



Submission to the

**SENATE ECONOMICS REFERENCES COMMITTEE
INQUIRY INTO THE GROCERYCHOICE WEBSITE**

September 2009

CHOICE is a not-for-profit, non-Government, non-party-political organisation established in 1959. CHOICE exists to unlock the power of consumers. We work for Australians to be the most savvy and active consumers in the world.

57 Carrington Road Marrickville NSW 2204

Phone 02 9577 3333 Fax 02 9577 3377 Email ausconsumer@choice.com.au www.choice.com.au

The Australian Consumers' Association is a not-for-profit company limited by guarantee. ABN 72 000 281 925 ACN 000 281 925



1 Introduction

“In an environment of rising prices, it is vitally important that consumers can have confidence that the prices they are being charged are fair, and are not the result of market power, particularly in relation to the two major grocery chains in Australia.”

CHOICE Submission to ACCC Inquiry into grocery prices, March 2008

Since CHOICE wrote this submission 18 months ago, there has been little positive change for consumers in the grocery sector. Retailers, on the other hand, have reported record profits and continued significant expansion programmes with acquisitions by Woolworths of Macro Wholefoods and hardware supplier Danks. The grocery industry alone is estimated to be worth \$70 billion a year in Australia. For every dollar Australian consumers spend on retail purchases, 25 cents are spent at a Woolworths or Wesfarmers owned company.¹

In 1994 the United Nations ratified the Guidelines for Consumer Protection. One of those basic rights is ‘the right to be informed’. Australian grocery retailers, manufacturers and suppliers have intimate knowledge and information about their industry, including extensive market research and point-of-sale data.

Consumers on the other hand, know very little about why prices seem to rise and never fall and whether price rises are fair and reasonable. Nor do they have a means of finding out. Yet consumers do know that they live in a country where food price inflation has increased 43.6% over other developed countries since 1996.²

The GroceryCHOICE website was to have been the vehicle to deliver on the ‘right to be informed’ by giving consumers an easy way to compare the price of grocery items at their local supermarkets. It would have filled the current gap in the capture and comparison of information in the grocery sector.

On 1 July 2009 CHOICE was ready to launch a new, consumer-focussed GroceryCHOICE website built on a platform of sophisticated, purpose built, software capable of delivering all the information that consumers expected about grocery prices in each store. On 1 July 2009 consumers would have had access to more than a thousand accurate and up-to-date prices in each major supermarket and in many other supermarkets as well. The number of prices would have increased steadily over the following weeks. In addition our GroceryCHOICE website would have delivered a rich menu of additional expert and consumer generated information soon after. From 1 July 2009 Australian consumers would have been in a position to judge the value of the investment made by the Government and the work undertaken by CHOICE and its team of sub contractors.

It’s important to remember that the impact of a successful GroceryCHOICE website would be felt in two ways. First it would help individual consumer users of the website make more informed choices in the grocery market. Second, by a percentage of consumers using the website to make

¹ Kelly Burke ‘How two supermarket giants divide your family's weekly spending’ *Sun-Herald* 14 June 09 p 14

² Ben Packham ‘Australia has the world’s highest food inflation’ *Herald Sun* 18 March 2008 accessed at <http://www.news.com.au/story/0,23599,23392303-421,00.html> on 11 September 2009



purchase decisions based on value for money, it would have placed increased pressure on supermarkets to offer consumers more competitive prices.

CHOICE welcomes the opportunity to make a submission to the Senate Economics References Committee Inquiry into the GroceryCHOICE website. In this submission, CHOICE will address the following Terms of Reference:

- the proposal CHOICE put to the Government to take over the website and the reasons why the Government was persuaded that taxpayers would receive value for money;
- the problems and issues faced by CHOICE in establishing, operating and relaunching the website;
- the contract arrangements with CHOICE and the various contractors involved with CHOICE's and the ACCC's management and operation of the website;
- the legal issues and trade practices concerns arising from the establishment, management, operation and closure of the website; and
- the specific concerns of the major chains and independent retailers.

2 CHOICE's proposal to run GroceryCHOICE

While CHOICE supported the idea of a grocery price website, we felt that the original Australian Competition and Consumer Commission (ACCC) website did not deliver what consumers needed for these reasons:

- The scoping, specifications and delivery were rushed.
- It didn't focus on the information of most value to consumers
- It didn't deliver local prices nor was it up to date.
- Consumers didn't find it useful.

The ACCC website August 2008 – January 2009

The screenshot shows the ACCC GroceryCHOICE website interface. At the top, there is a search bar and navigation links. The main content area displays a table of grocery basket prices for 'Inner Sydney North' as of 'Jan 09 Release'. The table compares prices across five retailers: Coles (EKO), Woolworths / Safeway, Franklins, Independents, and ALDI. A 'Total of above baskets' row is also included. To the left of the table, there is explanatory text about the basket prices and a note about independent retailers.

Basket	Coles (EKO)	Woolworths / Safeway	Franklins	Independents	ALDI
Meat & Seafood Basket	\$20.16	\$20.00	\$20.00	\$21.27	-
Fruit & Vegetable Basket	\$20.00	\$21.07	\$20.07	\$20.01	-
Dairy Basket	\$17.13	\$18.74	\$18.00	\$16.01	-
Bread & Cereals Basket	\$22.56	\$22.50	\$22.50	\$21.00	-
Drinks & Snacks Basket	\$21.18	\$21.70	\$21.40	\$22.00	-
General Groceries Basket	\$45.53	\$46.00	\$46.07	\$45.50	-
Household & Personal Care Basket	\$20.16	\$20.02	\$20.10	\$20.04	-
Total of above baskets	\$160.29	\$160.00	\$160.13	\$160.04	-

Inner Sydney North

Grocery Basket Prices Jan 09 Release

These basket prices represent the average basket price for the region for which supermarket chains. The total basket price reflects weights grocery purchases by the average Australian household.

Independent testing of product quality has been done to allow like-for-like comparisons between retailers. However, some differences in the quality of fresh meat, fruit and vegetables may still exist and consumers should include this when making price comparisons.

Note 1: Basket prices for individual stores are not provided.

Note 2: Independents refers to supermarket retailers that may not be part of a major chain.



The ACCC website launched to a barrage of public criticism and dissatisfaction. It was clear that consumers didn't find it useful or relevant.

CHOICE felt that there was an opportunity to present an alternative proposal to deliver a website that consumers could use. CHOICE saw a natural fit with GroceryCHOICE where we could offer the expertise, skills and consumer understanding necessary to deliver a consumer-focussed website. We considered our 50 year track record and experience in consumer research and publishing put us in the best position to partner with Government, retailers and consumers to deliver a useful service that was relevant to consumers.

