

The Senate

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Economics

References Committee

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GROCERYchoice Website

November 2009

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# Senate Economics References Committee

## Members

Senator Alan Eggleston, Chair	Western Australia, LP
Senator Annette Hurley, Deputy Chair	South Australia, ALP
Senator David Bushby	Tasmania, LP
Senator Barnaby Joyce	Queensland, NATS
Senator Louise Pratt	Western Australia, ALP
Senator Nick Xenophon	South Australia, IND

## Participating Members participating in this inquiry

Senator Guy Barnett	Tasmania, LP
Senator Mary Jo Fisher	South Australia, LP

## Secretariat

Mr John Hawkins, Secretary  
Ms Meg Banfield, Senior Research Officer  
Ms Hanako Jones, Executive Assistant  
Ms Meredith Bond, Executive Assistant

PO Box 6100  
Parliament House  
Canberra ACT 2600  
Ph: 02 6277 3540  
Fax: 02 6277 5719  
E-mail: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)  
Internet: [http://www.aph.gov.au/senate/committee/economics\\_ctte/index.htm](http://www.aph.gov.au/senate/committee/economics_ctte/index.htm)



# TABLE OF CONTENTS

<b>Membership of Committee .....</b>	<b>iii</b>
<b>Executive Summary .....</b>	<b>ix</b>
<b>Chapter 1.....</b>	<b>1</b>
<b>Introduction and background .....</b>	<b>1</b>
Referral .....	1
Terms of reference.....	1
Conduct of the inquiry.....	2
Structure of the report.....	2
Background.....	2
<b>Chapter 2.....</b>	<b>5</b>
<b>The ACCC's GROCERYchoice website .....</b>	<b>5</b>
Launch of the GROCERYchoice website .....	5
Evidence of the website's effect on grocery prices.....	15
Value of the website to consumers .....	17
Committee view.....	20
Data collection - Informed Sources and Retail*Facts .....	20
Committee view.....	32
<b>Chapter 3.....</b>	<b>33</b>
<b>The website's transfer to CHOICE.....</b>	<b>33</b>
Rationale for the ACCC ceasing to manage and operate the website .....	33
CHOICE's proposal to the Government .....	34
Events leading to the GROCERYchoice contract termination .....	41
A possible industry-run website? .....	46
Committee view.....	47

<b>Chapter 4.....</b>	<b>49</b>
<b>Issues and problems faced by CHOICE.....</b>	<b>49</b>
Survey methodology.....	49
Collecting price data.....	49
Cooperation from retailers.....	50
Cooperation from government .....	56
<b>Chapter 5.....</b>	<b>59</b>
<b>Concerns of the grocery retailers .....</b>	<b>59</b>
The ACCC website.....	59
Committee view.....	61
Committee view.....	67
The CHOICE website.....	68
<b>Chapter 6.....</b>	<b>77</b>
<b>Legal issues and trade practices concerns.....</b>	<b>77</b>
Should CHOICE have been allowed to take on GROCERYchoice?.....	77
Price accuracy and 'bait advertising'.....	78
ANRA's role in the GROCERYchoice negotiations .....	81
Committee view.....	84
<b>Chapter 7.....</b>	<b>85</b>
<b>Methods for comparison of grocery prices .....</b>	<b>85</b>
Participatory price sensing .....	86
<b>Chapter 8.....</b>	<b>91</b>
<b>The value and effectiveness of GROCERYchoice .....</b>	<b>91</b>
Relevance to consumers .....	91
Price transparency .....	94
An anti-competitive effect? .....	97
Committee view.....	98

<b>Labor Senators Dissenting Report .....</b>	<b>101</b>
History of GROCERYchoice .....	101
Criticisms of GROCERYchoice.....	104
Government Measures So Far to Improve Competition in the Sector .....	111
Emergence of New Technology .....	112
Conclusion.....	114
<b>Additional Comments by Senator Xenophon.....</b>	<b>115</b>
Introduction .....	115
Consumer behaviour.....	116
Implementation of GROCERYchoice.....	117
Limitations of GROCERYchoice.....	123
Conclusion.....	126
Recommendations .....	127
<b>APPENDIX 1 .....</b>	<b>129</b>
<b>Submissions Received.....</b>	<b>129</b>
<b>Additional Information Received.....</b>	<b>129</b>
<b>APPENDIX 2 .....</b>	<b>133</b>
<b>Public Hearing and Witnesses.....</b>	<b>133</b>
<b>APPENDIX 3 .....</b>	<b>137</b>
<b>Schedule of Payments under the Grocerychoice contract to date (4 Nov 09)</b>	<b>137</b>
Treatment of GST.....	138
<b>APPENDIX 4.....</b>	<b>139</b>
<b>GROCERYchoice Website Contract.....</b>	<b>141</b>
<b>APPENDIX 5 .....</b>	<b>201</b>
<b>GROCERYchoice subcontract arrangements.....</b>	<b>201</b>

<b>APPENDIX 6 .....</b>	<b>203</b>
<b>'Choice' Like for like product matching .....</b>	<b>205</b>
<b>APPENDIX 7 .....</b>	<b>207</b>
<b>'Choice' Memorandum of Understanding 2009 .....</b>	<b>209</b>



## Executive Summary

The GROCERYchoice website was launched on 6 August 2008 by the Australian Competition and Consumer Commission (ACCC). Later that year, the Government announced that the consumer organisation, CHOICE, would take over responsibility for the website. CHOICE was to launch a new version of the website in mid-2009. However, a few days before it was due to launch, the Government announced on 26 June 2009 that the website project would be abandoned.

This inquiry has revealed that the Government's GROCERYchoice initiative was characterised by waste and mismanagement. It was designed to fulfil a hollow election promise to put downward pressure on grocery prices. However, it is clear that the aims of the website were not going to be achievable. The poorly-designed ACCC website collected data in 61 regions across Australia, some of them covering tens of thousands of square kilometres, bearing no resemblance to real-world consumer shopping patterns. The difficulties in making like for like comparisons across fresh produce and different private label products also undermined the ACCC website's effectiveness.

This inquiry into the GROCERYchoice website has also raised questions about the legitimacy of the tender process run by the ACCC.

The committee has serious concerns about the thoroughness of the ACCC's evaluation process for the GROCERYchoice data collection contract. The time pressure that the Government placed on the ACCC to launch the website clearly led to hasty decision-making and little consideration of the potential saving to the taxpayer of \$2.7 million (the cost differential between the two data collection bids).

It appears that at least \$2.7 million could have been saved if the Government had been more flexible and kept its eye on the ball. The launch date for the website was arbitrary and politically motivated.

While not suggesting a lack of integrity on the part of Retail\*Facts, the company that won the contract, the committee is disappointed by the ACCC's apparent indifference to the risks inherent in Retail\*Facts' simultaneous data collection activities for Woolworths.

### Recommendation 1

**The committee recommends that the Commonwealth Auditor-General investigate the tender process undertaken by the Australian Competition and Consumer Commission in relation to the data collection contract for the GROCERYchoice website.**

The ACCC's decision not to undertake any in-field checks of Retail\*Facts' price collection, as authorised by the contract, is particularly concerning to the committee.

This lack of due diligence on the part of the ACCC leaves open the possibility that the integrity and secrecy of the GROCERYchoice data may have been compromised.

## **Recommendation 2**

**The committee recommends that the Australian Competition and Consumer Commission take more care in the future to monitor and assess the performance of contractors that undertake data collection on its behalf.**

When the Government announced on 26 June 2009 that it was abandoning the GROCERYchoice website, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, stated that the Government would hold discussions with supermarkets about the possibility of an industry-operated grocery price data website. Since then, neither the Government nor the major chains have reported any further developments on such a website.

## **Recommendation 3**

**The committee recommends that the Government reveal its plans for an industry-operated grocery price data website.**

The committee also believes that Dr Emerson demonstrated a lack of professionalism in his decision to announce the scrapping of the GROCERYchoice website, just days before its scheduled re-launch, without having forewarned CHOICE or provided an opportunity to respond. His behaviour lacked a clear sense of transparency or fair play, having not had the courtesy to speak to representatives of CHOICE prior to publicly announcing that the Government was terminating its contractual arrangements.

## **Recommendation 4**

**The committee recommends that the Government note the unfair manner in which its contractual arrangements with CHOICE were prematurely terminated by the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, without affording CHOICE a right of reply, and ensure that such unprofessional and discourteous conduct does not occur again.**

The committee is also of the view that the generalised information disseminated by the ACCC through the GROCERYchoice website was prejudicial and unfair to independent retailers, which do not and cannot operate to the same economies of scale as major chain supermarkets.

The *Mercury* published an article the day after the launch of GROCERYchoice, comparing the costs of grocery baskets at the major retailers and independents. The article also reported that the Chairman of the ACCC, Mr Graeme Samuel, had said that the website only compared supermarkets that were 1 000 square metres or larger. However, this inquiry has heard evidence that much smaller independent supermarkets had been included in the ACCC's surveys.

### **Recommendation 5**

The committee recommends that both the Government and the Australian Competition and Consumer Commission note that the operation of the GROCERYchoice website was prejudicial and unfair to independent retailers.

### **Recommendation 6**

Additionally and specifically, the committee recommends that the Australian Competition and Consumer Commission apologise to Tasmanian Independent Retailers for unfairly comparing small independent retailers to major chain supermarkets in its price surveys for the GROCERYchoice website, thereby disadvantaging smaller operators and contributing to undeserved negative press in the *Mercury* on 7 August 2008.

The committee is also concerned about the potential for breaches of the *Trade Practices Act 1974* in the role played by the Australian National Retailers Association (ANRA) during negotiations with CHOICE about the GROCERYchoice website and believes the matter warrants further investigation.

### **Recommendation 7**

The committee recommends that the Australian Competition and Consumer Commission investigate any potential breaches of the *Trade Practices Act 1974* in relation to the role played by the Australian National Retailers Association in negotiations with CHOICE on the GROCERYchoice website.

Overall, the committee believes that GROCERYchoice was a shocking waste of taxpayers' money, clearly demonstrating the Government's apparent disregard for obtaining value for money. Public funds should not have been spent on GROCERYchoice without having a clearer idea of the goals of the website and the practical feasibility of attaining them. GROCERYchoice has provided little information of use to consumers, as can be seen by the sharply declining drop in website use. The total cost to date of this failed experiment is \$7.7 million with an estimated contingent liability of \$700 000, although this may vary depending on the deliberation over the Government's unilateral termination of the CHOICE contract. The status of any possible further litigation by CHOICE or other contractors remains unclear. The Government appears not to have learnt any lessons from the failed FuelWatch experiment.

### **Recommendation 8**

The committee recommends that the Government learn from this episode of waste and mismanagement and ensure that such inappropriate and careless spending does not occur again in the future, noting that now, more than ever, value for money for the taxpayer should be a top priority.



# Chapter 1

## Introduction and background

### Referral

1.1 The Senate referred the matter of the establishment, management, operation and closure of the GROCERYchoice website to the Economics References Committee on 12 August 2009 for inquiry and report by 26 October 2009. On 20 October 2009, the Senate granted an extension of time for reporting until 16 November 2009. A further extension of time for reporting was granted until 18 November 2009.

### Terms of reference

1.2 The terms of reference required the committee to report on:

(a) the rationale and purpose for the website as stated by the Government before the 2007 election;

(b) the business plan, modelling or plans formulated by the Government or the Australian Competition and Consumer Commission (ACCC) to establish, manage, operate and close the website;

(c) the problems and issues faced by the ACCC in establishing, managing and operating the website, as well as in handing the website over to CHOICE;

(d) the rationale for the ACCC ceasing to manage and operate the website;

(e) the level of usage of the website while it was managed and operated by the ACCC;

(f) the proposal CHOICE put to the Government to take over the website and the reasons why the Government was persuaded that taxpayers would receive value for money;

(g) the problems and issues faced by CHOICE in establishing, operating and relaunching the website;

(h) the contract arrangements with CHOICE and the various contractors involved with CHOICE's and the ACCC's management and operation of the website;

(i) the legal issues and trade practices concerns arising from the establishment, management, operation and closure of the website;

(j) the specific concerns of the major chains and independent retailers;

(k) the total cost to the taxpayer in establishing, managing, operating and closing the website; and

(l) any other matters incidental thereto.

## **Conduct of the inquiry**

1.3 The committee advertised the inquiry in the national press and invited written submissions by 11 September 2009. Details of the inquiry were placed on the committee's website and the committee also wrote to a number of organisations and stakeholder groups inviting written submissions. The 15 submissions received by the committee are listed in Appendix 1.

1.4 Three public hearings were held by the committee, in Canberra on 18 September 2009, in Melbourne on 6 October 2009 and again in Canberra on 28 October 2009. A list of witnesses appearing before the committee at hearings is provided at Appendix 2.

1.5 The committee thanks all those who participated in this inquiry.

## **Structure of the report**

1.6 The report is divided into eight chapters. The report begins by examining the purpose of the GROCERYchoice website. Chapter 2 outlines the website's management under the ACCC. Chapters 3 and 4 discuss the website's transfer to CHOICE and the issues and problems CHOICE encountered. Chapter 5 examines the concerns of the major and independent grocery retailers and Chapter 6 looks at the legal issues and trade practices concerns arising from the website. Chapter 7 discusses current and emerging methods for grocery price comparisons. Chapter 8 concludes with a consideration of the value and effectiveness of GROCERYchoice.

## **Background**

1.7 The Australian Labor Party took to the last election a commitment to direct the ACCC to publish a periodic survey of grocery prices for typical shopping baskets. The Hon. Kevin Rudd MP, the then Opposition Leader, stated:

... this very act will serve to increase transparency in the market place and in doing so exert greater competitive pressure on the retail market [and] will provide the ACCC with the pricing information it needs to identify whether there are indications of breaches of the Trade Practices Act that require further investigation.<sup>1</sup>

1.8 This was implemented when the 2008–09 Federal Budget provided \$12.86 million over four years to the ACCC to:

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1 Kevin Rudd, Speech to Cranbourne Secondary College, 'Fresh Ideas for the Future Economy: Cost of Living Pressures Faced By Australian Families', 11 July 2007.

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undertake a monthly survey of grocery prices for typical shopping baskets across Australia [to] help consumers locate the cheapest supermarket chain in their area.<sup>2</sup>

1.9 The initiative took the form of the GROCERYchoice website, which was launched on 6 August 2008 by the ACCC. Later that year, the Government announced that the consumer organisation, CHOICE, would take over responsibility for the website. CHOICE was to launch a new version of the website in mid-2009. However, a few days before it was due to launch, the Government announced that the website project would be abandoned.

### *Purpose of the website*

1.10 The ACCC stated that the website:

... was designed to improve transparency in the grocery market and to help consumers locate the cheapest *overall* grocery prices and supermarket chain in their area without having to compare a large number of prices themselves.<sup>3</sup>

1.11 Asked whether the website was intended to address the lack of price transparency and real-time information on grocery prices, Treasury responded:

Certainly the website was intended to assist consumers to make informed choices about grocery purchases ... That as an aid to assist consumers is something that the government has indicated is worth pursuing. That is really the underlying policy rationale of setting up a website like GROCERYchoice.<sup>4</sup>

1.12 CHOICE's view was that its version of the website would have contributed to greater price transparency:

Information is a basic consumer right. The ability to compare prices at supermarkets at the touch of a button was an important innovation. It would have begun to address the information asymmetry between supermarkets and consumers. Specifically, it would have had two positive effects: (1) each consumer using the site could have actively chosen to shop somewhere cheaper; (2) all shoppers would benefit through a proportion of consumers changing their shopping behaviour and, in the process, driving greater price competitiveness. It is one important change that would have helped to create a more competitive market for groceries.<sup>5</sup>

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2 2008-09 Budget Overview, 'Easing cost of living pressures', [http://www.budget.gov.au/2008-09/content/overview/download/Budget\\_Overview.pdf](http://www.budget.gov.au/2008-09/content/overview/download/Budget_Overview.pdf) (accessed 10 September 2009).

3 Australian Competition and Consumer Commission (ACCC), Answers to Questions on Notice prior to public hearing (received 17 September 2009), p 2.

4 Mr James Chisholm, Treasury, *Proof Committee Hansard*, 18 September 2009, pp 8–9.

5 Mr Nick Stace, CHOICE, *Proof Committee Hansard*, 18 September 2009, p 39.

***Methods for comparison of grocery prices***

1.13 A number of grocery price comparison websites already operate in Australia and overseas. The emerging phenomenon known as 'participatory price sensing', whereby consumers themselves contribute to databases of real-time pricing information, is also likely to play a significant part in grocery price monitoring strategies into the future. These methods are discussed further in chapter 7.



## Chapter 2

### The ACCC's GROCERYchoice website

#### Launch of the GROCERYchoice website

2.1 The GROCERYchoice website<sup>1</sup> was launched by the Australian Competition and Consumer Commission (ACCC) on 6 August 2008, the day after the release of the ACCC's report on its inquiry into the competitiveness of retail prices for standard groceries.

2.2 The ACCC report had found that while the Australian grocery market was 'workably competitive', consumers would benefit from more vigorous competition. It concluded that there were high barriers to entry and expansion in the grocery market, limited incentives for the major supermarket chains to compete aggressively on price, and limited price competition to the major chains from the independent sector. The entry of ALDI in the eastern states had provided a substantial beneficial impact on competition.<sup>2</sup>

2.3 Announcing the launch of the website, the then Minister for Competition Policy and Consumer Affairs, the Hon. Chris Bowen MP, said:

It will provide a monthly snapshot of grocery prices in 61 different baskets – meat and seafood, fruit and vegetables, dairy, bread and cereals, drinks and snacks, general groceries, household and personal care; and basic staples basket to allow comparisons with ALDI, who do not have a wide enough range of goods to be compared with the other retailers on the different baskets.

The ACCC has undertaken considerable work to ensure that only like for like goods are used for comparison purposes for these baskets. The goods in the baskets will change from month to month, and be kept confidential to ensure supermarkets cannot manipulate prices to artificially reduce their prices in that basket while putting up prices on other goods.<sup>3</sup>

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1 The archived GROCERYchoice website (as it appeared on 7 August 2008) is accessible to view at the National Library of Australia's Pandora Archive at <http://pandora.nla.gov.au/tep/87702>.

2 The Hon Chris Bowen MP, Minister for Competition Policy and Consumer Affairs, ACCC Grocery Inquiry Press Conference, 5 August 2008, <http://treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2008/039.htm&pageID=004&min=ceb&Year=2008&DocType=2> (accessed 11 September 2009).

3 The Hon Chris Bowen MP, Minister for Competition Policy and Consumer Affairs, ACCC Grocery Inquiry Press Conference, 5 August 2008, <http://treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2008/039.htm&pageID=004&min=ceb&Year=2008&DocType=2> (accessed 11 September 2009).

2.4 The Minister noted some 'interesting facts' to come out of the first month of surveys, including that Coles was the cheapest of the major supermarkets in 52 out of 61 regions. In the 40 out of 61 regions where ALDI was present, that retailer had the cheapest prices on basic staple products, with a difference of around 25 per cent compared to the next cheapest retailer.

2.5 Mr Bowen also suggested that the introduction of the website could change consumers' shopping patterns, encouraging them to shop elsewhere, rather than their 'usual' supermarket:

Well, what [the website] does is give people a guide to say, well, in our region, ALDI, for example, is significantly cheaper. So people get into a habit. I'm no different and I'm sure people in this room are no different. You get into a habit. You go to the same supermarket time and time again and you notice prices going up and you think that's not good.

But it's not a spur for you often to look around, to search for cheaper prices. And if you do, you may get there and find that the prices are no different. So this is a guide for people to say, well, in your region, if choose to have a look at Woolworths, or Coles, or ALDI, or independents, whatever the case may be in that region, you may find a difference in prices. And then those people, as they should in a market economy, can make their own choices based on convenience, customer service, quality, et cetera.

2.6 The Chairman of the ACCC, Mr Graeme Samuel, commented at the press conference that GROCERYchoice would provide new information to consumers:

[GROCERYchoice] won't duplicate supermarket advertising; it won't publish the weekly specials; it won't list grocery prices for individual supermarkets. But this is about giving consumers something new that the supermarket chains won't tell them: who is cheapest in each region overall.<sup>4</sup>

2.7 The website's introductory page provided the following information:

GROCERYchoice ... provides practical grocery price information to help consumers find the cheapest overall supermarket chain in their area. With the large number of grocery items available at each supermarket, consumers often find it difficult to determine which retailer offers the cheapest prices overall. GROCERYchoice helps consumers compare the general price levels of supermarket chains in their area ...

Price information is obtained from an independent monthly survey of approximately 500 products from 600 supermarket outlets across Australia. The results of each monthly survey will be made available on the

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4 Mr Graeme Samuel, ACCC Grocery Inquiry Press Conference, 5 August 2008, <http://treasurer.gov.au/DisplayDocs.aspx?doc=transcripts/2008/039.htm&pageID=004&min=ceb&Year=2008&DocType=2> (accessed 11 September 2009).

GROCERYchoice website on the first business day of the following month.<sup>5</sup>

... The basket prices for each supermarket retailer represent the average weekly basket price for that retailer within a specified region, and not the price for a specific individual supermarket outlet.<sup>6</sup>

2.8 Under the 'Meat & Seafood' and 'Fruit & Vegetables' basket categories, the website added the caveat that:

The quality [of some meat products / fresh fruit and vegetables] can vary between supermarket retailers over time. Some differences in quality may exist and this should be considered when making price comparisons for this basket.<sup>7</sup>

### *The 61 regions*

2.9 The GROCERYchoice website stated that:

... the [61] regions have been selected to ensure the survey is conducted across geographically identifiable areas, which are relevant to the lifestyles and shopping practices of Australian consumers.<sup>8</sup>

The opening page allowed a consumer to enter their postcode, or click on an interactive map of Australia to choose one of the 61 regions, in order to see the basket price results for their local area. For example, the way in which Queensland was divided into regions is shown below.<sup>9</sup>

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5 'About GROCERYchoice', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/static/AboutGC.html> (accessed 2 September 2009).

6 'Prices, Products, Baskets', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/static/PricesProductsBaskets.html> (accessed 2 September 2009).

7 'Basket Categories', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/static/BasketCategories.html> (accessed 2 September 2009).

8 'Frequently Asked Questions', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/static/FAQ.html> (accessed 2 September 2009).

9 'Queensland', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/viewRegionsdcfd.html?state=QLD>, (accessed 2 September 2009).



2.10 Clicking on the Brisbane region would allow the consumer to 'zoom in' on another map, divided into a number of other smaller, more densely populated regions. The larger, non-metropolitan regions shown in the map above were counted as individual regions. Clicking on the 'North Queensland' region (encompassing Cairns, Mount Isa and Cape York) would lead to a page showing the price of typical grocery baskets for a range of retailers across that region.

2.11 In the same way, clicking on the region of Western Victoria—spanning Swan Hill, Avoca and Warrnambool—would lead to a page showing the following table<sup>10</sup>:

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10 'Western Victoria – Grocery Basket Prices, Aug 08 Release', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/Basket30c9.html?region=29>, (accessed 2 September 2009).

Basket	Coles / BI-LO	Woolworths / Safeway	Independents	ALDI
Meat & Seafood Basket	\$26.43	\$27.57	\$27.73	n/a
Fruit & Vegetable Basket	\$26.81	\$24.77	\$26.23	n/a
Dairy Basket	\$15.79	\$15.88	\$15.87	n/a
Bread & Cereals Basket	\$21.14	\$21.44	\$21.42	n/a
Drinks & Snacks Basket	\$19.90	\$21.07	\$22.48	n/a
General Groceries Basket	\$17.24	\$17.99	\$18.77	n/a
Household & Personal Care Basket	\$26.81	\$26.59	\$28.14	n/a
<b>Total of above baskets</b>	<b>\$154.12</b>	<b>\$155.31</b>	<b>\$160.64</b>	<b>n/a</b>
Basic Staples Basket	\$79.51	\$75.58	\$78.99	\$59.84

### *Preliminary scoping*

2.12 As is the case with all budget bids, Treasury provided the Government with advice as to the merits or otherwise of the GROCERYchoice proposal. However, this did not involve detailed economic modelling nor quantitative analysis prior to the allocation of funds for the website.<sup>11</sup>

2.13 The ACCC undertook a scoping study, looking at different ways to set up the website, with 'obvious trade-offs in cost [and] reliability' and provided options to the Government as to the website's parameters (e.g. regional sample surveys were recommended in preference to individual census monitoring of every large

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11 Mr David Martine, Treasury, *Proof Committee Hansard*, 18 September 2009, p 15.

supermarket<sup>12</sup>). The website that was launched in August 2008 was 'fairly close' to what the ACCC had put to the government as being preferable.<sup>13</sup>

2.14 In its February 2008 advice to the Minister on how best to establish a dedicated website to monitor and compare grocery prices, the ACCC provided details of its recommended model. The size and content of the baskets would be determined and weighted using data from the Australian Bureau of Statistics' Household Expenditure Survey as well as sales volume data to ensure that the dollar figures displayed on the website reflected approximate weekly expenditure by a typical household. The ACCC proposed that:

... about 30 to 50 items would be selected for each sub-basket in each month, so that in any month about 300 to 400 of the 500 items are used in the basket, and 100 to 200 are not. Over time, the contents of each basket is rotated through the entire list of 500 items, so that it changes gradually over time thereby assisting in maintaining basket confidentiality, but making sure the baskets can be sensibly compared over time.<sup>14</sup>

2.15 The ACCC recommended that 500 items per store struck an appropriate balance between the need for a representative basket and the cost of data collection.<sup>15</sup>

2.16 The advice to the Minister also showed that the ACCC had considered options which involved the monitoring and publishing of prices of around 50 individual products at individual stores (either a fixed list or a varied product list from week to week):

The principal advantage of both these options is that they would provide information on the prices of individual products on a store-by-store basis and in that sense would be highly transparent.

The principal disadvantage of such options would be that very large quantities of data and other information would need to be regularly collected and processed.<sup>16</sup>

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12 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 4.

13 Mr Brian Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 22.

14 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 3.

15 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 5.

16 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 6.

2.17 The ACCC considered that the disadvantages (outlined below) substantially outweighed the advantages of these alternative options and ultimately recommended against individual product and store monitoring:

The monitoring system could be beholden to the continuing good will of the participating supermarkets, as it would only be effective with prompt, accurate and regular provision of data by the stores.

The burden of data provision would likely be significant for smaller supermarket chains. Coles and Woolworths would likely be able to comply readily with such a data request. However, such a request would likely be burdensome on individual IGA stores (which is essentially a decentralised franchise operation) and other independent supermarkets, and possibly unworkable for ALDI (which does not stock many of the items that would be considered standard in the other chains). The likely result would therefore be exclusion of IGA and ALDI (and other independents) from individual store monitoring.

A further disadvantage of [the fixed list option would be creation of] incentives for chains and stores to manipulate the prices of those items, in attempts to be cheaper than competitors.<sup>17</sup>

2.18 The committee heard that prior to the 2007 election, the ACCC had sought advice from Informed Sources, a data collection agency, on the likely budget for a grocery price monitoring website:

They asked us to give them an estimate: if they were asked by government to put in place some sort of grocery monitoring, how many stores and what number of products did we think it might be across Australia? We gave them an estimate of those costs, and it ranged between \$2 million and \$2.5 million.<sup>18</sup>

### *Costs*

2.19 Table 2.1 is taken from Budget Paper No. 2 of the 2008–09 Budget and shows that \$12.86 million was appropriated for GROCERYchoice<sup>19</sup>:

**Table 2.1 GROCERYchoice 2008–09 Budget appropriation**

(\$m)	2007-08	2008-09	2009-10	2010-11	2011-12
	1.6	4.0	4.1	3.1	-

17 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, pp 6–7.

18 Mr Alan Price, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 65.

19 Budget Paper No. 2, Budget 2008-09, <http://www.budget.gov.au/2008-09/content/bp2/html/expense-23.htm> (accessed 10 September 2009).

2.20 Treasury tabled a breakdown of total payments made to date in relation to the GROCERYchoice website (\$7.7 million), which is at Appendix 3. Treasury estimated that the contingent liability associated with the termination of the contract with CHOICE was around \$700 000 but advised that this amount had not yet been settled with CHOICE.<sup>20</sup>

2.21 Around \$73 000 has been spent on legal costs in relation to the GROCERYchoice website contract. Treasury stated that legal advice for the period December 2008 to February 2009 had been mainly for the purpose of assistance in drafting the contract. From June 2009, ongoing legal advice has been sought on a number of matters:

- advice on possible contract amendments which were not ultimately pursued;
- advice on the Government's right to terminate the GROCERYchoice website contract; and
- Treasury's rights and obligations following the termination and matters flowing from it.<sup>21</sup>

2.22 The ACCC spent \$3.6 million before responsibility for the website was transferred to Treasury, along with the remaining \$9.2 million in funding.<sup>22</sup> The breakdown of the \$3.6 million expended by the ACCC was explained as follows:

\$486,000 was in salaries; \$64,000 was in salary oncosts; \$60,000 was the accommodation and fit-out for the relevant staff involved; \$1.4 million was for the data set-up and the data collection ... and \$1.5 million was for the development and establishment of the website and the associated IT architecture.<sup>23</sup>

### ***Collection of information for the website***

2.23 In its advice to the Minister in February 2008, the ACCC stated that it had considered whether collection of price data should be done by survey or by requesting scanner data directly from retailers. Its recommendation was to undertake independent price surveys, noting that requests to supply data may be burdensome on smaller independent supermarkets. The ACCC also suggested that the use of scanner data could be seen (in the eyes of the public) to compromise the perceived independence of the monitoring process.<sup>24</sup>

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20 Treasury, *Proof Committee Hansard*, 18 September 2009, p 5.

21 Treasury, Answers to Questions on Notice (received 10 November 2009), p 1.

22 Mr Cassidy, *Senate Estimates Hansard*, 22 June 2009, p 29 and p 50.

23 Mr Cassidy, *Senate Estimates Hansard*, 26 February 2009, p 50.

24 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 5.



2.24 The ACCC was questioned about the collection of price information and the length of time it would remain on the GROCERYchoice website. The information would be collected over one month and then would be displayed on the website for one month. When asked whether it was possible that the information on the website could be up two months old, the ACCC responded:

At the time that it goes on the website it would be about two weeks old ... You would have the survey completed, say, on day one and within two weeks of that the information would go on the website. It would remain on the website for a month, but in the meantime the next survey would be undertaken and that would overtake.<sup>25</sup>

2.25 Further discussion of the outsourcing of the data collection for GROCERYchoice appears later in this chapter.

### *The level of usage of the website*

2.26 Treasury provided the following information on the number of website hits and page views recorded:

**Table 2.2: Hits and page views on the GROCERYchoice website**

Time period	Hits ('000)	Page views ('000)
August 2008	7,500	3,150
September 2008	811	446
October 2008	632	104
November 2008	844	111
December 2008	836	106
January 2009	293	105
February 2009	246	64
March 2009	204	52
April 2009	260	61

2.27 Treasury advised that page views are the best indicator of the usage of the website, as one page view is equal to one webpage, and a hit is equal to one graphic.

<sup>25</sup> *Senate Estimates Hansard*, 22 October 2008, p 142.

The number of hits is therefore greater than the number of pages launched and also varies depending on the number of graphics on the website.<sup>26</sup>

### *Survey methodology*

2.28 The 'Survey Methodology' webpage explained how the price data collected was used to create the prices for various baskets:

Each of the product prices in the basket are ... multiplied by an appropriate expenditure weight, reflecting the importance, in terms of average weekly expenditure, of that product compared to all products within the basket. These data are then aggregated by supermarket retailer and region to create the various basket prices.<sup>27</sup>

2.29 To ensure the quality and integrity of the data published, the website stated that the ACCC had engaged 'an independent product tester':

...to ensure that the grocery products in each of the baskets across supermarket retailers are of the same quality and therefore allow meaningful price comparisons to be made. This is necessary because the various baskets include a range of private label products that need to be matched to other brand or private label products available from other supermarket retailers.<sup>28</sup>

2.30 Regarding the basket prices on the website, the ACCC was asked what mechanisms were in place to ensure that a grocery retailer could not engage in deliberate manipulation of prices to ensure that its basket of goods would be misleadingly presented best on the site. The ACCC responded:

To prevent the manipulation of the price survey and the published results the list of specific products and supermarkets included in the survey remain confidential to the ACCC. The sample of products and supermarkets included within the survey are also changed on a regular basis.

In addition to this, while there are approximately 500 products included in the price survey each month, a smaller sample of these products are used to calculate the basket prices published on the website. Changes to this sample are made so that the products contributing to the basket prices are not the same each month.<sup>29</sup>

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26 Treasury, Answers to Questions on Notice, *Budget Estimates*, 2–4 June 2009, bet 101, pp 4–5.

27 'Survey methodology', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/static/SurveyMethod.html> (accessed 2 September 2009).

28 'Prices, Products, Baskets', <http://pandora.nla.gov.au/pan/87702/20080807-0955/www.grocerychoice.gov.au/static/PricesProductsBaskets.html> (accessed 2 September 2009).

29 ACCC, Answers to Questions on Notice, *Supplementary Estimates*, 22–23 October 2008, p 4.

2.31 Referring to a caveat on the GROCERYchoice website (*Note: the towns and suburbs included on the maps do not necessarily reflect where the GROCERYchoice survey is undertaken*), Senator Bushby at Senate Estimates hearings raised the issue of different stores of the same supermarket chain pricing differently in various suburbs, asking:

Given the size of the regions – even the metropolitan regions that span a dozen or more major suburbs – how is a reasonable shopper meant to decipher the cheapest 'chain' in their area when the actual supermarket sampled may have been 10 stores away, or even hundreds of kilometres away?<sup>30</sup>

2.32 The ACCC acknowledged that:

Prices can vary between stores within the same group or chain, reflecting in particular the proximity to other local competitors. For example, if a Coles store and a Woolworths store in the survey are in close proximity, the relative prices at both are likely to be affected. This is taken into consideration when selecting the supermarkets for the GROCERYchoice survey so that the average for the region is a representation of relative overall grocery price levels for each supermarket chain in that region.<sup>31</sup>

2.33 (The practice of 'geographic price discrimination', where a different price is charged for the same product at different retail locations, is the subject of a bill currently before the Senate Economics Legislation Committee. The Trade Practices Amendment (Guaranteed Lowest Prices – Blacktown Amendment) Bill 2009 would require major supermarket chains to charge the same prices at any two locations within 35 kilometres of each other. If this bill were passed, or if other chains followed ALDI's lead and voluntarily adopted national pricing, it would make a GROCERYchoice website both much more useful and cheaper to compile.)

2.34 The ACCC also stated that stores in regional and rural areas could be compared on the grounds on that they had:

...many similarities, including on the one hand the higher cost of transporting dry grocery products from central warehouses, and on the other the ability to locally source fresh produce.<sup>32</sup>

### **Evidence of the website's effect on grocery prices**

2.35 For the six months from July to December 2008, the ACCC's website published price data in 61 regions per month. Of the 366 regional data collections,

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30 Senator Bushby, Questions on Notice, *Supplementary Estimates*, 22–23 October 2008, p 1.

31 ACCC, Answers to Questions on Notice, *Supplementary Estimates*, 22–23 October 2008, p 4.

32 ACCC, Answers to Questions on Notice prior to public hearing (received 17 September 2009).

Woolworths was the cheapest in 198 regions, Coles was the cheapest in 160 regions and independent supermarkets were the cheapest in eight regions.<sup>33</sup>

2.36 The general consensus from retailers was that the website, while operating under the ACCC, did not have any discernible effect on grocery prices:

**Senator BARNETT**—Did it have any impact whatsoever in terms of putting downward pressure on grocery prices which was, I think it is fair to say, the government's intent prior to the election? Presumably, this was a response to Labor's promise prior to the election? Was there any evidence of downward pressure on grocery prices?

**Mrs Osmond**—Not to my knowledge. The thing that will affect prices is competition in the marketplace.<sup>34</sup>

2.37 At Senate Estimates, the ACCC responded to questions about the whether the website had any measurable effect on grocery prices while under its control:

... over the three-month period of the site having had its surveys and the results of the surveys shown on the website, there has been a change in the relative positions of Coles and Woolworths ... In the first survey ... in 52 out of 61 of the regions in Australia, Coles was cheaper than Woolworths ...

In the last survey Woolworths was cheaper than Coles in 59 out of 61 sites. That suggests that there has been some movement on the part of Woolworths in its pricing practices, and we are aware ... that there were certain indications given at senior management level at Woolworths that they were not happy with being priced at a higher price than Coles on the GROCERYchoice site. We have also seen a closing of the gap between the independents and Coles and Woolworths in some of the pricing differences that have been present.<sup>35</sup>

2.38 This is suggestive of GROCERYchoice putting downward pressure on prices. The ACCC expected it would do so, albeit to a modest extent:

To the extent that the GROCERYchoice website is intended to provide transparency to consumers and thus increase the competitive process, it would have a small influence. But you will recall the opening paragraphs of the grocery inquiry noted that the issue of competition was but a very small factor, like one-twentieth of the influence over grocery price increases over the past five years.<sup>36</sup>

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33 ACCC, Answers to Questions on Notice (received 28 October 2009), p 15.

34 Mrs Margy Osmond, Australian National Retailers Association (ANRA), *Proof Committee Hansard*, 6 October 2009, p 42.

35 Mr Samuel, ACCC, *Senate Estimates Hansard*, 22 October 2008, p 141.

36 Mr Samuel, ACCC, *Senate Estimates Hansard*, 22 October 2008, p 146.

2.39 Professor Allan Fels, the former ACCC Chairman, and Professor David Cousins, recently commented that 'despite its severe limitations' the grocery price monitoring activity undertaken by the ACCC:

...seemed to have some beneficial impact for consumers, as the major suppliers seemed to respond to the favourable publicity for ALDI's low prices by also attempting to be the lowest price setters in a region.<sup>37</sup>

### Value of the website to consumers

2.40 At Senate Estimates hearings, the ACCC was asked whether the introduction of the website had 'tipped the balance of large chains versus consumers in favour of the latter.' The ACCC responded:

Consumers now have an indication of which supermarket chain offers the cheapest prices across-the-board and not simply the lowest prices of 'specials.' This information was not previously provided by supermarket chains.<sup>38</sup>

2.41 The ACCC also argued that despite the website not disclosing from which individual supermarkets the samples were taken, GROCERYchoice was still useful to consumers:

The survey is designed so that consumers do not necessarily need to know the individual supermarkets included in the survey in order to make use of the information provided. The basket prices presented on the website reflect the average price for a retailer within a specified region and not the price for an individual supermarket outlet. Over time the website provides a picture of which supermarket chain offers the cheapest prices in a particular region.<sup>39</sup>

2.42 The relevance of the website was questioned by Senator Joyce:

**Senator JOYCE**—As you are aware, Woolworths have said themselves that they have up to 4,000 price changes in a week. How relevant is your GROCERYchoice website when that is the fact—when it is at a snapshot in time and when one of these organisations asserts that they can have 4,000 price changes within their basket of goods in a week?

**Mr Samuel**—It depends on what is sought to be achieved by the website. If you look at the changes in relative pricing that I identified before between Coles, Woolworths, the independents and ALDI then the fact that there are changes each week in respect of so-called specials and other items would not be that relevant. What this does is provide a snapshot comparison on a monthly basis of pricing across 500 products. Those products are not

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37 David Cousins and Allan Fels, 'The Re-Emergence of Prices Surveillance', *UNSW Law Journal*, Volume 32(1), 2009, p 308.

38 ACCC, Answers to Questions on Notice, *Supplementary Estimates*, 22–23 October 2008, p 5.

39 ACCC, Answers to Questions on Notice, *Supplementary Estimates*, 22–23 October 2008, pp 5–6.

known to the stores concerned. It does give an indication of their relative competitive pricing levels.<sup>40</sup>

2.43 The ACCC also stated that despite the fact the data on the website could be up to four weeks old, 'the website provides a statistically significant indication of the comparison of the supermarkets as to who is more or less expensive'.<sup>41</sup>

2.44 A recent analysis of grocery prices at Coles and Woolworths stores in the Canberra region suggests that an 'average' figure for a chain is not necessarily of assistance to shoppers. For example, while the two chains' average prices throughout the region were similar, a more detailed analysis revealed that one chain was cheaper in one part of Canberra, while the other was cheaper in another area.<sup>42</sup>

2.45 Senator Xenophon suggested to the ACCC that the data on the website, given that it was only updated monthly, had the potential to be misleading to consumers:

**Senator XENOPHON**— ... for instance, in the first month, Woolworths could be the cheapest overall chain in a region and that led to consumers going to Woolworths in the next month. But what happens if in the next month Coles was the cheapest? It is a bit of a dud deal for consumers.

**Mr Cassidy**—That was one of the trade-offs in the design of the website and the amount of money to be spent on it. Clearly, the more regular the information, the less chance of a consumer going to one store when the price relativity has shifted.<sup>43</sup>

2.46 However, it could be argued that if the major supermarket chains did cut prices in response to the way they were represented on the GROCERYchoice website from month to month, there still may have been a good outcome for consumers.

2.47 The ACCC also stated that the website was designed to provide information on grocery prices alone but noted that:

The website specifically mentions that price is only one of the factors considered by consumers when deciding on where to shop. Consumers can take price information on the website into account with a range of other factors important to them when determining where to shop, including the location and accessibility of supermarkets to them, the quality of fresh produce, the product and produce range, and their assessment of the quality of service.<sup>44</sup>

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40 Mr Samuel, ACCC, *Senate Estimates Hansard*, 22 October 2008, p 146.

41 Mr Joe Dimasi, ACCC, *Senate Estimates Hansard*, 22 October 2008, p 146.

42 Research undertaken by the Senate Economics Committee Secretariat, 10 October 2009.

43 Mr Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 37.

44 ACCC, Answers to Questions on Notice, *Supplementary Estimates*, 22–23 October 2008, p 5.

2.48 At Senate Estimates, the ACCC was asked whether it could guarantee that it was not favouring ALDI or the larger retailers through the GROCERYchoice website. Mr Samuel told the committee:

I can guarantee that the survey process is a process that is bound by protocols of integrity and that there is no favouring or disfavouring of particular groups ...

As I said when the website was first launched, there are likely to be three reactions. One is to say, 'We're not faring well with this website and we will simply ignore it.' That probably does not go down too well with consumers. The other reaction is to adjust the price to become more competitive and that appears ... to be what Woolworths has done over the past three months ... The third, and you would say almost the most obvious, course of action for those who are not faring well with the website is to denigrate it in every possible way. It has been pretty clear where the denigration has been coming from, but that is part of the process.<sup>45</sup>

2.49 While accepting that the ACCC's 'mystery' basket approach was intended to prevent 'gaming' by retailers to achieve the perception of a cheaper store, the National Association of Retail Grocers of Australia (NARGA) argued that this also ensured that the information on the website was essentially irrelevant to consumers:

... no consumer was in a position to judge from the information on the website that a basket they might wish to purchase actually coincided with any of the items in the supposedly cheapest basket publicised.<sup>46</sup>

2.50 The Retail Traders' Association of Western Australia asserted that the original GROCERYchoice website did not take into account consumers' shopping behaviour and displayed information that was effectively meaningless:

Understanding the consumer's habits would also have shown the complexity of the project. Consumers by nature do not travel extensive distances for food and grocery necessities and generally restrict their shopping for these items to within a 5 to 10 kilometre radius of their homes.

... To be useful to the consumer, the price information must be real-time, accurate and relevant to the shopping precincts they frequent. Averages, historical data and other non-specific pricing data are useless, even misleading and totally irrelevant.<sup>47</sup>

2.51 The assessment of the ACCC website by Associate Professor Frank Zumbo, of the School of Business Law and Taxation at the University of New South Wales, was scathing:

...I have to say with considerable disappointment that GROCERYchoice website as operated by the ACCC was a complete waste of taxpayers'

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45 Mr Samuel, *Senate Estimates Hansard*, 22 October 2008, pp 149-150.

46 National Association of Retail Grocers of Australia (NARGA), *Submission 2*, p 13.

47 Retail Traders' Association of Western Australia, *Submission 9*, p 1.

money ... Fundamentally the website was flawed in its design. The information was too generalised. The thing we need to remember is that consumers shop locally. The GROCERYchoice website as operated by ACCC was broken into 61 regions which were very large regions ... It went from one side of the Sydney metropolitan area to the other side, some of the regions, and the reality is that consumers operate on a three to five kilometre radius ... Information was out of date; it was only collected once a month.<sup>48</sup>

## Committee view

2.52 The ACCC's GROCERYchoice website was designed to fulfil a hollow election promise to put downward pressure on grocery prices. However, it is clear that the aims of the website were never going to be achievable, with the sharply declining number of hits demonstrating that GROCERYchoice was of little or no use to consumers. The poorly-designed ACCC website collected data by regions, some of them covering tens of thousands of square kilometres, bearing no resemblance to real-world consumer shopping patterns.

