

Chapter 6

Predatory pricing and the ACCC's investigation

6.1 This chapter examines:

- the issue of predatory pricing and the current thresholds in statute that need to be met for a predatory pricing case to be successful; and
- the Australian Competition and Consumer Commission's (ACCC) approach to publicly commenting on individual matters.

Predatory pricing

6.2 Two major issues that this inquiry was concerned about was the effect that Coles' January 2011 private label milk price cuts had on the ability of its direct competitors to compete with it, and the impact on other businesses that may not ordinarily be in direct competition with Coles.

6.3 Predatory pricing occurs:

... when a company sets its prices at a sufficiently low level with the purpose of damaging or forcing a competitor to withdraw from the market. This leaves the company with less competition so it can disregard market forces, raise prices and exploit consumers.¹

6.4 Under Australia's competition law, predatory pricing is addressed by section 46 of the *Competition and Consumer Act 2010* (CCA), although the concept is not expressly mentioned in that section.

6.5 Subsection 46(1) of the CCA prohibits the misuse of market power. It has a number of elements that need to be satisfied for it to be relevant. They are:

- that the corporation has a substantial degree of power in a market; and
- that the corporation takes advantage of that power in that or any other market for one of three proscribed purposes:
 - (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
 - (b) preventing the entry of a person into that or any other market; or
 - (c) deterring or preventing a person from engaging in competitive conduct in that or any other market.

1 Australian Competition and Consumer Commission, 'Predatory pricing (s46(1) and s46(1AA))', www.accc.gov.au/content/index.phtml/itemId/816375 (accessed 12 August 2011).

6.6 Subsection 46(1AAA), a relatively new provision that was inserted into the CCA in November 2008, provides that if a corporation supplies goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying the goods or services, the corporation may contravene subsection 46(1) even if the corporation cannot, and might not ever be able to, recoup losses incurred by supplying the goods or services.

6.7 A number of other provisions in section 46 provide guidance to the court when considering alleged contraventions of the section.²

6.8 Another element of section 46 that is relevant to predatory pricing is subsection 46(1AA), more commonly referred to as the 'Birdsville Amendment'. Subsection 46(1AA) applies to a corporation that has a substantial *share* of a market, as opposed to the prohibition in subsection 46(1) that refers to a substantial *degree of power* in a market. The subsection prohibits these corporations from supplying, or offering to supply, goods or services for a sustained period at a price that is less than their relevant cost. However, it is similar to subsection 46(1) in that it requires that the supply of goods or services is for one of the three proscribed purposes noted earlier. To date, the Birdsville Amendment has not been tested in the courts.

6.9 The ACCC summarised what forms of conduct may, in general, constitute predatory pricing:

Predatory pricing has two key elements to it. Firstly, there has to be a target. There must be an intention to predate someone. That is different to someone suffering loss or harm as a result of the competitive process. What the company with market power does must be targeted at a competitor. It

2 Subsection 46(4A) provides that the court may have regard to the following conduct in order to decide whether a corporation has contravened subsection (1):

- any conduct of the corporation that consisted of supplying goods or services for a sustained period at a price that was less than the relevant cost to the corporation of supplying such goods or services; and
- the reasons for that conduct.

Subsection 46(6A) provides that in determining whether, by engaging in conduct, a corporation has taken advantage of its substantial degree of power in a market, the court may have regard to any or all of the following:

- whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;
- whether the corporation engaged in the conduct in reliance on its substantial degree of power in the market;
- whether it is likely that the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; or
- whether the conduct is otherwise related to the corporation's substantial degree of power in the market.

Subsection 46(7) provides that, for the prohibition under subsection 46(1), purpose may be inferred from the conduct of the corporation or from other relevant circumstances.

could be a particular competitor, it could be more than one competitor but it must be targeted at someone. Secondly, it must have the purpose of damaging whoever it is targeted at. It could be an existing competitor, or it could be a potential new competitor. They are the two key ingredients that we look for and what is in the legislation is really an embellishment of those key ingredients.³

6.10 These considerations are key as price discounting by companies can be pro-competitive. Legitimate price discounting can occur when large companies pass on to consumers the benefits of lower costs or increased efficiencies arising from reduced internal costs or better deals from suppliers.

