

MASTER GROCERS AUSTRALIA/ LIQUOR RETAILERS AUSTRALIA

Submission to the Harper Competition Policy Review Panel



in response to The Harper Competition Policy Review Panel Draft Report –
released 22 September 2014

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1. INTRODUCTION

On behalf of its members from around Australia, Master Grocers Australia and Liquor Retailers Australia (MGA/LRA) wishes to commend the Australian Government for undertaking a comprehensive review of the Australian competition laws and policy, through an independent panel of four prominent Australians, led by Professor Ian Harper, together with panellists, Sue McCluskey, Peter Anderson and Michael O'Brien QC.

MGA/LRA thanks the Harper Competition Policy Review Panel ('the Panel') for the opportunity to provide comment on the findings and draft recommendations contained in the Draft Report on Australia's competition policy ('the Draft Report').

Additionally, MGA/LRA and its members thank the Panel for the opportunity to participate in the public forums held throughout Australia which provided further valuable insight into the Panel's considerations and views.

It has been over 20 years since the last substantive evaluation was undertaken into Australia's competition laws, and in that period, the economic landscape in this country has changed to the extent that amendments are needed to facilitate economic growth, and stimulate innovation and productivity.

Consistent with the Panel's remit of assessing whether the Competition and Consumer Act 2010 (CCA') is "fit for purpose," it is essential that Australia's existing competition policy and laws be reviewed to determine their relevance in a country that has fast become part of a global economy, with its nearest Asian neighbours growing into substantial economic powerhouses, driven by an emerging wealthy middle class. Additionally, Australia faces the challenge of an ageing population that brings upon it serious economic challenges for the future.

The primary purpose for the Panel is to ascertain what will be the best economic drivers to serve the future growth and prosperity of the Australian economy. It is essential to understand that a healthy, small business sector is vital to enable a healthy and engaged competitive economy. Small businesses do not have the massive financial resources of big businesses, consequently their wealthier competitors are able to saturate the market place and take advantage of their market power with anti-competitive behaviours.

Small business is a vital component of our economy and its current strength and potential is worthy of legislative support. Recent research commissioned by American Express and supported by the Federal government at a recent launch of a campaign, "Shop Small," reveals that Australian consumers strongly support small businesses and believe that they make a major contribution to the community. The research showed that more than 80% of consumers believed that small business creates job opportunities, they provide easy access to products without the hassle of travel, and they support to their local communities. Over 90% of those surveyed would be disappointed if small businesses closed. This support for small business is a clear indicator of the vital role played by this sector and reinforces the need to ensure that it is afforded the required legislative protection.

"The ACCC is concerned to ensure that further acquisitions [by the national chains] do not ultimately lead to retail or indeed wholesale industry structures that may adversely affect the competitiveness of these markets or reduce choice for consumers."

(Mr Rod Sims, Chairman, ACCC, media release, 14 June 2012)

In its initial submission to the Review Panel, MGA/LRA raised a number of compelling concerns that are currently gripping the supermarket and liquor store industry from the perspective of independent retailers. These concerns formed the basis of a series of proposed amendments to the Competition and Consumer Act 2010 (CCA') to provide fair competition in the market place for independent supermarkets and liquor stores around Australia.

¹ "The Australian's Attitudes to Small business" conducted by Galaxy Research –September 2014-"Shop Small" founded by American Express. www.shopsmallaustralia.com

The suggestions and proposals in our initial submission were underpinned by a need to ensure healthy and robust competition in the supermarket and liquor industry sector, and to promote the longevity of consumer welfare.

In our response to the Draft Report, MGA/LRA will:

1. Briefly reflect on the issues identified in our initial submission which warrant legislative change;
2. Outline our initial recommendations;
3. Reflect on the Panel's findings and draft recommendations, and juxtapose these against our initial recommendations for reform; and
4. Provide comments and suggestions for the Panel for inclusion in the Final Report.

The legislative provisions governing competition law in Australia need to be effective, fit for purpose, and adaptable to the changing commercial landscape. Changes should ensure a high quality, enabling environment for businesses of all sizes with low barriers for entry, underpinned by the overriding principle of promoting consumer welfare.

The Australian supermarket and liquor industry is a highly concentrated market and the Panel has rightfully identified this sector as the subject of much conjecture and angst due primarily to the extent of the market power held by Coles and Woolworths.

2. MINISTER FOR SMALL BUSINESS AND COMPETITION POLICY, HON BRUCE BILLSON MP

2.1 Competition Policy Review International Conference in Canberra on 23 October 2014.

In his address to the Competition Policy Review International Conference Canberra in October this year, Minister Billson acknowledged the need for a full review of Competition Policy and Competition Laws to ascertain their "fitness for purpose", for Australia and all Australians to prosper into the future.

The following quotations from that speech endorse this view and enhance the difficulties that are currently being faced by small businesses in Australia. This submission reflects the values and principles stated in this speech and MGA has extracted a number of quotations that endorse our views about the need for the review of competition laws so that all Australians, competitors and consumers alike, can benefit from the outcome of changes to our competition laws:

WHY A ROOT AND BRANCH?

"It is an area of policy which, with the policy right settings, can do so much to promote innovation and choice, to energise enterprise in our economy and deliver real and durable benefits for consumers. This is why a 'root and branch' review of our competition policies, laws and institutions is a central element of the Government's Economic Action Strategy."

THE HARPER COMPETITION POLICY REVIEW

"It has been advocated, instigated and implemented by clear eyed and forward looking political leadership, in recognition of its important potential contribution to economic and consumer wellbeing."

THE CHALLENGE

“The challenge for parliamentarians is enacting legislation that seeks to anticipate the innovation and dynamic nature of our future economy and business conditions.”

TERMS OF REFERENCE – THE PANEL

“This is why I framed the panel’s work through the terms of reference to focus on the competition tool kit’s fitness for purpose, assessed against economic vitality and productivity, and durable consumer benefits.

While I of course have a commitment to the well-being of the small business sector, I understand that competition policy should be focussed on nurturing fair and healthy markets, working for the ultimate benefit of consumers. For me, this is about policy settings that allow efficient business – big and small – to thrive and prosper, where the contest for market share and margins is based on merit, not on the exercise of muscle.”

THE HARPER REVIEW

“The Harper Review will help us to identify ways to build our economy and promote investment, growth, job creation and durable benefits to consumers.”

BUSINESS COMMUNITY

“We need our business community to have the confidence to invest and innovate and to take considered commercial risks. We want our businesses – big and small – to thrive and prosper.”

COMMITMENT TO COMPETITION LAW REFORM

“I want to emphasise though, that we are absolutely committed to competition reform, and we are hoping that the Harper Review’s final recommendations are as robust as possible.

This will help to ensure that the Government and community is fully-briefed on problems needing solutions, the economic and consumer benefit drivers that shape the case for change.

As I mentioned earlier, there are many challenges that our economy faces now and in the future. This is a once in a generation opportunity to shape the competition policy foundation for the next generation and beyond.”

THE GOVERNMENT’S VISION – ALL BUSINESSES – BIG AND SMALL CAN THRIVE

“The Government’s vision for competition is one where efficient businesses, big and small, can thrive. Where there is reward for astute entrepreneurship. Where there is confidence and predictability in the law and institutions. Where this healthy competitive environment delivers durable benefits to consumers in terms of value and choice. To encourage innovation that drives the development of products and services that meet the needs and ambitions of the market here and abroad.”

3. ABOUT MASTER GROCERS AUSTRALIA/ LIQUOR RETAILERS AUSTRALIA

Master Grocers Australia and Liquor Retailers Australia (MGA/LRA) is the peak national employer industry organisation representing the independent sector of the supermarket and liquor retail industry. MGA/LRA represents nearly 2,500 independently owned and operated supermarkets and liquor stores (fully paid members) throughout Australia.

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

MGA/LRA is a registered employer organisation and represents its members in the areas of workplace relations, Legal and HR, training and compliance, and government relations.

Australia's 4000-plus independent grocery and liquor retailers employ 115,000 people and generate annual sales in the vicinity of \$14 billion and together, constitute the major competition for the major chains.



4. EXECUTIVE SUMMARY

Consumers play an integral role in creating and maintaining competitive markets. Competition policy and the CCA must preserve consumer welfare, and maintain robust competition. 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".

In its initial submission to the Panel, MGA/LRA comprehensively addressed the competition law issues and inadequacies that are adversely affecting independent supermarket and liquor store owners. These identified problems provide the foundation for a number of proposed amendments to the CCA which MGA/LRA submits will enhance competition in this important industry, and promote the long term interests of consumers.

In its Draft Report, the Panel proposed 52 recommendations in an effort to ensure Australia's competition policies, laws and institutions remain 'fit for purpose', especially in light of the changing circumstances of the Australian economy.

MGA/LRA reiterates the importance of promoting healthy, robust competition to ensure consumer welfare, the livelihood of small businesses and the independent retail sector. Independent supermarkets and liquor stores offer retail diversity and choice, innovation and support for the local communities within which they operate.

