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**Reference: Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown
Amendment) Bill 2009**

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SYDNEY

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**SENATE ECONOMICS
LEGISLATION COMMITTEE
Friday, 25 September 2009**

Members: Senator Hurley (*Chair*), Senator Eggleston (*Deputy Chair*), Senators Cameron, Joyce, Pratt, and Xenophon

Participating members: Senators Abetz, Adams, Back, Barnett, Bernardi, Bilyk, Birmingham, Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Farrell, Feeney, Ferguson, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ludlam, Lundy, Ian Macdonald, Marshall, Mason, McEwen, McGauran, McLucas, Milne, Minchin, Moore, Nash, O'Brien, Parry, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Sterle, Troeth, Trood, Williams and Wortley

Senators in attendance: Senators Cameron, Hurley, Pratt and Xenophon

Terms of reference for the inquiry:

To inquire into and report on:

Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill 2009

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Committee met at 11.23 am

CHAIR (Senator Hurley)—I declare open this hearing of the Senate Economics Legislation Committee inquiry into the Trade Practices Amendment (Guaranteed Lowest Prices—Blacktown Amendment) Bill 2009. On 12 August 2009 the Senate referred this bill to the committee. The bill is designed to limit the practice of geographic price discrimination. It will require large retailers such as the major supermarket chains and the oil companies to charge the same prices at any two of their sites that are within 35 kilometres of each other. The committee is due to report on 24 November 2009. These are public proceedings, although the committee may agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is taken, and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera.

I remind members of the committee that the Senate has resolved that departmental officers shall not be asked to give opinions on matters of policy and shall be given reasonable opportunity to refer questions to a superior officer or to a minister. This resolution prohibits only asking for opinions on matters of policy and does not preclude questions asking for explanations of policy or factual questions about when and how policies were adopted.

[11.25 am]

KELLY, Mr Craig Robert, President, Southern Sydney Retailers Association

CHAIR—Welcome. I now invite you to make an opening statement.

Mr Kelly—Thank you. I am very pleased that a bill on geographic price discrimination is finally being considered by our parliament. I believe it is long overdue if we look at the state that our retail sector has degenerated into over the last 20 years. During this time we have had many other inquiries into our retail sector, all of which have assumed that consumers are benefiting from lower prices. However, if we look at the hard facts, if we use the assumption that it is competition that puts downward pressure on prices, if we use prices as a benchmark to see how effective our retail market is in bringing prices down, if we look at all the international comparisons with all the other developed country in the world, in terms of food inflation Australia is the worst. We have the highest and fastest accelerating supermarket food prices in the developed world. In fact, since 1990 our food and supermarket prices have increased between 30 and 40 per cent higher than in New Zealand, England, Canada, France and everywhere else in the rest of the world.

One of the reasons this has occurred is the practice of geographic price discrimination. It is a practice that destroys competition, distorts investment and is a significant economic problem for this country. In my submission I have given a practical example of how geographic price discrimination occurs here in Sydney. The two suburbs of Greystanes and Fairfield are less than five kilometres apart but there was a 130 per cent price difference for a basket of groceries purchased an hour apart on the same day. That practice drove out the small independent competitor in that shopping centre in Fairfield. As soon as that independent competitor was gone, we did a comparison over 12 months. As soon as that independent competitor was out of the market, prices increased 80 per cent in just 12 months. That is a practical example of exactly what geographic price discrimination does and why we need legislation such as the Blacktown amendment to repair our Trade Practices Act, to restore competition to the market and to bring some real downward pressure on prices.

CHAIR—You said that Australia has the highest food price increases of the developed countries. You said it is 30 to 40 per cent since 1990.

Mr Kelly—Our prices are 30 to 40 per cent higher than in equivalent countries such as New Zealand, Canada, the UK, France and just about anywhere else you would like to look.

CHAIR—Where is that measure from?

Mr Kelly—The OECD statistics. It is the OECD's main economic indicators.

CHAIR—Is that just the fresh food prices?

Mr Kelly—It is food prices, which make up a component of the Consumer Price Index in Australia, which is equivalent to all around the world. All statistical organisations such as the Australian Bureau of Statistics belong to a loose international confederation that tries to standardise its units of measure so that the statistics are comparable between countries.

CHAIR—The survey you have done is quite interesting. The price of groceries at Woolworths Fairfield seem extraordinarily low. You said that the prices paid by Greystanes residents were 31 per cent higher but when the store closed down 12 months later they were 80 per cent higher.

Mr Kelly—The first chart shows the difference in price between Woolworths Fairfield and Woolworths Greystanes on 10 May 2008. They were identical products purchased just over one hour apart. The second chart shows Woolworths Fairfield only and compares the prices on 10 May 2008 with the prices 12 months later on 9 May 2009. That shows the 80 per cent increase.

CHAIR—Why do you think it did not go up to 131 per cent? Why don't you think they are equivalent now? Do you think they eventually will be? What do you think is going on there?

Mr Kelly—It is possible. Those are questions you might have to ask of Woolworths.

CHAIR—Do you think there could be any difference in the basic reason why the store at Fairfield might charge less than the one at Greystanes? Do you think it might always have some variation, though not quite as much as—

Mr Kelly—No. It is simply because at Greystanes there is no independent local competitor.

CHAIR—And there is not at Fairfield anymore, either.

Mr Kelly—The suburb of Fairfield has a shopping centre in the centre of the suburb. It also has a small retail strip around the outside. So it may well be that there is an existing competitor in that small retail strip that is bringing some competitive pressure but not as much as there was when we had a greengrocer inside that shopping centre.

CHAIR—If the prices are so high at Greystanes, why do you think a competitor has not moved into the area?

Mr Kelly—It is because of the practice of geographic price discrimination. A competitor can see the supercompetitive prices that Woolworths are charging at Greystanes. If I were a small greengrocer or independent businessman I would normally think it was a great opportunity for me to go into Greystanes shopping centre and open up a small business and bring that competitive pressure. But that businessman knows that the minute he does that, no matter what price he puts up, Woolworths will automatically slash their prices to supposedly match him without regard to any price they have in the other shopping centre.

CHAIR—Do you have some hard evidence about grocery stores opening up in the southern area and how many have closed? Is that different from the long-term trend? Do you have that kind of data?

Mr Kelly—I was speaking to a gentleman a couple of months ago who told me he used to have a fruit shop in Blacktown about 15 years ago. He said that, at that time, there were over one dozen fruit shops in Blacktown. They were all independent businesses who were working and earning a living. But today there are just the two big supermarkets.

CHAIR—Of course, that could also be a factor of our lifestyles. When people are busy they zip into a supermarket and buy everything there rather than—

Mr Kelly—There is some validity in that. But if you just want to buy a few items of fresh fruit and vegetables it is much more convenient to go into a small shop where you can be in and out in two minutes than it is to go into a big supermarket and wander around and line up at the counter, where you have to wait five or 10 minutes.

CHAIR—As a shopper myself, I do not know that that is necessarily true. But let us have a look at the 2008-09 comparisons with Woolworths Fairfield. I am not a statistician but the 80 per cent increase includes a 181 per cent increase in navel oranges from the USA, garlic going up by 436 per cent and longans going up by 232 per cent. You really should exclude those because they are exceptional price rises that are probably due to seasonal factors and other things.

Mr Kelly—That is why it is important to look at the number across the whole basket of 28 items. They were also a couple of items that were lower in price, and they may have been a group-wide special that occurred on that item in that year. So you can select one item that has gone up by 200 per cent and say it is extraordinary but, again, there are items that decrease. The important number is to look at the entire basket of 28 items.

CHAIR—But when garlic was \$ 2.98 a kilogram and goes up to \$15.90 a kilogram, statistically you would want to eliminate that sort of price.

Mr Kelly—Across 28 items that might bring it down to a 75 per cent increase rather than an 80 per cent increase over the 12 months.

CHAIR—The longans have gone from \$4. 95 to \$14 97. That is unrealistic, isn't it? No-one would—

Mr Kelly—That was the price difference.

CHAIR—Yes, but that is due to seasonal variations. If you are a housewife doing your grocery shopping, you would not buy longans at that price.

Mr Kelly—The difference in the ABS numbers for fruit and vegetables for the 12-month period was about a five per cent increase. So some items would have had a seasonal increase. That is why I think it is very relevant that it is also in May—exactly 12 months apart. Hopefully, that would have eliminated many of the seasonal variations in product.

CHAIR—Many but not all.

Mr Kelly—There are 28 items and at least half of them have increased by 50 to 100 per cent.

CHAIR—It is clearly quite difficult with fresh produce, because there will be some variations within a year. The season vary and you get weather events in some areas which mean things are difficult. So you do

need to do a lot of levelling out. Anyway, I think you prove the point that there is an increase after the loss of competition, which is really what you would expect in any case. People do compete, don't they?

Mr Kelly—I think 80 per cent is an extraordinary increase after the—

CHAIR—Statistically that figure is a bit difficult, but there has certainly been a significant increase. Do you think Woolworths should go down to the lower price that they charge at Fairfield, or should it be somewhere between the Fairfield price and the Greystanes price? If Woolworths had to charge exactly the same price for that basket of fruit and veg, do you think they would go down to the absolutely lowest price?

Mr Kelly—They would have an option. Woolworths could have raised their prices in 2008, when the independent was there. The only thing stopping them was that independent business being there. If Woolworths decided to raise their prices at Fairfield, they would simply lose business to the independent competitors. They would have a choice. If they raised their prices at Fairfield because of this law, they would lose business—and that would stop them from doing it. The competition at Fairfield would act as de facto competition for the non-existent competition at Greystanes to bring those prices at Greystanes down.

CHAIR—Do you think it would go down to the Fairfield level, or do you think it would be somewhere in between?

Mr Kelly—An important thing to remember is that those prices exist at Fairfield because of the independent competitor. If Woolworths raise their prices, those lower prices from the independent will still stay there and be in the market.

CHAIR—If Woolworths raise their prices, do you think the independent would see that they could raise the prices a bit, too?

Mr Kelly—No, because I think the independent would say, 'Here's my chance to establish some market share.' Also, you have to look at the matching of prices. If the independent is selling at the same price as a Woolworths supermarket, although they say the prices are matched they are not really matched—because the supermarket has shopper docket discounts, fly buy points, loyalty points and so on. If I am a shopper and I want to spend \$10 at one store and \$10 at the independent store, with the \$10 at the supermarket I get actually benefits and rebates and shopper docket discounts. So it makes it impossible for that independent to compete.

CHAIR—So you are saying that, even if we had this law in place, the supermarket would still have an advantage?

Mr Kelly—They would have many advantages. Every firm in the market would have to compete to its true efficiencies. It would not be able to leverage profits from uncompetitive territory and use those profits to undercut and reduce prices where it faces competition. It would increase competition and it would level the playing field. With more competition we would see downward pressure on prices overall in the country.

CHAIR—You do not think we would see increased prices in some areas?

Mr Kelly—No. Overall, we would hopefully see downward pressure on our food inflation numbers and we would hopefully be able to bring Australia's food inflation back to equivalence with the rest of the developed world.

CHAIR—Of course, this bill does not deal with food only. It deals with a whole range of other things.

Senator XENOPHON—You have given us only one case study, but you say it is not atypical of what goes on in the sector.

Mr Kelly—This is just one example I happened to stumble across. There was another example at Moorebank and Liverpool, which was shown on *A Current Affair*. At Liverpool a little fruit barn had set up outside the Westfield shopping centre. At Moorebank there was only the Woolworths shopping centre. The two stores were five kilometres apart and there was a price difference of about 70 to 80 per cent in a basket of goods that was purchased by *A Current Affair*. So there is not just one example. I believe this is happening all throughout Australia in many suburbs.

Senator XENOPHON—You mentioned that, according to the OECD surveys, Australia has the fastest accelerating grocery prices. In your submission you referred to the UK competition commission. Treasury and other submitters have made the point that there has been a trend away from geographic price discrimination with changes to section 49 of the Trade Practices Act a couple of years ago after recommendations. The Canadian law on geographic price discrimination was knocked out earlier this year. So the opponents of this

piece of legislation say there has been a trend away from that. What is your understanding of what goes on in the UK and the US in terms of this? If we can go back a step, are your members typically small retailers?

Mr Kelly—Yes.

Senator XENOPHON—How many do you represent and advocate for?

Mr Kelly—We speak for about 50 to 100 members.

Senator XENOPHON—What sorts of businesses are they?

Mr Kelly—Fruit and vegetables, petrol, home wares, furniture, clothing—a wide variety of small retail shops.

Senator XENOPHON—Is it a common complaint that the prices within a chain vary significantly between areas?

Mr Kelly—It is not so much in clothing, footwear or home wares. Those markets seem to be reasonably competitive. Where it does come up is in groceries and also in petrol retailing. These seem to be the main areas of concern.

Senator XENOPHON—Is that because, as a general rule, clothing and home wares are a bigger purchase?

Mr Kelly—I think the difference is that those markets are not as concentrated. There is more independent competition. There is more variety, with even larger retailers competing in that market. So there is competition everywhere. Geographic price discrimination only happens in areas where there is a substantial lack of competition.

Senator XENOPHON—So what is your understanding of the situation internationally? There has been a trend away from that in some jurisdictions.

Mr Kelly—Yes. If we look at the history of geographic price discrimination, it goes back almost 100 years. In the USA, Standard Oil was notorious for using geographic price discrimination. They charged high prices in certain areas and used the excessive profits to charge low prices in other areas. I think it was in about 1914 that the US attempted to outlaw geographic price discrimination with the Clayton Act. I think it was in about 1936 that they strengthened their laws on geographic price discrimination with the Robinson-Patman Act. That was amended by section 3, which had a specific provision against geographic price discrimination. At the time, the Americans considered that geographic price discrimination was so insidious and detrimental to competition that they made it a criminal offence. That law remains the law of the land in the USA today. Many people have argued that it is not a good law and should be repealed, but all attempts to repeal that law have failed.

In Canada they have recently repealed their geographic price discrimination law. As to whether the Canadians are right or wrong, only time will tell. Canada had very low rates of food inflation up until 12 months ago, when they repealed that law. In Australia we have section 49 of the Trade Practices Act, which was very similar to the Robinson-Patman Act but does not go as far—you have to prove a substantial lessening of competition, and also there are no triple damages as there are under the Robinson-Patman Act. That basically made section 49 completely useless as far as price discrimination is concerned.

Senator XENOPHON—You have got the Australian National Retail Association representing Coles, Woolworths and the biggest retailers saying that in the current provisions in section 46 there are provisions against predatory pricing, and those provisions should be sufficient. What is your comment in relation to that?

Mr Kelly—I say section 46 is totally and completely useless against geographic price discrimination. The structure of section 46 is that you first must have a substantial degree of market power before you can be caught under that legislation. Unless you do, the law is ineffective. That is in complete contrast to the US legislation, where you can be found guilty of an offence against competition to either acquire or maintain a monopoly. Section 46 does not go to acquiring a monopoly, and that is what geographic price discrimination does. So the provisions of section 46 are significantly deficient. In fact, there is a quote I could give you which is very relevant from Justice McHugh of the High Court in the Boral case. Justice McHugh stated:

Conduct that is predatory in economic terms and anti-competitive may not be captured by section 46 simply because the predator does not have substantial market power when it sets out on its course to deter and injure competitors.

Section 46 is ill-drawn.

Senator XENOPHON—Okay. One of the arguments put by ANRA and others who oppose this legislation is that it will not give good investment signals for larger supermarkets. I think that is an approximate summary

of the argument. Do you say that with geographic price discrimination as it exists now amongst your members and your knowledge of it, that acts as a disincentive for smaller retailers to get involved in the marketplace?

Mr Kelly—Definitely. The use of geographic price discrimination actually distorts investment in this country. Where we see very high prices in a market, that should encourage investment, that should encourage small competitors to come into that market and to bring competitive pressure. That is how the investment signals should work. But when a small business knows that geographic price discrimination exists, he knows that the minute he goes into that market that large store can simply come in and undercut him in price or so-called match his price but in effect undercut him while keeping prices in their other locations high. It becomes a significant disincentive to investment. Also it sends the wrong investment signals. There could be one particular geographic location—there is a current dispute about Newport here in Sydney, where the Newport shopping centre is a small, vibrant, competitive shopping centre. A big supermarket wants to move in there. If that big supermarket knows that it can move in there and build a huge box and use geographic price discrimination simply to eliminate the existing competitors, that might be an investment that is not beneficial to the nation. Thirdly, it concentrates our retail markets.

There has been very little study done on the disincentives it has on investments in our productive facilities in our entire food producing sector. If you are a farmer or if you are setting up to produce food, the one law of investment is to try and diversify your risk, not to put too many eggs in one basket. But if you are supplying a highly concentrated retail market where two players can control 80 per cent of your market, that simply becomes a disincentive for investments. So there are three aspects all completely contrary to the arguments put forward about why allowing geographic price discrimination becomes a disincentive for investment in the economy.

Senator CAMERON—Mr Kelly, you raised the issue of the legal system in the US. I have not studied that aspect of the system but what I have had a look at over the years is the Wal-Mart phenomenon. That legal system does not seem to have stopped the Wal-Mart phenomenon where they drive smaller retailers out even under the US legislation. Can you advise me of why that is the case?

Mr Kelly—Even though legal costs here are prohibitively expensive, they are nothing compared to the cost in the USA. In the USA, the Federal Trade Commission has taken an ideological position regarding enforcement of many of the United States laws. They have basically closed their eyes and have not enforced those laws, especially many sections of their Clayton act. That has allowed Wal-Mart to use predatory pricing. There is a famous case—I think it was in Arkansas—where originally Wal-Mart was found guilty of predatory pricing in pharmaceuticals. It went through the US Supreme Court and was, I think overturned on a five-four decision. That has basically opened the floodgates for Wal-Mart.

Also, many people in the USA are convinced that the increasing size of Wal-Mart has brought low prices for consumer goods. It is the complete contrary. The low prices of consumer goods that are available in the market have nothing to do with Wal-Mart. It is because of China. China has done exactly the opposite. It is the low export prices and the efficiency of the Chinese manufacturing facilities that have been able to reduce prices on the market. Those efficiencies of China have come about because they diversified their markets. Regarding the furniture industry, which I deal in, there are over 50,000 furniture factories in China. Before, there was a handful of very large state controlled organisations. Now they are all small and medium-size business enterprises, and that is what has reduced prices. That is what many people in America have not been aware of. Secondly, if we look at the US's food inflation rate, if we take Australia out, it is one of the worst in the world. While Wal-Mart has been getting bigger and bigger and supposedly has lower prices, if you benchmark the US's performance in food inflation, it has done very poorly compared to many countries in the rest of the world.

Senator CAMERON—So you are saying it is all the fault of China? A communist conspiracy, is it?

Mr Kelly—No, not at all. You missed the point. It is about the low consumer prices. We have had previous inquiries—Senate inquiries and other inquiries; I think there was the Himmler inquiry and the Swanson inquiry, and recent inquiries over the last 15 years—and consumers often think, 'The market is competitive. We have all these big retailers and lower prices.' It is true—the retail price of clothing, footwear, homewares and furniture has reduced significantly over the last 15 to 20 years. The reason has not been that we have concentrated our retail sector. The reason is that the cost of those goods has reduced significantly due to manufacturing from China.

Senator CAMERON—If that were the fundamental position, then the independents would be able to pick up the same value of goods from China and be able to compete effectively, but that is not the case. Wal-Mart

even drives prices down in China. It drives prices down with all of the suppliers. It has a very sophisticated management operation to drive prices down.

Mr Kelly—Many studies have shown in the US that Wal-Mart prices are actually no lower than many of the independent competitors.

Senator CAMERON—I am not talking about the retail price; I am talking about the wholesale price. Wal-Mart drives the wholesale price down. Whether that is reflected back at the retail level is another issue.

Mr Kelly—With respect, Senator Cameron, I have travelled a lot through China and have been involved in purchasing a lot of goods through China, to send to the USA, the Middle East and Europe, and there is the competition in the market between the variety of vendors that you can purchase from rather than Wal-Mart actually driving down prices from China. Many suppliers in China prefer to not deal with Wal-Mart because of the special demands that they have.

Senator CAMERON—That is the point I am making. This is not an inquiry into Wal-Mart, but Wal-Mart certainly establishes the system around the world. Wal-Mart, Woolworths and Coles have looked at adopting a Wal-Mart type approach with their wholesale suppliers.

Mr Kelly—The reason that we have had lower consumer prices would have occurred with or without the existence of Wal-Mart. The reason that we enjoy record low prices today for many consumer goods, whether that is clothing, footwear, electronics or computers, has nothing to do with Wal-Mart; it has to do with the deconcentration of the markets in South-East Asia, particularly China, and their manufacturing capabilities.

Senator CAMERON—I have heard very convincing arguments opposite to that. I am not convinced with your position on that. I take you to some of the issues that have been put to the committee from other submissions. Treasury are arguing that geographic price flexibility is not illegitimate, that it can relate to supply side factors such as differentials and costs, the scope of the operations, between locations or demand side factors such as local demographics and the nature of local competition, location, surrounding, service and convenience. They are all factors that go into pricing goods and services. How do you deal with that argument?

Mr Kelly—That is why I think this legislation is very effective—because it defines markets by a 35 kilometre radius. Definitely someone would not expect to pay the same price for goods in Blacktown as they would in Broken Hill, because there are many different cost factors.

Senator CAMERON—But in Blacktown, if you are a retailer in the Westfield centre or a retailer out in one of the suburbs of Blacktown, it is a completely different situation, is it not?

Mr Kelly—As to where?

Senator CAMERON—As to rent, as to throughput.

Mr Kelly—Firstly, with rent, what sets the rents in the retail market are the sales that are achieved from the location. You have to consider whether you are thinking of rent as a price or as a percentage of total sales and if it is a percentage of total sales, that has an effect on price or costs. Certainly many areas in the city here or at Bondi will have higher rents but they have higher rents because they have greater turnover.