6.11 The ACCC notes that predatory pricing can be difficult to prove. This is because 'the initial signs of predatory pricing are pro-competitive and there is often no written evidence of anti-competitive purpose with which an allegation could be upheld'.⁴ Section 46 differs from other provisions concerning general anti-competitive conduct in the CCA, as the prohibition only relates to conduct that has the 'purpose', as prescribed by the section, of substantially lessening competition. Other sections in that part of the CCA that do not prohibit conduct outright include an allowance for the 'effect' (or likely effect) of the conduct to be considered.⁵ This difference is explored in more detail in chapter 7.

Initial calls for an ACCC investigation

6.12 The ACCC is an independent statutory authority formed in 1995 by the merger of the Trade Practices Commission and the Prices Surveillance Authority. The ACCC has responsibilities under a number of Commonwealth laws, but most of its work relates to the administration and enforcement of the *Competition and Consumer Act 2010* (CCA).⁶

6.13 A number of submissions and witnesses raised concerns that Coles' conduct constituted predatory pricing (as well as other trade practices issues):

We call on the ACCC to investigate the latest discounting by Coles as a matter of urgency. We feel that there is probably predatory pricing there.

3 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 19.

4 Australian Competition and Consumer Commission, 'Predatory pricing (s46(1) and s46(1AAA))' www.accc.gov.au/content/index.phtml/itemId/816375 (accessed 22 February 2011).

5 For example, paragraph 45(2)(a) of the CCA (which forms part of the provisions relating to contracts, arrangements or understandings that restrict dealings or affect competition) states 'a corporation shall not: (a) make a contract or arrangement, or arrive at an understanding, if: (i) the proposed contract, arrangement or understanding contains an exclusionary provision; or (ii) a provision of the proposed contract, arrangement or understanding has the purpose, or would have or be likely to have the effect, of substantially lessening competition...'

6 Prior to 1 January 2011, the CCA was known as the *Trade Practices Act 1974*.

We feel that the ACCC needs to investigate the pricing practices of Coles, including the guarantee that has been made to dairy farmers that they will not be adversely affected. We do not believe that to be the case.⁷

They are buying very strongly, they are selling at cost, they are loss leading in regions, they are damaging milk value on the shelf and to a degree they are damaging the milk value of their partners, the processors who supply them and rely on branded milk to extract an average price from the market. So I think that is where the issue is. They are abusing their market power. There is predatory pricing, loss leading. They are all terms that came up in the Tasmanian inquiry. We can say we are not sure about those things, but I think the ACCC should look into that.⁸

CHOICE notes recent media reports referencing claims from unnamed industry sources that Coles Supermarkets are incurring losses of \$300,000-\$400,000 per week to sell heavily discounted milk, and that representatives of Woolworths Supermarkets have expressed concerns about the impacts of price reductions on dairy farmers. These claims require further investigation, given it is difficult to see why any retailer would sustain such losses if it were not seeking to eliminate or damage its competitors.⁹

... we believe there is an urgent need for ... [t]he ACCC to investigate the pricing practices of Coles, including its 'guarantee' that dairy farmers returns will not be reduced, to ensure that predatory pricing is not being practiced and that sustainable returns are delivered to Australian farmers and processors.¹⁰

Coles actions are not only hurting farmers. They will also damage Coles' competitors such as small businesses like local corner stores, independent service stations and other small retailers of milk. The industries that service these stores, such as delivery drivers will also be affected. Lower sales for corner stores and independent service stations will lead to a substantial lessening of competition in the market place and leave consumers with less choice.¹¹

7 Mr David Basham, President, South Australian Dairyfarmers' Association, *Committee Hansard*, 8 March 2011, p. 55.

8 Mr Ian Zandstra, Chairman, Dairy Farmers Milk Co-operative, *Committee Hansard*, 8 March 2011, p. 67.

9 CHOICE, *Submission 51*, p. 4 (footnotes omitted).

10 Australian Dairy Industry Council, *Submission 96*, p. 2.

11 Western Australian Farmers Federation, *Submission 88*, p. 2.

6.14 As the inquiry progressed, submissions and supplementary submissions became more direct on this issue, calling for the relevant Federal Minister to issue to a direction to the ACCC to investigate Coles' conduct.¹²

