Retail Grocery Industry Code of Conduct, later re-named the Produce and Grocery Industry Code of Conduct, was introduced in September 2000 to promote fair and equitable trading practices amongst retail grocery industry participants. The Code provides voluntary standards for produce standards and specifications; negotiation of contracts; labelling, packaging and preparation; and notification of acquisitions.

A review of the Code, which was completed in December 2003, concluded that:

- there were many issues between parties in the retail grocery industry supply chain that the Code had failed to address;
- the situation appeared to be affecting the economic health and efficiency of that sector;
- there appeared to be too few guidelines and standards for product specifications and codes of practice for the growing, transport, sale and management of produce in the retail grocery supply chain;

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81 Australian Government Response to the Report of the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure*, available at http://www.aph.gov.au/senate/committee/retail_ctte/govt_resp.doc, accessed on 28 March 2006.

82 Now known as the Produce and Grocery Industry Code Administration Committee (PGICAC).

83 Composition of the Committee has been recently changed with the increase of grower representatives from one to four.

- there were allegations of lack of transparency; lack of certainty in contract; issues associated with the determination of fitness for purpose of product; and intimidation of people who complained; and

- the level of awareness of the Code was low in some parts of the supply chain, with some groups (eg growers, producers) considering the Code did not apply to them.[84]

In its response to the review, the Australian Government signalled its intention to:

- retain the existing voluntary Code, but work with industry to strengthen its provisions, particularly those relating to transparency and improved business practices;

- develop and fund a widespread education and promotional campaign to increase awareness of the Code and encourage greater commitment to the Code by the industry; and

- work with the Retail Grocery Industry Code Administration Committee to improve Code transparency, internal dispute resolution procedures and representation for growers.[85]

The Code was renamed the Produce and Grocery Industry Code of Conduct in February 2005, to make it more relevant to the industry sectors that it covers.[86]

The Government has indicated that the voluntary Code will be reviewed again in 2007 and that if a future review indicates an unsatisfactory commitment to the Code by industry participants, then a mandatory Code may be considered.[87]

Finding 12

A 2003 Review of the Produce and Grocery Industry Code of Conduct identified a number of significant problems with the operation of the Code, including: low levels of awareness of the Code in some parts of the supply chain, too few standards and guidelines on product specifications and codes of practice along the supply chain; and lack of transparency in negotiations.

Both Woolworths and Coles adhere to the voluntary Produce and Grocery Industry Code of Conduct.[88]

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84 N Buck and Associates, *Report of the Review of the Retail Grocery Industry Code of Conduct*, December 2003.

85 Australian Government Response to the Buck Report, *Report of the Review of the Retail Grocery Industry Code of Conduct*, 1 July 2004.

86 Produce and Grocery Industry Ombudsman, latest news, available at http://www.mediate.com.au/rgio/latest_news.htm, accessed on 28 March 2006.

87 The Hon Joe Hockey, MP, Minister for Tourism and Resources, Media Release, 1 July 2004.

In its submission to the current inquiry, the Department of Agriculture (WA) indicated its disappointment that the Code was not made mandatory. The Department also questioned the effectiveness of the Code:

> *The Government notes that WA suppliers appear to see little value in the dispute mediation services relating to the voluntary Produce and Grocery Industry Code of Conduct. Since its inception, barely a handful of enquires or applications have been made to the Ombudsman from this State. A common industry view is that such voluntary codes will not work in circumstances where large corporations dominate the market.*[89]

The Department's comments are in agreement with the findings of the 2003 review of the Code. Between July 2001 and August 2003, the Produce and Grocery Industry Ombudsman fielded just six inquiries from industry participants in Western Australia, none of which went to formal mediation. Other States appear to have used the service to a much greater extent - for example, there 62 inquiries from Queensland, 43 of which went on to formal mediation.[90]

Finding 13

Since its introduction, few industry participants in Western Australia have made use of the dispute mediation services available under the voluntary Code of Conduct.

2.3 Accessing the retail market

(a) Business dealings with the major supermarkets

Figures supplied to the Committee by Coles Myer and Woolworths indicate that both the major chains have a significant number of WA based suppliers - 1,820 supplying Coles Myer[91] and more than 1,000 supplying Woolworths.[92] Despite the apparently large number of WA based companies supplying the major retail chains, comments raised in submissions point to several obstacles for local companies in obtaining, and in some cases, retaining supply contracts.

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88 Mr Stephen Bate, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p9; Mr Edward Moore, General Manager, Regulatory Affairs, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p12.

89 Submission 77, Department of Agriculture (WA).

90 N Buck and Associates, *Report of the Review of the Retail Grocery Industry Code of Conduct*, December 2003.

91 Submission 72, Coles Myer Ltd.

92 Submission 73, Woolworths Ltd.

A number of local producers consider the distance to the buying offices and the distribution centres of the major supermarkets[93] a significant impediment to their ability to conduct business.[94] Western Australian suppliers and producers are faced with greater transport costs, adding a hidden tax to the goods.

The interstate location of the buying offices for the major retail chains can create difficulties for both new and existing suppliers. For example, Linley Valley Pork commented:

> *As the head offices of the big ones are not situated in WA, we have found if difficult to negotiate [the] majority of the deals in a timely manner. As we supply fresh (not frozen) meat we are to face inevitable losses due to absence of point of contact in the state.*[95]

Coles Myer concedes that distance presents a problem for West Australian producers:

> *The only difficulty we face in Western Australia is getting the products back to the eastern states. It is a long way from the manufacturers in WA who have the scale, to ship their products back across the desert to the eastern states.*[96]

Volume parameters and supply capability are important considerations for both the major retail chains when new products are offered.[97] Coles Myer outlines its approach to new products as follows:

> *If we are presented with a new line, we must consider whether it will be something consumers want. If it is something that consumers want, will they want it in enough volume to meet our hurdle rates? We cannot stock everything….we have gone from supermarkets that carry 2000 products to 30 000 products…It usually displaces something. People do not realise that if something comes into the store, something must go out.*[98]

A number of submissions to the Inquiry indicate that the major chains are not interested in Western Australian producers, unless they meet the economies of scale to supply nationally. Those Western Australian manufacturers who wish to supply only the local market claim a lack of success when it comes to obtaining shelf space. Solarfruit, a Western Australian based company, advised the Committee that it had encountered difficulty in accessing the shelf space in the major supermarkets. Its approaches to the supermarkets have been rejected on more than one occasion:

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93 Both Coles Myer and Woolworths Ltd have their Australian buying offices on the eastern seaboard.

94 Submission 44, Solarfruit.

95 Submission 51, Linley Valley Pork and PPC Wholesales Services.

96 Mr Edward Moore, General Manager, Regulatory Affairs, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p10.

97 Mr Stephen Bate, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p4.

98 Mr Edward Moore, General Manager, Regulatory Affairs, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p8-9.

> *In each case we have been told that these national companies have no interest in doing business with WA based companies. All the purchasing decisions for these national companies are made in Melbourne or Sydney and we have been told that even if we are just after the West Australian market, it's not worth their trouble operating an account with us.*[99]

In a confidential submission to the inquiry, one West Australian company pointed out that state-based independent suppliers had previously been able to offer products to the state offices of the major chains, and that these products were often accepted. However, this is rarely the case now with the supermarkets expecting national supply.[100]

Finding 14

A number of West Australian suppliers consider centralised buying offices and distribution centres of the major supermarket chains, located in the Eastern States, a significant impediment to market access. Meeting the volume requirements of the major chains is also considered a major impediment for some local producers.

The Western Australian Farmers' Federation alluded to a range of indirect fees imposed by the major supermarket chains, which also restricts access to the shelves of the major supermarkets for some companies.[101] In evidence before the Committee, the Independent Grocers Association commented:

> *One supermarket has a program whereby a manufacturer can buy its competitor off the shelf. That is an innovative way to make money.*[102]

Both Coles Myer Ltd and Woolworths deny the charging of shelf fees or new line fees. Mr Stephen Bate, General Manager Fresh Foods, Woolworths made the following comments on shelf fees:

> *If your question is heading towards payment for shelf space, which is a question that was put to a previous witness, it is the same response: no-one pays for shelf space in Woolworths. It is a misconception. Whether it happened 20 or 30 years ago with some retailers, I am not sure…I went into buying 12 or 13 years ago and it has not been my experience in those 12 or 13 years that that has ever happened…They cannot purchase shelf space, nor can they do what the previous witness was saying; that is, actually buy out another product. I am not sure what the correct terminology is, but the indication was that*

99 Submission 44, Solarfruit.

100 Confidential submission.

101 Submission 57, Western Australian Farmers Federation (Inc).

102 Mr John Cummings, President, Independent Grocers Association, *Transcript of Evidence*, 9 November 2005, p10.

> *they could cause a de-ranging of another product by paying enough money….That is absolutely not correct.*[103]

When the issue of "slotting fees" was raised with Coles Myer, Edward Moore, General Manager, Regulatory Affairs, replied:

> *it is a myth….we have a relationship with our suppliers in which we go to market in a cooperative way. If decide that we will get it [a new line] in…we will ask the supplier how he will market the produce… The supplier will do cooperative advertising with us and have promotions to get that product up and selling. There are no new line fees or shelf-space fees.*[104]

The Committee notes that a requirement to participate in 'cooperative advertising' may impose a cost not easily met by small or medium sized West Australian producers. Other indirect costs, including rebates, may also restrict access to the shelves of major supermarkets:

> *They are very focussed on rebates and other more direct means of income from the supplier, and in many cases half of their margins are earned this way instead of from simple shelf turnover. However many suppliers generally do not have the substantial capital required to attract the interest of the chains with the 'up front' monies demanded.*[105]

The issue of indirect costs to producers to gain shelf space was also raised by the Small Business Development Commission. The Commission submits that *"access to the market is contingent on suppliers meeting, at times, onerous trading terms and costs (eg. in relation to shelf space and promotional commitments)."* They go on to say that the opportunity for small businesses to have their products available on supermarket shelves will be further limited given the vested interest of major retail chains in private labels as a source of potentially higher revenue generation.[106]

Finding 15

The imposition of indirect fees by the major supermarkets is seen as a further impediment to suppliers wishing to gain shelf space in the major supermarkets. Both major supermarket chains refute claims that 'shelf-space fees' and 'new line fees' are charged.

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103 Mr Stephen Bate, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p8.

104 Mr Edward Moore, General Manager, Regulatory Affairs, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p8.

105 Confidential submission.

106 Submission 53, Small Business Development Corporation.

(b) Buying policies and practices of the supermarkets

Comments on the buying policies and practices of the major supermarkets, focussed on:

- Their preference for dealing with a small number of large volume (often national) suppliers;[107]
- Efforts to increase private label penetration;[108] and
- Compulsory QA requirements.[109]

(i) National buying policies

There was a clear view by industry groups with regard to the major supermarkets overlooking small volume, local suppliers in favour of large volume (national or even global) suppliers. The Department of Agriculture contrasted the buying practices of the major supermarket chains with those of the independent sector:

> *FAL's wholesale operation has been more supportive of local producers and a much stronger promoter of WA products than Coles or Woolworths. Generally, the major chains appear disinterested in stocking innovative WA products, particularly those that do not offer enough supply to satisfy the national market demand.*[110]

The Regional Development Council highlighted the impact of national/global buying policies on regional growers:

> *Major chains do not generally rely on local suppliers. Food commodities come from central depots, supplied by large-scale producers at bulk supply prices. These large-scale producers are increasingly based in parts of the world where labour costs are lower. By reducing the number of suppliers of each commodity to just three or four, the major food chains cash in on the economies of scale the bigger producers can achieve.*
>
> *This trend to globally sourced food commodities has had a discernible and adverse impact on regional growers and producers. In the peel Region, for example, this has resulted in a number of regional farms turning in their crops, knocking over their trees, or selling off*

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107 Submission 61, WA Fruit Growers Association; Submission 54, Gascoyne Development Commission; Submission 55, South West Development Commission; Submission 69, Regional Development Council; Submission 60, Department of Industry and Resources; Submission 71, Perth Market Authority; Submission 77, Department of Agriculture (WA).

108 Submission 50, West Australian Olive Council; Submission 57, Western Australian Farmers Federation; Submission 58, R Palandri; Submission 53, Small Business Development Corporation.

109 Submission 56, LE & HA Handasyde; Submission 54, Gascoyne Development Commission.

110 Submission 77, Department of Agriculture (WA).

> *their viable agricultural land to developers who quickly subdivide for a rapid turn of profit.*[111]

The Department of Industry and Resources drew the Committee's attention to the potential for local businesses to be hindered in their attempts at expansion when access to the local market is restricted:

> *… Woolworths' purchasing practices operate against the majority of Western Australian suppliers because of the chain's emphasis on capacity to ship nationally and uniformity in product offered. Many small to medium size WA enterprises who could supply to Woolworths locally cannot do so because of this requirement to supply every Woolworths store in the country… In terms of business growth this practice hinders a company's ability to expand steadily from regional to state to national market status.*[112]

Rather than viewing the national/global buying policies as a disadvantage for local growers and producers, the Department of Fisheries viewed it as a potential opportunity:

> *The two major supermarket chains (Coles and Woolworths) also support local suppliers through selling locally grown produce and providing local suppliers access to the wider Australian market through their extensive wholesaling system. In this regard, while smaller supermarket chains (like Action) may rely heavily on local product (and as a result may have fewer Eastern States and overseas products on their shelves), the larger retail chains, such as Woolworths, also play an important role in providing local producers of seafood, such as prawns and rock lobsters, with access to external markets.*[113]

Despite the views outlined above, both Coles and Woolworths maintain that they source a significant proportion of food products locally. In relation to fresh produce, the preference is to buy locally in the first instance, although seasonal availability and volume requirements do impact on buying practices. Mr Stephen Bate advised the Committee that Woolworths have a policy of buying WA first, particularly in the fresh produce area:

> *about 84 per cent of fresh produce is sourced in Western Australia.…State policy very clearly says that if it is available in the state we will procure it in the state. The only caveat we have around that is provided we can get an acceptable quality and we do have pretty strict quality specifications.…The cost does not come into play.…If it is not available here, if it is out of season or we cannot get sufficient stocks, then we will head to the eastern seaboard.*[114]

Coles Myer advised the Committee, by way of submission, that over 80 percent of fresh fruit and vegetables sold in Western Australia comes from Western Australian suppliers.[115] The policy on

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111 Submission 69, Regional Development Council.