Senator CAMERON—I have lived in the western suburbs most of the last 20 years. There are some areas in the western suburbs where you would want to set up if you were a retailer because you have lots of advantages; there are other areas that do not have those advantages. So even within that 35 kilometre radius, there are differences in terms of the retail capacity of a shopfront. Is that not true?

Mr Kelly—I am still not with the premise of your question.

Senator CAMERON—If you are out in one of the smaller suburbs of Blacktown and you have a small independent retail operation, the rent is lower, throughput is lower, you may not have a car park, you may not have to put in for rent on a whole range of areas, but if you are an independent retailer in Westfield in Blacktown, you have costs, advantages and some disadvantages. It is a very complex situation. You just cannot say that within that 35 kilometres there is a level playing field because there is not.

Mr Kelly—That misses the point of the amendment. The amendment is for a particular store known by name. Where we have goods priced with multiple chain stores, they do not price in different areas because of different so-called cost structures. The main cost structure of an operation is the cost of the goods. The cost of the rent for a large supermarket is around 2.6 per cent of their turnover. For that supermarket to be viable, they have a very narrow band that they can work on and the differences are miniscule in cost. For different chain

stores there might be different prices for different goods, such as a Big W store might have a different price from a supermarket. Where Woolworths has a Thomas Duck's brand, that might have a different cost structure from a Woolworths supermarket and that is not affected by this amendment.

Also, too, I have found that, travelling throughout Sydney as often as I do, many times the prices in Bondi are cheaper than in the western Sydney suburbs simply because in those western Sydney suburbs new shopping centres have developed where the land users create restrictions, keeping competitors out of the market, and prices are higher there than what are being charged at Bondi.

Senator CAMERON—How do you start determining your 35-kilometre radius? How would it be determined and implemented, practically?

Mr Kelly—In my understanding of the legislation, you would look at yourself as a particular retailing group and you would have to define certain areas. If I were, say, a Woolworths supermarket, my 35-kilometre area would be several overlapping circles and it might take in from Hornsby to Penrith and down to Cronulla and Bondi. That would be one geographic market.

Senator CAMERON—I am asking: how would you do that?

Mr Kelly—How would I do that? I imagine I would take out a street map and measure 35 kilometres to work out what my market is.

Senator CAMERON—So you put a pin in and draw a radius?

Mr Kelly—I would imagine so, yes. That is how it would be established. I think that is a very good proxy for what regional markets actually are. All the supermarkets in Canberra, whether they are Woolworths or Coles, would come within the one geographic market. Once we moved outside Canberra, it would be another geographic market. We would look at, say, Sydney. The Sydney metropolitan area is one geographic market. Then we might move to Newcastle, and that might be another geographic market.

Senator CAMERON—Is this a bit of self-regulation, letting people figure out the 35-kilometre radius would work? Would the stores self-regulate and say, 'This is where it is,' or would government have to say, 'No, that's not right; you're fiddling the books again'? How would you do it?

Mr Kelly—I think it would be simple self-regulation, and it would basically be—

Senator CAMERON—Self-regulation?

Mr Kelly—Many stores that advertise 'low prices that you can count on every day' would simply be keeping faith to the consumer.

Senator CAMERON—You are talking to the wrong guy about self-regulation, I must tell you, and I am not convinced. If this relies on self-regulation then I think that is one of the biggest flaws.

Mr Kelly—It is a simple premise. If I am a consumer and I go out to buy a certain good, for example from a Bunnings hardware store, I do not expect to pay higher or lower prices than I would at any of the other Bunnings hardware stores in that one geographic market. The majority of retail businesses in the economy price their goods like that because they have to come up with the lowest price they can offer to their consumers every day in that specific geographic market. As far as regulation goes, the regulation or the enforcement of this is going to come from consumers, because if all of a sudden consumers say, 'Hang on a minute—I'm paying prices 50 or 100 per cent higher than I would be somewhere else,' that is what then becomes the enforcement.

Senator CAMERON—The area where the bulk of the submissions in opposition to this position seem to coalesce is the issue of compliance being unworkable. They all say that this is the problem.

Mr Kelly—I think it is the opposite. I think it would actually produce a lot of their compliance costs. If I am running a retail organisation with multiple stores, I do not have different prices for each different product with a couple of cents difference. That becomes unwieldy. It becomes cost ineffective. What becomes cost effective for me is to have my cost bases very similar. From store to store I would have miniscule differences that will change over time. It is much easier and much more cost effective for me just to have one straight price in that geographic market for that product.

Senator CAMERON—The other argument that is put forward in opposition to this is that it will actually increase prices and reduce discounting.

Mr Kelly—We have seen the effect on prices of not having this legislation. Supermarket prices and food prices in Australia have risen excessively and unexplainably higher than everywhere else in the developed world. This legislation is more likely to—in fact, it will—

CHAIR—We have had a drought in much of Australia.

Mr Kelly—That is often an argument that is used, but let us look at the facts of the drought and what is in food pricing. Firstly, we have had a drought, which has affected our production of wheat. Wheat is priced globally. Whether we have a drought or whether we have no production at all in Australia, the cost of wheat for the manufacturer would be the same in Australia as it is overseas.

CHAIR—No, it is not.

Mr Kelly—If we look at milk, what farmers receive at the farm gate for milk today is less than what they received 25 years ago.

Senator CAMERON—I do not want to get into those market areas. I am trying to understand how this would work at a micro level, and I am talking about this 35-kilometre area.

Mr Kelly—It would be very simple. If I am a retail group, I would work out the regions that I have within that 35-kilometre area. My region might be the Sydney metropolitan area. If I have a certain product, I would price that product the same throughout the region and give my customers in that area the lowest price that I could come up with.

Senator CAMERON—What is to stop that lowest price from being bumped up and set at an artificially higher level? How do you deal with that?

Mr Kelly—Unfortunately, that is what is happening now. Prices are being set at artificially high levels.

Senator CAMERON—I am not interested in what is happening now. I am interested in how you would stop that under the new legislation.

Mr Kelly—Competition. It would restore competition. Small businesses would know that they could enter the market and not have to be concerned about their prices going down. In fact, geographic price discrimination is used by many large retailers. It is used to discipline a small competitor. For example, you run a small shop in a supermarket and every day one of the representatives from the large supermarket comes into your store with his uniform on, records all your prices and goes back to his supermarket and matches those prices. You realise very quickly that it does not matter what price you put out, because the supermarket is going to match it. So, all of sudden, you give up competing on price. In fact, the best thing for you to do would be to go to the supermarket first, see what prices they have and, if any of your prices are lower than theirs, raise them. The supermarket is going to match your prices so you may as well match them at the higher price rather than at the lower price.

If this Blacktown amendment comes in, it will give that small businessman a chance. He will say: ‘I can go in and undercut that big supermarket price. I went to the markets early this morning and got a special buy on apples’—or whatever the goods were—‘and I can undercut them on price, win market share and drive prices down.’ That is what will happen in the market. It will free people up to give lower prices. It will increase competition. The big supermarket will then have to work out what it is going to do: ‘Am I going to leave my price higher and lose market share or am I going to lower them to match it? If I have to lower my prices, I have got to lower them everywhere.’ And that is what they are most likely to do.

Senator CAMERON—This comes back to one of the fundamental issues, and that is information asymmetry. Most people these days are pretty busy. They will go into a supermarket and try to get in as much of their shopping there as possible. They do not do a price survey prior to doing their shopping. They do not wander over to the local fruit shop and ask how much the mandarins are and then go into the supermarket and say, ‘Well, yes, this is the price of mandarins here,’ especially if the shops are at a distance. It is an information asymmetry problem. If you are in there, you are sort of captured. Woolworths get you, or Coles get you, don’t they, because you do not know the difference in prices?

Mr Kelly—You may shop that way, but, like many people, when I go shopping I will always try to look at what the differences are in the prices in the one shopping centre and try to buy at the best price.

Senator CAMERON—But sometimes it is not practical, is it?

Mr Kelly—All the more reason that such an amendment, the Blacktown amendment—a low price guarantee—would be effective.

Senator JOYCE—Do you believe that the current centralisation of the commercial marketplace is a healthy thing?

Mr Kelly—It is an absolute detriment to the country. It is a drag on the economy, it is increasing prices, it is discouraging investment and it is discouraging our entrepreneurial culture.

Senator JOYCE—People say that there is strong competition—Coles and Woolworths compete against each other—and that Australia is not big enough to have more competitors.

Mr Kelly—We have the most concentrated retail sector in the developed world, and it is not because we are a small market. We are now over 21 million people. I think we are about the 13th largest economy in the world. If we go back to the seventies, we had a much more ‘deconcentrated’ market. If we look at the numbers, we were more competitive and did not have the excessive price increases that we are now experiencing under a more concentrated market.

Senator JOYCE—How is telling a large organisation that they have to sell at the same price in the same area going to assist in stopping concentration?

Mr Kelly—Sorry, I missed the last part of the question.

Senator JOYCE—If Coles and Woolworths have to sell at the same price throughout the whole area, how is that going to assist competition?

Mr Kelly—Firstly in many non-competitive areas, as we see with Greystanes, where there are localised competitors such as at Fairfield, it will basically become a de facto, a proxy for competition in those areas. Woolworths and Coles will not be able to go into markets and basically leverage the profits from uncompetitive territory to wipe out these small businesses.

Senator JOYCE—Do you have evidence they are doing that now?

Mr Kelly—We have seen that with the submission I have made for Fairfield and Greystanes. We had an obviously very efficient small business operating in the Fairfield shopping centre which was undermined by geographic price discrimination and was eliminated from the market. The owners were probably driven to ruin and bankruptcy and as soon as they were wiped out we had price increases of 80 per cent.

Senator JOYCE—Do you believe that 35 kilometres is an appropriate distance? How do you come up with the market place being 35 kilometres.

Mr Kelly—It could be 31, it could be 32, but I think 35 works out as a very efficient proxy to establish regional markets in Australia. As I said, it would establish a regional market in Canberra, it would establish a regional market in metropolitan Sydney, it would establish a regional market in metropolitan Melbourne. I think it is a very good way to define the markets.

Senator JOYCE—As you know, I am on side because I launched the bill but what do you think of the main arguments put forward by the major retailers as to why we should not go forward with this?

Mr Kelly—It was a bit hard to hear you, Senator. I think your question was: what do I think are the main arguments in opposition to the bill?

Senator JOYCE—Yes, what do you think the major retailers are going to come forward with? Say they are going to tell us it is a terrible idea. What do you think the premise of their argument will be? We will see how predictable they are.

Mr Kelly—If it is going to put pressure on them and force them to lower prices all around, I think the fact that they are against it is the best evidence you have that this will bring competition to the market. If it is going to do the opposite, why are they arguing against it. If I am in the opposite camp, I am going to argue vigorously against this amendment if I think it is going to increase competition in the market.

Senator JOYCE—I believe their argument will be, ‘We don’t want regulation. Regulation is an inhibitor on how we act.’ Why do you think it is justified in this instance to have greater regulation on the larger players?

Mr Kelly—Firstly we have to look at the problem in this nation with our excessive food and supermarket prices and our excessive rates of food inflation. If Australia had been able to match other countries such as Canada, New Zealand and the United Kingdom in the rates of food inflation, that would make the average Australian consumer \$1,000 better off per year. So for an average family of four, because of the failure of competition, it is costing them \$4,000 in excessive food prices. That is one reason. The second reason is that we must protect our entrepreneurial culture. We cannot have a situation where a large enterprise sets up next

door to a small business and wipes them out by using geographic price discrimination by leveraging profits from uncompetitive territory to undercut the prices of that small business. If we continue in this way, we will end up with Coles at one end of town, Woolworths at the other end, a few token competitors from overseas and there will simply be no chance for an individual who wants to run their own business.

Senator JOYCE—Are the farmers getting a better price because inflation is going up in Australia?

Mr Kelly—One of the issues I studied very closely is our milk price, because milk has some of the least processing. We have the evidence and we have the historical records that we can go back to and make comparisons. Since 1990, the retail price of milk has increased by almost twice the rate of general inflation. In fact, since 1990, the price of milk has increased by 117 per cent. But, if we go to the farm gate price to see whether the farm gate price has had the same increase, you find that the farmer has not had a 117 per cent increase. He has not even had an increase at the same rate as inflation. In fact, the price that the farmer gets today is not even the same as it was 25 years ago. Looking at the numbers, the price he is getting now is less than it was almost a quarter of a century ago. That is what has happened to the farm gate price, yet the retail price has increased by 117 per cent. Clearly, we can see that there are major problems. There is a massively unexplained gap between farm gate prices and retail prices. This has come about because of the lack of competition and the concentration of our marketplace.

If you look at eggs, you will find the same situation. Over the last 20 years, the price of eggs at the farm gate has increased by about 10 or 15 per cent, yet the retail price has increased by well over 100 per cent. You can do the sums for commodity to commodity and see that there is a massive and complete disconnect between the farm gate prices and the prices items are selling for at retail shops.

Senator JOYCE—Is there a correlation between that and the greater centralisation in the marketplace?

Mr Kelly—There is in fact almost a direct correlation. If we go back to the period between the 1970s and the early 1980s, before the milk market became highly concentrated, we can see a strong correlation between the retail price, the farm gate price and the CPI. They were all moving fairly closely, lock-step, in the same direction. So the farmer was getting a fair deal, the consumer was getting a fair deal and the retailers were also getting a fair return.

If we fast forward to the last 15 to 20 years, when the market became concentrated, we see the graphs go in opposite directions. The farm gate price is going down and is much lower than the CPI, while the retail price is accelerating much faster than the CPI. So I would say that, yes, you are correct: there is a direct correlation between the increasing concentration of our market and the increasing gap between the farm gate price, the retail price and the increase in the consumer price index.

Senator JOYCE—How do the major retailers protect their position? They obviously had the talent to get themselves to this position where they are dominating the Australian marketplace in so many fields now, including in things such as insurance. How did they manage to get to this without anyone questioning it?

Mr Kelly—Firstly, they have pulled the wool over the eyes of previous inquiries like this one. They have turned out to previous inquiries like this and talked about vigorous competition and lowering prices. Unfortunately, at these previous inquiries their words were taken as gospel and no-one actually checked the figures. If someone at each of those inquiries had taken the time to compare performance, whether you go back to 2003, 2002, 2000 or 1998—all those previous retail inquiries—if they had simply benchmarked our performance against that of other OECD countries, they would have very quickly discovered that prices in Australia were not being held down and that, in fact, they were increasing faster than anywhere else in the developed world. So, Senator Joyce, as I said, the wool has been pulled over our eyes. Secondly, there is a mistaken theory that small business does not offer competitive prices. That is a complete and utter furphy. In fact, small businesses in many circumstances are much more competitive than large retailers and large businesses.

Senator JOYCE—Do you think that one of the advantages that the major retailers get is through their anchor tenancy arrangements?

Mr Kelly—Definitely. There is no question that someone who leases a larger space should get a better price than someone who leases a smaller space. That is a natural law of business. Whether I am renting space or whether I am buying goods and services, I should get a better price if I buy a bigger volume. But there comes a point at which that differential in price between large and small buyers becomes completely disconnected from the actual true economies.

If we look at our shopping centres, we find we have large anchor tenants paying 10 per cent of that which specialty retailers are paying. Certainly specialty retailers should pay a higher price because they are leasing a smaller area of space—five per cent, 10 per cent, 20 per cent, 30 per cent or maybe even 50 per cent. But we are seeing differentials of 500 per cent to 1,000 per cent. If I am paying 1,000 per cent more than my competitor for rent it does not matter how clever I am, at the end of the day I will not be able to make it up and compete. Also, that differential in rent only comes about because of our restrictive zoning laws, where we give a particular landlord owning a shopping centre a particular monopoly. If we had unrestricted retail spaces, or if we eliminated all our planning laws and allowed retailing to be a lot more diversified and allowed a competitor to set up outside the shopping centre immediately, those differentials in rent would not be occurring. They are completely unnatural and they greatly distort the retail market.

Senator JOYCE—So this is a step ahead in the trade practice law for the protection of small businesses. Would you see this as unique throughout the world, or would you see our trade practices law being principally weak and in need of strengthening?

Mr Kelly—Definitely our trade practices law is very weak. But it is not only the legislation; it is also the enforcement of it. There is a mistaken assumption that many laws overseas are to protect small business. The Trade Practices Act should not be about protecting anyone. The only thing it should be about protecting is equality of opportunity, where people can go into business and either fail or succeed on merit. That is what our Trade Practices Act fails to do.

If we look at areas of geographic price discrimination, predatory pricing and price discrimination, you will find that we have perhaps some of the weakest laws in the world. In countries that have strict enforcement of these laws there also seems to be a strong correlation with low consumer prices. One of the countries that has been most effective and that has the strongest laws is Germany. In Germany they have actually prosecuted Woolworths for predatory pricing, which they were not able to get away with under German law but which they would have been able to get away with in Australia, the USA and the UK. If we look at the rate of price increase in Germany, you will see that they are one of the most successful nations at keeping down food prices.

Senator XENOPHON—If I might interrupt, Mr Kelly, in fairness to Woolworths, it was ‘Wool-mart’ that was prosecuted in Germany, wasn’t it? Is that a different company?

Mr Kelly—I am sorry, it was Wal-Mart in Germany.

Senator XENOPHON—Yes, sorry, it was Wal-Mart in Germany.

Mr Kelly—I am sorry. Wal-Mart was prosecuted in Germany under German trade practices law for predatory pricing. Under Australian laws, they would have been able to get away with that. So Germany has much stronger competition laws and it has been much more effective than Australia at keeping prices down. In fact, if you look at the OECD figures, you will see that, since 1990, Germany’s food inflation rate has been running at about 35 per cent. Australia’s food inflation rate has been running at about 85 per cent. Clearly, Germany shows a strong correlation between strong competition laws and lower consumer prices.

Senator JOYCE—Thank you very much, Mr Kelly.

Senator CAMERON—I want to come back to the issue of the greengrocer in Fairfield.

Mr Kelly—Yes, certainly.

Senator CAMERON—In your submission on page 6 you say:

... exactly 12 months later, on the 9th May 2009, I returned Fairfield shopping centre. I discovered that the Greengrocer that was previously located in shop G1, had been driven from the market, and the shop was abandoned ...

Mr Kelly—Yes.

Senator CAMERON—Did you speak to the greengrocer?

Mr Kelly—No, because the shop was vacant. It was empty. As you can see from the pictures there.

Senator CAMERON—So you did not speak to the greengrocer. You do not know whether they have retired; you do not know whether there was a family break-up; and you do not know whether they just did not want to carry on. I am just trying to get to the point. This is a very powerful argument you are putting here, but it is based upon one greengrocer and you do not even know whether the greengrocer was driven out.

Mr Kelly—If you look at some of the other pictures, you will see that all his fixtures and fittings have been abandoned in the premises. When a retail shop goes into bankruptcy and is driven from the market, that is

commonly what you see. They basically abandon the fixtures and fittings on the premises. If they had been closing down, or just moving out or relocating, they would have taken those fixtures and fittings with them.

Senator CAMERON—But you cannot be sure of that, can you? Are you saying definitively that they were driven out because of predatory pricing?

Mr Kelly—Not predatory pricing; geographic price discrimination.

Senator CAMERON—So you are saying definitively that that is why they left?

Mr Kelly—On the balance of evidence, on the balance of probability, yes.

Senator CAMERON—But there is no evidence here, other than they have closed down.

CHAIR—I think we might be—

Senator XENOPHON—I have a follow-on question.

Senator CAMERON—Did you actually do a price check on that independent greengrocer when you did the price check on the two Woolworths stores?

Mr Kelly—I did not. I wish I had at the time, to provide further evidence.

Senator CAMERON—Why didn't you make a complete check?

Mr Kelly—I did not expect that these results would come about. I did not in my wildest expectations expect to find 130 per cent difference between prices.

Senator CAMERON—Could it have been that this greengrocer was actually charging more than Woolworths at Fairfield?

Mr Kelly—I would doubt it.

Senator CAMERON—Never mind doubt it; you do not know, do you?

Mr Kelly—No. I do not think so.

Senator XENOPHON—I want to follow on from Senator Cameron said—and it is obviously a relevant line of questioning. In your experience advocating and representing small businesses, if a business is viable and—as I think Senator Cameron said—there was a family break-up or they were tired or whatever, would you normally see in those cases that they would sell their business even at a discount so that they would get out of it with some goodwill and sell the stock or fittings and then someone else takes over?

Mr Kelly—Definitely. In the photos you see the layout, the abandonment of fixtures and signs saying '50 per cent off; everything must go'. These are all exactly what you would expect to see of a business that had been driven out of the market and had closed down.

Senator XENOPHON—But it is fair to say, is it not—and this is not a criticism—that, in hindsight, it would have been better to look at that greengrocer's prices as well?

Mr Kelly—Certainly. This is where we hoped the ACCC would become more involved. We are a very small organisation and we do not have the resources.

Senator XENOPHON—I am not criticising you, Mr Kelly.

Mr Kelly—This submission was sent to the ACCC's grocery inquiry. This is further evidence of how ineffective our Trade Practices Act is. This case study was sent—

CHAIR—I think we need to move on to the next witness now. Thank you very much for coming in this morning.

[12.27 pm]

LONG, Dr Brendan, Director of Policy and Strategy Development, Australian National Retailers Association

CHAIR—Welcome. Thank you for coming in this morning. Would you like to make an opening statement?

Dr Long—I would like to start by making an apology on behalf of Margy Osmond, who is the CEO of the organisation. She is caught up in unexpected media engagements, and I apologise that we were not able to indicate that she was not going to be able to attend today.