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

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

1. Identifies the prevailing issues which are gripping the independent supermarket and liquor store sector.
2. Demonstrates the unique nature of Australia's grocery market sector, particularly in terms of its hyper-concentration.
3. Establishes the nexus between protecting the independent supermarket and liquor store sector, and promoting competition and consumer welfare.
4. Reflects on the proposed reform to s.46, and expresses its views and concerns on the reframing on the provision, and the breadth of the defence.
5. Provides justification for establishing a mandatory Retail Supermarket and Liquor Code, which can complement the CCA and give guidance to the ACCC on specific industry issues (e.g. predatory capacity, anti-competitive price discrimination, creeping acquisitions, mandatory pre-notification to the ACCC for any merger or acquisition) when investigating potential breaches.
6. Explains the need for State planning laws to have due regard to the state of competition in that market and consider the detrimental impacts on the business community and/or the social environment with any proposed development.
7. Highlights that the deregulation of retail trading hours is yet another competitive advantage for the duopoly, and not based on cogent evidence emanating from the areas which have regulated trading hours.
8. Emphasises that state packaged liquor laws are anti-competitive for small businesses and do not align with the intent of Australia's competition laws.
9. Comments on the proposal for improving access to justice, particularly for small businesses.

5. THE INITIAL SUBMISSION BY MGA/LRA

On 10 June 2014, MGA/LRA made a submission to the Panel in respect to the Issues Paper seeking a review of Australia's competition laws. The submission evinced the concerns of MGA's 2500 members in the supermarket and liquor retailing industry, and proposed a number of reforms to ensure robust competition, the maintenance of consumer choice and retail diversity, and providing an even playing field in this important market.

These prevailing issues were substantiated with real-life examples of existing and former retailers being impacted by the inadequacy of the existing competition laws which have fostered the predatory behaviour of Wesfarmers and Woolworths.

5.1 MGA Submission – Identified industry problems

The Australian supermarket and liquor landscape has undergone significant change to the extent that there are now two prevailing and overly dominant retail giants in the marketplace which are threatening the sanctity of competition in this sector. The corollary of the growing market share of both Coles and Woolworths will be the loss of employment, a decline in productivity, and the diminishment of choice and retail diversity for consumers.

The unabated growth of the duopoly to the detriment of independent supermarkets and consumers has arisen due to the following factors:

- Unwarranted market saturation, particularly in areas where consumers are already well-served for their grocery retailing needs; Examples were provided with respect to the areas of Bathurst (NSW), Karingal (Vic), Hurstville (Vic), Water Gardens (Vic), Pakenham/Officer (Victoria), Werribee/Point Cook (Victoria), Narre Warren/Berwick (Victoria), Toowoomba (Queensland), Northern Gold Coast (Queensland), Sunshine Coast (Queensland) and Robina (Queensland), and an analysis of the Greater Launceston (Tas) catchment area was supplied. These examples all portrayed the hyper concentration of Coles and Woolworths in markets throughout Australia which does not enhance nor promote competition in Australia, but instead merely serves to increase market power.

- The ability for the duopoly to cross-subsidise their underperforming sites when acquiring sites with significant premiums (either greenfield sites, existing leases, or sites for redevelopment). In this instance, the chains are able to cross-subsidise and mitigate unviable large stores through their extensive network of stores and/or revenue from related retail entities. The premium paid to acquire underperforming stores can then be offset by their ability to lessen competition and consequently not have to compete on price in the medium to long term.
- The inherent problem of attempting to prove intent with respect to a misuse of market power, including predatory pricing, when the effect of substantially lessening competition is overt and clear. Particularly in the context of predatory pricing, proving such an anti-competitive practice remains problematic due to the initial signs of predatory pricing seemingly appearing pro-competitive. Additionally, there is an overriding difficulty in acquiring clear, cogent evidence of an anti-competitive purpose to uphold such an allegation.
- The inability of the Act to assess the cumulative effect of acquisitions in determining whether a merger or acquisition will substantially lessen competition. Anti-competitive acquisitions were blocked in Wallaroo (SA), Karabar (NSW) and Glenmore Ridge (NSW) because the proposed acquisitions would likely result in a substantial lessening of supermarket local competition, however the action administered by the ACCC did not establish a new direction and reiterated the limited effect of s.50.
- State and Territory legislation providing avenues to enhance the market share of both Coles and Woolworths e.g. planning laws (growing control of floor space used as an instrument of market power), the steady deregulation of trading hours (e.g. in Queensland, Western Australia and South Australia), and discriminatory packaged liquor laws (e.g. in Queensland, South Australia and Tasmania).
- Predatory capacity (in the same vein as predatory pricing) in the context of building oversized stores, or acquiring an existing business, freehold or leasehold site for development, in small local markets where the population is already well serviced by other retailers, even including the same retailer. This ultimately results in the closure of competing smaller businesses or deterioration in the services offered, leading to further market concentration and reduced competition. Examples outlined in the submission which reflected this issue included Bermagui (NSW), Bright (Vic), Churchill (Vic), Shearwater (Tas) and Macksville (NSW). In this instance, there is no conceivable justification or requirement to consolidate their future position in the market. The cumulative effect of this pre-emptive behaviour prevents, eliminates and deters competition, but continues to be justified under the existing form of the CCA.
- “Bundling” schemes such as petrol shopper dockets by which grocery purchases earned discounts from specified outlets for motor fuel purchases, are designed to alter consumer behaviour by increasing the willingness of consumers to purchase not only products from either Coles or Woolworths, but also to purchase fuel from specified service stations where the credits can be claimed.
- Anti-competitive price discrimination in which a supplier sells to certain customers at one price, and to other customers at higher prices, unrelated to economies of scale. Suppliers who refuse to deliver anti-competitive discriminatory (lower) prices to the big retailers are at risk of retribution such as having a product line or their entire range deleted. The price advantage obtained delivers a significant benefit at the beginning of the retail supply chain which can never be recovered by a competitor. This anti-competitive advantage also extends beyond goods purchased for resale. It applies also to all other associated costs of doing business, such as but not limited to, transport, electricity, refrigeration and air-conditioning installation and maintenance, cleaning services, staff training, staff uniforms, store fit out, and in-store consumables. These advantages simply assist in growing market share and do not result in increased productivity or consumer welfare levels.

The economic consequences of the market power and dominance of Coles and Woolworths was analysed in our initial submission, including a discussion as to the impact on consumers, business costs, and local business communities, all of which has led to an exploitation of both the economies of scale and the economies of scope. The anti-competitive practices of the duopoly distort patterns of consumption, production, investment and resource use, and have adverse effects on economic efficiency, distributional equity and social welfare.

Consequently, there is an impending need for legislative reform.

5.2 Impact on Consumers

MGA/LRA recognises that the overarching concern of the Panel is to promote and enhance consumer welfare. The independent supermarket sector welcomes competition, but only on an even playing field which is devoid of anti-competitive behaviour.

Significant levels of market concentration result in two unwanted scenarios:

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

If the market share of Coles and Woolworths continues to grow and independent supermarkets are forced to close, consumers will be left with no genuine choice, and at the mercy of a duopoly with no real effective downward pressure on prices. Additionally, producers, suppliers and service providers will also face very limited buyers for their products and services. Once competitors are driven out of a market or they are significantly weakened, prices will increase because there will be no competition.

When Woolworths or Coles negotiate with any supplier of goods or services they demand and receive the best price due to their size. While suppliers of goods or services are able to use the chains' volume to gain economies of scale within their own sectors, they then have to make their profits on the balance of goods and services sold to other customers at higher prices. Thus the gain to Woolworths and Coles is in fact borne by other businesses, and results in the customers of these smaller stores paying higher prices due to the anti-competitive conduct.

The growing role of private labels within Coles and Woolworths will also have the long term detrimental effect of increasing retail prices and decreasing diversity as they form part of a strategy to dominate the supply chain, thus reducing the viability of branded products. The volume sold gives the chains more bargaining power which enables them to achieve higher margins. This has adverse effects on dynamic efficiency and the ability to invest and undertake new product innovation. This conduct, like predatory pricing, appears to be pro-competitive on its face and benefit the consumer in the short-term, however when the margins of suppliers are squeezed too tight, there is little scope to innovate and therefore consumer welfare ultimately suffers through a lack of retail diversity.

It is the contention of MGA/LRA that the recommendations proposed in the reply submission will maintain the longevity of independent supermarkets and encourage new entrants into the market. Independent supermarkets offer difference and innovation, and this can only be facilitated by reforms to Australia's competition policy.

5.3 Recommendations Listed in MGA/LRA's Initial Submission

The recommendations proposed by MGA/LRA in the submission made to the Harper Competition Policy Review Panel, on 7 June, are designed to protect the welfare of consumers and businesses in the supermarket and liquor retail sector, whilst ensuring robust competition and increased productivity.