112 Submission 60, Department of Industry and Resources (WA).

113 Submission 75, Department of Fisheries (WA).

114 Mr Stephen Bate, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p3-4.

115 Submission number 72, Coles Myer Ltd.

milk supply for Coles' home brand dictates that the milk must come from the home state. In evidence given to the Committee, Mr Chris Mara said:

> *We have a contract with Peters and Brownes in this state for a sustainable supply of milk for our own brand. We stipulate in our contract that the milk had to come from Western Australian dairy farmers. That is no different from the situation in Queensland, New South Wales and Victoria.*[116]

Whilst Peters and Brownes may still be contracted to supply milk to Coles, the West Australian Farmers' Federation advised that the company recently announced it was closing its cheese making facility, because Coles Myer had decided to source cheese for WA supermarkets from the Eastern States.[117]

The major supermarkets' buying practices for meat varies according to the type of meat. Coles have indicated that all of the lamb and pork sold in Western Australian supermarkets is local produce.[118] Mr Chris Mara explained the meat procurement process undertaken by Coles as follows:

> *We have what we call "Colestock producers" which are independent graziers who supply all of Coles' beef, lamb and pork. There are 1 200 of those graziers around Australia. Essentially, they are contracted to grow a certain number of head per week or month….About 85 per cent of our meat is procured in that way. That system has been in operation for nine years. Not one of the 1 200 suppliers has left and a lot of graziers are knocking on the door to get in.*[119]

The current practice adopted by Coles Myer in relation to purchase of meat may be set to change. The Committee understands that Linley Valley Pork have been informed by Coles Myer that in two years all chilled meat for Western Australia will be centrally bought in from South Australia.[120] The Committee would be concerned if this proved to be the case.

Most of the grocery manufacturing is based on the eastern seaboard, with relatively few food suppliers based in Western Australia. It is widely reported that, between them, the top twenty grocery suppliers account for almost 50 percent of packaged grocery sales in supermarkets.[121] None of these top 20 companies are based in Western Australia.[122]

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116 Mr Chris Mara, Advisor, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p8.

117 Submission 57, Western Australian Farmers Federation (Inc).

118 Mr Chris Mara, Advisor, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p11.

119 Mr Chris Mara, Advisor, Coles Myer Ltd, *Transcript of Evidence*, 9 November 2005, p11.

120 Submission 51, Linley Valley Port and PPC Wholesale Services.

121 Australian Bureau of Agricultural and Resource Economics, *Australia's Food Industry; Recent Challenges and Changes* in: Australian Commodities Vol 12 no 2 June Quarter 2005, p385. available at http://abareonlineshop.com/PdfFiles/PC13169.pdf, accessed on 28 March 2006.

122 AC Nielson, *Grocery Report 2005*, available at http://au.acnielsen.com/trends/documents/ACNGroceryReport05-lores.pdf, accessed on 28 March 2006.

Woolworths has recently announced moves to establish a procurement office in Hong Kong . This move is to enable them to purchase direct from suppliers and factories and phase out the use of buying agents and brokers. Mr Bernie Bookes, Director of Corporate Marketing, is reported as saying:

> *China as a sourcing option has some significant advantages...the office will grow over the next few years and many hundreds of millions of dollars will eventually be purchased out of China direct from suppliers…. this does not mean Woolworths will by purchasing more product from China, but rather simply replacing the current purchases through an agent and capturing the mark up and margins that they were making….*[123]

Finding 16

There is a clear view amongst industry groups that the major supermarkets overlook small volume, local suppliers in favour of large volume (national or even global) suppliers. Both major supermarket chains, however, contend that they have a broad local supply base.

(ii) Increasing the market share of private label products

The move by the major supermarkets to increase the market share of their generic or private label (home brand) products is well publicised.[124] The private label push is occurring worldwide, with the private label market share in Australia actually lagging behind many developed countries.

Concerns were raised in submissions about the push toward expanded private label ranges.[125] Western Australian suppliers generally consider their market opportunities will be further diminished as a result. The Small Business Development Corporation stated:

> *The greater focus by major retail chains on private labels… is also effectively marginalising small businesses from the marketplace. Private label brands are owned and produced on behalf of the supermarkets and provide retailers with greater margins. Both Coles Myer and Woolworths in their latest annual reports identify the development and sale of private labels as an area of continuing growth. … The opportunity for small businesses to have their products available on supermarket shelves will be further limited*

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123 Woolworths Ltd, *Changing the way we do business in China*, Woolworths News, December 2005, available at http://www.woolworthslimited.com.au/resources/woolies+news+dec+05.pdf, accessed on 28 March 2006.

124 See ACNielsen *Grocery Report 2004*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005; Choices fade as Coles stacks shelves, Sydney Morning Herald, 18 March 2005, available at http://www.smh.com.au/news/Business/Choices-fade-as-Coles-stacks-shelves/2005/03/17/1110913738560.html, accessed on 29 March 2006.

125 Submission 53, Small Business Development Corporation; Submission 57, Western Australian Farmers Federation; Submission 50, West Australian Olive Council; Submission 61, WA Fruit Growers Association; Submission 58, Great Southern Plantations; Submission 44, SolarFruit.

> *given the vested interest of major retail chains in private labels as a source of potentially higher revenue.* [126]

To date, growth in private label retail sales has been relatively slow in Australia, with the private label share of the packaged grocery retail market increasing only marginally in the four years to 2004 (11 to 12 percent). While private label represented 12 percent of value, it represented around 20 percent of volume share in 2004. Private labels have a high share in commodity driven categories with little innovation/ product differentiation and consumer involvement or risk (eg sugar, butter, vegetable oil, milk, flour). Fresh milk has been the biggest private label growth product, increasing its market share from 14 percent in 2000 to nearly 50 percent in 2004.

Aldi, which generates around 95% of sales from private labels, continues to increase its share of the Australian grocery market (accounting for almost 5% of packaged grocery sales in NSW, 2.5 percent in Victoria and 1.4 percent in Queensland) - private labels will likely play an important part in the response of the major retailers to the Aldi threat. [127]

Over the past eight years, private label share of total packaged grocery sales has consistently been 2-4 percent lower in Western Australia than in other States and Territories.[128]

By global standards the market share of private label products is relatively low in Australia. In the 12 months to March 2005, private labels represented an average of 17 percent of the grocery retail market globally. Five European countries recorded the highest share of private label sales: Switzerland 45%, Germany 30%, Great Britain 28%, Spain 26% and Belgium 25%. Of the ten 'most developed' private label countries, nine had top five retailer concentrations of over 60%.

Growth of private label brands in the 12 months to March 2005 outstripped that of manufacturer brands (5% *versus* 2%). A contributing factor to private label growth, particularly in Europe, was the presence of 'Hard Discounters', which sell a very limited selection of (mostly private label) products at very low prices (eg Aldi).

In its 2005 report *The Power of Private Label*, ACNielsen made the following comment on potential growth in private labels: "*The differential between the 17% global share and Switzerland's high of 45% is a good place to begin our predictions for the future. Somewhere in between these two percentages is the answer…*"[129]

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126 Submission 53, Small Business Development Corporation.

127 ACNielsen *Grocery Report 2004*, available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

128 ACNielsen *Grocery Report 1999*, *Grocery Report 2001*, and *Grocery Report 2002*, all available at http://www.acnielsen.com.au/MRI_pages.asp?MRIID=4, accessed on 24 September 2005.

129 ACNielsen, *The Power of Private Label 2005*, available at http://www.acnielsen.com.au/ MRI_pages.asp?MRIID=22, accessed on 31 October 2005.

Finding 17

Mirroring global trends, there is a move by the major supermarkets to increase the range and volume of 'private label' products on their shelves. Western Australian suppliers generally consider their market opportunities will be further diminished by the move toward private labels.

(iii) Compulsory QA requirements

Several submissions commented on the major supermarkets' policy of dealing only with suppliers that have Quality Assurance programs in place.[130] The issue, it would appear, is not that local suppliers are required to have QA programs in place, but that the same requirements are not imposed equally on all suppliers.[131] The Rainbow Coast Horticulturalists stated:

> *As levels of production increase in Asian countries, and if the Australian dollar remains at high levels, there will be ever increasing pressure from the chains to pursue these cheaper sources. Surely if the chains demand local growers use QA then they should insist on the same levels of training, compliance with QA and traceability of product that they demand from local producers.*[132]

In its submission to the inquiry, Woolworths indicated that all direct suppliers must have third party audited QA programs in place. Contrary to the views of some local industry groups, Woolworths state that all overseas suppliers are subject to the same audited food safety requirements as local suppliers and must achieve Woolworths QA certification or similar industry certification.[133] Coles similarly indicated that all of their direct suppliers must have a third party audited Food Safety Program in place prior to commencing supply.[134]

Finding 18

A number of Western Australian growers believe the compulsory Quality Assurance (QA) requirements imposed on them by the major supermarkets are not imposed on overseas suppliers. Both major supermarkets argue that all of their direct suppliers are required to have specified QA programs in place.

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130 Submission 54, Gascoyne Development Commission; Submission 56, LE & HA Handasyde; Submission 42, Rainbow Coast Horticulturalists; Submission 61, Western Australian Fruit Growers' Association.

131 Submission 42, Rainbow Coast Horticulturalists; Submission 54, Gascoyne Development Commission; Submission 77, Department of Agriculture (WA).

132 Submission 42, Rainbow Coast Horticulturalists.

133 Submission 73, Woolworths Ltd.

134 Submission 72, Coles Myer Ltd.

2.4 Implications of Woolworths takeover of Action stores

The Australian Competition and Consumer Commission (ACCC) reviews mergers and acquisitions to determine whether they would likely result in a breach of section 50 of the *Trade Practices Act 1974*. Section 50 prohibits mergers and acquisitions which would have the effect, or be likely to have the effect of substantially lessening competition.

The ACCC announced on 19 October 2005 that it would not oppose Woolworths' proposed acquisition of 19 stores and three development sites (14 stores and two development sites in Western Australia). Prior to this decision being made, in January 2005, the Commission announced that it would not challenge the proposed acquisition of the remaining 60 Action stores and the wholesale distribution company Foodland Associated Ltd (FAL) by Metcash Ltd.

A number of West Australian businesses, industry groups, as well as the Government of Western Australia, made submissions to the ACCC opposing Woolworths' proposed takeover of Action supermarkets. Several of these submissions were also presented to the Committee as part of the current inquiry. The Western Australian Government submission argued:

> *Higher retail market concentration will further erode consumer choice, reduce supplier access to local markets and impact adversely on rural and regional communities to competitively supply a diverse range of quality groceries in the future.*
>
> *The Woolworths acquisition appears likely to result in a lower availability of local WA fresh produce and grocery lines to consumers, due to the tendency for the major retailers to source more product nationally and internationally, rather than locally. Coles and Woolworths have clearly demonstrated their preference for national buying strategies, with WA producers feeling the consequences in terms of lower prices and market access.*
>
> *Further reductions in local market distribution avenues for WA food producers could not come at a worse time. This extra pressure would add to the competitive difficulties they are facing in traditional export markets from low cost suppliers and from food imports, with serious consequences for small businesses and regional communities.*[135]

Chapter Six of this report gives further detail regarding the processes undertaken by the Australian Competition and Consumer Commission and gives particular reference to the aforementioned Woolworths acquisition of Action stores and the corresponding Metcash takeover of the Foodland distribution network.

Notwithstanding the formal procedure undertaken by the ACCC, many submissions to the current inquiry raised concerns about the proposed takeover in relation to the buying practices of Woolworths and Coles. Concerns centred around the effect the takeover would have on local producers; the argument being that Action was more willing to deal with smaller scale local producers than the national chains.

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135 Submission 77, Department of Agriculture (WA), Attachment 1.

The Western Australian Farmers Federation argued that Action have been broadly supportive of WA produce but the purchasing decisions made by Woolworths will see WA products losing shelf space.[136]

The Department of Industry and Resources go so far as to say that Woolworths purchasing practices operate against the majority of Western Australian suppliers because of the chain's emphasis on capacity to ship nationally and uniformity in produce offered. Many small to medium size WA enterprises who could supply to Woolworths locally cannot do so because of this requirement to supply every Woolworths store in the country.[137] [138]

In its submission to the current inquiry, New West Foods (W.A.) Pty Ltd included a copy of its submission to the Australian Competition and Consumer Commission (ACCC) in relation to Woolworths' proposed acquisition. The submission claimed that the only new products that will be accepted [into Woolworths stores] will be those with national marketing campaigns.[139] New West Foods submitted that they trade successfully with Action Supermarkets and, as all their business is done in Western Australia, the company stands to lose up to $1,500,000 annually in sales as a result of the acquisition. They flagged job losses in the company as a result.[140]

> *We were accredited to the Woolworths quality system, and would think that we can be reaccredited to the standard, so technically to supply Woolworths; yes we will be able to. However given their decision to remove local buying offices, and their non-ranging of Western Australian products, I believe that without Action, we will not supply any retailer, including Woolworths.*

The South West Development Commission believes the impact of the break-up of Foodland is being felt by fruit and vegetable growers throughout the State. Those growers who have been aligned to the Foodland (Action) supply chain are now threatened with no customer base or a reduced market. The Commission indicated that growers fear the 're-badged' Action stores will be serviced from the existing Woolworths distribution network. In the short-term, there will be a need for the Woolworths network to top up from the central market but this will be for only as long as it takes the Woolworths supply base to increase production to fill the gap. This situation would leave the existing Foodland growers with a significant capital investment in their farming operations and a significant reduction in their market.[141]

In evidence before the Committee, Mr Stephen Bate, representing Woolworths, indicated that local producers were slow to make contact with the company regarding supply to what would

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136 Submission 57, Western Australian Farmers Federation.