I thank the Senate committee for the opportunity to present the position of the Australian National Retailers Association. I take it that the committee is quite aware that the association, which was formed in 2006, represents the interests of many of the larger retailers in the nation who have sought the opportunity through the association to present to the committee their views in relation to a number of points in the bill. I would also like to make a general statement on the state of competition in retail in Australia. I would like to make a couple of quick comments about that level of competitiveness and have a brief discussion on the notion of predatory pricing, on geographical pricing—as so called—and about the potential regulatory burden the bill places on, particularly, the regulator.

CHAIR—Dr Long, that is a very long list. We have your submission and we do have some questions. So I would ask you to keep your opening statement fairly brief, please.

Dr Long—Yes, I will keep it very brief. I would simply state that the position of the Australian National Retailers Association would be that the Australian retail market as a whole and most sectors in the market are highly competitive. The analysis by which any economist—and I am an economist—would analyse the effectiveness or the efficiency of a market and the level of competitiveness in a market is not, as is often held, based upon the level of concentration within a market; namely, the number of operators within the market. That theory was very much overtaken in the sixties and seventies by the development of the contestability theory, which of course is the cornerstone of contemporary economic and microeconomic theory in relation to competitiveness. That theory indicates that it is not the presence of a certain number of operators in a market that would indicate the presence of monopoly power but rather whether the market as a whole is contestable, and that contestability is a function of the entering and exit costs that are present in the market. Therefore, if there are few entry costs, the threat of entry itself is a guarantee of competitiveness. This is not meant to be a speculative position; this is a mainstream economic theoretical position. At present I think the argument here is that there are various views on costs on entry to the market. We now see Costco entering the market, for example, and there is fair degree of capacity for new entrants to enter the market. As such, we would claim that the market is fairly contestable.

I will quickly go on to predatory pricing. I think the fundamental question here is that we do believe that predatory pricing and geographical pricing are very different things. Predatory pricing is a theoretical notion which tends to be the view that you can engage in a price war, force a competitor out of the market and then subsequently raise prices to extract monopoly rents from having controlled the space. Again, the argument goes back to: if the market is contestable, that would be difficult to achieve. I think the general reflection in the economic community is that such practices are quite rare and very difficult to identify in Australia.

There is a more sophisticated line of argument on predatory pricing. It is a new theory that says that you can actually engage in complex gaming behaviour to try to signal to potential competitors that your costs are different to what they might actually be. Again, that is very difficult to actually sustain and there is no direct evidence that it occurs in Australia. Therefore, we believe that section 46(1) of the Trade Practices Act is sufficient to deal with the threat of predatory pricing in this country. The central element of that is that it requires proof of anticompetitive intent. This bill, through the measures proposed, does not speak to the intention of the agents involved. I really think this is a critical element. Current trade practices law requires an anticompetitive intent, and that is interpreted as taking place in the words ‘taking advantage’ under section 46(1). This is not present the proposed amendment. The proposed amendment would work in such a way that it would effectively an effects-based test rather than a determination of a principle of anticompetitive intent. So it is actually quite a significant change that is proposed in the amendment.

It is the position of the Australian National Retailers Association that, if there were a view about a lack of price competition or problems in price competitiveness in different areas, the solution to that view would not be to fix a price, which is effectively what the proposed amendment does. It regulates, and in fact mandates,

and insists upon a price being fixed. We would claim therefore that the proposed amendment is actually highly anticompetitive in nature and would reduce the competitiveness of the Trade Practices Act. It would be a step backwards.

One of the key elements here would be that from the perspective of the organisations which I represent, there is tremendous supply side and demand side variation in pressures that would apply to different retailers in different regions. I would identify that this is a point made very strongly and actually quite well in the Treasury submission which you may be discussing later today. Treasury have indicated that there is significant scope for supply and demand pressures to be different within different localities, within even a small region of 35 kilometres, and, therefore, the price, the underlying cost pressures and the demand pressures in those different sites will affect the price. Demand for products in the North Shore is going to be different from demand for products in lower income areas of this city. And the supply side, the land costs for example, could be vastly different in different parts of a small region. To that extent, a degree of price difference in a region would simply reflect the rational allocation of the market according to demand and supply side pressures. To take away from that would effectively require one part of the region to cross-subsidise another part of the region, and to end up in a complex web of cross-subsidisation within the proposed 35-kilometre distance, and that would effectively distort price signals.

My next point is that to do this, to achieve this objective, major retailers would be required to invest in a new IT system. The proposed amendment does not specify under what time period the minimum uniform price would have to occur. It appears from the wording of the proposed amendment that you would have to keep this guaranteed minimum price available all of the time. So it could not be measured over a week or a fortnight; it would effectively have to be a real-time price. The retailers simply do not have the IT systems in place to be to do this at the moment, and that would require a significant investment.

Moreover, there is an issue about the capacity to engage in stock management. While the amendment does propose to be able to dispose of stocks which are immediately or imminently perishable, the management of the efficient allocation of goods in a highly competitive market requires clearing those shelves quite rigorously and adopting a very rigorous form of stock control management. This amendment would get in the way of that. It would make stock control management almost impossible, as we have alluded to in the submission. We would not be able to discount prices through normal competitive mechanisms just to clear the stock, so we would end up having to carry a lot of stock that we do not need to carry. Again, we would not be able to use the price mechanism to be able to properly respond to demand and supply pressures.

The last issue is that the regulatory burden placed on the ACCC, as it would be the regulator of this proposed provision, would be pretty high. It would be required to monitor these prices on a permanent and real-time basis, and we would therefore be required to provide them with information to do that. Were I the chairman of the ACCC, I would find this a pretty onerous burden. It would be very challenging for the ACCC to be able to meet the requirements of the provision. That would therefore undermine confidence in the price monitoring system that the ACCC generally operates under. I am happy to end my comments there.

CHAIR—Thank you. Let us continue with this practical aspect of it. You mentioned that it appears from the amendment, by your reading, that it would have to be real-time price monitoring. My understanding is that any chain with more than five outlets nationally would be covered by this proposed amendment. Is that your understanding?

Dr Long—That is my understanding, as long as they were associated entities.

CHAIR—What about franchises, like an independent grocery chain that operates an Adelaide IGA that has some stores within the corporation and some operated by independent operators. Do you have any view on whether they would be covered?

Dr Long—The issue is raised well in the Law Council's submission. They indicated that there seems to be no well-settled test in law of the definition of what is considered to be a—and you will forgive me senators if I quickly flick to the actual wording put in the submission. If I may, this is a quote from page 5 of the Law Council submission:

There is no settled legal or commercial meaning for any of the expressions 'genuine factory warehouse or clearance outlet' or 'wholesale outlet'.

Those definitions are important in relation to the practical aspects of the bill. I suppose the short answer is there is not complete certainty as to who would or who would not be covered by the proposed amendment.

CHAIR—We have been talking about Sydney up to now because we had the South Sydney Retailers Association appear earlier. But Adelaide, for example, is a long narrow city, and I used to live at the northern end of it. It was almost precisely 35 kilometres out from the city, so the entire northern suburbs would be affected by this rule. Someone with a chain store that had five stores nationally would have to have the same pricing if they had a shop in inner-city Adelaide and out at Elizabeth, which is probably about 30 kilometres out of Adelaide. And they would have to have a system that in real time would have exactly the same pricing at each of those stores, otherwise they would be in contravention of this proposed amendment.

Dr Long—The lower price anyway. If a price was at one store, it would have to be matched by the other store.

CHAIR—So that could be a bookstore, a dress shop, a fruit and vegetable shop or a petrol station?

Dr Long—Yes, that is right. In terms of meeting the five outlet test, that is right. Obviously you would have to have two outlets that were broadly the same for you to be able to have a price comparison between them. And if I might just respond to you on the precise example that you mentioned, the underlying demand and supply pressures that could face the retailer in those two locations could be quite diverse.

CHAIR—Indeed. I am also thinking in terms of a fruit and vegetable shop. Where I lived at Munno Para there was a very large IGA supermarket that had a very large fruit and vegetable section that prided itself on buying some local produce—we were near a market garden area. The pricing of that would have to be the same as an IGA store near where I now live in the inner eastern suburbs of Adelaide, I presume.

Dr Long—That is right, at the minimum price. It would have to be matched between both stores under the proposed amendment.

CHAIR—Okay. Those practical aspects of it make it quite difficult for one thing, but let us go to the rationale behind it—that is, that it would reduce competition. The competition is reduced and this would increase competition by allowing independent operators to come in, and this is talking about independent operators that would only have one store or maybe two or three nationally. So if they were aware of the prices being fixed in other chains, the theory is that they would come in under—well under, presumably—to put downward pricing pressure on. Is that necessarily so across all of these diverse sectors that we are talking about?

Dr Long—When you say ‘they’, do you mean the major retailers?

CHAIR—Yes, I presume so.

Dr Long—I would simply say that there seems to be quite a degree of movement in retail, and there seems to be quite a number of small producers, small businessmen who do manage to set up new going concerns. It is a fairly dynamic environment, and we even had new major chains entering. When this occurs, there seems no evidence that major operators would then be seeking to engage in some pricing process to be able to stop that entry. To the contrary, the fact that there is considerable entry into the market with limited entry costs seems to indicate against that point.

Furthermore, if there were such concern, the Trade Practices Act under section 46(1) provides a mechanism for the ACCC to prosecute any retailer, for example, who seeks to take advantage of that in such a way as to lessen competition. I suppose the position of the Australian National Retailers Association would be that the protections against that measure already exist and the evidence that such actions are taking place is simply not present.

CHAIR—Yet anecdotally—and I think it is evident to most people—that, if a new competitor moves in, stores around do reduce their prices to match them in an attempt to ensure that their customers do not go to that store. How do you respond to that?

Dr Long—There is obviously freedom for all retailers—be they large or small, part of a major chain or a dynamic small business—to engage in legitimate price competition. That is what a market is about. The purpose of that price competition is to gain market share, so that is competitive pricing. If a new operator enters the market, it might be the case that other operators will want to make sure that they are not at a price disadvantage. Yet again that is a very different thing from engaging in a deliberate attempt to drive a new operator out of the market and to then extract additional profits from that process. It would be my position and the position of the Australian National Retailers Association that, were this amendment to be successful, the protections that exist to stop predatory pricing while at the same time not stop normal price competition would be undermined.

CHAIR—How do you respond to the view of Mr Kelly from the Southern Sydney Retailers Association that the geographic price discrimination he describes is responsible in large part for driving up prices in Australia as compared to other OECD countries?

Dr Long—I might say that whether those international comparisons are current and cogent should be thoroughly examined. I might add that grocery prices in Australia are forecast by Access Economics to decline below trend in the next few years. But still the position of the Australian National Retailers Association would be that geographical differences in prices simply reflect underlying market conditions in different regions. This is normal market practice. With respect to the former witness, I would simply say that it is a mistake to confuse normal market differentials with a deliberate attempt to engage in an anticompetitive practice. The challenge for a regulator is to separate those two elements, which is what the Trade Practices Act does and what the proposed amendment does not do.

CHAIR—How would you account for those marked differences in prices that Mr Kelly noted for two stores that were I think five kilometres apart?

Dr Long—It is an issue for consumers at times. I come from Canberra, and I can find that one Coles store will discount at a certain level and another Coles store not far away will not. The prices within the same chain can be quite different. Having asked our own customers why this practice occurs, the response that has been given to me by the national retailers is simply that discretion is given generally to the store manager to engage in whatever discounting he feels appropriate to be able to maintain his stock levels. He has a certain degree of freedom in eliminating certain stock. Head office does not prescribe those costs and in fact probably does not find out about those costs until they have been reported through the normal business communication channels. There is this dynamic flexibility at store level which is simply a managerial function.

CHAIR—So you are saying that, if this amendment were brought in, that flexibility at store level would go because Coles, Woolworths, Aldi or whoever would have to set it centrally?

Dr Long—It would have to try to set it centrally. We are indicating that we would struggle to comply with the amendment as written without significant further investment in information technology. But, more to the point, it would fundamentally change the practice by which our managers have been trained to manage their stocks. They would not be able to engage in normal price discounting. As someone with a family of five children, I certainly watch out for that very closely and I know many low-income families in particular in Australia rely upon that at times to make ends meet. The amendment would simply make that practice impossible.

Senator XENOPHON—Dr Long, you have talked about contestability—

Dr Long—Yes.

Senator XENOPHON—and about entry costs. But Costco is in a very different position from a small family business wanting to break into a marketplace. You would concede that?

Dr Long—Absolutely.

Senator XENOPHON—In relation to ease of exit, only a week ago Dr Emerson, the Minister for Small Business and Tourism, announced that there would be changes in relation to restricted covenants. I think there was an acknowledgment about land banks and an acknowledgment as to the power of the big supermarket chains in their ability to tie up the marketplace. That in itself indicates that there are difficulties with the ease of entry into a marketplace, doesn't it?

Dr Long—The Australian National Retailers Association has not made any direct comment in relation to restrictive covenants on leases. Some of our members have been in negotiations or have had discussions with the ACCC and enforceable undertakings have been made by some of our members. Questions about those are really matters for the companies involved.

Senator XENOPHON—I note that Associate Professor Zumbo said that the government did not go far enough. But doesn't the fact that the government went down that path contradict your position, the position of your association, on contestability and the ease of entry into the marketplace?

Dr Long—The enforceable undertakings that some of our customers are engaged in are commercial decisions for them and I cannot speak about them per se. But to speak generally: the removal of those processes has been argued by the minister to be a procompetitive measure and we do not disagree with that view.

Senator XENOPHON—Therefore, what you have said about the ease of entry means that entry will become easier as a result of the changes proposed by Dr Emerson recently.

Dr Long—The position of the Australian National Retailers Association is that the market has substantial ease of entry and low entry costs. From time to time issues come up that might need to be finetuned, but on the whole the market is fairly competitive with low entry costs.

Senator XENOPHON—It is not so much finetuning as an engine overhaul, isn't it?

Dr Long—It is not a position that the Australian National Retailers Association has gone into.

Senator XENOPHON—We will agree to disagree on that.

Dr Long—I make no comment on behalf of the Australian National Retailers Association in relation to those points you made.

Senator XENOPHON—On notice: when will the Australian National Retailers Association have a position on what Dr Emerson announced last week? Secondly, will that position in any way impact on your evidence this morning about the ease of entry into the marketplace?

Dr Long—It will not impact on the statement that there are low costs to enter the market. I simply am hesitating to speak on behalf of two of our major customers, who have had separate negotiations with the ACCC with which ANRA has not been involved.

Senator XENOPHON—I am conscious of the time and I want to get to quite a few things. You have said predatory pricing is a theoretical notion. Are you familiar with the High Court's decision in the Boral case in relation to section 46?

Dr Long—Yes.

Senator XENOPHON—Are you or is your association comfortable with the High Court's decision in relation to section 46, given the circumstances of that particular case?

Dr Long—The High Court decision in that case was fundamental in determining the way the Trade Practices Act is interpreted, but—

Senator XENOPHON—I know all that. But do you think that the factual circumstances of that case indicate that section 46 is working as it should be, given the particular facts of that case in the way that a competitor was squeezed out of the market place?

Dr Long—I do not think the Australian National Retailers Association would like to present a position in relation to that particular High Court case. Our position—

Senator XENOPHON—It is the case, though.

Dr Long—Our position would be that section 46 operates reasonably well.

Senator XENOPHON—Hang on. If you say that section 46 operates reasonably well and the decision that has interpreted section 46 happens to be the High Court decision in the Boral case, therefore you are happy about the factual circumstances in the Boral case with respect to what happened to that paving company—that brick kiln—in Melbourne?

Dr Long—Absolutely not. As I said, I make no comment in relation to the specifics of the case. I just say that the general position is that section 46 of the act is reasonably functional.

Senator XENOPHON—But the functionality of section 46 has been determined by a High Court decision, where a small brick operator got pushed out of the marketplace. You are familiar with the facts of that case?

Dr Long—Yes.

Senator XENOPHON—Aren't you contradicting yourself by virtue of saying that you are happy with section 46 but you will not comment about the circumstances of the case in which a small company was pushed out of the market?

Dr Long—No. With great respect, I simply go back to my comment that we make no comment in the application of those facts to the operation of section 46. It would not be relevant for the Australian National Retailers Association to have a view as to whether the facts of that case were applicable generally in the sector. It is not an issue on which we have a position.

Senator XENOPHON—You do not see a contradiction there?

Dr Long—There cannot be a contradiction when I simply say that we make no comment on the applicability of the facts of that particular case to other wider cases. It is a court decision taken in relation to the facts of the case.

Senator XENOPHON—Perhaps it is circuitous of both of us but do you concede that the applicability of section 46 has been determined by the High Court decision in the Boral case?

Dr Long—It is the major case.

Senator XENOPHON—All right. Let us leave it at that. You talk about the difficulties for a major retailer to adopt uniform pricing. ALDI is not a member of your association. Is that correct?

Dr Long—That is correct.

Senator XENOPHON—They have a national pricing policy moving towards that. Is that your understanding—that ALDI is adopting a national pricing policy amongst its stores?

Dr Long—I cannot comment for ALDI.

Senator XENOPHON—If I were to put to you that ALDI is going down that path and has adopted a national pricing policy, does that indicate that it is not unreasonable or impossible for other retailers? Obviously it works for ALDI, given that that is their position. You have raised a whole range of problems for adopting a national, uniform pricing policy. Doesn't ALDI's commercial decision seem to indicate that you can go down that path? Clearly ALDI it is doing it in their own commercial self-interest.

Dr Long—It seems we are crossing into an issue of grocery pricing. I am happy to simply say that the Australian National Retailers Association is committed to a competitive, contestable, transparent pricing structure for grocery prices in Australia and it is committed to providing consumers with the most up-to-date and informed information that we can. There are significant technical and IT challenges in providing real-time prices—as in, what is the price at our stores in different locations at any one particular point in time. It is a less challenging exercise to be able to provide historical data, but it is still time-consuming. The issue is that there are technical challenges because the IT and managerial infrastructure to achieve that objective is not present.

Just save **Senator XENOPHON**—Just in terms of some of the technical objections that I think were raised by Senator Hurley in relation to this, if I were to put to you, firstly, that under the definitions in this particular bill a franchisee would not be affected, would that ameliorate your concerns—and also an independent chain, such as Senator Hurley mentioned in relation to the IGAs, if they are different owners? They might be under the same banner, but they are separate ownership structures and they were not affected if they did not have more than five stores. Would that ameliorate some of your concerns in relation to this bill?

Dr Long—Our concern with the bill relates to the fact that it is, in essence, an anticompetitive measure and reduces the competitiveness of the marketplace by insisting upon the application of uniform prices in a certain region, which distorts underlying pricing signals from the normal demand and supply constraints of a competitive market. So whether or not franchisees are in or out is not going to necessarily take away from the fact that the imposition of a uniform price is a specifically anticompetitive measure.

Senator XENOPHON—Honing in on that specific concern that your association has in relation to this, the July 2008 ACCC report on the competitiveness of retail prices for standard groceries contains an empirical analysis of Woolworths and Coles local store pricing. The aim of that study was to analyse the effects of local competition in grocery retailing. You are familiar with that study, no doubt.

Dr Long—Reasonably. I am new to the position, as some of you may know, but I am familiar with that aspect to a certain extent.

Senator XENOPHON—The ACCC report had a number of critics who said that it was not critical enough of Coles and Woolworths, but the report did find that the local presence of a competing supermarket, Coles or Woolworths, has a significant effect on Coles and Woolworths local pricing.

... in 2007 consumers shopping at a Coles stores with a Woolworths supermarket within 1 km, paid prices that were on average 1.36 per cent lower than the prices paid by consumers at Coles stores without a Woolworths within 5 km ...

Further it found that the local presence of an ALDI store lowered the prices consumers paid at the nearby Coles or Woolworths store:

... during 2007 consumers shopping at a Coles store with an ALDI within 1 km, paid prices for Coles' 'ALDI price check items' that were on average around 5.15 per cent lower ...

Doesn't the ACCC's own research contradict what the association is putting about the anticompetitiveness of this particular bill?

Dr Long—To the contrary, the fact is that as supermarkets cluster around certain locations it can produce some fairly strong price competition. Different stores operating within the market have different pricing structures and offer slightly different products targeted at different sections of the market. So there would be a little bit of variation expected between the stores. Of course, ALDI is not a member of ours and I do not speak for them, but they tend to produce their own packaged products, which are in some senses a little bit different because of that fact. So there are questions always to be asked about whether we are comparing like with like. That notwithstanding, the fact that you would get this fierce price competition—the quote I take you as referring to—within a cluster of supermarkets around a specific location might not be present in another operation where there might just be one operator, for example, in a different region. That phenomenon is a sign of a competitive marketplace. Obviously, operators will cluster around an area which they think is a place where they can attract consumers to purchase: convenient locations near highways, work localities and so forth. It is not surprising that the competition would be fierce around those premium spots. That is a demand-side pressure specific to a location that would not be necessarily present in another location. The fact that there are those variations simply indicates the underlying price and the market is different in different spots.

Senator XENOPHON—Sure. I am conscious of time and other senators have questions. You have referred to Mr Kelly and his evidence talking about the OECD in terms of grocery inflation. I think Senator Hurley mentioned other factors such as drought.

Dr Long—Yes.

Senator XENOPHON—You have said that you need to analyse whether it is cogent to look at the OECD figures—that you need to have that analysis. I am not misquoting you, am I?

Dr Long—I think I also said the word 'current'. I am really trying to look at whether we have the latest figures.

Senator XENOPHON—In terms of being current and cogent, but obviously the OECD could be useful in terms of trend lines.

Dr Long—Absolutely.

Senator XENOPHON—Has any analysis been done or will any analysis be done by your association, representing the major food retailers in this country, in the form of a critique, an analysis, a robust look at what the OECD has said?