6.15 It is important to keep in mind that the economic concept of predatory pricing is separate to the concept that exists in the language of the CCA. As noted in *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission*:

There is a danger that a term such as predatory pricing may take on a life of its own, independent of the statute, and distract attention from the language of s 46.¹³

6.16 In the context of predatory pricing, a question arises as to what is meant by 'cost'. The ACCC noted that under the CCA, the focus regarding cost 'is on the corporation that is making the supply', not whether the sale price is below a competitor's cost of supply.¹⁴ The ACCC further defined what they consider cost includes:

Senator WILLIAMS—... if Coles buy two litres of milk and land it in their store for \$1.50, does that cost also include the margin for running their people at the check-outs, their electricity and their rent? In other words, \$1.70 could be their cost...

Mr Bezzi—It is the cost of supply, so it would include the additional amount. It includes the 20c.

Senator WILLIAMS—It includes the labour factor and the electricity factor et cetera?

Mr Bezzi—The cost of supply, yes.¹⁵

6.17 Woolworths told the committee:

From a cost of product to a sell, at our first margin we are making a profit. When we take into consideration the costs associated with our supply chain

12 Australian Dairy Farmers, *Submission 150*, p. 3; Queensland Dairyfarmers' Organisation, *Submission 94A*, p. 2. It is important to clarify that the Minister, currently the Parliamentary Secretary to the Treasurer, cannot direct the ACCC to investigate matters that may constitute a contravention of the general anti-competitive conduct provisions such as section 46. Subsection 29(1A) of the CCA expressly prohibits the Minister from doing so.

13 *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 421 (Gleeson CJ and Callinan J).

14 Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 23. See also p. 21.

15 Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 22.

and distribution, our handling costs and the other costs associated within the store, we are still not selling milk below cost.¹⁶

6.18 Coles stated that it is confident that 'it has not sold milk at prices below the cost it acquired it from milk processors'.¹⁷ Coles was asked about how they define cost:

Senator XENOPHON—... You say in your submission that Coles is not selling milk at prices below the cost it acquired from milk processors. Have you chosen your words carefully by choosing not to focus on just the acquisition cost instead of also including the cost of refrigeration, in-store handling costs and transport?

Mr McLeod—No. We have described it that way because it is the way in which we manage our business. On a product-for-product basis, when we are determining the margin that we make on those products, it is done on the basis of the cost that we buy at and the price that we sell at. In terms of the overall costs within our business, we spread them across the entire company Australia-wide.

Senator XENOPHON—Can you categorically say that, when milk is being sold at \$1 a litre in Darwin or Kununurra, for instance, that that is not below cost?

Mr McLeod—We take the individual prices that we pay for those products on an individual basis by the arrangements that we have with those processors in those individual states and we apply that across that state. You may recall I mentioned earlier on that we have operated since last year with state based pricing, therefore we have uniform pricing across Western Australia, across Victoria, across New South Wales.

Senator XENOPHON—But that means in some parts of Western Australia—and in the Darwin market, for instance—you would be selling milk below cost.

Mr McLeod—I am not saying that at all.¹⁸

The ACCC's investigation

6.19 The public hearings conducted in March 2011 provided an opportunity for the committee to question the ACCC about its approach to investigating predatory pricing matters generally, as well as its specific actions regarding Coles' pricing decision. The implications of the decision by Coles to make its price cuts apply nation-wide were explored:

16 Mr Pat McEntee, General Manager, Fresh Foods, Woolworths, *Committee Hansard*, 29 March 2011, p. 6.

17 Coles, *Submission 131*, p. 16.

18 Mr Ian McLeod, Managing Director, Coles, *Committee Hansard*, 29 March 2011, pp. 37–38.

Senator COLBECK—Does targeting it broadly at the market in that context not necessarily constitute that sort of action [intention to predate and a purpose of damaging the target]?

Mr Cassidy—No, it would be unlikely to in the sense that it is a competitive process in which someone is trying to gain market share, and that is not predatory behaviour.

