Chapter 7

Competition law

7.1 This chapter follows on from the previous chapter which outlined the Australian Competition and Consumer Commission's (ACCC) investigation of Coles' pricing decisions under Australia's competition law as it currently stands. Both this inquiry and the committee's 2010 inquiry into competition and pricing in the Australian dairy industry received a significant amount of information regarding the effectiveness and perceived gaps in Australia's competition laws, as well as concerns about the approach taken to their enforcement. This chapter discusses these issues in detail, particularly those relating to price discrimination, misuses of market power and mergers and acquisitions.

Background

7.2 The principal legislation governing competition in Australia is the *Competition and Consumer Act 2010* (CCA), which was previously known as the *Trade Practices Act 1974*. The object of the CCA is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. Treasury describes the provisions related to general anti-competitive conduct as follows:

> The Part IV provisions are principally concerned with protecting the competitive process, not individual competitors. They are not designed to protect competitors from rigorous competitive behaviour, nor to force businesses to compete.[1]

7.3 An independent statutory authority, the ACCC, is responsible for administering the CCA. Policy responsibility for most parts of the CCA lies with the Treasury portfolio.

Anti-competitive price discrimination

7.4 Price discrimination occurs when a firm charges a different price to different persons or groups of persons for identical goods or services for reasons not related to costs.[2] The CCA previously contained a section which explicitly covered anti-competitive price discrimination. Prior to its repeal,[3] subsection 49(1) had stated:

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1 Department of the Treasury, *Submission 111*, p. 3.

2 Price discrimination was examined in more detail in another inquiry. See Senate Economics Legislation Committee, *Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill 2009*, November 2009.

3 Since the repeal of the section 49 which covered anti-competitive price discrimination, an unrelated section 49 regarding dual listed companies was introduced and remains in force.

> A corporation shall not, in trade or commerce, discriminate between purchasers of goods of like grade and quality in relation to
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> (a) the prices charged for the goods;
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> (b) any discounts, allowances, rebates or credits given or allowed in relation to the supply of goods;
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> (c) the provision of services in respect of the goods;
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> (d) the making of payments for services provided in respect of the goods if the discrimination is of such magnitude or is of such a recurring or systematic character that it has or is likely to have the effect of substantially lessening competition in a market for goods, being a market in which the corporation supplies, or those persons supply, goods.

7.5 Subsection 49(2) listed two defences to 49(1). The first was where the price differences reflected differences in the cost or likely cost of manufacture, distribution, sale or delivery resulting from the different places to which the goods are supplied to purchasers. The second defence was where the discrimination was constituted by the doing of an act in good faith to meet a price or benefit offered by a competitor of the supplier.

7.6 In 2002, the ACCC described the operation of section 49 as follows:

> Price discrimination was an issue under s. 49 if the discrimination was of such magnitude or was of such a recurring or systematic character that it substantially lessened competition. Section 49 did not apply when the discrimination in price reflected a reasonable allowance for differences in the cost of supply resulting from different delivery destinations or different quantities supplied to purchasers.[4]

Repeal of section 49

7.7 Section 49 was repealed in 1995 after the recommendations of the 1993 report of the independent inquiry into a national competition policy (the Hilmer Report). The view at the time was that price discrimination 'generally enhances economic efficiency', except in instances which may be in breach of either section 45 or 46, in which case those sections would apply.[5]

7.8 In recommending its repeal, the Hilmer Report noted concerns that the provision may discourage pro-competitive conduct.[6] The Hilmer Report summarised its view on the provision as follows:

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4 Australian Competition and Consumer Commission, *Report to the Senate by the Australian Competition and Consumer Commission on prices paid to suppliers by retailers in the Australian grocery industry*, September 2002, p. 8.

5 Independent Committee of Inquiry into Competition Policy in Australia, *National Competition Policy*, August 1993, p. 79.

6 *National Competition Policy*, August 1993, p. 78.

> The prohibition against price discrimination prevents the sale of like goods to different persons at different prices, where such discrimination substantially lessens competition. The provision is contrary to the objective of economic efficiency and has not been of assistance to small businesses. The Committee does not believe that it is the role of the competitive conduct rules to protect any particular sector of society, and does not believe that the competition rules should be used to achieve objectives contrary to economic efficiency.[7]

7.9 In its submission to this inquiry, the National Association of Retail Grocers of Australia (NARGA) questioned this finding:

> In Hilmer's own words, prevention of a substantial lessening of competition would be "contrary to the objective of economic efficiency". The corollary to Hilmer's logic is that a substantial lessening of competition would promote economic efficiency. And, presumably, that monopoly would be most efficient of all.[8]

7.10 The position of the Hilmer Report was maintained in the 2003 report of the independent review of the competition provisions of the Trade Practices Act (the Dawson Report). Previous inquiries such as the Swanson Committee (1976) and the Blunt Committee (1979) had also recommended the repeal of section 49.[9]

7.11 A 2004 Senate committee inquiry into Parts IV and VII of the Trade Practices Act examined whether section 46 required amendment to deal better with price discrimination (previously addressed by section 49) and concluded that section 46 was adequate.[10]

7.12 The ACCC provided a useful summary of the reasoning behind the repeal of section 49, noting that the Hilmer Report:

> … observed that anticompetitive price discrimination almost invariably involves a firm with market power. You have to have market power to make it stick. Alternatively, a group of suppliers has to get together and agree on the price discrimination; otherwise, it just does not work. The point the committee made was that if it is a use of market power then that is what section 46 is about. If it is a group of suppliers getting together and deciding on the anticompetitive price discrimination, then that is what section 45 is about. Basically, the Hilmer committee said that they did not

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7 *National Competition Policy*, August 1993, p. 74.

8 National Association of Retail Grocers of Australia, *Submission 50*, p. 6.

9 Although, as pointed out in NARGA's submission to this inquiry, it is worth noting that the recommendations of the Swanson and Blunt Committees to repeal section 49 were rejected.

10 Senate Economics References Committee, *Effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 3.

> see a role for section 49, because the conduct in question was already covered by sections 45 and 46.[11]

Calls for the reintroduction of a section 49-type provision

7.13 During this inquiry a number of individuals and organisations called for a specific anti-competitive price discrimination provision to be reinstated:

> … we need an effective prohibition against anti-competitive price discrimination. Australia is out of line, out of step, with international practice in this area. Other jurisdictions have express prohibitions against anti-competitive price discrimination. We do not. Any hope that section 46 would deal with that issue, I have to say, with all due respect, is somewhat misplaced if not delusional.[12]

> The AFGC is of the view that the switch from the s49 "effects" test to the s46 "purpose" test was a significant weakening of the provision against anti-competitive price discrimination.[13]

> The reintroduction of an anti-price discrimination clause into the Act is absolutely warranted and should be a foundation recommendation from the current Senate inquiry.[14]

7.14 NARGA considers that the timing of the repeal of the anti-competitive price discrimination is particularly relevant to the dairy industry:

> … since the deregulation of the Australian dairy industry in 2000, the supermarket chains' private label milk has consistently been priced substantially and continuously below proprietary branded milk.[15]

7.15 Associate Professor Frank Zumbo warned that price discrimination conduct 'adversely impacts' independent retailers, who:

> … will go out of business and will not be able to provide any competitive tension to Coles and Woolworths. Coles and Woolworths will just increase their dominance of the market.[16]

7.16 It is apparent that the prices and terms of supply in the grocery sector, and the effectiveness of competition laws in this regard, have been raised as issues for some time. In 2003, the Dawson Report noted that during its inquiry, parties involved in the

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11 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, pp. 45–6.