137 Submission 60, Department of Industry and Resources (WA).

138 Woolworths have said that though some of their stores in the south west of the State take stock directly from producers, in the main the procedure is to have the stock delivered directly to their distribution centres. The Committee also believes that any store direct sales to supermarkets would be a rarity.

139 Submission 30, New West Foods (W.A.) Pty Ltd.

140 Submission 30, New West Foods (W.A.) Pty Ltd.

141 Submission 55, South West Development Commission.

become newly branded Woolworths stores. Although the proposed takeover was formally raised in May 2005, with the Australian Competition and Consumer Commission making its final decision not to oppose the acquisition on 19 October, on 9 November 2005 Mr Bates said:

> *…we are currently getting minimal contact from vendors in this state inquiring about what will happen when the acquisition progresses. We field a few queries in the fresh produce area but I understand that there have been minimal queries in groceries so far….We may get a flood of inquires over the next couple of weeks….Over the next two weeks, we would like to think that we will be getting a higher degree of inquiry both from a fresh food point of view and also a packaged point of view.* [142]

The transition phase also presents challenges for Woolworths:

> *The difficulty we have with the whole acquisition process is in trying to get some accurate information during the transition period about who are the suppliers, what products are being supplied, what volumes are being supplied and so on. It is somewhat difficult for us to understand for every commodity the business that Action is doing with its vendors.*

Mr Bates went on to explain what Woolworths intended to do in relation to procurement for the new stores:

> *Our view has been that we will look at the range that Action supplies. The range and the volume rates. We will look at whether we have an alternative within the range. The difficulty that I guess all retailers have is a defined shelf space, so there is a limit to how many lines we can carry. We will then make an assessment of whether a particular line offers a point of difference and whether it has a good following in WA. If it does then we will give that line consideration in terms of ranging.*[143]

The Department of Industry and Resources also point out that in the general opinion of the local food and beverage industry, Action's purchasing policies offer greater opportunities to supply into stores than is the case with Woolworths. Action is particularly supportive of Western Australian seafood products, with Western Australian seafood product accounting for 90 percent of its supplies.[144] In recognition of its commitment to local produce, Action Supermarkets was awarded the Western Australian Fishing Industry Council Business of the Year Award 2004.[145]

The Western Australian Olive Council report that a number of corporate olive operations have secured shelf space in Coles and Woolworths, but many of the smaller growers rely on the

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142 Mr Stephen Bates, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p7-8.

143 Mr Stephen Bates, General Manager Fresh Foods, Woolworths Ltd, *Transcript of Evidence*, 9 November 2005, p7.

144 Submission 60, Department of Industry and Resources.

145 Submission 75, Department of Department of Fisheries (WA).

existence of independent food outlets. With fewer independent stores available, many of the smaller producers will suffer in terms of sales volumes.[146]

The perception, whether real or not, is that there will be a lessening of competition in Western Australia as a result of the takeover. Some of the comments made in submissions include:

> *The market dominance of only two major food retail chains is a very unhealthy development from the producer's point of view - not enough competition.*[147]
>
> *No group of companies should have the monopoly control of the food chain in W.A. The producers of fresh food will have absolutely no bargaining power when 80% of the product sold to customers in WA is bought by a conglomerate.*[148]
>
> *They are in a position to reduce prices until smaller dealers unable to compete are forced to stop trading, at which point they can increase their prices again.*[149]
>
> *I believe firmly believe Woolworths, and indeed Coles, will regulate and increase pricing as their ever increasing power is now being strengthened….*[150]
>
> *The independent food outlets are being absorbed (Action supermarkets are the current acquisition) by the big 2 which reduces competition and keeps the prices of items under their control.*[151]

The remaining Action stores and other independent supermarkets operating in Western Australia stand to gain from the Metcash acquisition of FAL, as they now have access to a much larger buying group.[152] A press release by Metcash 6 March 2006 announced a 40 percent lift in buying power as a result of its newly acquired assets and highlighted their ability to now offer national deals to their major suppliers.[153] Increased negotiating power with suppliers and bigger marketing thrust are expected to provide significant benefits for the independent retail sector.[154]

The implications of the Metcash acquisition for local producers are not yet known, but with the independent sector now tied to a national wholesale distributor, concerns were raised about the

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146 Submission 50, West Australian Olive Council Inc.

147 Submission 1, J Staniforth Smith.

148 Submission 2, One Nation (W.A) Inc.

149 Submission 7, C Davis.

150 Submission 30, New West Foods (W.A.) Pty Ltd.

151 Submission 40, J Clark.

152 Metcash services around 4 500 independent retail stores on the eastern seaboard of Australia and in South Australia.

153 Metcash Australasia Trading Ltd, available at http://www.metcash.com/site_files/s1001/files/Mar_0606_preso_1st_100_days.pdf, accessed on 28 March 2006.

154 Submission 66, Department of Treasury and Finance (WA).

potential for market access to be further reduced. The West Australian Fruit Growers' Association stated:

> *Local suppliers are now very concerned about the takeover of FAL. The reason for this concern is that if Metcash operates its WA warehouse similar to the way the two majors do (ie best national or global buying deals), WA suppliers such as Harvey fresh could be at a real loss once the majors fully implement their home brand schemes. This will leave the independents and corner stores as the only outlet for their brands if they do not make the top two brands in the majors' stores.*[155]

The Department of Industry and Resources was cautiously optimistic about potential benefits for the local industry:

> *At this point DoIR can not comment as to whether the proposed takeover of FAL by Metcash presents the same threats. …FAL has recently centralised purchasing in Melbourne with a consequent reduction in sourcing in Western Australia. The industry believes Metcash could reverse the supply line with listings in selected Metcash stores on the eastern seaboard.*[156]

Finding 19

A number of Western Australian food businesses and industry groups consider the Woolworths' acquisition of Action supermarkets will be to their detriment.

The Committee has received anecdotal evidence of the recent resurgence of fresh produce markets, both in metropolitan and regional areas. The growing popularity of these markets provides a valuable market opportunity for small volume growers, who are often unable to meet the volume demands of large supermarkets.

The Albany Farmers Market, which started operation in April 2002 with assistance from the Great Southern Regional Market Association, provides a good example of a successful local growers market. Starting with just eleven producers, the weekly market now offers up to 30 widely different producers with a vast range of locally grown produce and value added products. The markets are self-funding and are owned and run by the producers themselves.[157]

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155 Submission 61, Western Australian Fruit Growers' Association.

156 Submission 60, Department of Industry and Resources.

157 Albany Farmers Market, *History of the Markets*, available at http://www.albanyfarmersmarket.com.au/history.aspx, accessed on 22 March 2006.

CHAPTER 6 MARKET DOMINANCE AND ANTI-COMPETITIVE BEHAVIOUR: THE TRADE PRACTICES ACT 1974 AND THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

The following chapter addresses term of reference (e):

> *The role of, and mechanisms available to, the Australian Competition and Consumer Commission (ACCC) to restrict market dominance and tackle anti-competitive behaviour along with the effect of the Trade Practices Act 1974 (Cwlth) on production and marketing, and to recommend any changes that should be made to the Trade Practices Act 1974 (Cwlth).*

Section 6.1 provides a brief overview of the current provisions of the *Trade Practices Act 1974* (Cwlth, TPA) that deal with market power and anti-competitive and unconscionable conduct.

Section 6.2 examines the role of the ACCC and other organisations charged with enforcing the provisions of the TPA.

Section 6.3 explores recent reviews of the TPA, the amendments that have or will come about as a result of these reviews, and how these changes might be expected to alter the competitive environment in Australia. This section also examines mechanisms for dealing with anti-competitive conduct in other jurisdictions

Finally, section 6.4 examines the effectiveness of the TPA in its current form and considers the case for further amendments, drawing largely on comments in submissions to the current inquiry, as well as recent commentary by the ACCC and other key stakeholders.

6.1 The Trade Practices Act 1974

The *Trade Practices Act 1974* (TPA) is the primary Commonwealth legislation providing for fair trading and consumer protection. The Object of the Act is:

> *… to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.*

The TPA is generally concerned with protecting the *competitive process* and the level of competition in a market, rather than protecting individual *competitors*. This important distinction was highlighted by Trade Practices Act Review Committee (the Dawson Committee) in 2003:

> *The competition provisions should protect the competitive process rather than particular competitors. They should not be seen as a means of achieving social outcomes unrelated to*

the encouragement of competition or as a means of preserving corporations that are unable to withstand competitive forces.[673]

(a) Part IV – Restrictive Trade Practices

Part IV of the TPA prohibits specified restrictive or anti-competitive practices. The Act provides for certain *per se* contraventions, arrangements that are deemed to automatically lessen competition. These include price fixing, primary boycotts and third line forcing.

Other potentially anti-competitive arrangements are not *per se* contraventions and may be authorised (exempted) under the Act, if they can be justified on the basis of public benefit.

Submissions to the current inquiry focussed largely on the provisions outlined in sections 46 and 50 of the Act. The provisions of sections 46 and 50 have been comprehensively reviewed in recent years and are pivotal to the interactions of players in the food retail market.

(i) Section 46

Section 46 of the TPA prohibits corporations with substantial market power from taking advantage, or misusing, that market power in an anti-competitive manner. Importantly, it is not the intent of section 46 to prevent corporations from *holding* or *acquiring* a position of market power.

Section 46 (1) provides:

> *A corporation that has a substantial degree of market power in a market shall not take advantage of that power for the purpose 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.*

The TPA itself does not offer definitions for 'substantial degree of power in a market' or 'take advantage'. Both concepts have received attention in recent reviews (see section 6.3 below).

In its original form, section 46 reflected the provisions of the *Sherman Act 1890* (USA) and the *Australian Industries Preservation Act 1906*. The section was headed 'Monopolisation' and proscribed conduct of a corporation in a position to substantially control a market.

The original section 46 did not contain the phrase 'for the purpose of'. Following a 1976 review, which raised concern as to whether the section was directed at the 'purpose' of a corporation or

673 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

the 'effect' of its conduct, section 46 was amended to confine its operation to the use of market power for a proscribed purpose.

A 1984 Green Paper questioned the effectiveness of s.46 on the grounds that the requirement of 'substantial control' of a market was so narrow as to apply to only a few corporations. The Act was subsequently amended in 1986 to lower the threshold from 'substantial control' of a market to 'substantial degree of power' in a market.

Finding 131

Section 46 of the *Trade Practices Act 1974* prohibits corporations with a 'substantial degree of power in a market' from 'taking advantage' of that power to eliminate, damage or restrict competitors or potential competitors from competing in a market.

(ii) Section 50

Section 50 of the *Trade Practices Act 1974* prohibits acquisitions or mergers that would result in a *substantial lessening of competition in a market*.

Section 50 (1) provides:

> *A corporation must not directly or indirectly:*
>
> *(a) acquire shares in the capital of a body corporate; or*
>
> *(b) acquire any assets of a person;*
>
> *if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.*[674]

For the purposes of section 50, 'market' means a substantial market for goods or services in Australia, and Australian State or Territory or a region of Australia.[675]

Although other matters *may* be taken into account, section 50 (3) provides a list of matters that *must* be taken into account in considering the effect or likely effect of an acquisition on competition in a market:

> *(a) the actual and potential level of import competition in the market;*
>
> *(b) the height of barriers to entry to the market;*

674 *Trade Practices Act 1974*, s. 50(1)

675 *Trade Practices Act 1974*, s. 50 (6).

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

(e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;

(f) the extent to which substitutes are available in the market or are likely to be available in the market;

(g) the dynamic characteristics of the market, including growth, innovation and product differentiation;

(h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;

(i) the nature and extent of vertical integration in the market.

Finding 132

Section 50 of the *Trade Practices Act 1974* prohibits acquisitions or mergers that would have the effect, or be likely to have the effect, of 'substantially lessening competition' in a market.

(iii) Other anti-competitive provisions

Section 45 prohibits contracts, arrangements or understandings that have the purpose or effect, or likely effect, of limiting competition in a market. Specific provisions within this section prohibit price agreements between competitors; primary boycotts (whereby competitors agree to exclude a third party through bid rigging or market sharing); and secondary boycotts.

Section 47 prohibits exclusive dealing. Under this section, a supplier is prohibited from supplying goods or services on condition that the purchaser (a) will not acquire, or will limit the acquisition of, goods or services from a competitor of the supplier; or (b) will not resupply, or will resupply only to a limited extent, goods to particular persons or a particular class of persons or in a particular place or places. Purchasers are likewise prohibited from imposing such conditions on a supplier of goods or services. One form of exclusive dealing prohibited by the Act is 'third line forcing', which involves the supply of goods or services on condition that the purchaser acquires goods or services from a particular third party.

