

26<sup>th</sup> June 2014



Professor Ian Harper  
Competition Policy Review Secretariat  
The Treasury Langton Crescent  
PARKES ACT 2600

Dear Professor Harper,

## **COMPETITION POLICY REVIEW – SUBMISSION**

### **THE LOCAL SOUTH AUSTRALIAN SCENE**

The Independent Supermarket Retailers Guild of South Australia (referred hereinafter as the 'Guild') represents the independent supermarket owners of Foodland and IGA stores in South Australia.

The Guild represents 110 owners who are proud South Australians. They own between them 232 outlets and employ 15,000 people across the State, representing 13% of the total South Australian Retail workforce.

The South Australian supermarket industry is a robust market place in which the independents vigorously compete against the major chains.

In South Australia the market share of Independent supermarkets is currently 37%, Coles and Woolworths equally share 63%. The independents market share in SA is the highest in Australia and nationally the independents market share is 12%.

The Independents market share in South Australia has been achieved over 50 years by an aggressive successful growth model of investment by the Foodland group in its '*Mighty South Aussies*' marketing campaign and by the numerous IGA marketing campaigns including the latest '*How the locals like it*' campaign.

The independents successful campaigns are driven by having a strong emphasis on:

- quality customer service and support
- targeting and promoting local South Australian brands of manufactured food and grocery products
- promoting the largest range of Australian branded food and grocery products
- and by leading the promotion of South Australian and Australian fresh meat, fresh fruit and vegetables

The independent owners welcome an environment where competition is fair and equitable and where all retailers are treated in a non-discriminatory manner. This is not always the case today.

We recognise and accept that competition in the supermarket industry is vital for the community, to have a productive society and to increase their living standards.

It is also critical for fair competition in Australia that the independents (small to medium sized businesses) continue to survive and expand as they provide the necessary competition in the supermarket industry.

Any significant reduction of competition by loss of independent supermarkets means less choice and will have an adverse price effect for consumers.

However, for competition to be fair it requires enforceable laws to maintain this fairness.

Broadly the concerns of the independents in South Australia are:

- the current market power of Coles & Woolworths and their proposed unbridled growth plans will reduce competition with the loss of many independents
- Coles & Woolworths regularly use their capital strength in regional towns to manipulate the market by purchasing land, and building large boxes outside of the traditional main streets
- Coles & Woolworths predatory pricing and cross-subsidisation techniques
- small business is not currently protected by the Competition and Consumer Act 2010
- Coles & Woolworths use their market power to distort purchases at a wholesale level

In order for independent supermarkets to compete more effectively there needs to be within the CCA, competition rules that can be enforced, particularly those relating to market domination and misuse of market power, plus processes that allow for small to medium sized businesses to have quick access to the ACCC and a speedy resolution to these concerns.

There are many examples of the abuse of market power by the majors using predatory pricing techniques, cross-subsidisation, planning laws and price discrimination.

**It is our view that the Act needs to be amended to enable quick strong enforcement when abuse of market power is demonstrated.**

It is important to note that in the last 40 years there has only been a small number of cases pursued when hundreds of small to medium sized businesses have been effected by abuse of market power.

These abuse of market power actions have been significant in the last decade as the majors have had excessive growth and their market domination has gone unchecked.

According to an Accenture Australia report in 2010, in 1975 Coles and Woolworths had a national market share of 34% between them and today they have a national market share of 80% between them.



This unprecedented growth and market domination has occurred because the law governing misuse of market power (Section 46) has had very little real effect.

To support our argument, in the same four decades as this expansion of market power has occurred, the ACCC has taken up only 18 cases to the court and only 11 cases have been successful.

We believe that section 46 of the Act is not specific enough to achieve the outcomes desired, is perceived to be too complicated, and is a lawyers paradise.

**Accessibility to ACCC is difficult for small and medium sized businesses, in cases of misuse of market power. The process to be heard is cumbersome, is impossible to get quick decisions and is too costly.**

### **CONCENTRATION IN THE SOUTH AUSTRALIAN MARKET**

Coles & Woolworths by continually expanding their floor-space across South Australia to the extent that they have, has established the highest saturation of supermarket floor-space per capita when comparing to supermarkets floor-space in other states.

By saturating the market with more floor-space Coles and Woolworths are closing out competition.