12 Associate Professor Frank Zumbo, *Committee Hansard*, 9 March 2011, p. 51.

13 Australian Food and Grocery Council, *Submission 100*, p. 11.

14 Queensland Dairyfarmers' Organisation, answer to question on notice, 8 March 2011 (received 27 March 2011), p. 16.

15 National Association of Retail Grocers of Australia, *Submission 50*, p. 7.

16 Associate Professor Frank Zumbo, *Committee Hansard*, 9 March 2011, p. 59.

wholesale and retail grocery industry were the most vocal regarding price discrimination. The Dawson Report summarised their concerns as follows:

> Their complaint was that independent wholesalers (who sell wholesale to independent retailers) are not able to obtain goods at prices comparable to those charged by suppliers to the two major chains, notwithstanding that their central distribution warehouses are, in comparison with the facilities of the major chains, of comparable size and capable of like performance. They submitted that this constituted a failure on the part of suppliers to provide 'like terms for like customers' at this level of the grocery distribution chain, namely, the central warehouse level. This meant, they said, that the independent retailers were such that there could be no fair competition between them and the major chains at the retail level, only the later being able to reflect the benefit of lower wholesale prices in their retail prices.[17]

7.17 However, when asked at Senate Estimates whether it is price discrimination when different prices are charged for the same product in different packaging, the Chairman of the ACCC replied that 'it is not', and referred to other issues such as the marketing elements of the branded product.[18] This interpretation was also supported by the chief executive of an independent supermarket chain:

> Senator XENOPHON—Is it price discrimination to be selling branded milk and generic milk, or the home brand milk, for different prices when in effect it is the same product?
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> Mr Markham—I think that is the case for most private labels and branded products anyway. Branded products carry a marketing component, a brand value, which has always put them at a higher price than a private label. So, no, I do not believe so.[19]

Effectiveness of section 49 and criticism of its enforcement

7.18 When the price discrimination version of section 49 was in place, it was invoked in legal proceedings in very few instances.

7.19 NARGA was critical of the enforcement by the ACCC and its predecessor (the Trade Practices Commission) of anti-competitive price discrimination provisions—both section 49 and, after it was repealed, section 46. NARGA noted a

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17 Trade Practices Act Review Committee, *Report of the Trade Practices Act Review Committee*, January 2003, p. 90.

18 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Senate Economics Legislation Committee Hansard*, Additional Estimates 2010–11, 24 February 2011, p. 86.

19 Mr Russell Markham, Chief Executive Officer, Foodland Supermarkets, *Committee Hansard*, 8 March 2011, pp. 53–4.

private case where conduct was found to be in breach of section 49 to support their argument that it was repealed without cause.[20]

> In 1981, a private case, *JCool&Son v. O'Brien Glass Industries*, was taken to the Federal Court of Australia. Justice Keely found that both s49 and s47 of the Trade Practices Act had been breached.[21]

7.20 Treasury pointed out, however, that it is difficult to state with certainty that section 49 was necessary in the outcome of *J Cool & Son v O'Brien*, noting that if section 49 had not existed at the time, it is not clear if section 46 or another provision may have been pleaded instead.[22]

7.21 Treasury also cited two judicial observations made on the case:

> There is some overlapping between the different sub-sections of the Trade Practices Act. In particular, in the present case, it is alleged that the same conduct of the respondent constitutes both exclusive dealing contrary to Section 47 of the Act and price discrimination contrary to Section 49 of the Act. In other words, the giving of a substantial discount on certain conditions can be price discrimination and also, constitute exclusive dealing contrary to Section 47. Indeed, in the applicant's submission, it is the combination of the large systematic discounts and the exclusive dealing condition which greatly increases the adverse anti-competitive effects in the present case…[23]
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> It is also to be noted that the purpose of the discrimination in s. 49(1) is irrelevant and this may be compared with the provisions of s. 47(10).[24]

Limitations of section 49

7.22 Following on from the few instances of section 49 being used in court proceedings, and in addition to questions about the approach taken by enforcement agencies to pursuing section 49 cases, are questions about the possible limitations of the section. The Hilmer Report outlined what, in its view, were practical difficulties with the provision:

> It is not clear what degree of similarity is required for goods to be regarded as being "of like grade and quality"; it is not clear what might constitute a "reasonable" allowance for differences in cost; and it is not clear whether,

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20 *Re Cool and Sons Pty Ltd Trading As Wagga Windscreen Service v O'Brien Glass Industries Limited* [1981] FCA 95. National Association of Retail Grocers of Australia, *Submission 50*, pp. 8–9.

21 National Association of Retail Grocers of Australia, *Submission 50*, pp. 8–9.

22 Mr Andrew Deitz, Department of the Treasury, *Committee Hansard*, 10 March 2011, p. 13.

23 *Re Cool and Sons Pty Ltd Trading As Wagga Windscreen Service v O'Brien Glass Industries Limited* [1981] FCA 95 (Keely J); cited by Department of the Treasury, *Submission 111*, p. 15.

24 *Re O'Brien Glass Industries Limited v Cool & Sons Pty Limited Trading As Wagga Windscreen Service* (1983) 77 FLR 441 (Fox, Franki and Sheppard JJ); cited by Department of the Treasury, *Submission 111*, p. 15.

> when meeting a competitor's price, the goods must bear the same degree of similarity to the competitor's goods as is required by the phrase "of like grade and quality". The cost defence does not necessarily correspond with those factors which firms would monitor or consider significant.[25]

7.23 The ACCC also explained what it saw as the key limitations of the section:

> If you look at section 49, basically it said price discrimination is unlawful if it has the effect of 'substantially lessening competition'. Then there were a couple of exclusions, which included price discrimination because of differing costs and price discrimination in order to match a competitor. When you took all of that into account you had to be able to establish that there was the effect of substantial lessening of competition. Various types of pricing were excluded. So you ended up with a fairly small set of pricing behaviours which potentially would have fallen under that section for consideration.[26]

7.24 Although only a small set of pricing behaviours were likely to be captured, it is not clear this should be interpreted to be a criticism of the section, as such a provision should only be targeted at very specific behaviours.

