

**STAGE 2 SUBMISSION TO THE
COMPETITION POLICY REVIEW:
RETAIL GUILD OF AUSTRALIA**

24 November 2014

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Executive summary

THE RETAIL GUILD OF AUSTRALIA

The Retail Guild of Australia is the representative body of independent supermarket retailers operating under the IGA banner. It comprises 1,500 businesses, ranging in size from 400sqm to 8,000sqm. The members of the Retail Guild well understand the challenges facing the Australian economy, as we try to operate as efficiently as possible. The Guild firmly believes that an effective competition framework is essential for improving Australia's productivity in the years to come. While the Retail Guild's views are clearly informed by its understanding of the grocery sector, it considers that many of the issues facing this sector reflect matters which impact upon the Australian economy more generally. The Retail Guild is therefore delighted to take the opportunity offered by the Competition Policy Review to respond to the draft report.

While the Retail Guild brings a small business perspective to this process, it doesn't seek "special protection". The members of the Guild firmly believe in effective competition, and strongly endorse the observation in the draft report that:

Competition policy sits well with the values Australians express in their everyday interactions. We expect markets to be fair and we want prices to be as low as they can reasonably be. We also value choice and responsiveness in market transactions – we want markets to offer us variety and novel, innovative products as well as quality, service and reliability.¹

To this end, the Guild congratulates the Panel on its draft report and commends further suggestions for the Panel's consideration: these suggestions fundamentally relate to the three pillars of an effective competition law: the "right" section 46, the "right" section 50 and the effective enforcement of both.

¹ At 15.

OUTLINE OF SUBMISSION

Response to draft recommendations

Table 1 sets out, in short form, the Retail Guild's response to each recommendation put forward in the draft report.

#	TOPIC	RGA RESPONSE
1	Principles to guide competition policy	No position
2	Intergovernmental arrangements re human services	No position
3	Cost-reflective road pricing	No position
4	Liner shipping – repeal of Part X & block exemption	No position
5	Removal of cabotage restrictions for coastal shipping	No position
6	Removal of regulatory restrictions in taxi industry	No position
7	General review of intellectual property	No position
8	Repeal of section 51(3)	No position
9	Removal of remaining restrictions on parallel imports	Support
10	Inclusion of competition principles in planning & zoning legislation	Support
11	Review of regulations, to remove unnecessary restrictions on competition	Some concerns – see Section IV
12	Review of standards to remove unnecessary restrictions on competition	No position
13	Review of competitive neutrality policy	No position
14	Increase the transparency and effectiveness of complaints process for competitive neutrality	No position
15	Reporting requirements re competitive neutrality	No position
16	Finalisation of energy reform agenda, including deregulation of gas & electricity retail prices; further reform in water sector	No position
17	Retention of the central concepts, prohibitions & structure enshrined in competition law	Support
18	Simplification of the competition laws	Strongly support –

#	TOPIC	RGA RESPONSE
		scope of review could expand to include court processes; see discussion at paragraph 133ff
19	Application of the CCA when government engaged in “trade or commerce”	No position
20	Definition of market and competition	No position
21	Extending the extra-territorial reach of the law	No position
22	Simplification of the cartel provisions; improvements to the joint venture defence	Strongly support
23	Removal of the prohibition against exclusionary provisions	Support
24	Repeal of current price signalling laws & creation of new prohibition concerning “concerted practices” that substantially lessen competition (SLC)	No position
25	Amendments to the misuse of market power provision	Broadly support, subject to discussion in Section I
26	No specific provision to address price discrimination	No position
27	Third-line forcing to be subject to SLC test	Strongly support
28	Re-drafting of section 47 (exclusive dealing)	Support
29	Notification to be available for resale price maintenance; exemptions for related bodies corporate	Support
30	Procedural changes to merger assessments	Support, but substantive amendments to the law & improved enforcement are also needed – see Section II
31	ACCC reporting requirements re secondary boycott complaints & investigations	No position
32	Extending jurisdiction in relation to the secondary boycott provisions to state & territory courts	No position
33	Broadening sections 45E and 45EA to address scenarios where no prior dealing	No position

#	TOPIC	RGA RESPONSE
34	Simplification of authorisation and notification processes	Strongly support
35	Adoption of the “block exemption” framework	Strongly support
36	ACCC to consider burden imposed by section 155 notices, and requirements to produce documents qualified	Strongly support
37	Facilitation of private actions – better use of section 83	Support, but much more needs to be done, particularly to encourage stand-alone actions – see Section III
38	Tightening of declaration criteria in Part IIIA	No position
39	Establishment of Australian Council for Competition Policy (ACCP)	Support
40	Role of ACCP	Support
41	ACCP to have power to undertake market studies	Strongly support
42	Governments & market participants to have power to request market studies	Support
43	ACCP to conduct/publish annual competition analysis	Support
44	Possibility of re-introducing competition payments	No position
45	ACCC to retain competition and consumer functions	Support
46	Access & pricing regulatory functions to be transferred to new body	Support
47	Improvements to ACCC’s governance structure	No position
48	ACCC to develop media Code of Conduct	No position
49	Small business access to remedies – should there be a specific dispute resolution scheme?	Support, and would like to see building of capacity in small business sector generally – see discussion at paragraphs 136-139
50	Improvements to the collective bargaining process	Support
51	Removal of restrictions on retail trading hours	Some concerns – see Section IV

#	TOPIC	RGA RESPONSE
52	Removal of restrictions on pharmacy ownership and location	Some concerns – see Section IV

Table 1: Retail Guild's response to draft recommendations

Structure of submission

As is readily apparent from Table 1, where recommendations are relevant to the retail sector, the Guild is supportive on almost every front. That said, there are some key areas in relation to which the Retail Guild considers more substantive improvements should be implemented. Specifically:

- **Misuse of market power:** the Retail Guild welcomes the Panel's recognition of the difficulties posed by the current section 46. Nonetheless, it is concerned that the proposed alternative section 46 may also result in unintended enforcement difficulties. But minor amendments to the draft proposal could result in a highly effective law without chilling competitive conduct. *See Section I;*
- **Mergers:** the Retail Guild disagrees with the Panel's assessment of the effectiveness of Australia's merger processes. The law, as currently written and enforced, falls short and requires closer consideration. This is illustrated by the grocery sector: Australia's is internationally recognised as one of the most concentrated grocery markets in the developed world. Yet the majors – one of whom was found by the courts to have misused its substantial market power almost 20 years ago (in a less concentrated market) – continue to grow, both organically and by acquisition. In the Retail Guild's view, this concern can be addressed by supplementing the current mergers test, and by more active enforcement of the law. (The Guild's proposed amendments to section 46 would also assist in constraining organic growth where it is anti-competitive.) *See Section II;*
- **Private enforcement:** in the Retail Guild's view, enforcement of the merger laws (and the competition provisions generally) should not be the solitary domain of the ACCC. The Retail Guild welcomes the Panel's acknowledgment of the value of private enforcement, but considers more needs to be done to facilitate it – particularly stand-alone litigation. In particular, the Retail Guild would like to

see Australia adopt the approach of the United Kingdom and Europe, where they are seeking to reduce the impediments created by adverse costs orders. *See Section III*;

- ***Deregulation:*** Sections I-III of this submission address the three pillars of an effective competition law. While the Retail Guild readily accepts the principle that regulations can unreasonably restrict competition and deny consumers choice, it has concerns about relaxing certain regulations – namely retail trading hours and pharmacy ownership and location rules – before these pillars are in place. Absent an effective competition regime, deregulation can have unintended consequences, entrenching the market power of incumbents and driving smaller (nonetheless efficient) operators from the market. This may provide short-term benefit for consumers, but it is likely to come at a cost to effective competition over the long run. Accordingly, the Retail Guild submits that moves to deregulating trading hours and pharmacy restrictions should be delayed pending resolution of the issues above. *See Section IV*.

While this submission does not address the issue in any detail, the Retail Guild would also like to record its strong support for the Panel’s ***simplification agenda***.

Summary of key recommendations

- ☑ **Section 46 should be amended** along the following lines:

A company with substantial market power

Can’t engage in conduct which ~~substantially~~ lessens competition

Subject to the following defence –

If the conduct would be a rational business decision or strategy by a company lacking market power ~~and~~

~~If it is in the long term interests of consumers.~~

- ☑ **Divestiture should be an available remedy for a court** upon a contravention of section 46 being established

- ☑ **Section 50 should be supplemented** with an additional provision, prohibiting parties with substantial market power from acquiring shares/assets where there would be *any* lessening of competition. Authorisation would, of course, be available

- ☑ **Section 4(4)(b) should be amended** to make clear that section 50 can apply to the acquisition of new sites (including via leases)
- ☑ **Third parties must be empowered to pursue mergers of concern** through the courts via the better facilitation of private litigation
- ☑ **Mandatory pre-notification of mergers should be required** for firms with a substantial degree of market power
- ☑ **Formal independent reviews of ACCC merger decisions should be undertaken** on a regular basis and the results published
- ☑ **Practical steps should be taken to encourage private litigation**, principally, relief from the prospect of having to pay the other side's costs if proceedings are unsuccessful
- ☑ **Consideration should be given to ways in which matters can be brought within the jurisdiction of the Australian Competition Tribunal**, as opposed to the court, given their respective positions on costs
- ☑ A working party should be established to consider available options to **improve the procedures and practices surrounding competition law litigation**
- ☑ **A clearing-house for small business issues should be created**, allowing for the development of capacity and expertise in competition issues within a small business context – this should not be limited to complaints, but also include general engagement with the law (eg assistance in preparing notifications, responding to investigations)
- ☑ **Moves to relax trading hours and pharmacy regulations should be deferred** until such time as the three pillars of an effective competition framework are in place

I. Misuse of market power

SUMMARY

The Retail Guild makes the following submissions in relation to the draft recommendation concerning section 46 of the Competition and Consumer Act:

- The recognition of the current enforcement problems surrounding section 46 is significant and – on this basis – the proposed amendments to section 46 are welcomed*
- Nonetheless, a test which combines “substantial market power” AND “substantial lessening of competition” will be extremely hard to establish – history demonstrates that the ACCC has difficulties establishing either element; a requirement that both be proven will render section 46 unworkable*
- The Retail Guild proposes lowering the threshold for initial liability subject to a broader defence. This will allow for more effective enforcement of the law but at the same time resolve some of the uncertainty posed by the current defence*

Accordingly, the Retail Guild RECOMMENDS:

- ☒ *Broadening the basis for initial liability via the imposition of a “lessening of competition” test (rather than “substantial lessening of competition”) – see paragraphs 28-31*
- ☒ *Including a defence comprising only the first limb as proposed in the draft report – see paragraphs 32-35*
- ☒ *Divestiture be included as one of the remedies available to a court upon a contravention of section 46 being established – see paragraphs 42-45*

1. The Retail Guild welcomes comments in the draft report acknowledging the difficulties of interpreting and enforcing the current prohibition against misuse of market power. The proposed recommendation goes some way to addressing those issues – indeed, with some slight amendment, the Retail Guild considers that the draft recommendation provides a strong foundation for a highly effective law, better equipped to prevent anti-competitive conduct without chilling competitive conduct.
2. As it currently stands, however, the Retail Guild is concerned that requiring proof of substantial market power *and* a substantial lessening of competition sets the

legal standard far too high. In addition, it considers that the proposed defence (particularly the second limb) has the potential to be confusing.

3. These concerns may be addressed if initial liability were subject to a lower threshold *but* the defence broadened. Such an approach will, in the Retail Guild's view, get the balance right between a law that is capable of enforcement but one that does not prevent all Australians from benefitting from tough, but fair, competition. Importantly, it also results in a law that is more predictable and easier to apply in practice.
4. These points are addressed in further detail below.

ROAD-TESTING THE DRAFT RECOMMENDATION

5. The Retail Guild has “road-tested” the draft recommendation, using various benchmarks to assess its likely effectiveness. The benchmarks used are:
 - 5.1. analysis of all superior court cases in which a contravention of section 46 was unsuccessfully alleged;
 - 5.2. analysis of ACCC litigation over the last decade, in which conduct was alleged to have contravened section 46 and/or the SLC test; and
 - 5.3. specific shortcomings in the current law, as identified by the ACCC.
6. Each “benchmark” has shortcomings – for instance, as the ACCC noted in its first submission, there is no public record of complaints which the ACCC has investigated and found meritorious but considered so unlikely to succeed in court that no proceedings were launched.² While the ACCC has not provided case studies of such examples, it has in various public fora identified types of conduct about which it has concerns. Accordingly, the three benchmarks taken together provide a good basis for assessing whether the draft recommendation is likely to achieve its stated objectives.

² ACCC, First submission to the Harper Review (25 June 2014), 77.

7. Based on these benchmarks, one can conclude:
 - 7.1. the only superior court case in the history of the TPA/CCA in which the proposed amendments would have (possibly) changed the outcome is *Rural Press*, in which a separate contravention of Part IV was established in any event;
 - 7.2. the only case in the last decade, regardless of court, in which the proposed amendments would have (possibly) changed the outcome is *Cement Australia*, in which a separate contravention of Part IV was established in any event; and
 - 7.3. road-testing the draft recommendation against the types of conduct identified by the ACCC as problematic when assessed under the present section 46 demonstrates that the proposed revision is unlikely to substantively assist in addressing the apparent “gaps”. It also reveals the current difficulties experienced by the ACCC in bringing cases under the current SLC tests available in the CCA.

Superior court cases

8. Considering *all* unsuccessful section 46 cases to go before a superior court (see Table 2), the proposed draft recommendation would make little difference to overall outcomes even when considered only on the issue of threshold liability (ie without attempting to apply the proposed defence).
9. There is just one case in which the proposed revised threshold for liability would have resulted in a different outcome: *Rural Press*, although note that in this case the ACCC did prove other contraventions of Part IV. There are a further two cases (*Williams v Papersave*, *Melway*) for which there is insufficient information available in the judgments to assess the threshold issue of liability under the draft recommendation.

10. In all three cases, assessing the potential application of the defence is difficult³ so one cannot definitively determine whether *any* case would have been resolved differently. That said, it seems open to conclude that – had the test set out in the draft recommendation been applied – there may have been a different outcome in *Rural Press*.