Section 48 prohibits suppliers, manufacturers and wholesalers from specifying a minimum price below which goods or services may not be resold or advertised for resale (resale price maintenance).

Finding 133

Other forms of anti-competitive conduct, such as primary and secondary boycotts; exclusive dealing, including third line forcing; and resale price maintenance are prohibited under Part IV of the *Trade Practices Act 1974*.

(iv) Authorisations and notifications in respect of anti-competitive conduct

The Act recognises that under certain circumstances, the detrimental effects of anti-competitive conduct may be outweighed by benefits to the public. Under the authorisation and notification provisions of the Act (sections 50 and 50A and Part VII), individuals or corporations may be granted immunity from legal proceedings for conduct that might otherwise breach the anti-competitive provisions of the Act.

Authorisation may be granted (by the ACCC) for:

- anti-competitive agreements, including price fixing;
- covenants affecting competition;
- primary and secondary boycotts;
- anti-competitive exclusive dealing;
- exclusive dealing involving third-line forcing;
- resale price maintenance; and
- mergers leading to or likely to lead to substantial lessening of competition.

There are additional specific legislative requirements governing authorisation of mergers. There are no provisions in the Act for authorisation of the misuse of market power (s.46).

Exclusive dealing conduct (other than third line forcing) gains immediate and automatic immunity from prosecution under the Act upon notification (to the ACCC). For third line forcing, immunity comes into force at a predetermined period after notification is given (14 days).

The notification and authorisation provisions of the Act are further discussed below in relation to the role of the ACCC (section 6.2).

Finding 134

In recognition of the fact that the detrimental effects of anti-competitive conduct may be outweighed by benefits to the public, 'authorisation' and 'notification' provisions of the TPA enable individuals or corporations to be granted immunity from legal proceedings for conduct that might otherwise be anti-competitive.

(v) Penalties and remedies for Part IV breaches

A number of penalties and remedies are available in the Federal Court for breach of the provisions of Part IV of the TPA. These are:

- Monetary penalties of up to $500 000 for individuals and up to $10 million for companies (under ss. 45D, 45DB, 45E and 45EA, no monetary penalty is available for individuals and a limit of $750 000 applies for companies) (s.76);
- Injunctions (s.80);
- Damages (s.82);
- Divestiture of shares or assets illegally acquired or a declaration that a share transaction is void in the case of a prohibited merger (s.81);
- Other orders in favour of persons who have suffered loss or damage because of the conduct (s.87);
- Probation orders, community service orders and corrective advertising orders (s86C); and
- Adverse publicity orders (s.86D).[676]

Finding 135

A range of penalties and remedies are available in the Federal Court for anti-competitive conduct in breach of Part IV of the TPA, including injunctions, damages, divestiture orders and monetary penalties of up to $10 million for corporations and $500 000 for individuals.

676 Australian Competition and Consumer Commission, *Summary of the* Trade Practices Act 1974, May 2003.

(b) Part IVA – Unconscionable conduct

Part IVA of the TPA prohibits corporations from engaging in unconscionable conduct with other businesses or with consumers, during negotiations or within the terms of a contract.

The term 'unconscionable' is not defined in the Act, although section 51AA provides that a corporation must not engage in conduct that is unconscionable within the meaning of the unwritten law (ie common law) of the Australian States and Territories.[677]

The term unconscionable conduct has come to refer to circumstances whereby:

- One party to a transaction suffered from a special disability or disadvantage, in dealing with the other party;
- The disability was sufficiently evident to the stronger party;
- The stronger party took unfair or unconscionable advantage of its superior position or bargaining power to obtain a beneficial bargain.[678]

A person or business is not considered as being disadvantaged under the Act simply on the basis of inequality of bargaining power.[679]

Finding 136

Under Part IVA of the TPA, corporations are prohibited from engaging in 'unconscionable' conduct with other businesses or consumers during negotiations or within the terms of a contract.

(i) Remedies for Part IVA breaches

A number of remedies are available in the Federal Court for breach of Part IVA of the Act. These are:

- Injunctions (s 80)
- Damages under s.82 for breach of s. 51AC (unconscionable conduct in business transactions); and

677 Australian Competition and Consumer Commission, *Summary of the* Trade Practices Act 1974, May 2003.

678 *Ibid.*

679 Australian Competition and Consumer Commission, Briefing paper prepared for the Economics and Industry Standing Committee, December 2005.

- Other orders in favour of persons who have suffered loss or damage because of the conduct (s.87).

In contrast to Part IV, monetary penalties are not available for breaches of Part IVA of the Act.

Actions under Part IVA can also be brought in State or Territory courts of competent jurisdiction.[680]

Finding 137

A number of remedies are available in the Federal or State or Territory Courts for breach of Part IVA of the TPA, including injunctions and damages.

6.2 The Australian Competition and Consumer Commission

The Australian Competition and Consumer Commission (ACCC) is constituted under Part II of the TPA. The ACCC is responsible for enforcing the *Trade Practices Act 1974*.[681]

At a state level, the *Fair Trading Act 1987* (WA), administered by the Department of Consumer and Employment Protection, mirrors the provisions in Part V of the TPA.[682] The competition provisions of Part IV of the TPA are contained in Competition Codes.[683]

(a) Compliance and enforcement activities

The ACCC oversees a range of compliance and enforcement activities to ensure that individuals and corporations comply with the competition, fair trading and consumer protection provisions of the TPA.

A significant proportion of the ACCC's work relates to informal compliance activities, including education, advice and persuasion. Other voluntary activities include liaison and promotion of industry codes of conduct, voluntary compliance programs and voluntary company compliance culture.

680 Australian Competition and Consumer Commission, *Summary of the* Trade Practices Act 1974, May 2003.

681 As the Commonwealth is limited under the Constitution to making legislation in relation to corporations, the *Trade Practices Act 1974*, in general, covers corporations.

682 The *Fair Trading Act 1987* covers the activities of individuals and unincorporated entities who may engage in false and deceptive conduct or make misrepresentations. It does not extend to corporations. The Department of Consumer and Employment Protection does not have a role in enforcing the TPA.

683 Competition Codes were established in all states as part of the National Competition Policy Reforms. Competition Codes enable the ACCC to pursue individuals and unincorporated entities who engage in anti-competitive conduct.

The ACCC also undertakes formal enforcement actions, although these are less common than voluntary compliance activities.

Finding 138

The Australian Competition and Consumer Commission (ACCC) is responsible for enforcing the TPA. A significant proportion of the ACCC's work relates to informal compliance activities.

(i) Powers to obtain information

Section 155 of the TPA empowers the ACCC to obtain information, documents and evidence while investigating possible contraventions of the Act and in connection with some of its adjudicative functions (in relation to authorisation and notification applications). Limited powers to enter premises and inspect and/or copy documents are also provided by section 155.

Under section 155(1), where there is 'reason to believe' a person has information, documents or evidence relating to a matter that may constitute a contravention of the Act, a notice may be issued requiring the person to provide the information, documents or evidence.

Under section 155(2), where there is 'reason to believe' a person has engaged in conduct that may constitute a contravention of the Act, a notice may be issued authorising an officer of the ACCC to enter premises and inspect and copy documents.

Before issuing a notice under section 155, the ACCC will consider whether the information is otherwise available or could be provided voluntarily.[684]

Finding 139

Under Section 155 of the TPA, the ACCC has the power to obtain information, documents and evidence, as well as limited powers to enter premises and inspect and/or copy documents, while investigating possible contraventions of the Act and in connection with some of its adjudicative functions.

(ii) Enforceable undertakings

If the ACCC considers the Act has been contravened, but not in a deliberate manner or in a manner that involves considerable consumer detriment, the matter may be resolved through an

684 Australian Competition and Consumer Commission, *Section 155 of the* Trade Practices Act 1974, October 2000.

informal administrative arrangement or by the offender providing a formal undertaking under section 87B of the Act.

A section 87B undertaking is a written agreement between the ACCC and the party concerned, whereby the party agrees to undertake certain actions. The ACCC does not have the power to demand or require section 87B undertakings, but may offer this option for a party to consider. A section 87B undertaking is accepted by the ACCC only when it considers this to be the most appropriate solution to a breach or potential breach of the TPA.

The foundation of all section 87B undertakings is a commitment to cease a particular conduct and to not recommence it. An undertaking may also include a corrective action (eg corrective advertising) or an element of compensation or reimbursement for parties adversely affected by the conduct.

Following acceptance of a section 87B undertaking, the ACCC monitors its implementation and effectiveness. Where the ACCC becomes aware that a party has not complied with a section 87B undertaking, it may resolve the matter by consultation, or apply to the Federal Court for appropriate orders.[685]

Finding 140

Under section 87B of the TPA, if the ACCC considers the Act has been contravened, it may accept a formal undertaking, whereby the party concerned agrees to undertake certain actions. A section 87B undertaking is accepted by the ACCC only when it considers this to be the most appropriate solution to a breach or potential breach of the TPA.

(iii) Litigation

In the event of a more serious breach of the Act, the ACCC may litigate on behalf of the public. As with any other litigant, the onus rests with the ACCC to prove to the Court that there has been a breach of the Act.[686] Litigation is always a last resort, and the ACCC will only litigate if it considers there is a reasonable chance that the case will be upheld. In practice very few cases go to Court.

685 Australian Competition and Consumer Commission, *Section 87B of the* Trade Practices Act 1974, August 1999.

686 Australian Competition and Consumer Commission, Briefing paper prepared for the Economics and Industry Standing Committee, December 2005.

Finding 141

In the event of a serious breach of the TPA, the ACCC may litigate. As the onus rests with the ACCC to prove that there has been a breach of the Act, it will litigate only if it considers there is likelihood that the case will be upheld.

In 2004-05, of the 43 827 complaints and inquiries the ACCC received in relation to the Act, the majority were resolved by providing information and/or advice. Preliminary investigations were undertaken on 5 412 cases (12.3 percent) and 174 went on to in depth investigations (0.4 percent). Section 155 notices were issued in 487 cases, litigation was initiated in 30 cases and 55 section 87B undertakings were accepted.[687]

At a recent Competition Law Conference, Mr Graeme Samuel, ACCC Chairman, made the following comments with regard to litigation:

> *It's a fact of life that the ACCC does not have unlimited resources and therefore needs to be selective.*
>
> *The ACCC has therefore had a consistent position of being selective in its choice of enforcement actions involving litigation and of giving priority to cases which are best likely to improve overall compliance with the Act.*
>
> *The kinds of things that influence the ACCC in our decision making when potentially unlawful conduct is detected and investigated include:*
>
> • *whether the conduct involves a blatant disregard of the law*
>
> • *whether the person, business or industry has a history of previous contraventions of competition or consumer laws*
>
> • *the detriment caused by the conduct and avenues available to redress that detriment*
>
> • *whether the conduct is of major public interest or concern*
>
> • *whether the conduct is "industry wide" or is likely to become widespread if the ACCC doesn't intervene*
>
> • *the potential for action to educate and deter future conduct.*[688]

687 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, Presentation to the Competition Law Conference, *The Enforcement Priorities of the ACCC*, 12 November 2005.

688 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, Presentation to the Competition Law Conference, *The Enforcement Priorities of the ACCC*, 12 November 2005.

Mr Samuel further noted that section 87B undertakings are preferable to litigation under certain circumstances:

> *Whilst litigation is an integral part of the ACCC's enforcement action, in certain cases negotiating an outcome is more appropriate particularly when it provides much quicker relief for consumers.*
>
> *It's no secret that the ACCC has made greater use of section 87B court enforceable undertakings.*
>
> *The greater use of Section 87B undertakings has lead to more efficient and timely outcomes for consumers and in some instances reduced the extent of consumer harm or detriment.*[689]

Recent statistics support Mr Samuel's comment with regard to increasing reliance on section 87B undertakings as an alternative to litigation.[690]

Table 6.1 ACCC enforcement activities

Action taken	2002-03	2003-04	2004-05
First instance litigation	39	22	30[691]
Section 87B undertakings	29	33	55
Total	69	55	85

Finding 142

Section 87B undertakings are increasingly seen by the ACCC as an alternative to litigation, providing more efficient and timely resolution.

(b) Adjudication of authorisation applications

In addition to compliance and enforcement activities, the ACCC performs an important adjudication role, assessing applications for immunity from legal proceedings for arrangements or conduct that might otherwise breach the anti-competitive provisions of the Act. Under ss.88 –

689 *Ibid*.

690 *Ibid*.

691 The ACCC intervened in a matter before the Federal Court taking the total number of matters litigated to 31 for the 2004-05 financial year.

91C, parties who wish to engage in anti-competitive conduct, may apply to the ACCC for *authorisation*. Authorisations may be granted for any conduct proscribed under Part IV of the Act, with the exception of misuse of market power (s.46). A formal application must be made to the ACCC and can only be made by a party to the arrangement or by a party engaging in the conduct in question.[692]

Authorisation protection does not take effect until granted by the ACCC. However, the ACCC is authorised under section 91 of the TPA to grant an interim authorisation prior to finalising its decision on an application. An interim authorisation enables the applicant to engage in the conduct that is the subject of the application, prior to the decision of the ACCC. The ACCC is unlikely to grant an interim injunction under circumstances where the market would be unable to return to its pre-interim authorisation state in the event of the ultimate rejection of the authorisation.[693]

Finding 143

Parties wishing to engage in conduct that might otherwise breach the provisions of the *Trade Practices Act 1974* may apply to the ACCC for authorisation. Authorisation may be granted for any conduct proscribed under Part IV of the TPA, with the exception of misuse of market power (s.46).