Other criteria that made us the right choice:

- There are very few other organisations that could have done it – CHOICE is a unique source of truly independent consumer information in the marketplace.
- We had confidence in our hands-on experience in comparing products and services.
- CHOICE had already been reporting on grocery prices for 20 years. Our surveys found that prices continued to rise and that local and regional price variations were difficult to explain.
- The second largest Australian household spend is on food. Reporting on food prices is fundamental to CHOICE's charter of helping consumers.

2.1 Our proposal and approach

CHOICE wanted to create an easy way for consumers to compare prices in their local area and at the same time put downward pressure on prices. CHOICE identified the key requirements of an improved website should include these key deliverables:

- Better price information – more supermarkets by local area, more frequent price updates (minimum weekly), greater range of groceries, information on generics
- Improved information display and more appealing design
- Personalised baskets so that shoppers could create their own shopping list rather than using a generic, average basket
- Unit pricing
- Increased transparency
- User and community comments and interactivity to tap into the rich source of information gained through consumer exchanges

The complete submission that CHOICE presented to the Government in August 2008 is attached at Appendix 1.

2.2 Chain of events prior to contract signing

The Acting CEO of CHOICE, Bill Davidson, and the Chair of the Board, Jenni Mack, took the CHOICE proposal to Minister Bowen on 27 August 2008. The Minister was receptive to the idea and referred us to the ACCC.

A subsequent meeting was held with the ACCC on 2 September 2008 about the proposal. The ACCC was also receptive to the idea and referred us to Treasury. Treasury confirmed that CHOICE would satisfy a single supplier arrangement, subject to documentation and pricing.

CHOICE then developed a brief for SMS Management & Technology to present a proposal for a Project Management Plan and costing, and continued to work with Treasury on a contract document.



By December 2008, CHOICE had begun to brief supermarkets to outline the nature of the re-scoped project. Based on our recognition of supermarkets as a key stakeholder, CHOICE's approach was inclusive, flexible and accommodating. CHOICE knew that the most effective and efficient way to deliver the price information required by consumers would be through the cooperation of the supermarkets. A key strategy of the project was to set up an Industry Forum to act as an advisory body and keep communication lines with supermarkets open. CHOICE also made it clear to supermarkets that we were prepared to understand and address every genuine issue that they faced in providing the data needed by consumers. At the same time CHOICE was working on a 'back up' strategy to ensure that there were options to deliver an improved GroceryCHOICE site should some of the supermarkets decline to cooperate at first.

Briefings were held with independent supermarkets through the National Association of Retail Grocers of Australia (NARGA), Woolworths, Coles, ALDI, FoodWorks, Metcash, Ritchies and Franklins.

As final discussions were held with Treasury, CHOICE met with operational staff from the ACCC on 4 December 2008 to obtain information required to implement the project.

A final meeting with Treasury and Minister Bowen was held on 16 December 2008 before the Treasury Head Contract was signed by both parties on 19 December 2008.

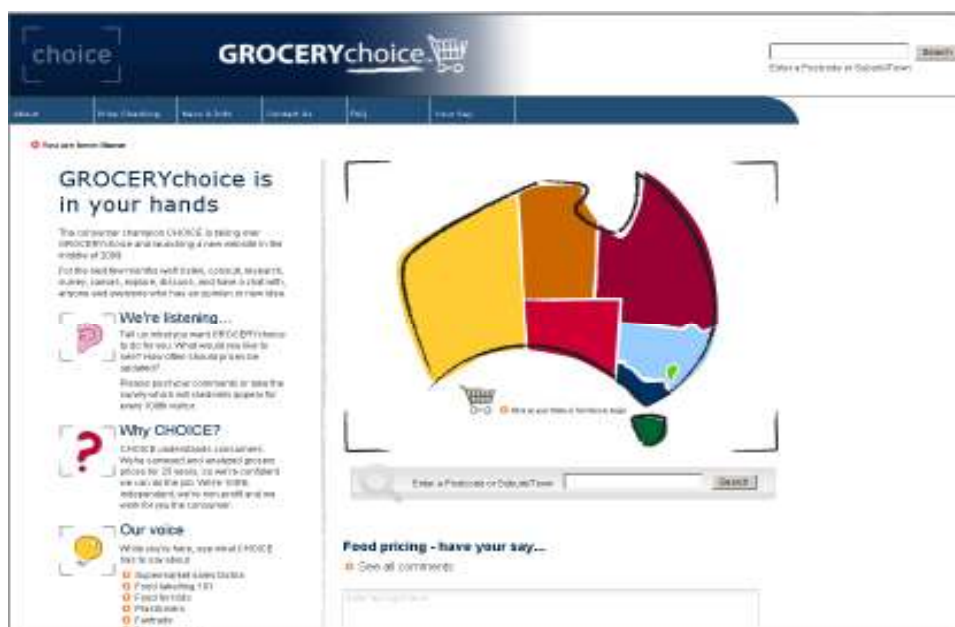
3 Programme management, contracts, technology solution and data

3.1 GroceryCHOICE Website Contract

The Head Contract with Treasury outlined three phases of the project.

Phase 1 was to deliver a re-badged GroceryCHOICE website by 1 February 2009. This was an interim website with CHOICE branding and an invitation to consumers to say what they'd like to see on the website. We also conducted a survey to gather opinions and shopping behaviours. The ACCC monthly survey data was still loaded on to the website but the emphasis was on conducting a needs analysis to scope the revamped website.

Re-badged GroceryCHOICE website launched 1 February 2009





Phase 2 covered the development period between the launch of the re-badged website until the commencement of Phase 3.

Phase 3 was to deliver a new web service by 1 July 2009 with:

- An expanded range of services for consumers
- New data presentation
- Weekly prices
- Local prices

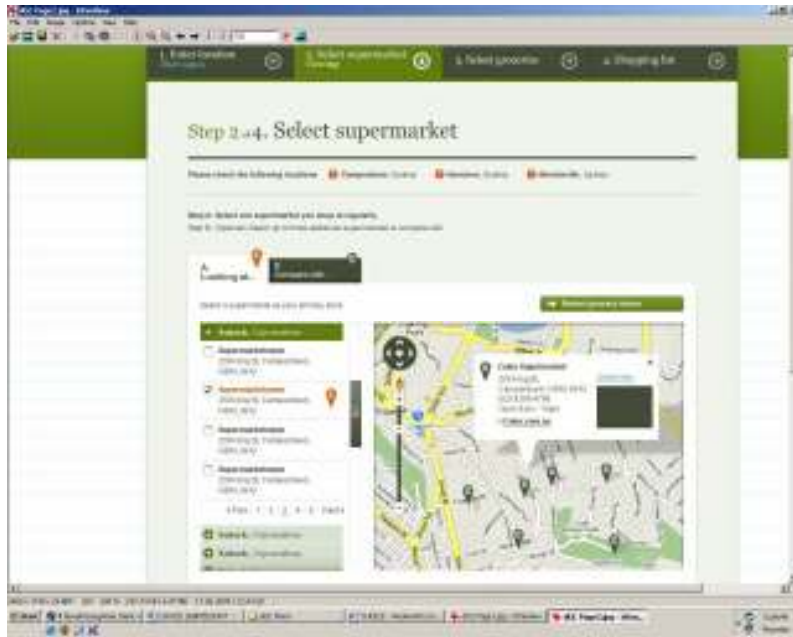
The revised website concept design centred on four simple steps to be taken by the consumer to get the information they needed.