Case	SMP proven	Comments
<i>Williams v Papersave Pty Ltd</i> (1987) 16 FCR 80	Yes	Difficult to tell whether initial liability would have been established under draft recommendation
<i>Australasian Performing Right Association Ltd v Ceridale Pty Ltd & Ors</i> (1990) 97 ALR 497	Yes	Conduct unlikely to have substantially lessened competition. Draft recommendation would not have changed outcome
<i>Singapore Airlines Limited v Taprobane Tours WA Pty Ltd</i> (1991) 33 FCR 158	No	As no substantial market power, draft recommendation would not have changed outcome
<i>Eastern Express Pty Limited v General Newspapers Pty Limited & Ors</i> (1992) 35 FCR 43	No	As no substantial market power, draft recommendation would not have changed outcome
<i>Petty v Penfold Wines Pty Ltd</i> (1994) 49 FCR 282	Yes	Claim included allegations under then section 49 (subject to SLC test). No SLC made out. Draft recommendation would not have changed outcome
<i>Morwood & Anor v Chemdata Pty Ltd & Ors</i> (unreported, BC9806182; 18 November 1998)	No	As no substantial market power (applicants failed to establish pleaded market), draft recommendation would not have changed outcome
<i>Stirling Harbour Services Pty Limited v Bunbury Port Authority</i> [2000] FCA 1381	Yes	Claim included allegations under sections 45 and 47, but no SLC established. Draft recommendation would not have changed outcome
<i>Melway Publishing Pty Ltd v Robert Hicks Pty Ltd</i> (2001) 205 CLR 1	Yes	No SLC claim made, so issue not considered. Difficult to tell whether initial liability would have been established under draft recommendation

³ In *Melway*, it is certainly open to conclude from the majority's position that the first limb of the defence may have been made out, although it is not possible to assess the second limb. In *Rural Press*, it seems more likely that the first limb of the defence would not have been established. As *Williams v Papersave* predates any sophisticated analysis of section 46, there is simply insufficient information in the judgment to attempt to apply the proposed defence to the conduct.

Case	SMP proven	Comments
<i>Kadkhudayan v WD & HO Wills (Aust) Ltd</i> (2002) ATPR 41-874	No	As no substantial market power, draft recommendation would not have changed outcome
<i>Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia</i> (2002) 122 FCR 110	No	As no substantial market power, draft recommendation would not have changed outcome
<i>Boral Besser Masonry v Australian Competition and Consumer Commission</i> (2003) 215 CLR 374	No	As no substantial market power, draft recommendation would not have changed outcome
<i>Universal Music Australia Pty Ltd v Australian Competition & Consumer Commission</i> [2003] FCAFC 193	No	As no substantial market power, draft recommendation would not have changed outcome
<i>Rural Press Ltd v Australian Competition & Consumer Commission</i> [2003] HCA 75	Yes	Claim included section 45 allegation in which SLC made out. This is the only case in which initial liability under the draft recommendation would clearly have been established. The conduct also appears unlikely to satisfy the proposed defence. That said, contraventions of Part IV were established in any case

Table 2: unsuccessful section 46 claims (all superior courts, 1974-present)

11. Of the 13 cases to have failed before the Full Court or High Court, around half (seven) failed due to an inability to establish substantial market power. The draft recommendation retains this threshold test, so there would be no change to the outcome in cases such as these if the recommendation were to be implemented.
12. Of the six remaining cases:
 - 12.1. SLC was separately alleged twice (*Petty v Penfolds*, *Stirling Harbour*), but not made out;
 - 12.2. on the facts provided, SLC was unlikely to be established in one case (*APRA v Ceridale*);
 - 12.3. SLC *may* have been made out in two further cases – *Williams v Papersave* and *Melway* – although there is simply too little information upon which to reach an informed view. There is certainly too little information to assess whether the proposed defence may have been made out; and
 - 12.4. in just one case – *Rural Press* – is it clear that the initial threshold for liability under the draft recommendation would have been satisfied. The judgment of the majority also indicates, although less decisively, that the

proposed defence is unlikely to have “saved” the conduct. That said, the conduct was found to both lessen competition and to have involved an exclusionary provision, so it is unclear what “mischief” remained unchecked due to a failure to establish a misuse of market power. Case law very clearly indicates that no further penalties would have been available, and it is unlikely that a section 46 contravention would have resulted in significantly different injunctions.

ACCC enforcement activity: the last 10 years

13. The ACCC observed in its first submission to the Review Panel that one should hesitate to draw conclusions on the basis of court cases, as investigations which fail to reach court rarely become public.⁴ Nonetheless, it is notable that – notwithstanding three distinct sections giving rise to an SLC test – the ACCC brings *very* few SLC cases.
14. Indeed, there have been just seven competition-tested cases brought by the ACCC which have proceeded to judgment in the last 10 years (see Table 3 below): that is, cases alleging contraventions of the SLC test (whether section 45, 47 or 50) and/or a misuse of market power (section 46). Over the last four years, there have been just four competition-tested cases filed by the ACCC:⁵ two misuse of market power cases, one (unsuccessful) merger case, and the recently filed collusion case involving Informed Sources and various petrol retailers.⁶

⁴ ACCC, First submission to the Harper Review (25 June 2014), 77.

⁵ ACCC, *Annual Report 2012/13* and *Annual Report 2011/12*. All media releases issued since 1 July 2013 (see <http://www.accc.gov.au/media/media-releases>) were also reviewed.

⁶ The cases were *Australian Competition and Consumer Commission v Visa Inc & Ors* (NSD 164/2013; filed 4 February 2013); *Australian Competition and Consumer Commission v Ticketek Pty Ltd* [2011] FCA 1489 (filed December 2011); and *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151 (filed November 2010). The Informed Sources case was only recently commenced: see VID450/2014.

Case	Claim	SMP proven	SLC proven	Comments
<i>ACCC v FILA Sport Oceania</i> (2004) ATPR 41-983	Sections 46, 47	Yes	Yes	ACCC claims made out (by consent)
<i>ACCC v Eurong Beach Resort</i> [2005] FCA 1900	Section 46	Yes	Yes	ACCC claims made out (by consent)
<i>ACCC v Baxter Healthcare</i> [2008] FCAFC 141	Sections 46, 47	Yes	Yes	ACCC claims made out (contested)
<i>ACCC v Cabcharge</i> [2010] FCA 1261	Sections 45, 46	Yes	Withdrawn	ACCC claims made out (by consent)
<i>ACCC v Metcash Trading</i> [2011] FCAFC 151	Section 50	N/A	No	ACCC lost at first instance and on appeal
<i>ACCC v Ticketek</i> [2011] FCA 1489	Section 46	Yes	N/A	ACCC claims made out (by consent)
<i>ACCC v Cement Australia</i> [2013] FCA 909	Sections 45, 46	Yes	Yes	Contested: claim under section 46 failed (no taking advantage), but SLC claim made out

Table 3: ACCC competition-tested claims, 10 years to 30 June 2014

15. Over the past decade, the ACCC has proven substantial market power (although not necessarily a contravention of section 46) only six times.⁷ It has proven a substantial lessening of competition just four times⁸ (notwithstanding that there are three distinct SLC prohibitions of virtually universal application, yet very few businesses in Australia would be said to have substantial market power).
16. During this time, no SLC case has failed on a “threshold” issue (eg the application of a particular section) – any failure has been due to an inability to show that the conduct had the purpose or (likely) effect of substantially lessening competition. As such, the absence of SLC cases cannot be explained other than by reference to the difficulties of establishing the test itself. Contrary to the ACCC’s claims

⁷ Only two of these cases were contested.

⁸ Again, this includes only two contested cases.

concerning section 46 complaints, there is no “iceberg” here that can be attributed to anything other than difficulties with the SLC test itself.

17. Accordingly, the Retail Guild has grave concerns that each element – ie substantial market power and substantial lessening competition – constitutes a significant hurdle to proving anti-competitive conduct. To require *both* elements to be established is likely to result in fewer – not more – cases.
18. Finally, analysing cases over the last 10 years, it is apparent that there is only one case in which the draft recommendation may have resulted in a different outcome: *Cement Australia* (even then, that depends upon the application of the defence).⁹ But – as with *Rural Press* – the mischief was captured under section 45 in any event.

Road-testing the draft recommendation against shortcomings identified by the ACCC

19. As amply demonstrated in both Table 2 and 3, many – if not most – section 46 cases allow an opportunity to plead the relevant conduct as an SLC (generally under section 45 or 47). Refusals to deal are the one category of conduct identified by the ACCC as requiring special consideration.¹⁰
20. **Refusals to deal:** analysis of the cases reveals that refusal to deal claims are in fact those which are most adeptly handled by the courts under the current test – viz *Queensland Wire*, *Melway* and *NT Power*.
21. The core conduct in *Rural Press* and *Cement Australia*, both being cases cited by the ACCC as “best exemplify[ing]” its concerns with section 46’s interpretation,¹¹ was not a refusal to deal and was captured under an SLC provision in any case.

⁹ The court’s analysis suggests the first limb of the proposed defence would have been established; there is no basis upon which to form a view concerning the second limb.

¹⁰ ACCC, First submission to the Harper Review (25 June 2014), 77.

¹¹ *Ibid*, 79.

22. Two further categories of conduct warrant close attention, however: predatory pricing and the overbuying of inputs for anti-competitive purposes.
23. **Predatory pricing:** predatory pricing is genuinely unilateral conduct, and so will properly fall for consideration only under section 46.¹² *Boral* remains Australia's best-known predatory pricing case. As the ACCC failed to establish substantial market power in that case, the draft recommendation would not have resulted in a different outcome.¹³
24. Nonetheless, a change to an effects test would move the debate away from recoupment and its significant complexities. For the reasons stated above, however, the Retail Guild is concerned that establishing a *substantial* lessening of competition (on top of substantial market power) may prove overly burdensome.
25. **Overbuying assets:** the ACCC has also expressed its concern about the anti-competitive overbuying of assets, particularly land (for example, in the context of supermarket sites).¹⁴ This conduct, however, is not unilateral: it is capable of being agitated under a general SLC provision.¹⁵ The complete absence of any such cases brought by the ACCC, however, demonstrates the difficulties of the SLC test. To ask that such cases require establishing both SLC and substantial market power will not result in any more cases being brought – it could only deter them further.

¹² Other than in an extreme scenario, eg *Baxter*.

¹³ See the discussion below at paragraph 40.

¹⁴ See, for example, comments by Rod Sims in the *Australian Financial Review*, 12 September 2014 and in an interview with to ABC Rural (18 August 2014; available at <http://www.abc.net.au/news/2014-08-18/accc-effects-test/5678036>).

¹⁵ As noted in the Regulatory Impact Statement accompanying amendments to section 50 in 2012, such acquisitions can be assessed under section 50 (as indeed, the ACCC's assessment of the Glenmore Ridge decision indicates: see at <http://registers.accc.gov.au/content/index.phtml/itemId/1116726/fromItemId/751043>). Note, however, the issues regarding section 4(4)(b), as discussed at paragraphs 95-98.

A SLIGHT REVISION TO THE DRAFT RECOMMENDATION

Key elements

26. Bearing these concerns in mind, the Retail Guild proposes that the draft recommendation be slightly modified, as follows:

A company with substantial market power

Can't engage in conduct which ~~substantially~~ lessens competition

Subject to a defence along the following lines [see comments in paragraph 35] –

If the conduct would be a rational business decision or strategy by a company lacking market power ~~and~~

~~If it is in the long term interests of consumers.~~

27. This suggestion involves two basic changes to the draft recommendation:
- 27.1. a lowering of the initial threshold for liability; and
 - 27.2. a broadening of the defence, via removal of the second limb.
28. **Lowering of initial threshold:** the Retail Guild submits that the initial threshold for liability should be lowered for two reasons:
- 28.1. as discussed above at paragraphs 8-17, requiring both substantial market power *and* substantial lessening of competition to be established is likely to result in a law that is *less* effective than the current section 46; and
 - 28.2. the Retail Guild's approach is in accordance with the High Court decision in *Rural Press*, in which Gummow, Hayne and Heydon JJ (when assessing the SLC claim under section 45) noted that stamping out "rivalrous conduct [in] a part of a market that had previously not known it" amounted to a substantial lessening of competition.
29. Thus, the majority recognised a clear relativity when assessing substantiality. In other words, removing *any* competition from a market in which there was (in fact or in effect) none amounted to a substantial lessening of competition. The analogy with a market in which a party has substantial market power – which is therefore not effectively competitive – is clear: *any* lessening of competition should be regarded as substantial.

30. While the *Rural Press* approach to the SLC test appears perfectly sensible (and indeed consistent with prior authority emphasising the relative nature of the test), it appears largely to have been disregarded, particularly by the ACCC in its enforcement of the various SLC prohibitions contained in the CCA. Accordingly, its logic should be codified in the terms suggested.
31. This may also have a practical benefit. A clear codification of the *Rural Press* approach will overcome issues caused by the increasing use in Australia of overseas economists, who struggle to adapt their understanding of the SLC test to the Australian legal system. Direction by the legal team as to the Australian approach to the SLC test can be interpreted as an attempt to interfere with an expert's independence; clear legislative direction on this point would be helpful.
32. **Broadening (and clarification) of defence:** the Retail Guild recognises, however, that a simple test of substantial market power together with any lessening of competition is likely to be too broad. Thus, it proposes this change *along with* a broadening of the defence proposed in the draft report.
33. The Retail Guild makes this proposal for two reasons:
- 33.1. as noted, a broader defence will alleviate concerns that the proposed section 46 will chill competitive conduct; and
- 33.2. the Retail Guild has concerns that the second limb of the defence may be difficult to interpret, adversely affecting the predictability of the revised section 46.
34. A defence which comprises only the business rationale limb will ensure that section 46 – designed to prevent companies with substantial market power from using that power to achieve anti-competitive outcomes – will operate in the manner intended. In particular, if a company can show that the particular conduct in question was rational business conduct for a party lacking market power, that should amount to a complete defence. As noted, however, this broadening of the defence first requires that the initial threshold for liability be lowered.
35. That said, the Retail Guild takes the business rationale limb of the proposed defence to be a codification of one of the ways in which the courts have

interpreted the current “take advantage” test.¹⁶ The Retail Guild supports this approach, appreciating that it will provide greater certainty as to the likely interpretation of the revised section 46. Nonetheless, care should be taken before a final form of words is settled upon and the intention to codify the judicial interpretation of “take advantage” should be clearly stated.