(i) Application for authorisation

On receipt of an application for authorisation, the ACCC will identify stakeholders and other parties who may have an interest in the application, or who may be able to provide relevant information. The ACCC seeks comment from interested parties, including the general public, by way of written and oral submissions and interviews.

The ACCC maintains a public register of all applications for authorisation. The public register records details of the application, submissions and documents prepared by the ACCC in relation to the application. Section 89(5) of the TPA allows the ACCC to exclude information from the public register on confidentiality grounds.

The ACCC has 30 days in which to decide merger authorisation applications, or 45 days for complex matters. It can also be extended by ACCC requests for information from the applicant or with the agreement of the applicant. No time limits apply to other types of authorisation applications.

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692 Australian Competition and Consumer Commission, *Summary of the Trade Practices Act 1974*, May 2003, available at http://www.accc.gov.au/content/item.phtml?itemId=303161&nodeId=file4398b8c3a75c4&fn=Summary%20of%20the%20TPA%20May%202003.pdf, accessed on 2 March 2006.

693 Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, November 1995, available at http://www.accc.gov.au/content/index.phtml/itemId/303449/fromItemId/656027, accessed on 3 March 2006.

In the case of applications for merger (acquisition) authorisations, the ACCC merger guidelines set out concentration thresholds below which it is considered unlikely that a merger would give rise to a substantial lessening of competition. The ACCC will generally only investigate a proposed merger where the merger will result in:

- The four or fewer largest firms having a combined market share of 75 percent or more and the merged firm having a market share of at least 15 percent; or

- The merged firm having a market share of 40 percent or more.

The thresholds have been established on the basis of the ACCC's historical experience of mergers and knowledge of market structures. [694]

Finding 144

The ACCC will generally only investigate a proposed merger where the merger will result in: the four or fewer largest firms having a combined market share of 75 percent or more and the merged firm having a market share of at least 15 percent; or the merged firm having a market share of 40 percent.

(ii) The authorisation tests

In assessing applications for authorisation, the ACCC must apply public benefit and public detriment tests. There are three variations on the authorisation tests:

- Under ss 90 (6) and (7), the ACCC must be satisfied that the conduct would, or would be likely to, result in a benefit to the public that would outweigh any detriment to the public due to any lessening of competition resulting from the proposed arrangement. This test applies to exclusive dealing, other than third line forcing, and to conduct that restricts dealing or affects competition, other than primary and secondary boycotts;

- Under s 90 (8) the ACCC must be satisfied that there is such benefit to the public that the conduct should be allowed. This test applies to primary and secondary boycotts and third line forcing; and

- Under ss 90 (9) and (9A) the ACCC is required to consider export enhancement and import replacement as public benefits and to take account of international competitiveness. Mergers must satisfy this and the second test.[695]

694 Australian Competition and Consumer Commission, *Merger guidelines*, June 1999, available at http://www.accc.gov.au/content/item.phtml?itemId=719436&nodeId=file43a1f42c7eb63&fn=Merger%20Guidelines.pdf, accessed on 3 March 2006..

Potential benefit and detriment to the public are assessed in terms of relevant markets. Section 4E of the TPA defines market as follows:

> *… 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 or services.*[696]

The ACCC, in its assessment, must consider both demand and supply side substitution (competition) in determining the relevant market. Competition must be considered in terms of the product market, the geographic market and the functional level (eg wholesale, retail) on which the party operates.

Public benefit is the key factor in authorisation. Although the Act does not define public benefit, it requires that the ACCC consider all circumstances that relate to public benefit. The emphasis of public benefit assessment is primarily on economic efficiency, although other benefits may also be considered. In its guide to authorisations and notifications, the ACCC provides the following examples of public benefits that have previously been recognised by the ACCC and the Australian Competition Tribunal:

- *Fostering business efficiency, especially when this results in improved international competitiveness;*
- *Industry rationalisation resulting in more efficient allocation of resources and in lower or contained unit production costs;*
- *Expansion of employment or prevention of unemployment in efficient industries or employment growth in particular regions;*
- *Promotion of industry cost savings resulting in contained or lower prices at all levels in the supply chain;*
- *Promotion of competition in industry;*
- *Promotion of equitable dealings in the market;*
- *Growth in export markets;*
- *Development of import replacements;*
- *Economic development, for example, of natural resources through encouraging explorations, research and capital investment;*

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695 Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, November 1995, available at http://www.accc.gov.au/content/index.phtml/itemId/303449/fromItemId/656027, accessed on 3 March 2006.

696 *Trade Practices Act 1974*, Section 4E.

- *Assistance to efficient small business, for example guidance on costing and pricing or marketing initiatives which promote competitiveness;*
- *Industrial harmony;*
- *Improvement in the quality and safety of goods and services and expansion of consumer choice; and*
- *Supply of better information to consumers and business to permit informed choices in their dealings.*[697]

Consideration of public detriments also focuses on economic efficiency, and may include consideration of:

- A reduction in the number of competitors (both buyers and sellers);
- Increased barriers to entry; and
- Constraints on competitors that affect their ability to innovate and to operate efficiently and independently.[698]

Finding 145

In assessing applications for authorisation, the ACCC must apply public benefit and public detriment tests. For agreements that may substantially lessen competition, the benefit to the public must outweigh any anti-competitive effect. For primary and secondary boycotts, third line forcing, re-sale price maintenance and mergers, the benefit to the public must be such that the conduct should be allowed to occur.

(iii) Decision of the ACCC

With the exception of applications relating to merger authorisations, prior to releasing its final decision, the ACCC prepares a draft determination. At this time interested parties who are dissatisfied with the draft may request a pre-determination conference with the ACCC to discuss the operation and effect of the application.

In the case of merger applications, there is no statutory requirement to hold a pre-determination conference, however, the ACCC may publish a Statement of Issues, outlining its preliminary view

697 Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, November 1995, available at http://www.accc.gov.au/content/index.phtml/itemId/303449/fromItemId/656027, accessed on 3 March 2006.

698 *Ibid*.

of the competition effects of the proposed arrangement. Additional submissions are then invited in relation to the Statement of Issues.

In making its final determination, there are three options available to the ACCC:

- To deny authorisation;
- To grant authorisation, subject to undertakings that are enforceable (under section 87B); or
- Grant authorisation unconditionally.[699]

Once granted, authorisation provides protection from action by the ACCC or any other party for potential breaches of the TPA. In the case of mergers and acquisitions, once authorisation is granted, neither the ACCC, the Minister, nor third parties can take action under the Act to overturn the arrangement.[700]

Applicants granted authorisation may apply for minor variations (s 91A) revocation (s. 91B) or substitution of authorisations (s. 91C). The ACCC may also initiate proceedings to revoke or substitute an authorisation.

Finding 146

Once authorisation is granted by the ACCC in relation to proposed anti-competitive arrangements, the parties engaging in the authorised conduct are protected from legal proceedings by the ACCC or any other party.

(c) Adjudication of Notifications

Under sections 93 and 93A of the Act, a party wishing to engage in exclusive dealing conduct may formally notify the ACCC of its intention to engage in exclusive dealing. The approach to notification differs from authorisation insofar as immunity from legal proceedings takes effect immediately upon lodgement of notification with the ACCC. The immunity remains in force until and unless the ACCC advises in writing that it is satisfied that the conduct constitutes a substantial lessening of competition that is not outweighed by any benefit to the public.

699 Australian Competition and Consumer Commission, *Guide to authorisations and notifications*, November 1995, available at http://www.accc.gov.au/content/index.phtml/itemId/303449/fromItemId/656027, accessed on 3 March 2006.

700 Australian Competition and Consumer Commission, *Merger guidelines*, June 1999, available at http://www.accc.gov.au/content/item.phtml?itemId=719436&nodeId=file43a1f42c7eb63&fn=Merger%20Guidelines.pdf, accessed on 3 March 2006.

Finding 147

Parties wishing to engage in exclusive dealing conduct may formally notify the ACCC of their intent. Immunity from legal proceedings takes effect upon lodgement of 'notification' with the ACCC and remains in force unless and until the ACCC gives written notice that it is satisfied that the conduct constitutes a substantial lessening of competition that is not outweighed by any benefit to the public.

Upon receipt of a notification of exclusive dealing conduct, the ACCC will make a preliminary assessment of the competition implications. If the assessment reveals minimal or no lessening of competition, immunity will remain in place unless later reviewed by the ACCC. If the ACCC's preliminary assessment suggests that there is substantial lessening of competition, further investigation will take place.

If the ACCC determines that the notified exclusive dealing conduct results in a substantial lessening of competition that is not outweighed by any benefit to the public, it will issue a draft notice setting out the reasons for its decision. Prior to issuing a final notice (removing the immunity), the party which lodged the application and other interested parties are given an opportunity to respond to the draft notice. If, at this point, the ACCC is satisfied that the notified conduct constitutes a substantial lessening of competition that is not outweighed by any public benefit, a final notice will be issued removing the immunity to legal proceedings. If the ACCC does not issue a final notice, the immunity remains in place.

In the case of third line forcing, immunity takes effect after a prescribed period (usually 14 days). If the ACCC issues a draft notice proposing to deny immunity during the prescribed period, immunity will not begin, unless and until the ACCC decides not to issue a final notice. The preliminary assessment of third line forcing conduct differs from that for other exclusive dealing conduct insofar as the ACCC must be satisfied that the public benefits arising from the conduct are such that the conduct should be allowed. If no draft notice is issued during the prescribed period, immunity will begin at the end of the prescribed period.

Finding 148

In the case of third line forcing, immunity from legal proceedings takes effect a prescribed period (usually 14 days) after notification is lodged with the ACCC. In contrast to other exclusive dealing conduct, adjudication of third line forcing conduct considers the likely public benefits and detriments arising from the conduct.

(d) Review of ACCC decisions by the Australian Competition Tribunal

The Australian Competition Tribunal (the Tribunal), constituted under Part III of the TPA, is responsible for reviewing, on the merits of the case, the authorisation and notification decisions of the ACCC. An application for review of the ACCC's decision may be made by the applicant for authorisation or by any party that the Tribunal is satisfied has a sufficient interest in the matter. An application for review must generally be lodged within 21 days of the ACCC's decision.

A review by the Tribunal is a re-hearing of the application and may include new material not presented to the ACCC. The Tribunal review is not a review of the appropriateness or otherwise of the ACCC's decision. The ACCC is required to provide information, reports and other assistance to the Tribunal, as requested.

Finding 149

The Australian Competition Tribunal is responsible for reviewing, on merit, the authorisation and notification decisions of the ACCC.

(e) Informal merger clearance process: the Woolworths acquisition

In the absence of statutory provisions for pre-merger notifications, a voluntary mechanism has evolved, whereby the ACCC provides *informal* clearance for proposed mergers that it considers would not be in breach of s.50 of the TPA. By informally clearing a merger, the ACCC effectively undertakes not to challenge the merger in the Federal Court. Informal clearance differs from authorisation in that it does not protect the merger from court action by a third party.

Finding 150

In the absence of statutory provisions, a voluntary mechanism has evolved, whereby the ACCC provides informal clearance for proposed mergers that it considers would not breach s.50 of the *Trade Practices Act 1974*. Informal clearance differs from authorisation in that it does not protect the merger from court action by a third party.

If the ACCC does not informally clear a proposed merger, the parties may (a) abandon the merger; or (b) proceed with the merger and risk Court action by the ACCC or a third party. The parties may also seek authorisation for the proposed merger. Concerns relating to proposals that do not meet the competition test under s.50 may be resolved through section 87B undertakings.

The informal merger clearance process is outlined below in relation to Woolworths' 2005 proposal to acquire 22 Action stores and development sites (14 stores and two development sites in Western Australia), an event that formed a significant backdrop to the current inquiry. A

detailed evaluation of Western Australia's grocery retail market is given in Chapter Two. Below is a brief description of the informal clearance process and the ACCC's public competition assessment.

On 1 June 2005, the ACCC received an initial submission from Woolworths in relation to its proposed acquisition of 19 Action stores and three development sites.[701] On 15 June 2005, interested parties were invited to make submissions (1 July deadline) in relation to the proposed acquisition. A number of Western Australian organisations made submissions to the ACCC. Several of these submissions were also forwarded to the Economics and Industry Standing Committee in relation to the current inquiry.[702] The views expressed in these submissions are outlined in Chapter Two.

Finding 151

The ACCC received an initial submission from Woolworths seeking informal clearance to acquire 19 Action stores and three development sites on 1 June 2005.

The ACCC conducted market inquiries involving suppliers and competitors of Woolworths and Action, as well as industry groups and government agencies. In undertaking its competition assessment, three relevant markets were identified (largely on the basis of information provided by market inquiries):

- Local Supermarket Markets: local markets surrounding each of the stores Woolworths proposed to acquire (limited geographic area);

- Procurement Markets: markets for procurement of the range of products sold by supermarkets. In this inquiry, there was a particular focus on regional markets for fresh products in Western Australia, since suppliers of these products are less able to sell these products interstate and overseas due to transport costs and perishability; and

- The National Wholesale Market: the market in which supermarket wholesalers, whether independent or vertically integrated, supply goods at a wholesale level to supermarkets.

701 It was also proposed that the remaining 60 Action supermarkets and FAL's wholesale distribution business be acquired by Metcash. On 27 January 2005, the ACCC had indicated that it would not challenge the proposed acquisition of FAL, including Action stores, by Metcash.

702 Submission 58, Great Southern Plantation; Submission 61, Western Australian Fruit Growers' Association; Submission 68, West Australian Independent Grocers Association; Submission 77, Department of Agriculture (WA). One confidential submission was also received.