Step 1: Enter your address, suburb, postcode or state

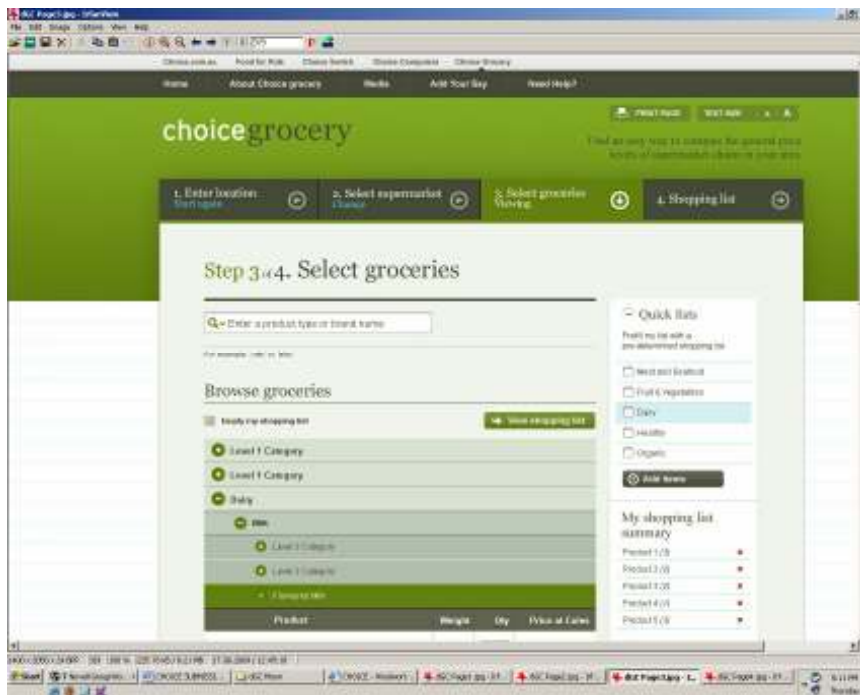




Step 2: Select supermarkets in your chosen area to compare



Step 3: Create your own grocery shopping list





Step 4: Compare your grocery shopping list prices at different supermarkets



During the course of Phase 2, progress discussions were held with Treasury. By late May 2009 it was clear that some supermarkets would not be in a position to deliver data to the new GroceryCHOICE website, so alternative sources of data were identified. This change meant a contract variation would be needed, which was verbally agreed to at a meeting with Minister Bowen, Treasury staff and CHOICE on 26 May 2009.

CHOICE and Treasury agreed that all contractual obligations would be met in full by launching a new GroceryCHOICE website on 1 July 2009 with significant improvements to usability as well as an extended product range. This would include weekly updates of 1100-1500 specials (increasing weekly), together with prices from Aldi and FoodWorks. The site would be subject to continuous improvements based on consumer feedback and increasing product ranges. This would also provide additional pressure on the other supermarkets to comply when they could see it working in practice.

On 9 June 2009 a new Minister for Competition Policy and Consumer Affairs was appointed, Dr Craig Emerson. The CHOICE CEO wrote to the Minister requesting a meeting to brief him on GroceryCHOICE. The Minister agreed and indicated he had already met with supermarkets.

In the week prior to the website's launch, on 23 and 24 June 2009, the CHOICE CEO and the CHOICE Director of Partnerships held a number of briefings with the Prime Minister's office, Government and Opposition representatives, as well as independent senators and journalists. The overall response to the re-designed website was positive.

CHOICE briefed Minister Emerson on 23 June 2009. The Minister gave no indication at his meeting with CHOICE that he intended to terminate the Government's contract with CHOICE. CHOICE supported his suggestion that it would be useful to meet jointly with supermarkets and ANRA, in fact outgoing Minister Bowen had planned to hold a similar meeting before the Cabinet re-shuffle. At the meeting on 23 June 2009, it was agreed that a meeting involving the minister, CHOICE and industry representatives would be held soon after the launch of the site a week later; instead, on 25 June 2009, Minister Emerson advised CHOICE that he had convened a meeting for the next day. The short notice meant appropriate officers from CHOICE could not attend. Minister Emerson



proceeded to meet with supermarkets and ANRA on 26 June 2009. On 26 June 2009, five days before the website was due to launch, CHOICE received notice of the GroceryCHOICE contract termination.

Minister Emerson's office rang the CHOICE CEO at 2pm, who was in a meeting. CHOICE received written termination by fax at 2.35pm and by email at 2.39pm. A media release from the Minister's office was published at 2.52pm. The CHOICE Media team received calls from 2.55pm. The CHOICE CEO learned of the termination after his meeting concluded at 3.15pm, when he was contacted by the Minister on the telephone.

CHOICE is still not clear why the decision to terminate the project was taken and firmly believes that it was the wrong decision. CHOICE had gone to Canberra the week before launch to give key politicians a clear understanding of what the website would deliver and demonstrate the website's purpose and readiness. We also briefed journalists with the objective of giving the website some positive publicity. At no time did we sense anything other than a high level of interest and support. It also seems curious that if the Minister had suspected the website wasn't going to be of value, that he didn't mention his doubts at the meeting convened with CHOICE on 23 June 2009. So close to launch it would have been more prudent to allow the site to launch, to gauge level of support and seek to add pressure on the non participating supermarkets to comply.

3.2 CHOICE sub-contracts

To deliver parts of the project requiring specific skill sets, CHOICE subcontracted other providers. These sub-contracts included clauses to reflect the requirements of the Head Contract.

Treasury formally approved the subcontracting of the programme management, technical build, hosting and maintenance of GroceryCHOICE to SMS Management and Technology, Australia's largest IT consulting firm.

SMS Management & Technology

Level 28 Suncorp Place, 259 George Street, Sydney NSW 2000
T +61 2 9259 8888
www.smsmt.com

Moon were contracted as CHOICE's digital agency to deliver designs for all online services and a digital strategy covering business communications, newsletters, marketing. The design for the new GroceryCHOICE website was one of the deliverables within this contract.