Senator COLBECK—In this overall context how do you go about the process of determining it? Let me use an example: our motive in all of this is to provide cheaper milk to our customers. That is the stated motive that is put on the public record. How do you go about determining what is effectively the action versus what is the stated action?

Mr Cassidy—We would look at it in general terms. We would look at the action taken and whether in all likelihood it is about delivering cheaper prices for consumers or whether the action that was taken and the way it was taken was really more likely to be about damaging a particular competitor where whatever benefits were offered to the consumer were probably a byproduct rather than being the prime objective. Let me give you a hypothetical example. If a firm with market power, with the ability to do it, was selling products at below cost and choosing the particular outlets in which to sell the products and the outlets just happened to be sitting alongside a particular competitor, you might say that is getting lower prices to consumers but if that is the objective why are they just doing it in these particular outlets? You would start to form a suspicion that what the conduct is really about is damaging the competitor rather than providing lower prices to consumers.¹⁹

6.20 The committee was advised of discussions between various organisations and the ACCC regarding the price decisions at an early stage of the inquiry. The ACCC's responses to questions on notice from the March hearings also outlined the meetings it had held with representatives of Coles and Wesfarmers on the issue.²⁰

6.21 The ACCC also made a public request for firm evidence:

If someone has got that evidence—because there are some fairly wild claims being made—then we would certainly like to have it. But on the basis of what we have got, we have no evidence.²¹

6.22 Unsurprisingly, based on the above statement, on 22 July 2011 the ACCC issued a media release stating that 'it considers there is no evidence' that Coles had acted in breach of the CCA. The ACCC Chairman at the time was quoted as stating:

19 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, pp. 19–20.

20 Australian Competition and Consumer Commission, answer to question on notice, 9 March 2011 (received 6 April 2011), pp. 5, 11.

21 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 23.

It is important to note that anti-competitive purpose is the key factor here. Price cutting, or underselling competitors, does not necessarily constitute predatory pricing. Businesses often legitimately reduce their prices, and this is good for consumers and for competition in markets.²²

6.23 The media release further elaborated on the need to prove an anti-competitive purpose:

ACCC enquiries have revealed evidence that Coles' purpose in reducing the price of its house brand milk was to increase its market share by taking sales from its supermarket competitors including Woolworths. This is consistent with what the ACCC would expect to find in a competitive market.

After Coles [sic] price reductions, Woolworths and other supermarket retailers have also reduced prices for house brand milk.

The ACCC's enquiries show that there is a significant variation between respective costs of supply and operating margins among supermarket operators.²³

6.24 The mechanics of the ACCC's investigation was explored at the hearing the committee conducted in October 2011. The ACCC advised that they discussed the issue with 'just about everyone in the supply chain, from the retailers back to the farmer organisations'. The ACCC also noted that they considered a range of confidential material during their inquiries.²⁴

6.25 Additionally, the ACCC explained some of the factors that restricted the scope of its investigation; as the material they had did not indicate that Coles' actions would match one of the anti-competitive purposes outlined in section 46 of the CCA, the ACCC limited some other parts of its assessment because a contravention would not be able to be proved. Although the ACCC advised it did assess whether Coles was selling below relevant cost in capital cities and regional centres (noting that in those areas it was confident that Coles was not), it did not examine more geographically remote areas because:

... from the evidence that we had we could see that we were not going to get a purpose in terms of section 46. There was, if a you like, a commonsense approach taken by us in terms of the resources that we would

22 Australian Competition and Consumer Commission, 'ACCC: Coles discounting of house brand milk is not predatory pricing', *Media release*, NR 129/11, 22 July 2011.

23 Australian Competition and Consumer Commission, 'ACCC: Coles discounting of house brand milk is not predatory pricing', *Media release*, NR 129/11, 22 July 2011.