These recommendations were as follows:

TYPE	ISSUE	RECOMMENDATION
Misuse of Market Power: s.46(1)	The existing prohibition against the misuse of market power requires the existence of a purpose or intent to substantially lessen competition, thus creating a high evidentiary burden.	The test for proving a misuse of market power should be amended to prohibit behaviour of a corporation with a substantial degree of market power that also has the effect or likely effect of substantially lessening competition.
Anti-competitive price discrimination: s.46(1AA)	Similar to above, proving purpose or intent is extremely difficult. Whilst the duopoly may be providing products at heavily discounted prices, there is an insurmountable detriment incurred as a result of such conduct; namely to the quality, range and service levels in the local area. Thereafter, diversity suffers and customer satisfaction declines.	The test for proving anti-competitive price discrimination by a corporation with a substantial share of the market should be satisfied by including; “that the behaviour has effect or likely effect of resulting in one or more of the practices,” outlined in ss.46(1AA)(a) to (c).
Predatory Capacity	Major chains open large stores in small markets which do not necessitate such an opening. The store can conceivably run at a loss, and therefore it is subsidised across the enterprise until competitors are forced to close. Alternatively, the corporation is already represented in the area and therefore consumers are already well serviced.	Implement a new prohibition following s.46(1AA) which prevents a corporation with substantial market share from acquiring an existing store or land (freehold or leasehold), or building a new store, in circumstances where the corporation has a reasonable degree of retail representation, and the conduct has the purpose, effect or likely effect of resulting in one or more of the practices outlined in ss.46(1AA)(a) to (c).
Reversal of the Onus of Proof: s.46	The onus of proving that conduct breaching s.46 is borne on the party alleging the contravention. Given the size and market power of Coles and Woolworths, this is an unreasonable burden.	A corporation with a substantial degree of market power bears the onus of proving that a proposed acquisition of a store or site (to build a store), or its pricing behaviour, does not offend s.46.
Creeping Acquisitions: s.50	The CCA does not empower the ACCC to investigate and consider “the cumulative effect” of past acquisitions in the local market or multiple local markets. In essence, there is no provision to take into account previous acquisitions when reviewing the competitive effect of a subsequent transaction. The legislation only requires an analysis of the proposed acquisition itself.	Amend s.50 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 will therefore facilitate an investigation of the “macro” market.
Supermarket and Liquor Retail Industry Code	The retail supermarket and liquor industry in Australia is unique in comparison to overseas experiences, and therefore, the heavy market concentration makes it pertinent to introduce a mandatory industry code.	Implement a mandatory supermarket and liquor retail industry code which can control and direct a number of activities related to the industry, and redress the many specific problems identified in MGA/LRA’s submission.

TYPE	ISSUE	RECOMMENDATION
Pre-notification of proposed merger or acquisition	There is no mandatory pre-notification requirement for mergers or acquisitions in Australia. Instead, parties are only “encouraged” to advise the ACCC of an acquisition if they meet the “notification threshold” as established by the ACCC.	Require corporations with a substantial degree of market power to pre-notify the ACCC of any proposed acquisition or merger, including existing businesses, new leases or greenfield developments.
Divestiture: s.81	The Court may order for divestiture of any shares or assets acquired in contravention of s.50. The existing scope of s.50 is not wide enough in that pre-notification is not a requirement.	Introduce divestiture as a penalty for failing to pre-notify the ACCC of a proposed acquisition or merger, including existing businesses, new leases or greenfield developments.
Trading Hours	Total deregulation may, on its face, appear to benefit the consumer, however this is just another mechanism which increases the market power of Coles and Woolworths.	Maintain existing regulations on trading hours to facilitate the continued prosperity of the independent retail sector, and ensure that the market power of the duopoly is not unnecessarily increased.
Packaged Liquor Laws	Queensland, South Australian and Tasmanian packaged liquor laws are discriminatory, e.g. in Qld., packaged liquor can only be sold by commercial hotel licensees. This option is and can easily be exercised by Coles and Woolworths who can thereafter set up detached bottle shops which are prevalent throughout the State.	Deregulate the liquor law provisions to enable supermarkets in Queensland, South Australia and Tasmania to sell packaged liquor.
Right of action for private litigants	The associated costs to initiate a private action for breach of the CCA are overly prohibitive, even though a legitimate cause of action exists.	Small businesses that fall below a determined size be provided with an opportunity to initiate an action for relief, with assurances that the applicant could seek a “no costs” order.

6. THE DRAFT REPORT BY THE PANEL

After receiving over 350 submissions, the Panel has expressed a number of views and recommendations for reform to the CCA.

The Draft Report states (pg. 38) that, in guiding its consideration of whether the CCA is fit for purpose, the Panel has asked the following questions:

- (a) Does the law focus on enhancing consumer welfare over the long term?
- (b) Does the law protect competition rather than individual competitors?
- (c) Is the law as simple as it can be consistent with its purpose?
- (d) Does the law strike the right balance between prohibiting anti-competitive conduct and allowing pro-competitive conduct?

In addition to these criteria, the Panel also states that ‘the language of the law should be clear to market participants and enforceable by regulators and the courts (pg. 187).

The Panel made 52 Draft Recommendations and reiterated that the law is designed to protect competition, not competitors, and any assessment should fundamentally consider the promotion and enhancement of consumer welfare.

MGA/LRA has reviewed the Draft Report, and will take this opportunity to make comments and further recommendations which will aid the Panel in achieving its objectives.

6.1 A competition Policy that is fit for purpose

MGA/LRA submits that a competition policy focussing on making markets work in the long term interests of consumers is of paramount importance. A prosperous Australia requires engaged Australians to drive the direction of the economy, not just big businesses. This means facilitating the entry of highly motivated entrepreneurs that have the incentive to invest in their ideas and vision into the market.

If there is no change to current competition laws that presently allow the two giants, Coles and Woolworths, to continue their unabated growth in supermarkets and liquor stores, then the drive and aspiration for entrepreneurs to innovate will dissipate, and investment opportunities in new businesses will erode. This is clearly not in the best interests of the consumer, nor does it enhance the welfare of Australians.

Just as the Panel consistently maintains in its Draft Report that the CCA is not designed to protect individual competitors, competition policy should not be an instrument for big businesses to thrive at the expense of small and independently owned businesses. Consumer choice and retail diversity is essential and is a consequence of strong competition policy. The Australian economy relies upon all businesses large and small to have the confidence to innovate and invest in their businesses to efficiently deliver products and services to the consumer.

Competition laws must stop big businesses such as Wesfarmers and Woolworths from misusing their market power with anti-competitive behaviours that can deflate entrepreneurial investment and substantially lessens competition.

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

6.2 Competition v Consumer

The Panel has made it abundantly clear in its Draft Report and in the public forums that the CCA must protect competition, not individual competitors, and the consumer welfare is paramount. But it is unclear how these priorities are to be ordered in this framework.

By obviating s.46(1AA) and removing any remnants or reference to “competitors”, there is a tendency to assume that otherwise anti-competitive practices, particularly in the supermarket and liquor store industry, will be permitted, provided there is some form “public benefit” or enhance of consumer welfare. Presently, this is facilitated through the authorisation and notification processes, which allow for exemptions from Part IV.

MGA/LRA contends that the Panel should not lose sight of s.2 which promotes the Act as the bastion for the welfare of Australians, and not consumers specifically. In *Qantas Airways Ltd [2004] A Comp T 9 [at 180]* the Tribunal reinforced the fact that public benefits were not limited to any particular type of public benefit:

‘The authorisation provisions of the Act, unlike those of Pt IV, are not solely concerned with the promotion of competition or the achievement of a socially efficient allocation of resources. The test for authorisation does, after all, provide for a balancing of public benefit against anti-competitive detriment, which necessarily calls on us to consider policy imperatives and broader social values and balance those against competition concerns.’

Therefore, the Courts themselves have considered that the operation of the CCA/TPA necessarily requires a consideration of broader notions of public benefit, beyond purely economic welfare. There is therefore no derogation from the essence of the CCA to consider these broader values, and therefore reflect on the impact on the community and on Australians generally, when assessing the scope of the prohibitions in the CCA.

6.3 Protecting Competition by Safeguarding Competitors

The CCA can best protect competition by maintaining a range of competitors who are protected from anti-competitive conduct. Existing firms and potential new entrants may be deterred from competing vigorously in Australia through the acquiescence of unilateral anti-competitive conduct. This consequently may lead to a reduction in economic growth, employment and innovation, with consequent impacts on economic welfare.

A broad market is critical so consumers are offered different product price-quality packages. Anti-competitive price discrimination, predatory pricing, and other tactics which result in sufficiently low prices for goods may deter rivals from competing or entering into the market. Therefore, rather than the law attempting to dictate how the market should operate, it instead should ensure that customers have the opportunity to decide which products/supplies best meet their needs.

The independent supermarket sector strives to compete in non-price competition. That is, while these businesses may not have the ability to increase sales by offering lower prices, instead they attempt to generate sales by differentiating the goods in question to make them more attractive to consumers. Non-price competition is a key mechanism for independent business to compete with the chains. However, when larger corporations engage in predatory pricing or anti-competitive price discrimination, the ability for these smaller businesses to compete in non-price competition is severely hindered, thus harming competition. Once the smaller businesses are squeezed out, the result is much higher, supra-competitive pricing for consumers. Therefore, not only are these smaller competitors essential for innovation in the industry, they also play a critical role in ensuring that prices are not increased to unwarranted levels in the future, thereby keeping the competitive market dynamically efficient and alive.

7. MGA/LRA RESPONSE TO THE DRAFT REPORT

For the Australian economy to truly prosper, small businesses must be allowed to compete on a level playing field. Prosperity for all Australians can only be generated with a fully engaged community – not just big businesses.