After reviewing written submissions and meeting with interested parties, on 31 August 2005, the ACCC released a Statement of Issues. Interested parties were invited, at this time, to make additional submissions prior to 15 September 2005.[703]

(i) Competition in the Local Supermarket Market

For the purposes of this assessment, the relevant local market was considered to include other supermarkets, but not specialty retailers, such as butchers, bakers, fruit and vegetable stores and convenience stores.

The relevant geographic market generally included all large supermarkets within 5km of the stores proposed to be acquired. Allowance was made for barriers such as rivers, as well as transportation factors in determining the precise boundaries.

Although small supermarkets were included in the local market, the ACCC was of the view that they have a 'smaller sphere of competitive influence' than large supermarkets and are therefore less able to constrain a price increase of a large supermarket. Small supermarkets were therefore only included in the local market if they were within 3km of the store proposed to be acquired.

In its Statement of Issues, the ACCC indicated that, based on preliminary market inquiries, it had formed the view that the acquisition would likely result in a substantial lessening of competition in eight local retail markets (six in Western Australia):

- Willetton (Southlands);
- Spearwood;
- Noranda;
- Maddington;
- Kalgoorlie (proposed); and
- Woodvale.[704]

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703 Australian Competition and Consumer Commission, *Public Competition Assessment, Woolworths' Proposed Acquisition of 22 Action Stores and Development Sites*, 19 October 2005.

704 Australian Competition and Consumer Commission, *Public Competition Assessment, Woolworths' Proposed Acquisition of 22 Action Stores and Development Sites*, 19 October 2005.

Finding 152

Following preliminary market inquiries, the ACCC indicated that it had formed the view that the Woolworths' acquisition would likely result in a substantial lessening of competition in eight local retail markets, six of which were in Western Australia.

After publication of the Statement of Issues and prior to a final determination, additional submissions, information and evidence from the merger parties and other interested parties were sought and received in relation to the local markets identified above. During this time, Woolworths advised the ACCC that it did not intend to proceed with its acquisition of the Action Spearwood store.

In the case of the development site in Kalgoorlie, market inquiries indicated that there are other potential development sites in Kalgoorlie. When coupled with a comparative view of Woolworths' prices in Western Australia (see below), the ACCC formed the view that acquisition of the Kalgoorlie development site was unlikely to result in a substantial lessening of competition in this local market.

The ACCC sought and received extensive information from Woolworths relating to prices and pricing practices in its Perth supermarkets. A review of pricing information was also undertaken by the ACCC, across a range of products in various Woolworths supermarkets in Perth. Pricing in markets with different numbers, types and sizes of competitors, including major chains and independent supermarkets, was examined to determine whether there was evidence that the acquisitions would reduce 'competitive tension' between supermarkets in any of the four remaining local markets identified in the Statement of Issues. The ACCC ultimately concluded that the increase in market concentration resulting from the Woolworths acquisitions would not result in significant price increases or a substantial lessening of competition in any of the four markets.[705]

Finding 153

Following further market inquiries and a review of Woolworths' prices and pricing practices in its Perth supermarkets, the ACCC determined that the increase in market concentration resulting from the Woolworths acquisitions would not result in significant price increases or a substantial lessening of competition in any of the local markets in Western Australia.

705 Australian Competition and Consumer Commission, *Public Competition Assessment, Woolworths' Proposed Acquisition of 22 Action Stores and Development Sites*, 19 October 2005.

(ii) Competition in Procurement Markets

The ACCC anticipated that the acquisition may give rise to issues in relation to procurement, particularly for perishable products. During initial market inquiries, concerns were indeed raised about substantial lessening of competition in some procurement markets. However, further market inquiries, involving a large number of interviews with suppliers and invitations to suppliers to provide further information, failed to yield evidence from market participants to substantiate the ACCC's initial views. The ACCC noted that during this stage of inquiries certain submissions sought to have the ACCC prevent the merger on the grounds that Western Australia's producers should be protected regardless of relevant competition issues.

In its Statement of Issues, the ACCC indicated that it had formed the preliminary view that there was insufficient evidence to suggest the acquisition would result in a substantial lessening of competition in any procurement markets.

Following the release of its Statement of Issues, the ACCC received no additional submissions, information or evidence on the impact of the proposed acquisition on procurement markets. As a result, in its final determination the ACCC indicated that there was no evidence that the proposed acquisition would substantially lessen competition in any procurement markets.[706]

Finding 154

Although initial concerns were raised by interested parties in relation to substantial lessening of competition in procurement markets, evidence in support of claims was not supplied to the ACCC, leading the ACCC to conclude that there was insufficient evidence to indicate that the proposed acquisition would result in a substantial lessening of competition in procurement markets in Western Australia.

(iii) Competition in National Wholesale Markets

With regard to the national wholesale market, the ACCC examined whether the loss of volume due to the proposed acquisition would diminish the ability of the independent wholesaler Metcash to buy at competitive prices (hence making it less competitive and in turn diminishing the ability of the independent supermarkets to compete on price at a retail level).

In its Statement of Issues, the ACCC indicated that it did not consider a substantial lessening of competition was likely in the national wholesale market. It was estimated that Metcash's supermarket wholesale sales would increase by 45-50 percent, through its acquisition of 60 Action stores and FAL's wholesale business. In comparison, it was estimated that the additional 22 stores would have increased Metcash's sales by a further five percent.

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706 Australian Competition and Consumer Commission, *Public Competition Assessment, Woolworths' Proposed Acquisition of 22 Action Stores and Development Sites*, 19 October 2005.

No further inquiries were conducted into this market following release of the Statement of Issues.[707]

(iv) Final determination

In its Public Competition Assessment, released on 25 October 2005, the ACCC announced its final determination in relation to the proposed acquisition, concluding:

> *… the ACCC has formed the view that the proposed acquisition would not have the effect, or be likely to have the effect, of substantially lessening the competition in these relevant markets in contravention of section 50 of the Trade Practices Act 1974…*[708]

Finding 155

In its final determination, the ACCC indicated that it considered Woolworths' proposed acquisition would not have the effect, or be likely to have the effect, of substantially lessening competition in any of the relevant markets.

6.3 Recent reviews of the *Trade Practices Act 1974*

(a) The Dawson Review

On 9 May 2002, Sir Daryl Dawson, Mr Curt Rendall and Ms Jillian Segal were appointed to conduct an independent review into the competition provisions of the TPA. The terms of reference of the review focussed on Part IV (Restrictive Trade Practices) and Part VII (Authorisation and Notification) of the Act.

With regard to the general application of the competition provisions of the Act, the Committee made the following comment, which offers some insight into the general thrust of the Committee's recommendations:

> *The Committee does not favour the introduction of competition measures specifically directed to particular industries to respond to perceived shortcomings in the relevant markets. Often the complaint when analysed is not about reduced competition but about the structure of the market which competition has produced. Concentrated markets can be highly competitive. It may be possible to object to the structure of such markets for reasons of policy (the disappearance of the corner store, for example), but not on the grounds of lack of competitiveness. Of course, concentrated markets should attract scrutiny to ensure that competition is maintained, but the purpose of the competition provisions of the Act is*

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707 Australian Competition and Consumer Commission, *Public Competition Assessment, Woolworths' Proposed Acquisition of 22 Action Stores and Development Sites*, 19 October 2005.

708 *Ibid*.

> *to promote and protect the competitive process rather than to protect individual competitors. The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition….Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons.*[709]

The Dawson Committee recommended, *inter alia*:

- The creation of a formal, voluntary clearance process for mergers, which would operate in parallel with the existing informal clearance process currently administered by the ACCC;

- Applications for the authorisation of mergers should be made directly to the Australian Competition Tribunal (bypassing the ACCC) and should be considered within a statutory time limit of three months;

- Amendment to the Act to include a time limit of six months for non-merger authorisations by the ACCC, as well as a possible time limit on any review by the Tribunal;

- The introduction of a notification process for collective bargaining by small businesses (including co-operatives that meet the definition of small business) dealing with large business;

- Amendment to the Act to provide for exclusive dealing and third line forcing, which are currently *per se* prohibitions, to be subject to a substantial lessening of competition test;

- The introduction of criminal sanctions for serious cartel behaviour (subject to the development of a satisfactory definition of 'serious cartel behaviour');

- A substantial increase in the maximum monetary penalties for corporations found to be in breach of the Act, as well as provisions prohibiting corporations from indemnifying officers, employees or agents against monetary penalties;

- The establishment of a Joint Parliamentary Committee to oversee the ACCC's administration of the Act and a consultative committee to advise the ACCC on administration of the Act, as well as the appointment of an associate commissioner to the ACCC to receive and respond to individual complaints about the administration of the Act; and

- Amendment to the Act to require the ACCC to seek a warrant from a Federal Court Judge or Magistrate to exercise its powers under section 155 to enter premises and inspect documents.

The Committee did not support:

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709 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

- Amendments to section 50 to address competition concerns arising from creeping acquisitions;
- Amendments to section 46; or
- The inclusion of provisions to enable the ACCC to make cease and desist orders, or to extend the ACCC's powers under s. 155 beyond the commencement of injunctive proceedings.

Finding 156

In January 2003, the Trade Practices Act Review Committee (the Dawson Committee) recommended amendments to the *Trade Practices Act 1974* that would streamline the processes of merger clearances and authorisations, provide for increased penalties for anti-competitive conduct and provide for notification of collective bargaining arrangements. The Dawson Committee did not support amendments to section 46 or to section 50 in relation to creeping acquisitions.

(i) The Trade Practices Legislation Amendment Bill (No. 1) 2005

The Government response, released on 16 April 2003, endorsed the recommendations of the Dawson Report. The *Trade Practices Legislation Amendment Bill (No. 1) 2005* implements the recommendations of the Dawson Review. The Bill (containing 12 schedules) was introduced in the House of Representatives on 17 February 2005 and passed on 10 March 2005.

On 9 March 2005, the Senate referred the provisions of the Bill to the Economics Legislation Committee for inquiry and report by 15 March 2005. The Committee specifically examined provisions in Schedule 1 (mergers and authorisations), Schedule 3 (collective bargaining) and Schedule 7 (third-line forcing and exclusive dealing).

The Senate Committee recommended that the Bill be passed. A minority report by opposition Senators opposed:

- provisions seeking to remove the ACCC from the merger authorisation process (Schedule 1);
- the amendment to prohibit trade unions from giving notice on behalf of small businesses who intend to engage in collective bargaining arrangements (Schedule 3); and
- removal of *per se* restriction of third-line forcing (Schedule 7).

The Bill was introduced in the Senate on 10 March 2005 and passed with amendments on 11 October 2005. Significantly, Schedule 1 of the Bill, which provided for major changes to

assessment of merger applications, was opposed. Amendments relating to Schedule 7 reversed the removal of *per se* prohibition of third-line forcing.

Finding 157

The *Trade Practices Legislation Amendment Bill (No. 1) 2005*, which implements the recommendations of the Dawson Committee, was introduced in the Australian Parliament in February 2005. The Bill was passed with amendments in the Senate in October 2005 and returned to the House of Representatives for further consideration, where it remains.

(b) The Senate Economics References Committee Inquiry into the effectiveness of the *Trade Practices Act 1974* in protecting small business

After the Dawson Committee completed its review, a number of decisions handed down from the Full Federal Court and the High Court raised questions about the application of section 46 of the TPA. Prompted in part by these events, in June 2003, the Senate Economics References Committee began an inquiry into the effectiveness of the TPA in protecting small businesses from anti-competitive or unfair conduct.

The inquiry focussed on the effectiveness of s.46 (misuse of market power), Part IVA (unconscionable conduct) and Part IVB (codes of conduct) of the Act. The Committee's report, tabled in March 2004, made 17 recommendations, the majority of which proposed amendments to the Act.

Placing its recommendations within the context of the Dawson report, the Committee made the following comments in relation to section 46, the only common ground between the two inquiries:

> *… in the Committee's view the nature of debates and concerns around section 46 have shifted considerably since Boral.*[710] *During the Dawson Inquiry, the primary concerns related to whether or not 'purpose' could be successfully demonstrated. Since Boral, the question of purpose and effect has become much less prominent, because the earlier test of whether a company has substantial market power has become contentious.* [711]

The Senate Committee recommended, *inter alia*, that section 46 of the Act be amended to:

- Explicitly state that the threshold of 'a substantial degree of power in a market' is lower than the former threshold of 'substantial control'; and to include a declaratory provision outlining matters to be considered by the courts for the purposes of determining whether a company has a substantial degree of power in a market (Rec. 1);

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710 *Boral Besser Masonry Ltd v ACCC.*

711 Parliament of Australia, Senate Economics References Committee, *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, March 2004.

- Make predatory pricing a clearer target of s. 46 (Rec. 3);

- Ensure that corporations with a substantial degree of power in a market are proscribed from taking advantage of that power in *any* market (Rec. 5); and

- Clarify that a company may be considered to have obtained a substantial degree of market power by virtue of its ability to act in concert with another company (Rec. 6).

Significantly, whilst sympathetic to some of the arguments for an effects test, the Committee noted that the ACCC's recent losses had not come about as a result of difficulty proving 'purpose'. The Committee did not recommend the introduction of an effects test. The position of the ACCC on this issue appears to have had considerable influence on the Committee's decision.

Other recommendations included:

- Addition of 'unilateral variation of contracts' to the list of matters contained in subsections 51AC(3) and (4), which the courts may consider in determining whether conduct is unconscionable (Rec. 8);

- Clarification in the Act that Part IVA applies to Commonwealth, State, Territory and Local governments (Rec. 9);

- Expediting the introduction of legislation to provide for a notification scheme for collective bargaining (Rec. 11);

- Strengthening section 50 of the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market (Rec. 12);

- Amendment to s.81(1) of the Act to allow for divestiture as a remedy for contravention of section 46, section 46A, or any new section introduced to regulate creeping acquisitions (Rec. 13); and

- Amendments to provide the ACCC with the power to issue 'cease and desist' orders (Rec. 14) and for the continued use of its powers under s.155 after the commencement of injunctive proceedings (Rec. 15).