Moon Group

115 Cooper St, Surry Hills, NSW 2010
T + 61 2 9035 6666
www.moon.com.au

Nielsen were contracted to conduct a user survey on choice.com.au and grocerychoice.com.au to canvas opinions of the current GroceryCHOICE website, do a needs analysis, and create a profile of GroceryCHOICE website users, their shopping habits and demographics.

Nielsen Online

The Nielsen Company
T +61 2 8204 5804
www.nielsen-online.com



Treasury approved the subcontracting of Fresh Logic to provide a range of services including:

- A rationale for comparing fresh produce
- The top selling 5000 products for the top 80% of supermarket brands
- Top selling fresh foods
- Specials data delivered weekly

Fresh Logic

Level 3, 192B Burwood Road, Hawthorn, Vic 3122

T + 61 3 9818 1588

www.freshlogic.com.au

Treasury approved the subcontracting of Bruce Clay Australia to develop a search engine optimisation strategy for GroceryCHOICE as part of the broader marketing strategy.

Bruce Clay Australia

Level 6, 301 George Street, Sydney NSW 2000

T + 61 2 9279 0384

www.bruceclay.com.au

3.3 Technology

The technology solution scoped and developed by SMS was in the final stages of user testing at the time of termination. CHOICE felt that the solution was an efficient, elegant, state-of-the-art piece of infrastructure with groundbreaking features. The Google mapping of local supermarkets was one such feature. Cloud computing to handle scalable demand was another.

In summary, CHOICE's technology solution was:

- Developed by the best technology partner available, SMS Management & Technology, with a proven track in delivering complex, best practice technology solutions, and Australia's largest IT consulting firm.
- An innovative technical solution and design which was scalable and robust
- A system with the technical capacity to accept supermarket data in up to 10 different formats at whatever frequency they specified (hourly, daily, weekly)
- Able to store terabytes of data
- Able to handle a load bearing capacity of 90,000 concurrent users.
- Able to accept alternative data and deliver the website without all supermarkets being on board.
- Being implemented by an efficient, productive, motivated team.
- Specified and documented to benchmark standards.

CHOICE had absolute confidence in the end result. This technology remains available and can be reactivated.

3.4 Price Data

CHOICE always recognised that accurate, timely data was key to the project's success. To this end CHOICE liaised with supermarkets to identify the most expedient and efficient way to access this data.

ALDI and FoodWorks were consistently supportive and cooperative in this respect, looking for ways to deliver data and work through issues with CHOICE.



When it became apparent that other supermarkets were either reluctant or unable to supply data, CHOICE investigated alternative sources including Aztec Point of Sale prices gathered by supermarkets and on-sold to manufacturers. We requested access and use of the Aztecprice and location data from Coles and Woolworths as this was already available to them but the request was declined. CHOICE also entered into an agreement with Fresh Logic to deliver weekly specials from all the major retailers, a strategy that the Minister agreed would fulfil CHOICE's contractual obligations. Scraping retailers' websites was also considered as a data source. CHOICE had sought advice on this strategy to ensure its legality.

4 Consultation process and issues arising

CHOICE sought to discuss the project and work through supermarkets' issues via Industry Forums, workshops on topics of concern, individual meetings and industry body meetings, as follows:

December 08
Information sessions with all supermarkets (individual meetings) and National Association of Retail Grocers of Australia (NARGA)
January 09
22/1 Meeting with Australian National Retailers' Association (ANRA)
February 09
Feb 09 Follow-up meetings with all supermarkets (individual meetings) 25/2 Industry Forum Sydney 27/2 Industry Forum Melbourne
March 09
10/11/12 March 09 Workshops on topics of concern 23/3 Letter of Woolworths concerns 24/3 Meeting with Woolworths to address concerns
April 09
7/4 Second industry Forum 21/4 Meeting with Woolworths 22/4 Meeting with Franklins 22/4 Coles pulls out of meeting with CHOICE CEO: 'until such time that industry has an agreed position' and that 'industry groups are difficult beasts to get agreement with.' 24/4 ANRA requests meeting with CEO 29/4 ALDI commits to send dummy data for prototyping 28/4 ANRA letter listing concerns 29/4 CHOICE response to ANRA's concerns
May 09
5/5 Progress letter from CHOICE CEO to all supermarkets 13/5 File format received from FoodWorks 22/5 Progress letter from CHOICE CEO requesting access to Aztec data as alternate source 28/5 All supermarkets are sent MOU, list of 5,000 products, rationale for like-for-like and fresh comparison, data integrity process.



June 09

5/6 Meeting with Woolworths
23/6 CHOICE CEO briefs Minister Emerson on GroceryCHOICE website
26/6 Minister Emerson meets with ANRA and supermarkets
26/6 Contract terminated

4.1 Communications

The communication challenge that CHOICE set itself was to take the politics out of GroceryCHOICE and encourage public debate around the solutions to an uncompetitive groceries sector. Demystifying GroceryCHOICE and what it would deliver for consumers was part of that process.

From the time of the announcement of CHOICE's involvement in the project, there was overwhelming public support and debate concerning supermarkets, food prices, tactics, insights, complaints and suggestions. The following are a small selection of the consumer comments we have received.

Consumer comments received by CHOICE

The large stores have been increasing prices but cutting the contents. Previously they increased prices because of the cost of diesel, yet when the cost dropped they didn't drop the food prices. Food has become a luxury.

Why are woolies grocery prices in my suburb more expensive - especially toiletries from the next which is about a ten minute drive (in a CBD). Would love to see price comparisons on staples i.e. rice/bread/eggs/milk/sauces, etc.

Coles in our area is pushing out brands we prefer, in preference to their own generic brand. Fuel went down groceries went up, why are Coles and Woolworths prices increasing faster than the annual rate of inflation?

When the cost of a simple item such as a box of 200 house brand (Coles) facial tissues can go from 99cents to \$1.22 in 2 months; what hope has the ordinary shopper got?

But the data on prices is potentially available electronically, since every supermarket has a database of its goods, to run the checkout scanning. If they were obliged legislatively to pass it over to GroceryCHOICE, then we could do some real online price searching. I estimate that the big supermarkets already do this, when they try to cut their input costs. Of course, this would give real power to at least a portion of consumers (those who are concerned or cost-conscious enough to care) and the supermarkets would scream like murder to stop it, but that's because it would be more effective.

The best way to keep prices down is competition, and this website will hopefully help with that when it's fully implemented.

The latest IPSOS Mackay research *We Are What We Eat*, August 2009, shows that "Antagonism towards Coles and Woolworths has been increasing, driven mainly by the monopoly these two major supermarkets have in the Australian market. Consumers blame them for the high cost of food and believe they are screwing the producers and putting the 'small guys' out of business. However convenience and range bring them back time and time again."

