Submission by

# MASTER GROCERS AUSTRALIA

/ LIQUOR RETAILERS AUSTRALIA

to

## Competition Policy Review Secretariat – Federal Treasury

# Response to the Competition Policy Review Final Report (March 2015)

May 2015

MASTER GROCERS AUSTRALIA

LIQUOR RETAILERS AUSTRALIA
Independent Liquor Outlets

**NATIONAL SUPPORT OFFICE**
Suite 5, 1 Milton Parade Malvern
Victoria 3144
Phone +613 9824 4111
Fax +613 9824 4022
Freecall 1800 888 479
Email admin@mga.asn.au
Website www.mga.asn.au

MASTER GROCERS AUSTRALIA

LIQUOR RETAILERS AUSTRALIA
Independent Liquor Outlets

## Introduction

Master Grocers Australia (MGA/LRA) welcomes the release of the comprehensive Competition Policy Review Final Report, dated 31st March 2015, (the Final Report). MGA/LRA would like to thank the Minister for Small Business, the Honourable Bruce Bilson MP and the Competition Policy Review Panel for the opportunity to comment on the Final Report.

As a national industry organisation MGA/LRA represents the interests of small businesses, particularly independent supermarkets and small liquor retailers across Australia. MGA/LRA has been a keen advocate of the need for competition law reform over many years and has long sought amendments to the Competition and Consumer Act 2010 (CCA), in order to maintain the sustainability of Australian small independent businesses in the retail industry and provide for their growth. MGA/LRA appreciates that the preparation of such a far reaching review of current Australian competition law has been a massive and challenging undertaking by the Competition Policy Review Panel (the Panel), together with the support of the Treasury Department in the Australian Government. MGA/LRA welcomes the opportunity to comment on a number of the proposed amendments to the CCA which, if implemented by the Australian Parliament, will hopefully achieve the economic benefits and increased productivity envisaged by the Panel.

## About Master Grocers Australia

Master Grocers Australia / Liquor Retailers Australia (MGA/LRA) is a National Employer Industry Organisation representing independent grocery and liquor stores in all States and Territories of Australia. These businesses range in size from small, to medium and large, and make a significant contribution to the retail industry, employing 115,000 people, conducting 780 million customer transactions per annum and accounting for approximately $14 billion in retail sales.

There are 2,700 branded independent grocery stores, trading under brand names such as Supa IGA, Farmer Jacks (WA), FoodWorks, Foodland (SA), Friendly Grocers, IGA, IGA Xpress, SPAR and Supabarn, and, with a further approximately 1,300 independent supermarkets trading under their own local brand names. In addition, there are numerous independent liquor stores operating throughout Australia, trading under names such as Cellarbrations, The Bottle O, Bottlemart, Duncans, and Local Liquor, which are either single or multi-store owners. These stores are comparatively much smaller when juxtaposed against the larger supermarket chains such as Coles and Woolworths, which combined, represent approximately 80 per cent of the retail supermarket industry.

MASTER GROCERS AUSTRALIA

LIQUOR RETAILERS AUSTRALIA
Independent Liquor Outlets

**Executive Summary**

MGA/LRA recognises that in order to maintain a strong and fair competitive market there must be robust competition and the Panel has been very firm in the direction that it has taken in this Final Report which is that the emphasis for reform must be on the competitive process. Consumers must also play an integral role in creating and maintaining competitive markets. The CCA's objects clause in s.2 reflects this:

> *"The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection"*

Throughout this inquiry into the current competition laws MGA/LRA has been proactive in seeking legislative amendments because we firmly believe the current laws are inadequate and they are adversely affecting the businesses of independent supermarket and liquor store owners. These identified problems have been thoroughly canvassed throughout the time the Panel has been calling for information about the effect of the current competition laws on particular industries. MGA/LRA has therefore, in this response to the Final Report, taken the opportunity to comment on areas of proposed law reform because we believe without this reform the current laws will continue to inhibit the ability of our members to compete on a level playing field.

We strongly support and welcome the proposal to introduce an "Effects test" and we applaud the manner in which we have seen the Panel provide for this legislative change. We remain of course steadfast in our views on issues which the Panel chose not to support but we have in this final submission referred to a number of those areas in the hope that if not now, at least some time in the future they may be implemented.

MGA/LRA reiterates that to promote competition and ensure consumer welfare, the livelihood of small businesses and independent sector must be preserved. Independent supermarkets and liquor stores offer retail diversity and choice, innovation and support for the local communities in which they operate.

The independent retail supermarket and liquor store industry in Australia is highly concentrated and vastly unique in comparison to overseas experiences. This in itself raises a compelling need for reform.