24 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 34.

put in to establishing one leg in certain geographic areas when we basically knew that we did not have the required other elements.²⁵

Transparency of ACCC investigations

6.26 An issue which the committee has considered as part of this and other inquiries is the transparency of the ACCC's investigations. Whether or not the ACCC was undertaking an active investigation into Coles' milk price cuts was a question that frequently arose during the early stages of this inquiry:

We said to the ACCC that we would welcome an ACCC inquiry, and make a submission to an ACCC inquiry, and felt they should bloody well do one. Clearly, they should. I do not know by what process the ACCC is triggered into action. You politicians have to decide that. But we need an ACCC inquiry here, without any doubt.²⁶

We wonder if the ACCC is providing leadership in the area of supermarkets. They might be doing a lot of things behind the scenes...²⁷

6.27 Some witnesses commented that the ACCC could be more active and upfront about their activities:

From what we have seen, the ACCC likes to watch. They take a long time to investigate. They could not even answer the question on whether they could give an answer about their investigation before the end of the year. If we have to wait beyond the year then there is something seriously wrong with someone's investigative processes.²⁸

6.28 After reflecting on a regular meeting they had with the ACCC during which the milk price issue was discussed, a representative of CHOICE stated:

I suppose I got the impression—and this is a broad impression I got—that the ACCC does not always signal what they are doing in terms of investigation. I do not know if that applies to supermarkets. I think it was argued that perhaps there needed to be more prominent smoke signals, as it were, to the ACCC. Basically, they have been very quiet on this whole issue. I think many people would have looked to them to have real guidance in terms of what was and was not predatory pricing and what was and was not in the consumer interest.²⁹

25 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 36.

26 Mr Ian Zandstra, Chairman, Dairy Farmers Milk Co-operative, *Committee Hansard*, 8 March 2011, p. 72.

27 Mr Christopher Zinn, Director, Campaigns and Communications, CHOICE, *Committee Hansard*, 29 March 2011, p. 87.

28 Associate Professor Frank Zumbo, *Committee Hansard*, 9 March 2011, p. 50.

29 Mr Christopher Zinn, Director, Campaigns and Communications, CHOICE, *Committee Hansard*, 29 March 2011, p. 92.

6.29 In their proposal to the committee that a Supermarket Ombudsman be appointed, CHOICE and the Australian Food and Grocery Council argued that one of the benefits of such an office would be that it could shed light on certain issues at an early stage, 'rather than operating under the veil of secrecy associated with the ACCC'.³⁰

The ACCC's policy on commenting on investigations

6.30 The ACCC's website provides the following advice on where information about its enforcement actions can be sourced:

For information on the enforcement activity of the ACCC see:

- News releases
- ACCCount, a quarterly report of Australian Competition and Consumer Commission's activities
- ACCC annual report.

For up to date information on current ACCC litigation in the Federal Court of Australia for alleged breaches of the Trade Practices Act go to the Commonwealth Courts Portal www.comcourts.gov.au. The Commonwealth Courts Portal is a web-based service that provides access to information about cases before the courts.³¹

6.31 The ACCC generally issues a media release and otherwise engages with the media only if an investigation reaches a certain stage, such as when court proceedings are instituted or finalised, or when a matter has been resolved by way of an enforceable undertaking or other arrangement. Prior to one of these stages being reached, however, in most cases there will be little public information available as to whether or not the ACCC is investigating, or has investigated, a particular matter.

6.32 The ACCC states in its *Compliance and Enforcement Policy* that one of the principles it has adopted to achieve compliance with the law is confidentiality:

... in general, investigations are conducted confidentially and the ACCC does not comment on matters it may or may not be investigating.³²

6.33 The effect of this policy is demonstrated by this exchange at Senate Estimates in February 2011 regarding a different matter:

Senator CORMANN—... Are you undertaking any investigations at present of financial institutions in Australia for suspected breaches of

30 CHOICE and the Australian Food and Grocery Council, *Submission 152*, p. 6.

31 Australian Competition and Consumer Commission, 'Enforcement Activities', www.accc.gov.au/content/index.phtml/itemId/585905 (accessed 28 June 2011).

32 Australian Competition and Consumer Commission, *Compliance and Enforcement Policy*, December 2010, p. 1.

part IV of the Trade Practices Act? I am not asking you to name anyone; I am just asking whether you are currently conducting any investigations.