The potential of GroceryCHOICE clearly touched a chord with the Australian public.



4.2 Problems and issues in establishing, operating and relaunching the website

CHOICE encountered no problems in managing the project and scoping a technology solution. It was a best practice project from this perspective.

The primary problem faced by CHOICE in implementing GroceryCHOICE at the level of quality to which we aspired was the failure of some but not all supermarkets to provide price data. By June 2009 CHOICE had developed an acceptable alternative approach to price information which would have provided useful information to consumers and demonstrated the potential of the site to deliver all the information expected by consumers and more – subject to the cooperation of the remaining supermarkets.

The Australian National Retailers Association (ANRA) aggravated this problem when it took over discussion of their relationship with GroceryCHOICE from Woolworths, Coles and Franklins. The Government failed to do all it could to help solve these problems and then, of course, has determined that GroceryCHOICE should not proceed thus stifling a project that was on the verge of delivering substantial benefits to consumers.

Supermarkets

Woolworths was resistant to the idea from the beginning. They cited a range of issues from technology constraints to trade practices breaches, all of which CHOICE was willing and able to address. ALDI and FoodWorks were supportive and cooperative and while they cited technology as a challenge, they were willing to find solutions and work with CHOICE. Coles and Franklins were initially cooperative and open to the idea, but became increasingly distant. Ritchies and Metcash remained uncommitted until they saw what action the big two retailers would take. NARGA were hostile to GroceryCHOICE from the outset, based on the fact that their members find it difficult to compete with the big two supermarkets (because of the Metcash monopoly), and difficulties in making information available for all stores. CHOICE therefore took the decision early on that NARGA members would be part of a post July 2009 strategy.

ANRA

The entry of ANRA marked a turning point in the project. Previously CHOICE had dealt with supermarkets individually, but after a meeting requested by ANRA on 30 April 2009, ANRA members Coles, Woolworths and Franklins would only communicate through their industry body. This new strategy gave these supermarkets an opportunity to present a united front and agree an approach to block progress. Supermarkets stepped away from the negotiating table and let ANRA do the talking.

CHOICE believes that the strategy used by the major supermarket chains to withdraw from direct discussions with CHOICE and work through ANRA had two devastating implications: firstly, that it allowed the supermarkets to no longer engage with CHOICE, including preventing discussions with technical and operational people within each company; secondly, it demonstrated ANRA's ability to block progress towards creating a more competitive environment now and into the future.

Whether or not ANRA's behaviour was in breach of the Trade Practices Act, it had the effect of advantaging sellers (supermarkets) at the expense of buyers (consumers). The Committee should consider the power and influence of ANRA as a barrier to the future competitiveness of the sector as much as their role in the demise of GroceryCHOICE.



Government

Given the slow progress being made by the supermarkets we asked ministers and officials to help bring greater influence and pressure to bear, including personally contacting the CEOs of the supermarkets and considering the implementation of price transparency legislation. We also considered what additional pressure CHOICE, our members and consumers more generally could unleash and what this would achieve. The Government made it very clear that their preference was to proceed in a conciliatory manner, giving supermarkets a longer time-frame to comply rather than increasing pressure on them to act.

In further discussions with Minister Bowen and officials it was agreed to continue with the launch on 1 July 2009, to increase the number of products displayed every day, with an acceptance that greater pressure on the supermarkets may have been required after launch to achieve the original aims of the project in relation to price information. The Minister agreed to a series of changes to the contract to reflect this new position.

Although the major barriers to supermarket compliance with GroceryCHOICE lay with the supermarkets themselves, the lack of political will to seek legislative and non legislative solutions had a detrimental impact on the ability of CHOICE to deliver the website the public wanted.

4.3 Legal issues and trade practices concerns

CHOICE sought legal counsel concerning a range of issues. To address concerns regarding the potential for or appearance of price collusion, Jonathon Casson (Chairman of Partners, Holman Webb Lawyers) advised that any potential breach of the Trade Practices Act would be mitigated if discussions with supermarkets at Industry Forums concentrated on prices, not pricing. CHOICE invited Mr Casson to attend the Industry Forum to allay supermarkets' concerns.

CHOICE also sought to address risks in publishing information in good faith which is found to be inaccurate. The legal position confirmed that prices on the GroceryCHOICE website are prices valid at a particular point in time and subject to local variation; see below for further details about how CHOICE sought to ensure data integrity and price accuracy.

Lastly, CHOICE is a prescribed information provider within the meaning of section 654 of the Trades Practices Act and is not an advertiser, therefore liability issues arising from comparative advertising were not a concern.

4.4 Supermarket concerns

Each supermarket came to the project with some concerns, many of them shared, but their approaches and attitudes differed. ALDI and FoodWorks voiced their concerns but were open and willing to discuss solutions. They indicated they could supply prices – ALDI because they have national pricing and FoodWorks had identified a technical solution to provide price data.

Coles and Franklins were cordial but cautious. CHOICE had preliminary discussions with their IT departments. Discussions were more strained with Woolworths who were aggressive in their approach compared to other retailers. They indicated they would incur substantial IT costs but were unable to say what these would be (quotes varied from \$50,000 to \$500,000).

NARGA represented a large number of small retailers whose ability to take part in GroceryCHOICE was initially limited by technical systems and time constraints. CHOICE proposed to include this group of supermarkets after processes for larger supermarkets were in place. For this reason, NARGA was not considered a primary stakeholder in the initial round of development.



Supermarkets had the opportunity to voice their concerns at two Industry Forums held in Sydney and Melbourne. CHOICE held a series of workshops to address issues raised at the Forums and all supermarkets agreed to attend with the exception of Woolworths.

CHOICE produced an Issues and Solutions document, a summary of which appears below. This was distributed to all supermarkets. We also addressed their concerns at individual follow-up meetings.

ANRA came in as a late player at the end of April and submitted a list of concerns on behalf of Woolworths, Coles and Franklins. From that point onwards, these three supermarkets would only speak through their industry body and individual negotiations ceased.

The concerns raised by supermarkets, or on their behalf, and CHOICE's response to those concerns are outlined below.

Accuracy of prices

CHOICE undertook to clearly state that the website is a price guide at a defined point in time and that prices may vary at the point-of-sale. CHOICE was prepared to receive updated price files from retailers (daily, weekly or as frequently as the supermarkets would like) and would clearly date and time stamp prices. CHOICE would also educate consumers on the complexities of grocery pricing through articles and directions on our website.