Dr Long—We are very happy to look at that. While some work is sometimes done on the topic, currently, there is no specific project underway within the organisation, but we are very happy to liaise with you about that.

Senator XENOPHON—It is pretty fundamental, though, because we have the evidence from the OECD, which indicates that the inflation in the price of food in Australia is the highest in the OECD. Surely, if that is an area of concern for you, would you not want to be tearing that evidence apart, given whom you represent?

Dr Long—Certainly, we would like lower prices for consumers. Generally, that tends to be the best way for the organisation to maintain its competitive position.

Senator XENOPHON—So you will be undertaking some—

Dr Long—I am saying we are obviously committed to lower prices for consumers. I cannot speak to the OECD report without having it in front of me. However, I simply would like the opportunity to look at the time periods under which the report provides its analysis and the benchmarks under which they are assessed before I could make an intelligent comment.

Senator XENOPHON—Finally, in your submission you have had a go at the amendment in terms of 'if submarginal cost pricing occurs, it is not fair if goods are perishable'. You acknowledge that this bill does not apply to goods that are perishable?

Dr Long—I note that the bill has a 'carve out' clause for goods imminently perishable. I am indicating to the committee that, on a practical basis, we have concerns whether that would deal with our capacity to clear stock in a way that the proposed amendment envisages. We are not confident that that 'carve out' clause would protect the organisation from a potential breach of the Trade Practices Act, because compliance with this

measure would place an extraordinary demand upon our managers at store level. We would effectively have to go through a whole retraining exercise, as well as set up a new IT system.

Senator XENOPHON—If ‘perishability’ was clearer—if we are looking at different categories, for example, a tin of baked beans, with a shelf life of 12 months, and some fruit and veg on the counter you would acknowledge that that would make issues of compliance for your members much less problematic.

Dr Long—I think the proposed amendment makes it impossible to manage stock generally. It is difficult to see how an amendment could be drafted that would adequately deal with those requirements at stock level. If an amendment was before us we could speak to it but, in the absence of such an amendment, it is difficult to see how one could be drafted, with the best will in the world, in such a way that the Australian National Retailers Association members would be able to fully comply with it.

Senator CAMERON—You indicated in your evidence that the market for your industry was fairly contestable. Do you stand by that statement?

Dr Long—Absolutely.

Senator CAMERON—Given that you have used the contestability theory as a justification for not adopting this approach, doesn’t the contestability theory require a perfectly contestable market?

Dr Long—No. The contestability theory is a complex theory but—

Senator CAMERON—I actually have it in front of me. The authors are Baumol, Panzar and Willig, and they say it has to be a perfectly contestable market.

Dr Long—No—

Senator CAMERON—So the authors are wrong, are they?

Dr Long—I would love to have a discussion with you about Panzar, Baumol and Willig. I have read the book a couple of times. If you go through it you will see there are a large number of three-dimensional graphs which are challenging, even for trained economists to follow. These guys are the path breakers—

Senator CAMERON—Do not feel pity for me.

Dr Long—These are the path breakers in the field. They have changed economic thinking in such a way as to say, ‘Let’s look, when we analyse a market, at the costs of entry and exit.’ It is not a fundamentalist’s model. It does not say it is either perfectly contestable or not perfectly contestable. Contestability is a range concept, even within their thought, and we could have a debate about the interpretation of certain parts of their book, if you want to, Senator.

Senator CAMERON—I am not here to debate it; I am here to ask you questions about it. As I read the theory that you claim is the basis of not accepting these amendments, the potential entrance under this theory should face no barrier to entry or exit costs. Incumbent firms would not then be able to respond quickly enough with a reduction in price to close off short-term profit opportunities for the new entrants. That does not seem to me to be what is happening in your industry.

Dr Long—Perfect contestability would be an ideal. The Trade Practices Act would be the most wonderful piece of trade practices legislation in the world if it could achieve perfect contestability across all sectors of the Australian economy. I think the position I stated is that there is a high degree of contestability. It is fairly contestable in the Australian retail market as shown by the relatively low levels of entry and exit costs. So in terms of the general tenets of economic theory, as they are applied to the competitiveness of the grocery or retail sector as a whole, you would have to say that the market is fairly contestable.

Senator CAMERON—Fairly contestable, but that does not meet the definition of these scholarly theories. In terms of some of the analyses of this contestability theory—because I think it comes back to whether contestability theory operates, as Baumol, Panzar and Willig have indicated, but there is also plenty of critique out there. It is not widely accepted that that theory is fundamentally unchallengeable. You have Shepherd in 1984, Schwartz in 1986 and, recently, Bratland in the *Quarterly Journal of Austrian Economics* wrote about the paradoxes and contradictions in this theory. I think what they finally came up with is that the theory of contestable markets does not apply to real markets since it is too significantly detached from reality to have any validity and regulatory policy. These are other scholarly academics and economists who have a completely different point of view. To be honest, their point of view would fit more with my layperson’s analysis of the problems of independent people operating in the market.

Dr Long—To respond to your comment, in any academic sphere there will be different views. Certainly, it has been my experience in the past, both as an employee in Commonwealth government agencies, that the contestability theory was considered to be a useful basis of government to be able to assess the underlying efficiencies of a market. Contestability is the best way to establish whether there are regulatory or natural impediments in the market, but there are other forms of analysis which can also supplement that analysis. Certainly, I would stand by my position that contestability theory is the best way to assess the underlying competitiveness of a market.

Senator CAMERON—Others have different points of view. Maybe we can move on. Why do you think that these amendments are being proposed? If the market is working so well, why does it continue to be a political issue? Why does lack of competition continue to be an issue in the media and why is there a view, I think, amongst the public that these big players do not really play fair?

Dr Long—Our internal research would not necessarily support those conclusions about perceptions. The Australian National Retailers Association is committed to the interests of consumers, who are our customers, and providing a high-quality, cheap product in an efficient market. We see ourselves as very responsible corporate citizens. I simply cannot speculate on why some might have other views. But that is not the perception that we are responding to.

Senator CAMERON—My perception is that there is a problem—and whether the Blacktown amendment fixes the problem is another matter. I have been alone in my thinking on some things, but not on this. I think there is a view around the place that there is a problem. Irrespective of whether the Blacktown Amendment fixes the problem, it is an issue. The scholarly theoretical arguments do not put my mind to rest. The evidence we have got is that people have had to close up because someone is forcing them into submission, and there seems to be a bit of that around.

Dr Long—Yes, but it has got to be proven. If evidence can be presented that shows that there are deliberate and intentional acts then that is a matter for the ACCC because provisions do exist to stop it. We cannot simply say that people are driving others out of the market without providing evidence.

Senator CAMERON—Whether that is the reality not, that is the perception. If that perception was not there then you would not get a Blacktown amendment coming before the parliament.

Dr Long—No matter what the public perception is, any proposed change to the regulatory arrangements needs to be well grounded in terms of economic theory and regulatory practice and the practical constraints the industry faces. If there is a concern that needs to be dealt with then all of those steps need to be gone through.

Senator CAMERON—Where does the consumer fit into that analysis?

Dr Long—As the ultimate beneficiary of the most competitive marketplace.

Senator JOYCE—Can you explain why there is a growing gulf between farm-gate prices and shelf prices?

Dr Long—The contestability theory is like an a priori analysis that looks at the underlying structures of a market and sees the threat of entry and exit. It is an analysis that looks at how many sunk costs you have to invest to get into the sector in the first place. It looks at that market in the aggregate. An a posteriori analysis, a historical analysis of price variations, is not the method contemplated by the theory.

Senator JOYCE—It is interesting to know the difference between a priori and a posteriori, but why aren't farmers getting a fairer deal? Are the supermarkets just collecting the margin?

Dr Long—Are you asking about the farm-gate prices in comparison to what the retailers are receiving?

Senator JOYCE—That is correct.

Dr Long—Retail margins are determined on the basis of underlying market conditions that take place in a reasonably efficient and competitive retailing market. I speak for the retailers. I am not going to make any comments about wholesaling, distribution, transport costs and so forth because they are not issues within my purview.

Senator JOYCE—You say section 46 is a worthwhile operation of the Trade Practices Act. Can you guide me to the last time there was a successful section 46 case?

Dr Long—That is an excellent question. I am not taking a position in relation to whether the abuse of market provisions will ever be reformed or whether there is scope to reform. I simply say that section 46 is a reasonably functional section of the act.

Senator JOYCE—I went to a law conference the other day. They were great people but, for the life of me, I could not find anybody who had successfully prosecuted a person for predatory pricing. They might have defended a range of cases and made a lot of money out of that, but there was not one successful prosecution.

Dr Long—In terms of predatory pricing, that is certainly the case.

Senator JOYCE—Surely that means the act is not substantial enough in areas.

Dr Long—Alternatively the argument could be made that the section is sufficiently functional to discourage the breach of it.

Senator JOYCE—Are you saying that, because no-one has been charged, it does not exist?

Dr Long—No, it is a functional section. Obviously the idea of a section is to discourage people from breaking it.

Senator JOYCE—How would you define ‘substantial market power’ under section 46(1) as described in your submission?

Dr Long—Let us be clear. What we are talking about is section 46(1), not the subsequent amendments that were recently made to it that brought in the definition.

Senator JOYCE—Not section 46(1AA), but section 46(1)

Dr Long—Okay, I just wanted to clarify that. The degree of power in a market is not a test that the courts in Australia have interpreted in a prescriptive way. It is not appropriate for me to speak on the way the High Court interprets the words ‘substantial degree of power’ in section 46(1), but it is certainly contemplated that there would be the capacity to unconsciously engage in an action that would explicitly hurt another operator—and it requires a degree of market power for that to even be an option. It is that intent and the capacity to deliver on that intent which has to be a factor in any consideration of any potential breach of section 46(1).

Senator JOYCE—I put it to you that it is such an impossible threshold that no-one can actually prove it and therefore it has been unable to be the guide for any case that has actually ended up in a prosecution.

Dr Long—That is certainly a view that people hold.

Senator JOYCE—That being the case, can’t you understand the sentiment behind the Blacktown amendment? People are saying they are getting done over because the market is getting more and more centralised. Stables that were once only in groceries are now going into insurance, and they are in alcohol, cigarettes and everywhere. The market has to have the invigoration of wider participation rather than just two gigantic stables.

Dr Long—I can identify with some people who sympathise with hard-working small business men who try to make a contribution through their work. However, our position is in relation to the amendment, not the sentiment. Our position is that the amendment that has been drafted is anti-competitive in nature.

Senator JOYCE—Do you think there will ever be a time when an excessive retail share is held by a retail stable?

Dr Long—Any market anywhere is perfectly capable of imperfect competition. My position is that that is not the situation in the Australian retail market at the moment.

Senator JOYCE—Can you describe to me in your own words what excessive market share looks like?

Dr Long—My position is that, in assessing the competitiveness of a market, one should analyse whether the market is contestable by looking at the presence of entry and exit costs and sunk costs. It is not a question of market share; it is a question of the regulatory or other natural impediments to the market that would ban the threat of entry. In one sense, the relevant factor for policy consideration is not the actual market share but whether the market is contestable.

Senator JOYCE—Do you think people have easy entry into and exit from shopping malls as anchor tenants?

Dr Long—There seems to be a fair bit of turnover of players in the market in retail environments, even in shopping malls. With regard to anchor tenants, that is a matter for those who might consider themselves to be anchor tenants to respond to.

Senator JOYCE—They pay the cheapest rent, which no-one else can get even vaguely close to. So they are basically being subsidised by all the other poor buggers in the same shopping mall.

Dr Long—I cannot respond to that without some evidence that it is a fact.

Senator JOYCE—If you are paying only 10 per cent of the rent everyone else is paying, that is a pretty good position to be in, isn't it?

Dr Long—Hypothetically speaking, yes.

Senator JOYCE—That would mean it is unlikely that there is easy entry and easy exit. There is an established position which is subsidised by the other players in the vicinity. Apart from them getting the benefit of being subsidised by every other tenant in the shopping mall, if you want to go down in price shouldn't you do that throughout the whole area? You are rubbing people's noses in it when you are not only getting subsidised rent but also using certain mechanisms such as a geographic price discrimination to make their life a complete misery.

Dr Long—I suppose you are saying that geographic price discrimination, added to all the other factors in the market, can ultimately reduce the degree of competition. You are referring to subsidised rents for anchor tenancy arrangements. I am not saying that any of that takes place. I simply say that geographic price discrimination, as contemplated by this bill, is not in fact dealing with a problem in the market. Differentials in price are very often a rational allocation of supply and demand in different regions, and the measures envisioned would actually distort prices and the setting of prices.

Senator JOYCE—If someone had a 99.9 per cent market share in retail, could that be deemed to be not excessive?

Dr Long—You would analyse the contestability of the market and assess whether the market was efficient by the presence of entry and extra costs. The figure of 99.9 per cent is a big one, but theoretically the market can still be competitive if there are low entry and exit costs.

Senator JOYCE—So someone could have 99 per cent of the grocery market and that would be contestable and competitive? There would be competitive stresses that give consumers the best outcome?

Dr Long—I am not talking about the grocery market. I simply say that, in analysing the efficiency of a market, it is important to look at the presence of entry and exit costs rather than just the current state of those people in the market.

Senator JOYCE—If the market is truly efficient, why do we have this great disparity between farm-gate prices and shelf prices? Surely, that is an indication that the market is inefficient and the retailers are pocketing the difference. Is your main disagreement with the Blacktown amendment that you believe it will lead to a corruption of market principles in the area?

Dr Long—That is one of the problems—it is anti-competitive. But we also have some major practical problems.

Senator JOYCE—But you acknowledge that in shopping malls there is already a corruption of market principles because anchor tenants have a discount on the rent that everyone else is paying. Is that not a corruption in the marketplace? Do you see that as fair?

Dr Long—I am not in a position to comment about that. I do not have the fact before me. I have no brief to speak about that and we have not discussed that in our submission. But I am not trying to avoid the question. If at another hearing of this nature that is a question you would like addressed, I am sure that could be done. But, at this stage, I am not in a position to give you a helpful answer in relation to that.

Senator JOYCE—Your premise of contestability talks about free entry and exit. Can you describe the latest major entry into the domestic retail market that is not from a foreign source?

Dr Long—A new market entry into Australia?

Senator JOYCE—Yes.

Dr Long—There has been a lot of turnover in ownership in many sectors of the economy, and the retail sector is no exception. Those change in ownership structures have effectively led to the operation of new entities in the market.

Senator JOYCE—If there was free entry, surely we would be seeing Australian-grown businesses rising up and competing against the stables that are currently there. It appears that the only people who are able to compete are the ones that come in from overseas, and even they have a hard time getting access to the commercial premises to compete against you.

Dr Long—As a matter of fact, there are some foreign competitors who have entered the market recently and seem to be having no problem in setting up major outlets around the country. Yes, they are foreign

owned—on the whole, they are US companies—but I do not see any anti-competitive aspect to that element. But I am not speaking for Costco and those companies. They are not members of the Australian National Retailers Association.

Senator JOYCE—What is the latest domestically-grown retailer that has managed to compete against Coles and Woolworths?

Dr Long—It is a big market and there are different players in the market in different locations. It is difficult for me to speculate about exactly where there is competition across Australia. But it is a very diversified market. The retailers are involved in a vast range of activities, not just groceries. There seems to be fairly fierce competition and changing market share at times between the operators within that market, and that is not necessarily an unhealthy sign.

Senator JOYCE—With all this free entry and free exit, surely you can name one of them. Is there an organisation that has grown up in Australia and is challenging Coles and Woolworths on alcohol, fuel and tobacco? Coles and Woolworths want to get into pharmacy and they are in insurance now. I do not know quite where they will stop, to tell you the truth. Surely, you can name one. That would prove your argument of free entry and contestability. You should be able to tell us about a ‘Kalamazoo Retail Corporation’ that has grown up, but you cannot name one.

Dr Long—To be able to name one would be consistent with the position that I have put, but to not name one before you now is not inconsistent with that.

Senator JOYCE—No, it shows categorically that there is not free entry; otherwise, they would be entering.

Dr Long—The question is about whether there is the capacity to enter, and that is the contestability test—not whether there has been actual entry or exit, but whether the sunk costs that exist prohibit potential entry.

Senator JOYCE—That is ridiculous! If there was capacity for entry they would be entering, but they are not entering because they cannot.

Senator XENOPHON—Dr Long, it is not just about the capacity to enter; it is also about the ease with which a competitor can be exited out of the marketplace, as seen in the facts of the Boral case. That is relevant as well, isn't it?

Dr Long—I cannot remember what the Boral case says in relation to exit cost issues. I do not have that in front of me, so it is difficult for me to comment precisely on that aspect of it. But exit costs are an issue in contestability theory. There should be low exit costs to be able to—

Senator XENOPHON—I meant that it is easier to get people exited out with predatory practices.

Dr Long—Yes, but that is not what I am talking about. I am saying that, if there are high exit costs, there are implicitly higher entry costs because you are stuck in the sector.

Senator XENOPHON—I do not want to labour this point but it is about the ease with which you can be exited out of a business, depending on the practices of another operator. That is a relevant factor, isn't it?

Dr Long—Yes. It is not an element of contestability theory, but I imagine the ACCC would consider such factors when it looks at any case under section 46(1).

CHAIR—Thank you, Dr Long, for coming in and giving us your time today.

Proceedings suspended from 1.36 pm to 2.27 pm

HENRICK, Mr Ken, Chief Executive Officer, National Association of Retail Grocers of Australia

van RIJSWIJK, Mr Gerard, Senior Policy Adviser, National Association of Retail Grocers of Australia

CHAIR—I thank the National Association of Retail Grocers of Australia for coming in this afternoon. Do you have an opening statement that you would like to make?

Mr Henrick—Yes, very briefly. We support this amendment. It is important to remember that the Trade Practices Act used to have a price discrimination prohibition, which was removed on the recommendation of the Hilmer committee back in 1993 on the assumption that section 46 would do everything that was required. Clearly it has not. On this particular amendment, the Blacktown amendment, evidence was given earlier today by the ANRA that it would cause various disruptions to retail operations in stores. We do not see that as a fact. In fact, a lot of the issues that were raised by them are covered by the exceptions in the proposed amendment at 46C(3)(a) to (f). We feel fairly comfortable about that.

Mr van Rijswijk—The other point that needs to be made is the question about pricing across stores, particularly where you have a large range of stores. Our understanding of the way the system works is that stores operate to a price file, which is available to each store on a computer. My understanding is also that the major stores have a price file that even has several price levels so that, if the store wants to be more competitive, they can drop to a lower price level and, if the store wants to be more profitable, they can increase to a higher price level. That gives the local manager flexibility, but the technology is there for a uniform price, and that is best demonstrated by the specials system. If you go into a major supermarket and you buy an item that is on special that week, that special will be the same right across the whole range of stores in that chain. So the capacity is there and the systems are there. There is no reason why, from a technical perspective, a uniform price policy cannot be adopted by the chains. In fact, in evidence given to the ACCC inquiry into grocery prices, Woolworths said that they were going to adopt a uniform national pricing policy, and that was also reported in the final report of the ACCC inquiry. We do not hold that a requirement to adopt a uniform price across a region, or across the nation for that matter, is any way a problem.

Mr Henrick—We have left two photographs there for you. Photograph A is of a Woolworths service station in Parramatta Road, Burwood in Sydney. If you look just to the right of the price sign, the building in the distance on the horizon is another Woolworths service station on the other side of the road and the prices are different between those two locations—about 70 metres apart. The picture we did not get was when we were going back to our office in fairly heavy traffic and could not stop, but there is another Woolworths service station at Roselands on King Georges Road.

Unknown speaker—How far physically?

Mr Henrick—About eight kilometres, maybe 10 but no more than that. The price there was 109.9, the reason being that it is right next door to a Mobil service station. The petrol price inquiry which the ACCC conducted said that the average profit margins for the petrol industry are 4.9 cents per litre. So that is a difference between the Roselands store and the other two of 13 or 16 cents per litre, which would seem to suggest that it may be predatory.

Mr van Rijswijk—And it is that low price because there is an independent petrol station next door which was pricing its petrol at 126.9, obviously not capable of competing with the 109.9 price. The other interesting thing about the two service stations on Parramatta Road is that they are 70 metres apart on opposite sides of the road and you have to wonder whether those prices change depending on whether the traffic flow is out of the city or into the city. What we say in our submission is that the fact that the major chains do not have to price uniformly across their various outlets gives them an opportunity to do a number of things, one of which is clearly price gouging and the other is predatory pricing. The difficulty the ACCC has in relation to picking up predatory pricing is that, certainly in the case of petrol, they do not have a clue as to what the price of petrol ought to be at retail level. They have some vague idea of wholesale margins and some vague idea of retail margins. They have already given Woolworths and Coles the okay to use shopper docket discounts, which further muddies the water, and these people can price anything anywhere at any time at any price and do what they need to do in order to either increase their margins at the expense of the public or push a competitor out of business. In that context, the Blacktown amendment will have a dramatic effect on these sorts of markets and give the consumer a fair go.

CHAIR—You were saying that the TPA formerly had a price discrimination provision in it and that following the Hilmer review it was repealed. The review concluded that to the extent that section 49 has had any effect, it seems to have diminished price competition. Do you think that Hilmer got it wrong?

Mr Henrick—Yes, I do, and I think he got it wrong by thinking that section 46 would perform all the functions required of preventing that sort of price discrimination.

CHAIR—Was that in the report? This seems quite positive—‘section 49 has diminished price competition’. He is not saying that another section will pick up the problem.

Mr Henrick—In his view. In the Hilmer report he did say that section 46 would do everything that was required of section 49.

CHAIR—But there is that positive statement that it has diminished price competition.