Price discrimination laws in other jurisdictions

7.25 It is evident that other key jurisdictions have a specific anti-competitive price discrimination provision in place, although the ACCC disagreed that 'most countries had it', asserting that these types of provisions have been repealed in a number of countries in recent years.[27]

United Kingdom and Europe

7.26 In the United Kingdom, subsection 18(1) of the Competition Act 1998 provides that, with certain exceptions, 'any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in a market is prohibited if it may affect trade within the United Kingdom'. This provision is based on Article 82(c) of the EC Treaty, which covers trade between its member states. The UK legislation extends the prohibition to cover trade within the UK itself.

7.27 Subsection 18(2) provides a non-exhaustive list of conduct which may constitute an abuse of a dominant position, including the 'application of dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The UK Office of Fair Trading (UK OFT), in its non-binding guidelines on the abuse of a dominant position, states:

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25 *National Competition Policy*, August 1993, p. 77.

26 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 27.

27 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 45.

> These are no more than examples, and are not exhaustive. The important issue is whether the dominant undertaking is using its dominant position in an abusive way. This may occur if it uses practices that have the effect of restricting the degree of competition which it faces, or of exploiting its market position unjustifiably.[28]

7.28 The key aspect of this provision is that it requires an abuse of a dominant position—in the absence of this there is no general provision in the UK which prohibits discriminatory pricing.[29]

7.29 A paper prepared for the American Bar Association examined a number of price discrimination cases taken in the UK. One significant action by the UK OFT against Napp Pharmaceutical Holdings[30] was highlighted:

> Napp Pharmaceutical Holdings produced sustained release morphine tablets (MST) and distributed its product to both the hospital and community sector of the market. Hospital usage was the 'trigger' for prescription by doctors in the (much larger) community sector. Napp distributed its product to hospitals at a 90% discount from the list price in the wider community. This discount—a form of price discrimination—was held by the OFT to be an abuse of a dominant position as it served to strengthen the dominant position of Napp in such a way that the degree of dominance reached by this undertaking substantially fettered competition in the market for MST.[31]

United States

7.30 Price discrimination in the United States is directly governed by the Robinson-Patman Act of 1936 (RPA), which amended the Clayton Antitrust Act of 1914. The RPA provides that, with some exceptions and defences:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality … and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce,

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28 Office of Fair Trading (UK), *Abuse of a dominant position: understanding competition law*, December 2004, p. 4.

29 Mr Peter Whelan and Dr Philip Marsden, British Institute of International and Comparative Law, *Reflections on the Robinson-Patman Act: A Review of International Perspectives on Price Discrimination*, paper presented to the American Bar Association Antitrust Teleseminar Series, February 2006, www.biicl.org/files/60_reflections_on_the_robinson_-_patman_act_a_review_of_international_perspectives_on_price_discrimination.pdf (accessed 5 April 2011).

30 *Napp Pharmaceutical Holdings Ltd* CA98/2/2001 [2001] UKCLR 597, on appeal *Napp Pharmaceutical Holdings Ltd v The Director General of Fair Trading* [2002] CompAR 13.

31 Mr Peter Whelan and Dr Philip Marsden, British Institute of International and Comparative Law, *Reflections on the Robinson-Patman Act: A Review of International Perspectives on Price Discrimination*, paper presented to the American Bar Association Antitrust Teleseminar Series, February 2006, www.biicl.org/files/60_reflections_on_the_robinson_-_patman_act_a_review_of_international_perspectives_on_price_discrimination.pdf (accessed 5 April 2011).

> or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them…[32]

7.31 An official of the US Federal Trade Commission described the rationale behind the introduction of the RPA as follows:

> In 1936, Congress believed that large firms could dominate markets through predation and other forms of economic warfare directed against smaller firms, and felt that "power buyers" such as large retailers could use their market power to extract price concessions from manufacturers and other sellers that were unavailable to their smaller competitors. As the Commission has stated, [t]he major legislative purpose behind the Robinson-Patman Act was to provide some measure of protection to small independent retailers and their independent suppliers from what was thought to be unfair competition from vertically integrated, multi-location chain stores.[33]

7.32 In 2002, the Antitrust Modernization Commission was formed by Act of Congress to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.[34] The Commission concluded that the RPA:

> … appears antithetical to core antitrust principles. Its repeal or substantial overhaul has been recommended in three prior reports, in 1955, 1969, and 1977. That is because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage. At the same time, it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit.[35]

7.33 These criticisms were also discussed by the Dawson Report when examining Australia's price discrimination laws. The Dawson Report noted:

> In recent decades, this legislation has been widely criticised as being too complex, deterring price competition and promoting price uniformity. Although originally directed at large retailers, in practice it has been applied mainly against small sellers who grant discounts in order to compete against large sellers and against businesses engaging in vigorous competition.[36]

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32 Robinson–Patman Act of 1936 (US), 15 U.S.C. § 13(a).

33 Mr Donald Clark, Secretary, Federal Trade Commission, 'The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues', *Address to the Ambit Group Retail Channel Conference for the Computer Industry*, 7 June 1995, www.ftc.gov/speeches/other/patman.shtm (accessed 8 September 2011).

34 Antitrust Modernization Commission Act of 2002 (US), P.L. 107-273, 116 Stat. 1856.

35 Antitrust Modernization Commission (US), *Report and recommendations*, April 2007, p. iii.

36 *Report of the Trade Practices Act Review Committee*, January 2003, p. 90.

7.34 In 2008 the ACCC stated that it understood the approach of the US Federal Trade Commission to enforcing the RPA:

> … has been to use the Robinson-Patman Act less and to now take action against price discrimination under the broader competition law framework (e.g. § 2 of the Sherman Act 1890), and only where the practices involved can be considered to be an attempt to monopolise. The ACCC considers that this is similar to the existing situation in Australia.[37]

Canada

7.35 Under section 50 of the Competition Act,[38] price discrimination between competitors who purchase similar volumes of a product was prohibited. Section 50 was repealed in 2009.

7.36 There is a provision currently in effect addressing delivered pricing. Delivered pricing under the Competition Act refers to the practice of refusing delivery of a product to a customer, or a person seeking to become a customer, on the same trade terms at any place where the supplier ordinarily makes deliveries. Under section 81, and subject to certain exceptions, delivered pricing conduct may be ordered to cease in circumstances where a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to them in the market.

What would a price discrimination provision in Australia achieve?

7.37 There appears to be two areas where price discrimination issues may be relevant to the dairy industry and the grocery sector generally. The first issue is the wholesale prices within the supply chain, including pricing differences between generic and branded milk and the price of milk offered by processors to different customers. The second is the different retail prices of generic and branded milk, although they are essentially the same product. An anti-competitive outcome may occur as a result of milk processors charging smaller retailers a higher price for their branded milk, to offset the lower wholesale price they receive for selling generic milk to Coles and Woolworths. The Chairman of NARGA expressed his frustration at this:

> … I have to admit that it does get up my nose that every day I figure out that I am actually subsidising Fonterra to sell house brand milk to Coles by the price they charge me for their branded milk and other products.[39]

7.38 These issues were examined by the ACCC during its 2008 inquiry into the competitiveness of retail prices for standard groceries. On the wholesale issue, the ACCC noted that the volume of sales through the major supermarket chains, their

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37 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, pp. 443-444.