Coles & Woolworths are also continually exerting extreme pressure in the market place using predatory pricing and cross subsidisation. Examples are the crushing of the fresh milk market and the prolonged use of fuel docketts.

The independent owners believe that if this continuing market dominance and the consequent abuse of market power is not managed and controlled, competition will quickly unwind.

We believe that the current competitive state of the market place in South Australia will change dramatically and lead to further crowding out of independents with the loss of many small businesses and reduction in employment.

In 1994 Hilmer recommended, no change to the CCA in this area of market domination. At that time Coles and Woolworths combined had a market share of 53% today their combined market share is nearly 80%.

**The market dominance by Coles and Woolworths is THE major issue that needs to be rectified by this review if fair competition is going to continue to exist in the marketplace in the years to come.**

Today, Woolworths in Australia has approximately 40% of the supermarket share. By comparison the two biggest American operators, Walmart and Kroger, combined have 20% of the USA supermarket business.

Importantly in USA, competition policy has recognised market domination as an issue and has a divesting process in place to rectify abuse.

In Australia the combined supermarket share of Coles and Woolworths is at nearly 80%. In our view this is market domination by the majors.

Fair competition is at risk if unbridled growth of Coles and Woolworths into new supermarkets and fuel/convenience stores Australia wide goes unchecked.

**It is our strong view that there needs to be a cap placed on the market dominance of the two major chains in the supermarket industry and a divestment policy implemented.**

If our view is not accepted, the consumers will be the biggest losers with reduction of choice and price increases and there will also be a demise of many independents with the consequent loss of employment.

The current Section 46 of the Act does not have powers to set limits on market dominance and needs to have this power.

We recommend that legislation be put in place to cap the existing market share and that a set of rules be established covering divestment. The rules covering divestment should apply to the cap and also to misuse of market power as proposed in legislation tabled recently in the Senate by Senator Xenophon \*(see attached legislative Bill).

The review should consider the USA Acts relating to competition policy when investigating options for the introduction of a market domination solution.

**Australia is the only country in the free world where competition policy allows market domination by two players to exist as it does in the supermarket industry without strong rules to control market domination and the misuse of their market power.**

#### **Recommendation 1**

- ***that an urgent amendment is required to Section 46 to introduce a maximum market share cap for any company operating in its specific market. The review to establish this desired cap to include a divesting process if the cap is breached and/or when a company is found guilty by a court for the misuse of its market power. The intent is to put a stop to market domination at the specified level and to severely penalise breaches.***



## USE OF CAPITAL STRENGTH BY THE MAJORS IN REGIONAL TOWNS

Coles & Woolworths regularly use their market power through their **capital strength** in regional towns to manipulate the market by purchasing land, and building large boxes outside of the traditional main streets.

This deliberate act by the majors changes the retail focus of these regional towns. We believe this use of capital market power is anti-competitive and not in the best interest of the community.

There are numerous examples in South Australia.

### Renmark story –

In 2007 Woolworths opened a supermarket 1.3kms away from the main street, several other shops (including Big W) also opened at the same time. Six years later over 300 people have lost their jobs, 30 retail stores have closed including a Target Country in late June 2014.

We have \*attached copies of recent photos which demonstrate the current situation in Renmark as a result of the majors using their capital strength in regional towns.

This type of action by the majors is one of many examples of the havoc caused by them setting up in country towns outside the main street. The excuse often given is the inability to purchase land at commercial rates within the existing shopping precincts. It is our view it is more to do with their desire to increase their market domination.

Similar situations have also occurred in the South Australian regions of Mt Gambier, Murray Bridge and Port Augusta.

It is important for the review to know that both the above communities are very vocally opposed to the use of market power by the major chains. Their concerns relate to the destroying of long term small family businesses that have traditionally operated in the main street. They see their community being destroyed.

This method of predatory capacity is a slow but incremental expansion of the ownership by the majors and increases their market power without showing cause to the ACCC.

This issue also highlights the need for the Planning Act in South Australia to be separately amended so that the majors are required to stay within prescribed shopping zones in regional towns, unless there are no practical options.

Land banking by the majors across the State is a growing part of the misuse of their market power.

### Recommendation 2

- ***that all incremental growth by the majors be notified to the ACCC before development can occur and it be reviewed to test market dominance overall. The review will need to consider amending Section 46.***

## **PREDATORY PRICING**

Coles & Woolworths have abused their market power using **predatory pricing techniques** at both wholesale and retail levels.