Mr van Rijswijk—We do not agree with that and, in fact, if you look at the regulators in other countries—and we heard this morning that Canada had withdrawn its price discrimination legislation in the same way as Australia had—across the OECD jurisdictions without price discriminations are the exception rather than the rule. In fact, price discrimination legislation in other jurisdictions is much more stringent than what is actually being proposed here in the Blacktown amendment. Both the UK Competition Act and the EU treaty, which is the core treaty of the EU, prohibit applying dissimilar conditions to equivalent transactions with other trading parties. So in any way where conditions are similar in the EU you cannot apply a different price, and there are good reasons for that.

CHAIR—You were talking about Woolworths going to national pricing. ALDI, we have heard already, have national pricing. You had that as an example of there being then no technical or practical problems.

Mr Henrick—Correct.

CHAIR—This amendment applies to stores with more than five outlets, so it is a long way between a store with five or more outlets and Woolworths and Coles. Are you not accepting any argument that that might be difficult for a range of other companies in between?

Mr van Rijswijk—No, not at all because you need to comply with two different requirements. You need to have more than five outlets but they have to be within a thirty five kilometre radius.

CHAIR—I was just explaining that—

Mr van Rijswijk—So with your example was morning of Adelaide, if somebody had five outlets and one was in Adelaide, one was in Perth and one was in Sydney, it would not matter. They could have all different prices under this current amendment.

CHAIR—As I was saying, with Adelaide being a long, thin city, you might have one in the city and there would be 35 kilometres to Elizabeth, but then from the Adelaide store you would have a whole range of other stores in the western and southern suburbs. You might very easily be able to accumulate five stores within that 35 kilometre radius. In fact it would almost be difficult not to.

Mr van Rijswijk—What is an example of an entity that would fall into that category? I think the number of five stores in the legislation is—

CHAIR—I am sorry: are you telling me that in between five stores and Coles and Woolworths there are very few entities that would be affected by that?

Mr van Rijswijk—I would suggest that there may be a number of stores at that low end of the spectrum but the majority of the concentration issues are with stores which have far greater numbers of outlets than five. If an entity has five trading outlets within a 35-kilometre radius, I would suggest that the likelihood is that they would also have the systems in place too.

CHAIR—I guess I am referring to this rolling effect. You might have a store in outer northern Adelaide, you might have one in inner northern Adelaide, you might have one in the city, you might have one in inner south and outer south and you might have another one in the western suburbs. They would all be appropriate to their local areas but they would all be within a 35-kilometre radius. That would not be uncommon in Adelaide. You would have things like Angus and Robertson bookstores and there are chains that hairdressers, there are chains of clothing stores, there are a number of chains in that category.

Mr van Rijswijk—You will find that wherever those chains exist they tend to operate to common price files. That is how they work. How does the local manager decide what price to put on a dress? She gets told by head office that that is the price for that dress. That is how it works.

CHAIR—I would beg to differ. In Elizabeth you might have a different style of clothing than you would in the city store. They might, and often do, I think, discount different ranges of clothing at different prices at different times.

Mr van Rijswijk—If there is a different style of clothing, then that allows a different price. If it is a discounting effort to get rid of stock, it is clearly allowed under the amendment. The Blacktown amendment does what the Trade Practices Act has not been able to do up to now and that is provide some measure of—

CHAIR—Yes, but I am not talking about the theory; I am talking about the practical difficulty of implementing this, that each store has to go out and determine their 35-kilometre radius and then not differentiate their pricing of any of their lines or ranges. A hairdresser in one suburb might find more shampoo than she needs and you cannot—

Mr Henrick—You can under this.

CHAIR—Can you?

Mr van Rijswijk—What the Blacktown amendments puts in place is a principle that could be adopted. Most of the critique has been on the basis of the 35 and on the number of stores. Those things can be discussed and an appropriate number come up with, without destroying the basic principle of the amendment. What we are saying is that we have had the Trade Practices Act in place since 1977 and up until now it has done nothing. The ACCC has done nothing. We have seen supermarket concentration go from 35 per cent to close to 80 per cent in that time. If we do nothing now, where is it going to stop?

CHAIR—I am not proposing that we do nothing. That is not what I am saying. I am saying that this amendment that we are considering now, that we have to report on, has a number of practical difficulties. It might work in Sydney, where you have a concentrated area and a large population, but in a number of other centres around this nation it is not going to work so well. That is what I am putting to you.

Mr Henrick—I understand the point you are putting, but the point is that the requirement only applies to identical product, it does not apply to different ranges of dresses in different shops. It does not apply to different hairstyles or different anything else. It is identical products we are talking about. So it would be a can of baked beans 420 grams in one store and the next store.

CHAIR—But it still means that you cannot reduce your price in one store if for whatever reason in one part of Adelaide or another you might want to shift your stock more quickly.

Mr van Rijswijk—The exemption is there for that, for shifting stock that is excessive.

CHAIR—How do you define excessive? I say this because in every other report we have had on the trade practices we have had these kinds of questions from the opposition about definition, about certainty, about the cost to retailers of putting in equipment, and these are questions that the government had raised every time that there has been a tightening to the Trade Practices Act or competition policy. Now to address an issue that is very real another amendment is proposed by Independent and other senators. I am applying that same test to this one. To me, it does not stack up.

Mr Henrick—I think that it works in practical terms in retailing. If we are talking about a small chains such as the five stores, the actual level of hands-on management to achieve uniformity would be pretty low and fairly easily managed across five stores.

Senator XENOPHON—Can I follow up on the issue of section 46. We heard from Dr Long earlier. I guess I am focusing on what the Blacktown amendment is trying to remedy in terms of the ineffectiveness of section 46. You may have heard Senator Joyce's line of questioning in relation to that. What is your understanding of section 46 in the context of small businesses being protected against abuse of market power? How would you see Blacktown, this amendment, fitting into the equation, and also its practicalities that Senator Hurley has raised?

Mr Henrick—As you mentioned earlier in Dr Long's evidence, section 46 has effectively been defined by the Boral case. In that case four out of the five High Court judges agreed that you cannot abuse market power unless you have market power and you do not have market power unless you can unilaterally raise prices without losing market share. In the Boral case there were allegations of predatory pricing by Boral in which they were actually putting prices down, not up. The victim was a small brick and paver company, C&M Brick in Nowra. It is right on the Princes Highway and pretty easy to find as you drive through Nowra. What happened in that case was that Boral decided to put that company out of business. It came very close to it. The company was actually saved, if my memory is correct, by some new investment that was made into the

company and also because the ACCC at that point started action against Boral. I think the High Court judgment was such that section 46 was effectively gutted and has never really been any sort of protection for small business from abuse of power.

Senator XENOPHON—But that was a classic case of geographic price discrimination where they charged less in that region.

Mr Henrick—That is correct.

Senator XENOPHON—What do you say in terms of the concerns about the practicality of this legislation? How do you address those concerns in terms of the number of stores and also the whole issue of pricing? You heard Dr Long say would it be practical to price the stores consistently. What is your understanding of what Aldi does, for instance, at a national level?

Mr Henrick—Aldi has got a fairly limited range of products, about 500 product lines, I believe. They have got just over 200 stores, all of them on the east coast, Victoria and New South Wales and in and around Brisbane. It is a relatively easy job for Aldi to price nationally because of that. Woolworths announced, as Mr van Rijswijk said, that they are going to move to a national pricing arrangement. I guess if they do that Coles would probably do the same. In practical terms, they do it now with state-wide specials every week, with specials uniformly priced, with one historical exception which I am happy to talk about if you would like to hear about it. Prior to the formal commencement of the grocery price inquiry last year, we were asked to meet the ACCC to talk about issues in general. One of the issues that we raised with them was an apparent case of predatory pricing in Cootamundra where a Woolworths store was pricing significantly below their state-wide specials for a period of about eight weeks. The ACCC when we raised the issue told us that it might look like predatory pricing to us but almost certainly was not. They gave us about 12 reasons in five minutes about why it would not be predatory pricing. When we finally prodded them into an investigation, they reported in the grocery inquiry report that indeed it had been below-cost selling by Woolworths but they were not going to take the case to court because in their opinion eight weeks was not a sustained period and in any case it was not with the intention or the purpose of damaging the competitor. I think that was a case for a court to decide, not the ACCC. In the 300 or so predatory pricing complaints that the ACCC has had since the Birdsville amendment, not one has gone to court. I am prepared to believe that most of them are not genuinely predatory pricing according to the Birdsville amendment, but I think that that Cootamundra one certainly should have been taken to court.

Senator XENOPHON—So you see this amendment as another piece of the jigsaw to make things more—

Mr Henrick—To make competition fairer, yes.

Senator XENOPHON—You have got Dr Long and others saying that this will actually be anti-competitive, that it will prevent discounting and force up prices. What do you say to that?

Mr Henrick—I do not accept that that all. I have some sympathy for Dr Long, because when I came into this industry in the early 1990s, after six months I thought I was on top of things and after 12 months I realised how little I knew after six months. He is relatively new to the job and maybe his views will change.

Senator XENOPHON—Can you talk about overseas jurisdictions. We have heard the Treasury in its public submission has said there has been a move away from this and section 49 was repealed several years ago in Australia after a number of reviews. Earlier this year Canada got rid of geographic price discrimination legislation. Can you tell us about the UK, the EU and the Robinson-Patman Act of 1936? What is your knowledge of those? We heard earlier today from Mr Kelly about these, but what is your understanding of them? Where is the best model legislation that is actually working on the ground that is as close as possible to the Blacktown amendment?

Mr Henrick—Probably any one of those three pieces of legislation would work here. The Robinson-Patman Act was brought in in an environment where the American legislators had already legislated very strongly on anticompetitive behaviour in the Sherman Act from the 1890s. It is often said, 'That is fine for America but Australia is a much smaller economy and we cannot do that sort of thing.' The fact is that the American economy in 1890 was smaller than the Australian economy is now. So that argument does not hold up. We need some firm competition law and a regulator that will actually apply it so that anticompetitive behaviour is not allowed to flourish. The major problem we have in this area is the concentration of the grocery industry within two companies with massive market share—around 80 per cent. That market share gives them massive market power and they apply it up and down the chain, and it impacts on everybody from farmers to consumers.

Senator XENOPHON—Finally, you represent the independent grocers, who have about 20 per cent of the national market share. Their local market share is higher in Perth and it is over 20 per cent in Adelaide with the IGAs and the like. You might want to take this on notice: what examples can your members give to this committee of pricing differentials, pricing practices and pricing discrimination which have forced someone out of business or at least weakened them? I suppose you do not necessarily have to force someone out of business. If you weaken a business by having some heavy discounting in a particular area, for instance, it means that store cannot refurbish or spruce itself up or be able to compete. Can you give examples of that sort of behaviour amongst your members?

Mr Henrick—I can take it on notice and try to find some examples within recent memory.

Senator XENOPHON—But it is your evidence that this is the sort of thing that goes on on a regular basis?

Mr Henrick—Yes. A case comes to mind—I will find the details on the names and location for you—of a small family business on the Central or North Coast of New South Wales. It was a grocery business. The family that ran that business wanted to open a liquor store as part of the business. Woolworths put in an objection and effectively stopped them from opening that liquor store because Woolworths had a liquor store 10 kilometres down the highway. That seemed to me to be using the financial resources of Woolworths to run court cases which prevented that family from doing what it was planning to do to expand its business. There was the Ettamogah Pub case where Woolworths and Coles were both penalised—Coles without admissions, but Woolworths was penalised for similar sorts of behaviour in the liquor market.

Senator XENOPHON—Can you take that on notice? Thank you.

Senator CAMERON—I am not sure if you have read the Coles submission.

Mr Henrick—No, I have not read it yet.

Senator CAMERON—I will just take you to some of the assertions in the Coles submission and get your point of view. Coles say that we should not support this Blacktown amendment and they say:

- freight costs vary in transporting products to different sites;
- rental tenancy agreements can vary from site to site;
- products delivered directly to sites ... commonly have different wholesale prices in different regions;
- products may be chosen for promotion in some sites but not others due to popularity within the relevant demographics of given areas;
- fresh products may have subtle quality distinctions based on their sourcing origins and this is often reflected in minor price variations;
- utility and other rates vary at different sites; and
- staffing levels and wages differentials that exist between sites.

Do your organisations have these same issues?

Mr Henrick—All of those cost imposts—like transport, rental and site locations—do affect our members. But, for a company like Coles or Woolworths, it is a mistake to regard each site as an independent business. These are large conglomerates. They are large corporations. Woolworths is running something like 800 sites now and Coles about 750. Not all of those sites are profitable. In fact, Coles is in the process of trying to sell 45 supermarkets to FoodWorks. That will go through the ACCC process, I presume. Clearly, Coles and Woolworths average their prices. They carry losses and profits at varying levels across the whole of their businesses. They could set the prices on a different average basis to cover those sorts of cost imposts.

Mr van Rijswijk—They do that now with quite a wide range of products anyway. The fact that Woolworths have said they want to go to a national pricing policy suggests that that is what they propose—that is, that they are simply going to average the prices across their stores nationally and in that way support those stores where the costs might be marginally higher and reap the benefits where they are marginally lower.

Senator CAMERON—The Law Council, Coles, the National Retailers Association and Treasury all say that one of the weaknesses in this bill is that it fails to distinguish between procompetitive and anticompetitive price discounting. Do you have any comment on that?

Mr Henrick—No. I do not think that is really an issue, to be honest. Competition is a very difficult thing to define. For example, Woolworths and Coles are said to be competitors but in fact there are relatively few cases where they actually compete head to head in a market. Very often, you will find a shopping centre which has one or the other of them in there and perhaps an IGA or perhaps a FoodWorks or perhaps an Aldi. Very rarely do you see Coles and Woolworths in the same shopping centre. This sort of assertion does not really hold up when you look at the individual local markets.

Mr van Rijswijk—If you go to the international jurisdictions, one reason they have price discrimination legislation is to be competitive. I have had dealings with companies in America where there are strong competition laws. It is illegal for those companies to give you a deal that they are not offering to somebody else. What we see here, for example, in the wholesale market is the immense power of the two major chains being able to simply screw down prices from suppliers and increase their own margins as a result—to the effect that in that way too they affect competition, because nobody else can get goods at those prices and compete effectively with them. That is because we do not have an anti-price discrimination clause in the TPA. The Blacktown amendment does not go that far, but overseas experience suggests that it should—that is, that there ought to be a more level playing field. If I am a supplier in America and I offer a discount to a customer—be they Walmart or anybody else—the only discount I can offer is one that relates to actual reductions in my cost related to the volume that that person buys. That gives a small competitor with Walmart a relatively level playing field to compete with Walmart.

Senator CAMERON—We were told in evidence this morning that the accessibility to laws in the US, where they are fairly strong, is limited because of the cost of litigation and therefore they are pretty meaningless because most small players would never bring any litigation.

Mr Henrick—Isn't that a separate problem that needs to be resolved?

Mr van Rijswijk—There is the same problem here. There is no small trader that can afford to take a case to the High Court. The situation in America is that whatever happens there is always that threat that the regulator will come in and say, 'Hey, you've done the wrong thing.' We do not have that here. We do not have any mechanism at all within the Trade Practices Act—apart from some very vague promises about unconscionable conduct and market power; there have not been enough cases going through the court to even define them—to actually limit the power of these large organisations. You wonder why, after 35 years, the Trade Practices Act has not worked.

Senator CAMERON—That is another story for another day, I suppose. We are trying to deal with this legislation, as we are faced with it. I want to try and come back to the issue of the legislation. A number of the submissions that we have had from those that oppose the bill argue that compliance may be unworkable and there will be an increase in unrealistic regulatory burden. Have you done any analysis on the cost of the regulatory burden on your members?

Mr Henrick—No, we have not. I am not sure that that is a significant burden anyway. One other thing they have suggested is that there would be a huge monitoring burden on the ACCC. The ACCC does not actually monitor now. It only acts on complaints. Even then it is hard to get it to do anything, as we showed with the Cootamundra case. It tends to be a hands-off and do-nothing sort of organisation.

Mr van Rijswijk—As far as the internal compliance burden is concerned, the government had no problem imposing unit pricing. That has an identical compliance burden to any other organising mechanism. It seemed to consider that that was worth while.

Senator CAMERON—How do you establish the 35-kilometre zone?

Mr Henrick—It would only have to be done once by each store, each company. I guess worst case they could quite easily get the geographic coordinates of every store, but the method you suggested this morning would work just as effectively. In any given market, put a compass on the map and draw a circle of 35 kilometres. Any similar stores or related entity stores that operate within that market would be captured.

Mr van Rijswijk—The chair said earlier, too, that there is a leapfrogging effect, where one store will have another 35-kilometre radius. What that basically will do is that, if you have a significant sized city, the whole city will come under the control of this legislation. It is relatively easy for a big store to say, 'Okay, the prices will be the same in Sydney; they will be the same in Melbourne.'

Senator CAMERON—It certainly would not.

Mr van Rijswijk—Sorry?

Senator CAMERON—A 35-kilometre radius would not cover the whole of Sydney.

Mr van Rijswijk—My word it would. If you have a store in Parramatta and draw a 35-kilometre radius around it, you may not get the outer suburbs but there will be an intermediate store and then you will draw another 35-kilometre radius around it. It will cover the whole of Sydney because of the leapfrogging effect.

Senator CAMERON—The chair earlier raised the issue of cities like Adelaide. That made me think about regional areas. I used to live in Muswellbrook and Singleton. This would not really work there, would it?

Mr Henrick—It would cover the local town.

Senator CAMERON—But there is no competition. You have one Coles store.

Mr van Rijswijk—That is a separate issue, isn't it?

Mr Henrick—Yes.

Mr van Rijswijk—If there were a competitor in that general area and you had a number of Coles stores or a number of Woolworths stores in that general area, common pricing would prevail.

Senator CAMERON—But you do not. In a town of, say, 12,000, 13,000 or 14,000 people, you will have one Coles store or you have one Woolworths store.

Mr Henrick—In that case, this does not apply in that circumstance.

Senator CAMERON—So they can do what they like?

Mr van Rijswijk—Maybe you need general price discrimination legislation.

Mr Henrick—I guess they would go on doing what they are doing now.

Senator CAMERON—If competition does not apply, really?

Mr Henrick—Yes. In many cases, it does not. There are probably towns where there is only one supermarket.

Senator CAMERON—In fact, the argument I have heard for areas like that is that it actually drives the smaller competition out. You know, Coles and Woolworths come in and everything is—

Mr Henrick—That has certainly happened in some towns, where they come in and build a big store down the end of town and the smaller competitors in the main street cannot compete.

Senator CAMERON—I was interested in Coles' submission about wage differentials. I am surprised that not more people are here giving evidence, to be honest, if it is such a huge issue. Coles have put a submission in basically saying that wage differentials are an issue. I would not have thought the wage differentials would have been huge, other than regional or state based wage differentials.

Mr van Rijswijk—They would be on the award, would they not? I thought they would have been under the award.

Mr Henrick—Yes, or on an EBA. One of the issues that has come up in the context of the retail award modernisation is that many independent stores would be moving to the new award levels—whatever they turn out to be—but Woolworths and Coles, with EBAs in place that may last for five years, would have an advantage. You could end up with a country town with two brothers working in different stores, with one getting \$35 an hour—or whatever it is—because he is under the retail award and the other on an EBA getting less money. Therefore, the costs to that individual business would be greater than the cost to the chains.

Senator CAMERON—You have said that market concentration is the issue.

Mr Henrick—Yes.

Senator CAMERON—In your submission you have a number of recommendations or conclusions, but market concentration is not one of the conclusions, even though it is in the body of your submission. I am bit puzzled by—

Mr Henrick—I think the recommendations specifically applied to this. The market concentration issue is a broader and more substantial issue, I think.

Senator CAMERON—But is that not the fundamental issue?

Mr Henrick—Yes, very much so.

Mr van Rijswijk—Absolutely. But it is something that this amendment cannot fix.

Senator CAMERON—And unless you can fix the market concentration issue, anything that we do is a bit like fiddling while Rome builds.

Mr van Rijswijk—But that is no excuse for doing nothing.

Senator CAMERON—So we should fiddle?

Mr van Rijswijk—Well, nobody has actually proposed anything major. There is nothing major in the offing. So, while there is nothing major in the offing, we may as well try to at least in a little way level the playing field a bit.

Mr Henrick—As Mr van Rijswijk pointed out earlier, when the Trade Practices Act was introduced in 1974, Woolworths and Coles had a market share of around 34 per cent of the national market. It is now close to 80 per cent. That is based on ACNielsen scan data figures which were in fact quoted in Dr Emerson's policy paper that he put out last Friday. It is a very substantial figure. That is the international benchmark as measuring packaged branded grocery products and market share. The picture has been of steady growth in market share for the chains right through that period, and nothing has been done to the Trade Practices Act to interrupt that trajectory.

Earlier this year, Woolworths advertised to acquire every site they could get their hands on for Thomas Dux, Dick Smith, Big W, Woolworths, BWS and their other liquor brand—whatever that is. Mr Luscombe gave a speech in Hong Kong in March in which he said they would buy every, single remaining hotel they could get their hands on. All that is happening and the ACCC says that creeping acquisitions is not a problem.

Senator CAMERON—I am just wondering whether your support for this proposed bill is on the basis of, as you have put, 'There is nothing else in the offing and I suppose anything is better than nothing'. That is not a good basis for legislation, in my view.

Mr van Rijswijk—You would need to look at what needs to be fixed. You correctly said that market concentration is the elephant in the room. Given the fact that that is not immediately fixable—even with the changes to the lease arrangements that were announced by the ACCC this week, which do not fix it by any stretch of the imagination—you have got to then say, 'If that is not immediately fixable, what else can be done that helps smaller stores and smaller outlets to be less of a target to the majors?' The Blacktown amendment does that, because it says to the majors, 'If you want to compete on price, that is great—compete on price—but you've got to compete on price everywhere. You can't single out one site and drop the price'—as we said earlier—'to 109.9c per litre in the case of petrol because there happens to be a Mobil station next door when you are charging 125.9c somewhere else. So, yes, compete on price by all means, but, hey, give everybody a fair go when you are competing on price.' That makes it much more difficult for a major chain operator to really push the price down extremely low in one particular area simply to be competitive with that one particular outlet.