The recommendations proposed by MGA/LRA are designed to achieve the relevant objectives of competition policy and the CCA.

The recommendations are not premised on the need to protect competitors, and the Panel has made it abundantly clear that the CCA (and competition policy) is not designed to support a particular number of participants in a market or to protect individual competitors. Instead, by maintaining the independent sector in the supermarket and liquor store industry, this will ensure continued choice for consumers and the continued facilitation of competition. The proliferation of the duopoly will lead to the extinction of independent supermarkets, the elimination of choice for customers, and the power to dictate processes to the detriment of consumer welfare

We need competition law reform to protect the long-term interests of consumers; that is, ensuring retail diversity, choice and genuine competition.

MGA/LRA submits that Australia's competition law, as it stands today, is not an adequate tool to drive a balanced and competitive economy which includes both big and small businesses, that is a beacon for innovation, certainty and investment for the benefit of consumers, towards a prosperous Australia for all Australians.

7.1 Australia's Grocery Market Sector – a truly unique picture

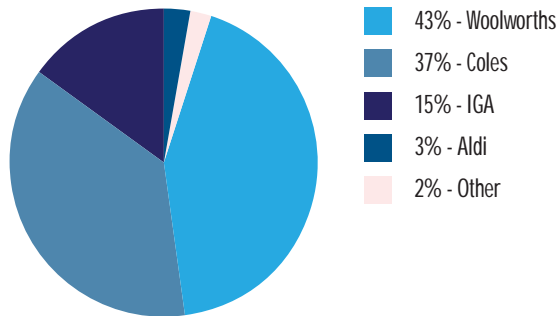
The Panel expressed the opinion that 'Australia's grocery market is concentrated, but not uniquely so' (p 181). The Panel stated that estimates of market share and international comparisons are fraught, and there is no single 'true' measure to ascertain market share. Despite this statement, the Panel relied on figures from the ACCC's 2008 Grocery Inquiry Report to reinforce its contention that the level of market concentration was not a cause for concern and did not, of its own right, prevent competition.

MGA/LRA challenges these figures on the basis of the statistical representation of market shares in other countries which were supplied in our initial submission:

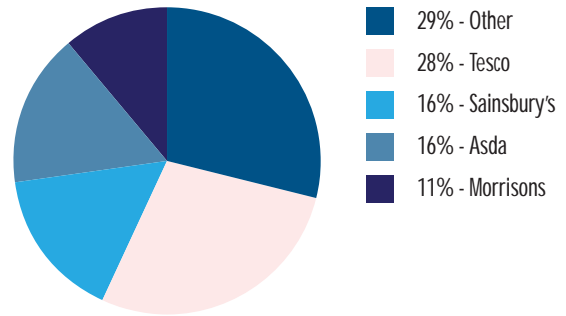
The following tables² indicate the comparative share of the grocery markets in Australia and overseas. In Australia, although there are 4 major retailers, 80% of the market share rests with Coles and Woolworths. There are significant differences in the market share of strong retailers in other countries around the world. In the USA, the largest supermarket retailer is Walmart and the chart below indicates it has 25% market share. In the United Kingdom, Tesco, which is the largest retailer, has a 28% market share and China has five large retailers holding 35% between them.

² The Conversation Media Group, *Fact check: is our grocery market one of the most concentrated in the world?*, 12 August 2013

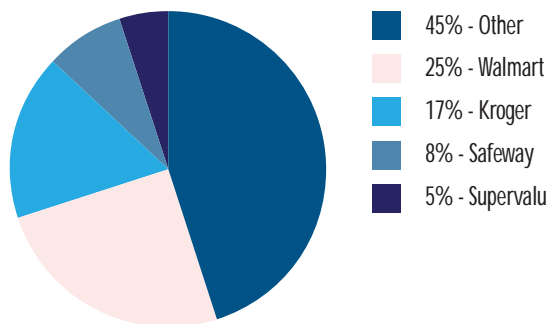
Australian food retail sector



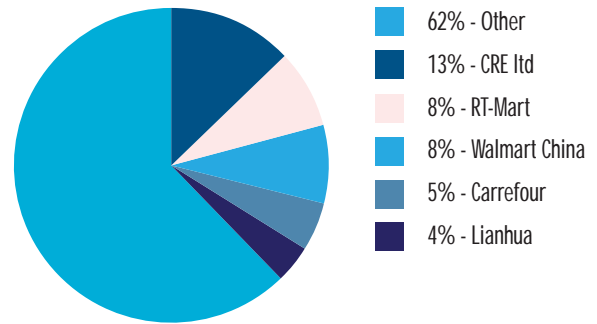
United Kingdom food retail sector



United States food retail sector



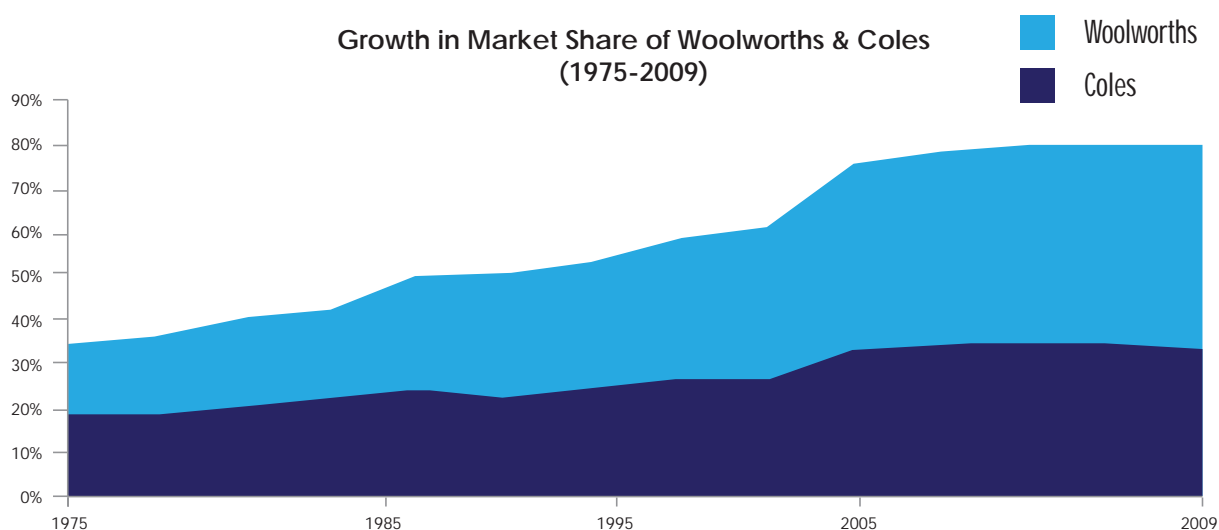
China food retail sector



In fact, the term 'hyper-concentrated' is coined by economists to describe the level of market concentration in Australia's grocery and packaged liquor sector. The high market share concentration has been fostered through the adoption of market saturation strategies which crowd out existing retailers and create a barrier to new entrants from entering the market.

As documented in our earlier submission, the following diagram sourced by Accenture Australia³ illustrates the growth in market share of Coles and Woolworths from 1975 to 2009. Increased store openings and acquisition of sites by Coles and Woolworths will translate into further market share growth, pushing their market share beyond 80 per cent with the prospect of further growth in the coming years.

³ Accenture Australia, *The Challenge To Feed A Growing Nation*, November 2010, p. 27



Accenture Australia⁴ noted :

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

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

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

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

The growth of market power of Coles and Woolworths has taken place over many years, starting approximately four decades ago when together they held approximately 34 per cent of the Australian grocery market share.

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

⁴ Ibid. p. 26

7.2 MISUSE OF MARKET POWER – SECTION 46

The Panel has proposed an amendment to s.46 in its Draft Recommendation 25:

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 Panel also proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- (a) would be a rational business decision by a corporation that did not have a substantial degree of power in the market; and
- (b) the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

The introduction of an effects test into s.46 and a reversal of the onus of proof align with our recommendation to facilitate robust competition and eliminate anti-competitive conduct.

MGA/LRA completely supports an “effects test” as it will ensure that whatever type of power is exercised – market power, financial power, or some other power – if it causes the prohibited effect, it will be captured by the provision. It is also anticipated that the breadth of the provision will capture a range of anti-competitive behaviours, such as predatory pricing, predatory capacity and anti-competitive price discrimination.

We note however that the reframing of s.46 centres on conduct that has the purpose, effect or likely effect of “substantially lessening competition.” This derogates significantly from the current wording which, despite requiring intent/purpose, is directed at proscribing purposes which are:

- (a) eliminating or substantially damaging a competitor or 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 premise of this realignment according to the Panel is to bring s.46 into line with other prohibitions by focusing on protecting competition and not competitors, and to enhance the long-term interests of consumers. Therefore the focus of inquiry is shifted away from the “misuse” of market power, and onto the effect of specific conduct on competition in the relevant market. MGA/LRA notes however that subsections (b) and (c) are already focused on competition rather than individual competitors, and therefore there is no need to remove this wording.