MASTER GROCERS AUSTRALIA

LIQUOR RETAILERS AUSTRALIA
Independent Liquor Outlets

In response to the Panel's FINAL Report, MGA/LRA submits:

1. MGA/LRA has made comment on the amendments to Section 46, Misuse of Market Power as proposed by the Panel. In particular MGA/LRA focusses on Section 46(i) and although we would have preferred a more rigorous effects test MGA/LRA is pleased to witness the proposed inclusion of this test.
2. MGA "recognises that Section 46(i) will be more effective with the deletion of the words, "take advantage" which will promote greater clarity in the interpretation of the section. The use of the word, "purpose" in the proposed amendment to Section 46(i), if implemented, will in conjunction with the effects test, also provide greater clarity and be more consistent with the objective of the CCA, which is to protect the competitive process.
3. The proposed introduction into Section 46(i) of legislative guidance is preferable to the previous proposal in the Draft Report in 2014. The introduction of legislative guidance in Section 46(i) will provide for greater scrutiny of business activities that may damage the competitive process.
4. MGA/LRA is disappointed that the Panel chose not to recommend the reintroduction of specific anti- competitive price discrimination laws and notes that the Panel is of the opinion that the CCA already provides sufficient legislative controls of any such activities.
5. The Panel considered the provisions in the Australian Consumer law in respect of the preventing acts of unconscionable conduct and notes the Panel's recommendations to strengthen the "misuse of market power provisions" which may assist in reducing the impact of unconscionable activities on smaller businesses.
6. MGA/LRA is a strong supporter of introducing a Supermarkets and Liquor Industry Code, which we submit should be mandatory. Although the Panel chose not to comment on this suggested industry code in the Final Report, MGA/LRA would welcome further consideration of this measure as one that could provide satisfactory competitive process outcomes for the smaller independent grocery and liquor industry.
7. The Panel refers in its Final Report to a number of barriers to economic growth in Australia and in particular MGA/LRA has focussed on issues such as the suggested deregulation of trading hours, the opening up of liquor trading markets and a review of State planning laws, all of which may be inhibiting the competitive process. MGA/LRA has expressed its views in respect of trading hours in that we believe that complete deregulation is not practical for smaller businesses at this time. MGA/LRA does however, support the need for greater opportunities for liquor sales in small businesses. It is also vital that planning laws be reviewed by the States in an effort to

control the unabated growth of larger businesses at the expense of smaller businesses, but at the same time allowing for the competitive process to flourish.

8. MGA/LRA strongly supports proposals to provide easier access to remedies in the Commission or Court systems in the event of a grievance or complaint. Any litigation can be cost prohibitive and a pathway to the Federal Court would be unreachable, due to potential costs, for most small business owners. Whilst the suggested alternative dispute resolution process, as proposed is welcomed, together with the assistance of the Small Business Commissioner, MGA/LRA would like to suggest the inclusion of "no cost orders" in the legislation to enable financially disadvantaged litigants from initiating court action .

9. MGA/LRA strongly supports the current ACCC Governance and submits that the introduction of any changes to the structure for the servicing of industry and consumers alike is unnecessary, and it is submitted that the status quo in the ACCC should remain.

# Response by MGA/LRA to the Final Report

## 1. Section 46 Misuse of market power

MGA/LRA has long advocated its views on the growth of market power of specific sectors within the retail industry, which have now reached unprecedented proportions. Due to the increased market share of the two largest retailers in Australia, Woolworths and Coles, many independent supermarket retailers and liquor stores are now at a point where they are in danger of disappearing from the market completely. Although these small, industrious retailers do not resile from the challenge of rigorous competition, it is difficult for them now, and into the future, to combat the increasing market power and dominance of the larger Australian supermarket chains without changes to competition laws.

In previous submissions to the Panel, MGA/LRA has vigorously pointed out the difficulties experienced by independent retailers at the hands of their more powerful rivals. Many small independent businesses have closed down or they struggle to retain market share and this is due largely to the deficiency in the current law, in particular Section 46. MGA/LRA understands that simply being bigger and being a determined competitor does not necessarily transgress the principles of the competitive process, but when the law permits a competitor to exploit its dominance to the detriment of a competitor then the law should be amended accordingly. Therefore, MGA/LRA welcomes the recommendations by the Panel for the amendment of Section 46.

MASTER GROCERS AUSTRALIA

LIQUOR RETAILERS AUSTRALIA
Independent Liquor Outlets

In the Competition Policy Review- Final Report (The Final Report) the Panel considers that the primary prohibition in section 46 should be re-framed to

*"prohibit a corporation that has a substantial degree of power in a market from engaging in conduct, if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market".*

The position taken by the Panel in the Draft proposal in respect of the proposed wording of Section 46 (1) has been retained in the Final Report.

The proposed amendments to Section 46 (i) in the Final Report provide for the introduction of an effects test, and significantly in the Final Report the Panel draws attention to the removal of the words "take advantage" and the retention of "purpose" in a modified form. The proposed section removes the defence that was previously proposed in the Panels first draft but which now instead provides legislative guidance to the Courts in Section 46(i).

MGA/LRA had sought a more rigorous effects test but acknowledges that the proposed amendments to Section 46(1) will provide assistance in combatting the misuse of market power and protect the competitive process.