Mr Samuel—Senator, I do not think we can give any details of any matters that we may or may not be investigating in relation to this area. That is not to imply that we are and not to imply that we are not; it is just that it is not appropriate for us to give any details on those issues. You would be aware—and our records would indicate—that one or two matters currently before the courts relate to part IV matters concerning one or other of the major trading banks, but beyond that I really cannot comment any more.³³

6.34 On occasion, however, substantial public interest will pressure the ACCC to provide some insight into its investigative activities. The supermarkets' milk pricing decisions being examined by this inquiry, for instance, is one such matter. At its public hearing on 9 March 2011, and in response to written questions on notice, the ACCC outlined some of the actions it has taken, including meetings with senior Coles and Wesfarmers executives. The then Chairman of the ACCC also gave an example of his engagement with the media on the issue:

In an interview I gave on the Perrett Report on Sky News, which predated the Senate inquiry, I was asked by Janine Perrett what our position was on milk. I said that we were examining all aspects of the milk supply chain from the grower through the processor through the delivery chain through to the wholesalers, the retailers and the like but our primary concerns were—I am almost quoting myself verbatim—at the grower level and at the level of the consumer. There were some strong vested interests that were interposed in between. They were very powerful vested interests. In particular, I referred to both the retailers, the wholesalers and the processors. I thought that gave a fairly open answer to indicate that there was a lot that we are examining.³⁴

6.35 As noted earlier in the chapter, the ACCC then issued a media release summarising the findings of its investigation of whether Coles' actions were likely to constitute predatory pricing. While this was a divergence from the ACCC's usual practice regarding its investigations, it was not unique as similar announcements have

33 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Senate Economics Legislation Committee Hansard*, Additional Estimates 2010–11, 24 February 2011, pp. 94–5.

34 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Senate Economics Legislation Committee Hansard*, Budget Estimates 2011–12, 31 May 2011, p. 97.

been made in the past.³⁵ The different approach was explained by the then ACCC Chairman:

... where a matter, milk for example, is the subject of examination that is of clearly intense public interest, it could be reasonably expected that once that examination is completed, we will make a public statement as to our findings. Those findings will necessarily be largely focussed on whether or not there have been determined to be breaches of the Competition and Consumer Act, though they may well relate to some incidental or other relevant matters.³⁶

6.36 It is not clear whether the ACCC's approach is changing; on 2 September 2011 it also issued a media release stating that it considered allegations that protests against certain businesses with Israeli ownership and which carry on business with the Government of Israel were unlikely to constitute a secondary boycott.³⁷

Issues with increasing transparency

6.37 It is important to keep in mind that the ACCC is a law enforcement agency, and accordingly there are certain principles and practices it should be expected to adhere to. While increased transparency of what the ACCC is investigating at any point of time may be desirable in terms of ensuring public confidence in the ACCC, there are important factors to consider.

6.38 Publicising investigations prior to proceedings being instituted or the matter being resolved in some other way is likely to deny procedural fairness to individuals or corporations that are the target of an ACCC investigation. This is significant because under Australia's competition law framework it is the courts that decide whether a contravention of the CCA has occurred. This principle forms an integral part of the ACCC's policy on engagement with the media:

The ACCC will issue a news release when it decides to institute proceedings in relation to an alleged contravention that accurately describes the allegations and does not imply that the allegations are more than allegations. In practice, the ACCC rarely makes public comments regarding

35 For example, the ACCC issued a media release in April 2008 after investigating allegations that Bakers Delight engaged in misleading and deceptive and unconscionable conduct towards franchisees: Australian Competition and Consumer Commission, 'ACCC does not consider Bakers Delight engaged in unconscionable conduct towards franchisees', *Media release*, MR 104/08, 22 April 2008. Other examples include the media releases issued by the ACCC in 2009 regarding Coles' offer of 40 cents per litre off fuel purchases for customers that spent \$300 at a Coles supermarket.

36 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Senate Economics Legislation Committee Hansard*, Budget Estimates 2011–12, 31 May 2011, p. 97.