The term ‘substantial’ has been variously interpreted as meaning real or of substance⁵, not merely discernible but material in a relative sense⁶ and meaningful⁷. In applying the concept of ‘substantially lessening competition’, Justice Smithers held⁸:

‘To apply the concept of substantially lessening competition in a market, it is necessary to assess the nature and extent of the market, the probable nature and extent of competition which would exist therein but for the conduct in question, the way the market operates and the nature and extent of the contemplated lessening.’

⁵ *Trade Practices Legislation Amendment Bill 1992, explanatory memorandum, paragraph 12*

⁶ *Australia Senate 1992, Debates, vol.5157, p 4776*

⁷ *Rural Press Limited v Australian Competition and Consumer Commission [2003] HCA 75 at 41*

⁸ *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd [1982] FCA 178; (1982) 64 FLR 238; (1982) ATPR 40–315, at 43,887*

From the standpoint of s.50, the ‘substantially lessening competition’ (‘SLC’) test has generated significant evidentiary issues, particularly in light of the standard of proof required to establish the counterfactual. In the first instance decision of Emmett J in the Metcash case, his Honour established a two stage process for the SLC test:

1. it is more probable than not that a particular counterfactual will emerge if the acquisition does not proceed; and
2. compared to that counterfactual, there is a real chance (which may be less than 50%) that there will be a substantial lessening of competition if the acquisition proceeds.

On appeal, Buchanan J noted that the application of a “real chance” standard, being less than the “balance of probabilities” standard, seemed ‘a strange, and unsatisfactory, result’ as ‘the Court may be required to find the statutory prohibition operative when, in all likelihood, the suggested possible effect on competition will not occur.’

He expressed the view that both stages of the test should involve proof on the balance of probabilities, rather than the “real chance” test.

Yates J noted that if “likely” is taken to mean “a real chance” in the context of s.50, then it is difficult to see why that standard should not apply to all elements of the test, rather than having different standards of proof for the first and second limbs, as is the case in Emmett J’s test.

The difficulty associated with the SLC test, and therefore a potential issue with the revised s.46 is being required to assess the future likelihood of something occurring in entirely hypothetical circumstances, and determining the extent of market power in circumstances where market power is already being exercised and has altered the observed market responses from what they would have been under normal ‘competitive’ conditions.

Additionally, this deviation from competitor to competition presents a number of practical issues:

1. If a corporation with a substantial degree of market power enters a market which has one supermarket, and the corporation’s presence results in the closure of that supermarket such that there has been a replacement of one supermarket for another, is this behaviour captured by the proposed new s.46?
2. Does s.46 cover the “means” of obtaining market power, rather than the result? This is particularly critical in the supermarket and liquor store sector where land-banking is a serious issue in respect of growing market share.
3. What is considered to be the specific “conduct” that lessens competition? Creeping acquisitions are major concern in this industry, and therefore will each acquisition need to be assessed individually, or can systematically buying sites or acquiring the leasehold/freehold be treated as a single course of conduct?

MGA/LRA therefore would like to see the inclusion of the term ‘substantially damaging a competitor’ so that the provision reads:

‘if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition or substantially damaging a competitor in that or any other market.’

MGA/LRA notes the Panel’s request for further submissions on the scope of the proposed defence. Although an introduction of an effects test into s.46 is a welcomed proposal, the strength of this prohibition will rely on the nature and extent of the defence. The Panel has introduced the defence to mitigate concerns about over capture and to minimise unintended impacts from any change to the provision that would not be in the long term interests of consumers.

MGA/LRA understands through its attendance at the various public forums throughout Australia that the Panel’s intention is to make the defence as broad as possible to avoid legal “loopholes” or technicalities being argued to circumvent the prohibition.

From the perspective of the supermarket and liquor store industry, the defence is riddled with unknown variables. The notion of ‘rational business decision’ is a nebulous concept which needs to be given significant consideration. In particular, the following comments are made:

1. Would it be “rational” for a corporation to open a store but have it operate at a loss initially, with the expectation that the gross profits will improve?
2. Will an assessment be different with a corporation with one store as compared to a corporation which has multiple stores?
3. Is a corporation’s capacity to cross-subsidise its stores a factor for consideration?
4. What is considered to be a “good” investment, and what individual factors will be taken into account? That is, will there be a criteria for ‘model’ and ‘rational’ business decisions in respect of each situation?
5. Will a corporation with some market power, be treated differently from a corporation with no existing market power?

The “long-term interests of consumers” is another amorphous concept which may involve an assessment of the future likelihood and effect of something occurring in entirely hypothetical circumstances, and, standing in the shoes of the objective consumer to judge whether or not the conduct is in the consumer’s best interests. This, it appears, will require a distinction between short-term anti-competitive purposes and long-term pro-competitive objectives, and achieving a careful balancing act. Additionally, questions are raised as to whether or not the assessment is solely based on the economic efficiency of the conduct in question.

In consideration of the Panel’s comments in the public forums, and the specific issues which are directly pertinent to the Australian supermarket and liquor store landscape, MGA/LRA submits that the proposed mandatory Code can provide additional clarity on the meaning of some of these concepts in the reformed s.46. In doing so, with respect to a.46, the Code can outline the following items:

1. An industry specific definition of ‘rational business decision’.
2. A provision (or clearer guidance) as to the limitations of the corporation that does not have a substantial degree of power in the market (the smaller competitor). This should include clear provisions stating the limitations of the ‘smaller competitor’ such as their inability to rely on cross-subsidisation and that they can only run at an operating loss for a limited period of time.
3. The capacity of the ‘smaller competitor’ should also be considered in light of planning considerations. That is the presumption that any new store could not significantly alter existing pedestrian and vehicular traffic away from existing shopping precincts. Greater clarity as to the ‘long term interests of consumers.’ For example whilst the duopoly may be providing products at heavily discounted prices, there is an insurmountable detriment incurred as a result of such conduct; namely to the quality, range and service levels in the local area. With the diminishment of independent supermarkets, diversity suffers and customer satisfaction declines.
4. A guideline as to the markets that will be the subject of inquiry – in the supermarket context, if an entity is buying up sites, must all possible markets for all other possible uses for those sites be considered?
5. Given the assessment of the ‘long-term interests of consumers’ is susceptible to subjective impressions and reasoning, the Code can include a non-exhaustive list of factors to consider when assessing this concept which are not limited or confined to economic efficiency considerations.

7.2.1 Divestiture

To enhance the welfare of Australians by ensuring our competition law is fit for purpose, the legislation needs to be backed by appropriate and proportionate sanctions that can be effectively enforced by the ACCC when necessary.

Divestiture is a powerful sanction which has been considered as a proposed punitive measure, in respect of misuse of market power, in a number of Senate enquiries⁹. Only the Senate Inquiry in 2004 upheld the view that a broader

⁹ Griffiths report (1989), Cooney Report (1991), Hilmer Review (1993), Senate Legal and Constitutional References Committee (2002). Dawson Report (2003) and Senate Economics reference Committee of Inquiry into the effectiveness of the TPA in protecting small business (2004).

divestiture power should be introduced for breaches of section 46. As a result of the references to the expanding power of the major supermarkets over a decade ago it was recommended at that time that divestiture powers be available for breaches of misuse of market power and any new sections relating to creeping acquisitions. The recommendation was never actioned.

It has been argued that divestiture as a sanction exists in a number of OECD countries but that it has seldom been utilised, and are often treated with scepticism. However, comparisons of market power of major supermarkets in OECD countries and Australia show that the market power by the major chains in Australia has reached astronomical proportions¹⁰. MGA has already clearly demonstrated in this submission that Australian independent supermarkets are being suffocated by the uncontrolled growth of the market power of the chains. This has resulted in a substantial lessening of competition and unless the law is changed and provisions made in the CCA for deterrence and penalties then the growth of the market power of the chains will continue and ultimately lead to the annihilation of their smaller rivals. Where general divestiture provisions exist under the competition law regimes in the United States and the United Kingdom they are used as remedies for conduct generally referred to as monopolisation. Monopolisation is any conduct that leads to or protects a monopoly through the exclusion of competitors. The basic result under monopoly is production is cut back and the price is raised by the monopolist in a particular market in order to maximise profit.

In Australia, the Federal Court may impose a wide range of sanctions on companies which contravene Australia's competition laws – fines and penalties, imprisonment for their employees and agents involved in cartels, injunctions, community service orders, banning orders and, importantly, damages for affected consumers.

However, the regulatory arsenal in Australia does not generally extend to breaking up a large company's operations. It is only in the special case of anti-competitive mergers or acquisitions that the Federal Court may order that an acquirer divest an illegally acquired target or assets.

The question now is whether a wider power – the power to order divestiture as a response to a misuse of market power by a dominant firm, or an illicit merger/acquisition – is justified.

The potential advantages of such a divestiture order over other sanctions are that:

- a well-targeted divestiture order to break up a firm with substantial market power will eliminate or reduce market power with one "cut", and can quickly create several competitor firms in a previously "monopolised" or oligopoly market; and
- a clean, one-off divestiture may involve far less ongoing supervision/monitoring by the regulator or court than "behavioural" undertakings or remedies imposed on a dominant firm.