In the Final Report we note that the Panel directs comment specifically to the introduction of an "effects test," the removal the words, "take advantage" and the changed effect of the word, "purpose" in Section 46(i) in the CCA. MGA/LRA offers the following comments on these changes below.

**(a) The Effects test**

The Panel has pointed out that between 1976 and 2004[1] there were considerable discussions and inquiries in relation to the benefit or otherwise of introducing an effects test into Section 46. Each Select Committee or Senate Inquiry that reviewed the need for an effects test concluded, without exception, that there were risks such as regulatory error or the likelihood of uncertainty if such a change was implemented and consequently each Committee systematically rejected the need for an effects test. Although there appear to be benefits from the introduction of an effects test in the form proposed by the Panel there continues to be some scepticism regarding the introduction of an "effects test" and whether the introduction of an effects test will "chill the competitive market."

[1] The Swanson Committee, the Blunt Review, the 1984 Green Paper, Griffiths Committee, Cooney Committee, Hilmer Committee, Baird Committee , Hawker Committee, 2002 Senate References Committee, Dawson Review Senate Enquiry 2004

It has therefore been argued that a business that has market power is unlikely to behave any differently in a situation where it can exercise or not exercise its power. A large powerful corporation may not be doing anything wrong in either scenario of exercising or not exercising its power even if their actions ultimately injure their competitors.[2] It is argued that this is the very nature of competition and if a competitor grows increasingly strong and has the ability to make significant gains by using its power then those who fall by the wayside are simply the inevitable consequences of ruthless competition.[3]

However, MGA/LRA submits, despite the previous comments, there is a need to focus on whether market power might be misused in some circumstances, to the detriment of the competitive process rather than an individual competitor. In reviewing the need to control the misuse of market power so as to protect the competitive process the Panel stated that:

"The challenge is to frame a law that captures anti-competitive unilateral behaviour but does not constrain vigorous competitive conduct. Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti- competitive conduct."

The current Section 46 of the CCA states that, a corporation shall not take advantage of its power for the purpose of eliminating or damaging a competitor in the market or preventing another person entry into a market or deterring or preventing anyone from engaging in competitive conduct in the market.

Although there is an established principle of what constitutes a substantial market there have been problems of interpretation in Section 46 with the words, "taking advantage" and also conduct that is undertaken for the "purpose" of eliminating or damaging a competitor. It was concluded by the Panel that the words "taking advantage" were not suitable for "distinguishing between competitive and anti-competitive unilateral conduct"[4] and the continued use of the test was having a destabilizing and uncertain effect on the legal process.

**Removal of words "take advantage" from Section 46**

In its review the Panel rightly points out that the use of the words, "take advantage" in section 46 have caused considerable difficulties of interpretation, in particular the decisions in various cases have resulted in making it difficult to distinguish between anti- competitive and pro- competitive conduct.

[2] The State of Competition – Rachel Trindade, Alexandra Merrett, Rhonda Smith: Issue 14 (Nov 2013) special double issue Page 6. www.the state of competition.com

[3] Queensland Wire High Court

[4] Final Report 2015 p 338.

The lack of clarity and uncertainty surrounding the retention of the phrase , "take advantage" has therefore influenced the Panel to conclude it is not a useful test within section 46 and should be removed.

In the Final Report the Panel makes a point of illustrating the difficulties of interpretation that have developed in respect of retaining the words, "take advantage"[5] in Section 46. A number of these cases reveal how the Courts have grappled with the interpretation of the words, "take advantage" and the difficulties that have arisen with the continuance of these words in the section is evident. In the Melway case[6] the High Court stated that, "it may be proper to conclude that a firm is taking advantage of market power where it does something that is materially facilitated by the exercise of the power even though it might not have been absolutely impossible without the market power."

Subsequent to the decision in Rural Press Limited v. ACCC[7], Section 46 was amended in an attempt to clarify the meaning of "taking advantage." Despite the addition of subsection 6(a) to Section 46 in the Competition and Consumer Act, difficulties of interpretation with the words "take advantage" continued to prevail. Again in Rural Press and ACCC v. Cement Australia[8] the Courts faced problems of interpretation in respect of the "take advantage" phrase. It is not the outcomes of these cases that is important but the degree of confusion and uncertainty that has been created by the retention of the words, "take advantage." The confusion and lack of certainty as a result of retaining the phrase in the legislation justifiably persuaded the Panel to conclude that the test has had the effect of, "undermining confidence in the effectiveness of the law."[9]

The most appropriate course of action in the interests of promoting the competitive process therefore is to remove the disadvantage test from section 46. MGA/LRA supports this proposal.

**Use of the word "purpose" in Section 46.**

The Panel has stated that "purpose" in Section 46 currently focusses on harming individual competitors and not the competitive process. The Panel queried whether it "ought to be directed at conduct that has the purpose of harming individual competitors (under the existing purpose test) or

[5] Page 338 Final Report
[6] Melway Publishing Pty Ltd v. Robert Hicks Pty Ltd(2001) 205 CLR 1at 51
[7] Rural Press Limited v. ACCC (2003 ) HCA 75
[8] ACCC v. Cement Australia (2013) FCA 909
[9] Final Report page 338

whether it ought to be directed at conduct that has the purpose or effect of harming the competitive process?"[10] By including the word "effect" in Section 46 together with the word, "purpose," this would, in the opinion of the Panel, be more consistent with the objective of the CCA which is to protect the competitive process.