To further mitigate risks of inaccurate prices CHOICE undertook to:

- draft a Memorandum of Understanding defining the retailer's responsibility to provide accurate information and CHOICE's responsibility to accurately publish that information,
- ensure data integrity by applying technical and manual Quality Assurance processes to information supplied, and
- apply prominent caveats to the website.

Potential breach of s56 of the Trade Practices Act

Supermarkets indicated to CHOICE that they were concerned that advertised prices could lead to prosecutions for bait advertising. In response to these concerns CHOICE undertook to:

- republish the special prices as they appear in retailers' catalogues and re-iterate the same disclaimers as used by retailers (eg available while stocks last);
- facilitate consumer reporting of advertised products which are not available in reasonable quantities or for a reasonable time; and
- make clear to consumers the possible variation between price reported and actual shelf price.

Methodology for product comparability

CHOICE acknowledged the difficulty of comparing fresh food, meat and private label products. While the consumer will be the ultimate arbiter of shopping basket composition and perception of quality, and will apply the same shopping decision-making as they would in the supermarket, the website needed to address supermarket concerns on the ability to appropriately compare products.

As a result CHOICE developed a detailed methodology to enable like-for-like comparisons. The methodology for fresh food comparisons, for example, encompassed:

- tangible product features
- ethical food attributes
- common product descriptions
- quality descriptors that are current across fresh food categories



To account for differences in product sizes, CHOICE proposed to publish the unit prices provided by retailers and to enable unit price calculations in accordance with Government regulations and guidelines.

Additionally, the website would give consumers the discretion to choose according to their own preference for brands, private labels or Aldi products.

CHOICE also recognised that many supermarkets offer benefits to their customers apart from price discounts, which may influence their shopping behaviour. Therefore, the website highlighted details about individual retailer loyalty and petrol discount offers or costs applied to credit card transactions or plastic bags in the 'hover' option available for each retailer on the final shopping list cost comparison page.

Use of website for CHOICE promotional purposes

CHOICE entered into a contract with the federal Government to deliver a new grocery pricing service driven by consumers. Under the terms of the contract, CHOICE had the discretion to brand the website as a CHOICE product and to include extra information in keeping with CHOICE's charter as a well-known and respected social enterprise. CHOICE does not accept advertising in any of its publications and did not intend to do so in GroceryCHOICE.

Cost of providing data

CHOICE developed a sophisticated data capture, data warehouse, data comparison and data publication process. To minimise the implementation costs to supermarkets and to accommodate the varying technical sophistication of individual supermarkets, CHOICE developed a system to accept data in 10 different formats. These ranged from live feeds from those with high-end IT systems, to capturing an Excel spreadsheet from those supermarkets with little technical infrastructure.

5 The supermarket industry – the way forward for consumers

Australian consumers are concerned about the impact that the power of the major supermarket chains (Woolworths and Coles) has on the grocery market. The overwhelming consumer feedback received by CHOICE in response to the axing of GroceryCHOICE is just one indicator of this concern.

Consumers are worried that supermarkets use their power to:

- reduce consumers' choice of brands and products, partly in order to create a market for their private label products,
- to put pressure on smaller retailers which often forces them out of business,
- to charge unfair prices, and
- make what they see as excessive profits at the expense of consumers and farmers.

In March 2008, the ACCC conducted an inquiry into the grocery industry. Many were surprised at their finding that the grocery market was 'workably competitive'. Others, including CHOICE, would argue that 'workably competitive' means the market is not competitive enough, and that there is significant room for improvement.



The ACCC nevertheless identified concerns about the way in which the grocery market operated. These included:

- a recognition that restrictive covenants in leases between mall operators and major supermarket chains (MSCs) are often used to prevent competitors to MSCs opening stores in a particular mall;
- the difficulties in comparing grocery prices within and between different supermarket chains which could be addressed by the GroceryCHOICE website and unit pricing.
- the potential for 'creeping acquisitions' to increase the dominance of the two MSCs.

In response, the ACCC undertook to examine whether the kinds of restrictive covenants identified as potentially anti-competitive breached existing trade practice law. It supported the introduction of laws that would enable the ACCC to prevent creeping acquisitions that could restrict competition.

Apart from the now-defunct GroceryCHOICE website, the Government has delivered little in response to those concerns. The mandatory unit pricing code, while significant and welcome, is only one small part of what needs to be done to address legitimate consumers concerns. There is no reason not to continue to support the ACCC's recommendations. In fact, there is every reason to think that more needs to be done.

In order for GroceryCHOICE not to have been a waste of government expenditure, its legacy needs to be the much needed impetus for change in other areas set out below.

5.1 Measures to help consumers drive change

Deliver on the Government's commitment to provide transparent supermarket pricing information

If the Government is going to deliver on its promise to provide transparent pricing information through an independent grocery price website it will require legislation that all supermarkets must provide timely pricing information. If the Government is not prepared to do this, then it is essential that it make good on its commitment to developing an industry based scheme, provided it is independently supervised and meets the needs of consumers.

On 24 July 2009, Minister Emerson issued a media release³ in which he confirmed the Government's commitment to transparent pricing, stating:

"The Government remains of the view that consumers are better placed to make informed choices when they are able to gain access to prices conveniently and make comparisons among supermarkets."

The Minister also undertook to work with the industry to develop a grocery price comparison website:

"I will hold discussions with supermarket chains about the possibility of an industry website capable of providing convenient grocery price data that could be audited by a Government-appointed auditor."

³ The Hon Craig Emerson MP, GOVERNMENT WILL NOT PROCEED WITH GROCERY CHOICE, Media Release 26 June 2009 available at <http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTWILLNOTPROCEEDWITHGROCERYCHOICE.aspx>.



CHOICE expects the Government to rapidly explore every possibility for enabling consumers to have access to comparative timely price information from all their local supermarkets.

Improve and extend unit pricing

The unit pricing provisions are a modest but significant improvement in the information available for consumers. They would be even more helpful if consumers were able to use the unit pricing system online.

Unit pricing becomes compulsory on 1 December 2009. Many supermarkets are already implementing the systems that they will use. Unfortunately, current implementation exposes the two main flaws in the system. The Code requires that prices are displayed in a prominent and legible fashion. There seems to be considerable divergence, if not non-compliance, with this requirement (for more detail see the Queensland Consumers Association submission to this inquiry). The Code needs to be supplemented with a new provision or guidelines that provide that unit prices at particular font sizes will be deemed to comply.

The Code also requires prices per 100g or 100 ml for most prices. This small benchmark means price differences for most day-to-day products are not very significant and thus underplays the value of the better choice for consumers: for example, only a 6 cents per 100g difference between the unit prices of 525g and 825g packs of corn flakes, but this represents an 8 percent saving. Consequently, many consumers will wrongly regard small differences in unit prices as unimportant.