The difficulty we have with this whole competition theory is that, when it comes to this question of predatory pricing, even with the Birdsville amendment, we have an ACCC that sits on its hands and does nothing. Every item you bring up and say, 'There's a predatory pricing issue here,' there is an excuse as to why we do not act. This is not a predatory pricing amendment, but it has the effect of making that whole competitive environment much more equal, because major chains cannot simply target one outlet or one area and push down the price of one or a number of items in that particular area.

Senator CAMERON—For competition to work effectively, consumers need to have access to information. That is this big argument about information asymmetry. We went through a lot of debate about that during the hearings into Fuelwatch and the like. It seems to me that, whether or not you have duopoly, if consumers do not have the information between even the duopolies, it makes it even harder.

Mr van Rijswijk—But doesn't this help. What you will have with the Blacktown amendment is that, if you drive around Sydney—take petrol as an example, and grocery would be the same—and you see a price sign on a Woolworths outlet saying 125.9c, you know you do not have to go chasing around for less than 125.9c because they are required to have it the same around there. If somebody else has a lower price, you know that is a genuine lower price because you would have to chase around.

Senator CAMERON—That sounds a bit like Fuelwatch.

Mr van Rijswijk—Yes, but Fuelwatch tried to provide information when people do not have the time to chase information. This actually says to the retailer, 'Be honest about competing.'

Senator CAMERON—You just tabled these two photographs of the Woolworths service stations and—

Mr van Rijswijk—Across the road from each other.

Senator CAMERON—Caltex, as part of the example of why there is a problem. I just think that this issue of price asymmetry is a major issue. Whether you have a duopoly, an oligopoly or a perfect competitive market, people need information. I am not sure that the Blacktown amendment is really dealing with that in a way that meets the argument that Treasury is putting forward—that is, that it is anticompetitive instead of pro-competitive.

Mr van Rijswijk—I think it is pro-competitive. Yes, you have Woolworths and Coles dealing with Shell and Caltex, but you still have BP and other brands. This says that the brands—instead of fiddling the numbers and giving people rebates and all the little fiddles that go on to try to make this site a bit cheaper or that site a bit dearer—have to be honest about competing and say, for example: ‘BP is cheaper. On Tuesday morning, all the BP service stations have the same price, and they are all 2c lower than the equivalent Woolworths site.’ That solves your asymmetry problem, because once you drive past one BP station, you know they are all the same.

Senator CAMERON—I am trying to get my mind around—

Mr van Rijswijk—Asymmetry is a problem when you have these prices fluctuating all the time. The ACCC could not put their finger on why you have a price cycle. The simple reason there is a price cycle is that people make more money that way. That is why you have a price cycle.

Senator CAMERON—But if you have information, having that information and the power of the information can help drive down prices. You will never have pure competition. I do not agree with what we heard today about this theory of contestability. I do not agree with that. I think it is one of these theoretical nonsenses. But I do agree with Stiglitz’s approach on information asymmetry that it is a fundamental. To my mind, I think what you are trying to do with a Blacktown amendment is overcome the information asymmetry issue by using a pretty blunt instrument.

Mr van Rijswijk—We tried to do it via the GROCERYchoice website, which was an absolute failure because people only got to work out what baskets there were; they did not know what was in the baskets. The regions were huge, so they did not even know which store these baskets applied to. With the Blacktown amendment, if they walk into a supermarket—Coles, Woolworths, IGA or whatever—they see a price for baked beans and they know it is the same price as in other stores around there. They can say, ‘I now know that price. I can walk into Woolworths and I can actually compare the price, because I know their price is the same. What consumers are dealing with at the moment is that these prices vary quite dramatically, even within the same chain. In spite of what Woolworths say that they want to go to a national pricing mechanism, we have not seen much evidence of that happening.

Senator CAMERON—We went through the debate on pricing. One of the hardest things is if you buy toilet paper or packets of hand wipes of different sizes, textures and qualities, how do you deal with all of that?

Mr van Rijswijk—Unit pricing was supposed to help with that.

Mr Henrick—You are right, Senator Cameron, it is not easy. It cannot be done in any simple, centralised way. There is no way to do that. It is impossible when you are dealing with fresh produce. Tomatoes in one place may be of an entirely different quality or variety than in some other place. Remember that people generally shop fairly close to home or to where they work. It is not that they are comparing prices in their local store with prices 100 kilometres away where they are never going to go, anyway.

Senator CAMERON—I am not here to try to defend Coles, Woolworths or any of the big players. I am trying to think of this in terms of how the consumer can deal with this. But if Coles and Woolworths happen to be correct that it will be absolutely unenforceable in terms of the complexities—I have just mentioned what I think are some of the complexities—you could end up disadvantaging the consumer, even though this is done with the best intent. That is my concern.

Mr Henrick—I understand the concern. I think the reality is that these sorts of issues that have been raised in the ANRA paper are not really going to impact on the way this legislation operates. The ACCC is not going to hire an army of people to go out to monitor prices; they will respond on a case by case basis to complaints, as they currently do. If, on the one hand, Woolworths can move to a national pricing system then what is the problem with complying with the Blacktown amendment? And the same applies for Coles.

CHAIR—Does anyone in the teleconference want to ask any questions?

Senator PRATT—No, that is fine. I have been following the conversation.

Senator EGGLESTON—I will not ask questions at this point.

CHAIR—I thank the National Association of Retail Grocers of Australia for coming in and answering questions today.

Proceedings suspended from 3.19 pm to 3.33 pm

ZUMBO, Associate Professor Frank, Private capacity

CHAIR—Associate Professor Zumbo, thank you for coming in this afternoon. Would you like to make an opening statement?

Prof. Zumbo—Thank you, Madam Chair. Yes, I will make a brief opening statement. Obviously, as the drafter of the Blacktown amendment, I am very keen to be as transparent as possible in my thinking in relation to the amendment's drafting, so I am very happy to give that thinking wherever possible. More generally, I have heard the evidence today and I have read through all the submissions, and I think a number of things need to be clarified very quickly. One is that we have heard evidence that Aldi does have a national pricing strategy. We have heard evidence that Woolworths is moving to a uniform pricing strategy. Aldi makes a big thing about that on its website. In relation to Woolworths, I have seen that from the ACCC's grocery pricing report. So, as a basic principle, there are some very strong arguments in favour of having a single pricing strategy. In fact, a single pricing strategy is more efficient. It is less costly. It is a simplified cost structure. It gives you a great opportunity to market to your customers that you are giving them the best price, all the time, every day, everywhere in a geographic area.

There has been some discussion about contestability theory. Senator Cameron quite rightly pointed out all of the deficiencies and commentary in relation to the debate on the contestability theory. The point has to be made that markets are only contestable where there are no barriers to entry or exit. Sadly, certainly in the retail grocery sector, there are very significant barriers. One is restrictive leases. We have already had acknowledgement by Minister Emerson and this government that they are a barrier to entry—80 per cent of them have gone—and that is long overdue recognition that they were a significant barrier to entry. I hasten to add they are possibly breaches of the Trade Practices Act, and I would strongly suggest that the remaining 20 per cent should also be removed immediately on the basis that they are a barrier to entry that the government has recognised.

The significant substantial rent advantage that an anchor tenant like Coles and Woolies get is a huge barrier to entry. There are restrictive covenants attached to the land, and you could have whole suburbs that have these restrictive covenants where Woolworths, for example, will have protection from competition in the whole suburb. There is an excellent example in Western Australia: in a new development in the suburb of Ellenbrook there is a restrictive covenant that protects Woolworths from any other competitor. Coles and Woolworths have enormous land banks. That is a huge barrier to entry. We have heard on the record from Aldi, and even IGA on numerous occasions, that they have difficulty finding sites. Zoning laws are a barrier to entry. The strength of the incumbent is a huge barrier to entry. We even hear suggestions from time to time that large international companies like Tesco may think twice about coming to Australia because of the entrenched dominance of Coles and Woolworths.

There is the financial standing of Coles and Woolworths. For example, when I was in Western Australia recently I spoke to a large landlord in that market and they had a bid from Coles and they had a bid from an IGA. They were exactly the same on rent and what have you, but the suggestion was that Coles would get the site because Coles was a bigger company, it had greater financial standing. So from a financial matrix point of view, Coles was 'less risky'. You cannot break into the market as easily as ANRA suggested this morning.

Other things include cost justifications, land cost, occupation costs. I am sure the committee will test this assertion, but my observation is there is no necessary connection between occupation costs, land costs and higher or lower prices. During the course of my evidence today, I will provide examples where prices are no cheaper just because they are near a distribution centre—in this case, a refinery in relation to petrol. So in terms of petrol, you might have a situation where an outer Sydney suburb may be cheaper than a suburb closer to the Caltex refinery at Kurnell. We have heard the assertion that in some suburbs there are higher costs. In the North Shore for example, there may be a higher land costs and what have you. I have evidence to show that prices in Lane Cove in Sydney, which we would all agree is a high price suburb, are as cheap as they are in Penrith—this is in relation to petrol. I will go into that evidence during the course of today.

The other thing is that something that needs to be corrected in terms of the repeal of section 49, the repeal of the Canadian specific prohibition against geographic price discrimination. It is very important to remember that in relation to the Hilmer recommendations, Hilmer recommended that 49 be repealed on the basis that what 49 was supposed to do could have been dealt with under section 46. The same rationale is being used in Canada—that is, although the specific prohibition against geographic price discrimination and the criminal offences have been removed, the suggestion is that their general market abuse provisions will do the trick. In

Australia, we have had the discussion today about the Boral case. It is clear that in section 46—other than the Birdsville Amendment, which is 46(1AA)—that the test of substantial market power has such a high threshold that you basically need to establish, if you are the ACCC or anyone else trying to bring cases under section 46, that you only have substantial market power if you have the ability to raise prices without losing business. So it was many years before the ACCC took a further case in relation to section 46. Suggestions that 46 effectively deters anti-competitive conduct, as made by ANRA, can easily be dismissed. The reality is that section 46 cases are very hard to run, particularly when you have a very high threshold, as established by the High Court in that case.

I want to emphasise this: we have heard a lot of reasons why the Blacktown amendment cannot do this and it cannot do that. That is unduly negative. We need to have a debate; let us try to look at the reasons why we can have a uniform price. In drafting this amendment, I was conscious to try to have as many like for like situations as possible. I went for the same trading name to suggest the same business format. So if I buy a bottle of Coke from a Woolworths supermarket, I expect that bottle of Coke to be the same price at all Woolworths supermarkets. I do not expect a bottle of Coke—

Senator XENOPHON—If you have Coles Express, which are smaller convenience stores—you see some of them in the middle of Melbourne—you are not suggesting that the price at a Coles Express be the same as at a big Coles supermarket?

Prof. Zumbo—Absolutely not. This legislation looks at same business format. The same business format suggests the same cost structure. A Coles Express convenience store will have a different cost structure to a Coles supermarket. A Kmart or a BigW will have a different cost structure to Coles and Woolworths supermarkets. This is like for like; this is looking at the same business format. It is very important to look at this in a real business scenario, not in a theoretical construct as the contestability theory is. It is just a theoretical construct. Let us look at the real business practicalities here. We have Coles, for example, seeking to have the same cost structures, the same occupation-cost ratio. I have to be very clear that while individual rents may vary from site to site, you need to look at rents by reference to the turnover of a particular store. That is what is described as the occupation-cost ratio, where they will try to keep that as consistent as possible in the same business format. What I am looking at is all of the reasons why we can have a single price. That is the basic philosophy underlying the Blacktown amendment.

Having said that, there are ample exemptions to deal with situations where stock needs to be moved that has been sitting there for a long time. That allows that product to be discounted. Imminently perishable: the reality is I have crafted the imminently perishable, taking into account the fact that you might have tinned products and you may have fresh fruit or you might have the barbecue chook. Imminently perishable obviously has to be considered by reference to the particular product. I tried to have an amount of flexibility there to deal with those legitimate situations where you may want to move stock quickly. You may delete items. We talked about fashion. You might have the winter fashion, and you move into spring fashion and so you delete that winter range and you may never have that particular range ever again. Having consulted widely in relation to the amendment in different industries, I tried my very best to focus on the like for like as much as possible. Thank you.

CHAIR—Thank you, Professor Zumbo. There has been the question raised about franchisees. You talked on the topic of business structures, for example the IGA supermarkets in Adelaide. I am aware of where one family owns a number of supermarkets within the IGA structure, the corporation itself owns a couple. Will franchisees be included if they own five or more outlets?

Prof. Zumbo—If the individual franchisee has more than five outlets, yes, that individual franchisee will be covered. But you have to be careful to distinguish between banners and independent operations and banners that reflect the same trading name and the same entity. So if you have an individual franchisee, that person is an independent, they decide which price to set at that retail outlet. That is made clear in the definition of ‘retail outlet operated by’ under subsection (8) of the amendment, where the focus is on the corporation that sets the price at the retail outlet. It is the individual franchisee that sets the price at that outlet. If the franchisee then has more than five stores, then that franchisee within that context has to follow the Blacktown amendment. But if that franchisee has only two stores, three stores, four stores then that franchisee is not covered by this amendment.

CHAIR—Is that section 46C(8)?

Prof. Zumbo—Yes.

CHAIR—Can you take me through that. It says:

retail outlet operated by, in relation to a corporation or a related entity, means a physical establishment where products are offered for sale to the general public and where the corporation or a related entity sets the price at which the products are offered for sale.

If you have a franchise, the franchise corporation might set the price.

Prof. Zumbo—I will just explain because I think people are getting confused. In a true franchise situation, the franchisor will have a maximum recommended retail price. The franchisor, being a separate entity to the franchisee, cannot dictate to the franchisee what price they can sell that product at because that would be a breach of section 48 of the Trade Practices Act, which is resale price maintenance. So individual franchisees independently set their price at that retail outlet.

CHAIR—For example, if you had McDonald's setting their prices throughout—

Prof. Zumbo—You have to be careful because McDonald's Corporation does not set prices other than at their own stores, because to set a price at a franchisee's store would be a breach of section 48 of the Trade Practices Act.

CHAIR—So a corporation cannot fix the lowest geographic price where it has got independent operators in its store.

Prof. Zumbo—Those independent operators set their own price, and that is very clear. If McDonald's has company stores, as they do, and they set a price, it would have to be the lowest price in that geographic area. Similarly, if a McDonald's franchisee has more than five outlets in the same geographic area then that McDonald's franchisee will need to set the same price.

CHAIR—In terms of the prices, I take it from this amendment that it is in real time, so if a store in one area drops its price towards the end of the day—say, at 4.30 they decide to have a sale of bakery items, which I am presuming are not about to expire—then every other store within 35 kilometres must change that too.

Prof. Zumbo—There are two answers to your question. If they are clearing the bakery items at the end of the day, I would suggest that comes within the imminently perishable category.

CHAIR—I am saying they are not imminently perishable.

Prof. Zumbo—Let us take a real example with petrol because it is simpler to understand. If this amendment were in place—

CHAIR—Can we not talk about petrol because I think the pricing of petrol, as many inquiries have demonstrated, is particularly impenetrable to most of us. I would rather talk about items where we can understand the pricing.

Prof. Zumbo—I am very happy to talk about it in a grocery context. If none of the exceptions under the Blacktown amendment apply and there was a decision at supermarket A to drop the price of product X, that would then hit the system, that would have to be physically entered into the computer system, because otherwise it would not scan correctly. So it is on the computer system.

CHAIR—You are talking about large grocery stores.

Prof. Zumbo—Yes.

CHAIR—What about the franchisee that does have five or more stores and does not have an interactive computer system?

Prof. Zumbo—The reality there is, for the simple reason that they do not have the IT, it is most likely that they will have a single price. It is more efficient to have a single price.

CHAIR—So at a Bakers Delight store, for example, they might not have a single price but the store might decide to do a special. If they have five or more Bakers Delight stores, then they will be required to be online or they will be required to ring around all their stores and say, 'I am dropping the price on this item, you have to match it.'

Prof. Zumbo—They will do that if they have price changes anyway. They will ring their manager on a daily basis to pick up that information. We have to be careful not to consider this in an abstract form. In relation to bakery items, the imminently perishable exemption applies. The point I want to make is that you have to consider the exemptions as part of the Blacktown amendment because the exemptions will kick in, and

they will kick in regularly during the day on particular products. You cannot look at the single price policy in isolation from the exceptions. They are supposed to work together.

CHAIR—Suppose you have a Bakers Delight bakery in the middle of a shopping centre, the cafe across the way runs a special on finger buns with a coffee and the Bakers Delight store wants to drop the price of its finger buns.

Prof. Zumbo—They can if there are five outlets. Once again, you have to look at it in a business context. If the person offering the finger bun discount is also part of a chain—it could be a Wendy's, a Brumby's or some other company—they will probably have a national special or a regional special and Bakers Delight will also be responding to that in real time. I know you do not want to talk about petrol, but Coles had some deep discounts on petrol—40c if you bought \$300 worth of groceries. Within a couple of hours Woolworths matched that and they matched it across all their stores. We have to look at this in a business context, because business is real time.

CHAIR—I am not really concerned about the larger operators in any case. We have heard evidence here today that ALDI are already on national pricing, Woolworths are going to national pricing and the assumption is that Coles will follow them. So this amendment really is not going to make much difference one way or the other to them. I am concerned about those groups in the middle who may have to face quite an onerous change to their software systems or a compliance regime that is going to be difficult for them.

Prof. Zumbo—I am concerned about consumers getting the lowest prices every day in every way. In amongst that I am concerned that Coles, Woolworths and the major retailers offer the best price they can every day and everywhere. If they are moving to uniform price then they would support this amendment and that would be a good thing. But they are not supporting this amendment, so we cannot consider Coles and Woolworths outside this question.

In relation to the small operators, my discussions over a long period of time suggests that a lot of those small retailers will have a single price policy, because it is just easier; it is simpler. You do not want to be spending management time changing prices. However, from time to time they will move stock. At a fashion outlet a line of trousers or dresses will have been there too long and they will move it, and there is an exemption for that to move that stock.

CHAIR—Let us go through that. There is an exemption for deleted stock but not necessarily for ones that are not moving very well because the weather is unseasonably warm or something.

Prof. Zumbo—Can I respond to that by saying that I believe paragraph (f) would take that into account.

CHAIR—I have:

(f) a price of a product marked down because the product has deteriorated in value as a result of being on display in a retail outlet for a substantial period of time ...

Prof. Zumbo—My response to that would be that, if it has been sitting on your shelf for a period of time, it is not selling and it is obviously deteriorating in value and you want to move it. The only way you are going to move it is with a lower price.

CHAIR—What if it is raining and you have got umbrellas and you decide to mark them down to get people into your store?

Prof. Zumbo—The reality is that rain and showers do not happen necessarily in one suburb; they will happen across a region. One would imagine that if it were raining in Sydney one day that all umbrellas would be—

Senator CAMERON—I am glad you are giving evidence to the climate change inquiry!

Prof. Zumbo—If it rains in a particular suburb the reality is you drop your price there. Why can't you drop it elsewhere? That rain shower might be moving across suburbs.

CHAIR—I am not against dropping prices anywhere; I am just talking about the practical reality of either having to have a computer system that facilitates that or having someone able to ring around and tee up with all the other stores that it is all right for them to reduce their umbrellas and they have people there to mark it down and all that kind of thing. As I have said before, compliance costs have been raised with other issues when we have had changes. There is also the uncertainty about the wording of legislation and what it applies to and what it doesn't apply to. I am putting to you, I think, arguments that you have put to me before in other inquiries.

Prof. Zumbo—The reality is that business works in real time. Specials will come on from time to time and your competitors respond in real time. I have suggested that that is what happened with Coles with their deep discounting and Woolworths matching it. It happens in small fashion retailers, where the competition will drop their prices on particular fashion items. You have to respond. Typically when it is a chain environment they will drop their product in unison to get that marketing bang for their buck.

CHAIR—How certain are you of this? The retailers group are opposed to this legislation.

Prof. Zumbo—That is the big retailers. I have spoken to smaller retailers and the answer I get back—

CHAIR—You have just spoken; you have not done any kind of survey whether they do operate in real time?

Prof. Zumbo—They do. I have spoken to fashion retailers. If I can just put that on the record. What they say is that we have a single pricing policy (1) because it is simpler and (2) it prevents arbitraging. I am selling a dress for \$40 in one store and it is sold at \$80 at another store. If a consumer buys it at that store for \$80 and the customer's sister tells her that that dress is \$40, they will return the dress that was \$80. Consumers do engage in arbitraging, particularly in relation to those fashion items.

CHAIR—Which of the fashion retailers have you spoken to.

Prof. Zumbo—I would prefer not to name those in terms of confidentiality of pricing behaviour of those retail chains.

CHAIR—I am not asking you about pricing behaviour; I am just trying to get a feel for what sort of range of chains you have been speaking to.

Prof. Zumbo—I would prefer not to name the individual chains that I have spoken to.

CHAIR—But you have spoken to a number of them?

Prof. Zumbo—Yes, but I would prefer not to name them, because they have spoken to me in confidence in relation to their pricing behaviour.

CHAIR—I just asking—

Prof. Zumbo—I would prefer not to name them. They have provided me information in confidence and I am not about to betray that confidence.

CHAIR—I do not want the information, but if you do not want to name them, that is fine.

Prof. Zumbo—I can also say that I have observed these pricing practices over a very extended period of time and what I have been told in conversations certainly reflects my observations.