In its current form the CCA is out of step with other international jurisdictions which have similar prohibitions. The Sherman Act in the USA supports an objective intent based on conduct and effect. In Canada there is a focus on conduct that has the effect or likely effect of substantially lessening competition and many European jurisdictions have moved towards a focus on how certain conduct of businesses can have an adverse effect on competition thereby damaging the competitive process.

The Panel proposes that Section 46 should prohibit conduct that has purpose or likely effect of substantially lessening competition in the marketplace.

MGA/LRA supports the view of the Panel that prohibiting conduct that has the purpose of harming a competitor is misdirected as it is more appropriately directed to conduct that has the purpose or effect of harming competition.

**(b) Legislative guidance**

MGA/LRA did not support the proposed defence that was recommended in the draft report that was released in 2014. MGA/LRA had concerns that a defence was an unnecessary addition to Section 46 and shifting the onus proof on to the Respondent was inappropriate.

In the Final Report the Panel has decided that in place of a defence there should be legislative guidance.

Firstly, the Court will be required to determine whether there is conduct that has the purpose, effect or likely effect of substantially lessening competition in a market.

Secondly, it must have regard to the extent to which the conduct has the purpose, effect or likely effect of increasing competition in the market by enhancing efficiency, innovation, product quality or price competitiveness; and of lessening competition in the market including by preventing, restricting or deterring the potential for competitive conduct in the market or new entrant into the market.

[10] Final Report Page 339

Thirdly, where there are concerns by business, authorisations will be available to excuse a business from a section 46 prohibition and the ACCC may issue guidelines on the enforcement of Section 46, which will be undertaken with the assistance of businesses, legal personnel and consumers.

MGA/LRA submits that it supports the guidance for greater scrutiny of business activities that may determine whether a business is acting in a manner that is likely to damage the competitive process. MGA/LRA also strongly supports any business that uses its efficient, innovative talent and is a genuine price competitor, but with regard to whether there is any lessening of competition or future competition.

Former ACCC Chairman, Professor Alan Fels, recently commented that, "Harper has replaced a previous proposed defence under Section 46 with an improved set of economic criteria that can be used to distinguish between pro- competitive and anti- competitive behaviour and it is wrong to think that the line between competitive and anti-competitive behaviour should be drawn by a purpose test. What is needed is an economic test that Harper proposes"[11].

MGA/LRA has long supported the introduction of an effects test in the CCA. The Panel has justified the reasoning behind its proposed amendments to Section 46 which will meet the objectives of the CCA and at the same time broaden the scope for businesses to challenge circumstances where there is a misuse of market power. Therefore, the proposed amendments to the wording of section 46 are welcomed by MGA/LRA.

**2. Anti- Competitive Price Discrimination**

As a result of the Hilmer Report on National Competition Policy in 1993[12] the anti-competitive price discrimination section 49 of the Trade Practices Act was repealed. The decision to repeal this section of the Act has been regarded as massively disadvantageous to the independent supermarket and liquor stores industry in Australia.

Section 49 was operative between 1974 and 1995 and it had prohibited a company from discriminating between purchasers of goods of similar quality in relation to prices, discounts or allowances. After reviewing the operation of the section the Hilmer Report in 1993 concluded that the section diminished price competition and if there were anti- competitive agreements or there was

[11] Professor Alan Fels Professorial Fellow, University of Melbourne- "Harper makes case for competition overhaul: experts react" The Conversation 1 April 2015.
[12] Australian Government Independent committee of Inquiry Report ,"National Policy Review"(1993)

misuse of market power associated with price discrimination activities there were remedies available in other sections of the former Trade Practices Act.

There have been several attempts to revive Section 49 since its repeal. The Dawson Review in 2003 reviewed the need for its reprisal and rejected the proposal. One of the bases for the rejection was that Section 46 in the former Trade Practices Act was sufficient to enable prosecution for anti- competitive price discrimination. In later objections to the proposed reintroduction of Section 49 it has been clearly determined, that there are other parts of the CCA that relate to anti- competitive conduct between buyers and suppliers that can lead to prosecution if such conduct is proven. This, it was argued is provided for in Section 47 of the CCA, that deals with exclusive dealing, and section 45 that deals with agreements to substantially lessen competition.