Structure

36. The Retail Guild supports the structure proposed in the draft report – that is, a threshold test for liability against which a defence can be raised.
37. Nonetheless, the Retail Guild considers that a cumulative test, along the lines set out below, could also be effective:
 - 37.1. a company with substantial market power
 - 37.2. must not engage in conduct which lessens competition
 - 37.3. unless such conduct would be a rational business decision or strategy by a company lacking market power (subject to the comments in paragraph 35).

Alternative approach

38. The Retail Guild firmly believes that substantial market power combined with the SLC test creates far too high a threshold for an effective section 46.
39. If, however, it is considered essential to retain the SLC test in the form in which it appears throughout Part IV, the Retail Guild recommends the following section 46:
 - 39.1. a company must not engage in conduct which substantially lessens competition,

¹⁶ See especially the judgment of Heerey and Sackville JJ in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339.

- 39.2. unless such conduct would be a rational business decision or strategy by a company lacking market power (again, subject to the comments in paragraph 35).
40. Such a proposal would help address the “gap” identified by McHugh J in *Boral*,¹⁷ whereby section 46 only operates to prevent anti-competitive conduct by a company which already has substantial market power, but it does not prevent anti-competitive conduct which *creates* substantial market power.
41. Nonetheless, the Retail Guild notes the draft report’s observation that substantial market power is broadly accepted as a threshold test.¹⁸ Accordingly, it submits that section 46 be amended in accordance with the proposal at paragraph 26.

REMEDIES: DIVESTITURE

42. The Retail Guild reiterates its calls for divestiture to be included as an available remedy for contraventions of section 46, perhaps by way of an addition to section 81.
43. Divestiture is available in numerous jurisdictions for prohibitions equivalent to section 46, including the United States and the United Kingdom. For example, in the United States, if a firm has been found to have monopolised in contravention of section 2 of the *Sherman Act*, the court can make a general divestiture order.
44. Divestiture may address scenarios whereby penalties – even substantial penalties – can be seen as licence fees to engage in anti-competitive conduct. For example, in 2010, Cabcharge was ordered to pay penalties of \$14 million for several misuses of market power, the “highest ever penalty for misuse of market power”.¹⁹ The remedies imposed by the court however did not – and arguably

¹⁷ *Boral Besser Masonry v Australian Competition and Consumer Commission* (2003) 215 CLR 374, at [319].

¹⁸ Draft report, 208.

¹⁹ *ACCC v Cabcharge Australia Limited* [2010] FCA 1261). Quote from Victorian Taxi Industry Inquiry, *Customers First: Safety, Service, Choice* (September 2012; available at <http://www.taxiindustryinquiry.vic.gov.au/final-report-customers-first>), 120.

could not – address the structural problems within the market that facilitated the conduct. When the Victorian Taxi Inquiry in 2012 came to consider Cabcharge, it found there had been no substantive change in its conduct notwithstanding the penalty ordered by the Federal Court.²⁰

45. In the Retail Guild’s view, the prospect of divestiture would:

- 45.1. enable, in the right circumstances, structural reform of a market where market failure is otherwise unlikely to self-correct in a timely fashion;
- 45.2. act as a significant deterrent for firms with substantial market power, such that they would be less likely to use that market power for a proscribed purpose; and
- 45.3. encourage more private litigation, as the prospect of a “permanent” remedy is likely to be more attractive than the limited options currently available.

²⁰ Victorian Taxi Industry Inquiry, *ibid*, finding that “serious concerns remain about the effectiveness of competition due to ‘upstream’ market power held by Cabcharge. Cabcharge’s strong position in the taxi-specific payment instruments market... *and its ongoing refusal to allow competitors to process Cabcharge cards* reduces the size of the market for Cabcharge’s competitors in payments processing” (at 213; emphasis added). See also at 193: “no party has been able to obtain access to process Cabcharge’s payment instruments”.

II. Mergers

SUMMARY

The Retail Guild makes the following submissions in relation to the regulation of mergers in Australia:

- *Section 46 is a safety net only – an effective mergers law is the best way to ensure Australian markets are not adversely impacted by market power*
- *While the current section 50 test is adequate to prevent the accumulation of substantial market power (assuming its appropriate enforcement), it does not address scenarios where a firm already has substantial market power but seeks to acquire more market share. This gap has allowed firms which have been found to have misused their substantial market power to continue to grow unabated*
- *The application of section 50 to new sites/leases remains untested in court and requires legislative clarification*
- *As observed in the draft report, there can be “differences of opinion” as to the appropriate outcome of a merger clearance process – not only as between the ACCC and merger parties, but also involving well-informed third parties*

Accordingly, the Retail Guild RECOMMENDS:

- ☑ *Section 50 should be supplemented with an additional provision, prohibiting firms with substantial market power from acquiring shares/assets where there would be any lessening of competition (such prohibition being subject to authorisation) – see paragraphs 59-90*
- ☑ *Section 4(4)(b) should be amended to make clear that section 50 can apply to the acquisition of new sites (including via leases) – see paragraphs 95-98*
- ☑ *Third parties must be empowered to pursue mergers of concern through the courts via the better facilitation of private litigation – see paragraphs 99-103*
- ☑ *Mandatory pre-notification of mergers should be required for firms with a substantial degree of market power in given markets – see paragraphs 104-105*
- ☑ *Formal independent reviews of ACCC merger decisions should be undertaken on a regular basis and the results published – see paragraphs 106-110*

46. The Retail Guild submits that the Review Panel should consider more closely issues concerning the legal test and processes for assessing mergers. In particular:

- 46.1. the current legal test has proven inadequate in preventing mergers in already concentrated markets. The Retail Guild submits that the current section 50 should be supplemented with an additional test, to prevent further concentration of markets in which substantial market power already pertains; and
- 46.2. the Retail Guild has reservations regarding the ACCC's application of the current test in particular scenarios. To this end, the Retail Guild considers that the ACCC's processes could be improved and the scope of the current legislation clarified. More to the point, however, it is essential to facilitate private litigation to enable well-informed third parties to challenge problematic mergers.
47. These key concerns relate, in some respects, to implicit assumptions contained in the draft report.
48. Whilst the Draft Report addresses (and dismisses) concerns that too many mergers are blocked,²¹ it does not address the question of whether too many mergers proceed unchecked. The Retail Guild finds this a troubling omission, given its own extensive submissions on this point which were supported by considerable data.²²
49. This significant oversight likely informs the Panel's conclusion in relation to creeping acquisitions, which is addressed in further detail below.
50. The Retail Guild also rejects the implication that merger clearances (regardless of the specific process used) are essentially private matters between merger parties and the ACCC. For example, the draft report states:

*when the ACCC and merger parties differ about whether a merger breaches the CCA, it is the place of the Tribunal or the courts to decide the outcome.*²³

²¹ See the discussion at 47-48 and 193-195.

²² See Section II of the Retail Guild's submission dated 11 June 2014.

²³ At 193.

51. This comment is indicative of the draft report generally, which does not contemplate circumstances in which a *third party* disagrees with a decision by the ACCC to object to a merger.
52. Yet, as the report observes immediately prior to making that comment:
- The assessment of the likely effect of a merger on competition, including the identification of markets that are relevant to such an assessment, involves judgment. Differences of opinion can and do emerge...*
53. As is well acknowledged, industry players have significant advantages over a regulator – particularly in the time-pressured environment of merger assessment – in understanding the implications of given conduct (including a merger). Accordingly, it is not a remote prospect that the ACCC could grant clearance in circumstances where a market participant has grave and well-founded concerns about the likely impact of a proposed acquisition.
54. To this end, the Retail Guild submits that there are ways in which the ACCC’s merger processes could be improved, and further submits that the ACCC’s performance should be reviewed from time to time. More substantially, however, the Retail Guild considers that third parties need to have greater capacity to themselves object to proposed mergers via private legal proceedings.
55. Finally, it must be remembered that section 46 is a safety net only – where section 50 functions properly, companies should not obtain substantial market power and they certainly should not be permitted to enhance it. As such, it is not enough to say that any “mistakes” under section 50 will be rectified via section 46. Section 46 in whatever form it takes is necessarily selective: it can never redress all harm to welfare that follows from the existence of market power.
56. This approach to section 46 is premised in part on the view that markets are self-correcting: in time, monopoly profits will attract new entry and competition will re-emerge. Nonetheless, when one examines the development of the grocery sector over several decades, it is apparent that market power is becoming entrenched (indeed, it is increasing), with no evidence that the market is self-correcting.
57. Therefore it is essential that the effectiveness of section 50 be closely considered.

A SUPPLEMENTARY MERGERS TEST

58. The Retail Guild considers that where markets are already impacted by substantial market power, a further mergers test is required in addition to the existing section 50.
59. The Guild proposes a further prohibition, along the following lines:
- (1A) A corporation [that has a substantial degree of power in a market] must not directly or indirectly:*
 - (a) acquire shares in the capital of a body corporate; or*
 - (b) acquire any assets of a person;**if the acquisition would have the effect, or be likely to have the effect, of lessening competition in any market in which it has a substantial degree of power.*
 - (2A) A person [who has a substantial degree of power in a market] must not directly or indirectly:*
 - (a) acquire shares in the capital of a corporation; or*
 - (b) acquire any assets of a corporation;**if the acquisition would have the effect, or be likely to have the effect, of lessening competition in any market in which the person has a substantial degree of power.*
60. The text in square brackets could be formulated in various ways, including:
- 60.1. in the manner suggested – ie by adopting the threshold test set out in section 46; or
 - 60.2. so that it applies only to corporations/persons specified by regulation – eg where such regulations are made upon the recommendation of the proposed policy body, the ACCP, following a market study in the relevant sector.²⁴
61. It may even be possible to stipulate, via regulation, that the largest 2-3 players in specified sectors are presumed to have substantial market power for the purposes of the new prohibition (again, this might follow a market study by the ACCP).

²⁴ See further draft recommendation 41.

Such a presumption should be rebuttable, such that a firm could challenge the application of the new prohibition.

62. This supplementary prohibition would, as with section 50 now, be subject to authorisation. With the proposed improvements to the merger authorisation process,²⁵ proving the public benefit outweighs any detriment should not be an unreasonable hurdle for parties “failing” the threshold test set out in paragraph 59.

Why is such a test required?

63. The Australian economy is well known for its pockets of concentration and substantial market power. While the current section 50 test is adequate to prevent the accumulation of substantial market power (assuming its appropriate enforcement), it does not address scenarios where a firm already has substantial market power but seeks to acquire more market share.
64. This gap in the law is particularly problematic in markets characterised by network effects and/or significant economies of scale, allowing firms with substantial market power to further raise barriers to entry and thus to entrench their market position.
65. The problems created by this gap are readily illustrated by reference to Australia’s grocery sector. That said, while the grocery sector is given as an exemplar in this submission, the same issues doubtless apply in other sectors of the Australian economy which are highly concentrated and characterised by network efforts and/or economies of scale. Indeed, the Retail Guild’s first submission to this process cited the example of Cabcharge – a company found to have misused its market power and subsequently criticised by a government inquiry for its ongoing conduct. Cabcharge, however, has continued to acquire new businesses since its

²⁵ See further draft recommendation 30.

contravention of section 46, with all applications for clearance unopposed by the ACCC.²⁶

66. Likewise in the grocery sector, in 2003, the Full Court of the Federal Court found that Safeway [Woolworths] had substantial market power based on conduct that occurred in 1994-95.²⁷ While *Safeway* is examined in further detail below, for present purposes, it suffices to note that since the decision, the grocery sector has become *more* concentrated and barriers to entry have risen further.
67. Yet, in the last decade, more than 90% of applications for merger clearance in the sector (including 90% by Woolworths)²⁸ have been approved by the ACCC: see Appendix A.²⁹ One of the ACCC's few objections was in fact the acquisition of Foodland by Metcash: an objection that was swiftly dismissed at first instance and on appeal.³⁰ Thus, in a market in which there has been a finding of substantial market power, and no apparent "material change in circumstances", the growth of the major supermarkets has continued unabated.

²⁶ Acquisitions of Grenda Transit Management (joint venture with ComfortDelGro, 2011; <http://registers.accc.gov.au/content/index.phtml/itemId/1018752/fromItemId/751043>); Austaxi Group (2011; <http://registers.accc.gov.au/content/index.phtml/itemId/1012142/fromItemId/751043>); and Yellow Cabs (2012; <http://registers.accc.gov.au/content/index.phtml/itemId/1028390/fromItemId/751043>).

²⁷ *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339. The market was the wholesale bread market in Victoria. Market definition is, of course, a purposive exercise, so it is always difficult to state how one finding impacts another scenario; nonetheless, the finding of substantive market power easily translates to many similar markets. Note that Safeway's application for special leave to appeal to the High Court was declined: *ACCC v Australian Safeway Stores Pty Ltd & Anor* [2004] HCA Trans 344.

²⁸ 24 applications for clearance have been approved, of a total of 27. Two were opposed (Karabar and Glenmore Ridge); one (Wallaroo) fell over for commercial reasons, following initial concerns by the ACCC: see further Appendix A.

²⁹ Of the 45 acquisitions involving supermarkets listed on the ACCC's mergers register 2005-present, two were opposed and did not proceed, one was opposed but subsequently permitted following proceedings in court, and a further merger was the subject of initial concern but fell over due to commercial reasons. See further Appendix A.

³⁰ *ACCC v Metcash Trading* [2011] FCAFC 151.

Why are 90% of mergers allowed in a sector tainted by substantial market power?