CHAIR—All right. To get onto the competition aspects of it, you have quoted Hilmer with the repeal of section 49 and said that they did it because they thought it was covered by other aspects. The quote I have here in the briefing paper is that the Hilmer review concluded that:

To the extent that s.49 has had any effect it seems to have been to diminish price competition.

Prof. Zumbo—I disagree. The words there 'seems to' suggests an observation made by the Hilmer committee. I disagree with that observation.

CHAIR—On any evidence?

Prof. Zumbo—Based on my observations and my confidential discussions.

Senator XENOPHON—Professor Zumbo, could we go to some of the criticisms raised by Treasury, since they will be giving evidence shortly. They say that this bill would introduce a blunt and poorly targeted type of price reduction; it would replace the flexibility of the market mechanism with a legislative outcome that fails to address specific anticompetitive behaviour; and that the trend in Australia and overseas has been to repeal provisions similar to those contained in this bill because of the negative consequences of these provisions. Could you address some of those concerns?

Prof. Zumbo—The repeal in other countries has also been made following observations that it may seem to keep prices higher. I have not seen that objectively tested. I have not seen empirical evidence that backs that up. It becomes a political exercise when these provisions are repealed. You can see that the vested interests are very well organised and they will be very well organised in trying to remove these sections in other jurisdictions. But they do remain in the United States; they do remain in Europe. Unfortunately, however, in some jurisdictions there is a philosophical objection to these laws on the basis that they put their faith in contestability theory. A lot of these repeals are based on assumptions made on contestability: 'You do not need

these price discrimination laws and our general provisions would be effective.’ But all those contain fallacies and are points that I would strongly argue against.

Senator XENOPHON—Senator Cameron has talked about information asymmetry in the marketplace. Would you say there is an information vacuum in policy making in this regard in terms of there having been broad assertions made? This is not a criticism of anyone in particular, any witnesses on both sides who have said that either it will make a difference or it will not make a difference. Is there an argument for having some further robust collection of data in the context of how this would work or the implications of it? Or is it the case that the principle is sound but you need to collect further data to see how it would be implemented, particularly in relation to the issue of, say, the 35 kilometre radius and, as Senator Hurley has raised, the five stores in a region threshold?

Prof. Zumbo—I could not agree more. One would hope that Treasury, with all their resources, have done this modelling or would consider doing this modelling. I am a humble academic—

Senator XENOPHON—It does not appear so to the committee.

Prof. Zumbo—with no particular resources to engage in the extensive modelling exercise that Treasury and the Productivity Commission could. So I would certainly support a recommendation from this committee that there be extensive modelling done on an Australia wide basis on how the Blacktown amendment would work, how pricing would change. We have had assertions from Treasury which may be based on their observations or may be based on their modelling of this legislation. But in terms of my observations and my discussions over a very extended period of time, having regard to the way the Blacktown amendment has been constructed, I believe it would produce a result being the lowest possible price. At the end of the day there seems to be a lot of argument by some big interests about why they cannot do this. I would like to hear the arguments why they cannot give us the best price every day and everywhere.

Senator CAMERON—You talk of vested interests. It would seem to me that Treasury would not have a vested interest in this, unless there is something you know that I do not know. Treasury basically say that this bill would lead to mixed price effects in the short term as prices will rise in some locations but fall and others, it will reduce discounting activity and specials, it will lower service quality and convenience, there will be a loss of choice for consumers and there will be a higher average price for consumers in the long term. That is quite a damning indictment of the Blacktown amendment, and I am wondering why they would come to such a polemic compared to your analysis on this issue.

Prof. Zumbo—I am looking forward to hearing very much to hearing Treasury. Given that their resources are considerably greater than mine, I would like to see and expect a modelling exercise to back up all those statements. But in taking all those statements, they are observations. No, I certainly do not consider Treasury a vested interest and I make that absolutely clear. But, as I said, I am keen to hear from them in terms of whether they also believe in contestability theory, what observations they have made in relation to the Blacktown amendment, what consultation they have had with other than Coles, Woolworths, ANRA and the big retailers. I would be interested to hear whether they have had discussions with NARGA, which you heard previously. So I am very keen to hear what Treasury has to say. In relation to their specific concerns, I will seek to address those in a supplementary submission. But in terms of those assertions, I believe this amendment will lead to lower prices across a geographic area because we have heard evidence about Aldi and about Woolworths. We hear that specials are state-wide, if not nationwide. You have to understand that informing the market of specials is a costly exercise if you are printing out advertising brochures, and that is why weekly specials are across a geographic area, because you want to maximise the bang for the buck for the marketing that you undertake. Having different price structures annoys consumers, may confuse consumers. A single pricing strategy is simpler, it is less costly to implement. The reality is that any savings from implementing a single price can be passed on to consumers.

I do believe that this will reduce costs because analysing data to look at different prices, having management making different pricing decisions, other than within the exemptions provided for in the Blacktown amendment, takes up management time—it costs. It eats into their profit margins perhaps if the manager makes the wrong decision. You have pricing errors when there are different prices. They are the specific points in rebuttal of the Treasury comments but I am happy to go further in a supplementary submission.

Senator CAMERON—The Treasury submission also indicates that, when a business is free to price flexibly, strong discounting activity occurs, particularly in areas of strong competition. I have asked Treasury about this, but I would like your view, given that you have looked at this over a long period. Where there is not

strong competition, what is your view of the effect? Do you know where there is really strong competition in the retail grocery market in this country?

Prof. Zumbo—There are a lot of questions there. In relation to the last question, the ACCC provided ample evidence that where you have an ALDI store there is intense competition and the prices are lower in Coles and Woolworths. I would agree with Treasury on the proposition that prices are lower where there is intensive local competition. In fact, I would go stronger and say that prices are generally only lower where there is strong local competition because that is the only place that Coles and Woolworths are forced to lower their prices. I am concerned about all those suburbs where you do not have strong local competition. Yes, it would be great to have new competitors in all these suburbs but for the reasons I said before about barriers to entry, you cannot have new competitors in all the suburbs around the country while the barriers remain. So if the government was moving towards removing all those barriers to entry, that would give me a greater level of comfort, but if we are not removing those barriers, if there are suburbs where there are higher prices because of a lack of local competition, what I am trying to do with the Blacktown amendment is to create virtual competition. I am trying to take a situation where they are independents in the market keeping prices down and I want to replicate those prices across to other local markets where there is not a stronger local competitor.

Senator CAMERON—Do you agree with the findings of John Bratlin when he said there are paradoxes and contradictions in contestability theory?

Prof. Zumbo—Absolutely. I am certainly not a disciple of contestability theory subject to this comment. You can only have contestability when you have no barriers to entry and no barriers to exit. You can only have free markets where there are no market failures. Yes, I believe in a market economy. I do believe in the value of markets but I also acknowledge that markets fail and the only time that regulation should be considered is when markets fail. Even then, when you consider regulation, it has to be the minimum effective to produce the outcome. I do not believe in prescriptive legislation; I believe in principles based legislation and I believe in simplicity in regulation, but markets fail. Markets are not always contestable because of market distortions and barriers to entry. There are significant barriers to entry, which even the government itself has recognised with restrictive leases. I am concerned to make the market work better, to work more efficiently. I would always remove barriers to entry wherever possible, but it has to be a suite of proposals. I certainly do not pretend that the Blacktown amendment is the only policy that should be pursued. I believe we need to actively pursue the removal of all barriers to entry—restrictive covenants, land banks, zoning laws, the 20 per cent of restrictive leases. We need price transparency. We need a website to give consumers real-time information. I would like to see Coles put up their own website as a service to their consumers. I would like to see a wide-ranging suite of proposals to make this market as competitive as possible. At the moment it is not as competitive as possible.

Senator CAMERON—The National Association of Retail Grocers of Australia say that market concentration is the fundamental issue.

Prof. Zumbo—Market concentration is ultimately, Senator, and you have market concentration—

Senator CAMERON—You are not letting me finish.

Prof. Zumbo—Sorry.

Senator CAMERON—If market concentration is the issue, can the Blacktown amendment really make a difference, if you still have this market concentration which is permeating the industry from their point of view?

Prof. Zumbo—I do want to put on the record one factor. Market concentration is a problem and what I was going to say when I interrupted you was that as markets become more concentrated there are fewer competitors in the market to keep the remaining players honest. You can only have efficiencies through mergers if there is sufficient competition left in the market to drive prices down. I see the Blacktown amendment as one key plank of a policy strategy to make the market more competitive, to make it as competitive as possible, to lower prices on the basis that we are trying to replicate competition through the Blacktown amendment in those local markets where you do not have a strong price-competitive independent. The reality is where you have a strong price-competitive independent today, that independent would be there after the Blacktown amendment came into effect. That price-competitive independent would remain competitive because the independent has to be as competitive as possible on price to get customers in. So the Blacktown amendment would mean that not only do you still get lower prices in those local markets where there is strong price-competitive independent, but under Blacktown you would get those same lower prices in

all those markets that currently have higher prices because they do not have a strong price-competitive independent.

Senator CAMERON—I suppose the Hilmer committee report on national competition policy was extremely influential. That has been used to justify opposition to the Blacktown amendment. I suppose there is some validity in the argument that Hilmer got it right on some things; I am sure he got it wrong on others. This issue goes back now to 1993 for Hilmer. Are the same fundamental issues still in play now that would have influenced Hilmer's view—and I know you cannot talk for Hilmer—as there were in 1993 or have things changed?

Prof. Zumbo—They have got worse. The retail market has become much more concentrated. The petrol market has become more concentrated. We have seen the liquor market becoming more concentrated. Since the Hilmer reforms were put into place we have seen markets become more highly concentrated. During that time I have closely looked at the OECD food inflation numbers and I have seen that food inflation has been increasing since that time. When you put all those things together, where markets have become more concentrated, where we have evidence from the ACCC that Coles and Woolworths prices are lower where there is an ALDI, when you see the food inflation numbers growing, it concerns me that the issue has not gone away and certainly the problems are getting worse. As I said, removing those barriers to entry in 80 per cent of retail leases yes is one step but many more steps need to be undertaken because these barriers to entry are slowly allowing companies like Coles and Woolworths—and use these words simply to suggest what they are doing—to spread their tentacles or to colonise particular suburbs. They will go to a particular suburb where there is a price-competitive independent and do whatever they can to remove that independent. Once they remove that competitor, prices will go up. Even if Coles and Woolworths do not remove that competitor and the competitor goes out of business prices will go up. So the reality is that over time Coles and Woolworths are taking over more and more of these suburbs. We have seen in petrol, we have seen it in grocery and we will see it in retail liquor and in hardware. Bit by bit they will colonise the suburbs and we will have fewer independents. With fewer and fewer independents, the reality is that prices go up.

Senator CAMERON—Was it in your submission that you say when Hilmer dealt with the issue of the Trade Practices Act, I think it was section 49, that he felt there needed to be some other aspects of the act that would continue to operate and you are saying that is not operating any more? Is that 47?

Prof. Zumbo—That his section 46.

Senator CAMERON—Can you explain that to us?

Prof. Zumbo—Thank you, Senator, because that is a very important point—that is, the repeal of section 49, dealing with price discrimination, was justified on the basis that section 46, which deals with abuses of market power, was sufficient as a general provision, so we prefer general provisions rather than specific provisions if they can do the same thing. The underlying assumption of the Hilmer report was that section 46 could do the same thing. At that point in time, we had not had the Boral case. Since the Boral case was handed down by the High Court, the whole dynamic in relation to section 46 has changed on the basis that it is now almost impossible to bring section 46 cases. So the general provision is not working, on the basis that the threshold test of substantial market power is too high. That is why parliament enacted the Birdsville amendment—to have the test of substantial market share in relation to predatory pricing. So the reality is that the general section 46 provision, with the exception of the Birdsville amendment as part of that general provision, is not working effectively.

Senator CAMERON—Thank you.

CHAIR—As there are no further questions, I thank Professor Zumbo for his attendance this afternoon.

Prof. Zumbo—Thank you, Madam Chair.

[4.16 pm]

ABBOT, Ms Simone Rochelle, Acting Senior Adviser, Competition and Consumer Policy Division, Department of the Treasury

KENNEDY, Dr Steven Kevin, General Manager, Competition and Consumer Policy Division, Department of the Treasury

SALISBURY, Mr Kim, Acting Manager, Competition Policy Framework Unit, Department of the Treasury

CHAIR—Thank you, Dr Kennedy, Mr Salisbury and Ms Abbot, for coming in. Dr Kennedy, do you have an opening statement you would like to make?

Dr Kennedy—I have a brief opening statement to make. Thank you for the invitation to appear today. As I have heard it referred to earlier, we provided a submission to the committee last week which outlined a number of concerns that we have with the Blacktown amendment. If I might, I will just briefly outline some of our concerns.

Primarily, we consider that in the longer term, if implemented, the Blacktown amendment would reduce local competition and result in higher prices on average for consumers. This is because the Blacktown amendment would reduce incentives for new investment, as business would be prohibited from setting locationally specific prices. Business would be constrained in its ability to recover the costs of its new investment and would be less likely to make those investments. By creating this barrier to entry, the Blacktown amendment would reduce competitive pressure in the market and allow incumbents to raise prices. As I said earlier, we think this would lead to higher prices on average for consumers in the longer term. We also consider that the Blacktown amendment, if implemented, could lead to less discounting, lower service quality and convenience and a loss of consumer choice.

Further, we do not consider that the Blacktown amendment is an appropriate approach to addressing predatory pricing conduct. By removing price flexibility, the Blacktown amendment does not distinguish between procompetitive pricing that benefits consumers through lower prices and anticompetitive behaviour that hurts consumers by seeking to eliminate competition. The Blacktown amendment would override key elements of the current rules on predatory conduct whereby a firm must have market power or substantial share of the market, the pricing conduct has an anticompetitive purpose and there is an examination of the relationship between prices charged and the costs of services provided. The ‘bright line’ test created by the Blacktown amendment condemns the behaviour of all retailers above five stores, regardless of their degree of market power or purpose, and consequently will dramatically restrict a wide range of procompetitive pricing conduct as well as possibly some anticompetitive conduct.

The existing section 46(1) of the TPA prohibits a business with a substantial degree of market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor or preventing the entry of a person or business into that or any other market. In our view, that provision is well targeted to prevent predatory pricing. At the same time, it allows businesses sufficient pricing flexibility to compete effectively and to provide their products at efficient prices.

In general, we consider that interventions by the government in markets should seek to encourage greater competition in the interests of all Australians. In our view, the price regulation imposed by the Blacktown amendment would discourage competition and increase prices in the longer term. I will end by reflecting on some earlier comments. We are certainly in favour of as much competition as can be generated in these markets; we just do not feel that the Blacktown amendment will achieve that goal. Thank you.

CHAIR—Thank you, Dr Kennedy.

Senator XENOPHON—Dr Kennedy, the Hilmer review in 1993 recommended the repeal of section 49. In part, it said that section 46 was there to provide protection to consumers—although in 2003 the High Court handed down its decision in the Boral case. Do you concede that the facts of the Boral case, given the High Court’s interpretation of section 46, indicate a very limited scope that would protect behaviour by corporations in terms of predatory pricing, again focusing on the particular circumstances of the Boral case, where section 46 was interpreted so narrowly?

Dr Kennedy—I will ask my colleague Simone to comment on that.

Senator XENOPHON—While you are looking for your notes, Ms Abbot: you are familiar with the facts in the Boral case, where there seemed to be such a high threshold set to provide protection for the business that appeared to be the target of Boral's behaviour?

Ms Abbot—Sorry, Senator; I am not sure what to add at the moment.

Dr Kennedy—Senator, is your question that—

Senator XENOPHON—Perhaps I can rephrase it. Section 46 is not much chop, given the High Court decision in the Boral case, in the sense that—

Dr Kennedy—So you are asking: does Treasury have a view that section 46 is no longer addressing predatory pricing, given the decision of that case?

Senator XENOPHON—I will put it another way. In the summary in your submission, you say:

The section 46 provisions are an appropriate measure mechanism for preventing unfair pricing practices as they only prohibit geographic price discrimination that is anti-competitive.

Dr Kennedy—Yes.

Senator XENOPHON—Does that not imply that you are satisfied with section 46(1) in its current form, notwithstanding the decision of the High Court in Boral and the set of circumstances there and the way that section 46 was interpreted by the High Court?

Dr Kennedy—Broadly speaking, we prefer, if you like, the current arrangements as they stand, including section 46, in preference to the Blacktown amendment, for example.

Senator XENOPHON—Going back to section 46 and the Boral case, because in terms of preventing unfair pricing practices you have relied on section 46—is that correct? I am not misinterpreting your evidence in relation to that?

Dr Kennedy—I believe so, yes.

Senator XENOPHON—Okay, so it seems to be quite clear in your submission. But section 46 has been interpreted by the High Court in the Boral case—correct? You would agree with that assumption?

Dr Kennedy—Yes.

Senator XENOPHON—The factual circumstances upon which that decision is based appeared to place such high barriers for a remedy to be sought by business from section 46, given the geographic price discrimination that occurred in that case for the paving company that was the subject of Boral's predatory pricing behaviour, where the High Court said that there was no remedy under section 46. You would agree with that proposition?

Dr Kennedy—Yes.

Senator XENOPHON—Doesn't that itself indicate a narrowness in the scope of section 46 in that we need to be looking at alternative remedies to deal with unfair pricing practices?

Dr Kennedy—The difficulty I have with responding to this, Senator, is that I cannot foreshadow the government making a range of policy changes to section 46. I can talk technically about how it works and its application, and you have outlined how that case has refined its interpretation. What we have outlined in our submission is our view that the existing arrangements, including section 46 and including its current interpretation, are a preferential set of arrangements to the Blacktown amendment. But I cannot foreshadow whether the government is going to—

CHAIR—I am sorry to interrupt. I think you are interpreting it as a policy question about government attitudes, whereas I think Senator Xenophon is asking—I am sorry to paraphrase it—about whether you think that that case tightened the understood provisions of section 46, which I do not think is a policy issue.

Dr Kennedy—Sorry; I did hear that question through Senator Xenophon's discussion. I thought I answered yes.

Senator XENOPHON—Senator Hurley is much more eloquent than I in setting it out. Your submission makes reference to section 46, as providing protection against unfair practices. Is that correct?

Dr Kennedy—Yes.

Senator XENOPHON—I think it is quite clear. I do not want to labour on this too much, but the Boral case seems to have set such a high bar for a remedy for an aggrieved entity that that in itself indicates the limits of the scope of section 46. Is that an unreasonable proposition, from your point of view?

Dr Kennedy—Let me just be clear. Are you asking me to comment on your view that section 46 is unfair? Are you saying—

Senator XENOPHON—Actually, Dr Kennedy, I am asking you to comment on Treasury's view, as stated in its summary of submissions, that:

The section 46 provisions are an appropriate mechanism for preventing unfair pricing practices ...

Dr Kennedy—That is our view.

Senator XENOPHON—And that view is maintained even in light of the Boral decision and the circumstances of the facts there, where this company was almost driven out of business but the High Court said that it could not intervene?

Dr Kennedy—Yes, that is our view.

Senator XENOPHON—You can understand, though, can't you, why there might be some small businesses in this country that would say that there ought to be a better way of looking at protecting against unfair pricing practices?

Dr Kennedy—I can understand why people would take a range of views. I apologise, Senator; I guess I had not come with a focus on a section 46. I had come with more of a focus on discussing the Blacktown amendment. But I am of course happy to discuss other aspects.

Senator XENOPHON—It is not being disrespectful at all, Dr Kennedy. The reason I have raised that is that it is right up there in the summary of your submission and it seems to be a premise for saying, 'We can deal with these issues under section 46.' It seems that there are real issues with section 46, given the High Court's decision in Boral.

Dr Kennedy—I understand your view.

Senator XENOPHON—So you can understand why I have pursued this line of questioning, given your submission?

Dr Kennedy—Yes.

Senator XENOPHON—You said in your submission:

However location, surroundings, service and convenience are all significant components of any product.

In my experience, when you go to a big Woolworths supermarket or Coles supermarket, as distinct from a Coles Express or the smaller convenient store outfits, you basically get the same service. It is a standard business model. It is like for like with a Coles supermarket and a Woolworths supermarket. Is it your experience that you do not have a substantially different shopping experience between the two?

Dr Kennedy—I have not found that I have had a substantially different shopping experience once I have entered the store. But there are, of course, the characteristics of where the store is located, the parking that surrounds the store, the ability to get to and from the store and a range of other factors. When I think about what store I might be going to, I would take those things into account.

Senator XENOPHON—But is it your understanding, though, that these stores would work on a business model where, even taking into account if rents are higher in one place than in another, it is usually evened out on a per customer basis? Is that your understanding? It is my understanding of the way that retailers work. They might be paying less rent in one area—

Dr Kennedy—I see what you mean.

Senator XENOPHON—In the sense that they will have lower throughput but, if it is in a busy mall—I think we have World Square down the road—I presume they would pay a bit more because they have a much higher throughput, so it works out about the same per customer through the store. In the factors that you refer to, it would even out, would it not, in terms of their business model?

Dr Kennedy—I would have thought that location specific factors—where firms are located—their leases and a range of other matters would be reflected. Are you arguing that they are not reflected in different costs?

Senator XENOPHON—I am asking whether there is a basic business model. Coles and Woolies are not mugs. Between them they have got 78 per cent or 80 per cent of the dry grocery market. They make decisions

based on the commercial realities of how they make a quid in a particular area. If they pay a bit more rent in one area, it is because their business model assumes that they will have a greater number of customers walking through the store. So the cost for rent per customer works out about the same as a place where there is a lower rent.

Dr Kennedy—I am sure that is the case in some cases, but I would not be certain that it would be uniform in the manner that you have described.