## Data collection - Informed Sources and Retail\*Facts

2.53 The ACCC outsourced the data collection for GROCERYchoice to Retail\*Facts, an arm of The Bailey Group Pty Ltd, which is a sales and marketing company.<sup>49</sup>

2.54 NARGA's submission pointed out that the ACCC's report of consultancy contracts let during the 2007–08 financial year to the value of \$10 000 or more lists The Bailey Group as having conducted a 'Research Survey on Grocery Prices'. The cost of this 'restricted source' contract is listed as \$5 135 650 (NARGA notes it was the largest consultancy for the year, about ten times that of the second biggest.)<sup>50</sup> NARGA commented at an inquiry hearing that a more realistic figure for the data collection contract would have been 'well under \$1 million.'<sup>51</sup>

2.55 A submission from Informed Sources, a data collection agency, also called into question the ACCC's decision to award the data collection contract to its commercial rival, Retail\*Facts:

The ACCC quickly and in our view correctly determined that there were two Australian companies who had the demonstrable experience, capability

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48 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 6 October 2009, p 2.

49 'About Us – The Bailey Group', <http://www.thebaileygroup.com.au/about.asp> (accessed 20 October 2009).

50 NARGA, *Submission 2*, p 6; and 'Consultancy Contracts', ACCC, <http://www.accc.gov.au/content/index.phtml/itemId/402496> (accessed 8 September 2009).

51 Mr John Cummings, NARGA, *Proof Committee Hansard*, 18 September 2009, p 63.



and management coverage to collect the data necessary to feed the GROCERYchoice website:

- **Informed Sources** – a company that, at the time, was in a heated debate with the ACCC, its Chairman and the Government over the potential introduction of FuelWatch. In addition to its collection capabilities, this company had extensive experience in the construction and running of a consumer pricing awareness portal (MotorMouth.com.au). Informed Sources bid \$1.975M (excl GST) for collection of data for the GROCERY Choice website.
- **Retail\*Facts** – a respected company with an extensive network of collection staff but (based on documents obtained under FOI) with the potential to fail the ACCC's [request for quotation] needs for confidentiality/anonymity because of the deployment of that network and its likely overlap with its existing collection services for big Supermarket companies. Retail\*Facts bid \$4.669M (excl GST) for collection of data for the GROCERY Choice website.<sup>52</sup>

2.56 Informed Sources asserted that the ACCC spent 2.3 times the amount of money necessary on its data collection tender.

2.57 The ACCC gave evidence that it had been under some time pressure to develop and launch the GROCERYchoice website:

**Mr Cassidy**—The government was keen for the website to be up and running as soon as possible ... We were working with an indicative time of having the first collection done so it could be released in early August.

... **Senator BARNETT**—So the government gave itself a self-imposed deadline to require it to be established within that six-week period. Did you advise them of the obvious cost differential? Did you advise the government of the implications of their push to rush this forward and to have it up and running so quickly?

**Mr Wing**—No. It was a policy and we had a budget so we just ran within that.<sup>53</sup>

2.58 The ACCC supplemented its response to the committee's question as to why it did not inform the Government of the cost difference, stating:

The procurement was conducted in accordance with Commonwealth Government procurement policies regarding value-for-money ...

The ACCC did not advise the Government of the difference in price between the two quotes because while they were both assessed to be within the budget for the program, only the Retail\*Facts quote adequately provided for the delivery of services within the timeframe required.<sup>54</sup>

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52 Informed Sources, *Submission 10*, p 5.

53 *Proof Committee Hansard*, 18 September 2009, pp 19–20.

54 ACCC, Answers to Questions on Notice (received 28 October 2009), p 16.

2.59 Due to the timeframe set by the Government, the ACCC had some doubts as to whether Informed Sources had a data collection team that was 'ready to go'. It was also noted that the ACCC had received several quotes and in the end had accepted the second cheapest tender:

We received a number of quotes ranging in price from about \$2 million to well over \$10 million. Our concern was very much that there was quite a major collection to be done—with approximately 600 supermarkets and approximately 500 products per supermarket—right across Australia and the first one would have to be up within six or seven weeks ... We looked very closely at the proposals by Informed Sources and others. At the end of the day, we were not convinced that there was a ready-to-go field force and we thought a fair amount of recruitment would have to be done. That was a great concern—that is, that there would be a great risk to the ability to deliver the data and high-quality data in time.<sup>55</sup>

2.60 Senator Barnett suggested that the ACCC based its decision on the Government's 'non-discretionary and non-flexible' deadline for implementation, to which the ACCC responded:

Yes. When we say 'non-discretionary', we were given a task and we did it, so it was not actually in our frame of reference or thinking, if you like, to sit there and think, 'Well, perhaps we should push this back for six weeks or whatever.' It is like a lot of times where agencies or departments are given a task by the government and they say this is what they have.<sup>56</sup>

2.61 Senator Pratt raised the possibility that the ACCC could not have had any foresight about which of the organisations tendering may or may not have been able to meet the prescribed timelines:

**Senator PRATT**—So it is quite usual in a tender process that you have to judge the tenderer according to the criteria in the tender? There are no second chances; if you do not make the standard then you fall away? You have to turn to your other tenderers to meet the tender, don't you?

**Mr Brocklehurst**—Effectively that is the process in terms of the risk management decision you have to make: the quality of the tender, the submission, whether the times can be met, costs and so forth. It is all done as a risk management answer, effectively, in terms of who the preferred provider would be.<sup>57</sup>

2.62 Informed Sources' view is that the GROCERYchoice initiative was a 'failure of process' on a number of levels. Mr Alan Cadd, Managing Director of Informed Sources, argued that excessive haste and the need to meet an 'illusory' deadline contributed to poor decision-making and design:

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55 Mr Anthony Wing, ACCC, *Proof Committee Hansard*, 18 September 2009, p 20.

56 Mr Mark Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 4.

57 Mr Adrian Brocklehurst, ACCC, *Proof Committee Hansard*, 28 October 2009, pp 5–6.

...there appears to have been a misinterpretation of the minister's objective of having a GROCERYchoice website operating 'as early as 1 August 2008'. That became 'absolute implementation by 1 August'. In all of the freedom of information papers that we have been able to obtain, this simple policy interpretation has caused an unnecessary reduction in the time available, leading to rushed decisions and poor design. Surely, a reasonable approach would have been for a practical assessment of the time frame and for the departmental head to approach the minister with alternatives to reconfirm time frames against costs.<sup>58</sup>

2.63 He also referred to an 'inappropriate culture when handling taxpayers' money' at the ACCC, stating:

If there is one positive to come out of GROCERYchoice, it should be that every government employee in every department henceforth realises that the Westminster system is founded on a strong public service able to suggest and recommend to ministers best courses of action and not merely that they should spend the money if it is within budget. In our opinion, this was the ultimate failure of process.<sup>59</sup>

2.64 Responding to this criticism, the ACCC suggested there was a degree of hypocrisy in Informed Sources' willingness to tender for an initiative that the company believed was 'fundamentally flawed' and not worth pursuing as a public policy objective (see Informed Sources' comments on the effectiveness of GROCERYchoice in chapter 8):

I find it a little bit hypocritical for these people to come in and say that we should learn on what they regard as folly when they were more than happy to put in a bid and take the money for what they considered was folly. I find a certain—I would not want to say lack of integrity, but it is a bit hard to join the dots there when we are being accused of one thing and yet the company accusing us were going ahead more than happily in putting in a bid for what they think is a nonsense and a folly, and they were more than happy to take taxpayers' money if we had chosen them.<sup>60</sup>

2.65 Informed Sources criticised the ACCC's tender process as 'the most rushed and frantic assessment process of something as significant as this that we have ever been involved in'.<sup>61</sup> It appeared that the ACCC 'did not know what they were going to do, and that was reflected in the RFQ (request for quotation)<sup>62</sup>:

All we had to do was provide the data to them. It was not in any way clear about what the baskets were and what the collection points were. We had an almost ridiculous circuitous argument with them. They asked, 'Where have

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58 Mr Alan Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 60.

59 Mr Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 62.

60 Mr Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 3.

61 Mr Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 71.

62 Mr Price, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 72.

you got staff?' And we asked, 'Where do you intend collecting this data?' They said, 'We don't know yet.' I said, 'Let us see where you are going to collect this data, what supermarkets you are going to collect this data in, and then we can answer your questions about field force.' But that never transpired. That was right up until days before the decision was made.<sup>63</sup>

2.66 Informed Sources stated that its bid for the contract, despite being the cheapest, had included a normal 40 per cent mark-up, and that based on the company's previous track record (including data collection for the introduction of the GST), there was no reason for the ACCC to doubt that Informed Sources was capable of delivering on the contract:

We were so confident with our ability and indeed with the prospect that Retail\*Facts would not be chosen because of their Woolworths affiliation that we had no reason whatsoever to drop our regular margins.<sup>64</sup>

2.67 The apparent haste with which the ACCC designed and tendered for the GROCERYchoice data collection was also criticised by Associate Professor Zumbo:

That is just astounding ... Was the government ever told that their haste would cost taxpayers that additional \$2.7 million? How long was the delay: was it a week, two weeks, three weeks? ... I just cannot believe that the haste can justify the huge additional expense ...<sup>65</sup>

### *Use of a separate field force*

2.68 The ACCC's key concern in its assessment of the two bids ultimately hinged upon the issue of recruitment of a data collection field force. Informed Sources' submission drew upon the ACCC's tender evaluation documentation (obtained under the *Freedom of Information Act 1982*) which suggested that Retail\*Facts won the contract primarily on the basis that it would be able to use its existing team of data collectors, whereas it was too risky to engage Informed Sources given that they were proposing to recruit an entirely new field force. Informed Sources argues that this decision effectively glossed over the crucial issues of confidentiality and anonymity:

The Informed Sources' approach was to deploy a completely independent field staff team specifically employed and appropriately constrained with confidentiality provisions to ensure no unintended signalling of the survey to watchful retailers or suppliers. The winning tender's approach was favoured (at least in part) by the ACCC panel because it made use of existing staff. Many of these Retail\*Facts staff would have had long term relationships in the retail industry and indeed could have had dual or multiple working relationships and responsibilities. A merchandiser who worked in a supermarket for a supplier who now works for Retail\*Facts simply can not turn off the existing friendships and working relationships

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63 Mr Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 72.

64 Mr Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 72.

65 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 6.

built with the supermarket and the supplier over many years of service. “Chinese walls” in this case would be impossible to police and leakage of GROCERY Choice survey details highly probable.

Conversely, the Informed Sources’ approach would have seen a dedicated team whose job it was to avoid detection with no crossover of responsibilities.<sup>66</sup>

2.69 At the hearing, Informed Sources stated that, as well as dispatching a completely separate field force, further measures would have been put in place to ensure confidentiality:

We would have also clouded the products that they were collecting with non-collection products so that they would not have been able to determine which products were available. We also would have probably done some random collections at other times during the month, again, to try and confuse the issue. If these people were only being dispatched once a month then that would be too big a signal. All of those audit type provisions are just a natural way of doing business for Informed Sources.<sup>67</sup>

2.70 Asked to respond to Informed Sources’ claims, the ACCC stated:

We made what we considered to be a well-informed judgment ... Even today I do not think anything Informed Sources have said would change our concern over whether they had the ability to actually get the workforce on the ground in the time they had suggested.<sup>68</sup>

2.71 Senator Xenophon questioned the ACCC on whether Informed Sources’ previous track record was taken into account when assessing their GROCERYchoice tender. The ACCC replied:

Definitely. We would not have put as much work into assessing them, we would not have invited them back and we would not have asked the supplementary questions if we did not feel that on one level they were technically capable of doing the job. We went to those extra steps because of that. There is a notion that we did not go a bit further. We could have just looked at the initial proposal and said it is going to be a problem because they did not have the people on the ground. We could have gone straight to Retail\*Facts. But we did not—and that was because of our relationship.<sup>69</sup>

2.72 However, the track record of Informed Sources was ultimately only one aspect of the risk judgment made by the ACCC in relation to its tender assessment:

When we get the tenders like that, we cannot sit there and just say, ‘Okay, we have all these doubts, so we’ll run with somebody’s track record.’ If in

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66 Informed Sources, *Submission 10*, p 12.

67 Mr Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 69.

68 Mr Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 3.

69 Mr Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 9.

six weeks or two months time they were not able to provide that work, that would be end of my job. The thing is that you sit there and you have to make those judgments in terms of the information in front of you. You can quantify some risks. Most risks are more a qualitative judgment.<sup>70</sup>

2.73 The ACCC also assured the committee that Informed Sources' comments in relation to the GROCERYchoice data collection tender would in no way prejudice any future tender bids or arrangements with the ACCC.<sup>71</sup>

### ***Confidentiality and conflict of interest***

2.74 The committee questioned the ACCC about Retail\*Facts' simultaneous data collection contract with Woolworths, the safeguards in place to prevent any inappropriate disclosure of information, and the potential for conflicts of interest with such arrangements. Acknowledging that it would have been a serious concern if the information collected for the GROCERYchoice website was being leaked to Woolworths, the ACCC said that Retail\*Facts had provided confidentiality undertakings for each of their data collectors:

It is not realistic to think, 'If someone else is using somebody to do something then we will not.' That is why we have safeguards and obligations in our contracts about confidentiality and so forth. It would almost be inevitable that some of the same data was being collected. Given we are collecting across 500 grocery items, there would be some commonality but only some in the sense that Woolworths or whoever else would be interested in some of the same items and some different items.<sup>72</sup>

2.75 The committee questioned Woolworths about the nature of the data collection activities contracted out to Retail\*Facts:

...they provide a backup mechanism to our stores that do price checking with their local competition. So they have a range of stores and a range of different baskets that our data collection guys ask them to go out and do price checking on. They also do other work for us, like compliance checking to make sure that stores are putting the right tickets on the right products with the right specials on the right day of the week ...

...there are only a few companies in Australia that specialise in that sort of work, obviously, and there are only a few who do it very well. You want to get it right, because if they give you the wrong price and you set your price wrong then you are out in the marketplace and your customer misses out. I could only assume that they have in place the right sort of framework to be able to service multiple clients with the right confidentiality. We definitely demand it of them when they are doing work for us. If any supplier is doing

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70 Mr Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 10.

71 Mr Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 11.

72 Mr Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 24.

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work for us and a major competitor we have got all the right contractual arrangements in place, obviously.<sup>73</sup>

2.76 Woolworths also stated that it had not been aware that Retail\*Facts had been doing work for the ACCC's GROCERYchoice website. Woolworths was not necessarily surprised, however, that Retail\*Facts had also been engaged by the ACCC given that there are few companies in Australia that undertake data collection work.<sup>74</sup> Mr Robert Hadler, General Manager of Corporate Affairs at Coles, said that in his view it was 'unusual' for the same data collectors to be doing price collecting for both Woolworths and the ACCC.<sup>75</sup> Mr Andrew Hall, Director of Corporate and Public Affairs at Woolworths, commented:

I do not know whether I would say it is unusual. Again, I would probably just put it in the context that the value of our contract with them is far less than the value of what I heard the ACCC was spending on them. Given the size of the price monitoring that I know they would have to have undertaken already for GROCERYchoice 1, one would assume that they were using a workforce far in excess of the people that they were using for us.<sup>76</sup>

2.77 Senator Xenophon questioned the ACCC further on the issue of confidentiality:

**Senator XENOPHON**—But would that contractual obligation also say, 'We don't want you collecting data for Woolworths at the same time'?

**Mr Cassidy**—No, we did not impose that sort of restriction.

**Senator XENOPHON**—Do you think you should have?

**Mr Cassidy**—No, I do not think that is commercial reality.

**Senator XENOPHON**—Did the ACCC review the Retail\*Facts data collection processes—for instance, did the ACCC ever accompany Retail\*Facts teams during data collection runs?

**Mr Wing**—No.

**Senator XENOPHON**—Do you think you should have?

**Mr Wing**—No, we contracted people to do this work.

**Senator XENOPHON**—I am not sure whether I am missing something here. You have the same team collecting data that could have conceivably collected data for both Woolworths and GROCERYchoice and you do not see any potential conflicts of interest there?

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73 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 22.

74 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 23.

75 Mr Robert Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 13.

76 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 23.

**Mr Cassidy**—Yes, and that is why we had confidentiality requirements in the contractual arrangement.

**Senator XENOPHON**—Is there any way that the ACCC could ever find out if there was any leakage of confidential information by Retail\*Facts to Woolworths? How would you know?

**Mr Cassidy**—That is a good question. Basically, what we want to protect is what was in our basket. Over a period of time of running the website if we started to suspect that the prices on our baskets were being manipulated then we would start to wonder how the information as to exactly what is in our baskets got out. In the time we have been running the website, we had no indication of that and we were crossmatching the data looking for outriders and for data which did not seem to be consistent. We saw no evidence that there was any manipulation going on or that any information had leaked.<sup>77</sup>

2.78 The ACCC stated that the majority of collectors for GROCERYchoice were not used to collect price information for Woolworths:

There were a very small number of exceptions to this in remote regional areas. However, in these limited instances the price collections for the ACCC and Woolworths were undertaken in different weeks and were never performed in the same store.<sup>78</sup>

2.79 Price collectors had access to the ACCC's list of products for only two days. They would download the product list using a personal digital assistant (PDA) network the night before the price collection task and access to the list would be removed following completion of data collection.<sup>79</sup>

2.80 The ACCC's contract with Retail\*Facts also specified that 'all internal control procedures, processes and practices would be open to ... an agreed audit test'.<sup>80</sup> When asked whether any in-field checks had been carried out, the ACCC responded: 'we never got to that point because we did not see any evidence of anything being wrong with the data'.<sup>81</sup>

2.81 The ACCC explained that it undertook a desktop analysis of the Retail\*Facts data:

... we were crossmatching the data looking for outriders and for data which did not seem to be consistent. We saw no evidence that there was any manipulation going on or that any information had leaked.<sup>82</sup>

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77 *Proof Committee Hansard*, 18 September 2009, pp 24–5.

78 ACCC, Answers to Questions on Notice (received 28 October 2009), p 14.

79 ACCC, Answers to Questions on Notice, provided 28 October 2009, p 14.

80 Senator Barnett, *Proof Committee Hansard*, 18 September 2009, pp 33–4.

81 Mr Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 31.

82 Mr Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 25.



2.82 Associate Professor Zumbo commented:

The fact that they included an audit provision is good audit practice ... It is disappointing that they did not at any stage undertake that audit. You do not have to check all the data, just spot checks.<sup>83</sup>

2.83 He also raised the potential for Retail\*Facts to have 'made a killing on this contract':

If you have the same data collection team collecting for Woolworths and Woolworths is paying you for that, and then you have the same data collection team collecting for GROCERYchoice, and the government is also paying you for that, you are killing two birds with one stone—you are getting paid double for doing the same thing.<sup>84</sup>

### ***Retail\*Facts' response***

2.84 Giving evidence to the committee, Retail\*Facts argued that its data collection offer to the ACCC was one of complete integrity and transparency. Retail\*Facts had disclosed its existing relationships with Woolworths and ALDI and had listed them as referees in the tender documentation. Retail\*Facts also highlighted the confidentiality undertakings signed by its collectors and explained the systems in place to ensure data confidentiality:

... we developed proprietary systems to provide specific product information to the price collectors and had that information available on a limited time. In most instances it was no more than 48 hours when that information was then taken away from their identification. Also to ensure confidentiality, specific and separately designed databases were used for each customer ... The notion that there was one database—that there was a price collector in a store collecting across a multiple number of our customers—is absolutely wrong. Every price collection that was undertaken was undertaken in a dedicated way. By way of explanation, every customer has different price audit requirements in relation to products, timings and the specific stores that are required. So there is no commonality apart from the fact that they are collecting price.<sup>85</sup>

2.85 Retail\*Facts described its extensive internal data validation processes, including its own 'mystery' audits, undertaken monthly by a supervisory team on a minimum of 10 per cent of stores to review the data collected.<sup>86</sup> Retail\*Facts stated it was unaware of any in-field audits undertaken by the ACCC.<sup>87</sup>

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83 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 7.

84 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 14.

85 Mr Tony Marshall, The Bailey Group, *Proof Committee Hansard*, 28 October 2009, p 30.

86 Mr James Kelly, Retail\*Facts, *Proof Committee Hansard*, 28 October 2009, pp 30–1.

87 Mr Marshall, The Bailey Group, *Proof Committee Hansard*, 28 October 2009, p 35.

2.86 The inference that Retail\*Facts could have undertaken 'dual collecting' for both the ACCC and Woolworths was staunchly rejected as 'ridiculous':

It not only shows a lack of understanding but a complete disregard for the way Retail\*Facts does and will continue to do business, both with integrity and transparency.

A point that supports this is that throughout the 11 months that Retail\*Facts conducted the price collections for the ACCC we visited some 6,255 stores across Australia and we collected details on approximately 2,400,000 products, which totalled, for the record, nearly 12 million at the points. It also should be noted that during the price collection process, throughout this massive undertaking, there was not one instance of dual collecting presented to us or to anybody that I am aware of. We are very proud of and would put on record the job we have done with the ACCC.<sup>88</sup>

2.87 When asked whether the same field force undertook the data collection for both the ACCC and Woolworths, Retail\*Facts responded:

**Mr Marshall**—We did not use a completely separate field team. The point I would like to make, though, is that the way our business operates is that every activity that was undertaken for the ACCC, or for any price audit, is what we call a dedicated activity. That particular price audit person would be in the store and only operating for that particular customer on that particular day.

**Senator BARNETT**—Was it the same field force?

**Mr Marshall**—There would be instances where some people would be collecting on behalf of the ACCC and those same people, in a different situation—a different circumstance—and different stores, may be collecting on behalf of Woolworths. The point I would also like to make is that those persons do not have the knowledge of who they are collecting on behalf of.<sup>89</sup>

2.88 Retail\*Facts also stated that the ACCC had queried 0.0001 per cent of their results (around 50 to 100 products) per check.<sup>90</sup>

### ***Potential for 'gaming' the basket***

2.89 In its advice to the Minister in February 2008, the ACCC acknowledged the potential for problems when price surveyors are sent out into the field. To alleviate risks, the ACCC proposed to:

... liaise closely with the price survey firm to ensure that price surveyors are thoroughly trained and that adequate and comprehensive contingency plans are in place ... The ACCC would need to ensure that data problems

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88 Mr Marshall, The Bailey Group, *Proof Committee Hansard*, 28 October 2009, p 32.

89 *Proof Committee Hansard*, 28 October 2009, pp 33–4.

90 Mr Kelly, Retail\*Facts, *Proof Committee Hansard*, 28 October 2009, p 34.

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are dealt with appropriately (e.g. the goods are not on the shelf, or are a different size) and that surveyors maintain confidentiality and are not 'followed' by supermarket representatives (which is a common problems for this kind of work).<sup>91</sup>

2.90 CHOICE commented:

If it is true that Woolworths came out on top most of the time, that should spark questions with the ACCC about, perhaps, the basket of goods they were putting together or the methodologies that were being used ...

One of the problems with the ACCC site is that it only looked at a basket of goods of just under 45 items ... I suggest it was quite easy to game that basket. It is easier to work out what is in the basket of 45 items than it is a basket of 1,500. You could argue that, if you had a basket of 1,500 or 5,000 and supermarkets want to game those prices, that could be in the interests of consumers.<sup>92</sup>

2.91 Regarding the secrecy of the ACCC's basket contents, NARGA commented:

It is my belief—I have no evidence of this—that people other than the tight circle would know what that basket was, if not in its entirety at least on some of the items. Very simply, as a retailer you just had to stand beside the person collecting the data and you knew that it was 750 gram-packets of Weet-Bix that they were taking the price of. You could not keep it secret forever.<sup>93</sup>

2.92 Associate Professor Zumbo also drew attention to the potential for gaming or manipulation of the basket of goods, while also pointing out the 'Catch 22' situation were the basket's contents to be rotated too often:

If it was rotated all the time, that would have provided some measure of feeling that perhaps there was some anonymity. But if at any point the rotation stopped and there was the same basket from month to month, it would not have taken long for the industry to know what was going on, particularly given that Retail\*Facts also collected for Woolworths ... The other problem is: if you keep rotating the baskets, you are not comparing like to like from month to month, so there is a downside to rotating the basket too often. If you do not rotate it enough, they game the system; if you rotate it too much, consumers do not have a point of comparison. That is the fundamental flaw in the design of the ACCC website.<sup>94</sup>

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91 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 5.

92 Mr Nick Stace, CHOICE, *Proof Committee Hansard*, 18 September 2009, p 43.

93 Mr Cummings, NARGA, *Proof Committee Hansard*, 18 September 2009, p 66.

94 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, pp 13–4.

## **Committee view**

2.93 The committee has serious concerns about the thoroughness of the ACCC's evaluation process for the GROCERYchoice data collection contract. The time pressure that the Government placed on the ACCC to launch the website clearly led to hasty decision-making and little consideration of the potential saving to the taxpayer of \$2.7 million (the cost differential between the two data collection bids).

2.94 It appears that at least \$2.7 million could have been saved if the Government had been more flexible and kept its eye on the ball. The launch date for the website was arbitrary and politically motivated.

2.95 While not suggesting a lack of integrity on the part of Retail\*Facts, the company that won the contract, the committee is disappointed by the ACCC's apparent indifference to the risks inherent in Retail\*Facts' simultaneous data collection activities for Woolworths.

## **Recommendation 1**

2.96 **The committee recommends that the Commonwealth Auditor-General investigate the tender process undertaken by the Australian Competition and Consumer Commission in relation to the data collection contract for the GROCERYchoice website.**

2.97 The ACCC's decision not to undertake any in-field checks of Retail\*Facts' price collection, as authorised by the contract, is particularly concerning to the committee. This lack of due diligence on the part of the ACCC leaves open the possibility that the integrity and secrecy of the GROCERYchoice data may have been compromised.

## **Recommendation 2**

2.98 **The committee recommends that the Australian Competition and Consumer Commission take more care in the future to monitor and assess the performance of contractors that undertake data collection on its behalf.**

## Chapter 3

### The website's transfer to CHOICE

3.1 On 5 November 2008, the Government gave approval for the transfer of the GROCERYchoice website from the Australian Competition and Consumer Commission (ACCC) to Treasury, with the formal transfer (including approximately \$9 million of remaining funding) taking place on 5 January 2009.<sup>1</sup>

3.2 The ACCC has explained that since the handover, its role had been limited to the provision of 'technical advice' until the end of June 2009.<sup>2</sup> The ACCC said that it had not been involved in CHOICE's proposed re-design of the website, nor was it aware of any complaints about the accuracy of information on the website.<sup>3</sup>

#### Rationale for the ACCC ceasing to manage and operate the website

3.3 Describing the rationale for the ACCC relinquishing responsibility for the website, Mr Brian Cassidy, Chief Executive Officer of the ACCC, said:

The issue that arose, and I think it only arose after the website had been up for a couple of months, was a suggestion that there should be various enhancements to the website. We found, and the government agreed with us, that that would be a difficult exercise for us to undertake as the regulator and law enforcer and that is what led to the website being transferred from us, if I can put it that way.<sup>4</sup>

3.4 Mr Cassidy then gave the example of the website publishing the specials of the grocery chains and the potential problems with such an activity:

Once the website starts carrying specials, that potentially leads to people saying, 'I went to the grocery store and that special was not available. It is fake advertising.'<sup>5</sup>

3.5 Treasury also gave similar reasons for the ACCC ceasing to manage the website, noting that there had been consumer feedback suggesting that the inclusion of 'specials' would be useful:

There were some issues around whether the ACCC, as the regulator of the [Trade Practices Act], could actually enter into the space of, for example, providing special prices, given that there are obviously consumer protection issues and, as the regulator of those, there would be actual conflict of

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1 *Senate Estimates Hansard*, 4 June 2009, pp 28–9.

2 *Senate Estimates Hansard*, 26 February 2009, p 51.

3 Mr Brian Cassidy, *Senate Estimates Hansard*, 22 June 2009, p 29.

4 Mr Cassidy, *Senate Estimates Hansard*, 26 February 2009, p 51.

5 Mr Cassidy, *Senate Estimates Hansard*, 26 February 2009, p 52.

interest in pursuing that type of information. Yet I think we were getting a lot of feedback from consumers that it is exactly that kind of information that would be useful and that there is a lot of interest in finding out more about the specials and a smarter way of shopping, if you like, the get the best value for money.<sup>6</sup>

3.6 Associate Professor Frank Zumbo stated that the ACCC should never have been given the responsibility of running the website in the first place:

The ACCC was the wrong body to give this website to ... It is always difficult to have the regulator involved in this sort of activity—providing information—because the information may be incorrect. Because the ACCC was not the best body to do this, they made the information so generalised that it was of little or no benefit to anyone ...<sup>7</sup>

### **CHOICE's proposal to the Government**

3.7 CHOICE made the approach to the Government to take over GROCERYchoice within a month of the website's launch. Noting the ACCC-run website appeared ineffective on a number of fronts including its rushed scoping, specification and delivery, and failure to deliver up-to-date local prices, CHOICE felt it could provide a much better service:

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

CHOICE felt that there was an opportunity to present an alternative proposal to deliver a website that consumers could use. CHOICE saw a natural fit with GROCERYchoice where we could offer the expertise, skills and consumer understanding necessary to deliver a consumer-focussed website. We considered our 50 year track record and experience in consumer research and publishing put us in the best position to partner with Government, retailers and consumers to deliver a useful service that was relevant to consumers.<sup>8</sup>

3.8 CHOICE took its proposal to the then Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, on 27 August 2008. The following are excerpts from that document:

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

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6 Ms H.K. Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 33.

7 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 6 October 2009, p 5.

8 CHOICE, *Submission 6*, p 4.

consumers choose products according to their performance, health attributes and environmental impact.

... In addition to empowering consumers, GROCERYchoice will support the Government's agenda of keeping downward pressure on grocery prices and will help drive competition to improve quality and the availability of healthy and environmentally sustainable choices consistent with consumer preferences.<sup>9</sup>

... GROCERYchoice will:

- deliver better price information than the current website
- enhance the usability of the information with improved information display, intuitive website design and interactive and visual features
- provide increased transparency (including store and product identification)
- add value to the grocery price information with additional features
- add value to the grocery price information by developing a user community through structured consumer input
- test and where feasible introduce ways of expanding the information available through consumer participation in data collection and information priority setting
- explore mechanisms to obtain more detailed price data from retailers
- use regular research into consumer preferences to guide ongoing review and redesign of the website
- integrate with other key consumer policy agendas including unit pricing, healthy eating and sustainable living.<sup>10</sup>

3.9 CHOICE also proposed that the website 'may' include additional features such as: cheapest basket; personalised baskets (user selected products); individual item prices (including unit prices)<sup>11</sup>; shopping advice (price cycles, how specials work, when to shop, how unit pricing works, links to CHOICE content on groceries including food; and supermarket address lists with maps, transport and parking advice).<sup>12</sup> The proposal also suggested that a 'community of empowered consumers' could be developed, with users providing input such as local specials reporting, local variation reporting on price and availability.<sup>13</sup>

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9 CHOICE, *Submission 6*, p 22.

10 CHOICE, *Submission 6*, pp 22–3.

11 *Submission 1* from the Queensland Consumers Association strongly advocated the inclusion of unit pricing comparisons in the GROCERYchoice website.

12 CHOICE, *Submission 6*, p 23.

13 CHOICE, *Submission 6*, p 23.

3.10 It was envisaged that building the new website would be feasible within a budget of \$20 million over five years:

CHOICE believes a five year commitment to GroceryCHOICE is required to support up-front development of an effective and engaging website. The precise amount required will depend to some extent on the work undertaken already by the ACCC that can be adapted to the website we propose to build, the contracts if any that the ACCC has entered into which would be assigned to us and the exact specification of deliverables. As an indication we believe that a useful website could be built, operated and from time to time enhanced within a budget of \$20 million across the five years.<sup>14</sup>

3.11 However, the contract that was eventually signed with Treasury was worth \$8 million.

#### ***Events leading up to contract sign-off***

3.12 CHOICE states that Mr Bowen was receptive to its proposal and referred the organisation to the ACCC. After a meeting with the ACCC on 2 September 2008, CHOICE was referred to Treasury. The department then confirmed that 'CHOICE would satisfy a single supplier arrangement, subject to documentation and pricing.' The chain of events leading to the contract sign-off occurred as follows:

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

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

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

A final meeting with Treasury and Minister Bowen was held on 16 December 2008 before the Treasury Head Contract was signed by both parties on 19 December 2008.<sup>15</sup>

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14 CHOICE, *Submission 6*, p 24.

15 CHOICE, *Submission 6*, pp 4–5.



3.13 On 22 December 2008, Mr Bowen issued a press release announcing that from 2 February 2009, the consumer organisation CHOICE would take over the management of GROCERYchoice:

"CHOICE's experience with the needs and interest of the Australian consumer make it well placed to be able to provide the most useful information on GROCERYchoice to help consumers find the best value at the checkout," Mr Bowen said.

... "At the time of the launch, the Government made it clear that through GROCERYchoice it wanted to give a guide to consumers as to the cheapest supermarkets in their region," Mr Bowen said ... "As I outlined previously, these new arrangements represent value for money for the taxpayer and will be put in place at no additional cost."

The decision to directly outsource the GROCERYchoice website to CHOICE was in accordance with the Commonwealth Procurement Guidelines.<sup>16</sup>

3.14 An attachment to the media release outlined the 'phases' of management under CHOICE. Phase 1—effective from 2 February 2009—would entail initial changes to the website such as: the CHOICE name and logos to appear on the website; a comments forum; access to a consumer grocery survey; and the continuation of a subscription service where consumers could receive notice of new data releases. In Phase 2, CHOICE would continue to use the existing data collection survey to publish prices on the first business day of each month. Phase 3 would involve the relaunch of the website with significant changes:

Subject to satisfactory supermarket co-operation, the new website will include the following features:

- Publication of basket prices for individual supermarket locations;
- Publication of basket prices for all leading supermarket chains or groups and other smaller independent operators;
- Publication of grocery prices on a no less than weekly basis.

Other further enhancements may include:

- The provision of additional information on grocery products, such as nutritional information, unit pricing information, product origin, etc;
- The addition of a new functionality that allows users to construct their own baskets of grocery products and to compare these baskets across supermarkets.<sup>17</sup>

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16 The Hon Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, Media release: 'CHOICE to provide expertise in managing GROCERYchoice', 22 December 2008, <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/110.htm&pageID=003&min=ceb&Year=&DocType=> (accessed 11 September 2009).

### ***The decision to outsource the website to CHOICE***

3.15 Asked why CHOICE was chosen to operate the website, Treasury replied:

CHOICE are a major, national consumer, not-for-profit organisation. They approached the government with a proposal to effectively take over the GROCERYchoice website and to enhance it with additional information that the ACCC were not really in a position to add to the website given potential conflicts with the ACCC's role. The government looked at that proposal and, because CHOICE could enhance it, there was consideration that it represented good value for money and the government made a decision to go with CHOICE. As I said the [Commonwealth] procurement guidelines do allow situations for direct sourcing.<sup>18</sup>

3.16 Treasury denied that this arrangement represented a breach of the AusTender protocol, referring to the mandatory procurement procedures.<sup>19</sup> Condition 8.33(c) states that an agency may conduct procurement through direct sourcing:

...for purchases made under exceptionally advantageous conditions that only arise in the very short term, such as from unusual disposals, unsolicited innovative proposals, liquidation, bankruptcy, or receivership and which are not routine purchases from regular suppliers.<sup>20</sup>

3.17 As far as market testing of opportunities for other organisations to run the website, Treasury stated that it had carried out 'desktop research' on some other options, after CHOICE had approached the Government with its unsolicited proposal:

... it was actually a situation where direct sourcing should be used. Having said that ... within a very short time frame we did quite a bit of research to look at what other possible organisations might be out there that are in the same stands as CHOICE, who is completely independent and who understands very well Australia's consumers as well as the grocery market which this website was targeting.<sup>21</sup>

3.18 At Senate Estimates, Treasury indicated that it had sought legal advice on potential conflicts of interest, noting CHOICE's commercial activities in the media,

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17 The Hon Chris Bowen MP, Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, Media release: 'CHOICE to provide expertise in managing GROCERYchoice', 22 December 2008, <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/110.htm&pageID=003&min=ceb&Year=&DocType=> (accessed 11 September 2009).

18 Mr David Martine, Treasury, *Proof Committee Hansard*, 18 September 2009, p 6.

19 Ms HK Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 33.

20 Commonwealth Procurement Guidelines, December 2008, <http://www.finance.gov.au/publications/fmg-series/procurement-guidelines/division-2.html#mandatory> (accessed 5 November 2009).

21 Ms Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 33.

and had put in place appropriate risk management strategies. Treasury also stated that CHOICE would not be able to promote their business interests on the website:

The contract makes it very clear that the GROCERYchoice website and information available on that website obviously has to be free of charge for the Australian people, that there cannot be any links that allow CHOICE to sell some of their other products.<sup>22</sup>

3.19 Asked what quality assurance processes were in place to verify the accuracy of prices CHOICE uploaded to the website and the usefulness of the information, Treasury answered:

One of the requirements is around the KPI [key performance indicator] that CHOICE has to provide us with a full report and an independent quality assurance report that goes with that.<sup>23</sup>

3.20 It was also stated that any key activities carried out by CHOICE could not be done without prior agreement from the department.<sup>24</sup>

3.21 Treasury said that it had not done its own calculations on the cost impact at the store level of the CHOICE proposals for gathering information for weekly price reporting, but noted that the mechanism by which CHOICE would be obtaining price data was still being considered. Senator Bushby then asked:

**Senator BUSHBY**—If an additional cost which a supermarket store does not currently have was imposed through government regulation on to a supermarket store, would you accept that where they could—and competition obviously comes into it—they would pass that cost on to consumers or they would seek to?

**Ms Holdaway**—Firstly, this is not regulation. It is basically an information website that is going to be made available to consumers. There are no mandatory requirements on anyone.

**Senator BUSHBY**—If CHOICE approaches a supermarket to obtain prices the supermarket can say no?

**Ms Holdaway**—Absolutely, because there is no mandatory requirement. This is not a regulation by the government.<sup>25</sup>

### ***Treasury's contractual arrangements with CHOICE***

3.22 Treasury provided details of its \$8 million contract with CHOICE to manage the GROCERYchoice website (which remains the property of the government).<sup>26</sup> The

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22 Ms Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 48.

23 Ms Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 47.

24 Treasury, *Senate Estimates Hansard*, 4 June 2009, p 47.

25 Treasury, *Senate Estimates Hansard*, 4 June 2009, p 48.

26 Ms Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 47.

contract was executed on 19 December 2008, with the first payment of \$1 million made at that time. Another \$1 million was paid around February 2009 when the website was re-skinned. Another \$1 million was paid in April 2009, once CHOICE met the contract requirement to provide a revamped and user-friendly website with opportunities for consumers to interact. The payment schedule and milestones were set out in Schedule 2 of the contract, which is at Appendix 4.<sup>27</sup>

3.23 Treasury described the key performance indicators set out in the contract:

... [they] are built around the objectives of the website to ensure that consumers are well-informed of the grocery prices and to ensure that it provides the ability for consumers to make their own choices about their purchasing behaviour. Therefore, it is built around the reliability of the website. Reliability includes providing up-to-date information but also ensures that the website does not falter where it is not accessible for an extensive period.<sup>28</sup>

3.24 A subcontract with an IT provider, Getronics, was also continued to allow for the website's transition to CHOICE.<sup>29</sup>

3.25 Appendix 5 shows a table of all subcontract arrangements in relation to the GROCERYchoice website under both the ACCC and CHOICE.

### ***CHOICE's subcontract arrangements***

3.26 CHOICE's submission provided the following details about its subcontracts with other providers:

- SMS Management & Technology, Australia's largest IT consulting firm, was subcontracted for the programme management, technical build, hosting and maintenance of GROCERYchoice;
- Moon Group was contracted to deliver the online design for the new GROCERYchoice website;
- Nielsen Online was contracted to conduct surveys on the CHOICE website and the GROCERYchoice website to canvas opinions of the original GROCERYchoice website, conduct a needs analysis, and create a profile of GROCERYchoice users, shopping habits and demographics;

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27 Treasury, Answers to Questions on Notice, Budget Estimates, June 2009, 'GROCERYchoice website contract', pp 51–2, available at [http://www.aph.gov.au/Senate/committee/economics\\_ctte/estimates/bud\\_0910/Treasury/answer/s/grocerychoice\\_contract\\_1.pdf](http://www.aph.gov.au/Senate/committee/economics_ctte/estimates/bud_0910/Treasury/answer/s/grocerychoice_contract_1.pdf). The full contract is available at [http://www.aph.gov.au/Senate/committee/economics\\_ctte/estimates/bud\\_0910/Treasury/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/estimates/bud_0910/Treasury/index.htm) (see bet 102).

28 Ms Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 32.

29 Ms Holdaway, Treasury, *Senate Estimates Hansard*, 4 June 2009, p 32.

- Freshlogic, a market analysis and consulting firm, was contracted to provide a rationale for comparing fresh produce; information on the top selling 5 000 products for the top 80 per cent of brands, top selling fresh foods, and weekly specials data; and
- Bruce Clay Australia was contracted to develop a search engine optimisation strategy for GROCERYchoice as part of the broader marketing strategy.<sup>30</sup>

### ***Freshlogic's arrangements with CHOICE***

3.27 Freshlogic appeared before the committee to describe the work it had done for CHOICE in relation to the GROCERYchoice website. The firm had approached CHOICE in February 2009, as Mr Martin Kneebone, Director, explained:

... we ended up talking to CHOICE about helping them distil fresh food information into the most sensible comparisons that they possibly could. That requirement was very time pressured. I just make the point that the data that they would potentially have been working with would have been highly varied because the conventions in fresh food have not really streamlined the same product description disciplines that you have in grocery products, where you have an ABN and a more structured sort of approach to the way it is described. In fresh food the same product can be described quite differently, and that was very much our focus.<sup>31</sup>

3.28 The issue of fresh produce comparison is discussed further in chapter 5.

### **Events leading to the GROCERYchoice contract termination**

3.29 CHOICE argued that all contractual obligations were on track to be delivered by 1 July 2009. The re-launched website was to include weekly updates of 1 100 to 1 500 specials (increasing weekly), and prices from ALDI and Foodworks:

On 1 July 2009 CHOICE was ready to launch a new, consumer-focussed GROCERYchoice website built on a platform of sophisticated, purpose built, software capable of delivering all the information that consumers expected about grocery prices in each store. On 1 July 2009 consumers would have had access to more than a thousand accurate and up-to-date prices in each major supermarket and in many other supermarkets as well. The number of prices would have increased steadily over the following weeks. In addition our GROCERYchoice website would have delivered a rich menu of additional expert and consumer generated information soon after.<sup>32</sup>

3.30 CHOICE described the events during June 2009 which led up to the public announcement of the website's demise:

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30 CHOICE, *Submission 6*, pp 9–10.

31 Mr Martin Kneebone, Freshlogic, *Proof Committee Hansard*, 6 October 2009, p 25.

32 CHOICE, *Submission 6*, p 2.

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

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

CHOICE briefed Minister Emerson on 23 June 2009. The Minister gave no indication at his meeting with CHOICE that he intended to terminate the Government's contract with CHOICE. CHOICE supported his suggestion that it would be useful to meet jointly with supermarkets and ANRA, in fact outgoing Minister Bowen had planned to hold a similar meeting before the Cabinet re-shuffle. At the meeting on 23 June 2009, it was agreed that a meeting involving the minister, CHOICE and industry representatives would be held soon after the launch of the site a week later; instead, on 25 June 2009, Minister Emerson advised CHOICE that he had convened a meeting for the next day. The short notice meant appropriate officers from CHOICE could not attend. Minister Emerson proceeded to meet with supermarkets and ANRA on 26 June 2009. On 26 June 2009, five days before the website was due to launch, CHOICE received notice of the GROCERYchoice contract termination.

Minister Emerson's office rang the CHOICE CEO at 2pm, who was in a meeting. CHOICE received written termination by fax at 2.35pm and by email at 2.39pm. A media release from the Minister's office was published at 2.52pm. The CHOICE Media team received calls from 2.55pm. The CHOICE CEO learned of the termination after his meeting concluded at 3.15pm, when he was contacted by the Minister on the telephone.<sup>33</sup>

3.31 The media release from the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, on 26 June 2009 stated:

Following a meeting today with the major grocery retailers, it has become clear to me that it is not feasible to implement the originally envisaged GROCERYchoice proposal.

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

However, the GROCERYchoice proposal as originally envisaged would not be able to generate reliable, timely data as a basis for consumers to make meaningful comparisons in their local neighbourhoods.

In Australia there are thousands of supermarkets and thousands of grocery items. Upon close examination of the data requirements for reliable price information, I have formed the view that it is not feasible to generate that

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33 CHOICE, *Submission 6*, pp 8–9.

information in a timely manner. Less comprehensive and less timely data could be generated but it would have significantly less value to consumers.

I will hold discussions with supermarket chains about the possibility of an industry website capable of providing convenient grocery price data that could be audited by a government-appointed auditor.<sup>34</sup>

3.32 CHOICE was clearly astounded by the Government's decision, having had no earlier indication of the Minister's reservations:

CHOICE is still not clear why the decision to terminate the project was taken and firmly believes that it was the wrong decision. CHOICE had gone to Canberra the week before launch to give key politicians a clear understanding of what the website would deliver and demonstrate the website's purpose and readiness. We also briefed journalists with the objective of giving the website some positive publicity. At no time did we sense anything other than a high level of interest and support. It also seems curious that if the Minister had suspected the website wasn't going to be of value, that he didn't mention his doubts at the meeting convened with CHOICE on 23 June 2009. So close to launch it would have been more prudent to allow the site to launch, to gauge level of support and seek to add pressure on the non participating supermarkets to comply.<sup>35</sup>

#### *The meeting on Friday 26 June 2009*

3.33 While CHOICE stated in its submission that the Minister's office had advised of the meeting on 25 June 2009 (the day before it was due to be held), Mrs Margy Osmond, Chief Executive Officer of the Australian National Retailers Association (ANRA), told the committee that ANRA had been given notice of the meeting earlier in the week:

**Mrs Osmond**— ... We were advised of this meeting going forward on Tuesday the 23rd. Like everybody else, we were busy but we made sure we were there. It is our understanding that CHOICE were advised at the same time we were of the minister's desire to get a clear picture from all the players in one room at one time. CHOICE, for reasons that I simply cannot fathom, chose not to attend ...