38 Competition Act (Canada), R.S.C., 1985, c. C-34.

39 Mr John Cummings, Chairman, National Association of Retail Grocers of Australia, *Committee Hansard*, 9 March 2011, p. 10.

vertical integration, and likely ability to better execute promotions largely explained wholesale price differences.[40] On these issues in the dairy industry, the ACCC stated:

> Generally speaking, larger customers will be supplied on more favourable terms (i.e. more generous rebates and discounts). For example, in its public submission Fonterra stated that it achieves lower unit costs, predominantly linked to volume, when selling to large customers. Fonterra states that additional benefits in dealing with larger customers include consistent purchasing patterns which enable manufacturing efficiencies. Fonterra stated that if a smaller wholesaler or retailer was to purchase the same volume as a larger customer, in general, they may be able to achieve similar discounts from Fonterra to the larger customer.[41]

7.39 The different retail pricing structures of goods that were 'essentially the same' were also considered, with the ACCC stating that its view was:

> As long as the labelling is not misleading, the ACCC will generally not have a concern with such practices. This is because consumers have different 'willingness to pay' for products, and this form of price discrimination can have potential benefits in allowing end users to obtain goods at more accessible prices.[42]

7.40 The consequences of reinstating a section 49-type provision on the future of generic products were also discussed. NARGA observed that generic supermarket brand products existed when section 49 was in force. NARGA also noted that in other jurisdictions where an anti-price discrimination law exists, it has not resulted in generic products being unable to compete with branded goods. In fact, NARGA pointed out that some of the most successful supermarket chains which heavily rely on generic products operate in these environments. Tesco in the UK was cited as an example:

> If they can do it, there is no reason that Coles or Woolworths or IGA or FoodWorks or Aldi could not do it in Australia. Aldi operate in the UK; Aldi operate through all Europe.[43]

7.41 This raises the question of what a specific price discrimination provision would achieve for participants in the dairy supply chain, if such a provision is in place in countries such as the UK. As noted in the committee's *Second Interim Report*, conduct within, and the general operation of, both the dairy and grocery sectors in the UK has at times been controversial. Various governments in the UK have reacted by

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40 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 441.

41 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 234 (footnotes omitted).

42 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p. 442.

43 Mr John Cummings, Chairman, National Association of Retail Grocers of Australia, *Committee Hansard*, 9 March 2011, p. 11.

making a mandatory code of conduct for dealings between major supermarkets and grocery suppliers, and by developing an office with responsibility for enforcing that code.

7.42 The possible result of a price discrimination provision adversely affecting consumer welfare was also raised by the ACCC:

> Mr Cassidy—… before the Coles action we already had quite a discrepancy in the price of branded versus home-brand milk. Indeed, that was shown in the report of this committee in, I think, table 3.4 [of *Milking it for all it's worth*]. The gap was about 60c or 70c a litre. What Coles has done, followed by others, might have widened that gap by 10c or 12c a litre. You then get the question: if it would have applied to the Coles behaviour, what would then be the case in relation to home-brand milk and branded milk more generally? Would that section result in the cost of home-brand milk increasing by 60c or 70c a litre, back to being equal to branded milk?
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> Senator O'BRIEN—Let me put another theoretical proposition to you, and that is: if the provision was in place, the processor would have been much more cautious about offering such a great differential in price for very similar if not the same product, between what is in one carton and what is in another, lest they offended the provision.
>
> Mr Cassidy—Yes, if you go back in history, that could be right. But I am just asking you to think a bit about what would be the outcome of that—would it be that home-brand milk would be 60c or 70c a litre dearer than it currently is?[44]

7.43 The Law Council argued:

> Such a law will more likely be harmful, since it would raise the cost to retailers of offering a discount on any product, because this would be required to be offered more widely than would otherwise have been the case. Such a law is likely to have the effect of increasing prices for consumer goods and staples generally, in all categories where generics or other forms of product differentiation are used, to the detriment of consumers and the economy.[45]

Misuse of market power and predatory pricing

7.44 It is clear that Coles and Woolworths dominate the Australian grocery retail sector:

> Senator HEFFERNAN—What percentage of the market do Coles and Woolies have in the prepackaged market? I say 80 per cent. You said it is less than that.

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44 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 28.

45 Law Council of Australia, *Submission 115*, p. 4.

> Mr McLeod—I think it is about 60 per cent, between 60 and 70 per cent, depending which market you use.
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> Senator HEFFERNAN—Just say 70 per cent for a nice easy work. That would be considerable market power, would it not?
>
> Mr McLeod—We are very sensitive to the fact that the market share that we have … is something that you have to be very responsible with.[46]

7.45 A recent draft report issued by the Productivity Commission estimated Woolworths' market share in 2009–10 to be 38 per cent, followed by Coles at 26 per cent, Metcash at 19 per cent, ALDI with three per cent and Franklins at one per cent.[47]

7.46 Many submissions and witnesses criticised the market share and market power held by Coles and Woolworths. The two major supermarket chains are able to access products on more favourable terms and conditions, including at lower prices, than other businesses such as smaller retailers and milk vendors.

7.47 Treasury commented on what is relevant when considering market power issues, noting other issues which need to be taken into account:

> Senator COLBECK—… I am trying to define how we characterise misuse of market power, because that is one of the key things that people are talking about in this instance. You have two supermarkets that effectively control the retail sector. Everyone down the supply chain and some of their competitors, who I accept have vested interests, are complaining about the market power that they have in these sorts of circumstances. How do we characterise that as far as the law is concerned so that we can ensure that the balance is fair?
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> Mr Archer—Our submission points to a range of factors that are relevant to the consideration of the degree of competition in a particular market. That does include, but not exclusively, the degree of market share that participants have, but it also includes other factors, importantly barriers to entry that might exist in that market. We have seen in the retail sector Aldi introducing competition into the retailing sector and there is the prospect of other companies, such as Costco, coming in—they are in Melbourne.[48]

7.48 As noted in chapter 6, the misuse of market power for an anti-competitive purpose is prohibited by section 46 of the CCA. Specifically, subsection 46(1) prohibits corporations that have a substantial degree of power in a market from taking advantage of that power in that or any other market for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person or deterring or preventing a person from engaging in competitive conduct in that or any other market.

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46 Mr Ian McLeod, Managing Director, Coles, *Committee Hansard,* 29 March 2011, p. 57.

47 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Draft Report, July 2011, p. 35.

48 Mr Brad Archer, Department of the Treasury, *Committee Hansard*, 10 March 2011, p. 6.

7.49 The relevance of section 46 when considering aspects of Coles' pricing decisions is clear. Treasury considers:

> Concerns that the current conduct of supermarkets amounts to anti-competitive conduct would, if proven, appear capable of being dealt with under the existing prohibitions of the CCA, particularly section 46, which deals with the misuse of market power.[49]

7.50 One of the forms of anti-competitive conduct that is addressed through section 46 is predatory pricing (see chapter 6 for a discussion of predatory pricing).