Finding 158

In March 2004, the Senate Economics References Committee recommended a number of amendments to Part IV and Part IVA of the *Trade Practices Act 1974* to provide for greater protection for small businesses in their dealings with large corporations.

(i) Government response

Of the 17 recommendations put forward by the Senate Committee, the Government supported one relating to section 46 (Rec. 5, the use of market power in any market) and two relating to Part IVA (Rec. 8, unilateral variation of contracts; and Rec. 9, application of Part IVA to governments).

A further five recommendations were supported in part, two relating to s.46 (Rec. 3, predatory pricing; and Rec. 6, coordinated market power), one relating to Part IVA (Rec. 11, collective bargaining for small business) and two relating to other matters (Rec. 16, ACCC budget; and Rec. 17, Federal Magistrates Court jurisdiction).

The remaining nine recommendations were rejected.

The *Trade Practices Legislation Amendment (Small Business Protection) Bill*, which implements the government's response to the Senate inquiry into the effectiveness of the *Trade Practices Act 1974* in protecting small business, was proposed for introduction in the 2005 Spring Sitting. Later re-named the *Trade Practices Amendment Bill (No.1)*, it is now proposed for introduction during the Autumn sittings. At the time of tabling of this report, the Bill had yet to be introduced.

Finding 159

The Australian Government supported three of the seventeen recommendations of the Senate Economics References Committee and indicated its partial support for a further five. The *Trade Practices Legislation Amendment (Small Business Protection) Bill*, later renamed the *Trade Practices Amendment Bill (No.1)*, implements some of the Senate Committee's recommendations. The Bill is proposed for introduction in 2006, but has yet to be introduced.

(c) Competition legislation in other jurisdictions

In submissions and evidence before the Committee during the current inquiry, no comparisons were drawn between the TPA and equivalent legislation in other jurisdictions. Further, no arguments were mounted in favour of amending the TPA to reflect provisions in other jurisdictions.

The Dawson Committee gave careful consideration to equivalent legislation in other jurisdictions before arriving at its final recommendations. The Senate Inquiry, likewise, considered alternative models in other jurisdictions. The following section provides a brief overview of legislation in other jurisdictions, drawing largely on the observations of the Dawson and Senate Committees.

(i) Misuse of Market Power

The Dawson Committee examined equivalent legislation in other jurisdictions with regard to the use of an 'effects test' in relation to misuse of market power. With the exception of New Zealand, the Dawson Committee found no counterpart in competition legislation in other countries, rendering comparison difficult.

In New Zealand, section 36 of the *Commerce Act 1986* is the equivalent of section 46 of the TPA. The Dawson Committee noted that the introduction of an effects test to section 36 of the *Commerce Act 1986* was rejected 'because it would unduly expand the scope of the section so as to deter efficient commercial activity and would increase the risk of error in determining whether or not conduct was in breach of the legislation'.

The Dawson Committee concluded that international practice did not support the introduction of an effects test to section 46.[712]

(ii) Mergers and acquisitions

In considering amendments to merger provisions of the TPA, the Dawson Committee examined the merger provisions in a number of other jurisdictions. Whilst there are a number of similarities between Australia and other jurisdictions, differences are also apparent, in relation to, *inter alia*: time limits; statutory requirements for pre-merger notification; transparency of the merger process; authorisation on public benefit grounds; and applicable competition thresholds are apparent:

- In the European Union, a merger is prohibited if it would create or strengthen a dominant position, which would significantly impede effective competition in the European Union (EU). A merger falls within the EU jurisdiction only if it affects inter-Member State trade and its size exceeds a certain threshold. Pre-merger notification is mandatory. If the European Commission (EC) has concerns about competition, it will issue the merger parties with a Statement of Objections and will then undertake an in-depth investigation before handing down a formal decision as to whether the merger will be cleared or vetoed. Clearance by the EC provides immunity from challenge by nation EU authorities. No authorisation on public benefit ground is available;

- In the United States, a merger that would likely substantially lessen competition or create a monopoly in a market will be prohibited. The US Federal Department of Justice (FDJ) and the US Federal Trade Commission (FTC) jointly administer a statutory notification procedure for mergers over a defined threshold. Following notification, there is an initial waiting period during which the FTC or FDJ may request further information. The FTC or FDJ may approve the merger or seek a court order to veto it. Parties may negotiate undertakings to gain approval. No written reasons are provided in relation to merger decisions;

712 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

- In Canada, a merger is prohibited if it would be likely to substantially lessen competition in a market. A compulsory pre-merger notification system for mergers exceeding a certain turnover threshold is administered by the Competition Bureau. A statutory 'efficiency' defence is available if the efficiency gains from a merger outweigh its anti-competitive effects. No written reasons are provided to the parties for merger decisions. There is no formal authorisation process available on public benefit grounds; and

- In New Zealand, a merger will be prohibited if it would be likely to substantially lessen competition in a market. The Commerce Commission administers a voluntary pre-merger notification procedure, publishing reasons for its merger decisions. Merger authorisation is available on public benefit grounds following a public consultation process.[713]

The recommendations of the Dawson Committee sought to improve transparency of the existing informal merger clearance process; introduce a formal merger clearance process that would operate in parallel with the informal process; and expedite the merger authorisation process. With the exception of the formal clearance process, which is similar in concept to the New Zealand model, these recommendations do not appear to draw substantially from models in other jurisdictions.

(iii) Divestiture

The Senate Committee considered international practice in relation to divestiture powers, which enable a court to order that a dominant corporation be divested, or broken up, to prevent anti-competitive domination of a market by a single player.

The Senate Committee noted that divestiture powers are widely available in Europe and the United States. Two of the most high-profile US divestiture cases in recent times are those involving AT&T (telecommunications) and Microsoft (internet browser software), the latter case ultimately being overturned on appeal.

The Senate Committee argued that, although rarely used, the threat of divestiture in the United States provides a legal remedy that is highly undesirable by large corporations and therefore promotes compliance with antitrust legislation.[714]

Under s.81 of the TPA, divestiture is only available to the court as a remedy for breach of s.50. The Senate Committee considered Australian authorities to be limited in their ability to use divestiture, either as a threat or as a remedy, and recommended that the application of s.81 be expanded to provide for divestiture as a remedy for other breaches of the Act, including breaches of section 46.

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713 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

714 Parliament of Australia, Senate Economics References Committee, *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, March 2004.

At the time of the Senate Inquiry, the ACCC supported the limited expansion of divestiture powers to s.46.[715]

(iv) Enforcement powers

In its submission to the Dawson review, the ACCC sought amendment to the TPA to enable it to make an order that a corporation 'cease and desist' from engaging in anti-competitive conduct. It was argued that a cease and desist order would provide a more expeditious resolution to the misuse of market power, avoiding irreversible damage to competition while the case was being investigated. The ACCC currently is able to seek an interim injunction, which has in the past been obtained within a short period of time. However, once the ACCC applies to the Court for an interim injunction, its powers to obtain information and documents under section 155 cease.

The Dawson Committee examined the range of mechanisms available in other jurisdictions:

- In Europe, where a prima facie case of anti-competitive conduct requiring urgent action is established, the European Commission's Directorate General for Competition has the power to order interim measures to bring an end to the conduct in question. The measures ordered must be temporary and must be proportionate with maintaining the status quo;

- In the United States, the Federal Trade Commission (FTC) may issue a 'cease and desist' order where there is 'reason to believe' that a corporation or individual is acting anti-competitively. The procedure for issuing such an order is lengthy (90 days) and therefore the preferred approach for the FTC is to seek preliminary or permanent injunctions in the US District Court;

- The Canadian Competition Commissioner can make an *ex parte* application to the Competition Tribunal for an interim order to prevent an individual or corporation from engaging in conduct that is considered to be anti-competitive. The provision was introduced in June 2002 and had yet to be used at the time of the Dawson Report; and

- In New Zealand, the *Commerce Act 1986* was amended in 2001 to provide the Commerce Commissioner with the power to make a cease and desist order. Such an order may only be issued after an investigation has been conducted, a hearing has been held and the Commissioner is satisfied that a prima facie case exists and urgent action is required to protect the public interest. The power had yet to be exercised at the time of the Dawson Report.

On balance, the Dawson Committee did not consider that a cease and desist order would enable the ACCC to more rapidly put an end to anti-competitive conduct than is currently the case through the use of an interim injunction. Further, the question arose as whether the ACCC would

715 As cited in: Senate Economics References Committee, *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, March 2004.

be exercising judicial power (by issuing a cease and desist order), a power that is not available to the ACCC under the Australian Constitution.[716]

The Senate Committee did not agree with the Dawson report on the issue of cease and desist powers, arguing that the New Zealand model provides an appropriate model for Australia, recommending that the TPA be amended to enable the ACCC to make cease and desist orders.[717]

6.4 The effectiveness of the TPA and the case for further changes

Although the *Trade Practices Act 1974* is Commonwealth legislation, the capacity exists at a State level, albeit limited, to comment on proposed amendments. The Department of Treasury and Finance advised the Committee that, with the exception of part IV, jurisdictional approval is not usually required to implement changes to the TPA. Under the 1995 Intergovernmental Conduct Code Agreement, the Commonwealth is required to consult with jurisdictions on proposed amendments to Part IV of the TPA. Through this mechanism, Western Australia has the ability to influence amendments to the competition provisions of the TPA by providing comments to the Commonwealth and by voting on any proposed changes to Part IV of the Act.[718]

Finding 160

Under the 1995 Intergovernmental Conduct Code Agreement, the Commonwealth is required to consult with jurisdictions on proposed amendments to Part IV of the *Trade Practices Act 1974*. Through this mechanism, Western Australia has the ability to influence amendments to the competition provisions of the TPA.

As indicated previously, only a small number of submissions to the current inquiry commented in relation to the *Trade Practices Act 1974*. Of those that commented, the majority were critical of the Act as it currently stands. The West Australian Farmers Federation questioned the effectiveness of the TPA in protecting competition in general:

> *It has been pointed out in a number of inquiries that there is a fine line between aggressive competition and anti-competitive practices.*
>
> *Importantly the bodies that have the responsibility of administering the TPA, have regularly contributed submissions to inquiries seeking amendments to the TPA. The ACCC, and before that the Trade Practices Commission, have tried to apply clarifying provisions to the TPA, that reflect the true spirit of the original intentions of the government when the Act was drafted (the TPA was introduced to Parliament by then*

716 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

717 Parliament of Australia, Senate Economics References Committee, *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, March 2004.

718 Submission 66, Department of Treasury and Finance (WA).

> *Attorney-General Lionel Murphy). The need for a an effective TPA is paramount, particularly in relation to the marketing and sale of foodstuffs, and this has been underlined in a number of reports.*
>
> *From the perspective of WA Farmers the TPA is ineffective in protecting competitive behaviour in Australia.*[719]

Both the Small Business Development Corporation and the WA Fruit Growers' Association questioned the effectiveness of the *Trade Practices Act 1974* in protecting small businesses in their dealings with larger firms. The West Australian Fruit Growers' Association commented:

> *WAIGA is of the belief that the Trade Practices Act 1974 (Cwlth) has become increasingly ineffective in maintaining a competitive environment between large and small competitors which in turn reduces or removes benefits to consumers. This is particularly the case in the supermarket industry where two large chain operators are able to use their economic power to gain marketshare through a variety of processes which are not reasonably available to their competitors.*

(a) The case for further changes to the TPA

Not all submissions favoured further changes to the TPA. The Department of Treasury and Finance argued that given recent and impending amendments, further changes are not warranted:

> *… a number of legislative changes have since been implemented, or are in the process of being implemented, subsequent to the recommendations that arose out of reviews of the TPA. The Department of Treasury and Finance considers that these changes successfully enhance the effectiveness of the TPA in addressing issues related to the misuse of market power.*
>
> *Given that the competition provisions of the TPA have recently been extensively reviewed and that a number of the recommendations arising from this review have been, or are in the process of being implemented, further changes to the TPA are not warranted at this point in time*[720].

Coles Myer also argued against further changes to the Act:

> *Although incremental, the changes to the TPA currently and prospectively before the Commonwealth Parliament have the potential to substantially change the relationships between parties along the food supply chain. As long as there is no new evidence of major structural sources of market failure along that chain, we believe it would be inappropriate to add to the changes that have already emerged from the many recent reviews. … It would therefore be inappropriate to pursue further changes to competition law and regulation*

719 Submission 57, Western Australian Farmers' Federation (Inc).

720 Submission 66, Department of Treasury and Finance (WA).

> *until the impacts of the proposed strengthening of s46 of the TPA and other changes are clear.* [721]

Those submissions that advocated further changes to the Act, invariably focussed on section 50 (particularly with regard to creeping acquisitions) and/or section 46 (misuse of market power).