Many submissions to the Harper Review have called for the reintroduction of a specific anti-competitive provision into the CCA. It is believed that the reintroduction of such a section in the CCA would assist small businesses to compete with larger businesses, who are able to reduce their prices to lower levels than small businesses are able to charge their customers. However, the Panel is of the same view as previous opponents of the reintroduction of specific anti- price discrimination laws and holds the view that, "price discrimination should only be unlawful where it substantially lessens competition."[13]

In the past MGA/LRA has strongly promoted a proposal to reintroduce anti- price discrimination laws. Many small businesses currently find themselves disadvantaged when large supermarket giants are able to exert their strength over their suppliers to provide goods at lower prices or risk having a particular line from their product range deleted. MGA/LRA has urged the reintroduction of price discrimination laws to align with laws in the USA and New Zealand. Despite the arguments of the continued disadvantage that results for small independent businesses in the above circumstances the Panel remains firmly of the view that the proposed amendments to Section 46 of the CCA will be sufficient to provide protection for small to medium businesses that are subject to the discriminatory activities of their more powerful supermarket rivals.

It is noted, that the proposed amendments to Section 46 of the CCA, according to the Panel, "should catch conduct engaged in by a major competitor ( a firm with a degree of substantial market power)

[13] Final Report page 351

with the purpose or effect or likely effect of substantially lessening competition"[14] The Court will need to determine by using the amended Section 46 ( as proposed ) whether the pricing activities engaged in by a large company is due to its being competitive or whether it is adversely affecting competition in the market by engaging in anti-competitive price discriminatory behaviour. Whilst MGA/LRA appreciates that changes to Section 46 in the CCA may assist in dealing with price discrimination activities we continue to support the reintroduction of the former section 49 into the CCA which would provide a more definitive ground for objection to this type of behaviour.

**3. (a) Unconscionable conduct (b) Retail Supermarkets and Liquor Industry Code**

(a) The Panel was charged with reviewing how unfair and unconscionable conduct of larger businesses might impact on smaller businesses. It is often difficult to establish whether the dealings of large businesses that are able to exercise their strength in the market place, are reaching beyond the boundaries of acceptable business behaviour. In determining whether a business has breached the standards of what would be considered reasonable business behaviour, the Courts will give consideration to whether conduct is oppressive, deliberate or harsh. In specifically establishing what might constitute "unconscionable conduct," factors to be considered might include, but are not necessarily limited to, the relative strength of the parties, the reasonableness of any requirements imposed on a smaller weaker party, whether any undue influence is used and whether the parties acted in good faith.

The Australian Consumer Law (ACL) does not provide a definition of unconscionable conduct and contracts between parties are generally considered in respect of how contracts are negotiated and whether terms have been imposed on a weaker party that are unreasonable.

The recent decision in the Federal Court[15] where Coles Supermarkets was fined $10 million and costs for engaging in unconscionable conduct with its suppliers, has provided some relief to those who have been subjected to behaviour that was not consistent with acceptable business standards. The Panel was of the opinion that the current unconscionable conduct provisions within the ACL are operating satisfactorily.

MGA/LRA well understands that the Panel is concerned with the competition process and not competitors themselves and notes the Panel's view that, "The CCA should not seek to constrain a competitor because it is big or because its scale or scope of operations enables it to innovate and thus

[14] Final Report page 351

[15] Australian Competition and Consumer Commission v. Coles Supermarkets Australia Pty Ltd [2014]FCA 1405 22 December 2014 ( ACCC v. Coles Supermarkets)

provide benefits for consumers."[16] It is also appreciated that the Panel must view the outcomes of the competitive process in the best interests of consumers. MGA/LRA does not expect amendments to the CCA that detracts from healthy competition and therefore takes some comfort in the proposed "strengthening of the misuse of market power provisions" in the recommendations of the Panel.

It is noted that the Panel makes reference to the recent decision in the Federal Court in respect of the engagement of Coles in unconscionable conduct.[17]The decision does demonstrate that the testing of the law in this matter reinforces the avenues of redress for those disadvantaged by actions of more powerful market participants.

The Panel refers to the development of Codes of Practice that could be available to provide for standards of behaviour in commercial dealings, but not at the expense of consumers. The development of a Food and Grocery Code of Conduct has already been drafted. MGA/LRA supports the development of a similar Code for the Retail Supermarket and Liquor industry. However, like many other contributors to the Review Panel, MGA/LRA seeks that such a code be a mandatory one.

**(b) A Supermarket and Liquor Retailer Industry Code**

There is no mention of a Supermarket and Liquor Retailers Industry Code of Conduct in the Final Report released earlier this year.

However, the Draft report released 22nd September 2014 does suggest that, "Codes of conduct can play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour, and are generally applied to relationships between businesses within a particular industry."[18]

MGA/LRA submits that to protect competition and the consumer, and to assist the ACCC, it is important to have a mechanism to protect against anti-competitive behaviour that can be dealt with and monitored through a mandatory enforceable industry code.

MGA/LRA strongly recommends an enforceable Supermarket and Liquor Retail Industry Code be developed and implemented to complement the legislative amendments to the CCA, so as to improve clarity and transparency within the supermarket and packaged liquor industry including;

[16] The Final Report page 285
[17] Ibid (ACCC v. Coles Supermarkets)
[18] Harper Review Draft Report September 2014, para 5.3 page 66

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

## Benefits of a Code

**The incipiency doctrine**

Each individual acquisition by Woolworths or Coles of an existing store or the site for a new store, of itself, it may be argued, has a comparatively minor impact in the wider Australian market.