7.51 However, as also discussed in chapter 6, after conducting an investigation into Coles' pricing decisions, the ACCC announced in July 2011 that, in their view, the actions did not constitute predatory pricing. This led to renewed calls for amendments to the anti-competitive conduct provisions of the CCA.[50]

Is section 46 adequate?

7.52 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.[51]

7.53 The ACCC's recent announcement regarding its investigation of Coles' pricing, discussed in more detail in chapter 6, demonstrates some of the possible consequences of the lack of an effects test in section 46. The statement 'it is important to note that anti-competitive purpose is the key factor here'[52] is particularly informative.

Recent reviews and reforms to section 46

7.54 Section 46 has been a controversial aspect of Australia's competition law, and accordingly has been subject to a number of inquiries and reviews. The last major independent inquiry, the Dawson Committee, examined the operation of section 46. In

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49 Department of the Treasury, *Submission 111*, p. 3.

50 See, for example, Australian Dairy Farmers, *Submission 150B;* NSW Dairy Industry Conference, *Submission 92A*; Queensland Dairyfarmers' Organisation, *Submission 94A*; National Association of Retail Grocers of Australia, *Submission 50B.*

51 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…'

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

its submission to the inquiry, the ACCC argued that the object of the general competition provisions of the CCA (then the Trade Practices Act) were to:

> … prohibit various types of conduct that are likely to maintain or enhance market power other than by competitive means.[53]

7.55 However, the ACCC's view at the time was that section 46 was of limited effect:

> … if the law does not even prohibit large firms with substantial market power from taking advantage of it with the effect of damaging competition—by virtue of such actions as an anti-competitive refusal to supply, anticompetitive predatory behaviour, anti-competitive leveraging of market power in one market to damage competition in another market—the law is not only deficient as a matter of economic policy, but deficient in relation to the above objectives.[54]

7.56 The ACCC were particularly concerned about the lack of an 'effects' test in section 46:

> The reason for the distinction between s. 46 and the other Part IV prohibitions is not obvious. The policy objective of s. 46 is fundamentally the same as the other prohibitions in Part IV—that is, the prohibition of specified conduct that will damage competition. As well, Australia's prohibition on misuse of market power is inconsistent with similar prohibitions in the United Kingdom, Europe and the United States. The Commission believes the distinction between s. 46 and the other Part IV provisions should be removed. However, this does not suggest that the purpose test in s. 46 is inappropriate. As in ss. 45 and 47 a purpose test is an important element of s. 46 where it can be proved.[55]

7.57 However, on the need for an effects test the Dawson Report concluded:

> The difficulty in proving purpose may be doubted. Not only may purpose be inferred, but the proof that is required is on the civil standard of the balance of probabilities only, and not on the criminal standard of proof beyond reasonable doubt. The purpose does not have to be the sole or dominant purpose. An admission of purpose is not required, much less an admission in the documentary form of a 'smoking gun'.[56]

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53 Australian Competition and Consumer Commission, *Submission to the Trade Practices Act Review Committee*, June 2002, p. 67.

54 Australian Competition and Consumer Commission, *Submission to the Trade Practices Act Review Committee*, June 2002, p. 68.

55 Australian Competition and Consumer Commission, *Submission to the Trade Practices Act Review Committee*, June 2002, p. 78.

56 *Report of the Trade Practices Act Review Committee*, January 2003, p. 77.

7.58 The Dawson Report also provided reasons for section 46 being limited to a purpose test, noting that the other provisions relating to anti-competitive conduct, such as sections 45 and 47, are:

> … concerned with conduct involving competitive relationships between two or more corporations, whereas section 46 is concerned with unilateral anti-competitive behaviour on the part of a corporation with a substantial degree of market power. It is the behaviour which gives rise to the prohibition rather than its effect…[57]

7.59 The Dawson Report also considered that an effects test would discourage competition:

> Not only would the introduction of an effects test alter the character of section 46, but it would also render purpose ineffective as a means of distinguishing between legitimate (pro-competitive) and illegitimate (anti-competitive) behaviour. The section is aimed against anti-competitive monopolistic practices, not competition, even aggressive competition. The distinction is sometimes a different one, but it is one that section 46 seeks to maintain and in doing so seeks to balance the risk of deterring efficient market conduct against the risk of allowing conduct that would damage competition and reduce efficiency.[58]

7.60 A similar debate was conducted at the time of the Hilmer Report, with the Trade Practices Commission, the forerunner to the ACCC, proposing that unilateral conduct that has the effect of substantially lessening competition should be prohibited.[59]

7.61 The High Court's decision on the predatory pricing case *Boral v ACCC*[60] was a turning point for section 46. In March 1998 the ACCC commenced proceedings in the Federal Court alleging that Boral Masonry misused its market power by selling concrete masonry products at or below its cost of manufacture to drive out a new competitor. The case went all the way to the High Court which, in February 2003 and by a 6-1 majority, found that Boral did not have substantial market power. The ACCC stated in 2003:

> The High Court decision in the Boral case, in our view—and in the view of senior counsel—has given a legal interpretation to the wording of section 46, which indicates that parliament did not achieve its intention. The use of the words 'substantial degree of market power' did not lower the threshold below that of dominance as was previously the case with section 46. This is a legal issue. What we have said is that as the High Court appears to have made it clear that parliament did not achieve its intention

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57 *Report of the Trade Practices Act Review Committee*, January 2003, p. 79.

58 *Report of the Trade Practices Act Review Committee*, January 2003, p. 80.

59 *Report of the Trade Practices Act Review Committee*, January 2003, p. 70.

60 *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* [2003] HCA 5.

> and, as there is now some uncertainty as to what 'substantial degree of market power' now means, it is appropriate for parliament to revisit the intention it expressed in 1986 to clarify the meaning of section 46 and, in particular, to clarify the threshold for the application of the section in the way that was evidenced by the intention of parliament in 1986.[61]

7.62 Amendments were made to the competition provisions of the Trade Practices Act in 2007 and 2008.[62] These included the clarification of what is meant by substantial degree of market power, factors the court may consider in determining whether a corporation has taken advantage of its market power, and an amendment (subsection 46(1AAA)) to specify that a corporation may breach subsection 46(1) even if it cannot, and might not ever be able to, recoup the losses incurred from below cost supply. In 2007, a provision to address predatory pricing conduct—subsection 46(1AA), or the 'Birdsville Amendment' —was also introduced.