Senator XENOPHON—I want to move on to an issue that Professor Zumbo raised—and I think Senator Cameron referred to the whole issue of information asymmetry for consumers in terms of pricing information. An example, given by NARGA this afternoon, was of a situation where there were three Woolworths branded petrol stations within an eight- to 10-kilometre radius, two across the road, on Parramatta Road at Burwood, and at the same time there was a difference of 3c a litre and about seven or eight kilometres down the road there was another Caltex-Woolworths service station where the price was, I think, about 109c. Senator Hurley says that petrol is something unfathomable, but that is a situation where it was about 109c a litre but very close by there was a Mobil station. There is an issue, is there not, where a big chain can pick off the smaller guys, particularly the independents, in the context of their pricing practices?

Dr Kennedy—I have to admit that I got a little lost in the example, but I think I have the gist—

Senator XENOPHON—I will be a bit more precise. There are three service stations of the same company, Woolworths-Caltex, within an eight-kilometre radius. There is a difference of about 16c a litre. Of those three service stations, the cheapest service station happens to be right next to a competitor. So there price is much lower because there happens to be another service station nearby. That seems to be the only differential factor in terms of competitive forces.

Dr Kennedy—So you are arguing that the competition drives prices lower?

Senator XENOPHON—No; I am arguing: is it fair that up the road you have a differential of 16c a litre and another operator seems to be the subject of, if not predatory pricing, discriminatory pricing compared to several kilometres up the road?

Dr Kennedy—I obviously cannot comment on the specifics of that case, but the best outcome for consumers is that there is that competition and there is the opportunity for them to get, in this case, petrol—in that case—in one location at a lower price. If it happens to be the case that there is less competition in another location and the price is higher, I cannot—and I probably would not—make a judgment about whether or not that is fair. From a consumer's perspective, I think they would like to see as much competition as possible and the lowest possible prices.

Senator XENOPHON—Perhaps it is safer to go to the grocery market. One of the issues raised is that, where there is an independent supermarket near a Coles or Woolworths, the prices will generally be lower in Coles or Woolworths compared to an area where there is not that competition. That is seen as unfair by the independent operator on the basis that they simply cannot compete on a fair basis with a supermarket up the road in terms of the price differential. One of the issues raised by Professor Zumbo was that you need to have some extensive modelling done in order to determine what the price impacts are on consumers. The Treasury submission has made a number of assertions—that this bill will cause a reduction in price discounting; it will discourage non-price competition; it will have mixed effects on prices in the short term; it will distort investment incentives, causing a long-term reduction in competition; and it will cause high prices in the long term in terms. There was a whole range of criticisms which you have set out. What is the basis for those assertions? Has any modelling been done or any analysis undertaken in terms of the impacts on the pricing practices of some of the larger retail chains?

Dr Kennedy—The basis of our assessment is our understanding of how markets tend to work, and also are a reflection on our previous examinations of this issue such as the Hilmer committee and the Dawson review. The type of modelling that people might do here, I would strongly support as much data and information that can be brought to bear to any policy question. I am not quite sure what type of modelling exactly we would do here. We could compare areas where there were a number of firms located and contrast them with prices in others, but I would have thought that would simply confirm our prior idea that wherever there is stronger competition, prices will be lower. Are you suggesting a different form of modelling?

Senator XENOPHON—I am just trying to understand. You said you have reached these conclusions on the basis of your understanding, but it seems it would be useful for further empirical information to be gathered that would add to Treasury's understanding about how the market operates.

Dr Kennedy—This is maybe a matter you can raise with the ACCC when you speak to them, but I believe—I will ask my colleague, Mr Salisbury, to comment on this in a moment—that in the retail and grocery inquiries undertaken by the ACCC, they did do some empirical analysis of those sorts of issues. This is from memory, so I will ask my colleagues to comment on this, but, for example, they found that wherever major supermarket chains were co-located there was more competition and prices tended to be lower.

Mr Salisbury—Yes, that is right. I think particularly prices were lower where there was an Aldi supermarket, but not necessarily where there was an independent. One of the findings from the ACCC report was that the major retail chains tend not to compete directly with independents because they provide a different type of service. It is more of a convenience service and not a broad range of the same sorts of goods that a major retail chain might find. I think it is attachment D in the ACCC report that looks at all of these various price impacts.

Senator XENOPHON—You are right, and it was referred to earlier today in evidence about the ACCC's findings. When it was Aldi, there was about a five per cent drop in prices compared to if it was just a Coles or a Woolies, when there was a 1.3 per cent differential in prices. But going back to the issue. You made a number of broader assertions here, Dr Kennedy, rejecting the premise of this bill. Are you saying that it would be useful for some further facts to be obtained in order to strengthen or perhaps even weaken your understanding as it currently stands in relation to the assertions you have made?

Dr Kennedy—As a general principle, it is always useful to shed as much light on any policy question through data and information and an understanding of how prices vary.

Senator XENOPHON—But it would be reasonable to say that on the basis of the assertions made in your report, that is on the basis of broad understandings about how the market works rather than any specific empirical evidence or any modelling done by Treasury?

Dr Kennedy—We have not done any modelling between being invited to appear, preparing the report and appearing. But it is a broader reflection on the understanding of Treasury officers over a longer period of time. As Mr Salisbury outlined, it is a reflection on some of the studies that have been undertaken by the ACCC. Perhaps we could narrow this down a bit. Is there a type of information that you are thinking that we should be looking at that has not been looked at that would shed light on in this issue?

Senator XENOPHON—The primary issue for me—

Dr Kennedy—I am sorry to ask you a question. I know it is not my right to ask questions of you.

Senator XENOPHON—That is alright. I guess the issue is that you have made a number of assertions about the reduction in price discounting and discouraging of non-price competition. I would have thought the onus would be on Treasury to say on what basis you have reached that conclusion. Is that decision reached on the basis of an understanding or on empirical evidence, on any research or on any modelling? Can you take that question on notice? In other words, what is behind these assertions? Does it go beyond any understanding?

Dr Kennedy—It goes beyond understanding. I am happy to take the question on notice. We have not done any specific modelling; I can answer that part of the question.

Senator XENOPHON—If you would elaborate on whatever forms the basis of this opinion, I would appreciate it.

Dr Kennedy—I am happy to do that.

CHAIR—Dr Kennedy, in part of your submission you say:

In reviewing the repeal of Section 49, the Dawson Review reinforced the decision

That was in 2003. Is that right? It goes on:

More recently, in 2003 the Dawson review found that:

This is on page 6.

Dr Kennedy—That is right.

CHAIR—I have not had a chance to look up the Dawson review. Was it set up specifically to look at the repeal, or was it a broader look at the Trade Practices Act?

Ms Abbot—It was a broader look at the competition provisions in part IV of the Trade Practices Act.

CHAIR—Right. That is relatively recent. Did that review go into the detail of looking at data in conjunction with the ACCC? How detailed was the examination?

Ms Abbot—I was not working in this area at that time, and so I am not sure about the logistics of how the review committee itself coordinated with the ACCC on these particular things, but I would imagine that those sorts of considerations were discussed. Certainly, the ACCC provided submissions to the committee in responding to the committee's terms of reference.

CHAIR—What year was the famous Boral case?

Senator XENOPHON—It was in January 2003.

CHAIR—If the Boral case was in January 2003, the review would have come down after that. I will just read out the quote, which is why we checked this out. It says:

The effect of price discrimination on competition should be considered on a case-by-case basis.

Senator XENOPHON—It was in February 2003, Chair.

CHAIR—Thank you.

Section 46 of the [TPA] provides an appropriate means to tackle anti-competitive price discrimination. There is no case for the reintroduction of a prohibition against price discrimination ... There are reasons for differences in wholesale prices in the grocery industry which do not involve anti-competitive practices.

So it does seem that the review of section 4, apparently, and section 49, and 46 under that, found that section 46 was adequate.

Dr Kennedy—That is correct.

CHAIR—I am sure that if Senator Joyce were here he would be asking about successful prosecutions under section 46.

Dr Kennedy—I believe he has asked the ACCC that question in the past.

CHAIR—Yes, many times. It does seem to us to be an issue in view of the high market share of the two major grocery chains and the fact that, anecdotally, there is a lot of frustration expressed with the current situation. The problem is, it seems to me, that there are some practical problems with the Blacktown amendment, and some worry about whether it will be pro or anti competitive. It is those anti-competitive aspects I would like to explore a bit more with you—that is, the reduction in price discounting and the discouragement of non-price competition. We have heard evidence from other witnesses here that it works very well in the United States. Is there any evidence from other countries where this type of legislation is in place where it has caused this kind of price distortion that you talk about? I think the National Association of Retail Grocers said that it was working very well in the United States.

Dr Kennedy—Before handing over to Mr Salisbury, I would like to make a couple of comments. It is not my view, but I will ask Mr Salisbury to comment, that it is widely accepted that it works well in the United States. In our submission we drew attention to the fact that Canada had chosen very recently to repeal some provisions that looked a little like those that Australia used to have. Of course, the Blacktown amendment goes further than that.

I also think it might be worth while my noting that policy approaches designed to improve competition, such as lowering barriers to entry, ensuring that people can get into the market and compete and, perhaps, planning and zoning issues, are important policy considerations that we would encourage people to think about in promoting competition in the grocery market. To go back to my earlier comments, we are of the view that price regulation, which is effectively what the Blacktown amendment is, is not a mechanism that would achieve those aims. Please do not interpret our comments as being that we somehow or other think necessarily that all is good or bad in the markets and that we do not think it is worth while pursuing policies that would lead to great competition. That is not our view. It is just that we think this particular policy would be counterproductive in pursuing more competitive markets. I will ask Mr Salisbury to comment on the US.

Mr Salisbury—As far as we can tell, there is nothing in the rest of the world operating in any way like the Blacktown amendment would work as proposed. So it is difficult to draw much from that. As Dr Kennedy said, what the Canadians are doing at the moment is what we have previously done to ensure that there is not price discrimination.

CHAIR—Can you elaborate, then, on the US market? In what way is their market different from the Blacktown amendment and why does it work well?

Dr Kennedy—We are not certain that it does work well, Senator. My understanding is that at least one aspect of it still requires—I still believe that it requires an anti-competitive test, if you like, but I will ask my colleagues to have a look. It allows for price variation that is driven by cost and relevant considerations.

Ms Abbot—My understanding is that the submission from the Law Council addressed some of these factors in relation to the US provisions. Our understanding is that it was recommended for repeal in 2007 by the Anti-Trust Modernisation Commission, so there have been some criticisms about the provision in the United States. I do not know whether the way it has been presented by others is quite as rosy as might first appear. It might be best to perhaps refer to the Law Council's submission for further details, because we did not refer in detail to the provision in our submission.

Dr Kennedy—I would also point out just to be careful here. My understanding is the same as Mr Salisbury's. The Blacktown amendment is quite different from the US set of arrangements and what arrangements we had previously, for example.

CHAIR—Thank you.

Senator CAMERON—Is the Canadian retail market similar to Australia's retail market, with a huge dominance by two players?

Mr Salisbury—I do not know the answer to that.

Senator CAMERON—Can you take that question on notice?

Mr Salisbury—Certainly.

Senator CAMERON—I ask because you have raised the issue of the Canadian legislation, and I am wondering whether their market is similar to ours but is operating in a completely different market set-up. That is a different proposition. It really is a different analysis that we have to make. You just cannot say: 'The Canadians do this. This is where we are in Australia.' I think it is a different market, but I am not sure how different.

Dr Kennedy—I guess what we were trying to draw your attention to was that Australia was not alone in repealing provisions that went to this issue. Other countries had found through their own analysis, if you like, that more was to be gained by repealing these types of provisions and allowing the market to operate more.

Senator CAMERON—That may be in the context that they have got a far more flexible and a far more competitive market than we have in Australia. That could be an issue, couldn't it?

Dr Kennedy—It could be, but I go back to my earlier comments. I would hold that, even if it was the view that the markets look quite different, price regulation would not be a mechanism that would be an effective way of improving the situation in the market that you thought was less competitive.

Senator CAMERON—If we have got what you could describe as a market failure in retailing because of the dominance of two players, why isn't it appropriate, until you correct the market failure, to put a transitional proposal like the Blacktown amendment in place until you get better competition?

Dr Kennedy—I will do something I probably should not do, but I would speculate that, if anything, something like the Blacktown amendment could potentially work in the opposite direction. It is very difficult to judge. It could easily put large incumbents in a more powerful position. If I took one of the earlier comments on board that the price in the larger chains would fall to whatever the lowest price was, then only large chains, I would have thought, could absorb such a change. In those markets where there are distinctly different geographical characteristics and higher costs, independents, for example, would have a lot of difficulty competing in that type of market, I would have thought, and things would actually work in the opposite direction.

Senator CAMERON—That is a judgment you are making. You are not coming here putting that as a factual position, are you; it is a judgment that you are making.

Dr Kennedy—It is my assessment of such how such a situation might unfold.

Senator CAMERON—I may want to come back to that. Aldi have got—

Dr Kennedy—Sorry, let me clarify. Perhaps it was something I should not have done. I am not saying that is how it will unfold, but if one took the premise that basically the chains drop their prices to the lowest price then the logical consequences of that are what I outlined.

Senator CAMERON—The National Association of Retail Grocers have raised as a fundamental problem market concentration. You have raised the issue of Aldi in terms of competition being better where Aldi are around. Aldi have got three per cent of the market nationally and they have got seven per cent on the east coast. So if they create the competition they are not very effective at creating it widespread in the market. So there is a market failure, isn't there?

Dr Kennedy—My understanding, but correct me if I am wrong, was that even when the other two chains were competing we also saw lower prices. The notion that there is a market failure is a tricky one—

Senator CAMERON—It is not a silly one, is it? That is a contestable argument about whether we have got a proper market in Australia, isn't it?

Dr Kennedy—I think we have a highly functioning grocery market.

Senator CAMERON—A highly functioning grocery market when Woolworths and Coles have got 70-odd per cent of the packaged grocery market—78, is it—and 50 per cent of the food.

Dr Kennedy—This goes to your assessment that we have a market failure. Where would our judgment be—

Senator CAMERON—I am asking you whether we have got a market failure. I am not making any judgment. I am saying that there is an argument that there could be a market failure with such a lopsided market that is not allowing proper competition and contestability.

Dr Kennedy—I think people could put arguments that parts of—for example, I spoke earlier about restrictions on barriers to entry and restrictions to competition being the sorts of market failures that I think one could clearly identify, and policies aimed at addressing those would be very useful. But to argue in the broad—let me take your example of can we take an assessment based on a degree of concentration that there is no market failure, so would we be happy if it was 50 or 60 per cent and then we could assure ourselves there was no market failure. That is a just very tricky assessment for anyone to make just simply based on concentration. But there are certainly other things one could look at to see if the market is functioning effectively.

Senator CAMERON—The Australian National Retailers Association described the market as fairly contestable. You go much higher in your judgment than the retail association. They say 'fairly contestable'. What was the phrase you used: highly contestable. Was that the phrase?

Dr Kennedy—I believe I did say—I am not sure if I said 'contestable'. Perhaps I did say contestable.

Senator CAMERON—Functioning.

Dr Kennedy—Highly functioning. Right. By which I meant there are many goods and services provided to a large group of people, and access. It is a market—

Senator CAMERON—Access but not a lot of choice, in some areas. Can I come back to this issue of the very specific propositions that you are putting forward. I raised earlier with one of the witnesses that your evidence would obviously be highly influential because you are not one of the retailers coming in, one of the big players, saying everything is okay. You are not one of the smaller group coming in. You are seen to be, I suppose, an honest broker, if I could put it in those words.

Dr Kennedy—I am pleased to hear that.

Senator CAMERON—Given that the government would rely on your submission here, I want to come back to this issue Senator Xenophon was raising with you about how you reached the assumptions that you did. Did you conduct a search of the literature and the previous inquiries to bring these very specific propositions to us?

Dr Kennedy—Yes, we did.

Senator CAMERON—Did you talk to any of the participants in the market?

Dr Kennedy—The industry representatives, for example?

Senator CAMERON—Yes.

Dr Kennedy—Not in preparing this submission. Of course Treasury has had contact with people in the past, but not in preparing this submission.

Senator CAMERON—Why wouldn't you talk to the market participants when you come here and put these extremely detailed conclusions without talking to the industry? It seems to me it is a problem.

Dr Kennedy—I did not say we do not talk to the industry but I did not think it was appropriate that we, if you like, prepared our assessment in conjunction with one or the other industry group. We reflected on our experiences of talking with people in the market over many years, spoke about it amongst our colleagues, went back and looked at previous inquiries, formed our assessment, wrote it up and presented it in good faith to the inquiry.

Senator CAMERON—What is the theoretical underpinning to your submission here?

Dr Kennedy—The economic theoretical underpinning?

Senator CAMERON—Yes.

Dr Kennedy—It is a standard mainstream understanding of how markets work.

Senator CAMERON—Is it contestability theory? Did you people look at that when you did this?

Dr Kennedy—I have further a number of mentions of contestability theory. I have to admit I am a little confused about exactly what people are meaning by. If someone could clarify it for me I would be happy to comment.

Senator CAMERON—Let me try. It was raised this morning by the retail association as being the fundamental for how the market operates in Australia. As I understand it, contestability theory is well known. It was developed in 1982 by Baumol, Panzar and Willig and it is about perfectly contestable markets operating disciplines firms to price products in a socially efficient manner that yields only normal returns. Does that make sense to you?

Dr Kennedy—Yes. It sounds like something that Alfred Marshall was talking about around the turn of the previous century.

Senator CAMERON—Given that the retail association said that the market here is only fairly contestable—you have got a different view, but these are the people in the market who are the big players—and contestability theory requires a perfectly contestable market, how can we be sure?

Dr Kennedy—I think you just verbalised me, Senator.

Senator CAMERON—Did I? I am sorry. I did not mean to.

Dr Kennedy—I think I made clear that I did not say I thought the market was highly contestable; I think I said it was highly functioning. I have not made a particular comment on whether the market is appropriate or not and I do not plan to today. What I have outlined is what I see as the features of markets that one would look to if one were looking to design policy to make markets as competitive—

Senator CAMERON—But you said we have a highly functioning market. Can you have a highly functioning market without high contestability?

Dr Kennedy—When I said we had a highly functioning market, I think I explained that I was talking about a range of services and products and a reasonably diverse grocery market spread across the country. I was not giving you a view on the competitive aspects of the market in any particular region or in general.

Senator CAMERON—I have had lectures about competition policy and how important competition theory is from government ministers of various persuasions in my previous employment as a union official. If we have, as the National Association of Retail Grocers says, a market concentration and a market that does not seem to operate under this theory of contestability then surely we have got a problem. Whether the Blacktown amendment fixes that problem or not, it just seems to me that this is recurring. I have been in the Senate for 13 months and I have heard these arguments go on and on in several inquiries about trade practices issues and market dominance issues, and it does not seem to go away. When I read your submission, I thought, ‘How could you come to these conclusions?’ I am not clear how you have done it. You said you have searched the literature. Some of that literature goes back nearly 30 years.

Dr Kennedy—We made an assessment of the Blacktown amendments and of what we think it would do to the market. You have all raised a much wider range of issues about the grocery market in this inquiry today, which I have tried to comment on and explain what our approach would be if we were looking at trying to promote competition in that area. You seem to be drawing the conclusion that we have done an assessment of the Australian grocery market and given it the tick. We have provided a submission on the Blacktown amendment and we have tried to explain what we think, how it would work and whether it would lower or raise prices, and we have given you our best assessment. That is what we have tried to do in that submission.

We were not asked to provide a submission on whether we thought the grocery market was highly contestable or otherwise.

Senator CAMERON—Dr Kennedy, you raised the issue of Aldi and their effectiveness in creating competition. That said, Aldi are a very minor player so, if they are the ones who are actually driving the competition, we do not have a lot of competition from a base of three per cent generally across the country and seven per cent on the east coast. I see there is a problem and, whether or not the Blacktown amendment fixes that problem, I am asking Treasury how can you come to these firm conclusions when there are issues of market concentration, a lack of competition and they do not even meet the theoretical analysis of what competitive policies should be about? I just do not understand it. You may be right that the Blacktown amendment is no good, but you do not give me any lead that what you are doing here is analysing this properly, because you are not dealing with some of the bigger issues.

Dr Kennedy—I take it that is a comment.

CHAIR—I think it is more of a comment than a question.

Senator CAMERON—Can you take on notice what you have said about the highly functional—is that a problem for you? I do not like this eyebrow raising. I am just asking you a question.

Dr Kennedy—What am I taking on notice?

Senator CAMERON—Will you take on notice what ‘highly functional’ means in the context of highly contestable and whether that meets this definition of the contestability theory that I outlined, which you said you understood? I would like to understand where Treasury is coming from on that issue.

Dr Kennedy—I am happy to take it on notice.

Senator XENOPHON—I have two very quick questions. Dr Kennedy, in relation to the OECD figures of grocery price inflation, could you advise—again, you may wish to take this on notice—whether Treasury has done an analysis of those figures where Australia has been shown to have a rate of grocery price inflation in excess of other OECD nations.

Dr Kennedy—I am happy to take that on notice.

Senator XENOPHON—Finally, in preparing your submission, can you just confirm you did not have any discussions with, for instance, Professor Zumbo, or Mr Kelly from the Southern Sydney Retailers, or any of the others who provided a submission?

Dr Kennedy—No, they did not approach us and we did not approach them.

Senator XENOPHON—And there was no discussion with any of the other submitters?

Dr Kennedy—No.

CHAIR—Any further questions from those in the teleconference?

Senator EGGLESTON—(Inaudible) the Law Council’s views, and I note that those views are repeated by quite a number of people throughout this inquiry. It is certainly a very divided issue as to whether this is a pro- or anticompetitive proposal. But that is a comment.

CHAIR—Thank you. As there are no further questions, thank you to Treasury for coming in this afternoon.

Committee adjourned at 5.08 pm