Coles & Woolworths, at wholesale levels, use their market power to distort purchases causing small to medium sized businesses to pay a higher wholesale price for goods and services. eg milk pricing.

On many occasions, the majors, have used extended under cost pricing in selected areas of the state in an attempt to reduce competition.

The majors have particularly abused their market power by using cross-subsidisation in the use of fuel shopper dockets. Their misuse of power required over two years of protest by independents for any action under the Act to take place. We have \*attached some examples from one of our members.

### **Recommendation 3**

- *that an amendment be made to section 46 that allows the Court to force divesting if a company is found to be guilty of misuse of market power*
- *that an amendment be made to Section 46 to outlaw cross subsidisation*

## **LACK OF PROTECTION FOR SMALL BUSINESS**

We believe that small business currently does not have the protection needed by the CCA 2010.

When small business has case where it believes that abuse of market power has occurred, it takes too long to get access, too long to achieve any outcome and finally is too costly for them to pursue.

The cost of putting together submissions in this complex legal access regime and perhaps later to the courts is that many small businesses just don't bother to persist with their complaints and a very large number of market power abuse activities that occur just do not get reported to the ACCC.

Independents are usually family owned and are already bogged down with the administration of regulations (red tape) required to run their businesses. This extra burden acts as a negative.

There is also a very significant fear of reprisals if they commence any action.

### **Recommendation 4**

- *that the Act be amended to provide for a simpler access and resolution process for small business. That this new process be a no cost regime.*



It is the view of many independents in South Australia that the cost of utility services to them is higher for the majors and is predominately due to their excessive market power.

Trading hours – this is a State jurisdiction. The trading hours legislation was recently amended to extend trading hours on some public holidays. Special exemptions have been made for the City of Adelaide. The majority of traders are satisfied with current balance.

Leases – this is a State jurisdiction. Legislation is currently being reviewed to make sure that small business is treated fairly when leases are renewed.

The Guild in South Australia works very closely with Master Grocers Australia (MGA). We strongly support their recommendations that have been presented in their submission, particularly the need for an 'effects test' in Section 46 of the CCA.

Yours sincerely,



**Colin Shearing**  
Executive Spokesperson.

**\* Attachments:**

1. CCA Amendment Sen. Nick Xenophon
2. Renmark retail businesses June 2014
3. Guild member eg predatory pricing

2013-2014

The Parliament of the  
Commonwealth of Australia

THE SENATE

*Presented and read a first time*

**Competition and Consumer Amendment  
(Misuse of Market Power) Bill 2014**

**No.     , 2014**

*(Senator Xenophon)*

**A Bill for an Act to amend the *Competition and  
Consumer Act 2010*, and for related purposes**





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## Contents

1	Short title .....	1
2	Commencement .....	1
3	Schedule(s) .....	2
<b>Schedule 1—Competition and Consumer Act 2010</b>		<b>3</b>





1     **A Bill for an Act to amend the *Competition and***  
2     ***Consumer Act 2010*, and for related purposes**

3     The Parliament of Australia enacts:

4     **1 Short title**

5                 This Act may be cited as the *Competition and Consumer*  
6                 *Amendment (Misuse of Market Power) Act 2014*.

7     **2 Commencement**

8                 This Act commences on the day after this Act receives the Royal  
9                 Assent.



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# Schedule 1—Competition and Consumer Act 2010

## 1 After section 80AC

Insert:

### 80AD Divestiture where contravention of section 46

*Circumstances when this section applies*

- (1) This section applies if the Court finds, or has in another proceeding instituted under this Part found:
  - (a) that a corporation that has, or is taken to have, a substantial degree of power in a market has contravened subsection 46(1); or
  - (b) that a corporation that has a substantial share of a market has contravened subsection 46(1AA).

*Reduction of corporation's market power*

- (2) The Court may, on the application of the Commission or any other person, by order, give directions for the purpose of securing, within 2 years of the order being made, a reduction in the corporation's power in, or share of, the market.

*When application must be made*

- (3) An application under subsection (2) may be made at any time within 3 years after the date on which the contravention occurred.

*Order by consent*

- (4) Where an application under subsection (2) has been made, the Court may, if the Court determines it to be appropriate, make an order by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsection (1).