7.63 The Law Council considers that 'these amendments have clarified section 46' and that 'the ACCC is now in a position where it could, in an appropriate case, more confidently prosecute conduct in breach of section 46'.[63]

7.64 However, issues about the sole reliance on the purpose test in section 46 may still remain. The ACCC's current ability to pursue a case under section 46 was examined by the committee:

> Senator O'BRIEN—Is it the experience of the ACCC that proving effect is easier than purpose?
>
> Mr Cassidy—It can be. In subsection 46(7) there is a provision where you can deduce what the purpose was from the conduct. So if you look at the conduct and you say to yourself the only purpose they could have had in doing what they did was in order to damage a competitor, you can get it by that sort of deduction rather than unnecessarily having direct evidence of what the purpose was. That makes it a bit easier. Having said that, I would agree with the general proposition, and I suspect my colleagues would as well, that it is probably easier to establish effect than it is to establish purpose.
>
> Mr Bezzi—I slightly qualify that by saying that if you are dealing with an organisation that is in the habit of having lots of exchanges by email and you get your hands on emails which really indicate what their true purpose

61 Mr Graeme Samuel, Chairman, Australian Competition and Consumer Commission, *Senate Economics References Committee Hansard*, Inquiry into the effectiveness of the *Trade Practices Act 1974* in protecting small business, 31 October 2003, p. 85.

62 *Trade Practices Legislation Amendment Act (No. 1) 2007* and the *Trade Practices Legislation Amendment Act 2008*.

63 Law Council of Australia, *Submission 115*, p. 6.

> was, it can sometimes be an easier case than for purpose, in practical terms.[64]

7.65 During this inquiry, the committee received evidence indicating that criticism of the section still exists:

> Section 46 has failed in its objective of dealing with abuses of market power. There were High Court decisions that basically undermined the effectiveness of section 46.[65]
>
> The lack of prosecutions under section 46 despite ongoing concerns in industry suggest that it may not contain the powers necessary to overcome problems within industries such as the dairy industry.[66]

7.66 On the other hand, Treasury and the Law Council also point out that the new provisions introduced in 2007 and 2008 are largely untested.[67] The ACCC also noted that since the Boral case they have succeeded in a predatory pricing case against Cabcharge:

> Mr Bezzi—… we have had one successful predatory pricing case that we concluded in recent months, which we are very pleased about—I have to put this on the record. We feel that the result we got in that was a very good result and it sent a strong signal to industry that we are serious about pursuing predatory pricing cases. There was a very substantial penalty imposed. It was a difficult case. It was an industry where there were substantial resources arrayed against us, but we pursued it and we got, I think, a very good result.
>
> Mr Cassidy—That was Cabcharge, and we are awaiting judgment on another case in the courts at the moment.[68]

7.67 Perhaps indicating a change in the ACCC's approach to deciding whether to litigate matters, its new chairman[69] recently remarked:

> The ACCC's success rate in first instance litigation stands at almost 100 per cent. This is frankly too high. It may sound strange to say so, but benchmarking against our international counterparts we are sitting at a

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64 Mr Brian Cassidy, Chief Executive Officer; Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 26.

65 Associate Professor Frank Zumbo, *Committee Hansard*, 9 March 2011, p. 48.

66 NSW Farmers' Association, *Submission 124*, p. 11.

67 Department of the Treasury, *Submission 111*, p. 12; Law Council of Australia, *Submission 115*, p. 3.

68 Mr Brian Cassidy, Chief Executive Officer; Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division, Australian Competition and Consumer Commission, *Committee Hansard*, 9 March 2011, p. 44.

69 On 1 August 2011, Mr Rod Sims took over from Mr Graeme Samuel as Chairman of the ACCC.

> much higher level of success. Of course I'm happy with the implication that ACCC staff handle cases well, but the flip side is that we have been too risk averse. We need to take on more cases where we see the wrong but court success is less assured…
>
> … There is a need, I believe, to test some aspects of Section 46 in the courts. Although there is some case law on "taking advantage of market power", the precise boundaries of that concept are not yet clearly defined. There is also a need to test some relatively new laws. For instance, in predatory pricing, we have yet to test our view of what "sustained period" means. It is in the public interest that these issues are tested, and the ACCC will take appropriate legal cases to do so.[70]

7.68 When asked whether section 46 needed adjustment, the new ACCC Chairman repeated his view that more test cases need to be taken, but also that:

> … my own view is that the biggest issue is whether it should be a purpose test or a purpose or effects test. To me, that is where the rubber hits the ground, and that is, I think, a legitimate issue to debate.[71]

Divestiture and limits on market share

7.69 This inquiry also heard calls for the major supermarkets to be forced to divest their assets and for a general divestiture power to be available to the courts as a remedy for anti-competitive conduct. The issue of divestiture was also considered by this committee in its previous inquiry,[72] and as part of other inquiries, such as the inquiry into competition in the Australian banking sector.

7.70 A general divestiture power which would enable the ACCC to take court action to break up existing companies is not a feature of Australia's competition laws. At present, the ACCC's divestiture powers are limited to seeking divestiture in merger and acquisition matters if the merger parties proceed with a transaction that is found to have the effect, or be likely to have the effect, of substantially lessening competition in a market. An application to the court for such a divestiture must be made within three years.

7.71 Associate Professor Zumbo explained how a general divestiture power could be framed:

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70 Mr Rod Sims, Chairman, Australian Competition and Consumer Commission, 'ACCC: Future Directions', *Address to the Law Council Competition and Consumer Workshop 2011*, 28 August 2011, pp. 5, 6 www.accc.gov.au/content/index.phtml/itemId/1004650/fromItemId/8973 (accessed 8 September 2011).

71 Mr Rod Sims, Chairman, Australian Competition and Consumer Commission, *Committee Hansard*, 6 October 2011, p. 42.

72 Senate Economics References Committee, *Milking it for all it's worth—competition and pricing in the Australian dairy industry*, 13 May 2010, pp. 54–5.

> Prof. Zumbo—The way that a divestiture power would work is simply that a court would have that as a possible order in relation to, for example, abuses of market power. There is no reason why it could not be expanded to other potential breaches of the competition laws but typically it is linked in with a monopolisation or an abuse of market power provision.
>
> CHAIR—Is that a percentage of the company, if you like, that has to be sold off or the whole lot? How does it work in practice?
>
> Prof. Zumbo—In practice it could be sold off as particular units, and it could be broken up on a geographical basis. It would be up to the discretion of the court in appropriate circumstances. In the case of vertically integrated companies it could be a vertical separation. It would need to depend very much on the particular factual context.[73]

7.72 The Australian Food and Grocery Council did not express a firm view on the need for a divestiture power, but supported a broader inquiry to consider issues such as divestiture. Their Chief Executive Officer argued that:

> I do not think you would jump into something like anti-trust laws or divestiture or whatever until you had really determined what the cost benefit of that was.[74]

7.73 A general divestiture power does exist in the United States and United Kingdom. The use of the power is probably most well known in the context of 'trust-busting', such as the breaking up of Standard Oil ordered by the Supreme Court in 1911.[75] The Dawson Report, with reference to *United States of America v Microsoft Corporation*, commented that the experience in the United States has been:

> … that divestiture is a remedy which is much more suited to dealing with anti-competitive mergers than to dealing with the conduct of unified enterprises, as would be the case if it were applied to a misuse of market power. A corporation that has expanded by acquisition often has pre-existing lines of division along which it may more easily be split than a corporation that has expanded through organic growth. Courts have, in the United States, referred to the logistical difficulty of 'unscrambling' the latter without greatly harming the efficiency of a viable market participant.[76]

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73 Associate Professor Frank Zumbo, *Committee Hansard*, 9 March 2011, p. 51.

