

SENATE SELECT COMMITTEE ON AUSTRALIA'S FOOD PROCESSING SECTOR
Inquiry into Australia's food processing sector
Public Hearing Tuesday, 15 May 2012
Questions on Notice

Questions directed to the Australian Competition and Consumer Commission (ACCC), referred to the Commonwealth Treasury.

1. Several Senate committees over the past decade have examined the issue of competition law and the particular problem of concentrated ownership of Australia's retail grocery sector. The ACCC has also examined the issue in some detail. In August 2008, it released a report into the competitiveness of retail prices for standard groceries. It recommended:
 - several changes to the Horticulture Code;
 - a mandatory, nationally-consistent unit pricing regime be introduced for standard grocery items both on in-store price labels and in print advertising, for significant supermarket stores;
 - that all appropriate levels of government consider ways in which zoning and planning laws, and decisions in respect of individual planning applications where additional retail space for the purpose of operating a supermarket is contemplated, should have specific regard to the likely impact of the proposal on competition between supermarkets in the area; and
 - a general creeping acquisitions law.

What was the government's response on each of these four issues? To what extent has the policy response addressed the issue? What more needs to be done on these issues?

The Horticulture Code

In its *Preliminary Action Plan to the Report of the ACCC inquiry in the competitiveness of retail prices for standard groceries* (the Grocery Inquiry), the Government announced that the Minister for Agriculture would work with the horticultural industry through the Horticulture Code Committee to carefully consider the ACCC's 13 recommendations to enhance the operation of the Horticulture Code of Conduct¹.

Any changes to the Horticulture Code of Conduct are the responsibility of the Minister for Agriculture, Fisheries and Forestry.

¹ Bowen, C Press Release *Rudd Government releases its Preliminary Action Plan in response to the ACCC's Grocery Report*
<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/065.htm&pageID=003&min=ceb&Year=2008&DocType=0> 5 August 2008

Unit Pricing Regime

On 5 August 2008, the former Assistant Treasurer, the Hon Chris Bowen MP² announced, as part of the Government's preliminary response to the grocery inquiry, that the Government would consider the best way to introduce a mandatory nationally-consistent unit pricing regime.

In early 2009, the Government released draft regulations to the Retail Grocery Industry (Unit Pricing) Code of Conduct for stakeholder consultation. Following consultation, the regulations for the Code of Conduct were prescribed under Part IVB of the *Competition and Consumer Act 2010* (CCA), taking effect on 1 December 2009.

In 2012, Treasury will be conducting a post implementation review of the regulations establishing the Unit Pricing Code of Conduct.

Planning and Zoning

Planning and zoning regulations are primarily the responsibility of the States and Territories.

In August 2008, in response to the recommendations of the Grocery Inquiry, the Government referred the potentially anti-competitive impacts of state and local planning and zoning laws to COAG.

At the COAG meeting of 7 December 2009, it was agreed that planning laws should not unjustifiably restrict competition in grocery retailing. It was also agreed that the Productivity Commission (the Commission) would report on the States and Territories' planning and zoning systems to identify practices that support or unjustifiably restrict competition.

In May 2011, the Commission's final report *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments* was released. In its report, the Commission identified a range of processes from various jurisdictions that it considers to be leading practice and that it advocated States and Territories implement.

The Commission reiterated many of the findings of its benchmarking report in relation to planning and zoning in its November 2011 inquiry report into the *Economic Structure and Performance of the Australian Retail Industry* (Retail Inquiry report).

In its response to the Commission's Retail Inquiry report, the Government encouraged State and Territory governments to carefully consider and implement, where appropriate, the findings of the Commission's report and its previous benchmarking report.

Creeping Acquisitions

As part of the 2007 election campaign, the then opposition, now the Government, committed to introducing a creeping acquisitions law.

² Bowen, C Press Release *Rudd Government releases its Preliminary Action Plan in response to the ACCC's Grocery Report*
<http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/065.htm&pageID=003&min=ceb&Year=2008&DocType=0> 5 August 2008

In November 2011, the Parliament passed the *Competition and Consumer Legislation Amendment Act 2011*, which clarifies and strengthens Australia's merger and acquisitions law in relation to creeping acquisitions.