(i) Section 50 and creeping acquisitions

Section 50 of the Act prohibits mergers or acquisitions that would have the effect or likely effect of substantially lessening competition in a market. A number of submissions argued that section 50 cannot prevent the gradual lessening of competition through creeping acquisitions.[722] The Department of Treasury and Finance (WA) provided the following definition of 'creeping acquisitions':

> *Creeping acquisitions is the term generally used to describe the acquisition of a number of assets or businesses over time that may have a cumulative effect upon the acquiring firm's market share, as each individual acquisition may not be capable of substantially lessening competition, although if the acquisitions had all been made at once they may have done so.*[723]

On section 50 and creeping acquisitions, the Small Business Development Corporation commented:

> *Under section 50, the ACCC has the power to reject corporate takeovers or mergers where an individual acquisition would substantially lessen competition in a market. Small retailers have raised concerns, over 'creeping acquisitions' where dominant retailers buy up a series of small firms over a period of time rather than in a single large acquisition. In many cases, small retailers are willing to sell out because of 'generous' offers made by major chains. In these situations, each new individual acquisition will not necessarily breach the section 50 merger provisions or significantly alter the major firm's market share, but over time may have the effect of substantially lessening competition in a market.*[724]

Finding 161

A number of submissions to the current Inquiry advocate further changes to section 50 of the *Trade Practices Act 1974* to capture 'creeping acquisitions'.

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721 Submission 72, Coles Myer Ltd.

722 Submission 53, Small Business Development Corporation; Submission 57, Western Australian Farmers' Federation (Inc); Submission 61, Western Australian Fruit Growers' Association; Submission 77, Department of Agriculture (WA).

723 Submission 66, Department of Treasury and Finance (WA).

724 Submission 53, Small Business Development Corporation.

The Australian Competition and Consumer Commission has commented publicly on creeping acquisitions on numerous occasions in the past. In June 2003, Professor Alan Fels, the then Chairman of the ACCC, made the following comments before a Senate Estimates Committee:

> *… no-one would want to disguise the difficulties of dealing with creeping acquisitions. The issue comes up most often in regard to big acquisitions of retail stores one by one. It is more the case that, while we feel uneasy about this part of the Act, we have not been able to come up with a proposal that would in our view solve our concerns. When a big retailer, say, is going to buy a very large number of outlets at a given time, if they bunch them all together it is possible for us to look at them as a whole and say, 'This could substantially lessen competition.' But most often acquisitions are made in small parcels or one at a time, so each case as you look at it does not seem to amount to a substantial lessening of competition. It has to be a substantial lessening of competition in a market.*
>
> *On the more general steady increase in market share of the big supermarkets, the more typical scenario is that the supermarket will move into a town where it is not represented, take over from an independent and often offer better prices, service and range and quality of goods than the independent may have done. For that reason and others, it is rather difficult to argue that this is going to substantially lessen competition in that town. But the accumulation of these acquisitions means that the national market share of these players has steadily been increasing. That has had some repercussions, including on their buying power.*[725]

Despite its concerns with regard to creeping acquisitions, the ACCC is also mindful of unintended effects of preventing creeping acquisitions. In a September 2003 speech to the Food and Grocery Council of Australia, Mr Graeme Samuel, ACCC Chairman noted:

> *… the focus on 'creeping acquisitions' has the potential to generate unintended and perhaps harmful consequences. This potentially could arise when incumbents seek to sell properties in a market made thinner by a prohibition on creeping acquisitions. Creeping acquisitions provide an exit path for those wishing to sell their business. Organic growth of Coles and Woolworths does not provide that exit. Stopping creeping acquisition may remove an exit path, but will not address increases in market shares through organic growth.*[726]

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725 Professor Allan Fels, ACCC Chairman, as cited in: *Senate Economics References Committee*, *The effectiveness of the* Trade Practices Act 1974 *in protecting small business*, March 2004.

726 Mr Graeme Samuel, ACCC Chairman, *Competition and the nation's supermarket trolley: A perspective of the Australian Competition and Consumer Commission*, Speech to the Food and Grocery Council of Australia, 16 September 2003.

Finding 162

The ACCC has publicly commented on the difficulties it faces in dealing with creeping acquisitions. However, it also cautions against the potential unintended consequences of prohibiting creeping acquisitions.

The Dawson Committee adopted the following position on creeping acquisitions:

> *… the Committee is of the view that section 50 in its present form is adequate to enable the ACCC to consider creeping acquisitions in so far as they raise questions of competition. They are referred to in the merger guidelines. Nothing before the Committee suggests that the ACCC is not presently aware of acquisitions that raise competition concerns under section 50.*[727]

The Senate Economics References Committee, however, disagreed with the findings of the Dawson Review, stating:

> *The Committee finds the arguments presented by the independent retailers convincing, and considers, as a matter of logic, that creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. Current merger law does not effectively address this issue. Section 50 of the Act should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.*[728]

The Department of Treasury and Finance (WA) advised the Committee that in June 2005, the Commonwealth Treasurer wrote to the Premier of Western Australia, seeking the Western Australian Government's endorsement of the *Trade Practices Legislation Amendment (Small Business Protection) Bill 2005*. Whilst the Bill was endorsed by the Western Australian Government, it was noted that the TPA may require future amendment on the issue of creeping acquisitions, subsequent to the ACCC's further investigation of the issue.[729]

On 1 July 2005, the ACCC announced the introduction of a Charter to promote fair competition between potential buyers of independent supermarkets. The Charter for Competitive Sales of Independent Supermarkets was formulated to address concerns about creeping acquisitions. The stated objective of the Charter is to ensure "that any acquisition of a Supermarket owned or

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727 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

728 Parliament of Australia, Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004.

729 Submission 66, Department of Treasury and Finance (WA).

operated by an Independent Supermarket Retailer takes place under a competitive bidding process."[730]

Parties to the Charter (initially Metcash, Woolworths and Coles) are not able to limit the ability of independent supermarket retailers to seek alternative purchasers for their stores and are required to provide independent supermarket owners with written notice of this fact when making an offer to purchase a store. On 29 August 2005, Franklins committed to the Charter.[731]

The Charter does not bind independent supermarket owners in any way and does not require them to seek bids from all possible buyers, but ensures the bidding process is open.

It is not yet clear whether the Charter will achieve its stated objective. In its submission to the current inquiry, the Small Business Development Corporation made the following comments in relation to the Charter:

> *… it does not prevent the action from continuing or provide any solution to maintain an appropriate balance within the market. The SBDC believes that the issue should continue to be monitored with the view to investigating if a legislative remedy to amend provisions of section 50 to deal with creeping acquisitions may be required over time.*[732]

Finding 163

The Charter for Competitive Sales of Independent Supermarkets, introduced on 1 July 2005, was formulated by the ACCC to address concerns about creeping acquisitions. Metcash, Woolworths, Coles Myer and Franklins are all parties to the Charter. The stated objective of the Charter is to ensure "that any acquisition of a Supermarket owned or operated by an Independent Supermarket Retailer takes place under a competitive bidding process." It is not yet clear whether the Charter will achieve its stated objective.

(ii) Section 46 and misuse of market power

Section 46 of the Act prohibits the misuse of market power for the purpose of damaging or eliminating a competitor, preventing entry into a market, or preventing a person from engaging in competitive conduct. Both the West Australian Farmers' Federation and the Small Business

730 Australian Competition and Consumer Commission, *ACCC announces charter to promote competitive sales of independent supermarkets*, media release 1 July 2005, available at http://www.accc.gov.au/content/index.phtml?itemId=694509, accessed on 8 March 2006.

731 Australian Competition and Consumer Commission, *Franklins commits to charter promoting competitive sales of independent supermarkets*, media release 19 August 2005, available at http://www.accc.gov.au/content/index.phtml/itemId/706437/fromItemId/2332, accessed on 9 March 2006.

732 Submission 53, Small Business Development Corporation.

Development Corporation were critical of section 46 of the Act as it currently stands. The Small Business Development Corporation stated:

> *From a small business perspective, it is often difficult for the ACCC (and courts) to decide whether a large corporation has misused its market power to damage a small competitor or whether the company is just engaging in vigorous (but fair) competition to attract market share. Small businesses still suffer from the adverse impact of a larger company's conduct, irrespective of the 'intent' of the larger company. Consequently, it is believed that the ACCC's enforcement of section 46 is somewhat hindered by the difficulty in proving the "purpose" or "intent" of the larger company's conduct to misuse their market power.*
>
> *… as section 46 currently stands, small businesses in the retail sector have virtually no defence against predatory pricing by major retail chains provided the major retail chain does not price below cost. The effect of the major retail chains' buying power and pricing practices are likely to significantly damage a smaller competitor, or even drive them from the market. However, it is extremely difficult to prove or infer the larger company's purpose was other than to meet competition in its own market.*
>
> *The SBDC believes that section 46 is currently unable to provide the level of protection for small businesses that was intended when the legislation was first framed.*[733]

The West Australian Farmers' Association commented:

> *The ACCC is unable to do its job properly due to the respective interpretations of the TPA in cases that have been brought by it. The ACCC and its predecessor have had one successful case involving s.46 in 30 years, and due to respective judgements which have narrowed the scope of what is meant by 'take advantage' and 'substantial market power', they have been forced to drop a number of actions that were in process. What is needed is action by a government that can invoke the spirit of the TPA when it was originally invoked.*[734]

The Small Business Development Corporation advocated the amendment of section 46 to provide for an effects test:

> *The operation of section 46 could be improved and strengthened by the introduction of an "effects test" that would allow courts to examine uses of market power having anti-competitive effects in a market rather than being limited to consideration of the intent of the company exercising the market power. The adoption of an "effects test" would address the difficulties experienced under the current section 46 provisions to prove that the 'purpose' of a company was to misuse its market power. In effect, the onus of proof would be placed on large companies to prove that their conduct did not have an anti-competitive effect on the market and particularly, small businesses.*[735]

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733 Submission 53, Small Business Development Corporation.

734 Submission 57, Western Australian Farmers' Federation (Inc).

735 Submission 53, Small Business Development Corporation.

Finding 164

Several submissions to the current Inquiry advocate further changes to section 46 of the *Trade Practices Act 1974* to strengthen its ability to capture 'misuse of market power'.

The Committee notes that the ACCC, which advocated the inclusion of an effects test in its submission to the Dawson Review,[736] has recently moved away from this approach. In evidence before the Senate Economics References Committee in October 2003, Mr Graeme Samuel offered the following reasons for the ACCC's altered position:

> *The first is a recognition that the effects test has now been through nine reviews. With the exception of one all nine reviews have indicated that the effects test was not to be proceeded with, so there is that aspect. The second is to recognise, as the ACCC recognised at the time of putting it to the Dawson committee, that an effects test could potentially have some unintended consequences and therefore would need to be very carefully framed and that the simple inclusion of an effects test may do some damage to the integrity of the foundation stone of part IV, which I mentioned before—that is, the process of competition.*
>
> *But the most important change is that as a consequence of the Boral decision it has become much clearer that the critical issues for the application of section 46 are now what constitutes having a substantial degree of market power and what constitutes taking advantage of that power. Indeed, in the Boral judgment several of the justices indicated that the issue of determining purpose and the issue of separating purpose from effect may not be as difficult as may have previously been contemplated.*[737]

More recent comments by Mr Samuel are also particularly pertinent to the question of whether or not further amendments to section 46 are warranted:

> *… one of the most difficult tasks the ACCC faces is balancing what I refer to as "the small business expectations gap" – the gap between what the ACCC can do to protect small business, and what some in small business believe we should be doing to protect them from tough competition.*
>
> *It is not the role of competition policy to favour one sector over another - competition policy is not about preserving competitors, it is about promoting competition.*
>
> *The difficult task for governments and regulators is to strike the balance – to distinguish between vigorous, lawful competitive behaviour that is likely to lead to significant and sustained benefits for consumers and unlawful inherently anti-competitive behaviour that is likely to disadvantage consumers.*

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736 As cited in: Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003.

737 Graeme Samuel, ACCC Chairman, in evidence before the Senate Economics References Committee, 31 October 2003.

While section 46 has long been heralded as the champion of small business it has many limitations. The misuse of market power provisions require that business actions are motivated by the purpose of damaging specific competitors. It is not enough to point to the fact that competitors, even small competitors, are being damaged by the actions of a larger, more powerful business.

Most importantly, section 46 requires as a precondition to its application, that the offending business have a substantial degree of market power. It is very rare that businesses that have this sort of power in a market concern themselves in the competitive environment with very small businesses. They are more concerned with larger businesses which do, or might, impose real competitive constraints on them.

That's why, in the opinion of the ACCC, small business with a genuine grievance about harsh and oppressive behaviour on the part of more powerful businesses with which they are transacting, are much better served by focussing on Part IVA – the provisions introduced in the late 1990s to deal with unconscionable conduct.[738]

Finding 165

Recent comments by the ACCC Chairman highlight the limitations of s.46 and argue that small businesses with a genuine grievance against a more powerful business may be better served by the unconscionable conduct provisions of Part IVA of Act.

(b) Concluding comments

The Bills that have resulted from the two recent reviews of the TPA have yet to pass through the Australian Parliament, however, there is no disputing the potential for the proposed amendments to bring about significant changes in Australia's competitive environment. Indeed, the ACCC Chairman considers they represent the most significant changes to the TPA since the Hilmer National Competition Policy reforms of the 1990s.[739]

In light of the two recent reviews of the *Trade Practices Act 1974*, and the amendments currently before the Australian Parliament, the Committee is of the view that further changes to the TPA would be imprudent at the present time. The current raft of changes has yet to be implemented and it may be some time before their full impact is known. The Committee notes, however, that the progress of the aforementioned Bills has been slow.

738 Mr Graeme Samuel, ACCC Chairman, *The Enforcement Priorities of the ACCC*, Presentation to the Competition Law Conference, 12 November 2005.

739 *Ibid.*

Recommendation 11

The Committee recommends that the Australian Government prioritises the passage of the *Trade Practices Legislation Amendment (No 1) Bill* currently before the Australian Parliament, and brings forward the introduction of the *Trade Practices Legislation Amendment (Small Business Protection) Bill,* to promote certainty in the market.