37 Australian Competition and Consumer Commission, 'ACCC: Recent anti-Israel protests not a secondary boycott', *Media release*, NR 161/11, 2 September 2011.

an investigation because of the potential detrimental impact on the reputation of the parties.³⁸

6.39 While these concerns may not be relevant now, the ACCC has in the past been criticised for how it engages with the media. A number of concerns were raised in 2002 and 2003 as part of the *Review of the Competition Provisions of the Trade Practices Act* (Dawson Review). Submissions to that review raised instances of the ACCC publicising investigations before they were concluded, before proceedings were instituted and when no decision had been reached by the court. The report of the Dawson Review devoted a chapter to the subject.³⁹

6.40 Regardless of any actions to increase transparency, a further issue is that the nature of many investigations undertaken by the ACCC would still require confidentiality while evidence was being gathered. The public disclosure of the existence of an investigation could damage that process. The ACCC has in the past noted:

... firms with substantial market power appear to be very much aware of the consequences of "smoking gun" documents being found in their internal records such as those relied upon in the QWI, Boral and Rural Press proceedings. Such firms appear to be taking great care to avoid potentially incriminating documents being created or stored. For example, the ACCC is aware from experience of instances where corporations have issued specific instructions in relation to the creation or destruction of internal documents, that display a disregard for compliance with the TPA [Competition and Consumer Act]. Consequently, the forensic task for the ACCC in proving section 46 breaches is getting more difficult.⁴⁰

Comparison with international counterparts

6.41 The ACCC's approach to releasing information about its investigations is not radically different from that used by the consumer protection and competition agencies in other countries, although there are some interesting differences.

United Kingdom

6.42 The Office of Fair Trading (UK OFT) is the agency responsible for consumer protection and competition issues in the UK. Like the ACCC's website, the UK OFT's (www.oft.gov.uk) provides general information to consumers and businesses about the legislation it administers. However, the UK OFT's website also includes information

38 Australian Competition and Consumer Commission, *Submission to the Productivity Commission's inquiry into Australia's consumer policy framework*, June 2007, p. 52.

39 Trade Practices Act Review Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, pp. 181–190.

40 Australian Competition and Consumer Commission, *Submission 21*, Senate Legal and Constitutional References Committee, Inquiry into s. 46 and s. 50 of the *Trade Practices Act 1974*, February 2002, p. 7.

about its enforcement activities by sector (such as consumer credit, retail and transport) and by the category of investigation the conduct falls under (such as consumer protection legislation, consultation or mergers). This includes its completed enforcement matters, as well as a selection of current actions.

6.43 The information the UK OFT's website provides about its current enforcement activities is not a complete list of investigations—the site notes it is limited to 'those investigations in the public domain'⁴¹—however, it does include a discussion of matters before the courts and, in some instances, investigations prior to a decision to institute proceedings being made.⁴²

Canada

6.44 Similar to the ACCC's online record of media releases, the Competition Bureau of Canada's (CBC) website (www.competitionbureau.gc.ca) includes its past announcements. However, the CBC also publishes on its website a 'Litigation Status Report' which provides a consolidated summary of matters before the courts.⁴³

6.45 The website also summarises judgements and orders made by the courts, and provides examples of discontinued investigations:

... where the Commissioner of Competition ended an inquiry initiated under the Competition Act because of insufficient evidence to institute proceedings before the courts or to refer the matter to the Director of Public Prosecutions of Canada.⁴⁴

New Zealand

6.46 The New Zealand Commerce Commission's website provides access to information relating to its enforcement activities through a number of methods.

6.47 An Enforcement Action Register outlines all litigation and settlements since January 2010 and all warnings and cease and desist orders issued since January 2011 under the Commerce Act 1986 and the Fair Trading Act 1986. Investigations which resulted in no further action being taken are not included. For competition matters, certain investigation reports are published, such as the Commission's investigation

41 Office of Fair Trading (UK), 'Consumer enforcement current cases', www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/ (accessed 28 June 2011).

42 For example, the UK OFT's website has a discussion of its investigation into retirement homes exit fees and an investigation into a possible anti-competitive conduct in the private motor insurance sector. See www.offt.gov.uk/OFTwork/consumer-enforcement/consumer-enforcement-current/retirement-homes/; www.offt.gov.uk/about-the-offt/legal-powers/enforcement_regulation/Cartels/motor-insurance/ (accessed 29 June 2011).

43 Competition Bureau (Canada), 'Litigation Status Report' www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02037.html (accessed 29 June 2011).