68. The Retail Guild submits that mergers in the grocery sector are proceeding unchallenged for several reasons:
- 68.1. the ACCC's position in relation to new sites has been inconsistent;
 - 68.2. on occasion, the ACCC gets it wrong; and
 - 68.3. the ACCC necessarily tends to focus on local markets, as a single transaction will rarely give rise to a *substantial* lessening of competition in a state or nation-wide market, even though such transactions do contribute to increased economies of scale (and often scope) in these broader markets.
69. While the first two factors go to the enforcement of the law as it currently stands (discussed below at paragraphs 91-103), the last is clearly referable to a gap in the law which – as demonstrated above – is not stopping firms with acknowledged market power from adding to that power by acquisitive growth.

The retail grocery sector as an exemplar

70. The Retail Guild notes the draft report's views on the effectiveness of competition in the retail grocery sector. In essence, the draft report acknowledges that Australia's market is highly concentrated, but states that one must take into account barriers to entry. The entry of ALDI and Costco into the Australian market is cited, and the report notes that "few concerns have been raised about prices".³¹
71. Addressing these issues in turn:

³¹ At 181.

- 71.1. barriers to entry into the retail grocery sector are high, and have always been acknowledged to be so.³² As observed by the ACCC in 2008, “Further improvements in the competitive dynamic are most likely to be by the potential entry of new grocery retailers. However, the ACCC has seen no significant evidence to suggest that such a competitor will enter in the near future”,³³
- 71.2. ALDI’s entry into the Australian market in 2001 does not “disprove” that barriers to entry are high (bearing in mind that it had a meaningful presence in Australia at the time of above comments from the *Grocery Report*). It is understood that ALDI’s parent company carried losses by its Australian operations for close to a decade – that is not evidence of low barriers to entry. Costco’s entry into Australia is, at this point, so insignificant that it also cannot be said to demonstrate low barriers to entry. In any case, as market concentration data over the years show, any growth (current or future) by ALDI or Costco is effectively in place of Franklins, the “third force” which in the *Safeway* case was not enough to counter the substantial market power of Woolworths (and by implication, Coles); and
- 71.3. the Retail Guild respectfully reminds the Review Panel that – as the Panel itself consistently states – choice and diversity are very important indicators of effective competition. Price, while important, is hardly determinative.
72. Indeed, while it might be said that Australian prices are competitive (although the data is not definitive), as the Review Panel continually states throughout the draft report, choice and diversity must also be considered. *Competition* is what ensures

³² For a detailed discussion of entry barriers into grocery retailing in the United Kingdom, see Office of Fair Trading, “Competition in Retailing” (Research Paper No 13, September 1997), 64ff. For a discussion of conditions in Australia, see Alexandra Merrett and Rhonda Smith, “The Australian grocery sector: structurally irredeemable?” (paper presented at Supermarket Power in Australia: A Public Symposium, Melbourne, 1 August 2013).

³³ ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008) (the **Grocery Report**), 213.

low prices are passed on to consumers. It is competition in the form of choice that underpins dynamic efficiency (innovation).

73. As the draft report observes:

*Lack of choice can result in poorer quality and more expensive services, and less diversity and innovation...*³⁴

74. This is one of many such statements throughout the report – their varying context (online retailing, human services, utility regulation) makes the underlying sentiment no less true for the grocery sector than for any other part of the economy.

75. Thus, the Retail Guild reminds the Review Panel that:

75.1. Australia is internationally recognised as having one of the most concentrated grocery sectors in the developed world.³⁵ Indeed, depending on what products are included in the market, Australia is generally regarded as the second-most concentrated market, as indeed reflected in the draft report.³⁶ Yet regulators in markets such as the United Kingdom, Ireland, Europe more generally, and Canada – all of which are significantly less concentrated than Australia's and generally have lower barriers to entry³⁷ – consistently express their concerns about the extent of concentration (and buyer power) in *their* markets;³⁸

³⁴ At 146.

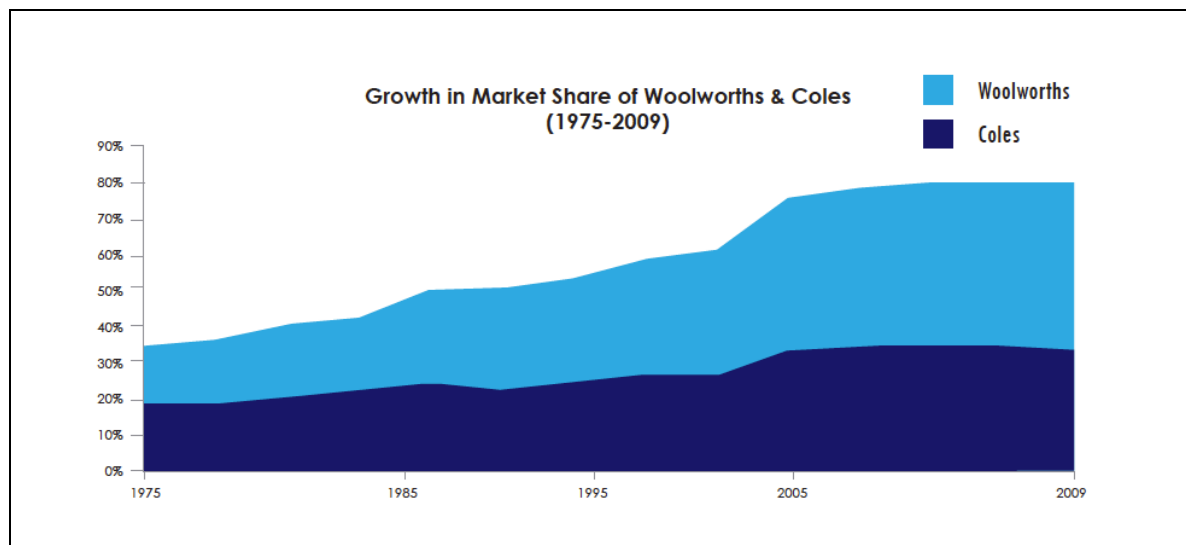
³⁵ See for example, Andrew Jacenko and Don Gunasekera "Australia's retail food sector: some preliminary observations" (ABARE Conference paper 05.11, 2005).

³⁶ Including by reference to the CR4 statistics listed in the draft report at 182, even though the data cited therein reflect a very conservative assessment of concentration in Australia.

³⁷ On account of their geographic proximity to other markets, facilitating the entry of established competitors from adjacent markets.

³⁸ See for example the discussion in UK Competition Commission, *The supply of groceries in the UK: market investigation* (2008), 2.19-2.28; *Rye Investments Ltd v Competition Authority* [2009] IECD 140 (appeal pending), at 9.39-9.76, also 9.14; and Jean-Francois Wen, *Market power in grocery retailing: assessing the evidence for Canada* (a report prepared for the Canadian Competition Bureau, 2001). See also, Gordon Mills, "Buyer power of supermarkets" (2003) 10 *Agenda*, 145-146, in which he compares the grocery markets in Australia and Great Britain. Also note the recent OECD report (Organisation for Stage 2 submission to the Harper Inquiry by Retail Guild of Australia

75.2. over the past several decades, the degree of concentration in the Australian market has increased, not decreased,³⁹ as shown by the following diagram;



Source: Accenture Australia, The challenge to feed a growing nation (2010)

75.3. in the *Safeway* case,⁴⁰ Safeway [Woolworths] was found to have substantial market power, and – by clear implication – Coles too. Since the relevant conduct in that decision, the grocery sector has become significantly more concentrated.⁴¹

Economic Co-operation and Development, *Roundtable on competition in the food chain: background note by the Secretariat* (DAF/COMP(2013)15 (2013)), at [25]:

Changing retail trends in Australia give another example of high and rising levels of concentration in food retailing. A recent study... reports that the top two food retailers (Coles and Woolworths) accounted for around 80 per cent of retail food sales in 2009. This compares with the UK where, even though food retailing is seen as being relatively concentrated, the top two firms account for 48 per cent of total sales. The trend towards increased concentration in Australia has occurred at a fast rate. In 1990, these two firms accounted for 50 per cent of market share; by 1999 61 per cent, rising to around 80 per cent by the mid-2000s.

³⁹ See for example Organisation for Economic Co-operation and Development, *ibid*.

⁴⁰ *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339.

⁴¹ See quote from the OECD, extracted at paragraph 83; also the graph extracted at paragraph 75.2.

76. While there may be debate over exact concentration figures (and what products to be included at any given time),⁴² the factors listed in paragraph 75 are *not* contentious.
77. Furthermore, the market is more fragmented than ever before. After ALDI, there is the independent sector, comprising thousands of retailers. Not only do the major supermarket chains account for an enormous portion of total market share, therefore, the remainder of the market is extremely fragmented, meaning its capacity to operate as an effective constraint on the major chains is severely diminished.
78. ***Safeway – a finding of substantial market power***: as regularly observed, however, market power requires more than just high market share. The *Safeway* case considered Safeway’s potential market power in its capacity as a buyer of wholesale bread. At first instance, Goldberg J found Safeway had substantial market power, on the basis of the combination of a number of factors. On appeal, these factors were considered closely, with Heerey and Sackville JJ basing their own finding of substantial market power on all but one of the factors identified by Goldberg J, being:
- 78.1. the lack of independent alternative sources of supply – a factor that was specific to the facts of the case, but would be equally applicable in other industries such as dairy;
- 78.2. the applicable barriers to entry that prevailed for a retailer of comparable size – that is, the barriers to entry that would apply to establishing a state-wide grocery retail network;
- 78.3. Safeway’s market share at the time (20-25% of all wholesale bread supplied in Victoria); and
- 78.4. the existence, in the bread wholesaling market, of significant excess capacity.⁴³

⁴² See draft report, 181.

79. Special leave to appeal the Full Court decision was sought – including in relation to the finding of substantial market power – but the High Court declined to intervene in the decision.
80. Considering the extent to which a case for market power on the part of Coles or Woolworths continues today, the first factor (as noted above) was specific to the facts of the case, although analogous circumstances may readily arise. Likewise the last factor. The second and third factors remain just as problematic now as they were at the time of Safeway’s conduct; indeed, in many markets falling within the broader grocery sector, Woolworths’ market share is likely to be considerably higher (as is Coles’) than at the time of the *Safeway* decision. As their market share has grown, so too has their capacity to take advantage of economies of scale and scope, thereby further increasing barriers to entry.
81. Accordingly, considering the current market structure, one can safely conclude that Coles and Woolworths would be considered to have substantial market power in many antitrust markets falling within the grocery sector. It is also notable that, at present, there are concerns about the conduct of the major supermarket chains specifically in relation to bread (85c bread, as well as return issues).
82. **Notwithstanding substantial market power, concentration is increasing:** nonetheless, more than 90% of mergers in the grocery sector over the past decade have gone unchallenged.
83. As noted by the OECD, “In 1990 [prior to *Safeway*], [Coles and Woolworths] accounted for 50 per cent of market share; by 1999 [around the time of the *Safeway* conduct] 61 per cent, rising to around 80 per cent by the mid-2000s”.⁴³
84. The Retail Guild therefore categorically rejects the assertion that there is an “absence of evidence of harmful acquisitions proceeding because of a gap in the law...”.⁴⁵

⁴³ *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339, at [305]-[318].

⁴⁴ Organisation for Economic Co-operation and Development, above n38, at [25].

Why this test?

85. As with the Retail Guild’s proposal in relation to section 46, the proposed additional merger prohibition is in keeping with the approach to the SLC test set out in *Rural Press*. In that case, Gummow, Hayne and Heydon JJ (when assessing the SLC claim under section 45) observed that stamping out “rivalrous conduct [in] a part of a market that had previously not known it” amounted to a substantial lessening of competition.
86. Thus, the majority recognised a clear relativity when assessing substantiality such that removing *any* competition from a market in which there was little or none amounted to a substantial lessening of competition. The analogy with a market in which a party has substantial market power is clear: *any* lessening of competition should be regarded as substantial.
87. While the *Rural Press* approach to the SLC test appears perfectly sensible (and indeed consistent with prior authority emphasising the relative nature of the test), it appears largely to have been disregarded. The Retail Guild is not aware of a merger (or conduct falling under sections 45 or 47) in which a “*Rural Press*” approach has formed the central tenet of the SLC argument. Accordingly, the Retail Guild considers that the decision should be codified in the manner suggested.
88. As noted earlier, this may also address practical issues arising from the use of overseas experts dealing with the different structure of Australian law (with its enforcement/adjudication model), as against other jurisdictions.
89. Such an approach also addresses the problems associated with aggregating distinct mergers, as discussed in the draft report.⁴⁵ Rather, the focus would still be on particular transactions, but subject to a lower threshold (assuming the anterior element of “substantial market power” was established).

⁴⁵ Draft report, at 48.

⁴⁶ At 199.

90. Authorisation would, of course, always remain an option, allowing merger parties to put forward public benefit (including efficiency) arguments to overcome the detriment caused by a party with substantial market power further enhancing its market position. While merger authorisations have been reducing in popularity over recent years and the process criticised, the recommendations put forward by the Panel in the draft report⁴⁷ should render the process far more effective.

CONCERNS REGARDING CURRENT APPLICATION OF SECTION 50

91. Returning to the reasons for so many unchallenged mergers in a sector bedeviled by market power (paragraph 68), the Retail Guild also has some concerns about the ACCC's enforcement of the law.
92. In short, the ACCC's position in relation to the acquisition of new leases has been inconsistent. In the *Grocery Report*, the ACCC concluded there was no "creeping acquisition" problem because "overwhelming[ly]" the growth of Coles and Woolworths was organic (the implication being that such growth was not subject to an SLC test, whether in section 50 or elsewhere). At the same time, the ACCC asserted its view that section 50 *does* apply to the acquisition of new sites/leases. The issue requires clarification.
93. Further, in the Retail Guild's opinion, the ACCC has allowed several acquisitions by Coles and Woolworths where – even on localised issues – there were strong grounds to suggest a substantial lessening of competition.
94. These issues are addressed in further detail below.