5.2 Measures to increase competition

CHOICE believes that price transparency is one of the solutions to resolving the anti-competitiveness of the grocery sector by helping consumers to make more informed choices in the grocery market and increase pressure on supermarkets to offer consumers more competitive prices. But this alone will not provide the silver bullet solution to a lack of competition in the grocery sector.

The power of the major supermarkets flows from their size and their dominance of the grocery retail sector. The ACCC report suggests that the two major supermarkets share of the grocery market has been between 75 and 78% over the years 2003-2007.⁴ Despite the existence of Metcash/IGA, Aldi, and other smaller competitors and the impact of new entrants into the market, Coles and Woolworths remain the dominant players and there is little prospect of that changing without significant change to the policy settings.

Key changes required to increase competition include:

- implementation of adequate creeping acquisitions provisions;
- ACCC action on restrictive lease covenants that diminish competition;
- legislation to provide to the ACCC the power to investigate the level of competition in a market on its own motion or that of an organisation empowered to make a 'super complaint', and to require divestiture of assets where a corporation holds a dominant market position such that competition is reduced;
- measures to increase access to suitable sites, especially for mid size competitors to the MSCs; and
- price transparency through the publication of grocery prices in a way that enables consumers to compare prices at different stores.

⁴ Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Chart 3.1 Retailers shares of grocery sales, p48.



5.3 Market competitiveness reviews and divestiture powers

In June 2009, Coles announced the transfer of 45 stores to FoodWorks, Australia's largest independent supermarket chain.^{5 6} Earlier this month it was reported that Metcash would supply grocery and liquor to the 45 stores in a deal that would earn Metcash an additional \$250 million in the first year.⁷

While the deal increases the competitiveness of the independent supermarket chain, it further concentrates wholesale supply with Metcash. Metcash is the only significant wholesaler to independent supermarkets. The ACCC found that wholesale prices set by Metcash allow larger independent stores to compete with Coles and Woolworths on price, but only by earning lower margins. The ACCC stated that lack of wholesale competition could limit the ability of larger independent stores to compete with Coles and Woolworths, suggesting that together Woolworths, Coles and Metcash account for around 95% of packaged grocery sales between 2004 -2008.⁸

CHOICE is concerned that current Australian competition law does not provide sufficient protection from reduced consumer welfare caused by market concentration. Current law provides that the ACCC may refuse to approve a merger where there is a substantial lessening of competition. But mergers are not the only way in which concentration and consequent harm to consumer welfare can occur. Creeping acquisitions, failure of competitors, organic growth and potentially other market developments can also result in excessive competition over time.

The recommended response to creeping acquisitions will not address the potential for harmful reductions in competition through other causes. Authorities in other countries have been granted powers to review markets where competition has been reduced and/or to require divestiture of assets or seek court orders for divestiture⁹. CHOICE believes that the Commonwealth should provide enhanced powers to the ACCC to review the competitiveness of particular markets including the groceries markets. Such an inquiry could be on its own motion or in response to a 'Super Compliant' lodged by approved organisations as provided under the United Kingdom's *Enterprise Act 2002*.

Equally, the Committee should review the desirability of providing to the ACCC a power to require divestiture of assets where, after review, it concludes that a market is not competitive and the divestiture would be likely to be in the public interest.

Section 95 of the *Trade Practices Act* allows for the Minister to direct the ACCC (or another body) to undertake a price inquiry. These powers were used, for example, in the 2007-2008 ACCC inquiry into the grocery industry. The *Trade Practices Act* provides detailed guidance on procedural matters associated with such inquiries but does not address substantive issues of how markets should be assessed. As such, the ACCC is granted a very broad remit in undertaking price inquiries. We believe that the ACCC should be required to issue guidance on the methodology used to assess competition in the relevant market and identify features of the market that may

⁵ Coles. (29/6/09) *Coles transfers 45 stores to FoodWorks*, media release available at: <http://www.coles.com.au/LinkClick.aspx?fileticket=waiLMjgf4u8%3d&tabid=101>

⁶ FoodWorks, (29/6/2009), *FoodWorks delivers huge network growth with the purchase of 45 Coles stores*, media release available at:

<http://www.foodworks.com.au/uploads/public/FoodWorks%20acquisition%20media%20release.pdf>

⁷ Sydney Morning Herald, (3/9/09), *Metcash to supply grocery to FoodWorks*. Available at :

<http://news.smh.com.au/breaking-news-business/metcash-to-supply-grocery-to-foodworks-20090903-f9f5.html>

⁸ Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, Chart 3.2 Neilsen: retailers' shares of packaged grocery sales, p50.

⁹ See for example for the USA: Antitrust Section of the American Bar Association 2007 Antitrust Law Developments 6th Ed.



adversely affect competition. Such guidance would bring a degree of transparency to market inquiries and provide room for a robust debate on the nature, scope and definition of competitive markets.

5.4 Geographic price discrimination/predatory pricing

Research has shown that supermarkets charge different prices for the same products at different stores in the same region or locality. While different cost structures may account for part of these price differential, we believe that the most likely explanation is that local competition influences the level at which prices are set. Such price differentials have the character of predatory pricing whether or not the strict legal test is met. They are also very unpopular with consumers whenever they are exposed. A price comparison website would help to expose these practices. An alternative or supplementary proposal is to outlaw such geographic price discrimination.

5.5 Access to retail premises

Potential competitors to the MSCs report difficulty finding suitable retail sites. The Commonwealth has announced that it is working with the States to explore changes to planning laws that would address this problem. Planning and development policies should ensure that there are no unreasonable barriers to mid-size competitors gaining ready access to suitable sites. Such changes should not compromise other social objectives, such as community amenity and sustainability.

There may also be merit in investigating ways to address the alleged practice of land banking, to prevent MSCs using their market power to create incentives to developers/land owners to remove suitable sites from the market until such time as the MSCs may have a need for them.

5.6 Role of industry associations such as the Australian National Retailers Association (ANRA)

CHOICE is very concerned about the role played by the industry association ANRA in the development of GroceryCHOICE and the decision made by the Minister not to proceed with the project.

As demonstrated earlier in our submission, most supermarkets were initially prepared to cooperate with CHOICE to create an effective website for consumers. Once ANRA began to participate in the project to represent its members, the prospects for their cooperation appeared to reduce. Our belief is that ANRA was able to play a role coordinating the interests of the MSCs at the expense of consumers and good public policy. Their work undermined a market development which may have increased competition, potentially to the detriment of the MSCs.

5.7 CHOICE Recommendations

Help consumers drive competition through online access to price and product information

- a) The Commonwealth Government should take legislative action to require provision of transparent and timely price information by supermarkets.
- b) Failing this, the Commonwealth Government should ensure that the commitment to an industry based website is delivered, provided it is independently supervised and meets the needs of consumers.