The impact in a much more local market, of course, is far greater.

When added to the existing outlets of the major chains and all of their other "minor" acquisitions, it represents a steady inroad into the market share of the small players in the market, such as the members of MGA/LRA. The logical end result, of course, will be the total control of the grocery and packaged liquor markets by Coles and Woolworths. In the absence of an amendment to section 50 to

allow for informal clearances of proposed acquisitions MGA/LRA proposes the inclusion of a proposed provision into the Code, as follows:

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

Incorporating the above "incipiency doctrine" into the Code will prevent any increase in the concentration of market power in a specific area, where the anti-competitive effects are not deemed sufficient to transgress the current terms of the CCA. This is analogous to the situation in USA under the Sherman Act.
It is submitted that this measure would be a step towards ensuring the objectives of the CCA are met, and would reduce the potential for the duopoly to engage in cross-subsidising practices.

**4. Creeping Acquisitions**

A deficiency in Section 50 is its inability to empower the ACCC to investigate the cumulative effect of creeping acquisitions on the local market. Such behaviour ultimately eliminates competition and increases market share in a clandestine manner. Section 50 of the CCA, only enables the ACCC to investigate an acquisition if it would have the effect, or be likely to have the effect, of substantially lessening competition in any market. It does not have the powers to investigate or act in the case of the "cumulative effect" of the same behaviour in multiple local markets in each state.

When the legislation was amended in 2011, there was criticism of the proposed reforms to s. 50. The changes provided the ACCC with the opportunity to consider multiple markets when considering the impact of mergers over a period of time, which could include smaller mergers. However, the ACCC is not compelled to consider the impact of an acquisition in a small market. The CCA did very little to provide protection against the power of the chains to acquire smaller stores at will. The amended legislation (2011) has also done very little to strengthen the powers of the ACCC to challenge mergers, and the chains have continued to acquire smaller outlets throughout Australia. The ACCC does not have the power to investigate or act in the case of the "cumulative effect" of the chains exercising the same behaviour in multiple local markets in each State.

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

It is noted that the Panel does not support changes to the issue of creeping acquisitions but unless there are significant reforms to the CCA the larger supermarkets will grow and the smaller supermarkets will die out. Consequently, MGA/LRA continues to seek an amendment to the CCA by substituting "the effect, or be likely to have the effect" in ss. 50 (1), (2) and (3) **with "the effect or cumulative effect, or be likely to have the effect or cumulative effect…**" This would ensure that creeping acquisitions, or acquisitions by stealth, are within the scope of review by the ACCC and would prevent any further incremental gathering of unhealthy market power.

**5. Barriers to entry into the market.**

In the Final Report the Panel referred to a number of obstacles which could prevent access to market entry. These obstacles are mainly State controlled issues and were matters that perhaps could be referred to the Council of Australian Governments (COAG).

**(a) Trading Hours**

The Panel recommends that the remaining restrictions on trading hours should be removed, and where any restrictions are retained they should be limited to Christmas day, Good Friday and the morning of Anzac day. Where necessary, trading restrictions on the sale of liquor or activities such as gambling should be retained in order to provide for harm minimisation. Many States and Territories have deregulated, but South Australia, Queensland and Western Australia, with some minor amendments, have resisted total deregulation.

MGA/LRA submits that the recommendation to further deregulate trading hours in such states as Queensland, Western Australia and South Australia is counterproductive. Deregulation of trading hours in the above mentioned states, is being called for by big businesses, not consumers. MGA/LRA does not agree with this recommendation because it can only serve to enhance the market power and dominance of large corporations such as Coles and Woolworths, substantially lessening competition, reducing retail diversity and eroding consumer choice.

The Panel is of the opinion that the resistance to extension of trading hours creates a "regulatory impediment to competition by raising barriers to expansion and distorting market signals."[19] MGA/LRA does not support the views of the Panel in regard to the extension of trading hours in States that have not deregulated.

In Queensland the Queensland Industrial Relations Commission has the authority under the *Trading (Allowable Hours) Act 1990*, to determine store trading which affords small independent retailers the opportunity to trade free of any restrictions. The larger stores, such as Coles and Woolworths, can only trade limited hours due to their size and magnitude. This provides smaller independent retailers with an advantage to which they cling tenaciously for the survival of their businesses.

In South Australia and Western Australia the respective State Governments determine the trading hour's laws. In line with what it sees as a more contemporary approach, the Western Australian Government has slightly modified its views on the extension of trading hours over recent years to alter the definition of a "small retail shop" in the trading hour's legislation. Although in some defined areas in Western Australia there are proclaimed extended trading hours, overall the restrictions on trading hours remain regulated.