The acquisition of new sites/leases

95. In the *Grocery Report*, the ACCC observed that "an overwhelming proportion of new growth for [Coles and Woolworths] over the last five years has come from

⁴⁷ As per draft recommendation 30.

the development of new sites”⁴⁸ – it was on this basis that it concluded that there was no “creeping acquisition” problem. The clear implication, as reflected in the 2012 Regulatory Impact Statement accompanying amendments to section 50, was that new sites did not fall within the ambit of section 50.⁴⁹

96. Yet the ACCC asserted in the *Grocery Report* that new acquisitions *do* fall within the scope of section 50 (notwithstanding the exception in section 4(4)(b) concerning acquisitions “in the ordinary course of business”).⁵⁰ But, until the decision in Glenmore Ridge in 2013,⁵¹ no merger had ever been opposed by the ACCC on this basis.
97. The Regulatory Impact Statement observed that, “It is appropriate for section 50 to apply [to new sites] because: it applies to acquisitions of legal or equitable interests in real property, which are ‘assets’ within the scope of section 50; and because such an acquisition has the potential to substantially lessen competition in the market”.⁵² Accordingly, the statement concluded, the “ordinary course of business” exception contained in section 4(4)(b) should not be read to remove the acquisition of new sites from the scope of section 50.
98. This clear statement is welcomed (and indeed may have been a relevant factor in the ACCC’s decision to oppose the Glenmore Ridge acquisition). Nonetheless, given the significance of the issue and the absence of judicial consideration, section 4(4)(b) should be amended to ensure the clear application of Part IV, including the SLC test in its various guises and section 46.

⁴⁸ *Grocery Report*, above n33, 428.

⁴⁹ See at 4.34. The Explanatory Memorandum and Regulatory Impact Statement are available at: http://parlinfo.aph.gov.au/parlInfo/download/legislation/ems/r4600_ems_b10671f4-f2bd-450c-92b8-48c32166a367/upload_pdf/356635.pdf;fileType=application%2Fpdf - search="legislation/ems/r4600_ems_b10671f4-f2bd-450c-92b8-48c32166a367".

⁵⁰ *Grocery Report*, above n33, 428.

⁵¹ See at <http://registers.accc.gov.au/content/index.phtml/itemId/1116726/fromItemId/751043>.

⁵² See at 4.53.

“Differences of opinion can and do emerge...”

99. As the draft report observes, there can be “differences of opinion” as to the appropriate outcome of a merger clearance process. The Retail Guild can point to several instances in which – even on local issues – it considers there was a clear and substantial lessening of competition, but the ACCC granted clearance.
100. The Retail Guild notes the Panel’s observation that it is not its “role... to adjudicate whether the ACCC has been right or wrong in its interpretation of the law in individual cases...”.⁵³ Nonetheless, contrary to the apparent position in the draft report,⁵⁴ third parties may also have a legitimate interest in the outcome of merger reviews. Accordingly, as discussed in further detail in Section III of this submission, private litigation needs to be facilitated to allow third parties the opportunity to press their case.
101. This capacity is particularly important given Coles’ clear strategy of non-engagement with ACCC merger processes and the surprising effectiveness of that strategy. Over the last 10 years, only six acquisitions by Coles (in respect of supermarkets) have been reviewed by the ACCC. Of these, three were notified to the ACCC by Coles in advance (ie on a voluntary basis) but the others were not. As such, they were reviewed by the ACCC following completion, either at its own instigation or perhaps following a complaint.
102. But in FY2012/13 alone, Coles opened 19 new supermarkets (as reported in Wesfarmers’ annual report of that year). Given the low number of acquisitions that the ACCC has investigated over the last decade (just six by Coles, as against 27 for Woolworths), it is clear that the ACCC lacks either the inclination or resources to instigate many merger reviews of its own accord. Third parties, therefore, must be empowered to pursue mergers of concern through the courts.

⁵³ At 193.

⁵⁴ See the excerpt from the draft report set out at paragraph 50.

103. As such, while the Retail Guild considers there is scope to improve the ACCC's assessment of mergers (see Appendix B),⁵⁵ fundamentally it considers there must be scope to *disagree* with the ACCC's assessment. This issue is developed further in Section III of this submission.

Other procedural issues

104. **Notification of mergers:** currently firms are not required to notify the ACCC in advance of a merger. Generally, prudence together with good corporate governance mean that mergers that might give rise to competition concerns will be notified. As noted above at paragraphs 101-102, however, not all businesses adopt such an approach.
105. In the Retail Guild's view, therefore, mandatory pre-notification of acquisitions by firms with a substantial degree of power in given markets should be required. An effective way to achieve this outcome would be to stipulate by regulation (similar to the process described above at paragraph 61) that the largest players in specific sectors should notify the ACCC in advance of all acquisitions – greenfields or otherwise – occurring within that sector.
106. **Post-merger review:** currently, there is little or no consideration of decisions by the ACCC to ascertain how the affected market(s) has/have performed in the time since a given acquisition occurred. This contrasts with other jurisdictions such as Europe and the United Kingdom.⁵⁶
107. Regular, thorough and independent reviews would:
- 107.1. allow a proper assessment of whether the ACCC is identifying – and analysing – the correct markets, and applying the counterfactual appropriately (noting the concerns outlined in Appendix B);

⁵⁵ As discussed in the Stage 1 submission in considerable detail: this analysis is reproduced at Annexure B.

⁵⁶ See for example Buccirossi et al, *Ex-post review of merger control decisions* (December 2006); available at http://ec.europa.eu/competition/mergers/studies_reports/lear.pdf.

- 107.2. over time, assist the ACCC to develop an understanding of the appropriate weight to give to types of evidence, which is also likely to facilitate better court outcomes; and
- 107.3. impose a necessary discipline on the ACCC, given the costs and time involved in litigation, a decision by the ACCC to oppose clearance generally stands as the final decision (even if private litigation were to be encouraged, this is likely to remain the case for the majority of merger clearances). All parties need to have confidence that such decisions reflect the law as it would be applied by the courts.
108. This is not to suggest that every merger needs to be subject to such an assessment, but contentious mergers would be candidates for review. Similarly, where a number of mergers have occurred in a particular sector, this may trigger a review. As with the Panel's market studies recommendation, the review should not be undertaken by the ACCC.
109. The aim of such a review would be to establish whether, given the policy objectives of Australia's merger regime, the market structure resulting from the merger decision(s) is better than that which would have emerged from alternative decisions. It would also assist in determining whether the correct decision was made given the information available and within applicable legal constraints and if not, why this was the case. The aim is to improve understanding of the assessment process by all parties and hence future decision-making.
110. Whilst allowing flexibility of approach, guidance as to appropriate methodology for reviews should be provided via a public document. Any such review should take the form of a competition assessment, including consideration of whether the boundaries of the market have changed from those used in the original assessment. In undertaking such reviews, sufficient time should be provided for the effects of the merger to become apparent.

III. Improved enforcement

SUMMARY

The Retail Guild makes the following submissions outlining general measures to improve the engagement of private parties, including small business, with Australia's competition laws:

- Private litigation has made a very important contribution to the development of competition law in Australia and overseas, but is in decline. The lack of private litigation – particularly stand-alone litigation – is not merely an “access to justice” issue for small business, it impacts upon the effectiveness of the Australian regime generally*
- The engagement of small business with Australia's competition regime – whether as complainant, applicant or investigation target – needs to improve*

Accordingly, the Retail Guild RECOMMENDS:

- ☒ *Practical steps be taken to encourage private litigation, principally, relief from the prospect of having to pay the other side's costs if proceedings are unsuccessful. While any number of mechanisms could be implemented to create an appropriate hurdle before relief from costs is granted, the Retail Guild favours an application to the court early in the relevant proceedings – see paragraphs 124-130*
- ☒ *Consideration be given to ways in which matters can be brought within the jurisdiction of the Australian Competition Tribunal, as opposed to the courts, given their respective positions in relation to costs – see paragraph 132*
- ☒ *A working party be established to consider available options to improve the procedures and practices surrounding competition law litigation – see paragraphs 133-134*
- ☒ *A clearing-house be created, allowing for the development of capacity and expertise in competition issues within a small business context – this should not be limited to complaints, but also include general engagement with the law (eg assistance in preparing notifications, responding to investigations). The new Small Business and Family Enterprise Ombudsman may be an appropriate vehicle for such a clearing-house – see paragraphs 136-139*

111. The Retail Guild welcomes the Review Panel’s consideration of two key issues upon which it heavily focused during the first stage of consultation: facilitating private actions and enhancing small business engagement.
112. Whilst recognising the need for improvements in these areas, the draft report only made limited recommendations – rather, the report called for further submissions.
113. In responding to this call, the Retail Guild draws upon its detailed consideration of these points as set out in its first round submission.

FACILITATING PRIVATE ACTIONS

The draft report’s assessment/approach

114. The draft report observes:

*Private enforcement of competition laws is an important right. However, there are many regulatory and practical impediments to the exercise of those rights. It is important to find ways to reduce those impediments.*⁵⁷

115. The report then goes to consider ways in which the use of section 83 may be expanded, and seeks input in relation to the handling of small business complaints.
116. The Retail Guild has the following observations concerning the approach in the draft report:
- 116.1. first, while it is obviously correct to observe that private enforcement is an “important right”, it is also vital to acknowledge the public benefits that follow on from vigorous enforcement of the law by private parties;⁵⁸

⁵⁷ Draft report, 53.

⁵⁸ See Alexandra Merrett and Rhonda Smith, “The public benefits of private litigation” (July 2014) *The State of Competition*; available at: <http://thestateofcompetition.com.au/wp-content/uploads/2014/07/TSoC-Issue-19-private-litigation.pdf>

- 116.2. the proposed changes to section 83 are likely to make minimal difference to the extent of private litigation, particularly the sort of litigation that brings with it broader benefits for the community; and
- 116.3. while there are obvious impediments limiting the engagement of small business with Australia's competition laws (as discussed in further detail below), it is vital to recognise that large businesses are also not seeking to enforce these laws. This is *not* a small business issue.

The role of section 83

117. Improvements to section 83 are unlikely to increase the rate of private competition litigation in Australia by any significant degree, for the following reasons:
- 117.1. section 83 only supports "piggy back" actions – so the ACCC must first bring (and win) a case before the section is in operation. If the concern is a lack of competition cases being brought by the ACCC (see for example Table 3 on page 17), expanding the operation of section 83 *cannot* help;
- 117.2. section 83 is most apt for use in relation to cartel-like behaviour, where there may be a large number of "victims" of the conduct in question. Its expanded operation is not likely to give rise to a significant number of *competition* claims piggy-backing on ACCC proceedings; and
- 117.3. as a matter of practicality, section 83 has hardly ever been used thus far. Even though it is a long-standing provision in the TPA/CCA, remedies have not been awarded to an applicant in reliance on section 83 in the last 30 years. Expanding its operation such that it clearly applies to admissions of fact may assist in this regard, but its operation is most likely to remain very confined. This is particularly so as findings for the purpose of section 83 tend to be one of the first measures given up by the ACCC

when negotiating a settlement with a respondent – see for example the *Visy* case.⁵⁹

Encouraging stand-alone private actions is essential

118. It is well known that Australia’s competition laws were intended to be primarily enforced by private parties, a point reaffirmed by the Hilmer Committee.⁶⁰ Yet, the CCA has increasingly become the exclusive terrain of the ACCC, entrenching what is ironically referred to as the “governmental monopoly over enforcement”.⁶¹ As Maureen Brunt observed, “the Commission has become the main enforcer – and indeed interpreter for the time being – of the law...”.⁶²
119. Particularly in light of the limited enforcement activity by the ACCC,⁶³ this is creating a massive hole in our jurisprudence. As Brunt noted in 1994, “more significant judgments on the merits [in competition cases] have stemmed from private than from public actions”.⁶⁴ Indeed of the five section 46 cases to go to the High Court, three were private actions (*Queensland Wire*, *Melway* and *NT Power*).
120. Private parties are best placed to anticipate long-term harm to a market. Their understanding of their own industry provides an unmatched insight into the strategic possibilities and consequences of particular conduct. As recently observed by US Assistant Attorney-General Bill Baer:

A high volume of private litigation in the United States means a constant flow of new competition law decisions. We still rely on

⁵⁹ *ACCC v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617.

⁶⁰ Independent Committee of Inquiry, *National Competition Policy* (1993), at 335.

⁶¹ Daniel A Crane, “Optimizing private antitrust enforcement” (2010) 63:3 *Vanderbilt Law Review* 675, 722.

⁶² Maureen Brunt, “The use of economic evidence in antitrust litigation: Australia” (August 1986) *Australian Business Law Review* 261, 294.

⁶³ See the discussion above at paragraphs 13-16, especially Table 3; note also Merrett and Smith, above n58.

⁶⁴ Maureen Brunt, “The Australian antitrust law after 20 years – a stocktake” (1994) 9 *Review of Industrial Organisation* 483, 485.

*decades old court decisions, but we also have the benefit of new judicial glosses on them. And our courts are constantly presented with new questions, new slants on old questions, and new factual settings, all of which can provoke rethinking the rationale of older decisions and restating core principles with added clarity. Competition law in the United States is constantly evolving.*⁶⁵

In the United States, the ratio of private to government actions is around 10:1;⁶⁶ yet, even there, commentators have recognised the need to “strengthen private enforcement so that it can serve as a more effective means of compensating victims and deterring potential transgressions”.⁶⁷

121. The Australian regime also needs the invigorating impact of private actions. While the United States has a long tradition of encouraging private litigation (including via triple damages, although there are many other contributing factors), other jurisdictions have been more comfortable with “regulator-led” enforcement of the law. This, however, is changing. In particular, both the United Kingdom⁶⁸ and the European Commission⁶⁹ have recently taken significant steps to encourage private competition actions.

⁶⁵ Bill Baer, “Public and private antitrust enforcement in the United States” (Remarks as prepared for delivery to the European Competition Forum 2014, Brussels Belgium, 11 February 2014; available at: <http://www.justice.gov/atr/public/speeches/303686.pdf>).

⁶⁶ Steven C Salop and Lawrence J White, “Economic analysis of private antitrust litigation” (1986) 74 *Georgetown Law Journal* 1001; see at 1003, where they note that, since the 1980s, the ratio of private-to-public antitrust cases in the United States has “declined” to 10:1.