**Senator BARNETT**—So you are saying CHOICE decided not to attend that meeting with the minister?

**Mrs Osmond**—Yes.

**Senator XENOPHON**—Were you told that they were not going to attend?

**Mrs Osmond**—That is right.

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34 The Hon Dr Craig Emerson MP, Minister for Competition Policy and Consumer Affairs, Media Release, 'Government will not proceed with GROCERYchoice', 26 June 2009, <http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTWILLNOTPROCEEDWITHGROCERYCHOICE.aspx> (accessed 11 September 2009).

35 CHOICE, *Submission 6*, p 9.

**Senator XENOPHON**—And were you given a reason? Did they refuse to attend or were they unable to attend?

**Mrs Osmond**—In fact, we were uncertain whether they would be there until we actually arrived at the meeting.

**Senator PRATT**—You were clear they were invited?

**Mrs Osmond**—Yes. The purpose of the exercise was to put all the players in one room.<sup>36</sup>

3.34 Mrs Osmond attended the meeting convened by Dr Emerson at Parliament House in Canberra on 26 June 2009 (at which ANRA, Woolworths, ALDI, Franklins, Metcash/IGA and Treasury were present) and gave the following evidence to the committee:

**Mrs Osmond**—It was intended to be a discussion of where everybody was at with the exercise. What were the stumbling blocks? Could we go forward? What was it all about? It was an exploratory meeting on the minister's behalf which I suppose you would expect from a new minister.

**Senator BARNETT**—Was the outcome of the meeting such that there were still more things to be considered, there were more things to be explored, or did you all come to the conclusion that this was a total waste of time and money and therefore the minister agreed with everybody in the room that he needed to shut it down within a matter of hours in the afternoon from that meeting?

**Mrs Osmond**—No.

**Senator BARNETT**—This is a very swift move by the minister following that meeting with you where CHOICE was not represented.

**Mrs Osmond**—Can I say to you that at the end of the meeting the minister gave no indication of where he was going. It was clearly an exploratory meeting.<sup>37</sup>

3.35 ANRA outlined to the committee the position that it had put forward at the meeting:

We had outstanding issues that needed to be resolved. They related to the legalities, the liabilities and a whole list of things that we had on a number of occasions put to CHOICE and got varying degrees of success in getting any kind of information back from them. Certainly my impression around the room was that everybody else was having similar difficulties.<sup>38</sup>

3.36 Senator Xenophon asked whether ANRA had conveyed the view that its members were ultimately not willing to cooperate with CHOICE:

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36 *Proof Committee Hansard*, 6 October 2009, p 38.

37 *Proof Committee Hansard*, 6 October 2009, p 45.

38 Mrs Margy Osmond, Australian National Retailers Association (ANRA), *Proof Committee Hansard*, 6 October 2009, p 46.



**Mrs Osmond**—We made it clear that our members had misgivings about CHOICE on the basis of their performance up to that point.

**Senator XENOPHON**—That is not what I asked. Did you make it clear that the information requested by CHOICE for the website to be launched would not be provided by your members?

**Mrs Osmond**—We made it clear we could not see a way that could be provided by 1 July, given that there was no memorandum of understanding signed.

**Senator XENOPHON**—Did you indicate that information could have been provided had there been a memorandum of understanding signed?

**Mrs Osmond**—I do not think we went to that level. The minister asked the question and I answered it.<sup>39</sup>

3.37 Mr Andrew Tindal of ALDI also gave evidence about the 26 June meeting, which he recalled had lasted for around 90 minutes, and to which ALDI had been invited via a telephone call from the Minister's office 'in the earlier part of that week'<sup>40</sup>:

The minister opened by asking if he could get an understanding as to the various retailers' positions regarding GROCERYchoice, and the various retailers provided those positions. The minister then wanted to get a bit of an understanding as to what options there were in terms of GROCERYchoice and what people's thoughts were. At the end of the meeting the minister wrapped it up and basically let us know that he was considering the matter and that he would therefore come to a decision as to how things would move forward.<sup>41</sup>

3.38 Mr Tindal stated that while he 'certainly got the impression that the minister wanted to appraise the situation and make a decision', there was no indication during the meeting that the Government was considering closing the website down.<sup>42</sup>

3.39 Senator Xenophon asked what ALDI's position had been at the meeting:

**Mr Tindal**— ... we put forward to the minister that we support the concept of transparency of pricing, that GROCERYchoice is a representation of such transparency and that we had provided to CHOICE in good faith a dummy set of data so that they were able to develop some back-end database and some front-end pages. I must stress that we have not seen the final version of that website. We also said there were some ongoing issues that we were trying to work through with CHOICE and they were issues such as the like-for-like concepts ...

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39 *Proof Committee Hansard*, 6 October 2009, p 56.

40 ALDI, Answers to Questions on Notice (received 16 October 2009).

41 Mr Andrew Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 83.

42 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 84.

**Senator XENOPHON**—Would it be fair to say that what ALDI said about the potential of GROCERYchoice was quite different from what ANRA, Woolworths, Coles and Franklins put to the minister?

**Mr Tindal**—I think that all parties stated support for transparency of grocery retail prices. In terms of the support of GROCERYchoice itself, the concept, there were varying views within the room.<sup>43</sup>

3.40 Further discussion of grocery retailers' concerns about the CHOICE version of the website is in chapters 4 and 5.

### **A possible industry-run website?**

3.41 In the aftermath of the failed website, CHOICE has called on the Government to:

...deliver on its promise to provide transparent pricing information through an independent grocery price website [which] will require legislation that all supermarkets must provide timely pricing information.<sup>44</sup>

3.42 Associate Professor Zumbo also recommended to the committee that:

In the absence of the major supermarket chains voluntarily providing full price transparency to their customers, the Federal Government to legislate to require that supermarkets of a size greater than 2000 metres make publicly available a website containing real time pricing information on all products sold in such supermarkets.<sup>45</sup>

3.43 CHOICE recommended that if the Government was not prepared to legislate to such an effect:

... then it is essential that it make good on its commitment to developing an industry based scheme, provided it is independently supervised and meets the needs of consumers.<sup>46</sup>

3.44 Treasury said that it had not been involved thus far in discussions with industry stakeholders as to the possible design or timeframe for an industry-run website.<sup>47</sup> ALDI told the committee that it had not been a part of any discussions on an industry-run website.<sup>48</sup> Woolworths understood that the Government had been discussing an industry website with ANRA.<sup>49</sup>

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43 *Proof Committee Hansard*, 6 October 2009, p 85.

44 CHOICE, *Submission 6*, p 17.

45 Associate Professor Zumbo, *Submission 14*, p 11.

46 CHOICE, *Submission 6*, p 17.

47 Dr Steven Kennedy, Treasury, *Proof Committee Hansard*, 18 September 2009, p 8.

48 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 82.

49 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 25.

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3.45 The *Daily Telegraph* reported on 9 November 2009 that ANRA advised that discussions had been taking place but that there was 'no plan for an industry-run price-tracking site', nor a timeframe for concluding discussions.<sup>50</sup>

### Committee view

#### Recommendation 3

3.46 **The committee recommends that the Government reveal its plans for an industry-operated grocery price data website.**

3.47 The committee also believes that Dr Emerson demonstrated a lack of professionalism in his decision to announce the scrapping of the GROCERYchoice website, just days before its scheduled re-launch, without having forewarned CHOICE or provided an opportunity to respond. His behaviour lacked a clear sense of transparency or fair play, having not had the courtesy to speak to representatives of CHOICE prior to publicly announcing that the Government was terminating its contractual arrangements.

#### Recommendation 4

3.48 **The committee recommends that the Government note the unfair manner in which its contractual arrangements with CHOICE were prematurely terminated by the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, without affording CHOICE a right of reply, and ensure that such unprofessional and discourteous conduct does not occur again.**

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50 John Rolfe, 'Kinks in food chains, duopoly of Coles and Woolworths blamed for the soaring supermarket costs', *Daily Telegraph*, 9 November 2009, <http://www.dailytelegraph.com.au/money/money-matters/kinks-in-food-chains-duopoly-blamed-for-the-soaring-supermarket-costs/story-fn300aev-1225795538817> (accessed 9 November 2009).



# Chapter 4

## Issues and problems faced by CHOICE

### Survey methodology

4.1 Retailers had been sceptical of the Australian Competition and Consumer Commission's (ACCC) attempt to develop a survey methodology to ensure like for like comparisons (e.g. for fresh food, meat and private label brands), with claims that a reliable method of comparison would be virtually impossible to achieve. These concerns were raised with CHOICE, which did acknowledge that there were difficulties, but claimed that on the new GROCERYchoice website they would not be insurmountable:

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

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

- tangible product features
- ethical food attributes
- common product descriptions
- quality descriptors that are current across fresh food categories.<sup>1</sup>

4.2 On the question of comparing private label or home brand packaged groceries between stores, CHOICE provided the committee with a copy of its principles for 'Like for like product matching', demonstrating the organisation's capability to develop and refine product comparison strategies (see Appendix 6).

4.3 Further discussion of like for like comparisons of fresh produce is in chapter 5.

### Collecting price data

4.4 Accurate, timely data was to be crucial to the new website's success, according to CHOICE. ALDI and FoodWorks were said to be cooperative in CHOICE's endeavours to access grocery data efficiently (as ALDI already applied

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1 CHOICE, *Submission 6*, pp 15–6.

consistent national pricing and FoodWorks had identified a technical solution to provide data).<sup>2</sup> However, when other retailers became less cooperative:

CHOICE investigated alternative sources including Aztec Point of Sale prices gathered by supermarkets and on-sold to manufacturers. We requested access and use of the Aztecprice and location data from Coles and Woolworths as this was already available to them but the request was declined. CHOICE also entered into an agreement with Freshlogic to deliver weekly specials from all the major retailers, a strategy that the Minister agreed would fulfil CHOICE's contractual obligations. Scraping retailers' websites was also considered as a data source. CHOICE had sought advice on this strategy to ensure its legality.<sup>3</sup>

## Cooperation from retailers

4.5 CHOICE stated that the failure of some supermarkets to provide price data was the primary problem it faced in delivering a website of the quality originally desired. (Nevertheless, CHOICE said it had developed an 'acceptable alternative approach' which still would have provided useful information to consumers).

4.6 The retailers' attitudes from the point of view of CHOICE are described below:

Woolworths was resistant to the idea from the beginning. They cited a range of issues from technology constraints to trade practices breaches, all of which CHOICE was willing and able to address. ALDI and FoodWorks were supportive and cooperative and while they cited technology as a challenge, they were willing to find solutions and work with CHOICE. Coles and Franklins were initially cooperative and open to the idea, but became increasingly distant. Ritchies and Metcash remained uncommitted until they saw what action the big two retailers would take. NARGA were hostile to GROCERYchoice from the outset, based on the fact that their members find it difficult to compete with the big two supermarkets (because of the Metcash monopoly), and difficulties in making information available for all stores. CHOICE therefore took the decision early on that NARGA members would be part of a post July 2009 strategy.<sup>4</sup>

4.7 The entry of the Australian National Retailers Association (ANRA) into the GROCERYchoice consultations was singled out by CHOICE as a 'turning point' in the project. Engagement with the retail sector deteriorated as:

Previously CHOICE had dealt with supermarkets individually, but after a meeting requested by ANRA on 30 April 2009, ANRA members Coles, Woolworths and Franklins would only communicate through their industry body. This new strategy gave these supermarkets an opportunity to present

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2 CHOICE, *Submission 6*, p 14.

3 CHOICE, *Submission 6*, pp 10–11.

4 CHOICE, *Submission 6*, p 13.

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a united front and agree an approach to block progress. Supermarkets stepped away from the negotiating table and let ANRA do the talking.<sup>5</sup>

4.8 CHOICE stated at the inquiry hearing that the supermarkets 'effectively sabotaged' the website:

I think there is an antidemocratic strain running through that because it was an election commitment of a popularly elected government. It is pretty antidemocratic for a body like ANRA and the supermarkets to block progress in that way.<sup>6</sup>

... The big two supermarkets in particular rarely take to public platforms or the media on this issue because I think they see it as damaging their brands in the eyes of the consumer. In a sense, ANRA becomes a whipping boy ... and a block and a protection to the two supermarkets.<sup>7</sup>

4.9 ANRA responded strongly to CHOICE's claims about its 'spoiler role':

I find these comments really offensive and indicative of what was and is the 'it must be someone else's fault' approach that CHOICE has taken on this issue from moment 1. ANRA is a not-for-profit body which fulfils its role as a good corporate citizen by supporting full compliance with the legislation and policy requirements of a democratically elected government of the day. We try to assist that process by presenting a unified and efficient voice to government and other stakeholders on behalf of our members.<sup>8</sup>

4.10 The committee heard evidence from ANRA on the chronology of interactions with CHOICE. ANRA stated that it convened the meeting on 30 April 2009 as a genuine attempt to:

... bring some focus to the range of issues that, just two months out from the launch of the site, CHOICE had still not dealt with or given any real clarity to the retailers on. At the meeting, the representative of the minister's office made it clear that the 1 July date for the launch was far less important than getting the basics of how the site might work right. In other words, they were flexible about that date and interested in understanding the stumbling blocks and getting to some sort of workable outcome. From that meeting, CHOICE committed to deliver to the retailers a draft MOU, and they indicated they had one pretty much ready to go and would get it to us ASAP with a copy of the Freshlogic report, which they felt would finalise the issue of how many items, how often et cetera.

We received an MOU pretty quickly after that, at the beginning of May. It was a two-page MOU. It was completely inadequate to the concerns of our members, and we had expressed those concerns at some length. So we went

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5 CHOICE, *Submission 6*, p 13.

6 Mr Nick Stace, CHOICE, *Proof Committee Hansard*, 18 September 2009, p 46.

7 Mr Stace, CHOICE, *Proof Committee Hansard*, 18 September 2009, p 48.

8 Mrs Margy Osmond, Australian National Retailers Association (ANRA), *Proof Committee Hansard*, 6 October 2009, pp 40–1.

back to CHOICE and indicated once again what those concerns were, and in the last few weeks of May we were still waiting for a redrafted MOU. At the end of May, while we had not received a copy of the Freshlogic report promised at that April 30 meeting, we did get a list of 7½ thousand items, including a wide range of clearly top-selling items like birdcage cleaner and a request that the price checks be done every week, twice a week in each store. When you do the maths on that it works out at something like two billion price checks a year, which is a pretty substantial task.<sup>9</sup>

4.11 CHOICE's draft Memorandum of Understanding (MOU) is at Appendix 7. Emails between ANRA and CHOICE showed the retailers' concern that the MOU needed to be more substantial and include issues such as:

Clear statements of when one or both parties are liable. For example, would CHOICE be liable for commercial harm caused to a participating retailer if CHOICE is negligent? What if any liabilities does a participating retailer have other than to provide data in good faith?

... How CHOICE will protect the integrity of the data – e.g. how will the data provided by retailers be manipulated by CHOICE?

What obligations in terms of fair comment, accurate presentation does CHOICE accept when presenting data?<sup>10</sup>

4.12 ANRA argued that it was CHOICE's poor management of the programme and a reluctance to address the concerns of individual grocery retailers that necessitated their involvement:

Our feeling is that if CHOICE had managed the program better and worked with ANRA sooner then maybe a model could have been made to work. Far from holding up the process, we may have been able to help it being brought in earlier. CHOICE could have gone to government and said they needed more time as there were unresolved issues with the major chains. We do not speak for the government, of course, but I do not think it is unreasonable to suggest that they probably would have looked at some form of extension and deemed it acceptable to get the right kind of outcome. This is not what CHOICE chose to do. What they did do was to go to government and get a contract variation on 26 May, when they were still talking to us supposedly in good faith by email about the current contract. This contract variation allowed for them to get alternative data from Aztec point of sale pricing. Their stated intention in their submission was to pressure the retailers—to shame them, in effect—to give data which we knew could not have been accurate.<sup>11</sup>

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9 Mrs Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 37.

10 ANRA, Answers to Questions on Notice (received 27 October 2009), Email from Mr Malcolm Roberts of ANRA to Ms Linda Magee of CHOICE, 14 May 2009.

11 Mrs Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, pp 37–8.



4.13 Coles told the committee that the motivation for involving ANRA was to 'expedite and facilitate discussions around very complex and difficult issues' and to be able to get 'the insights of other members about how best to resolve the issues'. Coles stated it was 'extremely disingenuous' of CHOICE to say that involving ANRA was anti-competitive:

In fact, the intention was to be cooperative and to try and meet a very looming deadline. We had no confidence in CHOICE being able to meet its stated obligations.<sup>12</sup>

4.14 CHOICE's website proposal was 'extremely ambitious' according to Coles, which felt that the full product list and MOU promised by CHOICE had been delivered to retailers quite late ('we were operating in a vacuum for a long period of time'<sup>13</sup>). Coles described two 'fundamental hurdles'—the lack of legal certainty from CHOICE about ownership and use of the data, and the inability to 'technically provide in real time the information they were seeking from us.'<sup>14</sup>

4.15 Woolworths described CHOICE's proposal for real-time prices on a website as 'fraught with significant problems', suggesting that the consumer group had been 'applying pretty poor project management skills to something that was enormously large':

At the outset they asked us for 300 items and they then moved that to 1,500. They then said they wanted 7,500 items across our 800 stores and they wanted it three times a week. To do that we would have to build a whole new IT system to create those data feeds. We estimated that it would cost about half a million dollars if we outsourced that work to India. On top of that we would then probably have the ongoing headcount and capital costs of maintaining it. Once you get to the point of doing 15,000 price checks per store in a week, the error rate would start increasing and we would be significantly concerned about price representations that the website would then be giving consumers.

That is where we came to our final point with CHOICE. They were not prepared to accept any of the responsibility for the prices they published. They just wanted to be the portal. The ACCC, we know, would not accept that. Our trade practices lawyers would not accept that, and we never got any satisfactory response from them about the sort of disclaimers we would have to put on the website to tell consumers that it was not necessarily accurate information.<sup>15</sup>

4.16 Woolworths claimed that from its perspective, it had 'never ceased discussions with CHOICE' and that 'the need to amplify our voice' through ANRA arose because

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12 Mr Robert Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 13.

13 Mr Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 14.

14 Mr Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 14.

15 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, pp 17–8.

CHOICE had not been answering Woolworths' questions ('it was a one-way discussion') or providing the necessary data 'to properly scope out the systems'.<sup>16</sup>

4.17 ANRA was also critical of the consultations that CHOICE held with industry. It cited the claim made by CHOICE in January 2009 that the new website would come at no new cost to supermarkets; this commitment was never restated in further consultations.<sup>17</sup> ANRA described the difficulties and uncertainty that arose during discussions with CHOICE:

Our large supermarket members began working with CHOICE towards the end of 2008, and a number of combined and individual meetings were held. CHOICE came to see me early in 2009 and I expressed a willingness to assist. In the following months, while ANRA heard little or nothing from CHOICE despite having indicated a willingness to help, meetings and conversations continued with our members. In April, retailers were still waiting for clear specifications and a range of details from CHOICE. For example, was this going to be 2,000 items or was it going to be 5,000 items? Both numbers had been discussed by CHOICE. You may or may not be aware from the earlier version of this particular website, after CHOICE took it over, that, in the frequently asked questions section, where people asked, 'Why do you have this number of items on the site?' which was somewhere around 300, the answer was: 'You do not really need more than 300 because that pretty much sums up the normal things that ordinary people would buy on a regular basis that should be in a basket.' I hope you can see our confusion in terms of understanding how we would scope it at our end when at that stage we still did not know how many items they were talking about.

Our members also needed to know how CHOICE were going to address such things as like for like, concerns that prices would not be accurate, the impact and liability that represented to retailers and the cost to retailers.<sup>18</sup>

4.18 Further discussion of the potential cost burdens to retailers is in chapter 5. Further discussion of potential breaches of the *Trade Practices Act 1974* in terms of data accuracy, as well as ANRA's involvement, is in chapter 6.

4.19 The National Association of Retail Grocers of Australia (NARGA) explained that its representatives met with CHOICE in late 2008 following reports that CHOICE was negotiating with the Government to take over the website. NARGA provided a critique of the website, outlining its failings and strongly advising CHOICE not to proceed 'on the basis that the task set was impossible to achieve'.<sup>19</sup> CHOICE was advised:

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16 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, pp 24–5.

17 Mrs Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 39.

18 Mrs Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, pp 36–7.

19 National Association of Retail Grocers of Australia (NARGA), *Submission 2*, pp 7–8.

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The GROCERYchoice budget was said to be \$13 million over four years and that had been based on one data collection a month – to make the data timely, data collection would have to be done more frequently and the cost of doing so was not covered by such a budget.<sup>20</sup>

4.20 According to NARGA, CHOICE claimed at a stakeholder meeting that it would set up a system for publishing weekly or continuous grocery prices for as many items as possible 'at zero cost to retailers'.<sup>21</sup> Industry representatives voiced a number of concerns, including:

- the inability to provide weekly or continuous data 'at zero cost', with costs necessarily being passed on to consumers;
- independent grocery businesses, mostly family-owned and operated, having to allocate resources to the data collection task with new software requirements (at an estimated cost of \$6,000 per store), given that current electronic price files included additional commercially sensitive information; and
- independents having to allocate further resources to uploading price data on their entire product range.<sup>22</sup>

4.21 Technical aspects of CHOICE's proposal were also questioned:

If even the top 1000 independent supermarket operators agreed to supply data electronically, CHOICE would require a very large number of modems and very substantial computer processing power to handle millions of product and price records.

CHOICE then suggested these stores could fax price changes once a week; however, NARGA pointed out that an average independent supermarket has about 3000 price changes a week, meaning CHOICE would have to key in about three million price changes every week for the top 1000 independent stores.

CHOICE could not explain how it would handle comparison of prices for fresh produce (fruit and vegetables, meat, dairy) and suggested omitting such prices - which account for about one third of all supermarket sales.

CHOICE could not explain how it would maintain security on price data if such data were to be forwarded to them - the data is, after all, commercially sensitive until price changes are on store shelves.

CHOICE had no plan or methodology to validate independently any data which might be given to it, running the risk that any incorrect data might unfairly create the impression that one store or group of stores was cheaper than a competitor/competitors, beyond a vague idea that its sympathisers

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20 NARGA, *Submission 2*, p 14.

21 NARGA, *Submission 2*, p 14.

22 NARGA, *Submission 2*, p 15.

would report if they noticed price discrepancies between shelf and website.<sup>23</sup>

4.22 Having undertaken to consider these issues, on 26 March 2009, CHOICE emailed NARGA to advise that because of the difficulties raised in relation to independent retailers, the website would proceed without them:

When asked specifically whether that decision meant Woolworths, Coles, ALDI and Franklins had agreed to provide pricing data, [CHOICE] said only that [it] had received "adequate commitment from enough sources to proceed."

Woolworths, Coles and Franklins later denied any such commitment. As far as NARGA is aware, if CHOICE has any support for its plans it is only from ALDI.<sup>24</sup>

4.23 NARGA met the responsible Minister, the Hon Chris Bowen MP, on 22 April 2009:

... and made clear to him that while we had no problem in principle with providing price data and did so continuously through shelf prices, advertisements and catalogues, the prohibitive cost of complying with CHOICE's requests and the methodological issues raised with them made resolution unlikely.

Mr Bowen acknowledged that the independent sector had special issues because of the large number of individually owned small and medium sized family businesses in the sector, but expressed the view that industry representatives should try to reach some form of agreement with CHOICE to allow the new website to build up over time.<sup>25</sup>

### **Cooperation from government**

4.24 Given the retailers' unwillingness to provide data, CHOICE requested the help of ministers and officials to influence and press the supermarket CEOs:

The Government made it very clear that their preference was to proceed in a conciliatory manner, giving supermarkets a longer time-frame to comply rather than increasing pressure on them to act.

In further discussions with Minister Bowen and officials it was agreed to continue with the launch on 1 July 2009, to increase the number of products displayed every day, with an acceptance that greater pressure on the supermarkets may have been required after launch to achieve the original aims of the project in relation to price information. The Minister agreed to a series of changes to the contract to reflect this new position.<sup>26</sup>

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23 NARGA, *Submission 2*, p 15.

24 NARGA, *Submission 2*, p 16.

25 NARGA, *Submission 2*, p 16.

26 CHOICE, *Submission 6*, p 14.

4.25 'A lack of political will to seek legislative and non-legislative solutions had a detrimental impact on the ability of CHOICE to deliver the website the public wanted', CHOICE claimed.<sup>27</sup>

4.26 Associate Professor Frank Zumbo called the decision by the new Minister, the Hon Dr Craig Emerson MP, to close down GROCERYchoice just days from its re-launch, a 'fundamental failure':

The Federal Government had a leadership role to play given that GROCERYchoice was part of the Government's election commitment to put maximum downward pressure on grocery prices. This leadership role was also clearly essential given that the Federal Government had spent or had committed to spend millions of taxpayers' dollars on the website.

The Federal Government's leadership role was particularly critical given the growing recalcitrant behaviour by the major supermarket chains towards CHOICE's work on the new GROCERYchoice website.

... After all, it was the Federal Government that turned to CHOICE when it became obvious that the ACCC's version of the GROCERYchoice website was failing to deliver any relevant information to consumers. It was only fitting, therefore, that the Federal Government would seek to use its best endeavours or even its legislative powers to ensure that the taxpayer funded CHOICE version of GROCERYchoice had every chance of success in delivering meaningful and comparative pricing information to consumers.<sup>28</sup>

4.27 He commented at the inquiry hearing that:

To pull the plug a few days beforehand is just unbelievable from the simple point of view that the government let its own website run for a few months to give it a go and see how it went, but they were not willing to extend that courtesy to CHOICE ... With the CHOICE website ... we would have known very quickly whether it was a goer or not – and, if it was not, Minister Emerson could have pulled the plug two weeks after its launch.<sup>29</sup>

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27 CHOICE, *Submission 6*, p 14.

28 Associate Professor Frank Zumbo, *Submission 14*, pp 3–4.

29 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 11.



# Chapter 5

## Concerns of the grocery retailers

5.1 Grocery retailers raised a number of concerns in relation to the GROCERYchoice website, including the survey methodology adopted by the Australian Competition and Consumer Commission (ACCC); problems with comparison of fresh food prices; the inclusion of ALDI in product range comparisons; the inclusion of independent stores with limited floor space; and the potential cost burdens on retailers which arose from CHOICE's proposal for a revamped website.

### The ACCC website

#### *Survey methodology*

5.2 The National Association of Retail Grocers of Australia (NARGA) argued that the ACCC's survey methodology was 'seriously flawed and invalid; it had the hallmarks of a website designed by people who did not personally shop for groceries and who had no clue about how grocery customers actually shop'.<sup>1</sup>

5.3 The system of 61 regions devised by the ACCC was heavily criticised on the grounds that the regions 'bore no relationship to actual commercial markets ... nor to the demographics of the regions'.<sup>2</sup> With some regions comparing prices in shops hundreds of kilometres apart, NARGA commented that:

Comparing averaged prices for a 'mystery basket' of unidentified products across ten unidentified stores spread across a region gave no indication of whether the basket prices identified in the survey bore even a passing similarity to the price of a basket of groceries that customer might actually want to buy in his or her nearest store(s).<sup>3</sup>

5.4 In hindsight, it may have been better for the website's regions to have been restricted to metropolitan areas and large towns, instead of the expansive regions in the ACCC's original design.

#### *Inclusion of fresh produce*

5.5 The issue of like for like comparisons of fresh produce as a part of the GROCERYchoice website was a major sticking point for retailers. The perishability of fresh food, it was argued, made it impractical for comparisons to be made based on price alone.

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1 NARGA, *Submission 2*, p 2.

2 NARGA, *Submission 2*, p 3.

3 NARGA, *Submission 2*, p 3.

5.6 The Australian Retailers' Association (ARA) stated that it was impossible to make timely comparisons of fresh food which took into account varying quality:

In regard to both meat and fresh vegetables, there are different grades. For instance, if you take tomatoes and bananas, I think there are four different grades. First, you have to define the type of product you are talking about—is it a grade 1 or a grade 4? Obviously the price will vary in relation to that. You will also get situations in supermarkets where products come very close to the end of their use-by-date, in particular meat, and that is often put out on sale as a last-minute thing. So that comes down in price quite drastically. There are also other products that have use-by-dates that will be put out from time to time. Those products could be out of date on the basis that, even if the reporting was done weekly, decisions are made virtually instantaneously at supermarket levels to clear products towards the end of their use-by-dates. It will be out of date very readily.<sup>4</sup>

5.7 Master Grocers Australia similarly argued:

If you put up the price of apples, what product are you talking about and what grade of apple are you talking about? It can be very misleading. My particular store is in an affluent area and we only buy the very best quality and we charge accordingly. But you can eat every apple in a bag of apples that you buy from my store. If you go to a Dandenong market and buy a bag of apples there, they will be a lot cheaper but you will throw out the last five or six apples in that bag. If my price goes on the website, I am dear in comparison to the rest of the area. So my products may be perceived as dear, but in fact it is about the quality of the product.<sup>5</sup>

5.8 NARGA stated that it raised the issue of accurate data collection in relation to comparison of fresh food prices in discussions with the ACCC. Its submission drew attention to inherent difficulties in collecting such data, including:

- There are numerous varieties of potatoes, tomatoes, apples, oranges, grapes, etc., not all available in all stores at the same time – on which would data be collected?
- Prices vary by the day, depending on availability, weather events, season, availability of and source of imports, etc.
- Prices vary from location to location, with different regions ripening fruit and vegetables at different times – even within some of the ACCC's 'regions'
- Fruit and vegetable prices may vary by size of the produce

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4 Mr Russell Zimmerman, Australian Retailers' Association (ARA), *Proof Committee Hansard*, 6 October 2009, p 19.

5 Mr Rodney Allen, Master Grocers Australia, *Proof Committee Hansard*, 6 October 2009, p 108.



- ... Meat prices vary by both grade and cut – would the data collectors be competent to distinguish lamb from hogget or mutton, for example?<sup>6</sup>

5.9 NARGA claimed that the ACCC ignored such concerns and 'purported to include price comparisons for fresh foods in its GROCERYchoice mystery baskets'.<sup>7</sup>

5.10 Retail\*Facts stated that the ACCC had provided a methodology for comparing fresh produce, commenting that:

... it is always going to be a difficult assessment; however, the general assessment was on things such as discolouration. That was one of the main reasons why we were not to collect a price if necessary, if, in the case of fresh produce, it appeared not to be of a certain quality.<sup>8</sup>

### Committee view

5.11 The committee believes that there were serious difficulties with the issue of like for like comparisons under the ACCC's version of the website, particularly given that the consumer was unaware of the contents of the ACCC's mystery baskets and therefore could not judge for themselves whether a like for like comparison was reasonable.

### *The inclusion of ALDI*

5.12 ALDI is a German-owned grocery retailer which commenced operations in Australia in 2001. It operates across 207 stores in Queensland, New South Wales, Victoria and the Australian Capital Territory. ALDI's typical store size is around 1,200 square metres, with around 1 000 products stocked in each store.<sup>9</sup> (A major full line supermarket can stock up to 30 000 product lines.)<sup>10</sup>

5.13 NARGA suggested that the ACCC 'devised' the special category of the 'basic staples basket' to allow ALDI to be included in comparisons on the GROCERYchoice website. Noting that the ACCC's 2008 inquiry into grocery prices had emphasised the significant competitive impact that ALDI's entry had brought to bear on the grocery retail market, NARGA asserted that:

GROCERYchoice had to be constructed to include the only company allegedly providing a "competitive dynamic" to the Australian grocery industry. ALDI's exclusion from GROCERYchoice would have called into question one of the ACCC's major findings from the grocery price inquiry.

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6 NARGA, *Submission 2*, p 4.

7 NARGA, *Submission 2*, p 3.

8 Mr James Kelly, Retail\*Facts, *Proof Committee Hansard*, 28 October 2009, p 36.

9 Mr Andrew Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 77.

10 Mrs Margy Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 36.

The problem remained, however, that ALDI did not have product range, nor the sites, to allow them to be included in the general GROCERYchoice price survey across Australia. A special category, the "basic staples basket" was devised by the ACCC to allow ALDI to be included. ALDI has a legitimate place in the Australian grocery industry, but it is not a direct competitor with full-service supermarkets or grocery stores offering much larger product ranges.<sup>11</sup>

5.14 If one of the aims of GROCERYchoice was to help price-sensitive consumers find the lowest prices on basic items at the supermarket, it might also be argued that including large numbers of other goods in the rest of the basket categories was a distraction that artificially favoured the large supermarket chains.

5.15 NARGA was sceptical that the ACCC could have accurately compared ALDI products directly with branded products, calling into question the ACCC's 'independent testing' regime:

... the ACCC claimed to have hired an independent product testing laboratory to ensure that product quality was similar – that the comparison of prices was based on a comparison of "like for like". The independent product testing laboratory was never identified and no results of the alleged product comparison testing were ever published.<sup>12</sup>

5.16 In its advice to the then Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, during the scoping stage of the GROCERYchoice project in early 2008, the ACCC had acknowledged there would be difficulties in incorporating ALDI, noting the issue of like for like product comparisons and its smaller range of products. On balance, the ACCC recommended including ALDI on the website because it was 'an important aspect of the competitive landscape in grocery retailing'.<sup>13</sup> At the time, the ACCC noted that the:

... the website would make it clear that the [basic staples] basket price is calculated on a 'matched similar product quality' basis rather than on an 'identical product' basis, and that consumers need to make up their own minds as to the issue of product quality.<sup>14</sup>

5.17 Some retailers were alarmed that the website identified ALDI as being significantly cheaper in the 'basic staples' category in every region in which it was

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11 NARGA, *Submission 2*, p 5.

12 NARGA, *Submission 2*, p 5.

13 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 3.

14 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 4.

present. The ARA called the initiative 'blatant Government brand promotion'. An ARA press release from 1 October 2008, submitted to the inquiry, stated:

But now the Rudd Government is taking a dangerous turn and promoting particular big supermarket brands by naming them the 'cheapest' in Australia. There is no place for Government interference in brand promotion and marketing of Australian supermarkets. This is overt favouritism of major brands while local grocers and fruiterers are being ignored.

... The market doesn't need government intervention, like GROCERYchoice, which discriminates against small independent grocers. It's not GROCERYchoice; it's GROCERYpromo.<sup>15</sup>

5.18 ALDI's response to the claim that its basket of goods could not be legitimately compared to those of other retailers because of ALDI's limited number of lines was that the number of lines had no bearing on the quality of products on offer.<sup>16</sup> Also, the 'like for like' question raised by NARGA could equally be applied to major supermarket chains' home brand and private label products being compared against each other.

5.19 Prior to the website's launch, the ACCC had also acknowledged that making appropriate comparisons across major supermarkets on their home brand goods would present difficulties:

...particularly since higher quality home-brand products are now very common and have high market shares. Simply choosing the cheapest product would create a bias towards supermarkets promoting low quality products.<sup>17</sup>

5.20 To ensure that appropriate comparisons between products could be made, the ACCC engaged expert consultants and undertook industry consultations. The ACCC has advised that Symbio Alliance undertook the 'like for like' product testing, at a cost of \$13 999 (GST exclusive).<sup>18</sup>

### ***Impact on independent stores***

5.21 Independent retailers claimed that the ACCC's website placed them at a significant disadvantage, with inherent biases and shortcomings in its survey methodology. They argued that issues such as lack of competition in remote areas and the high costs of delivery (particularly for fresh produce) were not adequately

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15 ARA, *Submission 7*, Attachment 1, p 7.

16 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 88.

17 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 4.

18 ACCC, Answers to Questions on Notice prior to public hearing (received 17 September 2009), p 3.

accounted for and therefore resulted in 'negative press' about independents once the survey results were published.<sup>19</sup>

5.22 Giving evidence to the inquiry, Mr Grant Hinchcliffe of Tasmanian Independent Retailers, quoted a newspaper article from the *Mercury* on 7 August 2008, the day after GROCERYchoice went live:

... in southern Tasmania a shopping trolley full of meat, seafood, fruit and vegetables, dairy, bread, cereals, drinks, snacks and other household items costs \$161.51 at Coles, \$162.97 at Woolworths and \$185.66 at an independent grocers.<sup>20</sup>

5.23 The article also reported that Mr Graeme Samuel, the Chairman of the ACCC, said that the website only compared supermarkets that were 1 000 square metres or larger.

5.24 Mr Hinchcliffe commented:

I am not sure whether any of my members were surveyed. I do not know whether it was IGA stores, FoodWorks stores or whatever, but that is about a 15 per cent price variation. For a price conscious, savvy consumer sitting at home reading that, it is going to send out the message quite clearly that independent grocers are very expensive to shop at. In my opinion, 15 per cent is way over the top, and I would suggest that with the larger independently owned and operated businesses in Tasmania it would be nowhere near 15 per cent.<sup>21</sup>

5.25 While the ACCC's general principle when conducting the price surveys was not to include any store with an area under 1 000 square metres, NARGA claimed that this principle was not adhered to:

We are aware that in some cases, independent stores as small as 270 metres were included, while similarly-sized petrol station convenience stores operated by Woolworths, Coles or the large petrol companies – charging convenience store prices – were excluded.

These smaller stores are not, to use the words of the UK Competition Commission, "close substitutes for other grocery retailers" and operate on a different business model. Yet the ACCC lumped the basket prices of these stores in with those of large independents which compete head to head with Woolworths or Coles in local markets, skewing upwards the basket price averages listed for the "independents" category, at the same time excluding the supermarket chains' petrol station convenience stores of similar size to small independent grocers.<sup>22</sup>

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19 WA Independent Grocers Association, *Submission 3*, p 2.

20 Sally Glaetzer, 'Top dollar groceries', *Mercury*, 7 August 2008.

21 Mr Grant Hinchcliffe, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, p 93.

22 NARGA, *Submission 2*, p 7.

5.26 In Tasmania, it is claimed that the ACCC surveyed the Shearwater Supa IGA, with 891 metres of retail space, the Value Plus Valley Road in Devonport, with 312 square metres of retail space, as well as the Festival IGA in Lindisfarne, with 232 square metres of retail space (at which the proprietor refused entry to the data collectors).<sup>23</sup> The ACCC's response was that 'they were the exception rather than the rule'<sup>24</sup> and that those stores 'identified by industry as being smaller than desirable [were] removed from the survey list'.<sup>25</sup>

5.27 In more isolated regional areas, the ACCC admitted that it ran into the problem of not having enough large-scale supermarkets in a particular region to 'cover off on the survey work':

In limiting those supermarkets ... it would have been fairly easy to identify the supermarkets in those areas that were actually being surveyed and also, possibly, to identify what was in the basket. On our website we had a notice that said that the GROCERYchoice survey was generally restricted to those with a total floor area of greater than 1,000 square metres, and it really was, in the Tasmanian instance in particular, an issue that we had identified after we started doing the surveys.<sup>26</sup>

5.28 Tasmanian Independent Retailers noted that only Tasmania's northern region has any independent stores in excess of 1 000 square metres—one in an outer suburb of Launceston, and one in St Helens in the state's far north-east. It is understood that out of the two, the ACCC surveyed only the St Helens store:

It should be noted that this store is some two hours drive from the urban centre of Launceston where there are approximately nine major chain supermarkets (Woolworths and Coles) of which both are largely serviced for their grocery requirements by two locally based Distribution Centres. The Supa IGA supermarket at St Helens is also largely serviced for its grocery requirements from Launceston.

Unfortunately, the ACCC would not reveal the supermarkets that were surveyed but it would be fair to assume that it is unlikely the other supermarkets surveyed in the northern area of Tasmania did not have the transport disadvantage of being located some two hours from their main Distribution Centre.<sup>27</sup>

5.29 The Western Australian Independent Grocers Association expressed the concern of its members about the lack of consultation and prior warning about the price surveys:

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23 Tasmanian Independent Retailers, *Submission 5*, p 3.

24 Mr Brian Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 36.

25 ACCC, Answers to Questions on Notice prior to public hearing (received 17 September 2009), p 4.

26 Mr Mark Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 2.

27 Tasmanian Independent Retailers, *Submission 5*, p 2.

... in some cases, the first store owners knew of any website was when individuals turned up at their door step and declared that they were there to collect pricing data that could take them up to 8 hours to complete.

... Store owners originally were unsure if the people in their stores had any legal right to be there and did not know if they should put a staff member with them for the whole day that they were there or leave them alone or ask them to leave without collecting the data.<sup>28</sup>

5.30 Tasmanian Independent Retailers was also disappointed that there was 'no protocol established by the ACCC with regard to informing our members that their premises were to be surveyed'. It was highly critical of the ACCC's inconsistency on the floor space issue, stating:

... Attempting to compare supermarkets with differing floor sizes is similar to attempting to compare an aircraft carrier with a speed boat.<sup>29</sup>

5.31 At the inquiry hearing, Mr Hinchcliffe elaborated on the reasons why the comparison of independents on price alone was unfair:

I think it is widely accepted that the smaller the operation the less opportunity you have to get goods into your store at the same landed in store cost as a larger store would have—that is, there are obviously efficiencies in buying if you are purchasing more and if you have the volume to purchase more. There are also efficiencies with respect to how you operate your business as well. All of those come into play when retailers are ultimately seeking their margins. I feel that it would be fair to say that from the Tasmanian experience, the independent retailers in Tasmania, generally probably have to accept a lower margin on their grocery items simply to remain competitive against the might of Woolworths and Coles. Also in some of the areas obviously freight and distribution come into play such as the outlying areas that are away from the main distribution centres in Launceston and also Woolworths have a distribution centre in Hobart. That comes into play as well.<sup>30</sup>

5.32 Master Grocers Australia gave similar evidence:

Smaller retailers certainly have less scale than a large, 3,000 square metre supermarket. There is no doubt about it. There are different costs associated with running those different businesses, whether it be labour, overheads, rent, wage percentages and so forth. There is a higher cost to running a smaller store. Subsequently, those higher costs are reflected in price in some of those stores that are conveniently located. I think it is generally accepted that the small to medium type stores that are conveniently located may incur higher costs to operate but the fact is that those stores do play a

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28 WA Independent Grocers Association, *Submission 3*, p 2.

29 Tasmanian Independent Retailers, *Submission 5*, p 3.

30 Mr Hinchcliffe, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, p 95.

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role within our community. It is genuinely accepted that the prices might be slightly higher.<sup>31</sup>

5.33 While it is clear that independent retailers do face higher operating costs that are reflected in higher prices, it could be argued that GROCERYchoice was not necessarily 'inherently unfair' given that it simply reported what independents already state to be the case. The question of *whether* a price is higher is a different issue to *why* it may be higher.

5.34 Senator Barnett asked Tasmanian Independent Retailers whether any legal action against the ACCC had been considered for putting evidence into the public arena that was damaging to independents in a competitive marketplace:

I did consider that briefly but at the end of the day Tasmanian Independent Retailers is a small business. It is owned by small business operators and for us to consider legal avenues against the ACCC is like a David and Goliath fight to be honest. We did issue a press release on the same day voicing our concerns that the website was false and misleading with respect to the statements that were contained in that article.

... That press release conveyed our concerns that in Tasmania, as I have said, with two out of the three regions there were no independents over a thousand square metres, so from my perspective the ACCC was clearly operating in breach of its own guidelines that had been set and to date we have not received any formal notification, apology or correspondence from the ACCC.<sup>32</sup>

5.35 Responding to the claim that the website had favoured the major retailers over the independents, the ACCC said:

If you look at our grocery inquiry report, you will see that we made the point that the independents have a lot of difficulty competing with Coles and Woolworths because of the prices that they are charged by their wholesaler Metcash, and that certainly showed up in the GROCERYchoice website during the time it was operating. We were doing 61 regions a month for six months, which gives you 360-odd regional readings. I think in about only eight of those did the independents come out as being the cheapest. So, even during those six months, I think the website illustrated the difficulty independents have competing with Coles and Woolworths.<sup>33</sup>

## Committee view

5.36 The committee is of the view that the generalised information disseminated by the ACCC through the GROCERYchoice website was prejudicial and unfair to

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31 Mr Jos de Bruin, Master Grocers Australia, *Proof Committee Hansard*, 6 October 2009, p 112.

32 Mr Hinchcliffe, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, p 96.

33 Mr Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 36.

independent retailers, which do not and cannot operate to the same economies of scale as major chain supermarkets.

### **Recommendation 5**

5.37 The committee recommends that both the Government and the Australian Competition and Consumer Commission note that the operation of the GROCERYchoice website was prejudicial and unfair to independent retailers.

### **Recommendation 6**

5.38 Additionally and specifically, the committee recommends that the Australian Competition and Consumer Commission apologise to Tasmanian Independent Retailers for unfairly comparing small independent retailers to major chain supermarkets in its price surveys for the GROCERYchoice website, thereby disadvantaging smaller operators and contributing to undeserved negative press in the *Mercury* on 7 August 2008.