(5) Where an application is made under subsection (2) for an order to give directions for the purpose of securing a reduction in the corporation's power in, or share of, the market, the Court may, instead of making the order, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the corporation to take particular action to reduce the corporation's power in, or share of, the market.

10 (6) This section does not limit the Court's powers under any other  
11 provision of this Act.



















**Abandoned Wendy's  
in Renmark Plaza  
25m<sup>2</sup>**



**Vacant shop in  
Renmark Plaza  
120m<sup>2</sup>**



**Vacant shop in Renmark Plaza  
102m<sup>2</sup>**



**Vacant shop in Renmark Plaza  
105m<sup>2</sup>**



**Vacant shop in  
Renmark Plaza  
90m<sup>2</sup>**



**Vacant former Subway  
relocated to Renmark Plaza  
180m<sup>2</sup>**



**Vacant Retail Horticulture  
(not included in retail m<sup>2</sup>)**



**Vacant Retail Horticulture  
(not included in retail m<sup>2</sup>)**





Vibrant tourist town centre  
Dead retail zone



Vacant shop  
320m<sup>2</sup>



Vacant shop  
168m<sup>2</sup>



Remnant 'antique' retail



Vacant  
150m<sup>2</sup>



Vacant  
70m<sup>2</sup>



Iconic tourist port



Modern Renmark Club  
on the river





File ACCC

Upper Level  
159 Henley Beach Road  
Torrensville SA 5031  
p: (08) 8415 6100 f: (08) 8154 1400  
www.drakes.com.au



26<sup>th</sup> June 2012

Mr Rod Sims  
Chairman  
Australian Competition and Consumer Commission  
PO Box 3131  
CANBERRA ACT 2601

**Re Coles Predatory Pricing – Port Lincoln**

Dear Mr Sims

I have enclosed a copy of a flyer recently distributed by Coles in the town of Port Lincoln.

Coles have once again used their market dominance and produced an advertisement offering "20 cents per litre off fuel until Tuesday, 3<sup>rd</sup> July when you spend \$100 or more" only at Coles, Port Lincoln.

If this type of behavior continues, no independent fuel retailer will be able to survive in this country town. Clearly, this must be viewed as them using their domination in both areas of fuel and food so as to eliminate all independent competition in this region. I am certain that if Drakes Supermarkets had not opened a store in Port Lincoln, both Coles & Woolworths would not have these types of offers on fuel and grocery price reduction, and surely if they are able to do this in one store, they should be forced to have this offer across all of their South Australian stores.

I am a believer in healthy competition, however if independent competition is eliminated, I have no doubt that the duopoly will not be offering any value to the consumer.

Again, I look forward to receiving your prompt response on this matter.

Yours sincerely

A handwritten signature in dark ink, appearing to read "Roger Drake".

Roger Drake  
Managing Director  
Drakes Supermarkets

**HUGE FUEL DISCOUNT**



**SAVE**  
**20¢**  
per  
litre

**UNTIL TUESDAY 3 JULY 2012**

**When you spend  
\$100 or more at  
Coles Port Lincoln**

Fuel offer terms and conditions: This 20 cent per litre fuel discount offer includes the standard fuel discount (including any bonus offer) for purchases of \$30 or more. Customers must spend \$100 or more in one transaction between Wednesday 27 June to Tuesday 3 July 2012 at Coles Port Lincoln. Standard 4 cent per litre fuel discount receipts remain redeemable at Coles Express for 4 cent per litre discount. Limit of one fuel discount receipt per fuel purchase up to 150 litres per vehicle per customer. Not valid for Fleet Card, Shell Card, Motorcharge or Motorpass purchases. Purchases of gift cards, tobacco and tobacco related products and coles.com.au delivery/service fees do not contribute to qualifying spend. Offer not to be used in conjunction with any other offer or receipt. Valid in conjunction with additional 2 cents per litre discount for in-store spend at Coles Express. Coles Express Fuel Discount and Save 6 cents Terms and Conditions also apply, see in-store or colesexpress.com.au. For Coles Express store locations, also see web. Fuel discount voucher valid for four weeks from date of issue.