There is no remedy available to the ACCC or a private party to seek a divestiture order from the court to break up the firm which has been found to have misused its market power, and the Panel considers divestiture as being likely to have broader impacts on the general efficiency of the firm, as well as on consumer welfare. However in 1993 the Hilmer Review¹¹ stated at page 163, in considering the inclusion of divestiture in legislation as a remedy, that "it may provide a structural remedy to conduct perceived to flow from the structure of a market rather than attempting only to remedy the problematic conduct; may provide a deterrent to firms potentially stronger than other remedies currently available; and may provide a negotiation tool in the hands of regulators seeking non judicial dispute resolution".

MGA/LRA submits that divestiture be introduced as a specific remedy under the proposed mandatory industry code and also in Section 46 of the CCA. The sheer size and dominance of Coles and Woolworths indicates that there will not be broader repercussions on their general conduct and efficiency, and it would be limited to circumstances where a firm with a substantial degree of market power has failed to pre-notify of the acquisition a site, store or lease. The threat of this remedy should consequently motivate compliance with the Code and the CCA. Whilst the inclusion of divestiture in a mandatory code would be a useful and powerful deterrent to misuse of market power, the additional inclusion of

¹⁰ *Ibid* page 21

¹¹ *National Competition Policy Review 1993*

divestiture as a sanction in Section 46 of the CCA would be an appropriate powerful measure, including a deterrent, in overcoming conduct of the kind that is currently destroying healthy competition in the Australian supermarket industry.

7.2.2 Predatory Pricing

Predatory pricing refers to the practice of under-pricing a product in the short-run with the aim of increasing prices/profits in the long run. The anti-competitive purpose stems from the firm crippling competitors in the short run so that in the long run they can no longer compete.

By its very nature predatory pricing involves low prices which makes it very difficult to discern whether an action is a reasonable reaction to a competitor, or predatory in nature. Is the reduction in prices a competitive response to a new entrant or is it predatory pricing?

This presents many problems for the regulators. If the regulator is too sensitive to price reduction this may result in prices remaining high for a sustained period which ultimately hurts consumers. It may keep inefficient producers in business.

The Panel states that in relation to s.46 'the supplementary prohibitions, which attempt to address concerns about predatory pricing, do not advance the policy intent of section 46' (p 43).and therefore, as part of Draft Recommendation 25, the Panel suggests that s.46(1AA) should be repealed.

MGA/LRA respectfully disagrees with this proposition and recommendation to remove s.46(1AA) on the premise that the anti-competitive nature of predatory pricing can cripple competitors by either rendering them wholly incapable of competing, or reducing stock lines and service capabilities which will have detrimental effects on their ability to compete. This consequently results in a lessening of competition, and by extension of diminished product lines and service standards, an attack on consumer welfare.

7.2.3 Predatory Capacity

The Panel ignored a specific prohibition on predatory capacity which prevents a corporation with a substantial degree of market power in Australia from acquiring an existing retail outlet or opening a new outlet in any market where that corporation already has a reasonable degree of retail representation.

The conduct would be prohibited if that conduct has the purpose or effect of eliminating or damaging a competitor in that or any other market, or prevents entry into that market; or deters or prevents a person from engaging in competitive conduct in that or any other market.

MGA/RA has identified that predatory capacity is an industry-specific problem and therefore, to minimise any unintended effects of over capture, a prohibition of this nature should be included in the suggested mandatory Code.

7.2.4 Anti-Competitive Price Discrimination

The Panel has emphatically rejected any proposition advocating for a specific prohibition on price discrimination (Draft Recommendation 26). The Panel instead noted that existing provisions in the CCA, including the recommended revision to s.46 (as per Draft Recommendation 25) can adequately deal with any price discrimination that has an anti-competitive effect on markets.

The Panel made reference to the former prohibition on price discrimination contained in the repealed s. 49 which was found to likely result in price inflexibility and therefore negatively affecting consumer welfare.

Notwithstanding this comment, the Panel has not elaborated on its own reasoning for not introducing a prohibition of this nature, despite acknowledging the concerns of small businesses and consumers about the impacts of price discrimination.

A consumer is naturally attracted to low prices. A major retail chain that offers the cheapest price is seemingly viewed as enhancing consumer welfare. However, the impact on the small competitors in that market needs to be observed – they are constrained by the chain’s infinite ability to offer a cheaper price as the loss can be absorbed and cross-subsidised across its enterprise. If the small competitor was to lower their prices, there would be no increase in sales and profits would fall. Price competition therefore derogates from true competition. It attempts to harmonise prices across all suppliers in the market, but such a tactic cannot be facilitated by smaller competitors.

Unfortunately, due to the market concentration, a reverse price discrimination tactic could still yield benefits for the duopoly, such is the extent of their power. Major chains could conceivably raise prices on items above the competitive level and still generate profits due to its customer base either facing high search costs; or being relatively uninformed about alternative prices; or because of the instilled trust that the major retailer always offers the cheaper prices, as evinced through its marketing and advertising campaigns.

MGA/LRA firmly contends that anti-competitive price discrimination is a relevant and concerning issue in the supermarket and liquor store industry, and therefore its prohibition should be wholly inserted into the proposed Code as a specific example of a s.46 contravention.

7.2.5 Fuel Retailing

MGA/LRA notes the Panel’s observations in section 13.2 in regard to fuel retailing (petrol shopper dockets in supermarkets). Following an investigation into the deliberate misuse of market power by Coles and Woolworths through the provision of heavily discounted fuel offers (up to 45 cents per litre) with the premise of attracting consumers away from independent supermarkets and service stations, the ACCC accepted court enforceable undertakings from Coles and Woolworths limiting the extent of fuel discounts to four cents per litre.

This damaging behaviour to competition was a clear example of market failure with the enforceable undertaking appearing to have addressed the concerns many submitters for the time being.

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

7.3 CREEPING ACQUISITIONS – SECTION 50

Individual decisions to acquire or sell stores might not be anti-competitive, but, over time, significant players increase their geographic footprint and reduce competition through incremental acquisitions. This matter of creeping acquisitions is of significant interest to the ACCC and the members of MGA/LRA.

MGA/LRA proposed reforms to s.50 in order to stamp out creeping acquisitions by empowering the ACCC to look into the “cumulative effect” of a merger/acquisition so that it can be observed on a broad level, with an emphasis on the “overall effect” and not just a look at the effect of the acquisition itself.

The Panel considered the current prohibition on mergers is “appropriate” (p 47) and dismissed suggestions that the concept of looking at the aggregate effect of previous acquisitions (for example, in the preceding three years) in determining a contravention of s.50 for the following reasons:

- Market conditions may have altered materially over the period chosen;
- Competition may have increased or decreased over the period, therefore an assessment of the aggregate effect on competition of mergers that have occurred over a period becomes a difficult exercise;

- Mergers rarely occur at the same time; they occur over time and choosing a set period of time over which to look back and ‘aggregate’ mergers undertaken by the corporation is an arbitrary exercise;
- Such a change would impose additional costs associated with merger review.

It is generally presumed that the greater degree of competition in a market, the less market power each market participant will possess. The supermarket industry is unique with its heavy concentration of market power primarily within two entities. Independent supermarkets are constrained in their pricing, output and related commercial decisions by the activity of the duopoly.

Some mergers and acquisitions meet consumer demand in a way that facilitates more intense competition and lead opposition firms to engage in substitution methods to effectively constrain the merged firm. Other mergers, particularly in the supermarket landscape, lessen competition by reducing and weakening competitive constraints and reducing the incentives for competitive rivalry.

It is therefore submitted that to allay the Panel’s concerns as noted above, an assessment of the “cumulative” effect of a merger or acquisition can be placed in a mandatory industry code. This will empower the ACCC to investigate the pattern of Coles and Woolworths systematically acquiring businesses or developing new “greenfields” sites in local markets which ultimately have the cumulative effect of increasing market power on a macro scale (the larger market) thus substantially lessening competition.

MGA/LRA notes the Panel’s overarching concern of enhancing consuming welfare in its recommendations. MGA/LRA reiterates that continued increases in levels of market power for Coles and Woolworths will ultimately be detrimental to consumers as it will lead to the extinction of independent supermarket and therefore to price increases and a loss in choice and diversity.

7.4 MANDATORY RETAIL SUPERMARKET AND LIQUOR INDUSTRY CODE

The Panel acknowledges receipt of a large number of submissions raising issues relating to supermarkets which predominantly raised policy or legal issues (p 67). MGA/LRA understands that the recommendations made by the Panel for reform to the CCA will have broader application beyond simply the supermarket sector. Given the widely publicised issues surrounding the supermarket sector, MGA/LRA proposes for the Panel to recommend a mandatory retail supermarket and liquor industry Code under s.51AE of the CCA.

As industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified, a prescriptive industry code is necessary. The problems associated with the competitive pressures experienced by the independent sector which are limiting economies of scale extend beyond this group to the extent that it is harming retail diversity and choice, thereby affirming that there is a public interest in the prescription of the Code.

The Panel expressed the opinion that greater vertical integration, the proliferation of the use of “home brands”, and the move of larger supermarkets into regional areas leading to concerns about a loss of amenity and changes to the community, do not, of themselves, raise issues for competition policy or law (p 183). However, it is submitted that these factors lead to a reduction in choice and diversity, and affect smaller supermarkets to compete and promote consumer welfare. As such, it is in the long-term interests of consumers to maintain independent supermarkets so as to keep the market competitive and avoid a situation where the Australian supermarket sector is comprised only of Coles and Woolworths at which point consumers are at the mercy of their prices which can conceivably be raised with no competition.