## **The CHOICE website**

### *Fresh produce comparisons*

5.39 NARGA also raised its concerns about fresh food comparisons with CHOICE. At a meeting between CHOICE and other industry participants on 25 February 2009, NARGA claimed that:

CHOICE's initial response was to offer to exclude fresh produce prices from the data collection process. Industry representatives pointed out that fresh produce sales account for about 30 per cent of all sales and any basket of groceries would be unrepresentative if they were not included.<sup>34</sup>

5.40 Woolworths also had concerns about how CHOICE was going to undertake like for like comparisons:

Woolworths has a quality assurance program, particularly around its fresh [products] that is unique. It is one of a very high standard. We know from past experience that when our meat is compared with some of our competitors' meat, our meat comes out more expensive, but that is because they are doing incorrect like-for-like comparisons. They are comparing cow meat with quality rump. We are very sensitive to that. That was another issue that we could not get a resolution on that was satisfactory from CHOICE. They were insisting they were to apply their own standards, and we felt that ignored the standards of our suppliers and that we abide by within our own store. We were not comfortable about a third party applying

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34 NARGA, *Submission 2*, p 3.



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their own standards on information we give them and then publishing it and then taking the liability for that.<sup>35</sup>

5.41 Freshlogic, which had worked with CHOICE to design a system to sort through and compare fresh produce descriptors (but without making an assessment of quality), noted that while meat, dairy and deli items ran mostly on weekly cycles, fruit and vegetables were the most volatile in terms of price and supply. Pursuing the question of fresh fruit comparisons, the committee asked:

**Senator BARNETT**—How do you compare a banana that is four days old and about to go off and a ripe banana or a barely ripe banana?

**Mr Kneebone**—We do not have a solution for how you would do that. You would be relying on the retailer's ability to manage stock and assuming there was some average quality there.

**Senator FISHER**—Surely that undermines the very wisdom of GROCERYchoice for genuine perishables? Standard quality bananas might be four bucks a kilo, but at the end of their life they may be one buck a kilo. A price of one buck a kilo might reflect that the bananas are at the end of their life. On the other hand, a retailer might want to have a loss leader, and thus sells bananas at one buck a kilo when they are at the top of their quality. How would a consumer know that? A consumer might second-guess the website and undermine the purpose of it anyway.

**Mr Kneebone**—I cannot rule out circumstances like that happening. My experience is that it is the exception rather than the norm. If the market price of bananas is \$4, there will only be a small number of retailers selling them at a grossly different price.

**Senator FISHER**—So a cheap price would mean they were second quality or third quality, and the consumer would be expected to deduce that?

**Mr Kneebone**—It could mean that they were clearing the product. It could mean they got the stock rotation on a product wrong. It could mean it was Saturday afternoon and they were not going to open on Sunday. It could be that it was the last 1½ hours of trade and they were simply clearing stock. That happens in the fruit and vegetable area more than anywhere else. Those are the practices in the market, and that is how they are going to recoup some costs from distressed stock.<sup>36</sup>

5.42 Freshlogic did note, however, that the grade of fresh product stocked by major retailers was quite narrow:

If you look at the grades of product that the major retailers take, they are not massive in my opinion. You do get some mixing of that going on—they might buy one or two grades and put them in there. Bear in mind that when they are communicating their offer to consumers—and they do that quite a lot—they do not communicate grade, they communicate product and price.

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35 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 28.

36 *Proof Committee Hansard*, 6 October 2009, p 30.

The consumers are by and large being met with a relatively consistent grade. They would get in trouble if they did that.<sup>37</sup>

5.43 CHOICE rejected the retailers' claims that it is impossible to make valid comparisons of fresh foods:

This is insulting to consumers who are required to make such comparisons everyday of the week. Consumers make comparisons between fresh food items all the time, taking into account whatever information may be available to them at the time which may – or may not (for example, in the case of online shopping or standing orders) – include physical inspection of goods.

There is a big difference between observing that fresh food comparisons present some challenges and at the end of the day it is up to the consumer to place a value on particular qualities that suit him or her (size, variety, grade), and claiming that such comparisons are not 'valid'.<sup>38</sup>

5.44 CHOICE had acknowledged that 'any solution implemented won't satisfy every retailer and will at best be a compromise'. In correspondence with the Australian National Retailers Association (ANRA) during development of its website, CHOICE said it was 'genuinely open to finding a workable solution':

While the consumer will be the ultimate arbiter of shopping basket composition and perception of quality, and will apply the same shopping decision-making as they would in the supermarket, CHOICE proposes the following options:

1. Use size as a differentiator where applicable (e.g. small/medium/large apples) or budget/everyday/premium for meat, as decided by the retailer.

OR

2. List price and other product information provided by retailers and let consumers decide.<sup>39</sup>

5.45 The Australian Chamber of Fruit and Vegetable Industries' submission stated that it would support a price comparison website for fresh produce, contending that such a website would be:

...feasible [and] would be of value to consumers ... Chamber members undertake 'price reporting' and this data is used by ABS and ABARE in ascertaining GVP for fruit and vegetable production.<sup>40</sup>

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37 Mr Martin Kneebone, Freshlogic, *Proof Committee Hansard*, 6 October 2009, p 30.

38 CHOICE, Answers to Questions on Notice (received 22 October 2009), p 2.

39 Australian National Retailers Association (ANRA), Answers to Questions on Notice (received 27 October 2009), Letter from Mr Nick Stace, CEO of CHOICE, to Mrs Margy Osmond, CEO of ANRA, 29 April 2009, pp 3–4.

40 The Australian Chamber of Fruit and Vegetable Industries Ltd, *Submission 8*, p 3.

5.46 A GROCERYchoice website could have been designed in such a way as to allow fresh produce comparisons to a certain extent. For example, to address the problem of use-by dates for meat or deli products, one could specify that products for comparison on the website must not be within 'x' days of their use-by date. While it is true that fresh produce comparison is not as simple as a comparison of identical branded products, it is worth noting that the Consumer Price Index relies on a regular analysis and comparison of fresh food prices. This begs the question: how accurate must the information be before it is better than nothing at all?

5.47 Comparison of fresh food must also be undertaken by supermarkets themselves when determining their own pricing against those of rival chains, so the argument that no valid or useful comparisons could ever be made appears questionable. Woolworths stated that it used 'its own expert staff to assess quality and price in competitive price checking.'<sup>41</sup>

### *ALDI's views*

5.48 ALDI had a more favourable view than the independents about CHOICE's proposed version of the website. As CHOICE had described, ALDI had been cooperative in providing data for the GROCERYchoice initiative:

ALDI's philosophy is one of consumer transparency. As a matter of principle, the company was prepared to cooperate with the ACCC, and subsequently CHOICE, on GROCERYchoice if the website could be established in such a way that would provide accurate and meaningful information to consumers.<sup>42</sup>

5.49 The policy of national pricing, introduced by ALDI in 2008 (with the exception of fresh fruit and vegetables and bakery lines), ensured that ALDI was able to provide centralised pricing data fairly easily. Consumers are able to search for a product or look at product lists on ALDI's own national website.<sup>43</sup> ALDI commented that its situation was different to that of its major retailer competitors, which would have to provide a lot of 'complex and specific information' in terms of price data.<sup>44</sup>

5.50 While ALDI stated in-principle support for a website that is 'able to deliver transparent, robust and dependable information to the consumer', it did express concern about the challenge of like for like comparisons:

One of the challenges that is faced in the creation of such a site is to ensure that we move further away from the technical requirements of just pasting up prices of groceries and move towards assessing the areas of comparative quality grocery pricing. That is the like-for-like principle that is so often

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41 Woolworths, Answers to Questions on Notice (received 11 November 2009), p 4.

42 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 78.

43 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 80.

44 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 82.

discussed. I can give you an example: our Remano basil pesto at \$2.69 a jar is at a 36 per cent discount to the market leading brand. It has 47 per cent basil as opposed to the market leading brand at 27 per cent basil. They are both Australian made. The question is, if you just have prices up, how is the consumer to understand what the offerings are that are available to them?<sup>45</sup>

### *Cost burdens on retailers*

5.51 ANRA argued in its submission that CHOICE's proposal to create a system of centralised real time prices would add significant costs to retailers:

There are some key misconceptions that need to be corrected in any cogent analysis of grocery pricing. Firstly, no retailer has a centralised data system which records in real time the prices of grocery items sold across the chain ... ANRA estimates that compliance with unit pricing has cost the grocery sector approximately \$40m. Provision of real time pricing data would be expected to impose a higher ongoing compliance cost than unit pricing. These compliance costs would need to be passed on to consumers through higher prices.<sup>46</sup>

5.52 ANRA asserted that the pattern of local short-term discounting or sudden shifts in the standard price across retail outlets would render GROCERYchoice inaccurate:

... Shelf prices in individual stores frequently vary from what might be called the standard price. Store managers have the discretion to respond to local competition by marking down products. Store managers may also discount below the standard price to clear perishable products. On a broader scale, a standard price set on one day can be changed across many stores the next day as retailers respond to competition. Thus the standard price is often not the actual shelf price in many stores or may only be valid, for many stores, for a short period.<sup>47</sup>

5.53 Woolworths put forward similar arguments, saying that CHOICE had wrongly assumed that the retailer had:

...a central database on a computer that sits in our head office and can tell us exactly the price of a good as it goes through the register and sells in real time ... We have about six systems that control our pricing in our business and they do not necessarily talk to one another.<sup>48</sup>

5.54 The data feed that would have been required did 'not exist in the IT form and it was going to cost millions of dollars to get that up and running'. Senator Joyce clarified with Woolworths that to build such a system to link up price databases, the

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45 Mr Tindal, ALDI, *Proof Committee Hansard*, 6 October 2009, p 86.

46 ANRA, *Submission 11*, p 5.

47 ANRA, *Submission 11*, p 5.

48 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 18.

initial quote was for 'about \$500 000'.<sup>49</sup> Even if such a system were built, Woolworths claimed it would 'have no need for it from a business point of view' and the only reason for it would be to support CHOICE's website.<sup>50</sup>

5.55 Associate Professor Frank Zumbo's view was that the argument advanced by the major supermarkets on cost burdens is overstated:

The reality is that that information changes in real time on the company's computer system. The fact that you have a checkout means that that information has to be up to date at the checkout. That information is available in real time at the checkout. That information at the checkout would be uploaded to the head office. How often during the day? I cannot tell you. That is probably commercial-in-confidence information. But I can tell you that it is uploaded and it is probably uploaded very regularly because it helps with stock management. You know what is being scanned out, so that helps you manage your stock purchases. You know what you are selling. So you manage your stock by carefully following the information flows. When the stock comes in, it is loaded in. When the price is put on to the system, when the product is scanned out—all that information is very powerful for the supermarket chains. They will drill down into that information on a regular basis to work out the profitability of individual products. So the information is there. It is uploaded. It is just a matter of providing a public interface between the information that is stored on the supermarket computer systems and the public.<sup>51</sup>

5.56 However, he did acknowledge that smaller operators were not equipped with the same sophisticated IT systems as the bigger supermarkets and would not be in the same position to supply information easily.<sup>52</sup> In its advice to the Minister on possible options for a GROCERYchoice website model, the ACCC had also noted that it was likely there would be a significant burden of data provision for smaller supermarkets, but that 'Coles and Woolworths would likely be able to comply readily with such a data request'.<sup>53</sup>

5.57 Coles stated at a public hearing that it had 'partial price data centrally on a computer' that was monitored regularly but that it did not monitor real-time price data across all stores.<sup>54</sup>

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49 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 18.

50 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 27.

51 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 12.

52 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 8.

53 ACCC, Answers to Questions on Notice (received 28 October 2009), 'Memorandum: ACCC Periodic Survey of Grocery Prices', advice from Mr Graeme Samuel to the Hon Chris Bowen MP, 22 February 2008, p 6.

54 Mr Robert Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 13.

5.58 In January 2000, Synovate Aztec, a scan data service provider, won the contract to act on behalf of Woolworths supermarkets in the sale of their (raw) scan data. Aztec claims that:

The services developed as a result of this relationship have revolutionised the use of grocery scan data by retailers and suppliers alike.<sup>55</sup>

5.59 According to Synovate Aztec's website, access to every single transaction that occurs within all Woolworths supermarkets is available through their BasketView service. Customers are able to purchase: state and store level raw data via the web; regional data or store clusters; and control/test store-level analysis.

5.60 BasketView is available to subscribers 'in the shortest possible time frame after the transaction occurs'. Reports derived from the data include:

- penetration/average weight of purchase
- promotional analysis
- promotional analysis by day
- common basket items
- time of day, day of week
- cross promotional impact analysis.<sup>56</sup>

5.61 The wealth of data quickly accessible through Aztec point of sale data seems to contradict the claim put forward by supermarkets that they were unable to provide accurate and timely product pricing information to CHOICE for the GROCERYchoice website. CHOICE claimed it had requested the use of Aztec point of sale data from Coles and Woolworths but the request was declined.<sup>57</sup>

5.62 The committee asked the supermarkets why they wouldn't be able to provide the same pricing data that is available at the point of sale. Their response was:

The only data that Aztec receives is dollars received and units of goods sold. From that data, an average price can be calculated, but this average price will not be the actual shelf price paid by a customer. The average price would be an amalgamation of all the prices that may have applied in a day or a week, including outliers such as clearance prices, scanning errors, etc.

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55 Synovate Aztec, 'Data Agency Services', <http://www.aztec.com.au/DataAgencyServices.html> (accessed 20 October 2009).

56 Synovate Aztec, 'Services', <http://www.aztec.com.au/Services.html> (accessed 20 October 2009).

57 CHOICE, *Submission 6*, pp 10–11.

We also note that third party information providers such as Aztec and Nielsen charge for access to their data and reports on the basis that they have invested in the collection and aggregation of the data.<sup>58</sup>

The data provided to third party contractors under legally binding commercial agreements is partial data that is not suitable for on-shelf price comparisons because of local pricing differences.<sup>59</sup>

5.63 The submission from Associate Professor Peter Earl of the School of Economics at the University of Queensland suggested that the lack of uniform pricing across chains was a reason why supermarkets would see provision of real-time price data as onerous. He argued that:

Such price differences are essentially ploys by the stores to maximise returns by price discrimination and the result quite often can be that those who are poor, either in terms of access to transport or time to shop, end up paying more than those who are better endowed with resources.<sup>60</sup>

5.64 He believed that there was a 'strong case' for introducing regulations that require stores to have uniform prices within each urban area, noting that 'if ALDI can do it, their major rivals can, too'.<sup>61</sup> (The Senate Economics Legislation Committee's current inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill 2009 is relevant here).

5.65 NARGA disputed CHOICE's claim that the large supermarket chains put pressure on the Government to shut down the website, citing the widespread concern across the grocery retail sector about the feasibility of CHOICE's proposal and its potential cost burdens:

With the possible exception of ALDI, every supermarket chain and the independent sector were united in the view that the task set could not be achieved without significant cost to the industry and would have no identifiable benefit to customers.

... In the case of the independent grocery sector, a very large burden would have fallen upon independent family businesses.

... The average independent grocery business handles about 3000 price changes a week and notification of prices changes on a weekly basis would represent a significant additional workload and cost across 4500 independent stores as a group. These stores are not networked and would have to report price changes store by store. And in any case, the computerised price files used in the independent sector could not isolate shelf prices from other commercial-in-confidence data. The data are not

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58 Woolworths, Answers to Questions on Notice (received 11 November 2009), p 4.

59 Coles, Answers to Questions on Notice (received 12 November 2009), p 2.

60 Associate Professor Peter Earl, *Submission 15*, p 2.

61 Associate Professor Earl, *Submission 15*, p 2.

available in the form CHOICE requested and would not be likely to become available in that form.<sup>62</sup>

5.66 According to the Western Australian Independent Grocers Association:

There was not one retailer who held the information in a form that would be able to be transferred to CHOICE and not one who was willing to do it if the information was to be made available at a cost to the individual owner.

As was pointed out to CHOICE earlier, all independent stores in WA run their own point of sale system that primarily complies with the collection of GST and as such has costs and sells in the file for the calculation of GST and the running of weekly specials which are the life blood of the grocery retail industry. All of this information is of course highly confidential and no business owner would want to share this with competitors or for that matter consumers. Also none of the systems are connected to the internet for data transfer as each system picks up required data on a once a week basis by traditional dial up modem.

Each system uses different product numbers to identify items, and in some cases different descriptions, so there is not even a common thread to the information available in each system.

Simply the data requested by CHOICE was not available from independents in WA who make up in excess of 30% of the market. So to proceed with such a website and think that it would contribute anything was in our opinion not realistic.<sup>63</sup>

5.67 Tasmanian Independent Retailers said that it would have been burdensome for independent retailers to have provided CHOICE with the information that had been requested, and explained the flexible pricing policy at independent retailers:

... ultimately it is up to the independent retailer to determine at what price point they want to sell a product. In general terms the majority of independent retailers would operate off our host price file. It is generally very competitive in reference to Woolworths and Coles because they are the only ones we have for comparison in Tasmania.<sup>64</sup>

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62 NARGA, *Submission 2*, pp 8–9 (see also Master Grocers Australia, *Submission 13*, p 4).

63 WA Independent Grocers Association, *Submission 3*, p 3.

64 Mr Hinchcliffe, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, p 97.



## Chapter 6

### Legal issues and trade practices concerns

6.1 The committee heard evidence during the inquiry relating to legal concerns about the GROCERYchoice website, including the potential for breaches of the *Trade Practices Act 1974* (TPA).

6.2 During the February 2009 meeting between CHOICE and industry stakeholders, some industry representatives expressed concern about the potential for unintentional breaches of the TPA, noting that 'the very discussion of pricing issues as a group was unwise'.<sup>1</sup>

6.3 CHOICE's submission stated that it sought legal counsel to address the concerns regarding the potential for, or appearance of, price collusion. CHOICE was advised that any potential breach of the TPA 'would be mitigated if discussions with supermarkets at Industry Forums concentrated on prices, not pricing'.<sup>2</sup> CHOICE invited a legal representative to attend industry meetings to allay such concerns.

#### **Should CHOICE have been allowed to take on GROCERYchoice?**

6.4 CHOICE's commercial activities were also of concern to the National Association of Retail Grocers of Australia (NARGA), raising the question of a potential conflict of interest:

Although CHOICE, as the self-appointed representative of consumers, purports to represent their interests, its consumer advocacy activities might also be seen as a public relations program to promote the sale of its products.

In seeking to acquire control of the GROCERYchoice website, CHOICE could be seen as providing a commercial service to government for a fee, potentially being in conflict with its purported role as an independent consumer advocacy organisation.<sup>3</sup>

6.5 Unease about such risks played out within the organisation itself, with the resignation of a CHOICE board member, Mr Robin Brown, who disagreed with the board's decision to take on GROCERYchoice:

My view is that this was such a momentous decision for CHOICE, quite unprecedented in its 50-year history; a large amount of government money and a matter that was clearly quite political. I thought that there was a significant risk to CHOICE's reputation as an independent commentator on

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1 National Association of Retail Grocers of Australia (NARGA), *Submission 2*, p 9.

2 CHOICE, *Submission 6*, p 14.

3 NARGA, *Submission 2*, pp 9–10.

public policy, on the way markets work and so on; and a risk to its bipartisan approach to politics ... But this particular process was just not quite right and I think it was an error to proceed in quite the way it did and I think there ultimately should have been some kind of process that involved all the members of CHOICE so that everyone involved could be sure that they were getting into something that was appropriate. If that had happened then I guess my resignation mightn't have happened.<sup>4</sup>

6.6 Giving evidence to the inquiry, CHOICE responded that 'the vast majority of board members' were fully supportive of the move and that no conflict of interest was perceived:

We are a fundamentally independent organisation ... Our only interest is that of the consumer. We believe that this site would radically transform the grocery sector. Therefore, we had a duty to take it on. I think it would have been a conflict had we not taken it on.<sup>5</sup>

6.7 CHOICE's submission responded to the concern that the website might have been used as a promotional tool:

Under the terms of the contract, CHOICE had the discretion to brand the website as a CHOICE product and to include extra information in keeping with CHOICE's charter as a well-known and respected social enterprise. CHOICE does not accept advertising in any of its publications and did not intend to do so in GROCERYchoice.<sup>6</sup>

### **Price accuracy and 'bait advertising'**

6.8 The inquiry heard from retailers that the potential for breaches of the TPA was a serious concern under CHOICE's proposed model. The Australian National Retailers Association (ANRA) argued that CHOICE had not sufficiently addressed the question of who would bear the legal liability were they to participate in providing data for the website.

6.9 ANRA cited section 52 of the TPA, which relates to misleading and deceptive conduct, and argued that under the new version of the GROCERYchoice website, pricing information provided in good faith that was later found to be inaccurate could represent a breach of the law:

... it could be deemed to be a technical form of misleading and deceptive conduct if you engage in a process of advertising a product and then you cannot subsequently have any real attempt to make that product available.

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4 'Former CHOICE director breaks silence', The World Today, ABC Radio, 27 November 2008, <http://www.abc.net.au/worldtoday/content/2008/s2431375.htm> (accessed 11 September 2009).

5 Mr Nick Stace, CHOICE, *Proof Committee Hansard*, 18 September 2009, p 43.

6 CHOICE, *Submission 6*, p 16.

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That is the sense in which the concern was raised. In other words, only in terms of the accuracy of the material presented on the website.<sup>7</sup>

6.10 In addition, ANRA also raised concerns about section 56 of the TPA and the potential for 'bait advertising':

Another legal concern related to the potential risk of breaching the Trade Practices Act by providing a “discounted price” for discontinued items or items in limited supply. The Australian Competition and Consumer Commission (ACCC) insists retailers who advertise products at a certain price must be able to offer to supply those goods at that discounted price for a period that is reasonable, and in quantities that are reasonable. The proposed scheme did not provide sufficient assurance that there it would have in no way risk creating the unintended consequence of a technical breach of breach of s.56 of the Trade Practices Act.<sup>8</sup>

6.11 Tasmanian Independent Retailers echoed ANRA's concerns in relation to sections 52 and 56, referring to recent Federal Court decisions and ACCC settlements in relation to bait advertising and associated activities.<sup>9</sup>

6.12 CHOICE argued in its submission that it did address the issue of data integrity:

CHOICE also sought to address risks in publishing information in good faith which is found to be inaccurate. The legal position confirmed that prices on the GROCERYchoice website are prices valid at a particular point in time and subject to local variation ...<sup>10</sup>

6.13 During consultation with industry, CHOICE sought to alleviate concerns about the accuracy of prices to be displayed on the website:

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

To further mitigate risks of inaccurate prices CHOICE undertook to:

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7 Dr Brendan Long, Australian National Retailers Association (ANRA), *Proof Committee Hansard*, 6 October 2009, p 47.

8 ANRA, *Submission 11*, p 6.

9 Professor Ian Duncan, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, p 98.

10 CHOICE, *Submission 6*, p 14.

- draft a Memorandum of Understanding [MOU] defining the retailer's responsibility to provide accurate information and CHOICE's responsibility to accurately publish that information;
- ensure data integrity by applying technical and manual Quality Assurance processes to information supplied, and
- apply prominent caveats to the website.<sup>11</sup>

6.14 The retailers' response to the MOU has been discussed in chapter 4.

6.15 CHOICE also undertook to:

- republish the special prices as they appear in retailers' catalogues and re-iterate the same disclaimers as used by retailers (eg available while stocks last);
- facilitate consumer reporting of advertised products which are not available in reasonable quantities or for a reasonable time; and
- make clear to consumers the possible variation between price reported and actual shelf price.<sup>12</sup>

6.16 Given that Woolworths has publicly stated that it is moving towards a system of uniform pricing on packaged groceries, Senator Barnett asked what the retailer's objection would be to providing such data for a GROCERYchoice website:

You could set a national price for baked beans of \$2 but once you put that can of baked beans in every local market there are a lot of factors that affect the price. A store manager has discretion to change that price down to be able to meet local competition ... You have overstocks and different things that happen during the course of the week. Food retailing is a complicated science.<sup>13</sup>

6.17 It is notable that the advertising catalogues currently circulated by grocery retailers already contain caveats and disclaimers about product availability at certain times and locations. The retailers' objection to real-time pricing data being out of date once it is on a website appears inconsistent given that arguably 'out of date' information is already available through these catalogues. Woolworths stated outright that 'we put our brochures out over Sunday night and Monday morning, and they are basically out of date by Monday afternoon' as local store managers price check their competition and adjust prices accordingly.<sup>14</sup>

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11 CHOICE, *Submission 6*, p 15.

12 CHOICE, *Submission 6*, p 15.

13 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 24.

14 Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 26.

## ANRA's role in the GROCERYchoice negotiations

6.18 CHOICE also raised concerns about ANRA stepping in to conduct negotiations on behalf of its supermarket members (see chapter 4). CHOICE recommended that the influence of ANRA be closely examined, suggesting that 'their work undermined a market development which may have increased competition'<sup>15</sup>:

Whether or not ANRA's behaviour was in breach of the *Trade Practices Act*, it had the effect of advantaging sellers (supermarkets) at the expense of buyers (consumers). The Committee should consider the power and influence of ANRA as a barrier to the future competitiveness of the sector as much as their role in the demise of GROCERYchoice.<sup>16</sup>

6.19 Associate Professor Frank Zumbo was also concerned by ANRA's behaviour during the GROCERYchoice negotiations, suggesting the potential for breaches of section 45 of the TPA.

6.20 He argued firstly that, assuming that there is a market for the supply of information on grocery prices, the effect of the supermarkets—through ANRA—refusing to supply price information to CHOICE could be seen as substantially lessening competition for the provision of price information:

What is important to ascertain is what actual discussions occurred between ANRA, Coles, Woolworths and Franklins. Were they collective negotiations? Were they individual negotiations? What is the effect of those negotiations?<sup>17</sup>

6.21 He also highlighted the commercial nature of the negotiations that ANRA was undertaking:

If an industry association is making representations to the government or government agencies, that is one thing; but, if an industry association then undertakes bargaining negotiations, makes representations about what could be a commercial proposition, what could be the provision of information, what could be the refusal for providing information, then you are in very dangerous ground, a very dangerous area.<sup>18</sup>

6.22 Secondly, Associate Professor Zumbo drew attention to subsection 45(4D) which relates to exclusionary provisions:

Exclusionary provisions are defined as a provision of a contract, arrangement or understanding whereby:

(b) the provision has the purpose of preventing, restricting or limiting:

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15 CHOICE, *Submission 6*, p 20.

16 CHOICE, *Submission 6*, p 13.

17 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 6 October 2009, p 4.

18 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 10.

(i) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons; or

(ii) the supply of goods or services to, or the acquisition of goods or services from, particular persons or classes of persons in particular circumstances or on particular conditions;

You would need two or more parties that are competitive with one another. Certainly Coles, Woolworths and Franklins were competitive with one another, so the question is if there were discussions between Coles, Woolworths and Franklins. If you have two or more parties that are competitive, that is enough to capture all the parties, so in that case ANRA itself could be party to a possible breach of section 4D and, in turn, section 45.<sup>19</sup>

6.23 When Senator Joyce suggested to the ACCC that the use of ANRA by Coles and Woolworths could be seen 'as two major organisations working very closely for a common purpose', Mr Brian Cassidy, Chief Executive Officer, responded:

I do not know. Maybe it is two major organisations using their representative body ... That is the way representative bodies work.<sup>20</sup>

6.24 Associate Professor Zumbo commented:

These are very serious concerns, because it is an age-old problem under the Trade Practices Act about what industry associations can and cannot do. If they engage in collective bargaining, they should lodge a notification with the ACCC. So a further question is: has ANRA lodged a collective bargaining notification with the ACCC? If not, there would be serious questions as to whether ANRA had entered into agreement with Coles, Woolworths and Franklins that Coles, Woolworths and Franklins would refrain from supplying price information to CHOICE or they would only supply price information on conditions determined by ANRA and/or Coles, Woolworths or Franklins.<sup>21</sup>

6.25 ANRA rejected the allegation that its role in negotiations on behalf of its members was in any way a breach of the TPA:

The question turns in section 4D of the definition section of the *Trade Practices Act*, which essentially says that exclusionary dealing relates to when two competitors come together in a market and so cooperate, come to an understanding or contract or agreement that would be seen to form an intention to restrict competition. It is related very much to the market in which the players operate. In this sector, the competition is between grocery retail. That is where the members participate. Certainly what the competitors are not competing over is the provision of information technology products and consultation services like website design and so forth. It is quite clear that there would be no breach whatsoever, in our

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19 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 4.

20 Mr Brian Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 29.

21 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 4.

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view, in relation to exclusionary dealing provisions, because they relate to a completely different form of competition and not competition in the market in which our members compete.<sup>22</sup>

6.26 ANRA stated that its role was to provide an 'efficient voice' for its members and that it was simply acting as a 'good broker' to bring some focus to discussions about the website.<sup>23</sup>

6.27 Senator Xenophon questioned ANRA further about its role:

**Senator XENOPHON**—Mrs Osmond, you have said that ANRA has been 'the good broker' in relation to this and that you are an efficient voice for your members. I do not doubt that. But you say that that relates to policy and legislative issues. That is a fair statement. But isn't this case here, in relation to the GROCERYchoice website, going beyond policy and legislation? Because of the very nature of what the website was attempting to do, doesn't it go beyond that into the actual commercial operations of those members?

**Mrs Osmond**—It is no different from, for example, us having a conversation on behalf of our members about the realities of how something like unit pricing will operate, which we have done also ... We were attempting to bring a single, focused voice to discussing the practicalities of how this would go forward, and that is part of what we do.

**Senator XENOPHON**—Isn't there a distinction, though, between a debate about unit pricing, where each retailer sets its own prices, and the issue here, which is what various stores will be charging, and for that information to be disseminated to consumers? Unit pricing is a policy issue. Isn't it a little different, though, in terms of what GROCERYchoice was attempting to achieve?

**Mrs Osmond**—No, I do not believe so ...

... **Senator XENOPHON**—But doesn't the issue of implementation involve commercial decisions being made by the individual retailers as to how it will work in a practical sense? There is a distinction between the two, isn't there?

**Mrs Osmond**—It was our job to amplify the concerns of our members, and that is what we did. As I mentioned earlier, those individual members will have individual views and take their own individual actions in terms of either a competitive or a commercial matter.

**Senator XENOPHON**—Sure. But they did not actually do that here, because they chose you—Coles, Woolworths and Franklins chose ANRA to represent their concerns to government.

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22 Dr Long, ANRA, *Proof Committee Hansard*, 6 October 2009, p 47.

23 Mrs Margy Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 48.

**Mrs Osmond**—They had had extensive discussions up to that point with CHOICE and continue to have some discussions past that point. We were asked to become part of the discussion to bring some clarity.<sup>24</sup>

### **Committee view**

6.28 The committee is concerned about the role played by the Australian National Retailers Association during negotiations with CHOICE about the GROCERYchoice website and believes the matter warrants further investigation.

### **Recommendation 7**

6.29 The committee recommends that the Australian Competition and Consumer Commission investigate any potential breaches of the *Trade Practices Act 1974* in relation to the role played by the Australian National Retailers Association in negotiations with CHOICE over the GROCERYchoice website.



# Chapter 7

## Methods for comparison of grocery prices

7.1 There are a number of grocery price comparison websites already in operation. In Australia, a website called BestPriceDirectory.com.au describes itself as:

... a grocery stores and supermarket comparison site that has been monitoring grocery prices for over four years. We find and compare grocery prices from grocery stores and supermarkets in Australia and from these grocery prices a Product Value Index or 'PVI' is calculated based on the individual product price history, as well as a price comparison with similar grocery products, to reveal which product brands are not only cheap, but the best value for money.<sup>1</sup>

7.2 Groceryguide.com.au compares the weekly catalogue specials of Coles and Woolworths (only for the Sydney area), enabling users to create their own customised shopping lists.<sup>2</sup> Lasoo.com.au also allows users to browse the specials catalogues of participating retailers, including grocery stores, acting as a 'pre-shop' search engine.<sup>3</sup>

7.3 The UK grocery comparison website, mysupermarket.co.uk, has been in operation since October 2006. Privately funded and owned by a group of venture capital investors, it allows consumers to select items that are available from four of the UK's leading supermarket chains: Tesco, Asda, Sainsbury's and Ocado. The website compares the entire price of the chosen 'trolley' of items between the four supermarkets, and includes a 'swap and save' option, where cheaper alternatives are presented. The completed shopping list can then be sent to the retailer's own website to place an online order, if desired. The site claims that it can save users up to 20 per cent on their shopping bills.<sup>4</sup>

7.4 During the course of the inquiry, the committee was cautioned against comparing the Australian GROCERYchoice initiative to the UK website:

Across the world, there is no example we know of that succeeds in delivering the stated outcomes of GROCERYchoice—and certainly not mysupermarket.co.uk ... This site is a comparison site of online shopping offered by the four major supermarkets in the UK—note: not all the supermarket chains. Also, the prices displayed are not the prices displayed in local shops, and currently less than three per cent of UK shoppers have visited the site. Indeed, it just scraped into the top 1,000 most visited sites

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1 <http://grocery.bestpricedirectory.com.au/>

2 <http://groceryguide.com.au>

3 <http://www.lasoo.com.au/>

4 <http://www.mysupermarket.co.uk/>

in the UK. The site carries, at most, 40 per cent of the product range of a normal supermarket and it is visited predominantly by those aged between 35 and 45, who have a graduate level of education and are unlikely to have children. The site seems to appeal to full-time professionals rather than working-class families—not at all what GROCERYchoice was about.<sup>5</sup>

7.5 The Italian Government has set up a short message service (SMS) text system, with the help of consumer associations, whereby shoppers can check the average price of different foods in northern, central and southern Italy. Consumers type the name of the food product they want to price check into their mobile phones and send a free message to a dedicated number. The consumer will then receive an SMS stating the prices for that food item in different areas of the country.<sup>6</sup>

7.6 Ireland's National Consumer Agency (NCA) also announced in July 2009 that it intends to set up a grocery price comparison website, where real-time information is provided by retailers to help consumers make accurate comparisons on a basket of goods. The agency has called on all grocery retailers to cooperate. *The Irish Times* reported that the NCA:

... had examined the situation elsewhere, including the UK and Italy, where grocery prices are available on a real-time basis, and believed the provision of more frequent information than NCA has provided to date [six-monthly surveys] would be of value to consumers. It said if retailers and the agency worked together to provide clear information to consumers, this would send a very positive message.<sup>7</sup>

### Participatory price sensing

7.7 'Participatory sensing' is a recent technological phenomenon, which uses mobile phone and web-based technologies to enable the collection and sharing of local knowledge for applications in areas such as public health, urban planning, and natural resource management.<sup>8</sup>

7.8 Professor Chun Tung Chou and Dr Salil Kanhere of the School of Computer Science and Engineering at the University of New South Wales are working on participatory mobile camera-phone sensing systems to track prices in the petrol and grocery markets. They argue:

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5 Mr Alan Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 60.

6 Alka Marwaha, 'Italians dial up best food price', 27 July 2008, <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/2/hi/business/7525175.stm> (accessed 11 September 2009).

7 Conor Pope, 'Consumer body wants food prices listed online', 14 July 2009, <http://www.irishtimes.com/newspaper/ireland/2009/0714/1224250638376.html> (accessed 11 September 2009).

8 Linda Deng & Landon P Cox, 'LiveCompare: Grocery Bargain Hunting through Participatory Sensing', *HotMobile 2009*, 23-24 February 2009, p 2, [http://www.cs.duke.edu/~lpcox/deng\\_hotmobile09\\_camera.pdf](http://www.cs.duke.edu/~lpcox/deng_hotmobile09_camera.pdf) (accessed 24 September 2009).

There are compelling reasons for creating such a clearinghouse of up-to-date product pricing information, even for offline markets of brick and mortar stores. It could create arbitrage opportunities, wherein an enterprising person can leverage the price difference for profit. The availability of real-time price dispersion information can empower consumers to more effectively negotiate prices.

... Numerous consumer communities are already tracking price dispersion manually. A group of Hong Kong housewives divide themselves into teams to manually copy prices of selected staple grocery items in major supermarkets and local grocery stores, and upload the prices to a website, prompting a major Chinese newspaper to advertise weekly grocery prices across different stores on its website.<sup>9</sup>

#### 7.9 Giving evidence to the inquiry, Professor Chou explained:

For online markets there are a number of price comparison websites. For offline markets we know there is an application called ShopSavvy that has won the Google application challenge. This application enables you to scan a barcode with a mobile phone. Based on this barcode, it will tell you how much the item costs in the online market, and it may also make a few suggestions and tell you how much the item will cost in a number of local stores. There are a number of teams of people developing applications in order for people to get a better deal by using their mobile phone to search for better deals.<sup>10</sup>

#### 7.10 Professor Chou and Dr Kanhere have developed the *MobiShop* system which implements Optical Character Recognition on a mobile phone to extract pricing information from an image of a grocery receipt. Professor Chou said:

We want to make the data collection process both automatic and transparent so that there is as little human involvement as possible. This means that people can go about their own daily routines and still be able to voluntarily collect and share information. Ultimately we want to turn participatory sensing to low-cost and less labour-intensive methods to collect information for the public.<sup>11</sup>

#### 7.11 He also pointed out that participatory price sensing technology was still in its early stages and noted some of the ongoing challenges and risks, such as malicious users infiltrating the system with false data, and the difficulties of comparing fresh produce accurately.

#### 7.12 Treasury and the Australian Competition and Consumer Commission (ACCC) advised they had not undertaken any detailed analysis of participatory price sensing

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9 Nirupama Bulusu, Chun Tung Chou, Salil Kanhere, et al, 'Participatory Sensing in Commerce: Using Mobile Camera Phones to Track Market Price Dispersion', 2008, <http://web.cecs.pdx.edu/~nbulusu/papers/urbansense08.pdf> (accessed 24 September 2009).

10 Professor Chun Tung Chou, *Proof Committee Hansard*, 6 October 2009, p 106.

11 Professor Chou, *Proof Committee Hansard*, 6 October 2009, p 102.

and emerging technologies.<sup>12</sup> However, the ACCC commented on consumer demand for price transparency in the grocery sector:

... as a general proposition: we think that transparency is important, because consumers can best exercise their right of choice if they are aware of what is on offer.

... When you look at the retail grocery sector on a spectrum, it is probably towards the end of the spectrum – where there is a lot of information made available to the general public through the press, through mailbox drops and the like. So it is one where there is already a good deal of information available.<sup>13</sup>

7.13 Regarding future trends in online pricing information, Woolworths commented that:

...companies like Tesco, and Sobeys and Loblaw in Canada [are] creating quite innovative websites that really allow you to dig down and understand where they sit on that value spectrum ... I think what you will see in the Australian marketplace is more retailers pushing online. It will create a second market of aggregators that will go in, pull that information down and tell you what I think the government was trying to do in the first place with the GROCERYchoice website.<sup>14</sup>

7.14 Woolworths' current online shopping website does not charge the same prices as its bricks-and-mortar stores:

It operates as a separate entity and has a complete and separate cost structure and retail price structure. The internet 'shop' requires a Woolworths staff member to pick desired products from a Woolworths store and then deliver them to the customer. There is no relationship between prices charged for delivered goods ordered over the internet and those in the closest store to the customer.<sup>15</sup>

7.15 Associate Professor Peter Earl suggested that more online grocery pricing information could lead to new opportunities and competitive developments:

By using two web-browser windows, it is perfectly possible to compare the current costs of shopping [online] at Coles and Woolworths and work out which item to buy from which store. The problem, of course, is that, as yet, one cannot extend the comparison to rival chains such as ALDI and IGA in one's area, who might actually be offering the products for less but do not offer online shopping. Neither can one be sure that online prices are the

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12 Mr David Martine, Treasury, *Proof Committee Hansard*, 18 September 2009, p 14; Mr Mark Pearson, Australian Competition and Consumer Commission (ACCC), *Proof Committee Hansard*, 28 October 2009, p 6.

13 Mr Brian Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 35.

14 Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 22.

15 Woolworths, Answers to Questions on Notice (received 11 November 2009), p 5.

same as prices in the stores – and this is significant since economists would expect differences between online and in-store prices as part of such firms' price discrimination strategies.

If online grocery shopping becomes so common that all supermarket chains offer this service, it will become possible to compare like with like and, if this encourages greater entry by new chains (since access to prime mall sites will not be such a concern ...), the competitive situation that consumers will face will change drastically. Although such an environment will make it easier for consumers to shop rationally than they can right now even if there is no comparison website for groceries, such a website would be more likely to emerge if the number of players in the market increased greatly.<sup>16</sup>



# Chapter 8

## The value and effectiveness of GROCERYchoice

### Relevance to consumers

8.1 The committee heard a range of views about the extent to which the version of the GROCERYchoice website run by the Australian Competition and Consumer Commission (ACCC) was relevant to consumers (see chapter 2).

8.2 Despite being critical of the ACCC's website, Associate Professor Frank Zumbo argued that the CHOICE version would have been worth pursuing:

Based on what I know—as I said, because the site was never operational we could never be 100 per cent sure—and from my understanding of the theory behind it, yes, it would have been useful to consumers because it would have at least given them weekly specials which the ACCC did not. I think having the weekly specials all put on the one website is very helpful to consumers. And that is the very least that CHOICE could have done to provide meaningful data, because that weekly data is available. You can get a flyer for each of the four or five major supermarket chains, you can download that data onto a website and then you can compare chains. That would have been enormously useful just on that basis. If the website did nothing other than just provide a comparison of weekly specials then we would have moved forward significantly.<sup>1</sup>

8.3 Associate Professor Peter Earl described his vision of a grocery comparison website ideally designed for consumers, with data coming directly from the stores:

Such a website needs to be designed so that consumers can store their own shopping list 'favourites' rather than hunting for them each time on hierarchical menus. Consumers should be allowed to specify their favourites in terms of particular branded products (e.g. Heinz vegetarian baked beans, 500g) or by category. It needs to enable them to mark which of these favourites they wish to buy on the particular shopping trip, and to add it to non-standard items for that particular trip. It should also allow them to specify a set of preferred shopping centres. Once a consumer has entered their requirements, the website should enable them to download two kinds of output: (a) which supermarket is cheapest if they wish to cut their shopping costs by doing a one-stop shop, and what is the cheapest way of getting the items on their shopping list within their stated geographical area (they should be presented with a list of what to buy at which store).<sup>2</sup>

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1 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 6 October 2009, pp 11–2.

2 Associate Professor Peter Earl, *Submission 15*, p 2.

8.4 However, Informed Sources asserted that even if a website providing real-time data could be developed, it would still be of little relevance to consumers, as price is not the primary driver of consumer shopping behaviour:

**Mr Cadd**— ... People do not shop for groceries on price alone. They shop because it is convenient. They shop because there is a particular brand that is there. There is a belief that people want to sit and spend hours deciding what products they are going to buy. It does not happen.

**Senator XENOPHON**—Although to be fair, if you had an effective website, those that do not have access to the net would probably hear about it through media reports—radio news or television news—saying which was the cheapest for a particular week.

**Mr Cadd**—Let us workshop that for a second. Let us get to the point where senators and also some of the witnesses prior to us said, ‘What about if we had a continuous update of prices onto this website?’ Then you would have a situation where prices would be being changed on an hourly basis by bigger players. How can anybody then determine comparative baskets? How can they then determine what they are comparing against this one et cetera?<sup>3</sup>

As far as a consumer tool is concerned, Mrs Shopper is not going to do it. She is going to walk away from it because it is not meaningful until she can pick it up, look at it and say, ‘Yes, I’m prepared to serve that.’

The shopping experience for the large majority of people who are in grocery starts when they ask what they are going to have for dinner tonight. If I am cooking shepherd’s pie, I want minced steak that is going to be a certain quality because I am trying to achieve something. I do not want fatty meat et cetera. Somewhere down the track people worry about the price.<sup>4</sup>

8.5 Informed Sources suggested that it is 'macro-level' information, not real-time data on individual prices, that is most useful to consumers:

We know already that Coles and Woolworths are going head-to-head and there is a hair’s breadth in it. This is not me saying this because I am a market researcher; consumers know this. They know that ALDI is cheaper but has a limited, more restricted range of products and that they are typically ALDI branded products. That is great. You can go there and save money. You can also go to the IGA and it is probably a little bit more expensive, but, hell, he is just around the corner, he is a friendly guy and I love to be able to walk there and pick up three things on the way home from work. This everybody knows.<sup>5</sup>

8.6 While consumers may already have a 'general' feeling about grocery prices through retailers' advertising of weekly specials, they do not currently know the extent

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3 *Proof Committee Hansard*, 6 October 2009, p 73.

4 Mr Alan Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, pp 75–6.

5 Mr Cadd, Informed Sources, *Proof Committee Hansard*, 6 October 2009, p 74.



to which they are paying for convenience in terms of location or one-stop shopping. As Associate Professor Earl argues:

The persistence of [price] dispersions may also be facilitated if firms introduce noise into price data by periodically having 'sales', making it harder for consumers to work out whether on average they are more expensive than others or what the probability of getting a particular kind of deal from them will be ....

Much the same issue arises where supermarkets compete in some cases by offering 'everyday low prices' and in other cases by offering 'specials': it takes a lot of effort to discover where the cheapest supplier of one's intended trolley-load of goods is to be found ... Given these search costs, consumers may opt to stay with suppliers whose prices and layouts they find acceptable, until their preferred store lets them down for some reason (e.g. persistent failure to stock particular items). They get the benefits of one-stop shopping but without really knowing whether the claims of rivals about better deals are true or not. It may take the entry of a new supermarket chain to signal that incumbents have been using the difficulty of comparing prices as a means to generate supernormal profits.<sup>6</sup>

8.7 A well-designed GROCERYchoice website therefore could have addressed to some extent the information asymmetry between retailers and consumers on grocery prices.