44 Competition Bureau (Canada), 'Legal Actions and Opinions' www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/h_00020.html (accessed 29 June 2011).

into New Zealand electricity markets. The policy on whether to produce and publish these reports is summed up on the website:

In some cases the Commerce Commission decides to publish investigation reports that are of general interest.⁴⁵

6.48 The website also includes a selection of court judgements.

Summary of the approaches taken by overseas agencies compared to the ACCC

6.49 Unlike the websites of the UK, Canadian and New Zealand competition and consumer protection authorities, for most enforcement matters visitors to the ACCC's website need to search through numerous media releases or the agency's quarterly and annual reports to find details about specific enforcement activities. Even then, those matters which the ACCC has been willing to publicise to some degree either in the media, at Senate Estimates or during a specific parliamentary inquiry—but which it has not issued a formal statement such as a media release—are unlikely to be found on its website.

6.50 The major exception appears to be for franchising matters. For these enforcement outcomes, the ACCC operates a dedicated page on its website which provides some information about the number of complaints received, the investigative process, and summarises the enforcement outcomes since 2004.⁴⁶

6.51 The information provided about matters before the courts also differs. As noted earlier, the ACCC merely provides a link to the Commonwealth Courts Portal website (www.comcourts.gov.au). While the Commonwealth Courts Portal provides some useful material such as hearing dates and copies of orders made, the information provided is limited and does not include a summary of the matter. In many instances it also requires the user to have some knowledge of the details of a particular case, such as the formal name of the applicant or respondent, in order to search for it successfully.

Committee view

6.52 The committee is aware that, at times, there can be significant concern within certain sectors and the wider community regarding the effectiveness of the ACCC in enforcing the CCA. On the other hand, the fact that the ACCC has a clear remit and is bound by the specific text of the CCA needs to be remembered.

6.53 The ACCC is an independent statutory authority. To ensure confidence in the organisation, it is critically important that the ACCC exercises, and is seen to exercise,

45 Commerce Commission (New Zealand), 'Investigation Reports' www.comcom.govt.nz/investigation-reports/ (accessed 30 June 2011).

46 Australian Competition and Consumer Commission, 'Franchising Code complaints, investigations and outcomes', www.accc.gov.au/content/index.phtml/itemId/816437 (accessed 8 September 2011).

its powers independently and based on the evidence it is able to gather. Having said this, the committee had the expectation that the ACCC would review Coles' price decisions against the legislation it is entrusted to enforce. The committee would have had serious concerns if it did not do so.

6.54 The committee is pleased that the ACCC was, on this occasion, willing to publish a statement that provided a high-level summary of the findings of its investigation. The committee believes that such public statements on key matters help inform the broader public debate.

6.55 The committee acknowledges that greater transparency of the ACCC's investigations could help improve public confidence in the regulator and further inform the public debate on certain competition or consumer protection issues. There is a need to consider other factors, however, such as the effect that greater transparency could have on the integrity of the ACCC's investigations and ensuring that, because it is the courts that determine whether the CCA has been contravened rather than the ACCC, the reputations of individuals and businesses are not unfairly damaged due to allegations or the stigma that could be associated with being under an ACCC investigation.

6.56 The committee notes that the ACCC's enforcement outcomes are highlighted within point-in-time documents, such as its annual report, quarterly reports and media releases. While the ACCC's website provides links to these documents, the website itself appears more directed at providing general information to consumers and businesses rather than highlighting specific outcomes. While this approach is understandable, and helps fulfil the ACCC's statutory obligations under section 28 of the CCA, it may be the case that the ACCC's website under-emphasises its enforcement activities compared to the approach taken by its international counterparts.

6.57 Therefore, the committee believes there is some scope, albeit limited, for additional transparency of the ACCC's enforcement activities. Improvements to the way the ACCC releases this information could help ensure that the public is confident that matters are being taken seriously, and increase the accountability of the ACCC.

Recommendation 4

6.58 The committee recommends that the Australian Competition and Consumer Commission (ACCC) review its approach to publicly releasing information about its investigations, with a view to providing greater general information about its current enforcement activities and relevant issues of particular public concern.

6.59 This recommendation is subject to the proviso that such action would not deny procedural fairness to the parties involved or threaten the integrity of the ACCC's investigations.