The amendments make it clear that a court or the Australian Competition and Consumer Commission (ACCC) can consider the competitive effects of a merger or acquisition on multiple markets in the one investigation. This amendment ensures that a court or the ACCC can look beyond the primary market in which the merger or acquisition would occur.

These amendments also ensure that a court or the ACCC can examine a merger or acquisition in any market, regardless of its size or geography.

The amendments came into effect on 6 February 2012. The amendments are yet to be tested before the court.

2. In a presentation to a conference in August last year, the former Chairman of the ACCC Mr Alan Fels outlined a range of possible measures to address the high level of concentration in Australia's retail grocery sector.

Can you comment on the following measures as a response to promoting greater competition in the Australian retail grocery sector?

Supermarket Ombudsman

Another option is for a Supermarket Ombudsman to be established.

- As a concept, what is the ACCC's view on a Supermarket Ombudsman?
- Would the ACCC support a supermarket ombudsman on the basis that it could act as a 'mailbox' for the ACCC in its handling of complaints?
- Would a Supermarket Ombudsman need to be backed by a mandatory code of conduct?
- If a Supermarket Ombudsman was established, how would recriminations by supermarkets against complainants be avoided?

As a concept, what is the ACCC's view on a Supermarket Ombudsman?

The voluntary Produce and Grocery Industry Code of Conduct is oversighted by an Ombudsman and is already well-established. In response to the Senate Economics References Committee's 2011 report on *The impacts of supermarket pricing decisions on the dairy industry*, the Government stated that it was willing to consider facilitating an industry-Government partnership to review the Code.

In regards to a potential Supermarket Ombudsman, it is not possible to comment on the overall merit of such a concept without further detail about its potential functions and how they would be exercised. However, any functions of a Supermarket Ombudsman, if established, should not interfere with the ACCC's exercise of its statutory responsibilities under the CCA.

It should also be noted that the ACCC does not have jurisdiction over commercial disputes that do not involve potential contraventions of the CCA.

Would the ACCC support a supermarket ombudsman on the basis that it could act as a 'mailbox' for the ACCC in its handling of complaints?

All persons, including members of the public and businesses, are able to contact the ACCC regarding potential anti-competitive conduct and consumer protection issues, including on a confidential basis. If a Supermarket Ombudsman were to be established, it could also refer complaints or inquiries to the ACCC.

The ACCC has a well-established complaints handling mechanism and a number of programs to inform the community about the ACCC's role and options available for approaching the ACCC with a complaint.

Would a Supermarket Ombudsman need to be backed by a mandatory code of conduct?

No. For example, the current voluntary Produce and Grocery Industry Code of Conduct and its Ombudsman, to which the major supermarket chains are signatories, is not prescribed as a mandatory code of conduct.

If a Supermarket Ombudsman was established, how would recriminations by supermarkets against complainants be avoided?

As part of its services, the Produce and Grocery Industry Ombudsman can, on a confidential basis, provide advice to industry participants on resolving disputes internally and the eligibility of disputes for mediation under the Code.

One of the primary avenues for dispute resolution provided by the Produce and Grocery Industry Ombudsman is mediation services. By its very nature, mediation requires the parties involved in the dispute to meet in good faith and seek a mutually agreeable outcome.

If there is evidence of conduct that may breach the CCA, the ACCC is appropriately placed to undertake an investigation.

Planning and zoning laws

In its 2008 review on supermarket prices, the ACCC recommended that all appropriate levels of government consider ways in which zoning and planning laws, should have specific regard to the likely impact of the proposal on competition between supermarkets in the area. It recommended that particular regard should be had to whether the proposal will facilitate the entry of a supermarket operator not currently trading in the area.

- Can you tell the committee what changes there have been to zoning laws since the ACCC made its recommendation in 2008?
- What has been the effect of these changes?

Can you tell the committee what changes there have been to zoning laws since the ACCC made its recommendation in 2008?

As stated in the response to Question One, planning and zoning regulations are primarily the responsibility of the States and Territories, enquiries regarding any changes to zoning laws should be referred to the appropriate State and Territory government departments.

In its response to the Commission's Retail Inquiry, the Government encouraged State and Territory governments to carefully consider and implement, where appropriate, the findings of the Commission's report and its previous benchmarking report.

What has been the effect of these changes?

Enquiries regarding the effect of changes to zoning laws should be referred to the appropriate State and Territory government departments.