⁶⁷ Joshua P Davis and Robert H Lande, “Defying conventional wisdom: the case for private antitrust enforcement” (2013) 48 *Georgia Law Review* 1, 8

⁶⁸ For a discussion of recent reforms, see Nikos Dimopoulos et al, “United Kingdom: private antitrust litigation” in Global Competition Review, *The European Antitrust Review 2014*; available at: <http://globalcompetitionreview.com/reviews/53/sections/179/chapters/2129/united-kingdom-private-antitrust-litigation/>

⁶⁹ Commission of the European Communities, *White paper on damages actions for breach of the EC antitrust rules* (COM (2008) 165 final) (**EC White Paper**).

What are the impediments? How can private actions be encouraged?

122. In the Retail Guild’s view, there are three basic impediments to private litigation:⁷⁰
- 122.1. the expense, particularly given the risk of an adverse costs order should an applicant lose;
 - 122.2. the likely length of the process; and
 - 122.3. the lack of suitable remedies.
123. The inclusion of divestiture as a remedy for section 46 contraventions may go some way to addressing the last issue. In respect of the first two (which are, in the Retail Guild’s view, the most significant), serious regard must be had to our court processes. Specifically, the Guild submits that:
- 123.1. relief from costs must be made available in some circumstances; and
 - 123.2. procedural changes – such as the provision of economic assistance to judges – should be explored thoroughly.
124. **Relief from costs:** the draft report acknowledges various calls for relief from costs, but states “such changes could have unintended consequences – for example, encouraging frivolous or vexatious actions”.⁷¹
125. Such analysis is superficial, disregarding moves particularly by the European Commission to encourage private litigation which have directly focused on the costs issue. It also discounts the many practical ways frivolous or vexatious litigation could be discouraged.
126. As at 2008, the European Commission stated that:

⁷⁰ The Guild notes the observation by the European Commission that the limited extent of private actions was “largely due to various legal and procedural hurdles”: *ibid*, 2.

⁷¹ At 256.

*it would be useful for Member States to reflect on their cost rules and to examine the practices existing across the EU, in order to allow meritorious actions where costs would otherwise prevent claims being brought, particularly by claimants whose financial situation is significantly weaker than that of the defendant...*⁷²

127. It continued that the “‘loser pays’ principle [for costs]... could... discourage victims with meritorious claims”.⁷³ Other recommendations included consideration of mechanisms to encourage the early resolution of cases, and limitations on court fees.

128. The Retail Guild submits that private litigants bringing actions under Part IV should be able to apply to the court at an early stage seeking relief from costs should their claim be unsuccessful. For example, such an application:

128.1. might involve a preliminary hearing whereby the judge (or a registrar) could assess the basic merits of the claim (in a similar manner to any *prima facie* assessment of a matter). If the judge (registrar) were satisfied that there was a sound basis for bringing the case and that there would be public benefit in it proceeding (whether due to the potential cessation of anti-competitive conduct and/or because an important aspect of the law was in issue), then the s/he could make an appropriate order relieving the applicant of costs, regardless of the outcome of the case; and

128.2. could be subject to a substantial filing fee (over and above the standard filing fee for such actions), which could act as a form of “bond”.⁷⁴ Such a bond, perhaps in the order of \$25,000 (the current merger authorisation filing fee), would discourage frivolous use of the process. If the judge considered the applicant’s case had not been conducted appropriately, the bond could be forfeited to the respondent.

⁷² *EC White Paper*, above n69, 9.

⁷³ *Ibid.*

⁷⁴ Although note paragraph 127, which refers to recent moves elsewhere to *lower* standard filing fees to encourage private competition actions.

129. Alternative ways in which frivolous or vexatious litigation could be avoided include:

129.1. allowing relief from costs orders only in cases where a market study by the ACCP supports a general claim of substantial market power;

129.2. requiring provision of “reasonable grounds” advice on a confidential basis to a registrar of the court for the purposes of reaching an assessment, as per the process described in paragraph 128;⁷⁵ or

129.3. creating a process whereby one of a number of recognised bodies – such as the ACCC or one of the various small business ombudsmen – could recommend to the court that relief from costs is appropriate.

130. As illustrated by paragraphs 128-129, any number of mechanisms could be considered to create an appropriate hurdle before relief from costs is granted. But such relief is also likely to contain costs generally, discouraging larger companies from “gearing up” in an intimidatory fashion to prompt the withdrawal of actions. Note, for example, the widespread concerns regarding the conduct of the C7 litigation.⁷⁶

131. See also the observations by Davis and Lande:

*Defendants in antitrust cases tend to be very wealthy and powerful. After all, violators of the antitrust laws must have market power for their illegal conduct to harm others. Their wealth allows them to retain effective counsel, pay the costs of litigation, and tolerate risk.... The plaintiffs in antitrust litigation, in contrast, tend to have limited means. By their nature, they generally lack market power and are vulnerable to the market manipulations of others....*⁷⁷

⁷⁵ Such advice might be similar to that required of Commonwealth agencies pursuant to paragraph 4.7 of *Legal Services Directions 2005* (Cth).

⁷⁶ As discussed in Kate Gibbs, “Excess or necessity? Lawyers reflect on C7 litigation” (28 September 2007) *Lawyers Weekly*; available at: <http://www.lawyersweekly.com.au/news/excess-or-necessity-lawyers-reflect-on-c7-litigati>.

⁷⁷ Davis and Lande, above n67, 68-69.

132. It might also be possible to consider ways in which matters can be brought within the jurisdiction of the Australian Competition Tribunal, as opposed to the court, given the Tribunal's position on costs. This also reflects the approach in the United Kingdom of directing claims away from the courts towards a specialist tribunal.⁷⁸ This may in part be achieved via draft recommendation 30, which will make merger authorisation more practical and thus more attractive, but there may also be scope to do more in this area.
133. **Procedural changes:** Europe and the United Kingdom have also explored ways in which to effect procedural changes to reduce the time and expense associated with competition litigation. In the United Kingdom, for example, a “fast-track procedure for simpler antitrust claims in the [Competition Appeals Tribunal] (principally for the benefit of SMEs)” has been introduced.⁷⁹
134. The Retail Guild also notes the Panel's question concerning the practice in New Zealand of allowing judges to draw upon the assistance of an economist.⁸⁰
135. The Guild welcomes any moves to improve the procedures and practices surrounding litigation and submits that a separate working party should be established to consider what options may be available. This process – perhaps similar to that recently undertaken in the United Kingdom⁸¹ – could form part of, or be linked to, the simplification process recommended by the Panel.⁸²

⁷⁸ Department of Business Innovation & Skills, *Private actions in competition law: a consultation on options for reform* (April 2012; available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31528/12-742-private-actions-in-competition-law-consultation.pdf).

⁷⁹ Dimopoulos et al, above n68.

⁸⁰ At 298.

⁸¹ See the report referred to at n78.

⁸² Draft recommendation 18.

IMPROVING THE ENGAGEMENT OF SMALL BUSINESS

136. The Retail Guild supports calls for better access for small business to all aspects of Australia's competition regime.
137. The victims of anti-competitive conduct are, frequently, small businesses lacking the time and resources to obtain legal advice prior to lodging a complaint with the ACCC. This can mean complaints are poorly drafted, sometimes lacking coherency and the necessary level of detail to prompt efficient consideration.
138. One way to assist more expedited investigations by the ACCC would be to improve the quality of the complaints it receives. Accordingly, the Retail Guild urges the building of capacity and expertise in competition law matters in a body such as the Small Business and Family Enterprise Ombudsman to assist small business in making complaints to the ACCC.
139. The Small Business and Family Enterprise Ombudsman should also develop the capacity to:
 - 139.1. develop and publish educational materials, explaining to small businesses what can be done within Australia's competition framework (as opposed to the ACCC's general focus on what shouldn't be done);
 - 139.2. assist small businesses to respond to enquiries from the ACCC, particularly where they are the target of an investigation; and
 - 139.3. assist with the preparation of various submissions to the ACCC, such as in support of notifications or third-party comments on proposed mergers.

IV. Deregulation

SUMMARY

The Retail Guild makes the following submissions concerning the deregulation proposals contained in the draft report:

- *Deregulation generally improves the competitive environment, delivering clear benefits to consumers. But, in some circumstances, it can provide an opportunity for market power to become entrenched or enhanced, even when it is intended to challenge such market power*
- *Specifically considering the retail sector, the proposed deregulation of retail hours and pharmacy ownership and location laws have the potential to deliver increased economies of scale and scope to major supermarket chains, further enhancing their efficiency but at considerable cost to competition*
- *Efficiency and competition are not synonymous. This is because “productive efficiency” is but one component – dynamic efficiency is best promoted by choice and diversity, and effective competition is what ensures consumers are the primary beneficiaries of all forms of efficiency*

Accordingly, the Retail Guild RECOMMENDS:

☑ *Moves to relax trading hours and pharmacy regulations be deferred until such time as we have the right laws in relation to misuse of market power and mergers and those laws are being enforced (whether by the ACCC or by private parties) – see paragraphs 140-147*

140. Moves to deregulate must be seen within the context of competition policy more generally. The three pillars – getting the right laws in relation to sections 46 and 50, and then ensuring that they are enforced – must first be in place before deregulation occurs, otherwise the transition period provides an opportunity for market power to be entrenched.
141. Stiroh and Rapp observe that deregulation imposes a ‘before’ and ‘after’ element on a dynamic market structure, noting that after deregulation, “the dominant firm

will still have a substantial market share although it will no longer be protected”.⁸³ As such, a dominant firm may be able to take advantage of its market position in the period immediately *after* deregulation such that it shores it up in the long run – thereby effectively entrenching or enhancing its market power, notwithstanding that deregulation was intended to challenge such market power.

142. This analysis is not merely theoretical. Indeed, it was recognised by the Competition Tribunal in the *Chicken Growers* authorisation:

*Following deregulation, Growers who invested with the ‘guarantees’ in place have become vulnerable to the possibility that Processors might impose fees and other terms which fail to cover (all of) their fixed – i.e. sunk or unavoidable costs... The potential for Processors to have behaved opportunistically in this sense (and, relatedly, to have engaged in risk-shifting and hold-up in relation to new investments) is indisputable.*⁸⁴

143. Thus “light touch regulation”, as called for in the draft report, can be at odds with ensuring the long term interests of consumers and promoting choice and diversity in circumstances where reducing regulatory barriers provides unreasonable advantages to incumbents. This, indeed, has been the experience in New Zealand where light touch regulation has been found wanting, particularly in the aviation sector, even though its general benefits are broadly acknowledged.⁸⁵
144. In the Retail Guild’s view, reducing or removing regulatory restrictions in relation to both retail hours and the location and ownership of pharmacies carries similar risks.

⁸³ Lauren Johnston Stiroh and Richard T Rapp, “Market power in technology markets” (1999) *SD72 ALI-ABA Course of Study: Antitrust / Intellectual Property Claims in High Technology Markets* 61, see at 68.

⁸⁴ *Chicken Growers* [2006] ACompT 2, [192].

⁸⁵ See the ongoing debates regarding New Zealand’s regulatory system in aviation: Commerce Commission, *Final report: Part IV inquiry into airfield activities at Auckland, Wellington and Christchurch International Airports* (2002); Office of the Ministers of Transport and Commerce, *Commerce Act review: Airports* (2007); and Oxera, *Buyer power and its role in regulated transport sectors* (2012), especially Appendix 3. In the banking sector, note the just published article by David G Mayes, “Regulation and governance in the non-bank financial sector: lessons from New Zealand”, *Journal of Banking Regulation* advance online publication 12 November 2014 (available at: <http://www.palgrave-journals.com/jbr/journal/vaop/ncurrent/abs/jbr201423a.html>).

145. Deregulation of the type suggested provides a further contribution to economies of scale and scope, allowing major supermarket chains to extend into yet more markets. Given that the retail sectors in which they operate tend to be high volume/low margin, any contribution to common costs serves to create a competitive advantage.
146. This can be characterised as efficiency. But efficiency is *not* synonymous with competition: while improved productive efficiency can be a good outcome, the cost savings are only passed on to consumers where effective competition provides a disciplining force. This is why the Australian competition regime requires pure efficiency arguments to be debated under the auspices of an authorisation test, where public benefit is given primacy.
147. Thus the structure of Australia's regime values competition above all else. In the Retail Guild's view, deregulation of the type contemplated is likely to adversely affect competition unless and until the three pillars for an effective competition law are properly in place.