Removing barriers to competition

- c) The Commonwealth Government should enact creeping acquisitions laws as supported by the ACCC.
- d) The Commonwealth Government should enact changes to competition law which give the ACCC power to review the competitiveness of markets on its own motion or that of an organisation empowered to make a 'super complaint'
- e) Additionally, the ACCC should be empowered to require divestiture of assets where a corporation holds a dominant market position such that competition is reduced.
- f) The ACCC should act on restrictive covenants in shopping mall leases. It should issue a timeline for action. If ACCC action has been unable to eliminate this practice within 12 months Government should consider legislative action to solve the problem.
- g) The Commonwealth should work with the State Governments to examine ways in which planning processes can be changed to ensure that there are no unreasonable barriers to mid-size competitors gaining ready access to suitable sites. Such changes should not compromise other social objectives, such as community amenity and sustainability.
- h) The ACCC should be required to issue guidance on the methodology used in s95H inquiries to assess competition in the relevant market and identify features of the market that may adversely affect competition.
- i) The Government should investigate ways to address the alleged practice of land banking.



Appendix 1

CHOICE submission to Minister Bowen 27 August 2008

Empowering consumers in the grocery market place: A proposal to operate GroceryCHOICE

Introduction

CHOICE is an independent not-for-profit consumer organisation with more than 25 years experience in surveying supermarket prices.

CHOICE proposes to operate GroceryCHOICE to deliver a wide range of information useful to grocery shoppers. CHOICE will use its expertise in consumer research and consumer information delivery to provide an enhanced GroceryCHOICE that is:

- responsive to consumer needs
- fully transparent
- a rich environment designed to satisfy the diverse needs of diverse consumers
- consumer driven

but also continues to put pressure on supermarkets and other grocery retailers to provide competitively priced groceries to Australian consumers.

GroceryCHOICE will be presented to the Australian community as a tool to help them in their daily lives. Its central purpose will be to provide price information of a type and in a form that is relevant to consumers. To do this it will be flexible to meet the needs of different households; and it will prioritise feature development based on consumer research and user feedback. Price data will be supplemented with information which will help consumers choose products according to their performance, health attributes and environmental impact.

GroceryCHOICE will offer consumers the opportunity to share with each other information and tips that they gather in the course of their grocery shopping. There will also be scope for both CHOICE and others to provide lifestyle information such as recipes, information about seasonal fruit and vegetables and tips for making sustainable GroceryCHOICES.

In addition to empowering consumers, GroceryCHOICE will support the Government's agenda of keeping downward pressure on grocery prices and will help drive competition to improve quality and the availability of healthy and environmentally sustainable choices consistent with consumer preferences.

Summary of proposed features

GroceryCHOICE will

- deliver *better price information* than the current website
- enhance the usability of the information with improved information display, intuitive website design and interactive and visual features
- provide increased transparency (including store and product identification)
- add value to the grocery price information with *additional features*
- add value to the grocery price information by developing a user community through *structured consumer input*



- test and where feasible introduce ways of expanding the information available through *consumer participation in data collection and information priority setting*
- explore mechanisms to obtain more detailed price data from retailers
- use regular research into consumer preferences to guide ongoing review and redesign of the website
- integrate with other key consumer policy agendas including unit pricing, healthy eating and sustainable living.

GroceryCHOICE will deliver *better price information* through increasing the number of supermarkets, frequency of data update and/or range of products. It will also provide better and more comparable information about generic/own brand products.

GroceryCHOICE's *additional features* may include

- cheapest basket, standard basket (and possibly premium basket)
- healthy basket
- green basket (environmentally friendly and/or organic)
- user mix and match basket (capacity to combine various sub-baskets, capacity to exclude certain items eg fresh fruit and vegetables)
- personalised baskets (user selected products)
- individual item prices (including unit prices)
- shopping advice (price cycles, how specials work, when to shop, how unit pricing works, links to CHOICE content on groceries including food)
- seasonal food advice
- green purchasing advice
- lifestyle information such as recipes or updates on seasonal fruit and vegetables and how to prepare them
- supermarket address lists with map links, transport and parking advice and disability access advice.

GroceryCHOICE will develop a community of empowered consumers to provide *structured input*. This may include

- local variation reporting (price, availability)
- local specials reporting
- general tips and comments about shopping options locally
- feedback on grocery prices or any related issues (unit pricing, availability)
- feedback on the website.

CHOICE will explore ways to take advantage of consumer input to build the quantity and richness of the data. We will assess the feasibility of data collection based on actual shopping experience (docket tracker) to build a database of GroceryCHOICE users shopping preferences and increase the quantity of real-world, near real-time price data.

Benefits to Australian consumers

The CHOICE proposal builds on the features and underlying infrastructure of the current GroceryCHOICE website. Depending on final feature mix, consumers will benefit through

- the ability to determine the cheapest retailer for a wide range of baskets of groceries at supermarkets in their area
- the ability to personalise this information to suit their shopping needs and preferences
- access to additional price information (including specials) provided by other consumers and potentially by retailers



- increase competition on the demand side offering some downward pressure on grocery prices
- access to additional information and advice relevant to grocery purchases (for example seasonality information, healthy eating information, green consumption information)
- the opportunity to join a community of 'price watching' consumers sharing information about grocery shopping.

Why CHOICE?

As Australia's largest consumer organisation, CHOICE has a long track record in consumer research. We have undertaken substantial grocery price surveys over 26 years. CHOICE is known as the only source of truly independent consumer information in the marketplace. We take no advertising and buy all the products we test.

CHOICE's market success demonstrates that we provide relevant, useful consumer information - CHOICE has a track record of successful commercial consumer publishing going back 48 years. Our core business does not depend on external funding but we have successfully delivered Government funded and politically sensitive projects.

CHOICE informs, engages and advocates for consumers. Our expertise, independence and hands-on experience in comparing products and prices makes it a natural fit with the concept of grocery website.

Government investment

CHOICE believes a five year commitment to GroceryCHOICE is required to support up-front development of an effective and engaging website. The precise amount required will depend to some extent on the work undertaken already by the ACCC that can be adapted to the website we propose to build, the contracts if any that the ACCC has entered into which would be assigned to us and the exact specification of deliverables. As an indication we believe that a useful website could be built, operated and from time to time enhanced within a budget of \$20 million across the five years.

Transition

CHOICE will work with the ACCC and Government to establish appropriate transition arrangements.

Qualifications and limitations

This proposal is subject to CHOICE access to detailed information about the current ACCC GroceryCHOICE website, including software and database design and functionality, data collection processes and third party contracts. It is also subject to the requirement that CHOICE is given sufficient time to design and develop the website features proposed above.