8.8 Associate Professor Earl's submission to this inquiry included an article on 'The Competitive Process in the Age of the Internet' in which he argued that if supermarkets posted all of their own prices online, a third-party price comparison website, which would retrieve data from supermarkets' websites, could allow consumers to shop more efficiently for groceries:

Prior to the Internet, this task inherently presented a major problem: it was difficult to judge which supermarket offered the best value for a one-stop shop, or which items to buy in which supermarkets if one were prepared to trade the financial savings from this against higher transaction costs. The problem was essentially caused by a conjunction of bounded rationality (limited memory capacity confronting upwards of 10,000 different product lines in a typical large supermarket), aggravated by continually shifting relative prices due to seasonal fluctuations and supermarkets' changing strategies over which items they would put 'on special' each week. Things would be very different if supermarkets started posting all of their prices (for online customers) on their websites and enabled shoppers to bookmark their favourite products separately from the thousands of lines stocked and thereby to read off the total cost of the week's trolley load from each store. One would imagine that these websites could be readily integrated with the

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6 Associate Professor Earl, Submission to Productivity Commission Review of Australia's Consumer Policy Framework, 2008, pp 2–3, [http://www.pc.gov.au/data/assets/pdf\\_file/0008/88946/sub024.pdf](http://www.pc.gov.au/data/assets/pdf_file/0008/88946/sub024.pdf) (accessed 7 October 2009).

stores' scanner information systems to reduce their costs of updating price information. Once sites like this existed, a third-party site could be set up to mine their information and then provide instant guidance on how to get the cheapest bundle of products for shoppers who were prepared to shop at several stores and were prepared to incur the set-up costs of bookmarking their typical shopping requirements at the third-party site. Supermarket owners would not relish such a development and would probably try to prevent it by making their information impossible to mine electronically ... but if they failed to provide website listings of all their prices to enable consumers to bookmark and check the cost of their favourite items easily, then policymakers might require that they do so. This might be a far cheaper means of helping consumers than having a State-sponsored 'price watch' website that listed prices that had actually been observed in supermarkets by enumerators and which were inherently less likely to be up to date.<sup>7</sup>

## Price transparency

8.9 Associate Professor Zumbo told the committee that a consumer tool such as GROCERYchoice would have empowered consumers and gone some way towards improving transparency in grocery pricing:

**Prof. Zumbo**— ... The real market failure is the information asymmetries which give the supermarkets enormous power and an enormous advantage because they have all the information about their own products and about competitors, but consumers do not have that information about grocery prices ...

I could walk into an ALDI store anywhere on the eastern seaboard and get the same price for the same product. I do not feel that I need to shop around. I do not feel that I have to go to different ALDI stores. But, when I am shopping at a Coles or a Woolworths, for example, I will shop around on items, on the basis that they do have a discrepancy in prices. Consumers will try to do what they can, but the only way that they can be empowered is by full price transparency online and in real time.<sup>8</sup>

8.10 The 2008 ACCC grocery inquiry found that consumers did not exclusively rate 'price' as 'very important' when choosing where to shop. Consumers placed high value on a range of non-price elements of the retail offer, including food quality, availability of favourite brands and store characteristics.<sup>9</sup>

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7 Associate Professor Earl, *Submission 15*, Attachment 1, Peter E. Earl and Tom Mandeville, 'The Competitive Process in the Age of the Internet', *Prometheus*, Vol 27, No 3, September 2009, p 200.

8 Associate Professor Zumbo, *Proof Committee Hansard*, 6 October 2009, p 9.

9 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 72.

8.11 The report also noted that consumers' comparison of grocery prices between retailers could be quite difficult for a number of reasons. A significant amount of time is needed to compare the 'total shopping spend' for a larger shopping trip across retailers; consumers often make unplanned or last-minute purchases; and prices can be difficult to compare across different sizes and weights (although unit pricing may assist in this regard). Price sensitive consumers will therefore often limit their product comparisons to a few (known value items).<sup>10</sup>

8.12 The ACCC also found that 17 per cent of consumers reported that they always compared prices, while 55 per cent of consumers do not compare prices before grocery shopping; 28 per cent of consumers did so sometimes. The ACCC commented:

Despite this, a large proportion of the same respondents rated price as 'very important'. It is likely that some consumers instead compare prices over time and build a mental picture of prices. Instead of comparing prices before every shopping trip, these consumers might re-evaluate their choices as their experiences change.

... Another reason for fewer consumers comparing prices can be the perceived costs associated with changing from a preferred grocery retailer. The cost of breaking with habit or the changeover effort of shopping at an unfamiliar store with a different layout can limit consumers' willingness to compare prices at their regular grocery retailer with another.<sup>11</sup>

8.13 Freshlogic, a food and grocery consultancy firm contracted by CHOICE, stated that there was evidence of some consumer demand for price information and that, to a certain extent, consumers who made discerning choices could contribute to greater price competitiveness:

**Mr Kneebone**—I believe there are segments of the market that will look for this information. In the last 12 months we have seen a higher level of what we would call value discernment with consumers, which has manifested in many things. We are seeing people shopping with lists. We are seeing shopping behaviour changing. They are reducing the number of outlets they go to. These are all reflections of looking to economise in the home. Based on that, I would say that there is probably a slightly higher proportion that would be interested in it. I think it has a lot to do with how easy it is to access and how much time it takes. Time and convenience is still 75 per cent of what drives where people shop.

**Senator PRATT**—For the proportion of people for whom price does matter, in that they are prepared to shop accordingly, if they are making discerning choices does that play a role in driving down prices for other consumers in general, in your opinion?

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10 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, pp 74–5.

11 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 76.

**Mr Kneebone**—Yes. If there is a competitor in the market that has sharpened up on some products and they are enjoying volume, the rest of the market will respond. We have seen that with a new entrant in the last five or six years.<sup>12</sup>

8.14 Professor Allan Fels and Professor David Cousins, recently wrote that enhanced price transparency can assist consumers to make more informed decisions when purchasing products. They also stated:

It is not necessary for all consumers to act on the information provided to them for there to be a significant impact on a market. Small shifts in custom and market share can induce competitive responses from suppliers.<sup>13</sup>

8.15 One submitter to the inquiry (a pensioner) was disappointed that GROCERYchoice had been scrapped:

... if the website had become available, I'd have be able to tell how much more the Woolworths monopoly in my town is charging for basics than people living in more populated areas where there was a Woolworths competitor (price fixer, ALDI excluded) nearby. But now I'll never know!<sup>14</sup>

8.16 However, the National Association of Retail Grocers of Australia (NARGA) disputed the claim that there is a lack of price transparency on the part of grocery retailers, which would justify the existence of a price comparison website:

The Australian grocery industry spends millions of dollars a month advertising its prices - particularly “specials” prices, but others as well - in press, radio and television advertisements, in home-delivered catalogues, in-store and with every product on every shelf. Lack of transparency is not an accusation that stands up to a moment’s scrutiny.

Till dockets nowadays display the normal shelf price as well as any discount when the product is on special, the brand, weight, size or volume of the item, the date and time of purchase, the store address and contact details - at least equivalent to the data which either the ACCC or CHOICE proposed to make available through the GROCERYchoice website.<sup>15</sup>

8.17 The Australian National Retailers Association (ANRA) also asserted that the claim that there was a lack of price transparency in the retail grocery market was misleading:

One of the best indicators of an efficient market is consumer access to high levels of accurate price and product information. When looking at the spectrum of different markets in Australia, from those with scarce pricing

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12 *Proof Committee Hansard*, 6 October 2009, pp 31–2.

13 David Cousins & Allan Fels, 'The Re-Emergence of Prices Surveillance', *UNSWLaw Journal*, Volume 32(1), 2009, p 308.

14 Mr Robert Chapman, *Submission 12*, p 1.

15 NARGA, *Submission 2*, p 10.

information to those with an abundance of information, grocery retail is clearly one of those markets that is information rich.

... If you want to buy an antique, you have to work hard to find out where and how to buy it and what is a fair price. But in major retail operations this is not the situation. One of our members alone prints a million brochures each week on price and product information. The supermarket sector alone is producing over a billion catalogues a year. This is not to mention advertising or the websites of the retailers themselves.<sup>16</sup>

8.18 Coles stated that it had been 'quite comfortable' with the ACCC version of the website, saying 'we have nothing to hide' and noting that 'quite a lot of detail' is already provided to customers through advertising.<sup>17</sup>

8.19 Another submitter agreed that shoppers already had 'ample opportunity to compare prices' through supermarkets' weekly advertising.<sup>18</sup>

### **An anti-competitive effect?**

8.20 The Australian Retailers' Association (ARA) asserted that any attempt to resurrect GROCERYchoice would:

... covertly organise market intelligence which could be manipulated [and] have an undesirable Big Brother approach to price monitoring.<sup>19</sup>

8.21 At the hearing, the ARA argued that CHOICE model of real-time grocery prices would ultimately prove dangerous for smaller retailers:

We believe it could lend itself to manipulation by majors, who have the ability due to their superiority in technology to alter their prices at any time to meet competition. It will also add to their ability to drive out competition from the smaller independents by routinely undercutting their prices in geographical areas just by monitoring what is being set up on the website.<sup>20</sup>

8.22 Concerns that the CHOICE-run website could lead to retail price maintenance were also expressed by NARGA and Tasmanian Independent Retailers.<sup>21</sup> Master Grocers Australia argued:

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16 Mrs Margy Osmond, Australian National Retailers Association (ANRA), *Proof Committee Hansard*, 6 October 2009, p 35.

17 Mr Robert Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 15.

18 Mr D Johnson, *Submission 4*, p 1.

19 Australian Retailers' Association, *Submission 7*, p 2.

20 Mr Russell Zimmerman, Australian Retailers' Association, *Proof Committee Hansard*, 6 October 2009, p 17.

21 NARGA, *Submission 2*, p 9; Mr Grant Hinchcliffe, Tasmanian Independent Retailers, *Proof Committee Hansard*, 6 October 2009, pp 99–100.

I am very much for the dynamic, competitive process that we have now, which is in some ways unpredictable, whereas what we see in the website is that there is an enormous amount of predictability about it and that there could even be a risk of an upward surge in pricing. If I am selling a product at \$1 and I can see that my competitors are selling at \$1.15, I might say: 'Maybe I am a bit too cheap on that. I could make some extra margin out of it.' I do not see it as a dynamic, competitive driver to drive prices down.<sup>22</sup>

8.23 The ACCC was somewhat sceptical of these claims, stating that 'too much transparency' was hard to argue for in the context of grocery retailing:

The very limited anecdotal evidence we saw in the six months it was run was that perhaps that did not occur—but that evidence is really limited and anecdotal. There is no doubt that sometimes you have too much transparency in a market. Everybody knows everybody's price, and it is easy to price fix. That tends to be more so in cases where a product is a bit more homogenous. It is a bit difficult with 25,000 lines. I would take it with a grain of salt. I can understand what their concern is but I am not sure that that would actually be the result and I am not sure that that is what we are seeing.<sup>23</sup>

8.24 A counter-argument to the claim that GROCERYchoice could have anti-competitive effects and even put upward pressure on prices is the fact that supermarkets already enjoy access to detailed pricing data obtained through their contracted data collection agencies, such as Retail\*Facts and Informed Sources.

8.25 Furthermore, if it is held that GROCERYchoice's increased price transparency would lead to higher prices, then the same argument would imply that the information provided in store advertising materials may also have a 'price maintenance' effect and that therefore such information ought to be suppressed. (Of course, it is not suggested that this should actually occur, but merely demonstrates the limits of the argument against price transparency).

### **Committee view**

8.26 Overall, the committee believes that GROCERYchoice was a shocking waste of taxpayers' money, clearly demonstrating the Government's apparent disregard for obtaining value for money. Public funds should not have been spent on GROCERYchoice without having a clearer idea of the goals of the website and the practical feasibility of attaining them. GROCERYchoice has provided little information of use to consumers, as can be seen by the sharply declining drop in website use. The total cost to date of this failed experiment is \$7.7 million with an estimated contingent liability of \$700 000, although this may vary depending on the deliberation over the Government's unilateral termination of the CHOICE contract. The status of any possible further litigation by CHOICE or other contractors remains

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22 Mr Jos de Bruin, Master Grocers Australia, *Proof Committee Hansard*, 6 October 2009, p 107.

23 Mr Mark Pearson, ACCC, *Proof Committee Hansard*, 28 October 2009, p 7.

unclear. The Government appears not to have learnt any lessons from the failed FuelWatch experiment.

### **Recommendation 8**

8.27 The committee recommends that the Government learn from this episode of waste and mismanagement and ensure that such inappropriate and careless spending does not occur again in the future, noting that now, more than ever, value for money for the taxpayer should be a top priority.

Senator Alan Eggleston

Chair





# Labor Senators Dissenting Report

## History of GROCERYchoice

1.1 Prior to the last election the Government acknowledged the concerns of Australian consumers in regards to what have been referred to as "kitchen table" issues such as grocery and petrol prices. On 11 July 2007, the Prime Minister gave the following commitment:

First, if Labor forms the next government of Australia, the ACCC will be directed to publish a periodic survey of grocery prices at supermarkets for a typical shopping basket, including family staples like biscuits, bread and baked beans. The ACCC will establish a dedicated website to publish this pricing snapshot – this very act will serve to increase transparency in the market place and in so doing exert greater competitive pressure on the retail market. Surveys will be conducted in all states, in both metropolitan and regional areas, and will provide the ACCC with the pricing information it needs to identify whether there are indications of breaches of the Trade Practices Act that require further investigation.<sup>1</sup>

1.2 Contrary to claims by the Coalition, the Rudd Government did not promise to reduce grocery or petrol prices but did commit to a reform agenda to remove barriers to competition, increase the powers of the regulator, and improve price transparency for consumers. The Government has proceeded to do this by introducing a number of legislative reforms in the area of consumer law, which are outlined at the conclusion of the report.

1.3 The GROCERYchoice website was established with the aim of providing a site where consumers could access a comparison of timely, reliable prices for local stores all around Australia. The objective was to enable consumers to easily locate the cheapest store in their area for a particular basket of goods.

1.4 The establishment of a website such as GROCERYchoice has not been undertaken previously by any Australian Government. In the view of Labor Senators, it needs to be recognised that the establishment of GROCERYchoice was a significant and complex challenge that the former government did not have the political will to undertake.

1.5 Furthermore, whilst it is very disappointing that the website was not able to meet the Government's objective of providing timely, reliable and local pricing, Labor

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<sup>1</sup> Speech to the Cranbourne Secondary College, Kevin Rudd, 11 July 2007, <http://www.alp.org.au>

Senators believe that testing of the GROCERYchoice website was warranted given the importance of price transparency for consumers.

1.6 Early in 2008, the Government asked the ACCC to undertake a monthly survey of grocery prices for a typical shopping basket of goods across Australia and to establish a dedicated website on grocery prices. The ACCC ran the website for a period of six months during which time it received pricing data on 500 items from 600 supermarket outlets in sixty one regions every month and posted a summary of this information on its website.

1.7 To prevent any manipulation by supermarkets, the list of 500 products remained confidential to the ACCC. While there were 500 products included in the price survey each month, a smaller sample of the products were used to calculate the monthly basket prices published. Each month, changes to the product sample were made so that the products contributing to the basket prices were gradually rotated each month.

1.8 From its inception it was acknowledged that the ACCC website would have some limitations. The Chairman of the ACCC, Mr Graeme Samuel, commented that GROCERYchoice would provide new information to consumers but would not publish the weekly specials or list grocery prices for individual supermarkets.<sup>2</sup>

1.9 The Government recognised that the absence of weekly specials on the site and the update of data monthly did not go far enough in providing consumers with the timely, accurate and local pricing information they desired.

1.10 However, claims that the site was a waste of money fail to recognise that the ACCC successfully ran and operated the GROCERYchoice website for six months and, in that time, met all of the requirements that the Government had committed to deliver and offered some improved price transparency for consumers.

1.11 The ACCC was always limited in relation to the information it could present on the website. Adding new features like 'specials' would have compromised the regulator, whose responsibility it is to investigate false or misleading representations in advertising. Therefore, in December 2008, the Government entered into a contract with Choice to deliver the GROCERYchoice website and expand the information it would provide.

1.12 The contract required Choice to deliver on the following four outcomes:

- a) Publication of basket prices for individual supermarkets locations, with the contents of the baskets transparent to users;
- b) Publication of basket prices for all leading supermarkets chains or groups (e.g. Coles, Woolworths, IGA, Franklins, Supabarn, Foodworks, ALDI, etc) and other smaller independent operators;

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<sup>2</sup> Mr Graeme Samuel, Chairman, ACCC, ACCC Grocery Inquiry Press Conference, 5 August 2008

- c) Publication of a 'staples' basket or something similar, that allows for a suitable comparison of prices between the larger supermarket chains, smaller independent supermarkets and ALDI;
- d) Publication of grocery prices on a no less than weekly basis with the 'date updated' clearly indicated on the Grocery Choice website. All data that is out of date or has not been updated in over a week must be removed from the GROCERYchoice website.<sup>3</sup>

1.13 The contract was terminated on 26 June of this year on the grounds that Choice was unable to deliver on all of the outcomes outlined in the contract. In particular the requirement of providing basket prices for individual supermarkets would not have been met.

1.14 The Government has been upfront about the reasons why the contract with Choice was terminated. Consumers who relied on the website might feel misled if its information was not accurate. In a media release on the 26 June 2009, the Hon Dr. Craig Emerson MP said that:

The Government remains of the view that consumers are better placed to make informed choices when they are able to gain access to prices conveniently and make comparisons among supermarkets. However, the Grocery Choice proposal as originally envisaged would not be able to generate reliable, timely data as a basis for consumers to make meaningful comparisons in their local neighbourhoods.<sup>4</sup>

1.15 At the time of the launch, the Government made it clear that through GROCERYchoice it wanted to give a guide to consumers as to the cheapest supermarkets in their region.<sup>5</sup> Unfortunately, the Choice site would not have delivered on this commitment and as a result the Minister determined not to continue with the Choice website.

1.16 Furthermore, Labor Senators note that the contract with Choice allowed for the cancellation of the contract at any time by Treasury. Clause 17.1.1 of the contract states: 'In addition to any other rights it has under this contract, Treasury may by notice, at any time and in its absolute discretion, terminate this contract or reduce the scope of this contract.'<sup>6</sup>

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<sup>3</sup> GROCERYchoice website contract, pp 44–45.

<sup>4</sup> <http://minister.innovation.gov.au/Emerson/Pages>, Media Release, 26 June 2009

<sup>5</sup> Minister Chris Bowen, Press Release, 22 December 2008, <http://www.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/110.htm&pageID=003&min=ceb&Year=&DocType>

<sup>6</sup> GROCERYchoice website contract, p 32.

## Criticisms of GROCERYchoice

### *Cost*

1.17 The total cost for the GROCERYchoice measure was \$7.7 million dollars with an estimated contingent liability of \$700,000. Labor Senators note that this did deliver a website which received at its lowest usage 260,000 hits or 61,000 page views in a four week period. Consumers did receive improved price transparency as a result of the site and there is some evidence to suggest that some downward pressure on grocery prices did occur as a result of the website.

1.18 Both Professor Allan Fels, the former ACCC Chairman, and Professor David Cousins commented that 'despite its severe limitations' the grocery price monitoring activity undertaken by the ACCC:

...seemed to have some beneficial impact for consumers, as the major suppliers seemed to respond to the favourable publicity for ALDI's low prices by also attempting to be the lowest price setters in a region.<sup>7</sup>

Labor Senators reject the assertion that the website did not offer some value during its operation and believe that even a small increase in pricing transparency and any downward pressure on grocery prices is beneficial to consumers.

1.19 Labor Senators also note that to put the expenditure on GROCERYchoice into some perspective, the ACCC's total net resourcing as proposed by the May 2009 Budget for 2009–10 is more than 140 million dollars.<sup>8</sup>

### *Accessibility of Real Time and Local Pricing Data*

1.20 Choice's proposal was for prices of at least 5,000 items to be provided on a weekly basis. Since there are well over 4,000 supermarkets in Australia, that could involve more than 20 million prices being checked and provided every week.

1.21 The committee heard evidence from the major retailers and their industry representative, the Australian National Retailers Association (ANRA), that the data being requested by Choice was not able to be provided in the form required by Choice. ANRA noted that the retailers had significant concerns regarding price accuracy. They used the example of soft drink to explain what data is recorded by stores locally.

On the issue of price accuracy, say you have 100 units of a particular soft drink to be sold and there is—as there has been today—an unseasonable cold snap. Say four of

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<sup>7</sup> David Cousins & Allan Fels, 'The Re-Emergence of Prices Surveillance', *UNSW Law Journal*, Volume 32(1), 2009, p 308.

<sup>8</sup> Portfolio Budget Statements 2009-10, Budget Related Paper No. 1.17, Treasury Portfolio, p 93, [http://www.treasury.gov.au/documents/1539/PDF/Treasury\\_portfolio\\_budget\\_statements\\_2009\\_10.pdf](http://www.treasury.gov.au/documents/1539/PDF/Treasury_portfolio_budget_statements_2009_10.pdf)

those bottles of soft drink are stolen, because that does happen, and four of them might have been damaged, as also happens. A proportion of the rest are discounted heavily because of the local conditions—that is, the weather—to clear the stock. The data then supplied to head office on a regular basis reflects the number of units sold against the total revenue figure. It is not necessarily represented in an immediate sense on a price-per-item basis. Aldi are actually able to do slightly different things because they do have uniform national prices for products across their 500 lines, compared to the 20,000 or 30,000 lines that you would find in a large supermarket. Any average price derived by this process would be inaccurate at best. What we were asked to do by Choice was to provide a price that nobody actually pays, which might be different to our advertised price and would potentially be misleading to consumers. This is the nub of the problem with Choice's model. It was flawed to start with. It was not based on the commercial reality of pricing operations at store level, or the data collection ability of the major retailers. What Choice asked our members to send to them would not have been accurate according to their specifications.<sup>9</sup>

1.22 During the hearings, the committee heard concerns that the major supermarkets through their representative may have worked together to ensure that the data was not made available to Choice. Senator Joyce went further in a comment to the ACCC:

They are 70 or 80 per cent of the retail market and they are working together in a coordinated form to basically sink the GROCERYchoice website.<sup>10</sup>

1.23 Labor Senators don't believe that the committee received any evidence to suggest that the major supermarkets deliberately colluded to prevent the supply of pricing data. Virtually all of the submitters who voiced concerns regarding the ability of the majors to supply the data assumed that the retailers *were able* to supply the data and were choosing not to do so.

1.24 Woolworths refuted this when appearing before the committee:

It comes down to this: the Choice model assumes that Woolworths—and I cannot comment for any other retailer—has a central database on a computer that sits in our head office and can tell us exactly the price of a good as it goes through the register and sells in real time. We had to explain to Choice in December that we do not have that.<sup>11</sup>

1.25 Coles commented that:

We do not monitor real-time price data across all of our supermarkets. Supermarket managers have the flexibility to price match for local competition, and therefore prices can vary daily across our supermarket network. So we do not have that data.<sup>12</sup>

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<sup>9</sup> Mrs Margy Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 36.

<sup>10</sup> Senator Joyce, *Proof Committee Hansard*, 18 September 2009, p 30.

<sup>11</sup> Mr Andrew Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, p 17.

<sup>12</sup> Mr Robert Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 13.

1.26 In response to Choice's claims that ANRA's involvement in the GROCERYchoice negotiations was anti-competitive Coles responded:

I think that is completely false. The motivation for involving ANRA towards the end of the discussions between Choice and the supermarkets was to expedite and facilitate discussions around very complex and difficult issues where we could get the insights of other members about how best to resolve the issues. It is extremely disingenuous to say that that was anticompetitive. In fact, the intention was to be cooperative and to try and meet a very looming deadline.<sup>13</sup>

1.27 ANRA themselves responded that:

Far from the spoiler role suggested by Choice, we were attempting to bring some focus to the range of issues that, just two months out from the launch of the site, Choice had still not dealt with or given any real to clarity to the retailers on.<sup>14</sup>

1.28 Labor Senators acknowledge the work undertaken by Choice to prepare the GROCERYchoice website. However, we not believe there is sufficient evidence to show that ANRA deliberately acted on behalf of the major retailers to prevent the supply of requested pricing data. Labor Senators take the view that Choice designed the website with an entirely consumer centric focus and as a result it began to incorporate a wide range of data not previously considered. Woolworths noted that, as the project developed, the information being sought by Choice became more complex:

What then happened was that as the project progressed Choice started adding more and more complication to it. They started asking us for people who could provide data feeds on the type of trolleys that each store had, so across 800 stores we were required to tell Choice what types of trolleys we had. They asked us to identify stores and their public transport options. They asked us to identify whether we had on-grade car parking. They then said as a measure of course they were going have consumers do their own surveys of the prices published and they would then come back to us and ask us to provide explanations as to any discrepancies between what was published and what they saw the website. So we then ended up with a headcount of at least half a dozen people who were going to have to support the project.<sup>15</sup>

1.29 Choice also made the incorrect assumption that real time pricing data was uploaded from the point of sale in local supermarkets to the retailers head office. It is disappointing that these issues were not addressed earlier in the negotiations, as Labor Senators are of the view that had they been overcome then the Choice website would have contributed to improved price transparency and provided a useful guide for consumers.

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<sup>13</sup> Mr Robert Hadler, Coles, *Proof Committee Hansard*, 28 October 2009, p 13.

<sup>14</sup> Mrs Osmond, ANRA, *Proof Committee Hansard*, 6 October 2009, p 37.

<sup>15</sup> Mr Hall, Woolworths, *Proof Committee Hansard*, 28 October 2009, pp 18–19.

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### ***Independent Retailers***

1.30 The committee heard criticism from smaller independent retailers that the GROCERYchoice website was prejudicial and did not represent them fairly. They argued that issues such as lack of competition in remote areas and the high costs of delivery (particularly for fresh produce) were not adequately accounted for and therefore resulted in 'negative press' about independents once the survey results were published.<sup>16</sup>

1.31 They also complained that the ACCC included stores under 1000 square metres in the survey although this was not the methodology the ACCC had outlined in their approach to the surveying.

1.32 Responding to the claim that the website had favoured the major retailers over the independents, the ACCC noted that the grocery inquiry report had highlighted the difficulties that independents have in competing with Coles and Woolworths – largely because of the prices they are charged by their wholesaler Metcash. They also pointed out that, during the six month operation of GROCERYchoice, approximately 360 regional readings were taken and in only approximately eight of these cases did the independent stores come out cheapest. The ACCC noted that this supported the results of the grocery inquiry, and indeed the arguments put by the independent retailers themselves.

1.33 The ACCC also noted, in regards to stores being included with floor space under 1000 square metres, that 'they were the exception rather than the rule'<sup>17</sup> and that those stores 'identified by industry as being smaller than desirable [were] removed from the survey list'.<sup>18</sup>

1.34 Whilst acknowledging the concerns put by independent retailers, Labor Senators do not believe that the GROCERYchoice website drastically misrepresented independent grocery stores and their competitiveness and supports the ACCC's findings in the grocery inquiry that smaller independents often face higher supply costs than the major chains.

### ***Tender Process and Planning***

1.35 Coalition Senators are critical of the timeframes the ACCC were given by the Government to establish the GROCERYchoice website. However, the ACCC in evidence to the committee noted that they went for the cheapest tender that would also

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<sup>16</sup> WA Independent Grocers Association, *Submission 3*, p 2.

<sup>17</sup> Mr Brian Cassidy, ACCC, *Proof Committee Hansard*, 18 September 2009, p 36.

<sup>18</sup> ACCC, Answers to Questions on Notice prior to public hearing (received 17 September 2009), p 4.

deliver accurate data and that a normal procurement process was adopted meaning that a best value for money approach was taken.<sup>19</sup>

1.36 Furthermore, the ACCC undertook a scoping study in order to assess the best way of implementing the Government's election commitment in regards to GROCERYchoice, and the ACCC told the committee that "the site that went up in early August was fairly close to what we put to the government as being the preferable way of going."<sup>20</sup>

1.37 Coalition Senators also criticised the tender process itself, due to the submission of Informed Sources, which at its core criticised the ACCC evaluation panel on the basis of the company's previous opposition to the Government's Fuelwatch scheme.

Whilst we are not suggesting there was any inappropriate direction from the Minister responsible, the Chairman, the Chief Executive or the Management of the ACCC, there was clearly a degree of "negative interpretation" or group think operating within the evaluation panel.<sup>21</sup>

1.38 Coalition Senators claim that the ACCC spent \$2.7 million more than necessary in the tendering process, but conveniently ignore evidence provided by the ACCC regarding their concern that Informed Sources may not have been able to provide accurate data in the timeframes required. Contrary to the views expressed by Coalition Senators, we believe that the ACCC showed appropriate due diligence by ensuring that the tender was not just assessed on cost but importantly on the certainty of delivery of timely and accurate data.

1.39 Labor Senators acknowledge the statement by Informed Sources that the evaluation panel assessment was incorrect – however, we fail to see any evidence of 'negative interpretation' or bias against the company, particularly given the ACCC's renegotiation of another contract with Informed Sources for the supply of fuel pricing data that occurred concurrently.

### ***Integrity of Data Collection by the ACCC***

1.40 During the inquiry, concerns were raised regarding the integrity of the data collection undertaken by the ACCC for its GROCERYchoice website. This criticism was twofold: firstly, that the successful tendered Retail Facts also undertook data collection for Woolworths and secondly, that the ACCC did not undertake an on site spot check audit of any of the data during the operation of the website.

1.41 It is important to note that both Informed Sources and Retail Facts collected pricing data for major retailers. The ACCC pointed out that whilst Retail Facts

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<sup>19</sup> *Proof Committee Hansard*, 18 September 2009, p 21.

<sup>20</sup> *Proof Committee Hansard*, 18 September 2009, p 22.

<sup>21</sup> Informed Sources, *Submission 10*, p 9.



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collected data for Woolworths, Informed Sources collected data for Franklins. Both are retailers that would also be covered by the GROCERYchoice website.

1.42 The criticism was that there may be some conflict of interest in Retail Facts gathering price data for both Woolworths and GROCERYchoice and that the data may somehow cross over, enabling Woolworths to know what items made up the basket and price them lower accordingly to 'game' the system. There were also concerns that Retail Facts would possibly just do the one price check and charge both customers for simply doing one lot of work.

1.43 These concerns were addressed by Retail Facts during the public hearing. Firstly, Retail Facts noted that the data collecting for each contract is always done separately – that data is never collected for two customers at the same time by the same person.

A point that supports this is that throughout the 11 months that Retail\*Facts conducted the price collections for the ACCC we visited some 6,255 stores across Australia and we collected details on approximately 2,400,000 products, which totalled, for the record, nearly 12 million at the points. It also should be noted that during the price collection process, throughout this massive undertaking, there was not one instance of dual collecting presented to us or to anybody that I am aware of. We are very proud of and would put on record the job we have done with the ACCC.<sup>22</sup>

1.44 Secondly, Retail Facts vehemently rejected any notion that data would cross over between clients. They argued that the highest levels of confidentiality were maintained and that this negated any potential conflicts. Furthermore, they noted that not one example had been provided of a Retail Facts employee not acting with integrity and meeting their commitments under confidentiality agreements:

The key points to support this are—and some of these have been mentioned by the ACCC—that every employee in the Retail\*Facts team was committed to the undertakings required by the ACCC and signed confidentiality agreements to that extent. In addition, we developed proprietary systems to provide specific product information to the price collectors and had that information available on a limited time. In most instances it was no more than 48 hours when that information was then taken away from their identification. Also to ensure confidentiality, specific and separately designed databases were used for each customer.<sup>23</sup>

1.45 Labor Senators also note the ACCC's point that it is not realistic to expect that a data collection agency will never have other clients who may be viewed as being in competition for the information and that this is why confidentiality agreements are regularly used in these circumstances:

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<sup>22</sup> Mr Tony Marshall, Retail Facts, *Proof Committee Hansard*, 28 October 2009, p 32.

<sup>23</sup> Mr Marshall, Retail Facts, *Proof Committee Hansard*, 28 October 2009, p 30.

They are under contractual obligations to us. We encounter this quite often. It is not realistic to think, 'If someone else is using somebody to do something then we will not.' That is why we have safeguards and obligations in our contracts about confidentiality and so forth. It would almost be inevitable that some of the same data was being collected. Given we are collecting across 500 grocery items, there would be some commonality but only some in the sense that Woolworths or whoever else would be interested in some of the same items and some different items.<sup>24</sup>

1.46 Another contracted company, FreshLogic, when asked about the need for additional mechanisms to ensure there is no transfer of information responded by saying that:

No, I do not believe we need that. We work with confidentiality agreements, particularly when we get down to advising people on business strategy. There may then be a competitive variable, and we would deal with that through a confidentiality agreement.<sup>25</sup>

1.47 Labor Senators do not believe that any evidence was proffered to the committee to suggest that the data collection process for GROCERYchoice was in any way jeopardised as a result of a breach of confidentiality. We note that the most important factor is retaining the confidentiality of the items being price checked. Given the rotation of dates, stores and the basket itself, combined with the systems implemented by Retail Facts to ensure confidentiality, Labor Senators believe the opportunity for 'gaming' would be very small.

1.48 Retail Facts confirmed to the committee that their contract with the ACCC allowed for access to both infield audits and systems audits at any time and under any circumstances. The ACCC explained that they conducted a crosscheck of the data they received using tools audited by Frontier Economics. The team ran through a couple of thousand items of data per month looking for any indications that the data may not be accurate. During the time GROCERYchoice was operational they found no indication that the data was inaccurate and, therefore, did not undertake a field or systems audit.

1.49 Labor Senators are of the view that the internal data cross check used by Retail Facts combined with the further check undertaken by the ACCC would have been adequate over the time period the website operated. However, we do find it surprising that given the contract with Retail Facts allowed both infield and systems audits 'at any time and under any circumstances' and the fact that the contract was a reasonably significant one, the ACCC did not avail themselves of the opportunity at some point during the operation of GROCERYchoice to conduct such an audit. Labor Senators believe this should have occurred and would have ensured full public confidence that no conflict of interest or breach of confidentiality had occurred.

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<sup>24</sup> ACCC, *Proof Committee Hansard*, 18 September 2009, p 24.

<sup>25</sup> Mr Martin Kneebone, FreshLogic, *Proof Committee Hansard*, 6 October 2009, p 33.

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## Government Measures So Far to Improve Competition in the Sector

1.50 In addition to GROCERYchoice the Government has undertaken a number of reforms to improve competition in the grocery retailing sector. Competition is by far the most effective means of exerting downward pressure on grocery prices. The ACCC grocery inquiry found that effective barriers to entry have stifled competition and consumers have suffered as a result.

1.51 On the 18th of September of this year, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, released a policy statement on improving competition in the retail sector.<sup>26</sup>

1.52 The policy statement details a number of ways in which the Government is removing barriers to entry to increase the number of competitors in the grocery sector, as well as further reforms to improve price transparency and to provide the regulator with greater powers to prosecute breaches of the *Trade Practices Act 1974*.

### *Foreign Investment Rules*

1.53 Until early in 2009, it was a condition of approval that foreign investors commenced construction on vacant land acquisitions within 12 months of receiving purchase approval. The Government extended this timeframe for development to five years recognising that 12 months was insufficient to enable a development to commence and that large companies make forward investment decisions well beyond a 12 month timeframe.

1.54 The policy benefits of this change have resulted in the planned expansion of ALDI from more than 200 stores to 700 stores and facilitated the growth of Costco from one store in Melbourne to plans for stores in New South Wales, Queensland, South Australia, the Australian Capital Territory and other regional centres.

### *Restrictive Lease Provisions*

1.55 Restrictive lease provisions between major supermarket chains and shopping centre owners prevent centre managers from leasing space to competing supermarkets. The ACCC has reached an agreement with Coles and Woolworths to end existing restrictive provisions in supermarket leases with shopping centres. Restrictive lease provisions will end immediately for stores that have been operating for more than five years, and for newer stores they will phase out and end no later than five years from the stores opening date.

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<sup>26</sup> "Introducing more competition and empowering consumers in grocery retailing", Dr Craig Emerson, 18 September 2009, <http://minister.innovation.gov.au/Emerson/Documents/CompetitioninGroceryRetailingstatement.pdf>

1.56 This new agreement will mean that out of 750 restrictive leases more than 80 per cent will cease immediately and the remaining 20 per cent will be gone within five years. This will open up shopping centre space for competitors such as ALDI, Franklins, FoodWorks and IGA, and will directly benefit consumers by increasing local competition.

### ***Planning Laws***

1.57 Planning laws affecting the location and use of land for specific activities are implemented by the zoning of land. By restricting the availability of retail space, state, territory and local government planning laws can hinder supermarkets from being established in particular areas.

1.58 This can be a particular problem for independent supermarkets since most states and territories have adopted 'centres' policies to concentrate retail activities in one location. Although planning laws and zoning restrictions are necessary for traffic management, public amenity and environmental protection, they can also be used to stifle competition. This is most apparent when existing businesses object to applications for entry by competitors.

1.59 The Government has referred the anti-competitive impacts of zoning and planning laws to the Business Regulation and Competition Working Group established by the Council of Australian Governments (COAG). The working group will present their recommendations to COAG this year to ensure planning laws do not impede competition in grocery retailing.

### ***Unit Pricing***

1.60 The Government introduced mandatory unit pricing in Australia for larger supermarket stores—all major stores have until December 2009 to complete the roll out of unit pricing. Unit pricing assists consumers by enabling them to compare prices readily between different sizes of the same product, different branded products and also between stores by stating the price per unit measurement (e.g. weight) so consumers can assess value by quantity. This measure has proven to be a useful tool for consumers and enhances price transparency between products in supermarkets.

### ***Stronger Predatory Pricing Rules***

1.61 In response to the ACCC grocery inquiry the Government passed legislation to strengthen predatory pricing rules so that the major supermarkets can't easily drive out rivals by deliberately sustaining non-profitable pricing for an extended period of time to drive smaller rivals out of the market, only to then increase prices later.

### ***Emergence of New Technology***

1.62 During the inquiry, there was much discussion about the role that new technology may play into the future in improving price transparency for consumers and improving their access to information.

1.63 With mobile phone technology advancing at a rapid pace and new social networking websites such as Facebook allowing consumers to share information with thousands of other consumers in real time – arrangements whereby consumers themselves may establish, update and share information about bargains they have found or specials in their local area may become increasingly common.

1.64 Increasingly consumers are also purchasing more of their groceries over the internet. If this trend continues to increase in popularity, we may see the emergence of a whole spectrum of "internet retailers" into the market which will benefit consumers through increased price competition.

### ***Industry Website***

1.65 In his media release announcing the decision not to proceed with the Choice website, the Hon. Dr Craig Emerson MP said:

I will hold discussions with supermarket chains about the possibility of an industry website capable of providing convenient grocery price data that could be audited by a government-appointed auditor.<sup>27</sup>

1.66 During the inquiry, reference was made to ongoing conversations between ANRA and the Government regarding an industry operated and run website to provide pricing information to consumers. Woolworths told the committee that:

The government is taking a keen interest in where retailers are going with online. As I mentioned to Senator Pratt, we are doing a lot of work on it. I hope you will all be really thrilled with the product that Woolworths will be able to deliver to the market fairly soon. My view and the Woolworths view are that, if you look around the world, the advances that are happening at the moment in the online space are happening fairly quickly. We are starting to learn that. We are starting to look at the technology we can get and to get those brought into the Australian marketplace. I think you will see that online participation area slowly increase.

**Senator BARNETT**—With that Woolworths initiative, has the government approached Woolworths or other major retailers, to your knowledge, to establish an industry based website?

**Mr Hall**—They have been having those discussions with ANRA, as I understand it. As a member of ANRA we have been participating in those discussions at our regular ANRA meetings. But of course it is a point of competitive advantage that we are not going to talk about what we are doing as a company in this space until we are ready to release it to our customers.<sup>28</sup>

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<sup>27</sup> 'Government Will Not Proceed with GROCERYchoice', Media Release, 26 June 2009, <http://minister.innovation.gov.au/Emerson/Pages/GOVERNMENTWILLNOTPROCEEDWIT HGROCERYCHOICE.aspx>

<sup>28</sup> *Proof Committee Hansard*, 28 October 2009, p 25.

Labor Senators believe that this firmly supports the view that the GROCERYchoice website has been worthwhile and that more will be undertaken in this area over time to improve price transparency for consumers.

## **Conclusion**

1.67 Labor Senators are disappointed that the proposal for Choice to operate the GROCERYchoice site did not come to fruition. However, we support the Minister's decision given the site would not have delivered accurate, timely and local pricing data enabling consumers to determine the cheapest store in their local area for an average basket of goods.

1.68 The Choice site was ambitious in trying to deliver the best outcome for consumers and Labor Senators believe that, if the data delivery issue could have been overcome earlier, the site would have been of great benefit.

1.69 However we also believe that the work done by Choice will not be wasted, and that discussions taking place with the major retailers to establish a similar site, whether such a site is taken up by the private sector or revisited by the Government, will benefit substantially from the lessons learned by the GROCERYchoice experience so far.

**Senator Annette Hurley**  
**Deputy Chair**

**Senator Louise Pratt**

# Additional Comments by Senator Xenophon

## Introduction

- 1.1 This inquiry was established to investigate the establishment, management, operation and closure of the GROCERYchoice website.
- 1.2 A key 2007 Labor election promise, the grocery price comparison website was intended to provide consumers with up-to-date information regarding supermarket prices around Australia.

In announcing the website, then Opposition Leader, Kevin Rudd, said that:

If Labor forms the next government of Australia, the ACCC will be directed to publish a periodic survey of grocery prices at supermarkets for a typical shopping basket, including family staples like biscuits, bread and baked beans.<sup>1</sup>

- 1.3 The Australian Competition and Consumer Commission (ACCC) was given this responsibility as an extension of its role in ensuring transparency in the marketplace and to create greater competition between market players.
- 1.4 \$12.9 million over four years was budgeted towards the website, with a total \$3.6 million spent within its first year by the ACCC. Subsequent costs for lawyers' fees, data collecting agencies and payments to CHOICE bring the total expense of the GROCERYchoice website to \$7.693 million, with an estimated contingency of \$700,000.
- 1.5 The website was launched on 06 August 2008, covering 500 products in 600 supermarkets across 61 regions.
- 1.6 The website's introductory page read:

GROCERYchoice is an Australian Government initiative. It provides practical grocery price information to help consumers find the cheapest overall supermarket chain in their area. With the large number of grocery items available at each supermarket, consumers often find it difficult to determine which retailer offers the cheapest prices overall. GROCERYchoice helps consumers compare the general price levels of supermarket chains in their area.

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<sup>1</sup> Kevin Rudd, Speech to Cranbourne Secondary College, *Fresh Ideas for the Future Economy: Cost of Living Pressures Faced by Australian Families*, 11 July 2007

- 1.7 However, a number of key issues plagued the website from the start. The data was not real-time and therefore was out of date for consumers before it was even uploaded on the website; the 61 regions into which Australia had been divided were too large and had no relationship to consumers' shopping behaviour; there were discrepancies between the size of the supermarkets included within the survey; and, the data provided was based on total cost of a secret basket of goods that consumers may or may not be purchasing.
- 1.8 Between its August 2008 launch date and the end of the year, 'hits' or visits from consumers GROCERYchoice had fallen from over 446,000 in September to under 105,000; suggesting that grocery shoppers found the website of little value.
- 1.9 The decision to transfer operations and management, and funding, of the website to Treasury occurred in November 2008, after it was agreed that the ACCC was not able to undertake certain required changes and was in a difficult position given its regulatory role.
- 1.10 Treasury outsourced the website's operations on 5 January 2009 to consumer agency, CHOICE, who said they would re-design the website and address issues faced by the ACCC, including providing additional features to add value to the grocery price information; more regular price updates across more supermarkets; better price information including unit pricing and personalised baskets; consumer interactivity; and, increased transparency.<sup>2</sup>
- 1.11 CHOICE worked to develop an improved version of the website for launch on 1 July 2009; however, GROCERYchoice was closed down on 26 June 2009, without discussion with CHOICE, by decision of the new Minister for Competition Policy and Consumer Affairs, the Hon Dr. Craig Emerson MP.

## **Consumer behaviour**

- 1.12 Consumers are driven to shop at a particular outlet not only by price but by a myriad of reasons.

Consumers can take price information on the website into account with a range of other factors important to them when determining where to shop, including the location and accessibility of supermarkets to them, the quality of fresh produce, the product and produce range, and their assessment of the quality of service.<sup>3</sup>

- 1.13 According to Associate Professor Frank Zumbo from the University of New South Wales, shoppers in metropolitan regions tend to travel no more than five kilometres to purchase supermarket products.

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<sup>2</sup> CHOICE, *Submission 6*, p 4.

<sup>3</sup> ACCC, *Answers to Questions on Notice – Supplementary Estimates*, 22-23 October 2008, p 5.