Appendix A: ACCC merger clearances in the grocery sector

Information drawn from all mergers listed on the Mergers Register which directly affect retail supermarket or wholesale markets. Acquisitions not directly affecting these markets are not listed (including acquisitions by key players in other sectors, such as liquor, pharmacies, hardware)





Date order is in accordance with the ACCC's final decision date

Green text indicates a horizontal merger at the wholesale level or a form of vertical integration (upstream)







Black text indicates the acquisition of one or more supermarket(s)

Blue text indicates the acquisition of a lease or a new site / development

 *indicates a merger of concern to the Retail Guild*







Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
2005				
	Foodland	Supermarket retail / wholesale	N/A	Not opposed
	Various Foodland supermarkets	Local retail supermarket (~5km surrounding target businesses), regional WA procurement & national wholesale markets	SOI (31.08.05) & PCA (19.10.05)	Not opposed <i>PCA issued because of "important issues" raised by acquisition</i> <i>In SOI, ACCC formed preliminary view that there was an SLC in 8 retail markets, as well as 2 other "areas of concern". Woolworths subsequently withdrew proposal for one of those; other concerns resolved by time of final decision</i>
	Eli Waters Foodworks	Local retail supermarket, Qld supply & national wholesale markets	N/A	Not opposed
	Action (Busselton)	Local retail supermarket, WA supply & national wholesale markets	N/A	Not opposed

Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
2006				
	Nardi's Foodworks (Bannockburn)	Local retail supermarket, procurement & national wholesale markets	N/A	Not opposed
2007				
	Supa IGA (Capalaba)	Local retail supermarket, procurement & national wholesale markets	N/A	Not opposed
	Roger & Dale's IGA (Thurgoona)	Local retail supermarket (3-6km surrounding target business) & NSW procurement markets	N/A	Not opposed
	Jindabyne IGA	Local retail supermarket (Jindabyne & Cooma) & NSW wholesale markets	PCA (26.06.07)	Not opposed <i>PCA issued because of "important issues" raised by acquisition</i>
2008				
	Mallam's Spar Supermarket (Mullumbimby)	Local retail supermarket (3-5km radius) & NSW procurement markets	N/A	Not opposed
	Ritchies Super [sic] IGA (Kelvin Grove)	Local retail supermarket & Qld procurement markets	N/A	Not opposed
	Karabar Supabarn	Local retail supermarket (3-5km radius), state wide procurement & wholesale markets	SOI (04.06.08) & PCA (15.07.08)	Opposed <i>As per PCA, there was "strong evidence" that, in a future without the acquisition, the supermarket would be acquired by the Supabarn Group and expanded into a full line supermarket. This would lead to higher levels of competitive tension between the Karabar supermarket and others in Queanbeyan and Jerrabomberra than would the future with the acquisition.</i>
	Food Rite Supermarket (Emerald)	Local retail supermarket & state wide wholesale markets	N/A	Not opposed



Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
	New site (Dubbo)	Local retail supermarket market (2, 3 or 6km surrounding target site)	N/A	Not opposed <i>Post-acquisition, Woolworths would have 2 of 3 stores within 3km radius & 3 of 5 stores in 6km radius. On the future without, there was no likely alternative operator. "[W]hile the proposed site's development would result in an increased presence for Woolworths, Woolworths would face the same competitors as would be the case without the proposed transaction"</i>
	Lease (Wallaroo, SA)	Local retail supermarket (including Wallaroo & Kadina, 16km away), state wide procurement & wholesale markets	SOI (11.12.08)	Withdrawn for commercial reasons <i>As stated in the SOI, the ACCC's preliminary view was that there would be an SLC in the local retail market, as the future without the acquisition would likely mean a large full-line independent supermarket in place of Woolworths</i>
	Lease (Southlands, Sth Penrith)	Local retail supermarket (5km radius), NSW procurement & NSW wholesale markets	N/A	Not opposed
2009				
	Lease (Waterloo, NSW)	Local retail supermarket (3km radius), NSW procurement & NSW wholesale markets	N/A	Not opposed <i>NB: acquisition reviewed by ACCC following completion</i>
	Solomon Food Group (food service wholesaling businesses)	Qld wholesale markets for food service products (fresh & frozen/packaged etc)	N/A	Not opposed
	New site (Kingston)	Local retail supermarket market (5km radius), ACT/NSW procurement & ACT/NSW wholesale markets	N/A	Not opposed

Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
	NFRF Developments	Vic/SE Aust/Tas wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in Vic, Tas & SE Aust	N/A	Not opposed <i>Bare transfer of market share</i> <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>
	Solomon Food Group (country retail produce wholesaling operations)	Qld/nthn NSW wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in Qld & nthn NSW	N/A	Not opposed <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>
	RKH Services (Dark Earth)	Central/sthn NSW/ACT wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in central/sthn NSW/ACT	N/A	Not opposed <i>Bare transfer of market share</i> <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>
	APFB	Central/sthn NSW/ACT wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in central/sthn NSW/ACT	N/A	Not opposed <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>
	Rainfresh	Vic/SE Aust/Tas wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in Vic, Tas & SE Aust	N/A	Not opposed <i>Bare transfer of market share</i> <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>
	Market Garden Produce	Qld/nthn NSW wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in Qld & nthn NSW	N/A	Not opposed <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>

Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
	Nu Fruit	Vic/SE Aust/Tas wholesale markets for fresh produce to independent supermarkets, national wholesale market for dry/packaged groceries, local retail supermarket markets in Vic & Tas	N/A	Not opposed <i>Bare transfer of market share</i> <i>Transaction unlikely to provide Metcash with the ability & incentive to engage in anti-competitive bundling</i>
	Macro Wholefoods	Local retail markets for organic food & groceries (3-5km radius) & state wide or regional wholesale organic markets	PCA (14.07.09)	Not opposed <i>PCA issued because of "issues of interest to the public" raised by acquisition</i>
	Fresh Market Meats	No definitive view reached	N/A	Not opposed
	Kelly's Providores	Wholesale markets for fresh produce to food service channel in central/sthn NSW & ACT	N/A	Not opposed
	New site (Giralang)	No definitive view reached	N/A	Not opposed
	Lease (Hunter's Hill, NSW)	No definitive view reached	N/A	Not opposed
	Lease (Kirrawee, NSW)	No definitive view reached	N/A	Not opposed
	New site (Newport)	Local retail supermarket market, NSW procurement & NSW wholesale markets	N/A	Not opposed
2010				
	New site (Tura Beach, NSW)	Local retail supermarket market (5-10km radius), NSW procurement market	N/A	Not opposed
	Coolum Village Shopping Centre	Local retail supermarket market (3-5km radius), Qld procurement & Qld wholesale markets	N/A	Not opposed <i>NB: acquisition reviewed by ACCC following completion</i>

Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
	Franklins	As per SOI: NSW wholesale markets for packaged groceries/fresh product to independents, combined NSW retail/wholesale market for supply/distribution to consumers, NSW procurement markets, local retail markets (5km radius)	SOI (22.09.10) No PCA, as proceedings filed	Opposed [overturned by Federal Court & Full Federal Court] Issues of concern (as per SOI): reduced competition in market for distribution of grocery products, resulting in increased power over price at wholesale level; some concerns in local retail markets <i>Note: the latter did not form part of the subsequent legal proceedings</i>
2011				
	Lease (Dunlop, ACT)	Local retail supermarket market (5km radius), ACT procurement & ACT wholesale markets	N/A	Not opposed <i>NB: RGA considered this to SLC on local issues</i>
	Greystanes shopping centre NSW	Local retail supermarket market (5km radius)	N/A	Not opposed <i>NB: RGA considered this to SLC on local issues</i>
2012				
	Crows Nest Plaza Shopping Centre	Local retail supermarket market, procurement & wholesale markets	N/A	Not opposed <i>NB: acquisition reviewed by ACCC following completion</i>
	Progressive Supa IGAs in Whitford City & Cockburn Gateway	Local retail supermarket markets & “broader retail market”, wholesale procurement & supply markets	N/A	Not opposed
	Logan Village Centre	Local retail supermarket market (5km radius), state wide retail supermarket market, state wide market for wholesale procurement & supply of packaged groceries	N/A	Not opposed <i>ACCC: Bare transfer of market share</i> <i>NB: RGA considered this to SLC on local issues</i>

Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
2013				
	<i>Glenmore Ridge Village Centre</i>	<i>Local retail supermarket & wholesale procurement markets</i>	<i>SOI (22.09.12) & PCA "in due course"</i>	<i>Opposed As per press release (06.06.13), Woolworths already had the only supermarket in Glenmore Park as well as the next closest (in south Penrith). Glenmore Ridge is "the only opportunity for a competing supermarket to enter Glenmore Park in the foreseeable future" (other than ALDI planned for 2014)</i>
	Supa IGA, Hawker	Local retail supermarket market (including parts of Belconnen, Jamison Centre & potentially Kippax Centre), state wide (NSW/ACT) retail supermarket & wholesale procurement/supply markets	SOI (06.12.12) & PCA "in due course"	Not opposed <i>SOI expressed concern re potential SLC in local retail market – the 'future with' included 2 Woolworths, 2 Coles, 2 ALDI & 3 small independents. As per press release (04.07.13), however, ACCC satisfied that, while there would be some reduction in competition, it would not be substantial. Note use of customer surveys (as commissioned by ACCC) NB: RGA considered this to SLC on local issues</i>
	Supa IGAs, Riverside Gardens, Banksia Beach & Rasmussen	Local retail supermarket markets (Bribie Is, specific suburbs in Townsville & other suburbs in Townsville), state wide supermarket market, state wide market for wholesale procurement & supply of packaged groceries	N/A	Not opposed

Acquirer	Target	Relevant markets considered	SOI/PCA	Outcome (comments)
2014				
	Supa IGA in St Kilda, Vic	Local retail supermarket market, state wide retail supermarket market, state wide market for wholesale procurement & supply	SOI (05.12.13)	Not opposed <i>Exit by 2017 likely in any case – unlikely to be significant constraint pending exit. Essentially a convenience store</i>
	4 Supa IGAs Western Australia	Local retail supermarket & liquor markets, state wide supermarket & retailing markets; state wide wholesale grocery & liquor markets	SOI (10.07.14)	Not opposed <i>Decision re 1 acquisition deferred at Coles' request. In relation to others, exit likely in any case. Coles to be constrained by existing Woolworths &, in each case "at least one large competitive independent offer". ALDI may enter "in coming years"</i>

Appendix B: concerns with ACCC assessment processes

Excerpt from Retail Guild's Stage 1 submission dated 11 June 2014 (being paragraphs 43-82 of that document) – information current as at that date

CURRENT MERGER REVIEW PROCESSES: THE GROCERY SECTOR⁸⁶

148. The following table breaks down the 44 merger proposals in the grocery sector which were considered by the ACCC between 2005 and June 2014.⁸⁷

ACCC merger decisions in grocery sector

Acquisition type / Acquirer	Existing supermarket	New site / lease	Wholesale supplier	Total
Coles	2	3	—	5
Woolworths	13	13	1	27
Metcash	1	—	11*	12
Total	16	16	12*	44

*Includes Metcash's acquisition of Franklins

149. Of the 44 mergers reviewed, exceptionally few have been opposed. They are: Woolworths' proposed acquisition of Karabar Supabarn in 2008; Metcash's

⁸⁶ The analysis contained in this section draws on private research commissioned by the Retail Guild in 2013.

⁸⁷ At the time of writing, a series of four acquisitions by Coles in Western Australia was under consideration by the ACCC but was yet to be resolved.

acquisition of Franklins in 2010 (a merger that was ultimately permitted by the Courts); and, most recently, Woolworths' attempted acquisition of a site at Glenmore Ridge in 2013. Woolworths' attempted acquisition of a lease at Wallaroo in South Australia was also opposed at the Statement of Issues (SOI) stage and did not proceed (apparently for commercial reasons). Accordingly, the ACCC did not reach a final decision (or issue a Public Competition Assessment or PCA).

150. When one examines these mergers in closer detail, the following issues arise:

150.1. how markets are identified and then considered;

150.2. the application of the counterfactual test – comparison of the future with and without the merger;

150.3. how creeping acquisitions can be addressed;

150.4. the processes employed in assessing mergers.

Market definition

151. A preliminary issue relates to the markets within which the ACCC undertakes its competition assessment for mergers. As a general principle, the ACCC identifies the following markets as being relevant in the grocery sector:

151.1. a local retail supermarket market;

151.2. a statewide procurement market, meaning the market in which supplies for sale in a supermarket are procured; and

151.3. a statewide or national wholesale market, for the wholesale supply of goods and services to supermarket retailers.

152. Although these markets (or variations to such markets) appear in almost every relevant assessment, in reality, the ACCC focuses *only* on the first market. In other words, and with the notable exception of the Metcash/Franklins merger (in

which the ACCC was ultimately unsuccessful in its opposition),⁸⁸ no assessment has turned on competition concerns relating to the wholesale supply and procurement markets. There is also only limited consideration of any state or national retail markets.

153. While obviously any supermarket merger will have an impact (to one extent or another) on the local retail market, a merger may also have implications for other markets. In particular, the loss of independent retailers reduces the independent wholesaler's access to economies of scale and scope and may have other adverse implications for its supply terms which in turn flow back as higher unit prices, affecting the ability of independent retailers, large and small, to compete effectively with the chains. Failure to identify national and statewide markets – including these broader retail markets – means that insufficient weight is given to any broader effect on competition.
154. For this reason (in addition to the concerns below regarding the counterfactual test), the Retail Guild considers that regular independent post-merger reviews should be conducted of ACCC decisions. This is discussed in further detail... below.

Application of the counterfactual test

155. The absence or otherwise of constraints is tested by reference to the “future with and without” test, ie the constraints that would ensue in the future if the acquisition were to proceed, as against the constraints that would ensue absent the acquisition. The “future without” is also known as the counterfactual.
156. The “future with and without” frequently presents an “easy” resolution to a merger assessment. For example, when considering its response to Woolworths' proposed acquisition of Macro Life in 2009, the ACCC was of the view that there was little prospect that Macro Life would continue to operate in its current form (due to its poor financial performance). Accordingly, any competitive constraints

⁸⁸ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151.
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currently offered by Macro Life would not continue even in a future without the acquisition; thus, the acquisition of Macro Life by Woolworths would not lessen competition.

157. In matters where the ACCC has opposed a transaction, the “future without” has been critical to that decision. Two proposed acquisitions involving Woolworths provide good examples.

Proposed acquisition of Karabar Supabarn (2008)

158. In considering this proposed acquisition, the ACCC concluded:

when compared to the situation ‘with’ the acquisition, the ‘without’ position would entail a higher level of competitive tension in the market, resulting in increased competition on pricing and promotions, range, quality of fresh produce, service levels. There may also be an additional competitive response by existing players to the opening of the supermarket by a new operator.⁸⁹

159. The ACCC particularly considered the prospect of new entry, concluding that such prospect was “highly uncertain”. It continued:

even if a new supermarket were to open, there is no certainty that it would be a new entrant to the local market (like the Supabarn Group) rather than an additional Woolworths or Coles store. Given this uncertainty and the lack of other suitably located and zoned sites, the ACCC considered that access to suitable new sites constitutes a high barrier to entry, and that there was not sufficient prospect of competitive new entry to alleviate the competition concerns raised by the proposed acquisition...⁹⁰

Proposed acquisition of a lease in Wallaroo, SA (2008)

160. This matter did not proceed to a PCA, as the proposal was withdrawn. At the SOI stage, however, the ACCC indicated that it was inclined to oppose the transaction for the following reasons:

[I]n the absence of the proposed acquisition, it appears likely that Drake [independent] will open a large full line supermarket at the

⁸⁹ Australian Competition and Consumer Commission, *Public Competition Assessment: Woolworths Limited – proposed acquisition of Karabar Supermarket* (11 July 2008), at [31].

⁹⁰ *Ibid*, at [73].