Although trading hours are deregulated in Victoria, NSW and Tasmania these states have all experienced the opening of increased numbers of stores by Coles and Woolworths. As they build new stores or swallow up existing ones, rather than increasing productivity by allegedly creating more jobs, what really happens is the disappearance of the local independent store and the smaller retailers that previously contributed to the economy of the region. When Coles or Woolworths move into a new region and open up a new store that trades longer hours they drain the life from the smaller stores and other surrounding businesses and the net result is loss of productivity, choice and efficiency. Businesses die and not just grocery and retail businesses. The local high street disappears, apart from the small supermarket, the local butcher, and the small bakery, the local chemist, the local professionals and the local producers all cease to exist. More and more goods are brought in from overseas and the end result is that the dominance of Coles and Woolworths increases and the community loses because there is no competition left. No economy can prosper where there is a lack of choice and diversity and healthy competition.
In a 2005 referendum in Western Australia voted firmly against changes to trading hours. Furthermore, a study recently undertaken on behalf of independent retailers in Western Australia

[19] The Final Report page 165.

revealed that 88 per cent of consumers in the metropolitan area of Perth are satisfied with the current trading hours,[20] nine out of 10 consumers were satisfied with the trading hours, and 75 per cent of survey participants in the 18-39 age group found the trading hours satisfactory.

Coles and Woolworths argue that if they are able to trade longer hours, consumers will have more opportunity to shop when they choose, there will be more competition and there will be more employment opportunities for workers. There are many differing opinions as to whether the there is any credence in what is claimed by these larger retailers.

The biggest threat to the community however, if the smaller retailers are gradually pushed out of the market, is the fact that there will not be any competition and the question arises, "what happens to the economy then?" Without choice there is no competition and without competition prices will increase and the consumer will be disadvantaged. This will be the inevitable consequence of eliminating the smaller shops that are allowed to trade for a few hours more than the two big retailers like Coles and Woolworths.

**(b) Packaged Liquor**

Independent supermarket retailers in Queensland, South Australia and Tasmania welcome the Panel's suggestion, to reduce regulatory liquor licensing restrictions on their ability to compete with Coles and Woolworths supermarkets. By ranging and selling packaged liquor, retailers, other than the two largest businesses in Australia would be able to offer consumer's more choice and allow more competition. The productivity and efficiency of Queensland, South Australian and Tasmanian independent supermarket businesses will increase, competition will be enhanced and the consumer will be exposed to retail diversity and choice if they are permitted to retail packaged liquor

In the States of Queensland, South Australia and Tasmania there are laws that prevent certain parts of the retail sector from entering the packaged liquor market. These laws are restrictive, obstructive and anti –competitive and prevent the expansion of independent supermarkets who wish to expand into an additional area of retail sales in their businesses. By lifting these restrictions there would be greater opportunities to retailers who are currently disadvantaged by the law, not to mention that there are distinct benefits for the public and the economy of the various States that are affected by out-dated laws. MGA/LRA believes it is critical to demonstrate the level of support that is given to members of MGA/LRA in other States of Australia, where liquor is sold in supermarkets.

[20] Patterson Research Group, April 2014

Any amendments to the Liquor legislation in the various States where restrictions remain will reinvigorate business confidence, create incentives for further investment, drive innovation, employment growth and inspire independent retailers to compete on a level playing field.

**(c) Planning**

The Panel found that local planning and zoning legislation lack effective economic objectives and proper consideration for competition.

However, MGA/LRA disagrees with the principle that more floor space & more entrants in a market equals more competition, this is simply not sustainable. Larger supermarkets have unlimited resources and will crowd out family owned businesses, who have limited resources, thus reducing consumer choice and lessening competition. There must be state planning and zoning controls put in place to protect competition and consumers.

If the amenity, productivity and economies of local communities are to prosper and the long term interests of consumers are to be seriously considered, then state planning and zoning legislation must be reformed, simplified and inclusive of a net community benefit test, to protect robust and sustainable competition between supermarkets and liquor stores.

In a recent article written for MGA/LRA, Associate Professor Robin Goodman[21] referred to the need for urban planners to consider a number of factors when new developments are being considered by Council, including the competition that will be generated for existing businesses. But when there are two powerful businesses entering the market who have extensive power, the town planners need to seriously consider the impact on the town centre. There is a need to consider the town centre as the centre of the community, the "Traditional main street retailing provides a reason for people to gather, a place to meet and socialise, and a chance to connect and maintain a sense of community. This is particularly so in small to medium size towns where alternative gathering places may be some distance away. The loss of a key shop in a local strip shopping centre may lead to a decline in pedestrian traffic and the eventual closure of many businesses."

In the same article Professor Goodman also made reference to how "the arrival of a Coles or Woolworths might seem initially like an economic boon to a small town, the ultimate consequences

[21] "Let's have Fair Competition Report" Master Grocers Australia 2012 Associate Professor Robin Goodman School of Global Studies, Social Science and Planning. RMIT University Melbourne

may in fact harm the local economy. The net community benefit in the longer term needs to be clearly assessed."[22]

It has been accepted in the past that it is not the role of planning laws to regulate competition.[23] It is the concept of 'Net Community Benefit' (NCB) that has been central to considerations of planning proposals by virtually all state and local government authorities[24].