**Prof. Zumbo**—The GROCERYchoice website as operated by ACCC was broken into 61 regions which were very large regions of Australia. In the Sydney metropolitan area it went from one side of the Sydney metropolitan area to the other side, some of the regions, and the reality is that consumers operate on a three to five kilometre radius. That is the market definition used by the ACCC. It is commonly accepted that consumers will not travel more than those three to five kilometres in the metropolitan area. So the GROCERYchoice website was not local in its approach, it was too general.<sup>4</sup>

1.14 Further, Associate Professor Zumbo stated in his submission to the Committee that:

Consumers already have a "general" feeling about grocery prices. What consumers want is specific pricing information that they can use to identify the cheapest products in the cheapest individual supermarket in their local area.<sup>5</sup>

### Implementation of GROCERYchoice

1.15 Understanding of consumer behaviour is crucial to configuring an effective consumer-focussed website; however, it's understood no modelling was undertaken by the Government, Treasury, the ACCC or CHOICE to ensure GROCERYchoice would be relevant to the Australian public:

**Senator XENOPHON**—Has any modelling or analysis been done by Treasury in terms of the benefit to consumers from giving consumers full price transparency?

**Mr Martine (ACCC)**—Not that I'm aware of.<sup>6</sup>

This questioning was followed up by Senator Barnett during the Committee hearing:

**Senator BARNETT**—Do you have any evidence to suggest that it would work? There must have been some document, some modelling undertaken, some information and research undertaken by the department so as to say to the government, 'Yes, this is going to work.' Where is that evidence? Can you identify it for us?

**Mr Chisholm (Treasury)**—In response to questions on notice we provided some documents which had been developed by CHOICE which were made available to government, to the best of my recollection, in August-September 2008 setting out a proposal for a CHOICE-run GROCERYchoice website.

**Senator BARNETT**—I am not talking about the CHOICE—

**Mr Martine (ACCC)**—You are talking about the original—

<sup>4</sup> Senate Economics Committee, *Proof Committee Hansard*, Tuesday 6 October 2009, p 2.

<sup>5</sup> Associate Professor Frank Zumbo, *Submission 14*, p 7.

<sup>6</sup> Senate Economics Committee, *Proof Committee Hansard*, Friday 18 September 2009, p 8.

**Senator BARNETT**—The original one, taken by the ACCC.

**Mr Martine**—Treasury obviously at the time—it would have been in the lead-up to the 2008-09 budget—provided the government with our advice. In terms of the question of whether we undertook detailed modelling, not being there at the time, I guess it would have been that we did not, and there would have been no detailed economic modelling undertaken on it. That is probably fair to say.

**Mr Chisholm**—To the best of our knowledge, no.

**Senator BARNETT**—You are saying that there is no evidence, no modelling, that you just sort of came up with the idea. You do not just spend \$13 million over a four-year period and put it in the budget and say, ‘We hope it is going to work.’ There must have been some basis for that. Can you please advise the committee of the reasons for it and of the evidence or modelling you relied on to put forward a budget proposal of some \$13 million over four years.

**Mr Martine**—If you are talking about quantitative economic modelling, where one looks at a proposal and undertakes an assessment of its impact on consumers or prices, anything like that, then the answer in this case is no, we did not undertake quantitative analysis. Just sitting here today, I would probably scratch my head trying to work out what sort of quantitative analysis you could undertake.

**Senator BARNETT**—What analysis did you undertake, Mr Martine?

**Mr Martine**—Like all budget proposals, in fact any proposals the government is considering, we provide the government and the relevant ministers with our views and advice on the merits or otherwise of the proposals under consideration. In terms of the original GROCERYchoice website that the ACCC were to run, we did provide that advice.

**Senator BARNETT**—I think it would be fair for one to assume that, if there were no modelling or business plan—and there is evidence that apparently that was not undertaken—some might argue that it is policy on the run or ill-conceived.<sup>7</sup>

1.16 The Committee was advised by the ACCC in its Answers to Questions on Notice, provided on 13 November 2009, that:

modelling of effectiveness of a policy proposal would form part of the policy decision for Government.<sup>8</sup>

Further, the ACCC stated that:

decisions on policy and the parameters of a project are made by the Government with advice from appropriate government departments.<sup>9</sup>

1.17 Subsequently, the commencement date provided to the ACCC by the Government was a policy parameter<sup>10</sup> and as such it appears not once that the

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<sup>7</sup> Senate Economics Committee, *Proof Committee Hansard*, Friday 18 September 2009, p 15.

<sup>8</sup> ACCC, Answers to Questions on Notice, 13 November 2009, p 5.

<sup>9</sup> ACCC, Answers to Questions on Notice, 13 November 2009, p 5.

<sup>10</sup> ACCC, Answers to Questions on Notice, 13 November 2009, p 6.

ACCC questioned or discussed with the Government as to whether it could be extended. This means that adequate planning and preparation for the website was not able to be done.

- 1.18 Bids to collect the data were received from five companies, including Retail Facts, who was successful in the tender, and Informed Sources.

Retail Facts' quote for \$4.669 million (excluding GST) was the second cheapest of the quotes, but was \$2.694 million greater than the quote provided by Informed Sources, of \$1.975 million (excluding GST).

- 1.19 The ACCC's explanation of awarding the tender to the more expensive quote of the two companies during the Committee hearings was:

**Mr Cassidy**—...while the Informed Sources tender was lower in price than the Retail Facts tender, which we accepted, we were under some time pressure to get the GROCERYchoice website up and running and we did have some doubts as to whether Informed Sources was going to be able to deliver, particularly on the data collection side, within the time frame we were operating in.

**Senator BARNETT**—What time pressure were you under, Mr Cassidy?

**Mr Cassidy**—The government was keen for the website to be up and running as soon as possible.

**Senator BARNETT**—How soon?

**Mr Cassidy**—We were working with an indicative time of having the first collection done so it could be released in early August.

**Senator BARNETT**—When was this discussion? You are talking about a six-week period to get it up and running.

**Mr Wing**—By the time the contract was let, there would have been about six or seven weeks to do the surveys.

**Senator BARNETT**—So the government gave itself a self-imposed deadline to require it to be established within that six-week period. Did you advise them of the obvious cost differential? Did you advise the government of the implications of their push to rush this forward and to have it up and running so quickly?

**Mr Wing**—No. It was a policy and we had a budget so we just ran within that.<sup>11</sup>

- 1.20 The ACCC went on to state that it did also not believe Informed Sources would be able to prepare a field force team within the six-week timeframe, as compared to Retail Facts who already had a field force in place.

11 Senate Economics Committee, *Proof Committee Hansard*, Friday 18 September 2009, pp 19-20.

However, Informed Sources did advise the ACCC that it would indeed be able to prepare a team within the required timeframe:

**Senator XENOPHON**—Sure. But weren't you satisfied at the outcome of that subsequent supplementary meeting with Informed Sources that they would be able to deliver within the time frame that was requested?

**Mr Pearson**—We had no doubts about their integrity, their process, the fact that they could do work, because they are doing an extremely good job for us now with petrol. The risk was too high for us, because if they could not do it—

**Senator XENOPHON**—So are you saying that the reason that Informed Sources did not get the job, even though it was \$2.7 million cheaper, was based on a belief, notwithstanding that you have said that they have a track record of doing a good job for the commission and, I think, they were also responsible for undertaking the mammoth task of price monitoring after the introduction of the GST?

**Mr Pearson**—They have done a wonderful job for us. In fact, we signed another a contract with them either in June last year or June this year. We extended our petrol monitoring for two years. It was purely within that time frame and the fact that we believed that they did not have the staff ready to put on the ground ....

...

**Senator XENOPHON**—Can I go back a step. The ACCC's relationship with Informed Sources goes back how many years—since the introduction of the GST?

**Mr Pearson**—A fair while.

**Senator XENOPHON**—About a decade?

**Mr Pearson**—Yes.

**Senator XENOPHON**—Have they ever let you down before in terms of their commitments to the ACCC?

**Mr Pearson**—Not that I am aware of.

**Senator XENOPHON**—I suggest to you that the answer is no. Someone's track record would be important to you in terms of assessing a tender and assessing their ability?

**Mr Pearson**—Definitely. We would not have put as much work into assessing them, we would not have invited them back and we would not have asked the supplementary questions if we did not feel that on one level they were technically capable of doing the job. We went to those extra steps because of that. There is a notion that we did not go a bit further. We could have just looked at the initial proposal and said it is going to be a problem because they did not have the people on the ground. We could have gone straight to Retail\*Facts. But we did not—and that was because of our relationship. So that did come to bear and we did look at it.

**Senator XENOPHON**—Although they previously had an unblemished record with the ACCC, you were holding back because you did not think they could deliver. That is effectively what happened, that is the reason why they did not get the tender, but I still do not understand the basis on which you made that decision.

**Mr Pearson**—We just did not believe they would be able to get sufficient well-trained staff on the ground by the August date. That was our concern.

We had to weigh up the fact that we had one potential operator who can confirm they had those staff and another one that said they could train the staff in time. We did not believe that time frame would be sufficient.

**Senator XENOPHON**—I think this goes to the nub of it: if a successful tenderer does not deliver the goods for the ACCC, there would be contractual consequences. There would be a breach of contract and you could potentially pursue damages against an entity that does not deliver the goods. Also, that would presumably put a big black mark against them in terms of any further work with the ACCC.

**Mr Pearson**—Yes, without a doubt.

**Senator XENOPHON**—Here is an organisation that has a long track record of providing massive surveys, not just on fuel but also on groceries, for the ACCC in the past. They have never let the ACCC down before.<sup>12</sup>

- 1.21 On the question of cost, Senator Barnett during the Committee Hearings asked the Chairman of the National Association of Retail Grocers of Australia, Mr John Cummings, a retailer himself, how much a private company would likely have paid for the same work to be conducted.

**Senator BARNETT**—What do you think would be more realistic?

**Mr Cummings**—I would have thought that it would be well under \$1 million.

**Senator BARNETT**—To undertake the work?

**Mr Cummings**—Absolutely. And that is not only collection of data but also interpretation of the data and then setting price files.

...

**Senator BARNETT**—Their initial bid was \$4.669 million and subsequently it signed up at, I think, \$5 million-plus. The Informed Sources tender was \$1.975 million, and you are saying that in fact it should be about \$1 million or less to undertake that sort of work.

**Mr Cummings**—That is what I think private enterprise would be expecting to pay.<sup>13</sup>

- 1.22 Mr Cummings also advised the Committee that private enterprise would also likely demand regular auditing, spot checking and reviews to ensure best practice; however, no audits of GROCERYchoice were undertaken while it was operating.<sup>14</sup>

**Senator BARNETT**—Despite the fact that the contract referred an opportunity for an audit, such an audit was never undertaken. What is your view about that, and should such a contract ever have been signed up?

**Mr Cummings**—We were always concerned about that, and we were always concerned about the data collection and the integrity of that data, especially when it came down to some of the smaller stores that were being gone into and having that price data taken out of. One of our concerns there was, of course, a smaller store might not have the entire

<sup>12</sup> Senate Economics Committee, *Proof Committee Hansard*, Wednesday 28 October 2009, pp 8–10.

<sup>13</sup> Senate Economics Committee, *Proof Committee Hansard*, Friday 18 September 2009, p 63.

<sup>14</sup> Senate Economics Committee, *Proof Committee Hansard*, Friday 18 September 2009, p 63.

range. If you take my particular instance, you have a larger independent, or Coles or Woolworths, that would sit at somewhere around 22,000 or 23,000 SKUs. In my particular instance, we sit on about 16,500 SKUs. Seeing as nobody knows what is in the prices that they are taking, if I do not range one of those products and they come into my store, what do they actually mark down? Do they take a larger size, a smaller size? Was that veracity ever checked? Again you have that same problem if you look at a shelf label. Even for one who is in the industry, when you go to short descriptions it is very difficult to actually figure out what the short description stands for. Quite often you have to go to an item number or a PLU to get what the actual product is. There is a whole pile of issues in there that make the data collection difficult.

**Senator BARNETT**—All right. I want to go back to the initial website the ACCC was setting up, and I have read your submission and some of the compelling arguments that you have put. You have got 500 products, 600 supermarkets and 61 regions. Frankly, in your view, was it ever going to work?

**Mr Cummings**—I still cannot see what the relevance is of a product available in Merredin to a product in Broome—which was the area that you are looking at. It would be like travelling from Greece to London to do your grocery shopping in the afternoon.

**Senator BARNETT**—So the way it was designed was a fatal flaw?

**Mr Cummings**—I have no doubt that the consumers who looked at it voted with their fingers and decided to go away from it because it did not deliver them any meaningful information.<sup>15</sup>

1.23 In addition to being significantly more expensive, Retail Facts already had a contract with Woolworths when it took on the GROCERYchoice tender, and Retail Facts' potential conflict of interest regarding the integrity of the data collected was raised.

1.24 The ACCC advised the Committee in its Answers to Questions on Notice that:

The majority of data collectors engaged by Retail Facts to collect price information for the ACCC were not used for the collection of price information for Woolworths. There were a very small number of exceptions to this in remote regional areas.<sup>16</sup>

It went on to say that in these instances, price collections for the ACCC and Woolworths were undertaken in different weeks and were never performed in the same store.

1.25 Associate Professor Frank Zumbo argued that the ACCC should never have been given operational management of the website to begin with.

**Prof. Zumbo**—The ACCC was the wrong body to give this website to. I believe it was poorly planned in the sense that there was a lot of time

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<sup>15</sup> Senate Economics Committee, *Proof Committee Hansard*, Friday 18 September 2009, p 63.

<sup>16</sup> ACCC, Answers to Questions on Notice, 13 November 2009, p 3.

pressure being placed on the ACCC to deliver. I think haste is not a good thing, especially when we are told that the ACCC spent \$3.64 million on this website, which was completely wasted.<sup>17</sup>

## Limitations of GROCERYchoice

1.26 Overseas, grocery price comparison websites appear to operate relatively well.

In the United Kingdom, a privately-funded and owned company operates a grocery comparison website which allows consumers to select items for the country's four leading supermarket chains: Tesco, Asda, Sainsbury's and Ocado. One feature of the website includes the opportunity to for users to place an online order based on their search.<sup>18</sup>

The Italian Government has set up a similar service for grocery price comparison, whereby consumers can send an SMS from their mobile phone to check the average prices of different foods in across the various regions.<sup>19</sup>

And, in July 2009, Ireland's National Consumer Agency announced that it intends to set up a grocery price comparison website with real-time information for consumers.<sup>20</sup>

1.27 While the usage of these websites is small or yet to be determined – it's estimated around only 3 percent of the UK population use [www.mysupermarket.co.uk](http://www.mysupermarket.co.uk)<sup>21</sup> – its approach appears to be decidedly more user friendly and useful to consumers in the information it provides.

1.28 The ACCC and CHOICE cited difficulties with the supermarket chains as a reason for the ineffectiveness of GROCERYchoice.

According to CHOICE's submission to the Committee:

Woolworths was resistant to the idea from the beginning. They cited a range of issues from technology constraints to trade practices breaches, all of which CHOICE was willing and able to address. ALDI and FoodWorks were supportive and cooperative and while they cited technology as a challenge, they were willing to find solutions and work with CHOICE. Coles and Franklins were initially cooperative and open to the idea, but became increasingly distant.<sup>22</sup>

<sup>17</sup> Senate Economics Committee, *Proof Committee Hansard*, Tuesday 6 October 2009, p 5.

<sup>18</sup> <http://www.mysupermarket.co.uk>

<sup>19</sup> Article: BBC – Alka Marwaha, *Italians dial up best food price*, 27 July 2008

<sup>20</sup> Article: The Irish Times – Conor Pope, *Consumer body wants food prices listed online*, 14 July 2009

<sup>21</sup> Mr Alan Cadd, *Proof Committee Hansard*, Tuesday 6 October 2009, p 50.

<sup>22</sup> CHOICE, *Submission 6*, p 13.

- 1.29 According to the Australian National Retailers Association, which represents companies including Woolworths, Coles and Franklins, providing price data on a real time basis is not realistic and would incur significant compliance costs:

No retailer has a centralised data system which records in real time the prices of grocery items sold across the chain.<sup>23</sup>

- 1.30 The ACCC similarly stated in its July 2008 report, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, that the head offices of Coles and Woolworths:

...set the shelf prices for most of its products in each of its stores. It also sets promotional prices, although not all stores necessarily have the same promotions at any one time. The local store manager can reduce prices below the standard shelf price in a range of circumstances including clearances of discontinued stock and stock approaching its use-by date and as a response to local competition.<sup>24</sup>

- 1.31 However, supermarket IT systems do enable checkouts to price in real time. Associate Professor Frank Zumbo in his submission to the Committee stated that:

Since scanned pricing information through their checkouts is in real time, the major supermarket chains could provide real time pricing information to the public if they chose to do so.<sup>25</sup>

He advocates supermarkets commit to full pricing transparency:

Given that they have some of the most sophisticated IT systems that enable them to collect all pricing information scanned through their checkouts, it is clear that the major supermarket chains have the technical ability to implement full price transparency through their own websites in relation to all products sold in each of their supermarkets.<sup>26</sup>

- 1.32 Another issue which added to the apparent irrelevance of the website for consumers is that data appears to have been out of date before it was even released online:

The ACCC's version of the GROCERYchoice website only provided a very limited monthly "snapshot" that was out of date as soon as it is put on the website. As supermarket shoppers will typically shop on at least a

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<sup>23</sup> Australian National Retailers Association, *Submission 11*, p 5.

<sup>24</sup> ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, p 467.

<sup>25</sup> Associate Professor Frank Zumbo, *Submission 14*, p 10.

<sup>26</sup> Associate Professor Frank Zumbo, *Submission 14*, p 10.



weekly basis, they want the most up to date information possible about the cheapest local supermarket and products in their local area.<sup>27</sup>

And:

In the ACCC's version of the GROCERYchoice website, the products included in each month's survey were rotated, which meant that consumers had no ability whatsoever to compare prices month to month.<sup>28</sup>

1.33 Associate Professor Frank Zumbo explained in his submission that:

The ACCC's version of GROCERYchoice contained out of date pricing data and extremely generalised information that failed to give consumers any meaningful data that consumers could seek to rely on to help reduce their grocery bill. The key failure of the ACCC's version of the GROCERYchoice website was that it failed to assist consumers to find the cheapest individual local supermarket or to find the cheapest individual products they may be looking to buy during their next supermarket visit.<sup>29</sup>

1.34 Further, the 61 regions as set out by the ACCC's initial version of GROCERYchoice meant that supermarkets hundreds of kilometres away, in some instances, were being compared to each other.

The state of Tasmania was broken up into three regions, for example:

**Senator BARNETT**—You can understand their concerns, particularly in Tasmania where you had three regions and you were comparing supermarkets in St Helens, Scottsdale and Launceston, for example, which are up to 100 kilometres apart. In terms of the benefit or merit of that to consumers it is, frankly, an absurdity.<sup>30</sup>

1.35 The ACCC advised the Senate Committee that:

Regions for the GROCERYchoice website were determined using information from the Australian Bureau of Statistics. Each region represented an aggregation of a number of Local Government Areas.<sup>31</sup>

1.36 However, as previously stated, shoppers tend not to venture further than 5 kilometres to buy their groceries and as such this data became irrelevant.

Furthermore, the website did not detail which supermarkets had been surveyed, but rather kept the details area-generic.

<sup>27</sup> Associate Professor Frank Zumbo, *Submission 14*, p 7.

<sup>28</sup> Associate Professor Frank Zumbo, *Submission 14*, p 9.

<sup>29</sup> Associate Professor Frank Zumbo, *Submission 14*, p 3.

<sup>30</sup> Senator Guy Barnett, *Proof Committee Hansard*, Friday 18 September 2009, p 36.

<sup>31</sup> ACCC, *Answers to Questions on Notice*, 13 November 2009, p 6.

- 1.37 In comparison, supermarkets employ an established practice that was not set to cease under GROCERYchoice and which provide consumers with greater, more-localised information:

Woolworths, Coles, Aldi, Franklins and the thousands of independent grocery retailers already spend many millions of dollars a year through print, radio and television advertisements to tell customers which items on "special" represented the best value directly in the customer's area.<sup>32</sup>

- 1.38 Woolworths advised the Committee in its response to Questions on Notice that it alone publishes 8 million brochures each week about its store specials and prices.<sup>33</sup>

## Conclusion

- 1.39 While the intent behind the GROCERYchoice website was genuine, the practicality of it in terms of its operations and its usefulness to consumers on a day-to-day basis seems to have been an issue since its establishment.
- 1.40 While these may have been identified and clarified had more time been allocated towards the planning of the website rather than the rush in which it seems to have been conceived, it appears that any grocery price comparison website will not provide consumers with any additional useful knowledge unless it is real-time, suburb specific, advertises the daily specials and lists all products in store.
- 1.41 The decision to close GROCERYchoice appears to have been rushed and without full consultation by the newly-appointed Minister to the portfolio, Dr Craig Emerson, with the website's new providers, CHOICE.

While Minister Emerson clearly identified that the website in its current form, without real-time, localised information, was not able to provide consumers with relevant information, the Minister could have facilitated additional dialogue between all supermarket chains and CHOICE regarding possible improvements to GROCERYchoice before making his decision.

- 1.42 It was raised during the Committee hearings that discussions have occurred to look at establishing a similar website to GROCERYchoice; however, to date it remains unclear whether this will eventuate.
- 1.43 According to new OECD price data, food prices in Australia have increased 41.3 percent since the start of 2000, so there's no question more needs to be done to address these price hikes which appear to be driven largely as a result

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<sup>32</sup> National Association of Retail Grocers of Australia, *Submission 2 - Attachment B*, p 2.

<sup>33</sup> Woolworths, Response to Questions on Notice, 10 November 2009, p 4.

of a market duopoly. Accordingly, a price comparison website based on real-time information can only be part of the solution.

- 1.44 A grocery price comparison website was considered initially because Coles and Woolworths have such a dominant market share and it is this dominance which raises competition issues.
- 1.45 If the government wants to address high grocery prices, it needs to improve competition in the groceries sector overall, by requiring supermarkets to provide full price transparency to enable and empower consumers with pricing information before they shop; by enabling greater entry to the market by independents and small retailers; and by addressing geographic price discrimination, predatory pricing and other anti-competitive practices.

## **Recommendations**

### **Recommendation 1**

**That the government improves competition in the groceries sector by requiring supermarkets to provide full price transparency to enable and empower consumers with pricing information before they shop, enabling greater entry to the market by independents and small retailers; and by addressing geographic price discrimination, predatory pricing and other anti-competitive practices.**

### **Recommendation 2**

**That the system of dealing with tenders by the ACCC be improved and more transparent given the curious and unsatisfactory explanation given for why Informed Sources was not awarded this tender on the basis of cost and its prior work with the ACCC.**

### **Recommendation 3**

**That prior to any government-run or government funded price comparison website being established in the future, significant time be allocated towards planning, modelling and consultation so to ensure effectiveness, relevance and requirements of such a website.**

### **Recommendation 4**

**That companies providing bids for government projects identify any potential conflict of interest and that they be required to provide detailed information on how confidentiality and integrity of the project will be adhered to. Further, that an ongoing audit of their work be carried out at random intervals throughout the project, regardless of whether an incident has first arisen to cause suspicion.**

**Recommendation 5**

**That the Trade Practices Amendment (Guaranteed Lowest Prices – Blacktown Amendment) Bill 2009 is enacted, to deal effectively with the anti-competitive practice of geographic price discrimination.**

A handwritten signature in black ink, appearing to read 'Nick Xenophon', with a stylized flourish at the end.

**NICK XENOPHON**  
**Independent Senator for South Australia**

# **APPENDIX 1**

## **Submissions Received**

<b>Submission Number</b>	<b>Submitter</b>
1	Queensland Consumers Association
2	National Association of Retail Grocers of Australia
3	WA Independent Grocers Association
4	Mr D Johnson
5	Tasmanian Independent Retailers
6	CHOICE
7	Australian Retailers Association
8	The Australian Chamber of Fruit and Vegetable Industries Ltd
9	Retail Traders' Association of Western Australia Inc
10	Informed Sources (Australia) Pty Ltd
11	Australian National Retailers Association (ANRA)
12	Mr Robert Chapman
13	Master Grocers Australia
14	Associate Professor Frank Zumbo, School of Business Law and Taxation, University of New South Wales
15	Associate Professor Peter Earl, University of Queensland

## **Additional Information Received**

Received 16 September 2009 from Treasury. Answers to Questions on Notice asked prior to public hearings.

Received 17 September 2009 from Australian Competition and Consumer Commission. Answers to Questions on Notice asked prior to public hearings.

Information received from Informed Sources Pty Ltd regarding the mysupermarket.com website (UK), received 13 October 2009.

Received 15 October 2009 from ALDI. Answers to Questions on Notice asked at a public hearing in Melbourne on 6 October 2009.

Attachment to the above answer to Questions on Notice received from ALDI.

Received 16 October 2009 from ALDI. Answers to Questions on Notice asked at a public hearing in Melbourne on 6 October 2009.

Information received from Informed Sources Pty Ltd received 16 October 2009: ACCC tender evaluation documents obtained under FOI.

Received 16 October 2009 from freshlogic. Answers to Questions on Notice asked at a public hearing in Melbourne on 6 October 2009.

Received 20 October 2009 from freshlogic. Answers to Questions on Notice asked at a public hearing in Melbourne on 6 October 2009.

Received 23 October 2009 from Treasury. Answers to Questions on Notice asked at a public hearing in Canberra on 18 September 2009.

Received 27 October 2009 from ANRA. Answers to Questions on Notice (plus attachments) asked at a public hearing in Melbourne on 6 October 2009.

Received 28 October 2009 from ACCC. Answers to Questions on Notice asked at a public hearing in Canberra on 18 September 2009.

Received 22 October 2009 from Choice; answers to Questions on Notice.

Attachment 1 to the above answer to Questions on Notice by Choice: 'Like for like product matching'.

Attachment 2 to the above answer to Questions on Notice by Choice: 'Rationale for retail fresh food products comparison'.

Received 11 November 2009 from Coles; answers to Questions on Notice.

Received 12 November 2009 from Woolworths; answers to Questions on Notice.

Received 16 November 2009 from ACCC; answers to Questions on Notice asked at a public hearing on 28 October 2009.

## **TABLED DOCUMENTS**

### **18 September 2009, CANBERRA ACT:**

- Document tabled by CHOICE at a public hearing: "Claim to Treasury on GROCERYchoice project".
- Document tabled by Treasury at a public hearing: "Schedule 2 - Funding Schedule" from the GROCERYchoice website contract.
- Document tabled by Treasury at a public hearing: "Total payments made to date" in relation to GROCERYchoice.
- Document tabled by the National Association of Retail Grocers of Australia at a public hearing: "Grocery Price Comparison - 15 September 2009".
- Document tabled by National Association of Retail Grocers on Australia (NARGA) at a public hearing: "Glengarry Fresh IGA - copy of receipt".

### **6 October 2009, MELBOURNE VIC:**

- Document tabled by Tasmanian Independent Retailers at a public hearing.





## **APPENDIX 2**

### **Public Hearing and Witnesses**

**CANBERRA, FRIDAY 18 SEPTEMBER 2009**

BROCKLEHURST, Mr Adrian, Chief Financial Officer,  
Australian Competition and Consumer Commission

CASSIDY, Mr Brian, Chief Executive Officer,  
Australian Competition and Consumer Commission

CHISHOLM, Mr James, Manager, Competition Policy Framework Unit,  
Treasury

CUMMINGS, Mr John Watson, Chairman,  
National Association of Retail Grocers of Australia

HENRICK, Mr Kenneth Michael, Chief Executive Officer,  
National Association of Retail Grocers of Australia

KENNEDY, Dr Steven, General Manager, Competition and Consumer Policy  
Division, Treasury

MARTINE, Mr David, Acting Executive Director, Markets Group,  
Treasury

PAINTON, Mr Geoffrey Andrew, Branch Manager, Central Agencies Branch, Budget  
Group, Department of Finance and Deregulation

RENOUF, Mr Gordon, Director, Policy and Campaigns,  
CHOICE

STACE, Mr Nick, Chief Executive Officer,  
CHOICE

WING, Mr Anthony, General Manager, Transport and General Prices Oversight  
Branch, Australian Competition and Consumer Commission

**MELBOURNE, TUESDAY 6 OCTOBER 2009**

ALLEN, Mr Rodney Frederick, President, Master Grocers Australia; and Board Member, Director and Retailer, Mount Martha Supa IGA

CADD, Mr Alan Stephen, Managing Director,  
Informed Sources (Australia) Pty Ltd

CHOU, Associate Professor Chun Tung,  
Private capacity

de BRUIN, Mr Jos, Chief Executive Officer,  
Master Grocers Australia

DUNCAN, Professor Ian, Legal Adviser,  
Tasmanian Independent Retailers

HINCHCLIFFE, Mr Grant, Chief Executive Officer,  
Tasmanian Independent Retailers

KANHERE, Dr Salil,  
Private capacity

KNEEBONE, Mr Martin, Director,  
Freshlogic

LONG, Dr Brendan, Director of Policy and Strategy Development,  
Australian National Retailers Association

OSMOND, Mrs Margy, Chief Executive Officer,  
Australian National Retailers Association

PRICE, Mr Alan George, General Manager of Strategy,  
Informed Sources (Australia) Pty Ltd

TINDAL, Mr Andrew James, Group Buying Director,  
Aldi Stores

ZIMMERMAN, Mr Russell, Executive Director,  
Australian Retailers Association

ZUMBO, Associate Professor Frank,  
Private capacity

**CANBERRA, WEDNESDAY 28 OCTOBER 2009**

BROCKLEHURST, Mr Adrian, Chief Finance Officer, Australian Competition and Consumer Commission

HADLER, Mr Robert, General Manager, Corporate Affairs, Coles Group

HALL, Mr Andrew John, Director, Corporate and Public Affairs, Woolworths Ltd

KELLY, Mr James, Customer Business Manager, Retail\*Facts

MARA, Mr Chris, Adviser, Government Affairs, Coles Group

MARSHALL, Mr Anthony, Managing Director, Bailey Group

PEARSON, Mr Mark, Executive General Manager, Regulatory Affairs, Australian Competition and Consumer Commission

SAMIA, Ms Nathalie Shoshana, Group Manager, Government Relations, Woolworths Ltd



## APPENDIX 3

### SCHEDULE OF PAYMENTS UNDER THE GROCERYCHOICE CONTRACT TO DATE (4 NOV 09)

#### Total payments made to date

Payment	Description	Date accrued	Amount (\$) GST inclusive	Amount (\$) GST exclusive
<b>Grocerychoice appropriation funding</b>				<b>\$12,857,000*</b>
<b>Payments made by the ACCC</b>				
ACCC costs incurred	The ACCC incurred costs for the hosting maintenance, and grocery product prices survey associated with the Grocerychoice website from August-December 2008			\$3,642,968*
<b>Appropriated funds transferred from ACCC to Treasury</b>				<b>\$9,214,000*</b>
<b>Payments made by Treasury to date</b>				
Choice	Payments under the Grocerychoice Website Contract	Dec 08 - June 09	\$3,000,000	\$2,727,273
Getronics	Payments for the re-skin, hosting and maintenance of the Grocerychoice website	Jan 09 - Jun 09	\$436,319	\$396,654
The Bailey Group (Retail Facts)	Payments for the monthly grocery price data surveys	Jan 09 - May 09	\$918,029	\$834,572
Internal costs	Legal advice on the Grocerychoice Website Contract	Dec 08-ongoing	\$80,020	\$72,745
Internal costs	External audit of Grocerychoice	Sep 09- Oct 09	\$21,495	\$19,541
<b>Sub-total</b>			<b>\$4,455,863</b>	<b>\$4,050,785</b>
<b>Remaining appropriated funds</b>				<b>\$5,163,247*</b>
<b>Total payments under the Grocerychoice website to date</b>				<b>\$7,693,753*</b>

\* numbers may not add due to rounding differences between the ACCC and Treasury

- *NOTE: The table updates the corrected table that was provided to the Senate Inquiry into Grocerychoice after Treasury's appearance on 18 September 2009. Figures have been updated to include adjustments for costs incurred for legal expenses and audit fees.*
- Legal proceedings associated with the termination are ongoing. It is not appropriate to comment further at this stage or discuss final payment figures until this process is completed.

### **Treatment of GST**

- All payments made under the Grocerychoice appropriation are *GST inclusive*.
- However, the total cost to the taxpayer will be *GST exclusive* once the GST is netted off these payments.

## **APPENDIX 4**

### **GROCERYchoice Website Contract**







Australian Government Solicitor

**GROCERYCHOICE WEBSITE CONTRACT**

**Commonwealth of Australia** as represented by the **Department of the Treasury**  
ABN 92 802 414 793

**Australian Consumers' Association** trading as **Choice**  
ACN 000 281 925 ABN 72 000 281 925

50 Blackall St Barton ACT  
Contact: Tony Beal  
T (02) 6253 7231 F (02) 6253 7306  
M 0407 548 125  
tony.beal@ags.gov.au

File reference: 08093803

A handwritten signature in black ink, appearing to be 'Tony Beal', located in the bottom right corner of the page.

**CONTENTS**

<b>1.</b>	<b>Interpretation</b>	<b>1</b>
1.1.	Definitions	1
1.2.	Interpretation	9
1.3.	Guidance on construction of contract	10
<b>2.</b>	<b>Commencement and Term</b>	<b>10</b>
<b>3.</b>	<b>Conduct of the Grocerychoice website and activities</b>	<b>11</b>
3.1.	Summary of Choice accountabilities	11
3.2.	Phase 3 Commencement	11
3.3.	Phase 3 Review and Alternative Phase 3	11
3.4.	Choice Responsibility and Availability of Treasury Services	12
3.5.	Performance standards	13
3.6.	Subcontractors	14
3.7.	Personnel	14
<b>4.</b>	<b>Payment</b>	<b>15</b>
4.1.	Making of payment	15
4.2.	Calculation of Funding	15
4.3.	Adjustment of Unpaid Cash Funding	15
4.4.	Sanctions for inadequate management or performance	15
4.5.	Debt and Interest	16
<b>5.</b>	<b>Financial accountability</b>	<b>16</b>
5.1.	Use of Funding	16
5.2.	Keeping of Funding	16
5.3.	Financial Records	17
5.4.	Use as security	17
5.5.	Refunds	18
5.6.	No additional Funding	18
5.7.	Other funding	18
<b>6.</b>	<b>Taxes, duties and government charges</b>	<b>19</b>
<b>7.</b>	<b>Assets</b>	<b>19</b>
7.1.	Acquisition of Asset	19
7.2.	Ownership of Asset	19
7.3.	Terms applicable to Asset	19
7.4.	Use of Asset	19
7.5.	Choices' responsibilities for Asset	19
7.6.	Sale or Disposal of Asset during term of this contract	20
7.7.	Loss, damage, etc of Asset	20
7.8.	Dealing with Asset	20
7.9.	Failure to make payment	21

<b>8.</b>	<b>Records</b>	<b>21</b>
8.1.	Keeping Records	21
8.2.	Retention of Records	21
<b>9.</b>	<b>Reporting</b>	<b>22</b>
9.1.	Progress Reports	22
9.2.	Annual Reports and Final Report	22
9.3.	Use of Approved Auditor and Qualified Accountant	24
9.4.	Who provides certification	24
9.5.	Other Reports	24
<b>10.</b>	<b>Relationship Management</b>	<b>25</b>
10.1.	Liaison and monitoring	25
10.2.	Choice's Representative	25
10.3.	General	25
10.4.	Schedules Meetings	25
10.5.	Information and Review	25
<b>11.</b>	<b>Intellectual property</b>	<b>25</b>
11.1.	Activity Material	25
11.2.	Licence of Treasury Background Material to Choice	25
11.3.	Licensing of Choice Material to Treasury	26
11.4.	Provision of Activity Material to Treasury	26
11.5.	Dealing with Intellectual Property Rights	26
11.6.	Consent to Specified Acts	26
<b>12.</b>	<b>Confidential Information</b>	<b>27</b>
12.1.	Confidential Information not to be Disclosed	27
12.2.	Written Undertakings	27
12.3.	Exceptions to Obligations	27
12.4.	Period of Confidentiality	28
12.5.	No reduction in Privacy Obligations	28
<b>13.</b>	<b>Privacy</b>	<b>28</b>
13.1.	Interpretation and application of clause	28
13.2.	Obligations of Recipient in relation to privacy	28
<b>14.</b>	<b>Acknowledgement and publicity</b>	<b>29</b>
14.1.	Acknowledgement of support	29
14.2.	Right to publicise Funding	29
14.3.	Copies of publications	29
14.4.	Public Announcements/Media Contact	29
14.5.	No restriction on advocacy activities	30
<b>15.</b>	<b>Indemnity</b>	<b>30</b>
15.1.	General indemnity	30
15.2.	Reduction of scope	31
15.3.	Preservation of other rights	31

15.4.	Meaning of 'fault'	31
<b>16.</b>	<b>Dispute resolution</b>	<b>31</b>
16.1.	Procedure for dispute resolution	31
16.2.	Costs	32
16.3.	Application of clause	32
16.4.	Performance of obligations	32
<b>17.</b>	<b>Termination, or reduction in scope of contract</b>	<b>32</b>
17.1.	Termination for convenience	32
17.2.	Termination for fault	33
17.3.	Preservation of other rights	34
<b>18.</b>	<b>Occupational Health and Safety</b>	<b>35</b>
18.1.	Use of Agency's premises	35
<b>19.</b>	<b>Corporate Governance</b>	<b>35</b>
19.1.	Constitution	35
<b>20.</b>	<b>Notices</b>	<b>35</b>
20.1.	Format, addressing and delivery	35
20.2.	When effective	36
<b>21.</b>	<b>General Provisions</b>	<b>36</b>
21.1.	Audit and Access	36
21.2.	Insurance	36
21.3.	Conflict of interest	37
21.4.	Relationship of parties	37
21.5.	Waiver	37
21.6.	Variation of contract	37
21.7.	Assignment	37
21.8.	Survival	38
21.9.	Applicable law and jurisdiction	38
	<b>Schedule 1 Grocerychoice Activity Details</b>	<b>39</b>
	<b>Schedule 2 Funding Schedule</b>	<b>51</b>
	<b>Schedule 3 Contract Details</b>	<b>54</b>
	<b>Schedule 4 Grocerychoice Website SOW</b>	<b>1</b>
	<b>Schedule 5 Grocerychoice IT Contract</b>	<b>23</b>
	<b>Schedule 6 Grocery Product Prices Survey Contract</b>	<b>262</b>
	<b>Schedule 7 Protocol</b>	<b>295</b>

## GROCERY CHOICE WEBSITE CONTRACT

### PARTIES

This contract is made between and binds the following parties:

1. **Commonwealth of Australia** as represented by the **Department of the Treasury** 92 802 414 793, Langton Crescent, Parkes ACT 2600, Australia (**Treasury**)
2. **Australian Consumers' Association, trading as Choice** ACN 000 281 925 ABN 72 000 281 925 (**Choice**)

### CONTEXT

- A. As part of a package of measures to enhance competition and assist Australian consumers to be better informed about grocery prices, the Australian Government launched the Grocerychoice Website on 6 August 2008.
- B. Choice approached the Australian Government with a proposal to take over the Grocerychoice Website. Choice proposed to provide the public with a more useful website by enhancing and improving upon the current operation and information provided by the ACCC.
- C. This contract sets out the agreed basis on which the Grocerychoice Website and associated functions will be transferred to Choice and for the operation and enhancement of it by Choice during the term of this contract.