**coles  
express**



Quality food costs less | **coles**

Upper Level  
159 Henley Beach Road  
Torrensville SA 5031  
p: (08) 8415 6100 f: (08) 8154 1400  
www.drakes.com.au



21<sup>ST</sup> June 2013

Mr Rod Sims  
Chairman  
Australian Competition and Consumer Commission  
PO Box 3131  
CANBERRA ACT 2601

**Re Fuel Pricing by the Duopoly**

Dear Mr Sims

I wish to bring to your attention another example of what Woolworths are doing with petrol pricing and have enclosed their latest fuel offer which was in today's Adelaide Advertiser, advertising 15 cents per litre off fuel at any Woolworths Caltex outlets when you spend more than \$100 in a single transaction. This comes just 1 day after Coles advertised their 10 cents per litre reduction.

Drakes Supermarkets currently runs 4 cents per litre discount fuel offer which is funded by an approx. 2 cent contribution from us and a 2 cent contribution from the independent fuel operators. The average monthly cost to our company is \$48k across all sites.

On 11<sup>th</sup> March, we trialed a 10 cents per litre fuel discount offer for a 4 week promotion to try and combat the ongoing exceptionally high petrol discounting war of Coles & Woolworths. This cost the company an additional \$284k over our regular redemption discount of 4 cent during the same redemption period which also cost the company \$50k

If Coles & Woolworths can continually offer these highly discounted fuel offers, clearly the Australian consumer is being ripped off somewhere.

Again; this is another case of the duopolies market dominance to eliminate competition, and I am not sure how long the independent fuel outlets and supermarkets can withstand this unconscionable conduct.

I look forward to receiving your response on this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read "Roger Drake".

Roger Drake  
Managing Director  
Drakes Supermarkets

Helping Aussie families save



Woolworths

15¢

OFF FUEL

When you spend \$100 or more in a single transaction

# more everyday

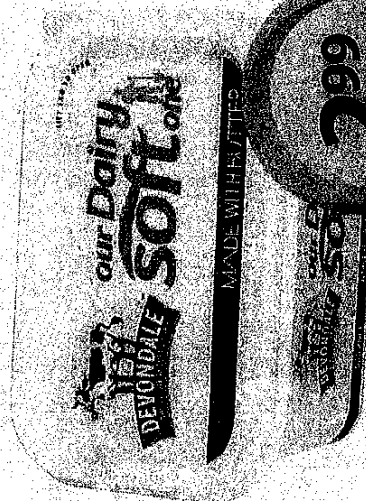


Until Sunday

Kellogg's Coco Pops or Nutri-Grain Liquid Breakfast 6x250ml \$3.99ea \$2.66 per Litre

1/2 PRICE

SAVE 400



Until Sunday

Devondale Extra Soft or Dairy Soft Spread 500g 60c per 100g

2.99

SAVE 121



AUSTRALIAN GROVET

Until Sunday  
Australian Beef  
Market Value Scotch  
Fillet Steak

18.99

SAVE 300 kg

**BOOST**

Until Sunday  
Cadbury Medium Bars 30-60g  
or Europe Bars 40-45g 79¢ ea

1/2 PRICE  
SAVE 10¢

SAVE  
UP TO  
265



238  
ea

South Australian Pink Lady  
Apples 1kg Pack

224  
kg

SA Grown  
South Australian  
Clementine Mandarins



168  
ea

Australian Cauliflower



298  
ea

Australian Cup Mushrooms  
200g Pack \$14.90 per kg



Green Asparagus  
- Product of Peru

2 FOR  
\$4  
SINGLE  
SELL  
250  
ea

Australian  
Strawberries  
250g Pack  
\$13.92 per kg

250g Pack  
348  
ea

Woolworths

Online In Store Mobile

ON SALE FROM FRIDAY 21ST JUNE, 2013 UNTIL TUESDAY 25TH JUNE, 2013 unless sold out earlier. Some stores closed Sunday. Savings based on our Adelaide metropolitan sell price. Advertised savings may vary in some stores, as some products may already be priced below the metropolitan sell price. Limits per customer may apply. Trade not supplied. Specials may not be available at Woolworths online, Loxton and Wallerie and are not available at CALTEX WOOLWORTHS co-branded fuel outlets. To locate your nearest Woolworths store call 1300 767 969 or SMS the suburb/postcode or state on 0439 767 969.