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

These factors are readily quantifiable and are directly relevant to the local community's economic and social welfare. Some local authorities are considering the application of formal objective 'tests' of the NCB concept.[25]

MGA/LRA submits that the NCB test should be expanded to include an assessment of competition. This would apply where a new development has the potential to result in a level of market dominance that could have detrimental impacts on the business community and/or the social environment. Many planning outcomes would fail any NCB test on several or all of the above listed criteria. This means that local communities are disadvantaged by a reduction in retail diversity, damaged by a contraction of the local economy, employment and the loss of environmental amenity.

With the current rate of urban and regional expansion due to population growth, the number of retail planning proposals involving supermarkets is ever increasing. The increasing incidence of resident action groups and the consistently high ranking of planning issues among voters' concerns reaffirm expectations that developments should yield a net benefit to the community as well as developers. The state planning laws in many cases result in giving the larger retailers an opportunity to obtain approvals at the state level for their applications. The laws provide an opportunity for larger retailers to gain an advantage predominantly because their presence is perceived as beneficial to the

---

[22] Ibid above

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

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

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

community. However, when the planning applications are weighed against the criteria of the NCB test, this is shown not to be the case.

## 5. Enforcement and Remedies.

**A Right of action by a private litigant**

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

MGA/LRA welcomes the recognition in the Final Report that small businesses do not have access to remedies or affordable access to the justice system in contraventions of the CCA, by businesses misusing their market power. Anti- competitive behaviour has the effect of unfairly damaging small businesses and substantially lessening competition, but challenging the law with the prospect of litigation ahead is far too daunting and cost prohibitive for most small retailers.

The Panel's report recommendation for the ACCC to connect small business with alternate dispute resolution (ADR) schemes in respect of competition law issues is welcomed. Providing expedient and effective outcomes which are able to be delivered by using ADR would be welcomed. Such a system would support the operation and effectiveness of competitive markets, which in turn foster a diversity of businesses that provide for consumer choice.

At present, it is completely financially unrealistic for an independent supermarket or liquor store owner to bring an action in the Federal Court seeking relief from anticompetitive behaviour without the threat of having to pay the other party's costs, in the event of an unsuccessful application.

MGA/LRA/ wishes to strongly recommend that a "no costs order" be introduced. The reassurance of a "no-costs order" would be likely to encourage businesses to challenge situations where they believe an application to defend a particular right is justified.

Unless there is a provision implemented for a smaller business to take an action without the possibility that it will face financial ruin, then it is unlikely an action would be initiated by a small business private litigant. As in previous reports and submissions, MGA/LRA/ submits that the the Government should give serious consideration to the suggested ADR schemes as a means of encouraging genuine challenges to what are perceived as unfair practices.

**ACCC governance**

MGA/LRA does not support the Panel's Recommendation 51 of the Final Report to "improve" the governance of the ACCC. The current structure of the ACCC in respect of servicing the business needs of industry and consumers alike is more than satisfactory.

Any proposal to amend governance of the ACC would in our opinion be an unnecessary and retrograde step. In particular the needs of the small business community have been well supported in recent years and therefore, MGA/LRA questions any proposal to amend the present format, which is currently operating admirably in the interests of all parties.

The ACCC Deputy Chair is well placed to continue to support the interests of small business. The Small Business and Family Enterprise Ombudsman is a welcome role initiative and together with the work that is done by the Deputy Chair of the ACCC will undoubtedly be effective in providing for the needs of both consumers and businesses.

There has been and MGA/LRA is confident that there will continue to be a valuable process of consultation between the ACCC and the business community and, it is submitted, there is therefore no reason for the legislative changes as proposed in Recommendation 51 by the Panel.

**Conclusion**

Members of MGA/LRA have fought for many years for legislative reform of the former Trade Practices Act and now the CCA. The small independent retail sector industry has grown but perhaps for the first time it is truly vulnerable to the ever increasing strength of its major competitors. This is due mainly to the inadequacies of the law. MGA members are very clear in their opinions, they respect the competitive spirit of those who engage in fair play and they admire any business that succeeds in a difficult and demanding business environment. There will always be those retailers at any level, who will do better than others due to their particular brand of business acumen and their

creativity. This is to be encouraged and they deserve to succeed. However, if all the players operate on a level playing field then each competitor has a chance of success, no matter what the level of achievement. It is hoped that any amendments to the CCA that emerge following this Final Report will provide an equal competitive opportunity for all businesses , large and small and that the competitive process which has been so strongly promoted by the Panel will provide the opportunities for all parties to achieve success on their merit and not just their power.

We thank the Government, and the Panel once again for the opportunity to comment on this Final Report and we look forward to the next stage in the process of achieving positive outcomes.

Jos de Bruin
CEO
Master Grocers Australia
May 2015