### OPERATIVE PROVISIONS

In consideration of the mutual promises contained in this contract, the parties to this contract agree as follows:

#### 1. INTERPRETATION

##### 1.1. Definitions

1.1.1. In this contract, unless the context indicates otherwise:

**Activity** means the activity to be undertaken, the requirements to be met and the accountabilities to be discharged by Choice as described in the Grocerychoice Activity Details and as agreed in accordance with clause 3.3.2, and includes the provision of Activity Material;

**Activity Generated Income** means any income earned by Choice from its Grocerychoice activities including income generated from third party advertising or promotion but excluding income generated from Choice's advertising or promotion of its own activities,

publications and services;

**Activity Material**

means:

- a. any Material that is developed, created or generated by Choice (including by third parties directed by, or contracted to, Choice) in respect of, or contemplated by, this contract ('Foreground Material');
- b. any pre-existing tools, object libraries, data, methodologies or Material used by Choice in relation to the Foreground Material or the Grocerychoice Website ('Choice Background Material');

**Activity Period**

means the period specified as the 'Activity Period' in the Activity Schedule, during which the Activity must be completed;

**Adjustment Factor**

means the basis by which a Base Funding Amount is adjusted to calculate the Funding (in cash) payable, as specified in the Funding Schedule or as may be otherwise agreed in writing by the parties;

**Alternative Phase 3**

means the details of all activities necessary for Choice's performance of its obligations in respect to the alternative to Phase 3 including its scope, maximum Funding amount and payment schedule agreed in accordance with clause 3.3.2;

**Approved Auditor**

means a person who is:

- a. registered as a company auditor under the *Corporations Act 2001* (Cth) or an appropriately qualified member of the Institute of Chartered Accountants in Australia or of CPA Australia;
- b. not a principal, member, shareholder, officer, agent, subcontractor, employee or related entity of Choice or of a related body corporate (the terms 'related entity' and 'related body corporate' have the same meaning as in section 9 of the *Corporations Act 2001* (Cth)); and
- c. not Choice's Qualified Accountant;

**Asset**

means any item of property, purchased, leased, hired, financed, created or otherwise brought into existence either wholly or in part with use of the Funding, which has a value of over \$500 exclusive of GST, but excludes any Intellectual Property Rights;

<b>Auditor-General</b>	means the office established under the <i>Auditor-General Act 1997 (Cth)</i> and includes any other entity that may, from time to time, perform the functions of that office;
<b>Australian Accounting Standards</b>	refers to the standards of that name maintained by the Australian Accounting Standards Board created by section 226 of the <i>Australian Securities and Investments Commission Act 2001 (Cth)</i> ;
<b>Australian Auditing Standards</b>	refers to the standards made by the Auditing and Assurance Standards Board created by section 227A of the <i>Australian Securities and Investments Commission Act 2001 (Cth)</i> ;
<b>Australian Government</b>	means Commonwealth of Australia;
<b>Australian Government Grocerychoice Initiative</b>	means the Australian Government initiative to provide identified grocery price information to help consumers compare price and other relevant information in relation to supermarkets and groceries;
<b>Base Funding Amount</b>	means the base funding (in cash) amount specified in respect to a part of the Activity, specified as the 'Base Funding Amount' in the Funding Schedule or as otherwise specifically agreed in writing by Treasury, which is subject to adjustment by the Adjustment Factor to calculate the Funding (in cash) for that part of the Activity;
<b>Business Day</b>	means in relation to the doing of any action in a place, any day other than a Saturday, Sunday, or public holiday in that place, or if no such place is specified or reasonably ascertainable, in Canberra;
<b>Business Hours</b>	means 9:00 to 17:00 on Business Days;
<b>Choice</b>	includes officers, employees, agents, volunteers and subcontractors, and successors of Choice;
<b>Completion Date</b>	means the day after Choice has done all that it is required to do under clauses 3 [Conduct of the Grocerychoice website and activities], 5 [Financial accountability] and 9 [Reporting] of this contract;
<b>Confidential Information</b>	means: <ul style="list-style-type: none"> <li>a. in respect of Treasury's confidential information, any information that is by its nature confidential that is provided by Treasury to Choice or which Choice otherwise accesses or becomes aware of as a result of this contract and which: <ul style="list-style-type: none"> <li>i. is listed as "Treasury's Confidential</li> </ul> </li> </ul>

Information" in the Contract Details; or

ii. Choice knows or ought to know is confidential; and

b. in respect of Choice's confidential information, any information that is by its nature confidential and:

iii. is listed as "Choice's Confidential Information" in the Contract Details;

iv. is otherwise specifically agreed in writing by Treasury in respect of this contract to be confidential; or

v. Treasury knows or ought to know is confidential

**Conflict**

means any matter, circumstance, interest or activity involving or affecting Choice, its Personnel or subcontractors which may or may appear to impair the ability of Choice to perform the Activity fairly, objectively, diligently or independently;

**Constitution**

means (depending on the context):

a. a company's constitution, which (where relevant) includes rules and any amendments that are part of the company's constitution; or

b. in relation to any other kind of body:

i. the body's charter, rules or memorandum; or

ii. any instrument or law constituting or defining the constitution of the body or governing the activities of the body or its members;

**Contract Details**

means the schedule to this contract headed 'Contract Details';

**Deliverable**

means any Material (including Activity Material) that Choice is required to provide to Treasury pursuant to this contract;

**Depreciated**

means the amount representing the reduction in value of an Asset calculated in accordance with Australian Accounting Standards;

**Director**

means any of the following:

a. a person appointed to the position of a director or alternate director and acting in that capacity for a body corporate within the meaning of the *Corporations Act 2001* (Cth) regardless of the



	name given to their position;
	b. a member of the committee of an organisation incorporated pursuant to State or Territory laws relating to the incorporation of associations; or
	c. a member of the board, committee or group of persons (however described) that is responsible for managing or overseeing the affairs of the body corporate;
<b>Dispose</b>	means to sell, licence, lease or sublease, or otherwise transfer or give up ownership or the right to occupy or use, or to enter into an agreement to do any of the preceding acts and 'Disposal' means the method of so disposing;
<b>Financial Year</b>	means each period from 1 July to the following 30 June occurring during the Activity Period, or any part of such a period occurring at the beginning or end of the Activity Period;
<b>Funding</b>	means the amount or amounts (in cash or kind) payable by Treasury under this contract as specified in the Funding Schedule, and includes Activity Generated Income and In-Kind Contributions;
<b>Funding Schedule</b>	means the schedule to this contract headed 'Funding Schedule';
<b>Getronics</b>	means Getronics Australia Pty Ltd;
<b>GST</b>	has the meaning that it has in the <i>A New Tax System (Goods and Services Tax) Act 1999 (Cth)</i> ;
<b>Grocerychoice Activity Details</b>	means the schedule to this contract headed 'Grocerychoice Activities Details';
<b>Grocerychoice Website</b>	means the 'Grocerychoice' website accessible at <a href="http://www.grocerychoice.gov.au">www.grocerychoice.gov.au</a> (and <a href="http://www.grocerychoice.net.au">www.grocerychoice.net.au</a> and <a href="http://www.grocerychoice.com.au">www.grocerychoice.com.au</a> ) and all associated ICT systems and associated facilities as at the date of this contract and as modified, supplemented or replaced by Choice at any time (including all associated domain names);
<b>Grocerychoice Website SOW</b>	means the Grocerychoice website statement of work (SOW) at Schedule 4 which sets out the work to be performed by Getronics pursuant to a work order issued under clause 12 of the Grocerychoice IT Contract;
<b>Grocerychoice IT</b>	means the contract titled 'Grocery Price Monitoring

<b>Contract</b>	Website System Design, Implementation and Services Contract' between Treasury and Getronics, a copy of which is at Schedule 5;
<b>Grocery Product Prices Survey Contract</b>	means the contract between Treasury and The Bailey Group Pty Ltd in relation to services for Grocery Product Prices Survey, dated 6 June 2008, a copy of which is at Schedule 6;
<b>Hosting Arrangement</b>	means the contract for hosting of the Grocerychoice Website between Treasury and Getronics Australia Pty Limited created pursuant to clause 4.4 of the Grocerychoice IT Contract;
<b>Identified Contingent In-Kind Contributions</b>	In-Kind Contributions that may arise during the Term if certain events occur and are identified in the Funding Schedule;
<b>In-Kind Contribution</b>	means the expenditure, liability and cost incurred by Treasury in relation to the Australian Government Grocerychoice Initiative, including without limitation fees under the Hosting Arrangement, Grocerychoice IT Contract or Grocery Products Price Survey Contract;
<b>Intellectual Property Rights</b>	includes: <ul style="list-style-type: none"> <li>a. all copyright (including rights in relation to phonograms and broadcasts);</li> <li>b. all rights in relation to inventions, plant varieties, trademarks (including service marks), designs, circuit layouts; and</li> <li>c. all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields;</li> </ul> <p>but does not include:</p> <ul style="list-style-type: none"> <li>d. Moral Rights;</li> <li>e. the rights of performers; or</li> <li>f. rights in relation to Confidential Information;</li> </ul>
<b>Interest</b>	means interest calculated at an interest rate equal to the general interest charge rate for a day pursuant to section 8AAD of the Taxation Administration Act 1953 (Cth), on a daily compounding basis;
<b>Key Performance Indicators</b>	means the minimum standards of performance specified (no matter how named or referred to) in Grocerychoice Activity Details or otherwise agreed in writing between the parties;

<b>Material</b>	includes any thing in relation to which Intellectual Property Rights arise;
<b>Milestone</b>	means a stage of completion of the Activity as set out in the Funding Schedule;
<b>Milestone Date</b>	means the date for mandatory completion of all specified obligations of Choice in respect of a Milestone;
<b>Moral Rights</b>	includes the following rights of an author of copyright Material: <ul style="list-style-type: none"> <li>a. the right of attribution of authorship;</li> <li>b. the right of integrity of authorship; and</li> <li>c. the right not to have authorship falsely attributed;</li> </ul>
<b>Objectives</b>	means the objectives described in Grocerychoice Activity Details;
<b>Official Information</b>	means any information developed, received or collected by or on behalf of the Australian Government, through its agencies and contracted providers.
<b>Official Resources</b>	includes Official Information, people who work for or with the Australian Government, assets in the possession of the Australian Government and assets belonging to the Australian Government, whether in the Australian Government's possession or in the possession of its contractors or agents or any other person;
<b>Personal Information</b>	means information or an opinion (including information or an opinion forming part of a database), whether true or not and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion;
<b>Personnel</b>	means a party's officers, employees, agents, contractor staff or professional advisers engaged in, or in relation to, the performance or management of this contract;
<b>Phase</b>	means, as the context requires, either Phase 1, Phase 2, Phase 3 or Alternative Phase 3;
<b>Phase 1</b>	means all activities necessary for Choice's performance of its obligations in respect to phase 1 of the Activity in accordance with this contract;
<b>Phase 2</b>	means all activities necessary for Choice's performance of its obligations in respect to phase 2 of

	the Activity in accordance with this contract;
<b>Phase 3</b>	means all activities necessary for Choice's performance of its obligations in respect to phase 3 of the Activity in accordance with this contract;
<b>Phase 3 Commencement Date</b>	means 1 July 2009;
<b>Privacy Act</b>	refers to the <i>Privacy Act 1998</i> (Cth);
<b>Privacy Commissioner</b>	means the Office of the Privacy Commissioner established under the Privacy Act and includes any other entity that may, from time to time, perform the functions of that Office;
<b>Protocol</b>	means the document at the schedule to this contract headed 'Protocol';
<b>Qualified Accountant</b>	means a person who is a member of the Institute of Chartered Accountants in Australia or of CPA Australia;
<b>Records</b>	includes documents, information and data stored by any means and all copies and extracts of the same;
<b>Related Party</b>	means: <ul style="list-style-type: none"> <li>a. a related party within the meaning given to that term in Section 9 of the <i>Corporations Act 2001</i> (Cth); and</li> <li>b. any entity or person with whom any dealing, association, or relationship with in the relevant context might involve a Conflict;</li> </ul>
<b>Report</b>	means Activity Material that is provided to Treasury for reporting purposes as stipulated in clause 9;
<b>Security Classified Information</b>	means Official Resources that, if compromised, could have adverse consequences for the Australian Government;
<b>Schedule</b>	refers to the schedule to this contract and may include annexures and incorporate other documents by reference;
<b>Source Code</b>	means the source code to any computer software (including any relevant, module, function, procedure or object) and includes any software tools, software objects or object libraries embedded in that software or otherwise forming part of it and all Materials relating to that software and/or its design, development, modification, operation, support or maintenance (which except as otherwise specifically

	agreed in writing by Treasury must be in English);
<b>Specified Acts</b>	means any of the following classes or types of acts or omissions by or on behalf of Treasury: <ul style="list-style-type: none"> <li>a. using, reproducing, adapting or exploiting all or any part of the Activity Material, with or without attribution of authorship;</li> <li>b. supplementing the Activity Material with any other Material; or</li> <li>c. using the Activity Material in a different context to that originally envisaged,</li> </ul> but does not include false attribution of authorship;
<b>Third Party</b>	means a person who is not a party to this contract or a Related Party to a party to this contract;
<b>Third Party Interest</b>	means any legal or equitable right, interest, power or remedy in favour of any person other than Treasury or Choice in connection with the contract, including, without limitation, any right of possession, receivership, control or power of sale, and any mortgage, charge, security or other interest;
<b>Treasury</b>	includes officers, delegates, employees and agents, and successors of Treasury;
<b>Treasury Background Material</b>	means any Material used by Choice as part of Grocerychoice Website that is provided by Treasury and/ or the ACCC to Choice for the purposes of this contract – but only to the extent that the Intellectual Property Rights are owned by Treasury;
<b>Undepreciated</b>	in relation to the value of an Asset, means the value of the Asset which has not been Depreciated; and
<b>Unpaid Cash Funding</b>	means the amount of Funding (in cash) that has not been paid by Treasury and is not due and payable by Treasury.

**1.2. Interpretation**

- 1.2.1. In this contract, unless the contrary intention appears:
- a. words importing a gender include any other gender;
  - b. words in the singular include the plural and words in the plural include the singular;
  - c. clause headings are for convenient reference only and have no effect in limiting or extending the language of provisions to which they refer;

- d. words importing a person include a partnership and a body whether corporate or otherwise;
- e. a reference to dollars is a reference to Australian dollars;
- f. a reference to any legislation or legislative provision includes any statutory modification, substitution or re-enactment of that legislation or legislative provision;
- g. if any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- h. an schedule and any attachments to this document form part of the contract;
- i. if any conflict arises between the terms and conditions contained in the clauses of this contract and any part of any schedule to this contract (and attachments if any), the terms and conditions of the clauses prevail;
- j. if any conflict arises between any part of a schedule and any part of an attachment, the schedule prevails;
- k. a reference to a schedule (or an attachment), is a reference to a schedule (or an attachment) to this contract, including as amended or replaced from time to time by agreement in writing between the parties; and
- l. a reference to writing is a reference to any representation of words, figures or symbols, whether or not in a visible form.

**1.3. Guidance on construction of contract**

- 1.3.1. This contract records the entire agreement between the parties in relation to its subject matter.
- 1.3.2. As far as possible all provisions of this contract will be construed so as not to be void or otherwise unenforceable.
- 1.3.3. If anything in this contract is void or otherwise unenforceable then it will be severed and the rest of the contract remains in force.
- 1.3.4. A provision of this contract will not be construed to the disadvantage of a party solely on the basis that it proposed that provision.

**2. COMMENCEMENT AND TERM**

- 2.1.1. The term of this contract commences on the date of execution and, unless terminated earlier, it expires on the Completion Date.

### **3. CONDUCT OF THE GROCERYCHOICE WEBSITE AND ACTIVITIES**

#### **3.1. Summary of Choice accountabilities**

- 3.1.1. From the date of this contract, Choice will have full responsibility and accountability for the Grocerychoice Website.
- 3.1.2. Choice will use its best efforts to perform the Activities in a manner that is consistent with and will achieve Australian Government's Grocerychoice objectives.
- 3.1.3. Choice will not be liable to Treasury for any breach of its accountabilities under clauses 3.1.1 and 3.1.2 to the extent that the breach was due to any failure to provide, delay or defect in the In-Kind Contributions and the circumstances were that reasonable action by Choice could not enable the failure, delay or defect to be overcome or the accountabilities met by other actions or means reasonable in the circumstances.
- 3.1.4. Choice must:
- a. undertake:
    - i. Phase 1;
    - ii. Phase 2; and
    - iii. subject to clause 3.3, Phase 3; and
  - b. otherwise fully comply with all of its obligations under this contract.

#### **3.2. Phase 3 Commencement**

- 3.2.1. Choice must undertake and perform Phase 3 as and from the Phase 3 Commencement Date in accordance with this contract.

#### **3.3. Phase 3 Review and Alternative Phase 3**

- 3.3.1. If Choice does not commence Phase 3 on or before the Phase 3 Commencement Date, Treasury will initiate a structural review of Phase 3 during which Treasury and Choice must meet to discuss:
- a. the continuation of the Activity, including, but not limited to, the conditions for contingency if the Phase 3 Commencement Date is not met, as specified in Option 1 and Option 2 described in the Activities Details Schedule; and
  - b. if applicable, the proposed new commencement date for Phase 3.
- 3.3.2. If the parties agree that Choice will continue the Activity with an alternative to Phase 3, the parties will agree an Alternative Phase 3.

- 3.3.3. Choice must continue to perform Phase 2 obligations until the earlier of:
- a. the date the parties agree an Alternative Phase 3; or
  - b. the end of the Term.

**3.4. Choice Responsibility and Availability of Treasury Services**

3.4.1. Unless otherwise agreed in writing by the parties, Treasury will make available to Choice the use of services in respect to the Grocerychoice Website under the following contracts as In-Kind Contributions:

- a. hosting via the Hosting Arrangement;
- b. modifications in accordance with the Grocerychoice Website SOW to the Grocerychoice Website as it exists at the date of this contract, to be performed by the Grocerychoice IT Contract contractor;
- c. support and maintenance via the Grocerychoice IT Contract; and
- d. collection of grocery product price data and provision of monthly basket prices in the required .xml format via the Grocery Product Prices Survey Contract,

until the commencement of Phase 3, on condition that:

- e. the availability of these services does not in any way limit or diminish Choice's obligations in any other respect to this contract;
- f. to the extent that legal participation of Treasury is required, including for example to issue work orders under the Grocerychoice IT Contract, the availability of these services is subject to Treasury's internal sign-off process.

3.4.2. Choice acknowledges and agrees that all In-Kind Contributions by Treasury, including the Grocerychoice Website, Treasury Background Material and any services or Material including those under the Hosting Arrangement, the Grocerychoice IT Contract and the Grocery Product Prices Survey Contract, are, to the extent permitted by law, provided to Choice 'as is' and without any represent or warranty (whether express or implied) or liability of any kind.

3.4.3. Where Choice incurs liability to a Third Party in respect to data provided under the Grocery Product Prices Survey Contract that is required to be published by Choice as part of the Activity, clause 3.4.2 shall not prevent Choice from joining Treasury as a party to any proceeding or taking legal action against Treasury in respect to liability Treasury may have to Choice in respect to such matters, providing however that any liability Treasury may have to Choice in respect to such matters is, to the extent permitted by Law, limited to the amount that Treasury recovers from the Grocery Product Prices Survey Contract contractor in respect to the same underlying issues as any action between Choice and Treasury.



**3.5. Performance standards**

3.5.1. Choice must carry out the Activity:

- a. to achieve the Objectives;
- b. throughout the Activity Period;
- c. in accordance with the Activity Timetable;
- d. to Treasury's reasonable satisfaction; and
- e. otherwise in accordance with this contract.

3.5.2. Choice must undertake and perform the Activity:

- a. diligently, effectively and to a high standard;
- b. in accordance with suitable and appropriate methods and practices;
- c. in a timely, safe, prudent and reasonable manner and with the degree of professional skill, care and diligence which may reasonably be expected of a skilled and professional person suitably qualified and experienced in the conduct of activities similar to the Activity.

3.5.3. Choice must meet or exceed all Key Performance Indicators.

3.5.4. Subject to clause 3.5.5, Choice must ensure that the Grocerychoice Website:

- a. complies with:
  - i. the priority 1 and priority 2 checkpoints of the WC3 Web Content Accessibility Guidelines;
  - ii. the Human Rights and Equal Opportunity Commission's (HREOC) World Wide Web Access: Disability Discrimination Act Advisory Notes;
  - iii. the Australian Government Information Management Office's (AGIMO) Australian Government Web Publishing Guide;
  - iv. the Office of the Federal Privacy Commissioner's Guidelines for Federal and ACT Websites; and
  - v. the *Disability Discrimination Act 1992 (Cth)*;
- b. contains and adequately displays a disclaimer in the manner and in the form specified in the Contract Details or as otherwise advised by Treasury; and
- c. complies with all other requirements of this contract.

3.5.5. Choice will not be in breach of clause 3.5.4.a during either Phase 1 or Phase 2 except to the extent that the breach arises as a result of any change to the Grocerychoice Website made by Choice (for the purposes of clarity, any change to the Grocerychoice Website made pursuant to the Grocerychoice Website

SOW will not be considered a change to Grocerychoice Website by Choice for the purposes of this clause 3.5.5 or as a result of any specific action taken by Choice.

**3.6. Subcontractors**

- 3.6.1. Choice agrees not to subcontract the performance of any obligations under this contract without Treasury's prior written approval. Any subcontractors approved by Treasury at the date of this contract, and any terms and conditions relating to their use, are identified in the Contract Details. If Choice proposes to replace an approved subcontractor, Choice must also obtain Treasury's approval for the proposed change under this clause 3.6.
- 3.6.2. Choice is fully responsible for the performance of Choice's obligations under this contract regardless of whether Choice has subcontracted any of its obligations.
- 3.6.3. Choice agrees, in any subcontract placed with a subcontractor, to reserve a right of termination to take account of Treasury's rights of termination under clause 17 [Termination, or reduction in scope of contract], and Choice agrees, where appropriate, to make use of that right in the event of a termination or revocation by Treasury.

**3.7. Personnel**

- 3.7.1. Choice must ensure that it has sufficiently qualified personal and an appropriate allocation of roles and responsibilities within its staff to undertake the activities required for the successful operation of the Grocerychoice Website.
- 3.7.2. Choice must, at the earliest opportunity, provide full details to Treasury of the responsible personnel for each appropriate area of this contract, including, but not limited to, the primary Treasury contact point, the contract manager, IT manager and media liaison.
- 3.7.3. Choice must at all times have in place contingency plans, succession plans, and other relevant plans, processes and procedures to minimise any potential adverse impact for the operation of the Grocerychoice Website if any member of the personal delegated to undertake activities relating the Grocerychoice Website is, for any reason, not available.
- 3.7.4. Choice must provide full details of any replacement personnel to Treasury in writing.

**4. PAYMENT**

**4.1. Making of payment**

4.1.1. Treasury agrees to provide Choice with the Funding at the times and in the manner specified in Schedule 2 subject to:

- a. receipt of a correctly rendered invoice issued on or after the relevant part of the Funding falls due for billing;
- b. the due and proper provision of the Activity (including achievement of Milestones) and compliance by Choice with all other requirements of this contract;
- c. adjustment in accordance with clause 4.2 [Calculation of Funding] and 4.3 [Adjustment of Unpaid Cash Funding]; and
- d. sufficient funds being available for the Australian Government Grocerychoice Initiative for the Funding.

4.1.2. Without limiting Treasury's rights, Treasury may suspend any payment in whole or in part until Choice has performed its obligations under this contract that relates to the payment concerned.

**4.2. Calculation of Funding**

4.2.1. Except to the extent specifically provided to the contrary in this contract or otherwise specifically agreed in writing by the parties, the Funding payable for the Activity, and each part of the Activity, under this contract will be calculated by way of the following formula:

Funding = Base Funding Amount - Adjustment Factor.

**4.3. Adjustment of Unpaid Cash Funding**

4.3.1. The Unpaid Cash Funding will be reduced by the value of any In-Kind Contributions, not identified in Schedule 2 in the Table of In-Kind Contributions to be paid by Treasury.

**4.4. Sanctions for inadequate management or performance**

4.4.1. Where Treasury is not satisfied that Choice is adequately:

- a. managing the Funding; or
- b. performing or otherwise undertaking the Activity in accordance with this contract,

or is otherwise not satisfied that Choice will do so, or has the capacity to do so, Treasury may by written notice:

- c. suspend, reduce or cease the release of Funding to Choice; and/or

- d. require Choice to refund some or all of the Funding to Treasury, subject to Treasury providing written advice to Choice and allowing Choice the opportunity to rectify the cause of Treasury's concerns.

**4.5. Debt and Interest**

- 4.5.1. Choice agrees to pay any amount owed or payable to Treasury or which Treasury is entitled to recover from Choice, under this contract, including any Interest, without prejudice to any other rights available to Treasury under the contract, under statute, at law or in equity, at the discretion of Treasury, as a debt due to Treasury by Choice without further proof of the debt by Treasury being necessary.
- 4.5.2. If Treasury notifies Choice that an amount is to be refunded or repaid to Treasury and the amount is not refunded or repaid within 20 Business Days, or as otherwise notified by Treasury, Choice agrees to pay Interest, unless Treasury notifies Choice otherwise, on the amount outstanding after the expiry of the date it was due, until the amount is paid in full.
- 4.5.3. In respect to any obligation Choice may have under this contract to pay Treasury any Interest, Choice agrees that the Interest represents a reasonable pre-estimate of the loss incurred by Treasury.

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**5. FINANCIAL ACCOUNTABILITY**

**5.1. Use of Funding**

- 5.1.1. Choice agrees to spend the Funding only for the Activity in accordance with this contract.
- 5.1.2. Choice agrees to do all things necessary to ensure that all payments from the Funding that Choice makes to third parties (including subcontractors) are correctly made and properly authorised and that Choice maintains proper and diligent control over the incurring of all liabilities.

**5.2. Keeping of Funding**

- 5.2.1. Choice agrees to:
  - a. ensure that the Funding is held in an account in Choice's name and which Choice solely controls, with an authorised deposit-taking institution authorised under the *Banking Act 1959* (Cth) to carry on banking business in Australia;
  - b. notify Treasury, prior to the receipt of any Funding, of details sufficient to identify the account;
  - c. if requested by Treasury, provide written notification to the authorised deposit-taking institution at which the account is established that the

Funding is held for the purposes of the Activity, and provide a copy of that notification to Treasury;

- d. on notification from Treasury, provide Treasury and the authorised deposit-taking institution with a written authority for Treasury to obtain any details relating to any use of the account;
- e. if the account changes, notify Treasury within 10 Business Days of the change occurring, provide Treasury with details of the new account;
- f. ensure that as a minimum, two signatories, who have Choice's authority to do so, are required to operate the account; and
- g. identify the receipt and expenditure of the Funding separately within Choice's accounts and Records so that at all times the Funding is identifiable.

### **5.3. Financial Records**

5.3.1. Choice agrees to keep financial accounts and Records relating to the Activity so as to enable:

- a. all receipts and payments related to the Activity to be identified and reported in accordance with this contract;
- b. unless otherwise notified by Treasury, the preparation of financial statements in accordance with Australian Accounting Standards including:
  - i. an income and expenditure statement for the Financial Year to date; and
  - ii. a register of the Assets created, acquired, written-off or Disposed of during the Financial Year to date;
- c. the audit of those accounts and Records in accordance with Australian Auditing Standards; and
- d. the identification of all Choice's taxation liabilities and payments.

### **5.4. Use as security**

5.4.1. Except with the prior written approval of Treasury, Choice agrees not to use any of the following as any form of security for the purpose of obtaining or complying with any form of loan, credit, payment or other interest, or for the preparation of, or in the course of, any litigation:

- a. the Funding;
- b. this contract or any of Treasury's obligations under the contract; or
- c. any Assets or Intellectual Property Rights in Activity Material.

**5.5. Refunds**

- 5.5.1. If, at the completion of any Phase or as at the Completion Date or earlier termination of this contract Treasury determines that:
- a. there remains an amount of Funding that has not been spent or legally committed for expenditure in accordance with the contract; or
  - b. Funding has not been spent in accordance with the contract,
- then at the discretion of Treasury and subject to clause 5.5.2, Choice agrees to refund this amount to Treasury within 20 Business Days of a notice from Treasury or deal with this amount as notified by Treasury, or Treasury may reduce further payments of Funding to Choice by up to this amount.
- 5.5.2. If paragraph 5.5.1a applies and Choice wishes to retain that Funding and use it to further the Government's objectives, Choice agrees to seek Treasury's written consent to retain the Funding and use it for purposes agreed by Treasury. Treasury acknowledges that Choice has discretion as to how the Funding is spent as long as it is to further the agreed objectives of this project.

**5.6. No additional Funding**

- 5.6.1. Treasury is not responsible for the provision of additional money to meet any expenditure in excess of the Funding.

**5.7. Other funding**

- 5.7.1. Unless otherwise agreed by Treasury in writing, no Funding will be paid for the conduct of an Activity where Choice receives funding for the same or a similar activity from Treasury or another Commonwealth, State, Territory or local government.
- 5.7.2. Choice agrees to inform Treasury in writing within 20 Business Days of entering into any arrangement (whether contractual or statutory) under which Choice is entitled to receive funding from the Commonwealth or a State, Territory or local government.
- 5.7.3. Any payments under this contract may be suspended by Treasury:
- a. if Choice has amounts to be repaid or unacquitted moneys under any arrangement (whether contractual or statutory) with Treasury; or
  - b. if a Report provided by Choice is not accurate or complete or indicates that Choice currently has unspent Funding.
- 5.7.4. Notwithstanding such suspension of any payments, Choice agrees to continue to perform any obligations under this contract, unless Treasury agrees otherwise in writing.

## **6. TAXES, DUTIES AND GOVERNMENT CHARGES**

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- 6.1.1. Unless otherwise indicated, Choice agrees to pay all taxes, duties and government charges imposed or levied in Australia or overseas in connection with the performance of this contract.
- 6.1.2. Unless otherwise indicated, any consideration for a supply made under this contract is exclusive of any GST imposed on the supply.
- 6.1.3. If one party (the supplier) makes a taxable supply to the other party (the recipient) under this contract, on receipt of a tax invoice from the supplier, the recipient will pay without setoff an additional amount to the supplier equal to the GST imposed on the supply in question.
- 6.1.4. No party may claim or retain from the other party any amount in relation to a supply made under this contract for which the first party can obtain an input tax credit or decreasing adjustment.

## **7. ASSETS**

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### **7.1. Acquisition of Asset**

- 7.1.1. Choice agrees not to use the Funding to acquire or create any Asset, apart from those detailed in the Contract Details, without obtaining Treasury's prior written approval. Approval may be given subject to any conditions Treasury may impose.

### **7.2. Ownership of Asset**

- 7.2.1. Unless it is specified in Contract Details that Treasury or a third party own the Asset or Treasury provides written consent to a third party owning the Asset, then Choice must ensure that it owns any Asset acquired with the Funding.

### **7.3. Terms applicable to Asset**

- 7.3.1. If Treasury owns the Asset, clauses 7.6, 7.8 and 7.9 do not apply.
- 7.3.2. If the Asset is owned by a third party then Choice agrees to ensure that the terms of the lease, hire or finance arrangement are consistent with this clause 7 [Assets], except for clauses 7.6, 7.7 and 7.8 and 7.9.

### **7.4. Use of Asset**

- 7.4.1. During the Activity Period Choice agrees to use any Asset in accordance with this contract and for the purposes of the Activity.

### **7.5. Choices' responsibilities for Asset**

- 7.5.1. Throughout the term of this contract, Choice agrees to:

- a. not encumber or Dispose of any Asset, or deal with or use any Asset other than in accordance with this clause 7 [Assets], without Treasury's prior written approval;
- b. hold all Assets securely and safeguard them against theft, loss, damage, or unauthorised use;
- c. maintain all Assets in good working order;
- d. maintain all appropriate insurances for all Assets to their full replacement cost noting Treasury's interest, if any, in the Asset under the contract;
- e. if required by law, maintain registration and licensing of all Assets;
- f. be fully responsible for, and bear all risks relating to, the use or Disposal (where approved by Treasury) of all Assets;
- g. maintain an Assets register in the form and containing the details as described in the Contract Details; and
- h. as and when requested by Treasury, provide copies of the Assets register to Treasury.

**7.6. Sale or Disposal of Asset during term of this contract**

7.6.1. If Choice Disposes of an Asset during the term of this contract, the greater of the following proportions must be accounted for as Activity Generated Income and used for the Activity:

- a. the proportion of the sale proceeds from the Asset; or
- b. the proportion of the Undepreciated value of the Asset,

that is equivalent to the proportion of the cost of the Asset that was funded from the Funding.

**7.7. Loss, damage, etc of Asset**

7.7.1. If any of the Assets are lost, damaged or destroyed, Choice agrees to promptly reinstate the Assets including from the proceeds of the insurance, and this clause 7 [Assets] continues to apply to the reinstated Assets. The proportion of any surplus from the proceeds of the insurance, which reflects the proportion of the cost of the Asset that was funded from the Funding, must be notified to Treasury and accounted for as Activity Generated Income and used for the Activity.

**7.8. Dealing with Asset**

7.8.1. On expiry of the Activity Period or earlier termination of the term of this contract, Treasury may require Choice to deal with an Asset as Treasury may, at the sole discretion of Treasury, notify Choice.



- 7.8.2. Subject to clause 7.8.1, if on expiry of the Activity Period or the earlier termination of this contract, an Asset has not been fully Depreciated, Treasury may, by written notice, require Choice to:
- a. pay to Treasury within 20 Business Days of the expiry of the Activity Period or earlier termination of the contract, an amount equal to the proportion of the Undepreciated value of the Asset that is equivalent to the proportion of the cost of the Asset that was funded from the Funding;
  - b. sell the Asset for the best price reasonably obtainable and pay to Treasury within 20 Business Days of the sale the proportion of the proceeds of the sale that is equivalent to the proportion of the cost of the Asset (less an amount equal to the reasonable Disposal costs incurred by Choice) that was funded from the Funding; or
  - c. continue to use the Asset for the purposes, and in accordance with any conditions, notified by Treasury.

**7.9. Failure to make payment**

- 7.9.1. Amounts payable to Treasury under clause 7.8.2 form part of the Funding and are recoverable as such.

**8. RECORDS**

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**8.1. Keeping Records**

- 8.1.1. Choice must create and maintain full and accurate accounts and records of the conduct of the Activity including, without limitation, all:
- a. progress against the Milestones;
  - b. performance against Key Performance Indicators
  - c. receipt and use of Funding;
  - d. creation of Intellectual Property Rights in Activity Material; and
  - e. creation, acquisition and Disposal of Assets.

**8.2. Retention of Records**

- 8.2.1. Choice agrees to create and maintain records and accounts under clause 8.1.1 and retain them for a period of no less than 7 years after the end of the Activity Period.

**9. REPORTING**

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**9.1. Progress Reports**

- 9.1.1. Choice agrees to provide to Treasury written Reports of Choice's progress in undertaking the Activity within two weeks of the completion of Phase 1, and quarterly thereafter, which include (but are not limited to):
- a. financial information (prepared by a Qualified Accountant who, if notified by Treasury, must also be a person acceptable to Treasury) including:
    - i. an income and expenditure statement including:
      - A. a statement of the Funding to date including the amount spent and the amount remaining in the account referred to in clause 5.2.1.a; and
      - B. a statement on the amount and use of all Activity Generated Income; and
    - ii. a schedule of the Assets created, acquired written-off or Disposed of during the Financial Year to date; and
  - b. Activity performance information including:
    - i. a description of the progress of the Activity to date;
    - ii. detail of the Objectives achieved during the period to which the Report relates and reasons why any Objectives have not been met;
    - iii. a description of actual performance against the Key Performance Indicators during the period to which the Report relates and reasons why any Key Performance Indicators have not been met; and
    - iv. a discussion and statement as to whether the timeframes and Milestones for the Activity (and specifically during the Report period) are being met and an explanation of any delays that have occurred, including the reasons for those delays and the action Choice proposes to take to address the delay and the expected effects (if any) the delay will have on the Activity (including subsequent Milestones and the overall completion of the Activity).

**9.2. Annual Reports and Final Report**

- 9.2.1. Within 60 Business Days after:
- a. the completion of each Financial Year in which a payment of Funding is made or used by Choice except the Financial Year in which subparagraph b applies; and
  - b. the expiry of the Activity Period, completion of the Activity or the termination or expiry of this contract, whichever is the earlier,

Choice agrees to provide to Treasury:

- c. audited financial statements prepared in accordance with Australian Accounting Standards in respect of the Funding (separately and in the context of Choice's overall financial position), which must include a definitive statement as to whether the financial information for the Activity represents the financial transactions fairly and is based on proper accounts and Records;
- d. a written statement of Choice's financial position (assets and liabilities by class), which must include, under assets, the balance of Choice's account referred to in clause 5.2.1.a;
- e. a written statement of how much money Choice needs to meet current liabilities under legal commitments entered into by Choice pursuant to this contract;
- f. a copy of a letter to Choice from the Approved Auditor, or a report from the Approved Auditor, including:
  - i. specific comment on the adequacy of financial controls being maintained by Choice;
  - ii. specific comment on Choice's financial position as it relates to any issues affecting Choice's ability to repay surplus Funding or complete the Activity with available Funding;
  - iii. specific comment on Choice's ability to meet Choice's taxation liabilities and any costs associated with any court or tribunal orders made against Choice or involving Choice;
  - iv. specific comment on Choice's compliance with Choice's obligations to pay superannuation entitlements;
  - v. where there are any qualifications or limitations on the audit, an outline of the reason(s) for the qualifications or limitations and the remedial action recommended; and
  - vi. an itemised list of fees paid to Directors, stating how much was paid, to whom, when and what travel costs were involved; and
- g. any other requirements specified in the Contract Details.

9.2.2. Information required to be provided under clauses 9.1 and 9.2 must be accompanied by a statement that:

- a. all Funding received were spent for the purpose of the Activity and in accordance with this contract, and that Choice has complied with the contract;
- b. salaries and allowances paid to persons involved in the Activity are in accordance with any applicable award or agreement in force under any relevant law on industrial or workplace relations;

- c. unless the Activity Period has expired or the contract has been terminated, the unspent portion of the Funding (if any) is available for use within the next Reporting period;
- d. the financial information is presented in accordance with any other financial Reporting requirements Treasury may notify to Choice;
- e. where an Asset has been created or acquired with the Funding, that clauses 7.5.1.d and 7.5.1.g have been complied with in respect to the Asset; and
- f. at the time the Report or financial statement is provided to Treasury, Choice is able to pay all Choice's debts as and when they fall due and Choice has sufficient resources to discharge all Choice's debts at the end of the current Financial Year.

**9.3. Use of Approved Auditor and Qualified Accountant**

- 9.3.1. The audited statement referred to in clause 9.2.1.c must be prepared by an Approved Auditor and must comply with the Australian Auditing Standards, and the statements referred to in clauses 9.2.1.c, 9.2.1.d and 9.2.1.e must be prepared by a Qualified Accountant who, if notified by Treasury, must also be a person acceptable to Treasury.

**9.4. Who provides certification**

- 9.4.1. The statement referred to in clause 9.2.2 must be provided by Choice's Chairperson, Chief Executive Officer, Chief Financial Officer or a person authorised by Choice to execute documents and legally bind Choice by their execution. Satisfactory evidence of the authorisation is to be provided to Treasury before the statement is made.

**9.5. Other Reports**

- 9.5.1. Throughout the Activity Period, Treasury may require Choice to provide ad-hoc Reports concerning:
- a. any significant developments concerning the Activity; and
  - b. any significant delays or difficulties encountered in performing the Activity in accordance with the contract.
- 9.5.2. Choice must provide any such ad-hoc Reports within the timeframe notified by Treasury.

## **10. RELATIONSHIP MANAGEMENT**

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### **10.1. Liaison and monitoring**

10.1.1. Choice agrees to liaise with and provide information to Treasury as reasonably notified by Treasury.

### **10.2. Choice's Representative**

10.2.1. Choice shall appoint and at all times maintain a Choice Representative with full power and authority to represent and bind it in any matter related to this contract.

### **10.3. General**

10.3.1. Notwithstanding any other provision of this contract, an instruction, advice or notice given to the Choice Representative is deemed to be given to Choice.

10.3.2. Choice must ensure that the Choice Representative is available to provide information, advice and assistance to Treasury and to discuss and facilitate any matter related to this contract at all reasonable times.

### **10.4. Schedules Meetings**

10.4.1. The parties will meet on a quarterly basis to discuss Choice's progress in undertaking the Activity and any issues that relate to the Grocerychoice Website generally, on a time and day specified by Treasury or as otherwise agreed by the parties.

### **10.5. Information and Review**

10.5.1. Choice agrees to:

- a. provide all reasonable assistance required by Treasury;
- b. respond to all of Treasury's reasonable requests; and
- c. provide any information Treasury reasonably requires,

in relation to the Activity and any matter relevant to this contract.

## **11. INTELLECTUAL PROPERTY**

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### **11.1. Activity Material**

11.1.1. Intellectual Property Rights in the Activity Material vest in Choice or as it may otherwise arrange.

### **11.2. Licence of Treasury Background Material to Choice**

11.2.1. Subject to clause 11.2.2, Treasury grants to Choice:

- a. a perpetual, royalty free, worldwide, non-exclusive licence to use, reproduce, modify, adapt, publish and communicate the Treasury Background Material; and
- b. the right to grant a sub-licence on the same terms to third parties.

11.2.2. Treasury may cancel the licence provided under clause 11.2.1 at any time by written notice to Choice should Choice fail to perform the Activity to the reasonable satisfaction of Treasury or if this contract is terminated for any reason.

**11.3. Licensing of Choice Material to Treasury**

11.3.1. Choice grants (and undertakes to ensure that all relevant third parties will grant) to Treasury:

- a. an irrevocable, perpetual, royalty free, worldwide, non-exclusive licence to use, reproduce, modify, adapt, publish, communicate and exploit the Activity Material; and
- b. the right to grant a sub-licence on the same terms to third parties, providing however, that such a sub-licence shall not be granted to a person where it will be used by the sub-licensee for purposes that might reasonably compete with business activities of Choice being conducted at the time of the grant of the sub-licence unless Choice is no longer operating the Grocerychoice Website.

**11.4. Provision of Activity Material to Treasury**

11.4.1. Choice will provide a copy of any and all Activity Material (including, as relevant, any Source Code) to Treasury promptly following Treasury's request.

**11.5. Dealing with Intellectual Property Rights**

11.5.1. Choice:

- a. agrees, if requested by Treasury to do so, to bring into existence, sign, execute or otherwise deal with any document which may be necessary or desirable to give effect to this clause 10 [Intellectual Property]; and
- b. warrants that it is entitled, or will be entitled at the relevant time, to deal with the Intellectual Property Rights in the Activity Material in accordance with this clause 10 [Intellectual Property].

**11.6. Consent to Specified Acts**

11.6.1. Choice agrees:

- a. to obtain from each author of any Activity Material a written consent to the Specified Acts (whether occurring before or after the consent is given)

which extends directly or indirectly to the performance of the Specified Acts by Treasury or any person claiming under or through Treasury;

- b. to obtain from each author of any Activity Material a written consent to the Specified Acts (whether occurring before or after the consent is given) which extends directly or indirectly for Treasury's benefit in relation to Treasury's licensed use of such material; and
- c. upon request, to provide the executed original of each such consent to Treasury.

## **12. CONFIDENTIAL INFORMATION**

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### **12.1. Confidential Information not to be Disclosed**

- 12.1.1. Subject to clause 12.3, a party must not, without the prior written consent of the other party, disclose any Confidential Information of the other party to a third party.

### **12.2. Written Undertakings**

- 12.2.1. Choice must, on request by Treasury at any time, arrange for:

- a. its Personnel; or
- b. any person with a Third Party Interest,

to give a written undertaking in a form acceptable to Treasury relating to the use and non disclosure of Treasury's Confidential Information.

### **12.3. Exceptions to Obligations**

- 12.3.1. The obligations on the parties under this clause 12 [Confidential Information] will not be taken to have been breached to the extent that Confidential Information:
  - a. is disclosed by a party to its Personnel solely in order to comply with obligations, or to exercise rights, under this contract;
  - b. is disclosed to a party's internal management Personnel, solely to enable effective management or auditing of contract-related activities;
  - c. is disclosed by Treasury to the responsible Minister;
  - d. is disclosed by Treasury, in response to a request by a House or a Committee of the Parliament of the Commonwealth of Australia;
  - e. is shared by Treasury within Treasury's organisation, or with another agency, where this serves the Commonwealth's legitimate interests;
  - f. is authorised or required by law to be disclosed; or
  - g. is in the public domain otherwise than due to a breach of this clause 12 [Confidential Information].

12.3.2. Where a party discloses Confidential Information to another person pursuant to clauses 12.3.1.a - 12.3.1.e, the disclosing party must notify the receiving person that the information is confidential.

12.3.3. In the circumstances referred to in clauses 12.3.1.a, 12.3.1.b and 12.3.1.e, the disclosing party agrees not to provide the information unless the receiving person agrees to keep the information confidential.

12.3.4. Choice agrees to secure all of the Commonwealth's Confidential Information against loss and unauthorised access, use, modification or disclosure.

**12.4. Period of Confidentiality**

12.4.1. The obligations under this clause 12 [Confidential Information] will continue, notwithstanding the expiry or termination of this contract:

- a. in relation to an item of information described in the Contract Details – for the period set out in respect of that item; and
- b. in relation to any item of information agreed after the date of this contract to be Confidential Information – for the period agreed by the parties in writing in respect of that item.

**12.5. No reduction in Privacy Obligations**

12.5.1. This clause 12 [Confidential Information] does not detract from any of Choice's obligations under the Privacy Act or under clause 13 [Privacy], in relation to the protection of Personal Information (as defined in clause 13.1.1).

**13. PRIVACY**

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**13.1. Interpretation and application of clause**

13.1.1. In this clause 13 [Privacy]:

**Information** has the same meaning as it has in the Privacy Act; and  
**Privacy Principle**

**Personal Information** has the same meaning as it has in the Privacy Act.

13.1.2. This clause applies only where Choice deals with Personal Information when, and for the purpose of, conducting the Activity.

**13.2. Obligations of Recipient in relation to privacy**

13.2.1. Choice agrees, in conducting the Activity:

- a. not to do any act or engage in any practice which, if done or engaged in by Treasury, would be a breach of an Information Privacy Principle; and



- b. to comply with any directions, guidelines, determinations or recommendations of Treasury, to the extent that they are consistent with the Information Privacy Principles.
- 13.2.2. Choice agrees to notify Treasury immediately if it becomes aware of a breach or possible breach of any of its obligations under this clause 13 [Privacy].

## **14. ACKNOWLEDGEMENT AND PUBLICITY**

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### **14.1. Acknowledgement of support**

- 14.1.1. Unless or until notified by Treasury, Choice agrees, in all publications, promotional and advertising materials, public announcements and activities by Choice or on Choice's behalf in relation to the Activity, or any products, processes or inventions developed as a result of it including on the Grocerychoice Website to acknowledge the financial and other support Choice has received from the Australian Government, in the manner set out in the Contract Details or as otherwise approved by Treasury prior to its use.

### **14.2. Right to publicise Funding**

- 14.2.1. Treasury reserves the right to publicise and report on the awarding of Funding to Choice. Treasury may do (but is not limited to doing) this by including Choices' name, the amount of the Funding given to Choice, the title and a brief description of the Activity in media releases, general announcements about the Funding, annual reports or through any other means as determined by Treasury.

### **14.3. Copies of publications**

- 14.3.1. Where Choice has been provided with Funding to produce any publication, a copy of the publication must be provided to Treasury, if notified by Treasury.

### **14.4. Public Announcements/Media Contact**

- 14.4.1. Choice must not make any public announcement or make any representation to any media representative about or concerning:
- a. this contract;
  - b. the Grocerychoice Website to the extent that the announcement involves any matter that might directly or indirectly be construed as relating to the Australian Government's association with the Activity; or
  - c. the Australian Government Grocerychoice Initiative;
- or any related matter without providing details of the relevant public announcement or representation to Treasury prior to its public release.

14.4.2. Communications by Choice with external parties regarding the Grocerychoice Website or the Australian Government Grocerychoice Initiative must be consistent with the Australian Government's public policy in respect to the Grocerychoice Website and the Australian Government Grocerychoice Initiative.

**14.5. No restriction on advocacy activities**

14.5.1. Treasury confirms that, subject to clause 14.5.2:

- a. no right or obligation arising under this contract should be interpreted as limiting Choice's ability to enter into public debate or criticism of the Commonwealth or its agencies, employees, servants or agents;
- b. Treasury does not require Choice to obtain advance approval of any involvement by Choice in public debate or advocacy activities; and
- c. Treasury will only exercise its rights under clause 3.7 on reasonable grounds relating to the performance of the Activity.

14.5.2. Nothing in this clause 14.4 limits or derogates from Choice's obligations under clauses 12 [Confidential Information] and 13 [Privacy].

**15. INDEMNITY**

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**15.1. General indemnity**

15.1.1. Choice indemnifies (and agrees to keep indemnified) Treasury against any:

- a. cost or liability incurred by Treasury or Treasury's Personnel;
- b. loss of or damage to property of Treasury; or
- c. loss or expense incurred by Treasury in dealing with any claim against it, including legal costs and expenses on a solicitor/own client basis and the cost of time spent, resources used, or disbursements paid by Treasury,

arising from:

- d. any act or omission by Choice or Choice's Personnel, in connection with this contract, the Grocerychoice Website, the Australian Government Grocerychoice Initiative or the Activity, where there was fault on the part of the person whose conduct gave rise to that cost, liability, loss, damage, or expense;
- e. any breach by Choice of the contract;
- f. use or Disposal of the Assets; or
- g. the use by Treasury of the Activity Material, including any claims by third parties about the ownership or right to use Intellectual Property Rights or Moral Rights in the Activity Material.

**15.2. Reduction of scope**

15.2.1. Choice's liability to indemnify Treasury under this clause 15 [Indemnity] will be reduced proportionally to the extent that any act or omission involving fault on the part of Treasury or its Personnel contributed to the relevant cost, liability, loss, damage or expense.

**15.3. Preservation of other rights**

15.3.1. The right of Treasury to be indemnified under this clause 15 [Indemnity] is in addition to, and not exclusive of, any other right, power or remedy provided by law, but Treasury is not entitled to be compensated in excess of the amount of the relevant cost, liability, loss, damage or expense.

**15.4. Meaning of 'fault'**

15.4.1. In this clause 15 [Indemnity], 'fault' means any negligent or unlawful act or omission or wilful misconduct.

**16. DISPUTE RESOLUTION**

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**16.1. Procedure for dispute resolution**

16.1.1. The parties agree that a dispute arising under this contract will be dealt with as follows:

- a. the party claiming that there is a dispute will give the other party a notice setting out the nature of the dispute;
- b. within 5 Business Days each party will nominate a representative not having any prior involvement in the dispute;
- c. the representatives will try to settle the dispute by direct negotiation between them;
- d. failing settlement within a further 10 Business Days, the parties may agree to refer the dispute to an independent third person with power:
  - i. to intervene and direct some form of resolution, in which case the parties will be bound by that resolution; or
  - ii. to mediate and recommend some form of non-binding resolution;
- e. the parties will co-operate fully with any process instigated under clause 16.1.1 d in order to achieve a speedy resolution; and
- f. if a resolution is not reached within a further 20 Business Days, either party may commence legal proceedings.