To save 15¢ per litre on fuel at CALTEX WOOLWORTHS co-branded outlets, simply spend \$100 or more in a single transaction (no transaction splitting is permitted at point of sale) at Woolworths Supermarkets from Friday, 21st June, 2013 until Sunday, 30th June, 2013. Offer is not available at Woolworths Liquor/BWS or CALTEX WOOLWORTHS outlets. Purchases of Woolworths Gift Cards, "Smoking Tobacco product and accessories" and Woolworths Online delivery fee are excluded from the qualifying amount. Surrender your fuel saving by presenting your Everyday Rewards card (not applicable in Tasmania) at any CALTEX WOOLWORTHS co-branded fuel outlet to receive your fuel discount. Fuel discount valid for 28 days after purchase. Discounts not available on purchases of LPG at designated CALTEX co-branded outlets or on any Caltex Starcard purchases. Woolworths Limited reserves the right to at any time suspend or terminate this offer. Regular fuel discount docket conditions apply.



## Michelle White

---

**From:** Rowan Mansfield  
**Sent:** Friday, 21 June 2013 1:47 PM  
**To:** Roger Drake  
**Subject:** Petrol Update - 10c

Roger,

Update on the 10c petrol offer:

Total vouchers over 8 week period (4 week promotion, 4 week redemption): 72765  
Total cost to Drakes : \$284,611.55

Average cost to Drakes per week on 10c vouchers for a 4 week promotion is \$71,152.89

Over this period there were also 33064 regular 4c vouchers redeemed, with a cost of \$48,711.89

On an average week with just the regular 4c discount, we will pay out approx. \$12,000 per week across all sites.

Let me know if you need any more info

Thanks,

Kind regards,

**Rowan Mansfield**  
Category Manager



*We give you more*

Address: Head Office SA  
Upper Level, 159 Henley Beach Road  
Torrensville SA 5031

Phone: (08) 8415 6100  
Fax: (08) 8154 1400  
Web: [www.drakes.com.au](http://www.drakes.com.au)



*On*

Upper Level  
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www.drakes.com.au



10<sup>th</sup> July 2012

Mr Rod Sims  
Chairman  
Australian Competition and Consumer Commission  
PO Box 3131  
CANBERRA ACT 2601

**Re Coles Predatory Pricing – Port Lincoln**

Dear Mr Sims

I have enclosed yet another copy of a flyer recently distributed by Coles in the town of Port Lincoln.

Coles have again used their market dominance and produced an advertisement offering "16 cents per litre off fuel until Tuesday, 17<sup>th</sup> July when you spend \$100 or more" only at Coles, Port Lincoln.

I have said it before, I am a believer in healthy competition across all industries, however I have no doubt that if Coles are continually allowed to advertise in this manner, and not be forced to have the same offer across all their stores within the State, this will have a devastating effect on all independent service stations and supermarkets, and ultimately our consumers!

Again, I look forward to receiving your prompt response on this matter.

Yours sincerely

A handwritten signature in black ink, appearing to read "Roger Drake", written in a cursive style.

Roger Drake  
Managing Director  
Drakes Supermarkets

# HUGE FUEL DISCOUNT



# SAVE 16¢ per litre

## UNTIL TUESDAY 17 JULY 2012

# When you spend \$100 or more at Coles Port Lincoln

Fuel offer terms and conditions: This 16 cent per litre fuel discount offer includes the standard fuel discount (including any bonus offer) for purchases of \$30 or more. Customers must spend \$100 or more in one transaction between Wednesday 11 July to Tuesday 17 July 2012 at Coles Port Lincoln. Standard 6 cent per litre fuel discount receipts remain redeemable at Coles Express for 4 cent per litre discount. Limit of one fuel discount receipt per fuel purchase up to 150 litres per vehicle per customer. Not valid for Fleet Card, Shell Card, Mastercard or Motorpass purchases. Purchases of gift cards, tobacco and tobacco related products and coles.com.au delivery/service fees do not contribute to qualifying spend. Offer not to be used in conjunction with any other offer or receipt. Valid in conjunction with additional 2 cents per litre discount for in-store spend at Coles Express. Coles Express Fuel Discount and Save 6 cents Terms and Conditions also apply, see in-store or colesexpress.com.au. For Coles Express store locations, also see web. Fuel discount voucher valid for four weeks from date of issue.

**coles**  
express



Quality food costs less | **coles**