74 Mrs Kate Carnell, Chief Executive Officer, Australian Food and Grocery Council, *Committee Hansard*, 10 March 2011, p. 35.

75 *Standard Oil Co. of New Jersey v United States*, 221 U.S. 1 (1911).

76 *Report of the Trade Practices Act Review Committee*, January 2003, p. 162; *United States of America v Microsoft Corporation*, United States Court of Appeals, No. 00-5212, 28 June 2001.

7.74 In *United States v Microsoft*, the Court of Appeal observed that 'divestiture is a remedy that is imposed only with great caution, in part because its long-term efficacy is rarely certain'.[77]

7.75 The ACCC has in the past noted that in the United States, the divestiture power is a remedy for monopolisation.[78] Depending on how it is drafted, such a law may not be effective for markets where there is more than one large participant.

7.76 There are also likely constitutional implications. Section 51(xxxi) of the Constitution states that:

> The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.

7.77 Depending on the form a divestiture law takes, it may fall under this provision—thus requiring the acquisition to be on 'just terms' and likely involving significant compensation.

Mergers and acquisitions

7.78 The law governing mergers and acquisitions, and the ACCC's approach to assessing these transactions, is a particularly relevant area to consider due to the high degree of market concentration in both the grocery retailing sector and the milk processing industry.

7.79 Section 50 of the CCA prohibits acquisitions that would have the effect, or likely effect, of substantially lessening competition in a substantial market in Australia. Subsection 50(3) provides a non-exhaustive list of factors which must be taken into account when assessing whether a merger would be likely to substantially lessen competition. The ACCC's *Merger Guidelines 2008* also provides guidance on the ACCC's approach when reviewing and analysing acquisitions.

7.80 During its previous inquiry related to the dairy industry, the committee heard a lot of criticism about the ACCC decision not to oppose, on condition that certain divestitures took place, the acquisition of Dairy Farmers by National Foods. The committee noted that the acquisition resulted in a significant reduction in competition,

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77 *United States of America v Microsoft Corporation*, United States Court of Appeals, No. 00-5212, 28 June 2001, www.justice.gov/atr/cases/f257900/257941.htm (accessed 6 April 2011).

78 Mr Brian Cassidy, Chief Executive Officer, Australian Competition and Consumer Commission, *Senate Economics References Committee Hansard*, Inquiry into competition in the Australian banking sector, 25 January 2011, p. 56.

notably in Tasmania.[79] On the other hand, the NSW Farmers' Association noted there may have been some benefits from the divestitures the ACCC required:

> The resulting divestiture of National Foods assets as a result of their purchase of Dairy Farmers has provided opportunity for Parmalat to enter the NSW industry both as a buyer of NSW milk off farm, as a processor with NSW based infrastructure, and also a brand. This does provide an additional market for farmers however the full extent of this competition is not yet realised.[80]

7.81 The committee is also aware of criticism from a number of areas regarding the continued concentration of the grocery market in general, including through creeping acquisitions.[81] The committee's 2010 report *Milking it for all it's worth* examined market share issues, in both anti-competitive conduct and merger contexts, in other jurisdictions:

> It is a matter for judgement what market share might be regarded as raising potential concerns about market power. The European Commission takes the view that a firm would generally have a dominant position once it reaches a market share of 40-45 per cent and may achieve a dominant position in the region of 20-40 per cent.
>
> This is broadly consistent with approaches in some individual European countries. The Austrian Cartel Act places the burden of proof on a company to show it is not dominant where its market share exceeds 30 per cent. In Germany a market share of a third is taken as indicating dominance. The corresponding threshold in Bulgaria is 35 per cent and in Croatia, Estonia, Lithuania, Poland and Serbia 40 per cent. In Malta a company with a 40 per cent market share is deemed dominant unless it provides evidence to the contrary. In Sweden a market share of 40 per cent is regarded as indicative of dominance. Latvia and Slovakia have removed their previous 40 per cent thresholds for defining dominance. A firm would, of course, have some market power well before reaching dominance.
>
> The US Department of Justice's benchmark for challenging mergers is where the sum of the squared percentage market shares of the merging companies exceeds 1800. This would occur if two firms each having a 30 per cent market share wanted to merge; or a firm with a 40 per cent market share wanted to take over a competitor with a 14 per cent market share.[82]

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79 Senate Economics References Committee, *Milking it for all it's worth—competition and pricing in the Australian dairy industry*, 13 May 2010, p. 62.

80 NSW Farmers' Association, *Submission 124*, pp. 4–5.

81 The committee's sister legislation committee has previously examined the issue of creeping acquisitions. See Senate Economics Legislation Committee, *Competition and Consumer Legislation Amendment Bill 2010 [Provisions]*, 15 June 2010; *Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*, 26 August 2008.

82 Senate Economics References Committee, *Milking it for all it's worth—competition and pricing in the Australian dairy industry*, 13 May 2010, p. 60 (footnotes omitted).

7.82 The United States model is supported by some smaller retailers in competition with Coles and Woolworths:

> CHAIR—It is really all about market share, isn't it? In the United States they do limit market share. Do you think that would be something that we should consider in Australia to facilitate competition?
>
> Mr Reynolds—I would love to see that. There has to be a balance of green sites going to the independents and also distance between stores. The Woolworths store got the green site that we were chasing and had spent several years trying to achieve. We got into a bidding war and, of course, we could not afford it. We had done our sums and told the landlord what we could afford, what we wanted to do, and Woolworths just outbid us. In the end we are situated in the same footprint that we had when we started the business 25 years ago.[83]

7.83 The committee notes that the Competition and Consumer Legislation Amendment Bill 2011, aspects of which relate to the consideration of acquisitions in local markets (including creeping acquisitions), is currently before the Senate.

Ex-post analysis of merger decisions

7.84 The lack of any analysis of the actual effects of the ACCC's merger decisions after they have been made was discussed in the committee's 2010 report, *Milking it for all it's worth*. The committee observed:

> There is inadequate assessment of whether markets have become excessively concentrated because the agency assessing this (the ACCC) is the same agency that approved the mergers leading to the high degree of concentration.[84]

7.85 This issue was also raised in the committee's recent inquiry into competition within the Australian banking sector. Competition academic and former ACCC Commissioner (during which time he chaired the ACCC's Mergers Review Committee), Professor Stephen King, was asked about the merits of reviewing past merger decisions during the banking competition inquiry. He appeared generally in favour of the idea:

> One of the things that we have not had in Australia which has occurred within the competition agencies in the US, for example, is an ex post evaluation of mergers—a looking back after five or six years out to see whether the decision that was made was the right decision. We need to find out whether a decision that was good at the time make a difference, whether that decision was to allow a merger to go ahead or to oppose a merger. That

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83 Mr David Reynolds, Yentrac, trading as Goolwa Foodland, *Committee Hansard*, 8 March 2011, p. 47.