**16.2. Costs**

16.2.1. Each party will bear its own costs of complying with this clause 16 [Dispute resolution], and the parties will bear equally the cost of any third person engaged under clause 16.1.1. d.

**16.3. Application of clause**

16.3.1. This clause 16 [Dispute resolution] does not apply to:

- a. legal proceedings by either party for urgent interlocutory relief; or
- b. clauses 4 [Payment], 5 [Financial accountability], 21.1 [Audit and Access] or 17 [Termination, or reduction in scope of contract].

**16.4. Performance of obligations**

16.4.1. Despite the existence of a dispute, Choice will (unless requested in writing by Treasury not to do so) continue to perform Choice's obligations under this contract.

**17. TERMINATION, OR REDUCTION IN SCOPE OF CONTRACT**

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**17.1. Termination for convenience**

17.1.1. In addition to any other rights it has under this contract, Treasury may by notice, at any time and in its absolute discretion, terminate this contract or reduce the scope of the contract.

17.1.2. Treasury will give Choice not less than three month's prior written notice in respect to any termination under clause 17.1.1

17.1.3. Choice acknowledges and agrees that it must take all reasonable action to arrange its affairs to ensure that its involvement in this contract and all matters supporting it can be terminated, cancelled, unwound or discontinued at minimal cost, expense or damage should Treasury exercise its rights under clause 17.1.1 and will immediately comply with any directions given in the notice by Treasury. Without limiting the foregoing, Choice must in each order, contract, or subcontract to the value or potential liability exposure of \$5,000 or more include a right for Choice to terminate it for convenience on terms no less favourable than as between Treasury and Choice in these clauses 17.1.1 to 17.1.8.

17.1.4. Choice agrees, on receipt of a notice of termination or reduction, to:

- a. stop or reduce the performance of Choice's obligations as specified in the notice;
- b. do everything possible to minimise loss arising out of resulting from or otherwise connected with that termination or reduction;
- c. continue work on any part of the Activity not affected by the notice; and

- d. immediately return to Treasury any Funding in accordance with clause 17.1.5.e, or deal with any such Funding as directed by Treasury.

17.1.5. In the event of termination under clause 17.1.1, Treasury:

- a. will be liable only for payments due and owing to Choice under the payment provisions of the contract as at the date of the notice;
- b. will be liable to reimburse any reasonable costs incurred by Choice and directly attributable to the termination of the contract;
- c. will, in addition to amounts payable under clause 17.1.5.b, pay to Choice a sum equivalent to twenty per cent of the committed cash Funding that would have been paid to Choice but for the termination, as liquidated termination to cover costs and expenses incurred by Choice as a result of the termination that cannot be identified and claimed under clause 17.1.5.b;
- d. will not be liable to pay amounts under 17.1.5. a and 17.1.5. b which would, added to any payments already paid to Choice under this contract, together exceed the Funding set out in Schedule 2;
- e. will be entitled to recover from Choice any part of the Funding which:
  - i. has not been legally committed for expenditure by Choice in accordance with the contract and payable by Choice as a current liability by the date that the notice of termination is received; or
  - ii. has not, in Treasury's opinion, been spent by Choice in accordance with the contract.

17.1.6. In the event of a reduction in the scope of the contract under clause 17.1.1, Treasury's liability to pay any part of the Funding will, unless there is agreement in writing to the contrary, reduce in accordance with the reduction in the Activity.

17.1.7. Treasury's liability to pay any compensation under or in relation to this clause 17.1 [Termination, or reduction in scope of contract] is subject to:

- a. Choice's compliance with this clause 17.1 [Termination, or reduction in scope of contract]; and
- b. Choice's substantiation of any amount claimed under clause 17.1.5.b.

17.1.8. Choice will not be entitled to compensation for loss of prospective profits or loss of any benefits that would have been conferred on Choice.

## 17.2. Termination for fault

17.2.1. Treasury may by notice terminate this contract immediately (but without prejudice to any right of action or remedy which either party has or may have) if:

- a. Choice fails to fulfil, or is in breach of any of its obligations under this contract, and Treasury considers that this failure or breach is not capable of remedy;
- b. Choice fails to fulfil, or is in breach of any of its obligations under this contract, and does not rectify the omission or breach within 10 Business Days of receiving a notice from Treasury to do so;
- c. Choice is unable to pay all its debts as and when they become due and payable;
- d. Choice has applied to come under, received a notice requiring it to show cause why it should not come under, or has otherwise come under one of the forms of external administration referred to in Chapter 5 of the *Corporations Act 2001* (Cth) or equivalent provisions in legislation of the States and Territories pertaining to incorporated associations or an order has been made for the purpose of placing Choice under external administration;
- e. in relation to the contract, Choice breaches any law of the Commonwealth, or of a State or Territory;
- f. Treasury is satisfied that any statement made in Choice's application for Funding is incorrect, incomplete, false or misleading in a way which would have affected the original decision to approve the Funding; or
- g. Treasury exercises any other specific right of termination under the contract.

17.2.2. Where Treasury terminates this contract under clause 17.2.1 Treasury:

- a. will be liable only for payments due and owing to Choice under the payment provisions of the contract as at the date of the notice; and
- b. will be entitled to recover from Choice any part of the Funding which:
  - i. has not been legally committed for expenditure by Choice in accordance with the contract and is not payable by Choice as a current liability by the date that the notice of termination is received; or
  - ii. has not, in Treasury's opinion, been spent by Choice in accordance with the contract.

**17.3. Preservation of other rights**

17.3.1. Clause 17.2 does not limit or exclude any of Treasury's other rights under this contract.

## **18. OCCUPATIONAL HEALTH AND SAFETY**

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### **18.1. Use of Agency's premises**

- 18.1.1. Choice agrees, when using Treasury's premises or facilities, to comply with all reasonable directions and procedures relating to occupational health, safety and security in effect at those premises or in regard to those facilities, as notified by Treasury or as might reasonably be inferred from the use to which the premises or facilities are being put.

## **19. CORPORATE GOVERNANCE**

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### **19.1. Constitution**

- 19.1.1. Choice agrees to provide a copy of Choice's Constitution to Treasury upon notification by Treasury.
- 19.1.2. Choice agrees to inform Treasury whenever there is a change in Choice's Constitution.
- 19.1.3. If Choice is registered under the *Corporations Act 2001* (Cth), in the event that Choice applies to come under, receives a notice requiring Choice to show cause why Choice should not come under, receives a notice or an application from any other person for Choice to come under or has otherwise come under one of the forms of external administration referred to in Chapter 5 of the *Corporations Act 2001* or an order has been made for the purpose of placing Choice under external administration, Choice agrees to notify Treasury within 5 Business Days of the date of the making or receipt of such a notice or application or the making of such an order.

## **20. NOTICES**

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### **20.1. Format, addressing and delivery**

- 20.1.1. A notice under this contract is only effective if it is in writing, and dealt with as follows:
- a. *if given by Choice to Treasury* - addressed to Treasury at the address specified in the Contract Details or as otherwise notified by Treasury; or
  - b. *if given by Treasury to Choice* - given by Treasury and addressed (and marked for attention) as specified in the Contract Details or as otherwise notified by Choice.
- 20.1.2. A notice must be:
- a. signed by the person giving the notice and delivered by hand;
  - b. signed by the person giving the notice and sent by pre-paid post; or

- c. transmitted electronically by the person giving the notice by electronic mail or facsimile transmission.

**20.2. When effective**

- 20.2.1. A notice is deemed to be effected:
  - a. *if delivered by hand* - upon delivery to the relevant address;
  - b. *if sent by post* - upon delivery to the relevant address; or
  - c. *if transmitted electronically* - upon actual receipt by the addressee.
- 20.2.2. A notice received after 5.00 pm, or on a weekend or public holiday in the place of receipt, is deemed to be effected on the next Business Day in that place.

**21. GENERAL PROVISIONS**

**21.1. Audit and Access**

21.1.1. Choice agrees:

- a. to give Treasury, or any persons authorised in writing by Treasury, access to premises where obligations under this contract are being carried out; and
- b. to permit those persons to inspect and take copies of any Material relevant to this contract.

21.1.2. The rights referred to in clause 21.1.1. are subject to:

- a. Treasury providing reasonable prior notice;
- b. the reasonable security procedures in place at the premises; and
- c. if appropriate, execution of a deed of confidentiality by the persons to whom access is given.

21.1.3. The Auditor-General and the Privacy Commissioner are persons authorised for the purposes of clause 21.1.1.

21.1.4. This clause 21.1 does not detract from the statutory powers of the Auditor-General or the Privacy Commissioner.

**21.2. Insurance**

21.2.1. Choice agrees:

- a. to effect and maintain the insurance specified in the Contract Details; and
- b. on request, to provide proof of insurance acceptable to Treasury.

21.2.2. This clause 21.2 continues in operation for so long as any obligations remain in connection with this contract.



**21.3. Conflict of interest**

21.3.1. Choice warrants that, to the best of its knowledge after making diligent inquiry, at the date of this contract no Conflict exists or is likely to arise in the performance of Choice's obligations under the contract.

21.3.2. If during the term of this contract a Conflict arises, Choice agrees to:

- a. notify Treasury immediately;
- b. make full disclosure to Treasury of all relevant information relating to the Conflict; and
- c. take any steps Treasury reasonably requires to resolve or otherwise deal with that Conflict.

**21.4. Relationship of parties**

21.4.1. Choice is not by virtue of this contract an officer, employee, partner or agent of Treasury, nor does Choice have any power or authority to bind or represent Treasury.

21.4.2. Choice agrees:

- a. not to misrepresent its relationship with Treasury; and
- b. not to engage in any misleading or deceptive conduct in relation to the Activity.

**21.5. Waiver**

21.5.1. A failure or delay by a party to exercise any right or remedy it holds under this contract or at law does not operate as a waiver of that right.

21.5.2. A single or partial exercise by a party of any right or remedy it holds under this contract or at law does not prevent the party from exercising the right again or to the extent it has not fully exercised the right.

**21.6. Variation of contract**

21.6.1. Except for action Treasury is expressly authorised to take elsewhere in this contract, no variation of this contract is binding unless it is agreed in writing and signed by both parties.

**21.7. Assignment**

21.7.1. Choice cannot assign its obligations, and agrees not to assign its rights, under this contract without Treasury's prior written approval.

**21.8. Survival**

21.8.1. The operation of clauses 7 [Assets], 8 [Records], 10 [Relationship Management], 11 [Intellectual Property], 12 [Confidential Information], 13 [Privacy], 15 [Indemnity], 21.2 [Insurance], 16 [Dispute resolution] and any other provision which expressly or by implication from its nature is intended to continue survive the expiration or earlier termination of this contract.

21.8.2. Clause 21.1 applies for the term of this contract and for a period of 7 years from the date of expiration or earlier termination of the contract.

**21.9. Applicable law and jurisdiction**

21.9.1. This contract is to be construed in accordance with, and any matter related to it is to be governed by, the law of the Australian Capital Territory.

21.9.2. The parties submit to the jurisdiction of the courts of that State or Territory.

## **SCHEDULE 1 GROCERYCHOICE ACTIVITY DETAILS**

### **1. Activity Period**

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**(Recital A, clauses 1.1.1 and 3.5.1)**

The Activity Period commences on the date of this contract and ends on 31 March 2011 (or as otherwise agreed in writing between the parties).

### **2. Objectives**

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The Australian Government's objective for this contract is to

2.1.1. provide a dedicated website for consumers that provides reliable information on overall grocery prices, so as to help them make better informed purchasing decisions, and to provide this information in a manner which promotes competition in the market, without introducing distortions.

2.1.2. More specifically, the Grocerychoice Website will:

- a. provide current, relevant and accurate information on the prices of supermarket grocery products;
- b. provide functionality that allows consumers to make assessments about grocery prices both at detailed level and from an overall perspective within and across appropriately defined regions;
- c. will be available to all users and capable of facilitating a high volume of traffic with minimum disruptions to the user experience;
- d. will provide all information free of charge; and
- e. will represent the information made available via the Grocerychoice Website as a Choice product.

### **3. Activity Description**

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#### **3.1. Overview**

Choice is responsible for the management, editorial content, IT, data collection and publication and other operational requirements necessary to successfully operate the Grocerychoice Website according to three main phases:

##### ***Phase 1***

Choice must re-skin the Grocerychoice Website with the Choice brand and style and takes editorial responsibility for the content of the Grocerychoice Website.

Choice must launch the re-skinned Grocerychoice Website no later than 30 January 2009.

### **Phase 2**

Choice must continue to publish monthly basket prices using the data provided by the ACCC under the existing data collection survey, with the option to modify the presentation of this information and include additional information.

Choice must research and develop the new website strategy to be implemented from the commencement of Phase 3.

Phase 2 commences immediately upon the completion of Phase 1.

### **Phase 3**

Choice must launch a new Grocerychoice Website on or before 01 July 2009.

The new website must have an expanded range of services for consumers, an amended data presentation and alternative user functionality to the existing Grocerychoice Website.

## **3.2. Detailed Description of Phases**

### **PHASE 1**

Treasury will facilitate arrangements Choice wishes to put in place as a matter of expediency with the contractor under the Grocerychoice IT Contract (Getronics). This will include the work relating to the Grocerychoice Website SOW. This work will be in accordance with clause 3.4 and be an Identified In-Kind Contribution. Choice will be responsible for performing tasks and responsibilities specified in the Grocerychoice Website SOW to be performed by Choice and working with Getronics to ensure that the changes associated with the re-skin of the Grocerychoice Website are implemented no later than 30 January 2009.

The re-skin of the Grocerychoice Website is detailed in the Grocerychoice Website SOW, and must include, but is not restricted to, the following website changes;

- a. the Grocerychoice Website must display the Choice brand and style (including new colour presentation and maps) and replace the ACCC name and logo on the website to ensure no conflict of interest, real or apparent, for the ACCC;
- b. the Grocerychoice Website must include a comments forum where users can provide moderated feedback and comments;

- c. the Grocerychoice Website must include access to a user survey; and
- d. the Grocerychoice Website must continue to make available to consumers the option to subscribe to a service which informs consumers about new data releases.

Choice will have responsibility for all editorial content on the re-skinned Grocerychoice Website from the commencement of the re-skin.

All changes to the Grocerychoice Website under Phase 1 not specified above or in the Grocerychoice Website IT Contract must be made in accordance with the Change Management processes specified in this Schedule.

## **PHASE 2**

Choice will be responsible for all changes to the 'live' website.

Choice must continue to publish monthly basket prices from the existing survey data provided under the Grocerychoice Survey Contract until the introduction of the new Grocerychoice Website from the commencement of Phase 3.

Choice must publish the existing survey data provided under the Grocerychoice Survey Contract on the first business day of the month following the survey. Choice must ensure that the basket prices remain on the Grocerychoice Website until the next set of basket prices are published.

Treasury will have responsibility for the management of the Grocery Product Prices Survey Contract and will conduct the management of this contract in consultation with Choice.

A protocol document (Protocol for the publication of monthly survey results under Phase 2 of the Grocerychoice website contract), to be agreed between Treasury, Choice and the ACCC will set out the roles and responsibilities of the ACCC and Choice under Phase 2 in relation to the collection, dissemination, and quality assurance of the monthly survey data, in preparation for its publication.

The Protocol is at Schedule 7 to this contract. Choice must conduct the tasks assigned to it in, and otherwise comply with, the Protocol.

Choice must research and develop the new Grocerychoice Website to be implemented from the commencement of Phase 3. The development must include consideration of at least the following elements and functionality and achieve the following outcomes:

- a. publication of basket prices for individual supermarkets, with the contents of the baskets transparent to users;

- b. publication of basket prices for all leading supermarkets chains or groups (e.g. Coles, Woolworths, IGA, Franklins, Supabarn, Foodworks, ALDI etc) and other smaller independent operators;
- c. publication of a 'staples' basket, or similar basket, that allows for a suitable comparison of prices between the larger supermarket chains, smaller independent supermarkets and ALDI;
- d. publication of grocery prices on a no less than a weekly basis with the 'date updated' clearly indicated on the Grocerychoice Website;

Choice must ensure that independent verification of data on the Grocerychoice Website is conducted to ensure the accuracy of prices data displayed on the Grocerychoice Website.

Choice must examine the implementation of appropriate changes to the method of data collection for grocery prices to fully support the above in the most efficient and effective way possible. To the extent that these changes involve the introduction of data capture through electronic means, appropriate alternative arrangements must also be developed for those supermarkets unable to provide data in Choice's desired format.

Choice must engage with major interest groups and independent experts regarding potential amendments to the Grocerychoice Website with initial consultations to be completed prior to the commencement of Phase 3.

Choice must continue to provide the existing Grocerychoice Website subscription service up to the launch of the Phase 3 Grocerychoice Website. This must include despatching monthly emails to subscribers as well as the addition of new subscribers and the deletion of subscribers requesting removal from the list.

Choice must continue, in an amended form if required, the existing Grocerychoice Website electronic feedback and inquiry service until the commencement of Phase 3. Choice must respond to all inquiries within 7 Business Days.

Choice, in consultation with Treasury, may consider publishing an alternative presentation of the data collected from the existing Grocerychoice Website survey.

All changes to the Grocerychoice Website under Phase 2 not specified above must be made in accordance with the Change Management processes specified in this Schedule.

**Contingency if Phase 3 Commencement Date not met**

In the event that Choice is unable to transition to Phase 3 by the Phase 3 Commencement Date, Treasury and Choice, in consultation with the ACCC where applicable, will reach an agreement on the future roles and responsibilities of the parties in relation to the Grocerychoice Website beyond this period, in accordance with the two options specified below.

Under both options, Choice will continue to improve and progress the Grocerychoice Website, consistent with the Australian Government's objectives for the Grocerychoice Website. This may include, but is not limited to:

- a. providing a small subset of grocery prices updated on a more frequent basis, in addition to the existing data presented on the website (such as weekly specials);
- a. providing additional information on grocery products, supermarkets, smart shopping etc; or
- b. providing greater detail on grocery prices for some individual supermarkets.

All changes to the Grocerychoice Website under the continuation of Phase 2 not specified above must be made in accordance with the Change Management arrangements specified in this Schedule.

If Choice requests a change in the scope of the Activity under Phase 3, outside of the review process in accordance with clause 3.3, it will be dealt with in accordance with clause 17, 21.6 or other relevant provisions of the contract.

**Option 1**

The ACCC will continue to provide support to Choice as specified in the Protocol, and continue the corresponding financial arrangements. Choice will continue its responsibility for the publication of monthly basket prices as per the arrangements specified under Phase 2.

In the event of a change in the roles and responsibilities specified in the Protocol being agreed, the funding arrangements will also be modified accordingly.

All parties will be required to agree to any changes. In the event of disagreement, the existing Protocol arrangements will continue.

As part of this arrangement, Treasury will, if requested by Choice, enable Choice to contract directly with the Bailey Group Pty Ltd (Retail Facts) for the services provided under the Grocery Product Prices Survey Contract by:

- a. subject to agreement of Retail Facts and Choice, novating the Grocery Product Prices Survey Contract to Choice; or
- b. terminating the Grocery Product Prices Survey Contract.

Should Choice not wish to retain the Grocery Product Prices Survey Contract, it will make arrangements for a similar data collection survey to be undertaken, with no gap between survey collection periods.

### **Option 2**

Choice will assume all responsibility for the data management, collection and publication of the survey undertaken by the ACCC in the Protocol and continue its responsibility for the publication of monthly basket prices. The ACCC will assist in facilitating the transfer of knowledge and skills from the ACCC to Choice as quickly as possible.

As part of this arrangement, Treasury will, if requested by Choice, enable Choice to contract directly with Retail Facts for the services provided under the Grocery Product Prices Survey Contract by:

- c. subject to agreement of Retail Facts and Choice, novating the Grocery Product Prices Survey Contract to Choice; or
- d. terminating the Grocery Product Prices Survey Contract.

Should Choice not wish to retain the Grocery Product Prices Survey Contract, it will make arrangements for a similar data collection survey to be undertaken, with no gap between survey collection periods.

### **PHASE 3**

Choice must launch a new Grocerychoice Website on or before the Phase 3 Commencement Date.

The Grocerychoice Website must at all times include at least the following elements and functionality and achieve the following outcomes:

- a. publication of basket prices for individual supermarkets locations, with the contents of the baskets transparent to users;
- c. publication of basket prices for all leading supermarkets chains or groups (e.g. Coles, Woolworths, IGA, Franklins, Supabarn, Foodworks, ALDI etc) and other smaller independent operators;
- d. publication of a 'staples' basket, or something similar, that allows for a suitable comparison of prices between the larger supermarket chains, smaller independent supermarkets and ALDI;



- e. publication of grocery prices on a no less than a weekly basis with the 'date updated' clearly indicated on the Grocerychoice Website. All data that is out of date or has not been updated in over a week must be removed from the Grocerychoice Website;

Choice must ensure that independent verification of data on the Grocerychoice Website is conducted to ensure the accuracy of prices data displayed on the Grocerychoice Website; and

Choice must examine the implementation of appropriate changes to the method of data collection for grocery prices to fully support the above in the most efficient and effective way possible. To the extent that these changes involve the introduction of data capture through electronic means, appropriate alternative arrangements must also be developed for those supermarkets unable to provide data in Choice's desired format.

Choice must continue to research and develop improvements in the Grocerychoice Website. Any future developments must comply with the Objectives.

Further enhancements to the Grocerychoice Website may include, but are not restricted to, the following;

- a. the provision of additional information on grocery products, such as nutritional information, unit pricing information, product origin etc; and
- f. the addition of new functionality that allows users to construct their own baskets of grocery products and to compare these baskets across supermarkets.

All changes to the Grocerychoice Website under Phase 3 not specified above must be made in accordance with the Change Management processes specified in this Schedule.

The ACCC may be called upon to assist as appropriate in the transfer of knowledge from the ACCC to Choice under Phase 3.

### **3.3. Website Hardware**

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- a. Choice must acquire all the necessary hardware, software and other facilities and systems for the development, testing and hosting of the Grocerychoice Website prior to the Phase 3 Commencement Date.

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### **3.4. Website Hosting**

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- a. Except as otherwise specifically agreed in writing by Treasury, the Grocerychoice Website will continue to be hosted in accordance with the Hosting Arrangement until the commencement of Phase 3.
  - b. Choice must host and support the Grocerychoice Website on its own infrastructure or under its own outsourcing arrangements from the commencement of Phase 3.
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### **3.5. Website Performance**

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The Grocerychoice Website must be a highly available system capable of meeting traffic peaks without failure or performance loss.

The Grocerychoice Website must have a highly detailed website usage monitoring in place.

The Grocerychoice Website must perform with each page taking no longer than 5 seconds to load. This must also occur when being used on a low speed (56kbs) connection.

The Grocerychoice Website must be available to the public 24 hours x 7 days per week, excluding scheduled maintenance.

The Grocerychoice Website must have 24 hours x 7 days per week monitoring and alert processes to identify unexpected system and software failures.

Choice must provide Grocerychoice Website support during normal business hours.

The Grocerychoice Website must not be offline for a period exceeding 30 minutes. Choice must notify Treasury of all outages exceeding 10 minutes in duration.

Choice must notify Treasury of scheduled maintenance for the website. Scheduled maintenance will be in addition to the offline period requirements detailed above.

Choice must implement appropriate systems and user testing procedures to ensure that all amendments to the Grocerychoice Website are made effectively and without error.

### **3.6. GroceryChoice domain names**

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Subject to this contract, Treasury will provide Choice with technical control of the www.grocerychoice.net.au and grocerychoice.com.au, but the Commonwealth will remain the registered domain name holder during the term of this contract.

Providing Choice performs this contract to Treasury's satisfaction and Treasury is satisfied that Choice will continue to operate the Grocerychoice website in an appropriate manner into the indefinite future, Treasury will transfer the www.grocerychoice.net.au and grocerychoice.com.au domain names to Choice following the completion of this contract.

Treasury will also arrange for the www.grocerychoice.gov.au domain to be redirected to grocerychoice.com.au for an appropriate period to ensure a smooth transition.

### **3.7. Change management processes**

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Choice must notify Treasury about all changes to the Grocerychoice Website prior to their occurrence in accordance with the following requirements:

- a. changes classified as 'minor' in nature will require notification only, and will not be subject to Treasury approval. Changes classified as 'significant' in nature will require Treasury approval.

—'minor' changes are those that do not affect the substantive experience for consumers, and include, but are not limited to, changes to presentation, text, layout, graphic, editorial content or formatting of the website, minor operational changes to the data collection methods or presentation etc.

—'significant' changes are those that affect the substantive experience for consumers are include, but not limited to, changes to the consumer's interaction with the website, the number or types of grocery baskets, the representation of aggregated grocery price information, and the expansion of the grocery price/product information to include other information about supermarkets or grocery products etc.

- b. changes classified as 'significant' that are considered by Choice and Treasury to be consistent with the Objectives cannot be rejected by Treasury without explanation.

Choice should consult Treasury for clarification in the event of uncertainty regarding the definition of a change.

#### 4. Activity Timetable

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Activity	Completion Date or Period (as applicable)
Phase 1	From date of contract signing until the commencement of Phase 2.
Launch of re-skinned Grocerychoice Website	By no later than 30 January 2009
Phase 2	From the launch of the re-skinned Grocerychoice website until the commencement of Phase 3.
Phase 3	No later than 01 July 2009 until 31 March 2011

#### 5. Key Performance Indicators

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Key Performance Indicators may be changed, added to or subtracted from with agreement between Treasury and Choice. Each rating assigned to a KPI denotes the partial Adjustment Factor assigned to that criteria for which a penalty may be applied, if it is not met.

Consumer experience KPIs will include either a and b or c and d but not both.

The maximum penalty that can be imposed for non-compliance with KPIs is 20 per cent of the Base Funding Amount.

##### **Consumer experience**

##### *Phases 1 and 2*

- a. Updated grocery price information for all 61 regions is provided no less frequently than on the first Business Day of each month. (12.5 per cent of 20 per cent of Base Funding Amount)
- b. Consumers can successfully locate information about grocery prices in their area by using the Grocerychoice Website search functions. (12.5 per cent of 20 per cent of Base Funding Amount)

*Phase 3*

- c. Updated grocery price information for all defined regions is provided no less frequently than on a weekly basis. (12.5 per cent of 20 per cent of Base Funding Amount)
- d. Consumers can successfully locate information about grocery prices in their area by using the Grocerychoice Website search functions. (12.5 per cent of 20 per cent of Base Funding Amount)

**IT**

- e. All Grocerychoice Website pages complete loading in 5 seconds or less. (12.5 per cent of 20 per cent of Base Funding Amount)
- f. The Grocerychoice Website is available 99.7 per cent of each month. (12.5 per cent of 20 per cent of Base Funding Amount)
- g. The Grocerychoice Website is not offline for more than 30 minutes within each 24 hour period, excluding scheduled maintenance. (12.5 per cent of 20 per cent of Base Funding Amount)

**Communications**

- h. Choice responds to requests from the Treasury in a timely manner. (5 per cent of 20 per cent of Base Funding Amount)
- i. Choice responds to all inquiries by the general public to the Grocerychoice Website within 7 Business Days. (5 per cent of 20 per cent of Base Funding Amount)
- j. Choice notifies Treasury of all 'minor' changes to the Grocerychoice Website. (5 per cent of 20 per cent of Base Funding Amount)
- k. Choice consults Treasury on all 'significant' changes to the Grocerychoice Website. (5 per cent of 20 per cent of Base Funding Amount)

**Quality of service**

- l. Where complaints are made in respect to the Grocerychoice Website, Choice will act to investigate and if necessary correct such information, within 2 Business Days. (8 per cent of 20 per cent of Base Funding Amount)
- m. Choice records, investigates and rectifies all legitimate complaints about the Grocerychoice Website. (7.5 per cent of 20 per cent of Base Funding Amount)

**Record keeping**

- n. Choice records website 'hits' on a daily basis. (1 per cent of 20 per cent of Base Funding Amount)

- o. All information provided in the consumer feedback forums and the Grocerychoice Website survey is recorded.(1 per cent of 20 per cent of Base Funding Amount)
-

**SCHEDULE 2 Funding Schedule**

**Funding and Payment**

(clauses 1.1.1, 4.1, 4.2, 4.4)

Payments will be conditional upon Milestones being achieved. Once a Milestone has been achieved, the KPI Adjustment Factors (if applicable) will then be applied to determine the final payment.

The maximum amount of Funding for the Activity is **\$8.0** million GST inclusive, which will be paid as follows:

Table of Milestones and Funding Allocations

Milestone	Milestone Date	Base Funding Amount upon delivery of Milestone (cash) (GST Incl) (\$)	Applicable KPIs	Total KPI Adjustment Factor	Maximum penalty imposed for non-compliance with KPIs
<b>2008-09</b>					
Execution of this contract	19 Dec 09	\$1,000,000	n/a	n/a	n/a
Website re-skinned: Phase 2 begins	30 Jan 09	\$1,000,000	n/a	n/a	n/a
Phase 2 progressed: Specification documents issued for tender	1 Mar 09	\$1,000,000	a, b and e-o	Maximum 20 per cent of Base Funding Amount	\$200,000
Phase 2 progressed: Tender awarded; Website built; Data feeds from supermarkets received	1 Jun 09	\$1,000,000	a, b and e-o	Maximum 20 per cent of Base Funding Amount	\$200,000
<b>2009-10</b>					
New Website launched: Phase 3 begins	1 Jul 09	\$1,000,000	c-o	Maximum 20 per cent of Base Funding	\$200,000

				Amount	
Phase 3 KPI period 1: Report to Treasury delivered; Consumer survey published	1 Oct 09	\$500,000	c-o	Maximum 20 per cent of Base Funding Amount	\$100,000
Phase 3 KPI period 2: Report to Treasury delivered; Small supermarket facility added; New features added	1 Jan 10	\$500,000	c-o	Maximum 20 per cent of Base Funding Amount	\$100,000
Phase 3 KPI period 3: Report to Treasury delivered; New features added	1 May 10	\$500,000	c-o	Maximum 20 per cent of Base Funding Amount	\$100,000
<b>2010-11</b>					
Phase 3 KPI period 4: Report to Treasury delivered;  New features added	1 Aug 10	\$500,000	c-o	Maximum 20 per cent of Base Funding Amount	\$100,000
Phase 3 KPI period 5: Report to Treasury delivered	1 Nov 2010	\$750,000	c-o	Maximum 20 per cent of Base Funding Amount	\$150,000
Phase 3 KPI period 6 and completion of Phase 3: Final report to Treasury delivered; Final audit carried out	31 Mar 2011	\$250,000	c-o	Maximum 20 per cent of Base Funding Amount	\$50,000

Treasury will also make In-Kind Contributions in accordance with the table below. Choice will be notified of any changes to these contributions.



Table of In-Kind Contributions to be paid by Treasury

Activity Phase	Expenditure Item	Date	Funding (cash) GST Incl (\$)
Phase 1	Grocerychoice website SOW	December 2008	\$95,372 (currently GST exclusive)
	Grocery Product Prices Survey Contract	December 2008 survey	\$208,019
Phase 2	Grocery Product Prices Survey Contract	January 2009 survey	\$208,019
	Grocery Product Prices Survey Contract	February 2009 survey	\$208,019
	Grocery Product Prices Survey Contract	March 2009 survey	\$208,019
	Grocery Product Prices Survey Contract	April 2009 survey	\$208,019
	Grocery Product Prices Survey Contract	May 2009 survey	\$208,019
	ACCC staff costs (\$15,911 per month)	Jan -June	\$95,466

**Invoicing**

Invoices forwarded by Choice in accordance with this contract must be correctly addressed to Heather Cotching, Department of the Treasury, and include the following information:

- (a) title of Activity;
- (b) date and name of this contract (including the contract number (if any));
- (c) the amount invoiced (separately identifying the amount charged as GST and other taxes, interest or other charges);
- (d) details of all aspects of the Activity performed in respect of the amount invoiced; and
- (e) any other details as notified by Treasury from time to time.

**SCHEDULE 3 Contract Details**

**A. Reporting**  
(clauses 1.1.1, 9)

**A.1. Final Report**

The final progress Report must be a stand-alone document that can be used for public information dissemination purposes.

The final progress Report must:

- a. summarise Choice's actual performance against the Key Performance Indicators during the whole Activity Period and the reasons why any Key Performance Indicators were not met;
- b. discuss in detail the conduct, benefits and outcomes of the Activity as a whole during the entire Activity Period; and
- c. evaluate the Activity and include a detailed discussion as to whether the Objectives of the Activity were achieved, and if not, an explanation of why any Objectives were not met.

Choice must also include in the final progress Report a discussion of any other matters, relating to the evaluation of the Activity, which Treasury notifies Choice is required to be included in the final progress Report. Any such requirement will be notified to Choice at least 20 Business Days before the final progress Report is due.

**B. Assets**  
(clauses 1.1.1 and 7)

Treasury approves the use of the Funding for purchase of the following Assets:

- 1) the necessary hardware and software for the development, testing and hosting of the Grocerychoice Website prior to the commencement of Phase 3.

Choice must for the term of this contract maintain an Asset register in the following form and containing the following information:

Asset number	Description of Asset	Creation, acquisition or total lease cost	Date of creation, acquisition or lease	Term of lease or other arrangement	Location of Asset	Method of, and date, which Asset was written off or Disposed of

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**C. Insurance**  
**(clause 21.2)**

Choice must maintain:

- a. workers compensation insurance as required by law where Choice carries out activities under this contract;
- b. public liability insurance to the value of at least \$20 million for each and every claim, or occurrence giving rise to a claim, in respect to activities undertaken under this contract, where occurrence means either a single occurrence or a series of occurrences if these are linked or occur in connection with one another from one original cause, as the case may be; and
- c. insurance against any loss or damage to an Asset for its full replacement cost including where relevant the costs of demolition and removal of debris and the cost of architects, engineers and other consultants.

**D. Subcontracting**  
**(clause 3.6)**

not applicable

**E. Acknowledgement and publicity and Disclaimer**  
**(clause 3.5.4.b, 14)**

**Acknowledgement**

Choice must acknowledge the provision of the Funding by Treasury in the following way:

- a. The Grocerychoice Website is supported by funding from the Australian Government.

**Disclaimer**

*Although the Australian Government supports this website by contributing funding to its operation, it is not an Australian Government website and the Australian Government is not responsible for its content or operation and, to the extent permitted by law the Australian Government makes no representation and gives no warranty and accepts no liability in respect to it.*

**F. Notice**  
**(clause 20.1)**

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Treasury's details are as follows:

HK Holdaway, Project Manager Grocerychoice contract. Manager, Competition Policy Framework Unit, The Treasury. Phone 02 6263 3791, email hk.holdaway@treasury.gov.au

Choice's details are as follows:

Linda Magee, Manager, Choice Online. Phone 02 9577 3378, email limagee@choice.com.au

**G. Confidential Information**  
**(clause 12)**

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<b>Treasury Confidential Information</b>	<b>Period of Confidentiality</b>
Treasury Personal Information	Indefinitely
Security Classified Information	Indefinitely
Funding details (not publicly available)	Indefinitely
Grocerychoice IT Contract	Indefinitely
Grocery Product Prices Survey Contract	Indefinitely

<b>Choice Confidential Information</b>	<b>Period of Confidentiality</b>
Choice Personal Information	Indefinitely

## APPENDIX 5

### GROCERYchoice subcontract arrangements

Subcontractor	Subcontracted by ...	Description	Date	Comments	Amount expended (GST exclusive)	Total value of contract (GST exclusive)
The Bailey Group Pty Ltd (Retail*Facts) <sup>1</sup>	ACCC/Treasury	Field data collection surveys	10 June 2008 to 10 June 2010	Contract transferred to Treasury on 5 January 2009	\$1,455,042 expended by the ACCC; \$834,572 expended by Treasury	\$4.7 million
Getronics <sup>2</sup>	ACCC/Treasury	Website design, development, hosting and maintenance	Unknown (likely to be between mid-2008 and 1 July 2009)	Contract transferred to Treasury on 5 January 2009	\$1,433,238 expended by the ACCC; \$396,654 expended by Treasury	Unknown (but likely to be close to the amount already expended)
SymbioAlliance <sup>3</sup>	ACCC	Undertake like for like testing of survey product items	Unknown (likely to be between mid-2008 and 5 January 2009)		\$13,999	Unknown
Cogent Business <sup>4</sup>	ACCC	Advice on system architecture	Unknown (likely to be between mid-2008 and 5 January 2009)		\$87,147	Unknown

<sup>1</sup> ACCC, Answers to Questions on Notice (received 17 September 2009), p 3; Treasury, Answers to Questions on Notice (received 10 November 2009).

<sup>2</sup> ACCC, Answers to Questions on Notice (received 17 September 2009), p 3; Treasury, Answers to Questions on Notice (received 10 November 2009).

<sup>3</sup> ACCC, Answers to Questions on Notice (received 17 September 2009), p 3.

<sup>4</sup> ACCC, Answers to Questions on Notice (received 17 September 2009), p 3.

CHOICE <sup>5</sup>	Treasury	Take over the GROCERYchoice website	Over three years from 5 January 2009	Estimated contingent liability of \$700,000 – yet to be determined	\$2,727,273	\$8.0 million (GST inclusive)
Freshlogic <sup>6</sup>	CHOICE	Provide a method for comparing fresh produce; information on top selling products and weekly specials data	Unknown	No contract was signed	\$64,250 (April to June 2009)	N/A
SMS Management and Technology <sup>7</sup>	CHOICE	Program management, technical build, hosting and maintenance of GROCERYchoice	Unknown		Unknown	Unknown
Moon Group <sup>8</sup>	CHOICE	Online design for the website	Unknown		Unknown	Unknown
Nielsen Online <sup>9</sup>	CHOICE	Conduct surveys on the CHOICE website, create a profile of website users, shopping habits and demographics	Unknown		Unknown	Unknown
Bruce Clay Australia <sup>10</sup>	CHOICE	Develop a search engine optimisation strategy for GROCERYchoice as part of a broader marketing strategy	Unknown		Unknown	Unknown

<sup>5</sup> Treasury, Answers to Questions on Notice (received 10 November 2009); Treasury, Answers to Questions on Notice (received 16 September 2009), p 3; CHOICE, *Proof Committee Hansard*, 18 September 2009, p 40.

<sup>6</sup> CHOICE, *Submission 6*, p 10; Freshlogic, *Proof Committee Hansard*, 6 October 2009, p 27; Freshlogic, Answers to Questions on Notice (received 16 October 2009), p 1.

<sup>7</sup> CHOICE, *Submission 6*, p 9.

<sup>8</sup> CHOICE, *Submission 6*, p 9.

<sup>9</sup> CHOICE, *Submission 6*, pp 9–10.

<sup>10</sup> CHOICE, *Submission 6*, p 10.

# APPENDIX 6

## 'Choice' Like for like product matching

Underlying principles for non-fresh-food groceries





## Like for like product matching

### Underlying principles for non-fresh-food groceries

#### Assumptions:

1. There are three tiers of supermarket products: good/budget, better/standard/premium, best/super-premium.
2. ALDI products, Woolworths Select products, You'll love Coles products and IGA-branded products are in competition with and comparable to leading brands; all these fall into the better/standard market segment.
3. Some brands are in the good/budget end of the market; these brands are competing with Woolworths Home Brand, Coles SmartBuy, Franklins No Frills, IGA Black & Gold products. ALDI does not offer a product range in this tier.
4. Some manufacturers and retailers offer a best/super-premium product. In this space are GJ Coles and ALDI premium varieties of some foods.

#### Product matching strategy:

1. ALDI, Woolworths Select, You'll love Coles and IGA-branded products are matched to each other and to the leading brand(s).
2. Woolworths Home Brand, Coles SmartBuy, IGA Black&Gold and Franklins No Frills are matched to each other and any leading budget brands that are identified.
3. Leading brands are selected based on the top-selling 5000 supermarket groceries as determined by FreshLogic. Where the product is not represented in this list, the market leaders as listed in Retail World's Grocery Guide (by volume) will be used.
4. Products are matched for size: the size range of matched products is no greater than 30% of the modal size; depending on the number of products, if there is no mode, then the median size, or in the case of only two sizes, the smallest size, will be used.
5. Products are matched for number of items per pack where the product is primarily purchased by count, not weight or other measure (for example, toothbrushes, plastic bags). Note: for some products, such as plastic bags, further parameters such as dimensions of bag may need to be taken into account).
6. Products are matched for food composition & processing: matched foods fall within the same basic food standard (for example, whole fresh milk matches with other whole fresh milks, but not whole UHT milk, or fat/protein modified fresh milk).
7. Products are matched for nutrition composition: using the terms defined in the Code of Practice for Nutrient Claims, products are matched for low & reduced fat; low and reduced salt, light, low-joule, diet, etc, where these hold significant nutritional meaning (for example, low-salt tomatoes does not match regular tinned tomatoes).

8. Products are matched for meaningful quality terms, for example standard olive oil does not match with extra virgin olive oil, three-ply toilet paper does not match with two-ply, alkaline batteries do not match with non-alkaline. A list of the terms considered meaningful and used for this purpose will be developed.
9. Products will be matched for flavour/variety where this is highly relevant and possible. Flavoured and unflavoured milk, or scented and unscented baby wipes do not match, but where there are a wide range of flavours/fragrances, for example flavoured tunas, scented fabric softeners, the most similar will be matched where possible, but differing flavour/fragrance will not preclude a match.

choice

57 Carrington Road Marrickville NSW 2204  
Phone 02 9577 3333 Fax 02 9577 3377 [choice.com.au](http://choice.com.au)

## APPENDIX 7

'Choice' Memorandum of Understanding 2009



## MEMORANDUM OF UNDERSTANDING

DATED: 2009

### PARTIES

BETWEEN AUSTRALIAN CONSUMERS' ASSOCIATION of 57 Carrington Road,  
Marrickville in the State of New South Wales ("CHOICE")

AND ("the Company")

### RECITALS

- A. CHOICE is a not-for-profit company limited by guarantee and is the largest consumer organisation in Australia.
- B. The Company owns and operates supermarkets in Australia.
- C. CHOICE intends to relaunch the website known as Grocerychoice ("**the Website**") in July 2009 for the purpose of assisting Australian consumers in comparing general price levels of supermarkets in their local areas.
- D. The Company proposes to contribute to the operation of the Website by participating in a regular Grocerychoice Industry Consultative Forum ("**the Forum**") and by providing CHOICE with prices of consumer goods for sale in the Company's supermarkets ("**the Price Information**") on a twice weekly basis.

This Memorandum of Understanding is not intended to create contractual obligations between the parties but records the common understanding of the parties of the following matters:

### 1 Participation

- 1.2 CHOICE acknowledges that the Company participates in the Forum and provides the Price Information on a voluntary basis and that the Company is at liberty to cease participating in the Forum and/or cease providing the Price Information at any time and without prior notice.

### 2. Use of Price Information and the Website

- 2.1 The Company acknowledges that CHOICE may use the Price Information for publication on the Website. The Company acknowledges that, once publication of the Price Information on the Website occurs, all such Price Information will be in the public domain. The Company acknowledges that the Pricing Information may be used by CHOICE to calculate unit prices. CHOICE acknowledges its good faith intention to refrain from disturbing the original form of the Pricing Information beyond what is necessary for meaningful comparisons.

- 2.2 CHOICE and the Company each acknowledge their good faith intention to work co-operatively with each other and with the other participants in the Forum to collate the Price Information in a manner which benefits consumers and fairly represents the Price Information and that such co-operation will extend to discussion by the Forum of appropriate items for inclusion in comparative collections of consumer goods.
- 2.3 The Website may refer to other CHOICE articles and CHOICE websites, but, except to the extent necessary to carry out the purpose of the Website described in Recital C above, will not otherwise advertise consumer goods or services.

**3. Accuracy of Price Information**

- 3.1 The Company acknowledges that it will bear responsibility for providing timely and accurate Price Information and that CHOICE will not bear any responsibility for errors, omissions or inaccuracies in the Price Information as provided by the Company to CHOICE from time to time. CHOICE will publish an appropriate disclaimer on the Website to inform consumers of the temporary accuracy of the Price Information.
- 3.2 CHOICE acknowledges its good faith intention that the Price Information it publishes will be an accurate reflection of the Price Information supplied by the Company. CHOICE acknowledges that it will not hold the Company responsible for errors, omissions or inaccuracies in the Price Information as published by CHOICE where such errors, omissions or inaccuracies are attributable to the negligence of CHOICE.
- 3.3 The Company may review the Website on a regular basis and notify CHOICE of any errors, omissions or inaccuracies in the Price Information published on the Website as soon as practicable. CHOICE will take all reasonable steps to correct any errors, omissions or inaccuracies so notified by the Company as soon as practicable.

**4. Representations arising from Price Information**

- 4.1 The Company acknowledges its good faith intention that the Price Information will reflect the price of goods reasonably available in its supermarkets in line with normal consumer expectations.
- 4.2 Without limiting the generality of 2.4 above, the Company acknowledges its good faith intention to refrain from bait advertising in connection with the Website or any other practice which has the potential to compromise the integrity of the Price Information.
- 4.3 CHOICE acknowledges that it will not hold the Company responsible for any misrepresentation of the Price Information as supplied by the Company where such misrepresentation is attributable to an act or omission of CHOICE.

Signed for and on behalf of CHOICE:

.....

Signed for and on behalf of the Company:

.....

choice

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