

Thank you for the opportunity to make a brief statement. This Committee has shown a continuing interest in two matters that we are investigating:

1. the conduct of the major supermarket chains in Australia; and
2. the competition issues associated with the use of shopper docket petrol offers.

Last October, and in response to a direct request, I undertook to update Senators on both investigations at this meeting.

Supermarket supplier issues

Senators will recall that in late 2011 much was said in the media indicating that supermarket suppliers were being treated harshly by the major supermarket chains.

It quickly became clear that suppliers were reluctant to speak to the ACCC for fear of the consequences. Whether or not that fear was justified, it was certainly held by the suppliers we spoke to.

I made it clear that the ACCC was prepared to speak to industry participants on a confidential basis, and we would do everything we could to maintain that confidentiality.

I indicated in October that my statement today would not be about a decision to commence Court proceedings, but rather a more general statement about whether we had discovered issues worth investigating

or whether the concerns expressed by suppliers fell outside of the *Competition and Consumer Act 2010*.

We have now reached the point where I can address these issues.

We are aware that the major supermarket chains deal with a large number of suppliers across a wide range of product categories, and around 50 of these suppliers were prepared to speak to us.

They largely told us of behaviour that had a high degree of consistency in many respects. The behaviour that has been raised with the ACCC gives rise to two distinct issues for the purposes of the Act:

1. Whether the major supermarket chains are engaging in unconscionable conduct in their dealings with their suppliers; and
2. Whether the major supermarket chains are misusing their market power by discriminating in favour of their own homebrand products to deter or prevent suppliers of proprietary brands from engaging in competitive conduct.

The allegations raised with the ACCC, and subsequently illuminated in our investigations to date, include allegations of some conduct that does not conform to acceptable business practice and may be unconscionable or a misuse of market power. Such conduct, which is not necessarily identical across suppliers, product lines or even supermarkets, includes:

- persistent demands for additional payments from suppliers, above and beyond that negotiated in their terms of trade
- the imposition on suppliers of penalties that did not form part of any negotiated terms of trade, and which apparently do not relate

to actual costs incurred by the major supermarket chains as a result of the conduct which has led to the penalty being imposed

- threats to remove products from supermarket shelves or otherwise disadvantage suppliers if claims for extra payments or penalties are not paid;
- failure to pay prices agreed with suppliers; and
- conduct discriminating in favour of homebrand products.

Now that we understand the broad nature and context of the alleged conduct, it is evident that, if fully put to proof, this conduct may constitute a breach of the Act and so it is now being investigated in even more detail.

In our investigations to date, we have obtained considerable material from the major supermarket chains. While the ACCC has already spoken to a number of suppliers, those conversations have been on a confidential or anonymous basis and the ACCC will continue to maintain that confidence and will not rely on that material in any action that may arise.

The ACCC has therefore, begun the resource intensive task of acquiring further information using our compulsory information powers from a range of suppliers and, importantly, in the main not just from those suppliers that have approached the ACCC. With the information and documents we now have, the ACCC has identified a number of suppliers who are likely to have relevant information to assist our investigation. This information will be indispensable in the assessment of the allegations. This approach of identifying a broad range of businesses of interest to our investigation avoids placing suppliers in the potentially difficult position of being seen to have reported their concerns to the

ACCC. Our experience is that many businesses prefer this approach, and this is consistent with discussions with certain suppliers to date; and we will continue to be responsive to their situation.

Subject to the evidence we gain from that process, we then expect to interview others in the market before deciding whether the evidence supports the institution of proceedings. This process will involve careful consideration by the ACCC as well as independent legal advice before any decisions are made.

I am unable to estimate the time required as that will depend upon what we find during the process, but we are keen to finish these investigations as soon as we can.

ACCC investigations and possible action may address some of the issues being identified. However, it is apparent already that we will only be able to address some of the issues, and that any action taken will relate to specific instances of conduct rather than broader issues arising from existing market structure and market power.

The imbalance of bargaining power is one of the key issues identified. Such an imbalance, when misused, can have important economic consequences. For example, suppliers may find it more difficult to plan for and invest in their businesses.

In the circumstances we see here, where there are broader issues resulting from existing market structure and market power, on balance, a legally enforceable code of conduct may also have merit. It could, for example, enable more effective enforcement of contracts, better encourage supplier investment, see a more appropriate sharing of risk and allow more effective dispute resolution. Of course, any code will

impose some transaction and compliance costs and cannot address all the issues that arise from market power. In a market economy there will always be parties with significant market power; collective bargaining can, of course, help offset this.

The Minister for Agriculture, Fisheries and Forestry and the Assistant Treasurer indicated on 25 September 2012 that, following a forum of food sector participants, there was a common view that improvements could be made in commercial relationships along the food supply chain.

A supermarket and grocery industry working group, including Coles, Woolworths, the Australian Food and Grocery Council and the National Farmers Federation, is proposing that an industry code could be made enforceable under the Competition and Consumer Act.

The ACCC has been providing input to this working group. The ACCC has stressed the importance of the code containing clear and meaningful obligations to allow industry and the ACCC to know when traders have crossed the line.

Let me make two points clear. First, the development of any code will not dissuade the ACCC from completing its investigations and taking any consequential action it considers appropriate based on the information and evidence available to it. Second, we will not hesitate to make it clear where we consider the development of a code falls short or is off track.

Shopper docket petrol offers

I will now briefly update the Committee on our investigation of the competition issues associated with the use of shopper docket petrol

offers by supermarkets arising from the extended frequency, duration and quantum of offers.

In July 2012, the ACCC confirmed publicly that it was considering these matters and in late December we publicly confirmed that we were considering the extended Coles 8cpl offer as part of the continuing investigation.

While the ACCC has previously noted the short-term consumer benefits flowing from the discounts offered through the shopper docket schemes, we are particularly conscious of the importance of looking at the potential for longer term impacts on competition and therefore, ultimately, consumers.

Relevant to the ACCC's assessment is the question of whether fuel retail offers that are linked to the activities of Coles and Woolworths, in other unrelated markets, may have the effect of distorting competition between fuel retailers in circumstances where, having regard to retail fuel margins, the discounts may be difficult or even impossible for other fuel retailers to match.

ACCC investigators have already met with a broad range of industry participants, including national and state motoring associations, fuel retailers and fuel wholesalers, as part of our evidence gathering activities, and we anticipate further engagement throughout the investigation.

In this regard, it is important that fuel retailing businesses which may be affected by the shopper docket arrangements are prepared to substantiate claims about the impact of the schemes on their business and on competition, by providing evidence and real examples. The

ACCC will work closely with businesses and organisations to obtain the type of information required.

As you would appreciate, assessments of this kind are complex, particularly in this case given some of the issues I have described, and generally involve extensive evidence gathering followed by legal and economic analysis. Given this, the ACCC anticipates this shopper docket investigation will take some time and is presently working towards finalising the investigative phase of the matter around mid 2013. A decision as to further steps, including any potential action, will be made by the ACCC following the conclusion of the investigation phase.

I anticipate being in a position to expand on our views, in relation to both our consideration of supermarket supplier issues and shopper docket offers, following the conclusion of the investigation phases.