The Panel believes that the issues outlined above are not matters to be addressed by the competition laws but instead reflect broader economic and social changes that are often the outcome of competition (pp 183 and 184). In doing

so, the Panel suggests that consumer preferences and choice should be the ultimate determinant of which businesses succeed and prosper. MGA/LRA contends that these small and independent businesses provide diversity and choice to cater to consumer preferences, however if their ability to compete is significantly diminished, they can no longer trade to provide this alternative, therefore harming consumer welfare.

Consumers are also members of the local community and therefore MGA/LRA seeks clarification as to how the concept of the “consumer” is dissected so as to mutually exclude the preferences of a consumer from those of the local community member. On this basis, MGA/LRA submits that both concepts are intertwined and therefore considerations of the community must be regarded when assessing the consumer welfare. This also reflects the object of the CCA which in s.2 is stated as being ‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection’. If Parliament intended to only be concerned with the welfare of consumers then this should have been necessarily reflected in the objects of the Act.

The Panel has recommended for a Code to be introduced between supermarkets and suppliers (p 184). However, a Code designed simply to govern the relationship between suppliers and retailers does not address the prevailing issues which are pervading the retail supermarket and liquor store industry.

The retail supermarket and liquor industry sector is particularly unique in terms of the market concentration, and the problems identified elicit a need for a mandatory industry Code. The Code will complement the provisions CCA by aiding the interpretation and application of ss. 46 and 50, and it can assist in facilitating an industry specific dispute resolution framework.

A Code will achieve compliance with the Act and help to enhance consumer welfare. While it may be difficult for the Panel to recommend wholesale changes to the Act, a prescriptive industry code can accentuate and elaborate upon s. 46 and s.50 from the perspective of the retail supermarket and liquor store landscape. It can therefore provide greater transparency and confidence in the market. The Code is more malleable and can be amended more efficiently to keep abreast of changes in the supermarket industry’s needs. Additionally, an industry-specific dispute resolution scheme can be developed to resolve many of the issues identified herein.

The strength of this Code will also be reinforced by the ACCC’s additional powers to issue infringement notices for alleged breaches, and for the court to impose penalties on businesses that breach the code.

Some essential elements of the Code:

- A requirement on merger parties to pre-notify the ACCC before proceeding with a merger or acquisition of a site, lease or existing business:
 - By altering the structure of markets and the incentives for firms to compete, mergers have anti-competitive effects. Based on the unique nature of the retail supermarket and liquor store industry in Australia, and the fact that merger parties are not legally required to notify the ACCC before completing a clearance, it is recommended that a pre-notification requirement exist for a corporation with a substantial degree of market. A failure to pre-notify should thereafter arm the ACCC with the power to unwind the transaction.
 - Merger parties are not obliged to notify or seek clearance from the ACCC before proceeding with an acquisition. Pre-notifying the ACCC of an acquisition will not impose an onerous burden on participants in the market, and as the issue is predominantly a supermarket industry-specific matter, this can be an additional feature of the Code. There are no fees associated, for instance, with an informal merger clearance, and therefore pre-notifying the ACCC in this regard will help improve and protect the sanctity of s.50 with respect to the retail supermarket and liquor industry.
- Where a firm with a substantial degree of market power has failed to pre-notify the ACCC of the acquisition a site, store or lease, in the manner listed above, the ACCC will be empowered to make a divestiture order, The threat of this remedy should consequently motivate compliance with the Code and the CCA.

- A specific definition of predatory capacity and anti-competitive price discrimination for the purposes of being prohibited through the proposed new s.46. These definitions can specifically elaborate on industry-specific issues such as the use of floor space as an instrument to enhance market power.
- Where there is a proposed acquisition, the ACCC will be required to give specific inquiry into the effect on the local community, the availability of other supermarkets or stores, and the general commercial impact.
- There will be scope to address bundling schemes which are substantially lessening competition.
- Greater clarity on the proposed new s.46, including an elaboration on the defence:
 - The Code can specifically include consideration of the ‘smaller competitor’ in the market, such as their inability to rely on cross-subsidisation, and their limited ability to run at an operating loss.
 - A set of non-exhaustive factors to be considered when addressing the ‘long-term interest of consumers’.
 - An industry specific definition of ‘rational business decision’.
- For the purposes of s.50 and to eliminate creeping acquisitions, the ACCC will be empowered to assess “cumulative” effect of a merger or acquisition.
- A specific dispute resolution framework which is binding on parties.

7.5 SMALL BUSINESS: COST OF PRIVATE ENFORCEMENT & ACCESS TO JUSTICE

Many small businesses have genuine claims to misuses of market power, but the costs of litigation are far too high. The prohibitive cost of litigation means access to justice is denied. MGA/LRA therefore made the recommendation in its initial submission for small businesses to be permitted to bring an action in the Federal Court seeking relief, without the threat of having to pay the other party’s costs in the event their application is unsuccessful.

MGA welcomes the Panel’s recognition (p 259) that small businesses do not have access to remedies or an affordable access to the justice system with a view of initiating litigation concerning serious anti- competitive behaviours. Anti-competitive behaviours have the effect of unfairly damaging small businesses and substantially lessening competition.

The Panel dismissed the suggestion to include a no-costs jurisdiction for small businesses on the basis that it will lead to frivolous or vexatious claims (p 256).

MGA/LRA advocates for a no-costs jurisdiction limited to small businesses, provided the applicant small business establishes a prima-facie contravention on the “real chance” standard of proof. This proposition is subject to further consultation as to what may need to be established. Nevertheless, this mitigates the Panel’s concerns of frivolous or vexatious claims, and can provide small businesses with the necessary impetus to pursue a legitimate claim.

MGA/LRA supports Draft Recommendation 37 as a means to reduce the costs of private actions by ensuring that s.83 also applies to admissions of fact made by a corporation in another proceeding.

MGA/LRA also supports Draft Recommendation 49 and believes the ACCC should be armed with greater resources to enable it to better investigate suspected contraventions of the Act and assist small businesses in exercising their rights. This is particularly so given its willingness to pursue complaints but its limitations by virtue of its budgetary constraints.

A dispute resolution system needs to be founded on a parity of bargaining powers between the parties. Given many of the concerns and competition complaints emanating from small businesses in the supermarket and liquor retail industry relate to Coles and Woolworths, a dispute resolution scheme needs to be timely, accessible, and binding on the

parties. There also needs to be clarification as to how a complaint is deemed to have merit but not a priority for public enforcement.

These matters again, like with many of the recommendations and comments contained herein, can be addressed in a specific mandatory industry code to avoid unnecessarily traversing to other industries.

7.6 ACCC GOVERNANCE

MGA/LRA supports the role of the ACCC and firmly believes that the body simply needs the tools and resources to investigate and enforce the CCA. As such, MGA/LRA does not support any attempts to “improve” the governance of a commission which has not presented any identifiable problems warranting change.

MGA/LRA submits that Draft Recommendation 47 which is to replace the current commission with a board comprising of executive members is not in the best interests of the small business sector. This will create a barrier for communication and remove the ACCC from the community it serves and supports.

MGA/LRA also disagrees with the Panel’s view that the ACCC should not undertake competition policy advocacy and education, on the basis that this may compromise stakeholder perceptions of impartiality. The ACCC has played a growing and crucial role liaising with all businesses in respect of providing timely education and information concerning competition and consumer policy and the CCA. Information letters, newsletters, public speaking engagements, forums and industry committees have assisted the business community to be cognisant of their legislative and compliance obligations. This connected approach is less confronting for businesses and takes away the threatening and often antagonistic “perception” of being constantly watched by the Government.

Under the leadership and guidance of the ACCC Chairperson, Rod Sims, and the Deputy Chairperson, Dr Michael Schaper, together with their team of Commissioners for various jurisdictions, the ACCC has become highly energised and responsive to the needs and protection of consumers and any business that may be a victim of a breach of the CCA.

The current commission structure is accessible, engaging and responsive to the needs of small businesses in the independent supermarket and liquor store industry. To introduce a board to govern the ACCC is a backward step, as the ACCC will become a faceless organisation.

Currently the ACCC is the facilitator of the ACCC Small Business Consultative Committee (SBCC). This committee is made up of representatives from most small business industry associations. This is a forum at which the ACCC, through the Chairperson and Deputy Chairperson, delivers an ACCC report covering a variety of issues that the ACCC is dealing with at any given time. This is also a forum at which matters concerning issues, queries and concerns relating to the Competition and Consumer Act can be raised and discussed on behalf of members.

This forum is informative and educative and allows industry associations to be connected with the ACCC with a view of building better business relationships. This in turn is enormously beneficial for industry association members.

Owing to the breadth of issues associated with a variety of CCA protection issues MGA/LRA supports the Panel’s recommendation (Draft Recommendation 47) the ACCC be given access to parliament via a broadly based Parliamentary Committee. This communication between the ACCC and Parliamentarians is vital to keep politicians in touch with the constantly changing Australian competitive landscape.