84 Senate Economics References Committee, *Milking it for all it's worth—competition and pricing in the Australian dairy industry*, 13 May 2010, p. 65.

> sort of exercise would allow us to, in a sense, check that our laws are appropriate.[85]

7.86 Reflecting later, Professor King observed:

> This type of retrospective study represents best regulatory practice. The U.S. antitrust authorities have carried out this type of study. One recently published example is in the Review of Industrial Organization (subscriber only). However, such a study is a major piece of work as the econometricians have to try and tease out the relevant effects.
>
> The benefits of such a study are clear. It allows feedback to both the regulators and the legislature about our competition laws and their implementation. If the federal government made the resources available to do this exercise (and required relevant businesses to provide relevant data, such as retail scan data) then this would be a good outcome.[86]

Is there a need to review the Competition and Consumer Act?

7.87 In its previous inquiry, the committee concluded:

> A combination of narrow interpretations by the courts of expressions in the *Trade Practices Act 1974* and the repeal of section 49 mean that the Act fails to provide adequate protection against excessive market concentration and abuse of market power.[87]

7.88 The committee subsequently recommended that a review of section 46 and a Productivity Commission review of the effectiveness of the National Competition Policy be undertaken.

7.89 Some time has passed since the last major independent review of Australia's competition framework. It is also apparent that some of the findings of these reports take time to enact. Most of the amendments made as a result of the Dawson Report came into effect at the start of 2007. While the report furthered the push to introduce criminal sanctions for cartel conduct, such laws were only passed by the Parliament in 2009.

7.90 Since the Dawson Report was published, however, there have been many amendments either made or proposed to the Trade Practices Act/CCA. Australia's competition laws are evidently not complete—the current proposals to address price signalling and the issue of creeping acquisitions are clear examples.

7.91 A review of the CCA had some support:

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85 Professor Stephen King, *Committee Hansard*, 21 January 2011, p. 109.

86 Professor Stephen King, 'Retrospective merger analysis', *Core Economics blog*, economics.com.au/?p=6638 (accessed 5 April 2011).

87 Senate Economics References Committee, *Milking it for all it's worth—competition and pricing in the Australian dairy industry*, 13 May 2010, p. 65.

> The AFGC seeks a review of the effectiveness of the *Competition and Consumer Act 2010* … to establish and respond to anti competitive pricing behaviour.[88]
>
> Consideration and review of the *Competition and Consumer Act 2010* ... to determine if the Act is effective in dealing with actions such as those taken by Coles recently with a view to changing provisions to ensure that such conduct is not repeated.[89]

7.92 The key advantage of a broad inquiry into Australia's competition laws is that it would allow a wide range of views and issues to be considered with an economy-wide focus. It would also allow the ACCC's and Treasury's views and proposals on a number of issues to be examined.

7.93 Other organisations, such as the Law Council, considered the number of recent changes make moves to review or reform the CCA premature:

> … it is still too early for the full effect of these changes to be confirmed, and so it is important that the ACCC be given the opportunity to test those new powers before further reform of section 46 is considered…[90]

7.94 It is clear that care needs to be taken in recommending amendments to economy-wide competition laws. Treasury warned:

> Where policies are being proposed which contemplate government intervention in markets in response to an identified market failure, consideration must be given to Clause 5 of the Competition Principles Agreement 1995. Relevantly, it provides that, when intervening in markets, competition should not be restricted unless it can be demonstrated that:
>
> - the benefits of the restriction to the community as a whole outweigh the costs, and
> - the objectives of the legislation can only be achieved by restricting competition.
>
> … If a market failure is identified in a particular industry, industry-specific measures may need to be considered, and it is likely such measures would be preferable to amending the economy-wide competition laws. Any proposals to amend the provisions of the CCA which seek to correct market failures in one sector need to carefully weigh the full range of possible costs and benefits which would accrue across the economy.[91]

7.95 General concerns about the form of a government response were also shared by participants in the grocery sector. IGA argued that although 'this price war is not

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88 Australian Food and Grocery Council, *Submission 100*, p. 11.

89 Australian Dairy Industry Council, *Submission 96*, p. 3.

90 Law Council of Australia, *Submission 115*, p. 3.

91 Department of the Treasury, *Submission 111*, p. 3.

part of the normal competition in grocery retailing … government and regulatory intervention may be worse than the problem that they try to solve'.[92]

Committee view

7.96 During this inquiry, the committee received many submissions and took a significant amount of evidence at public hearings in which the effectiveness of Australia's competition laws was questioned. Among other key issues raised were the repeal of the specific anti-competitive price discrimination law in 1995 and the lack of an 'effects' test in provisions such as section 46 of the CCA, which currently is tasked to deal with price discrimination issues as well as other misuses of market power.

7.97 The committee notes that the object of Australia's competition law is to enhance the welfare of Australians. Competition law is not intended to protect competitors, but instead is intended to promote the competitive process. With respect to this object, the concentration of the grocery market, the market power that Coles and Woolworths may have and the ability of smaller retailers to compete with their purchasing power, are concerning issues for the operation of the grocery sector and for longer-term consumer welfare.

7.98 Concerns with aspects of the competition law and the approach taken to their enforcement have also been raised in the context of other sectors and in several other inquiries previously conducted by the pair of Senate economics committees. However, the committee is firmly aware that this inquiry has been primarily focused on the dairy supply chain, with broader elements of the grocery sector necessarily examined as well. Australia's competition law is usually framed to apply to the entire economy. Any amendments to the CCA that are proposed as a result of issues facing the dairy industry and/or grocery sector need to be examined to determine how they will impact other sectors and overall consumer welfare. As this inquiry was directly focused on the dairy industry, other sectors may not have had the opportunity to engage on these issues as part of this process. Accordingly, the committee has not formed a view on the merits or otherwise of the proposals put forward for amendments to the CCA. Such issues could be appropriately dealt with by a specific independent inquiry into the CCA which allows for submissions and evidence to be taken from all areas of the economy.

7.99 The last independent inquiry of the CCA/Trade Practices Act was the Dawson Committee, which commenced in 2002 and reported in early 2003. The inquiry before that was the Hilmer Committee, which was finalised in 1993. Since the Dawson Report, a number of amendments have been made to section 46 of the CCA. The committee urges the ACCC to identify and litigate appropriate matters that will enable these recent amendments to be tested in the courts. However, questions remain about the operation of certain provisions. Additionally, in recent years a number of other competition issues including price signalling, creeping acquisitions, geographic price

92 IGA Retail Network, *Submission 112*.

discrimination and, as noted earlier in the report, the effectiveness of current collective bargaining arrangements have been raised. It appears appropriate that, rather than recommending piecemeal amendments, an independent inquiry be formed to fully address any perceived gaps in Australia's competition law.

Recommendation 5

7.100 The committee recommends that the Government initiate an independent review of the competition provisions of the *Competition and Consumer Act 2010*.