*Owen Terrace site in Wallaroo either with Leasecorp or another developer. In particular, the ACCC's preliminary view is that Leasecorp intends to open a supermarket as part of its proposed development, and that if Woolworths were unable to operate that supermarket, it is likely that another supermarket operator, probably Drake, would be willing and able to operate the supermarket. Alternatively, if Leasecorp were unwilling to proceed with the development without Woolworths as a tenant, the ACCC understands that another developer is willing and able to proceed with a development on the site that would include a full line Drake supermarket.*⁹¹

161. Conversely, in the “future with” the transaction, if a new Woolworths store were to open, the existing Drake store would close. “Accordingly, if the transaction proceeds, Woolworths’ two supermarkets would be the only two supermarkets in the relevant market...”⁹²

Examples where the “future without” may be underdeveloped

162. Where the ACCC does not identify competition problems, however, its approach to the “future without” can be lax. In the ACCC’s controversial approval of Woolworths’ acquisition of the Jindabyne IGA in 2007, there is mention that the owner of the target store had received alternative offers to that from Woolworths.⁹³ There is no further discussion of those offers (the “future without”), including, even in broad terms, who made them and the likelihood of any of those alternative parties successfully operating the store. This is a serious oversight, particularly in the context of a line-ball decision.
163. In another example, when considering the impact of Woolworths’ acquisition of 22 Foodland supermarkets in 2005 on the national wholesale market, the ACCC stated that Metcash’s own acquisition of various Foodland supermarkets (in a parallel transaction) would increase its supermarket wholesale sales by about 45-

⁹¹ Australian Competition and Consumer Commission, *Statement of Issues: Woolworths Limited – proposed acquisition of a supermarket lease in Wallaroo, South Australia*, at [19].

⁹² *Ibid*, [35].

⁹³ Australian Competition and Consumer Commission, *Public Competition Assessment: Woolworths Limited – proposed acquisition of Jindabyne IGA Supermarket, Festival IGA Liquor, and Porter’s Liquor licence* (26 June 2007), at [20].

50%; the additional stores which Woolworths sought to acquire would add only a further 5% to that.⁹⁴

164. This is an incorrect – or at least poorly expressed – application of the future with and without test. The ACCC fails to express exactly what it considers the counterfactual to be. By implication, however, it appears to involve the acquisition of the 22 stores by Metcash. The ACCC then assesses the merger on the basis of minor growth in Metcash’s wholesale market share (the “future without”) as compared with the already substantial increase in its market share by reason of its parallel acquisition of the remaining Foodland stores (the “future with”). This latter increase, however, should already be factored in, and should not be seen to be affecting the make-up of the future with and without for the acquisition under consideration .
165. In recent years, the ACCC has been more willing to take into account future plans when undertaking its competition assessment. In the case of Jindabyne, for example, Coles’ plans to open a supermarket in Cooma were critical to the ACCC deciding not to oppose Woolworths’ acquisition. Conversely, in the case of G Gay & Co Hardware in Ballarat in 2012, the ACCC decided to oppose Woolworths’ proposed acquisition in part because of Woolworths’ own plans to enter the market in the relatively near future.⁹⁵ Ordinarily, Woolworths’ acquisition would not have been seen to lessen competition in the local retail market as it would have been regarded as a new entrant; on the ACCC’s assessment, however, the “future with” included a Woolworths’ business (Masters) that had yet to open in Ballarat and indeed was only in the planning stage.
166. This more recent approach appears to have been a driving factor in the ACCC’s desire to establish a “protocol” for the assessment of mergers in the grocery

⁹⁴ Australian Competition and Consumer Commission, *Public Competition Assessment: Woolworths’ proposed acquisition of 22 Action stores and development sites* (19 October 2005), at 8-9.

⁹⁵ Australian Competition and Consumer Commission, *Public Competition Assessment: Woolworths Limited and Lowe’s Companies Inc - proposed acquisition of G Gay & Co stores* (5 December 2013) .
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sector. However, the use that the ACCC has made of information concerning future plans seems likely to explain the reluctance, particularly of Coles, to engage in the development of any such protocol.

167. In any event, it can be seen that the ACCC does not always apply the future with and without test with appropriate rigour. Furthermore, on the rare occasions it objects to proposed mergers, the novel approaches used (as demonstrated in the *Metcash* case⁹⁶ and as also discussed below in relation to Glenmore Ridge) suggest that decisions to oppose may not withstand judicial scrutiny. As with market definition, one way to address the difficulties posed by inappropriate use of the counterfactual would be to undertake regular independent post-merger reviews (discussed below...).

Creeping acquisitions

168. A key problem in addressing mergers in a number of areas is the apparent difficulty of bringing “creeping acquisitions” within the scope of section 50 of the CCA. “Creeping acquisitions” are defined as:

*the practice of making a series of acquisitions over time that individually do not raise competitive concerns, usually because the changes in competitive rivalry from any individual acquisition are too small to be considered a substantial lessening of competition. However, when taken together, the acquisitions may have a significant competitive impact.*⁹⁷

169. Although the creeping acquisition debate has tended to focus on the grocery industry, concerns about creeping acquisitions are much more widespread: occurring, for example, in relation to service stations; liquor retailing; taxi networks; hardware retailing; diagnostic services; optical services; funeral services; and child care.
170. The taxi industry – in particular, Cabcharge – provides an excellent example of the problem of creeping acquisitions:

⁹⁶ *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCAFC 151.

⁹⁷ ACCC, *Grocery Report*, above n33, 422.

170.1. in 2009, Cabcharge was found by the Federal Court to have misused its market power on several occasions, resulting in the “highest ever penalty for misuse of market power”;⁹⁸

170.2. in 2012, the Victorian taxi inquiry found that Cabcharge continued to engage in the conduct which had resulted in that early finding;⁹⁹

170.3. since the Federal Court’s decision, Cabcharge has submitted three applications for informal clearance without opposition from the ACCC.¹⁰⁰

A law which permits a company which has been known to misuse its market power and appears to continue to do so, to improve its market position is not functionally optimally.

171. In essence the problem posed by creeping acquisitions is that in order to contravene section 50, the effect or likely effect of the merger must be to substantially lessen competition; if the acquirer already possesses a substantial degree of market power, however, acquiring one more competitor will mean the barest increase in market share and is therefore unlikely to constitute a *substantial* lessening of competition. Any increase in market power is de minimus. Nevertheless, successive acquisitions have a cumulative effect, adding to the market share (and ultimately market power) of the acquirer over time. Taken together, they may well have the effect of substantially lessening competition.

172. In essence, creeping acquisitions in the grocery sector mean that – over time – the state and national markets are becoming increasingly concentrated in ways that may not lessen competition when assessed by reference to individual acquisitions.

⁹⁸ *ACCC v Cabcharge Australia Limited* [2010] FCA 1261). Quote from Victorian Taxi Industry Inquiry, above n19, 122.

⁹⁹ See the excerpts from inquiry’s final report, set out at n19.

¹⁰⁰ See the acquisitions of Yellow Cabs (2012; available at: <http://registers.accc.gov.au/content/index.phtml/itemId/1028390/fromItemId/751043>); AusTaxi Group (2012; available at: <http://registers.accc.gov.au/content/index.phtml/itemId/1012142/fromItemId/751043>) and, together with ComfortDelGro, Grenda Transit Management (2011; available at <http://registers.accc.gov.au/content/index.phtml/itemId/1018752/fromItemId/751043>).

In other words, this issue links directly with the ACCC's failure to analyse the markets set out in paragraphs 151.2-151.3 above.

173. In the 2008 *Grocery Report*, ACCC identified the following effects from creeping acquisitions:

173.1. loss of economies of scale in independent wholesaling relative to the chains;

173.2. loss of bargaining power of independent wholesalers with suppliers relative to the chains;

173.3. consequently, reduced competitiveness at the retail level, creating a looped effect.

174. To place the concern about the reach of section 50 in context, the High Court in *Rural Press* made it clear that substantial lessening of competition was a relative assessment rather than an absolute one.¹⁰¹ If a market is not particularly competitive, then even a small absolute reduction in competition may be found to substantially lessen competition.

175. Nonetheless, history suggests that it is unlikely that the ACCC will oppose an acquisition on the basis of the logic set out in *Rural Press*. As an alternative approach, it could be argued that individual acquisitions by a single party should not be viewed separately but should instead be seen as part of a policy of acquiring competitors. By aggregating acquisitions, the outcome may be assessed as a substantial lessening of competition. To date no such claim has been put to the court by the ACCC, although in a proposed amendment to the then TPA in 2007 the following approach was proposed:

an acquisition shall be deemed to have the effect, or be likely to have the effect, of substantially lessening competition in a market if the acquisition and any one or more other acquisitions by the corporation or a body corporate related to the corporation in the period of 6 years

¹⁰¹ *Rural Press Ltd v Australian Competition and Consumer Commission v Rural Press Ltd* [2003] HCA 75.

*ending on the date of the first mentioned acquisition together have the effect, or are likely to have that effect.*¹⁰²

176. This is similar to the approach adopted in the European Union. The Bill lapsed due to the election in 2007 and was not revived. Alternative changes to the TPA/CCA were introduced in 2009 but have had little impact (being more a clarification than a substantive change).
177. As discussed in the following section, however, much of the expansion of the major supermarket chains occurs via organic growth. Accordingly, it is necessary to consider whether such acquisitions can ever fall within the scope of section 50.

Greenfields developments

178. Most acquisitions by the major chains are not acquisitions of going concerns. Rather, they involve redevelopment of a site either via outright purchase or pursuant to a lease (often known as “greenfields” developments). Currently section 50 prohibits acquisitions of shares or assets that have the likely effect of “substantially lessening competition” in “a market”. It seems clear that acquiring a site is acquiring an asset and so falls within the scope of section 50. Arguably the long term lease of a site may also be regarded as acquiring an asset.¹⁰³
179. Until recently, the ACCC has not attempted to claim a contravention of section 50 in relation to greenfields developments. However, as the table below shows this has been a significant source of growth for the major chains.

¹⁰² Trade Practices (Creeping Acquisitions) Amendment Bill 2007.

¹⁰³ If not, section 45 would apply. Note that, pursuant to section 45(4), there is the power to aggregate multiple contracts, arrangements or understandings.

ACCC Findings

Coles & Woolworths – store openings in past 15 years (%)

	1993-97	1998-2002	2003-05	2006-07	Overall
Development of new site	73	46	67	90	61
Site previously occupied by a supermarket: Franklins and Action acquisitions	0	21	13	0	13
Site previously occupied by a supermarket: store openings other than Franklins & Action acquisitions.	27	33	20	10	26

Source: ACCC, Grocery Report, 2008

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180. The table indicates that the overwhelming majority of new growth by the major chains over the last two decades has been by way of new sites. Subsequent to the *Grocery Report*, the acquisition of sites by the major chains has accelerated.
181. In 2008 the ACCC indicated that it was inclined to oppose Woolworths' acquisition of a lease in Wallaroo, but the proposal was withdrawn and the ACCC formed no final view.¹⁰⁴ It was not until June 2013, with the Glenmore Ridge decision, that the ACCC made a final decision to oppose a greenfields development under the auspices of section 50.¹⁰⁵ Woolworths proposed acquiring a block of undeveloped land which was zoned for construction of a supermarket plus specialty shops, banks and post offices. The ACCC found that the acquisition would substantially lessen competition in the local market, notwithstanding numerous other supermarkets in the general area. It stated:

¹⁰⁴ ACCC, *SOI: Woolworths / Wallaroo*, above n91.

¹⁰⁵ Australian Competition and Consumer Commission, *Public Competitive Assessment: Woolworths Limited – proposed acquisition of supermarket site at Glenmore Ridge Village Centre* (25 October 2013).
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*the proposed acquisition would be likely to result in a substantial lessening of competition in the local retail supermarket market by preventing or hindering competition that would likely otherwise have been brought to the local market by an alternative supermarket operator. This competition would be unlikely to be otherwise introduced into the local market because of the lack of other available suitable sites for supermarket development.*¹⁰⁶

182. Notwithstanding the merits or otherwise of the ACCC's Glenmore Ridge decision, leases and new sites would seem to fall squarely within the language of section 50 (being "assets" of a person or corporation, cf sections 50(1) and (2)). As a matter of policy, however, the merger prohibition is not designed to inhibit "organic" growth. That is, an efficient and effective competitor should be able to expand of its own accord (reflecting its success and indeed consumer preferences), even to the point of obtaining market power. Given this, building a new factory/warehouse or developing a new retail site may not be considered to involve the acquisition of "assets" within the meaning of section 50.
183. Accordingly, while the ACCC's novel approach appears to have some merit, it is unclear whether it would withstand judicial scrutiny. That said, the argument appears stronger if expressed within the framework of a market for sites, as opposed to a local retail supermarket market. There may also be scope for considering arrangements pursuant to section 45. That said, the ACCC – as already noted – appears to have little appetite for bringing such cases.

Creating an additional mergers test for parties with substantial market power

184. Regardless, a review of merger decisions in the grocery sector suggests that section 50 is not being used effectively – most likely due to a combination of its drafting and its application by the ACCC. As such, the market power of the major supermarket chains is only increasing, not self-correcting in the manner one would expect if an effective merger policy (and competition regime generally) were in place.

¹⁰⁶ *Ibid*, [60].

185. For this reason, the Retail Guild considers it necessary to introduce an additional mergers prohibition, applicable only to those with substantial market power. Such corporations should not be permitted to acquire shares or assets (following the language of sections 50(1) and (2)) if the acquisition would have the effect, or be likely to have the effect, of lessening competition in any market. In other words, they would be subject to essentially the same mergers test as present, except there would be no need to demonstrate the lessening was substantial. (The Retail Guild anticipates that authorisation would still be available.)
186. Parties to whom this prohibition applied would be best identified in advance by, for example, regulation. Such regulations could stipulate that the largest 2-3 players in specified sectors were presumed to have substantial market power for the purposes of the new prohibition. Such a presumption should be rebuttable, such that a firm could challenge the application of the new prohibition.

The sum is greater than the whole

187. Accordingly, the Retail Guild considers that a robust mergers regime should have *all* the following characteristics:
- 187.1. identification and analysis of all relevant markets;
 - 187.2. correct application of the counterfactual;
 - 187.3. an additional prohibition to address parties with pre-existing market power; and
 - 187.4. [as discussed later in this submission, a more active role by private parties].