7.7 COLLECTIVE BARGAINING

Collective bargaining has not been a common practice in the independent supermarket and liquor retail sectors. These sectors instead are predominately served by a variety of grocery and liquor wholesalers, banner and buying groups, direct suppliers and a variety of external service and support providers.

MGA/LRA does however, acknowledge the Panel's Draft Recommendation 50 that the practice of collective bargaining be considered by small businesses with the scope of obtaining competitive prices through volume, scale and supply chain efficiencies.

7.8 THIRD LINE FORCING

In the first instance, MGA/LRA does support the current prohibition on third line forcing. This behaviour is anti-competitive and excludes potential competitors from fairly competing due to exclusive arrangements based upon one party agreeing to a condition to deal with the other party.

However, MGA/LRA notes the Panel's Draft Recommendation 27 which states:

"the provisions on 'third line forcing' (subsections 47(6) & (7) of the CCA) should be brought into line with the rest of section 47 and only prohibited where conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition."

This recommendation to simplify the law concerning third line forcing behaviours between parties seeks to encourage dealings between parties whilst eradicating the risk of one party threatening to lessen competition through unsavoury and anti-competitive conduct.

7.9 STATE BASED ISSUES

7.9.1 Packaged Liquor

MGA/LRA notes the Panel's Draft Recommendation 11 which calls for all Australian governments, including local government, to review the regulations imposed in their respective jurisdictions to ensure that unnecessary restrictions on competition are removed (e.g. liquor restrictions).

An open and free market permitting the sale of packaged liquor in supermarkets enhances competition and aligns with consumer needs in terms of diversity of choice. The existing regulations in Queensland, South Australia and Tasmania which restrict the sale of packaged liquor unnecessarily benefits the likes of Coles and Woolworths, are ant-competitive, and do not serve the needs or welfare of consumers.

These entities are readily able to obtain hotel licenses and thereafter open detached bottle shops in the area, providing an alternative income stream which cannot be utilised by the independent supermarkets, and therefore making it difficult to compete.

Other States throughout Australia exemplify that there are numerous checks, regulations and facilities established to ensure the responsible service of alcohol and to minimise any perceived harm from alcohol consumption. Any public policy considerations relating to health and safety can therefore be accounted for, and there are no compelling reasons for the disparate treatment of Queensland, South Australia and Tasmania in comparison to other States.

As a point of interest, MGA/LRA questions why the Panel actively made a recommendation for the total deregulation of trading hours, but did not formally implement a specific recommendation in its report for State packaged liquor laws to be equally amended. Both matters are state-specific, and both, according to the Panel, are counterproductive for Australian competition.

Furthermore, MGA/LRA calls for the Panel to strongly recommend that the Queensland, South Australian and Tasmanian state governments consider immediate regulatory reform.

The ability for independent supermarket operators to compete in those markets with a packaged liquor offer (i.e. a whole meal solution) is non-existent and unfair to consumer choice and compromises the efficiencies that independent businesses seek to gain from adding packaged liquor to satisfy consumer demand.

The productivity and efficiency of Queensland, South Australian and Tasmanian independent supermarket businesses will increase, competition and the consumer will be exposed to retail diversity and choice if these businesses are permitted to sell packaged liquor.

7.9.2 Planning and Zoning Laws

MGA/LRA refers to the Panel's acknowledgement that effective economic objectives and proper consideration of competition are lacking from planning and zoning legislation and processes. Draft Recommendation 10 states that all governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making. The principles should include:

- a focus on the long-term interests of consumers generally (beyond purely local concerns);
- ensuring arrangements do not explicitly or implicitly favour incumbent operators;
- internal review processes that can be triggered by new entrants to a local market; and
- reducing the cost, complexity and time taken to challenge existing regulations.

MGA/LRA recommends for the uniform adoption of the Net Community Benefit Test which, in the context of competition for supermarkets, will include considerations as to 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. This will therefore give due regard to a new development which 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.

The viability of existing businesses and the impact on incumbents is a crucial element as these businesses are also serving as a means of competition and choice for consumers. It would not be in the interests of consumer welfare to not have regard to competing businesses as competition is fostered through a greater number of participants in the market. Any assessment of competition should therefore incorporate consideration of the ability for existing businesses to compete and provide choice and diversity to consumers.

7.9.3 Retail Trading Hours

The Panel recommends for the total deregulation of retail trading hours in Draft Recommendation 51. The Panel perceives trading hours regulations in States such as Queensland, Western Australia and South Australia as counterproductive. MGA/LRA submits that the deregulation of trading hours is simply another avenue for Coles and Woolworths to extend and grow their market share, as well as undercut their smaller competitors, resulting in the extinction of independent retail businesses.

Furthermore, in areas such as Queensland where trading hours for non-exempt shops are regulated, consumer-based surveys and petition have not been presented in those areas which evince a demand by consumers for greater shopping diversity or an extension of trading hours. As such, it remains only a perception that total deregulation of trading hours

in all areas of Australia is both necessary and warranted to promote consumer welfare. Furthermore, online shopping has little effect in the supermarket and liquor store industry, therefore it is not an accurate measure to gauge consumer demand in this sector.

The Panel's comments about the ability of independent and small businesses to differentiate their offerings to fulfil consumer demands and compete in the face of deregulated trading hours must be viewed in the context of the effect on the independent supermarkets – profit margins and stock lines are reduced which impacts on the quality of service, therefore having a negative impact on consumer welfare.

The analogy is made to Victoria when the 8% packaged licence cap was removed in 2005 – this led to an explosion of liquor licences for Coles and Woolworths, and a proliferation of their liquor outlets as they stood to gain from expansion plans which at the time were constrained by the 8% rule. The result was an extinction of choice and further ability to increase their market share.

On this basis, MGA/LRA respectfully disagrees with Draft Recommendation 51.

7.10 CONCLUSION

The continued existence of independent supermarkets and liquor stores aligns with competition policy. That is: “Maximising opportunity for choice and diversity, keeping prices competitive, and securing necessary standards of quality, service, access and equity — these are the things Australians expect from properly governed markets” (p 15).

MGA is strongly in favour of significant amendments to the CCA and supports legislative changes which will be beneficial for all Australians. MGA/LRA identified throughout its first submission, and again in this response, that we strongly advocate in favour of small business. However, MGA/LRA recognises that there must be ample opportunity for both large and small businesses to compete in the market place. We believe that the amendments to the CCA that are being sought will enable the survival and future prosperity of all businesses, by providing a right to participate in healthy competition based on laws that provide for fairness and equity for all parties. Our submission also recognises there is a need to ensure that consumers have the advantages that a healthy competitive atmosphere can offer and that can only be achieved by ensuring that all industry participants, both large and small have the advantage of a level playing field. It is submitted that the legislative amendments that have been proposed in this response will provide the equitable basis from which to deliver consumers the best outcomes.

MGA/LRA has addressed the following issues in this Response:

- There is a clear imbalance in the market share of the major supermarket chains and the independent supermarkets in Australia. The high market share concentration of the major retailers continues to be a barrier to healthy competition. It will undoubtedly continue to grow unless there is legislative change.
- MGA/LRA strongly supports **the introduction of an effects test into s.46** but notes the proposed incorporation of **the reverse onus of proof**. However, a number of issues have been raised in relation to the proposed defence and the reframing of s.46 which need to be considered to ensure consumer welfare and the promotion of competition is enhanced.
- MGA/LRA **disagrees with the recommendation to remove S 46(1AA)** based on the fact that the anti-competitive nature of predatory pricing can adversely affect the ability of a business to properly compete.
- It is requested that the Panel gives further consideration to **the issue of prohibiting predatory capacity**. A powerful corporation is currently able to acquire existing retail outlets or establish new ones, despite its current representation in the area. Allowing this to continue will have a serious impact on smaller businesses survival who are simply suffocated out of the area due to the overwhelming presence of a more powerful retailer.

- MGA/LRA requests that further consideration is given to the inclusion of a **specific prohibition on price discrimination**.
- It is respectfully submitted that the Panel should further consider **the impact of creeping acquisitions** when considering a breach of Section 50 of the CCA.
- **The inclusion in the CCA of a mandatory Code of Conduct** would enable a number of issues such as the adverse effects of creeping acquisitions and price discrimination to be addressed and remedied by the ACCC.
- **The inclusion in Section 46 and in the mandatory Code of Conduct of a divestiture remedy** that may be invoked in the event of the use of market power or creeping acquisitions that damage or are likely to damage a competitor.
- To enable small business access to justice – it would be beneficial that there be a **no costs jurisdiction** sector within the ACCC.
- MGA/LRA seeks that the Panel recommends to the Federal Government that State based issues, including deregulation of trading hours, the anti-competitive nature of liquor regulations and detrimental anti-competitive effects of many State planning and zoning laws be reviewed.

The continued existence of these independent retailers will ensure robust competition and the enhancement of consumer welfare. After all, they offer consumers choice, access, retail diversity, competition and innovation.

The Panel can retain the broadness in the CCA, and the mandatory Code can provide added clarity and specificity for the industry-specific issues which have been outlined in this submission.

MGA/LRA again thank the Panel for the opportunity to provide comment on the Draft Report.