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Campbell, ACT, Australia 2612

**Select Committee on the ACT Supermarket Competition Policy
Legislative Assembly for the Australian Capital Territory**

By email committees@parliament.act.gov.au

Dear Sir/Madam,

RE: Select Committee Inquiry into the ACT Supermarket Competition Policy

Preamble

The following submission takes note of the Terms of Reference but adopts a wider approach seeking to put some issues into a wider context. It seeks to avoid the hang ups about National Competition Policy and looks at the situation of a highly planned urban environment dominated by the supermarket majors.

I am a former CEO of the ACCC and currently am in business as a consultant in competition and consumer issues. I am also a consultant to Supabarn Supermarkets but this submission is **not** made on behalf of that client. It is my personal submission.

Submission

“Where have all the retailers gone, long time passing?”- apologies to Bob Dylan.

Do we remember Shooeys, Jack the Slasher, Tom the Cheap, Flemings, Charlie Carter, Safeways, Jewel, Bi Lo, Action, Advantage, Cannons, Foodland, Franklins (Mark 1), Purity and Shop Rite as independent grocery retailers in various parts of Australia?

For older Canberrans, who remembers The Co op and J B Youngs.

All these are now part of Woolworths and/or Coles or have just vanished, some of the names are still used. Also wholesalers QWI, Composite Buyers, SSW, Independent Wholesalers are now part of Metcash.

The above list is by no means exhaustive but indicative of what Woolworths, Coles and Metcash have been up to.

Nationally we now have Woolworths, Coles and Metcash and some irritants to them, namely, ALDI, Costco, AUR, FoodWorks, SupaBarn, and Harris Farms. Some are real irritants, some are not as they cannot be competitive. In Canberra we have less than those listed above- we are a highly concentrated in the grocery market.

So do we care and, if so, what do we do about it?

Canberra is a planned market place and some of the problems we face today are due to the effect of that planning and not letting the market choose where supermarkets might be located. We simply had too many and too fragmented.

Any ACT Supermarket Policy has to factor in planning issues. Sites are limited and that being the case those with the deepest pockets can and will outbid others for the scarce resource, sites. That is what has happened in the ACT over the past decades.

In the past Cannons and the old Franklins were a competitive force, But even Cannons had initially to start up in Fyshwick to get a foothold. Franklins went into major shopping centres head to head with the majors but when we lost Franklins (Mark 1) nothing really took its place. Off course every suburb had its obligatory small supermarket.

Both Coles and Woolworths retreated from Civic and moved into the Town Centres and then went further into the suburbs.

Competition dynamics will mean that as Coles and Woolworths expanded that caused others to pull back and deterred others from entering the ACT market.

Diversity and choice are drivers of competition. The ACT has little of either and as things are going Woolworths and Coles will dominate grocery and liquor and perhaps petrol.

ALDI initially had to go down the direct sale path to get sites and Costco is at the airport where the ACT Government lacks planning jurisdiction.

However, despite entrants such as ALDI and Costco, the majors, especially Woolworths, still dominate and particularly Woolworths is expanding.

So where to now?

It is assumed by many that National Competition Policy is about letting the market rip- not so. It is more measured than that.

The Hilmer Committee Report, on which NCP was modelled, stated,

“Competition Policy

Competition policy is not about the pursuit of competition per se. Rather, it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds.”

In other words balance competition with other demands and where need be intervene in markets to foster competition. Governments over the years have done just that; in telecommunications, ports, airlines, electricity and more. We are a country of monopolies and duopolies and Governments can and do step in the counter act any negative effect of those concentrated structures.

In relation to the ACT grocery market the Governments over the years allowed the current structure to develop. Governments can also take steps to counteract or at least minimise any negative impacts.

There have been many enquires into retailing in Australia but the following are the most relevant to this Inquiry.

The ACCC Grocery Inquiry (2008)

The ACCC Report spoke of the existence of “workable competition”- whatever that means.

It also made recommendations or comments about improving the competitive dynamics in the industry, particularly relating to the key issue of access to suitable sites.

- the lack of availability of such sites and the difficulties for independent retailers to gain access or approval for land outside of existing retail activity centres;
- shopping centre landlords’ preference to lease sites to the majors over independent supermarkets and the use of favourable lease arrangements with the majors,
- the use of restrictive provisions or penalty clauses in leases which prevent landlords from offering space in centres to other supermarkets; and
- the use of planning laws to restrict the development of new supermarkets;

- land acquisition activities and the establishment of duplicate presences by the majors purely for the purpose of 'locking out' competition.
- the issue of creeping acquisitions by the majors and in particular by Woolworths.
- issues around conduct by Metcash in relation to its retailer customers.

It is easy to list issues but there is another dimension as to carrying them out, particularly as most were not within the control of the ACCC.

Some of the above are in the process of being implemented by Governments and the ACCC, for example,

- Restrictive covenants in leases.

The ACCC has in the recent past accepted section 87B enforceable undertakings from many in the industry to remove restrictive covenants in supermarket leases.

As a matter of general principle this is probably a good thing even though the ACCC really only has jurisdiction if such covenants amount to an SLC, some will, some wont. Some covenants could be pro competitive as it allows new entry without being crowded by the majors.

As to effect in the market place, that will be limited and may only assist Coles and Woolworths and occasionally ALDI, the majors will be helped as they may be kept out of malls by each other through such covenants. It may also force down rents but query whether that will be passed on.

- Impact of planning and zoning laws.

COAG has been reviewing State and Territory planning and zoning laws but query what will come from that as the Federal Government has been taking an open slather approach and the Urban Development Institute has called for the same. I do not think that the ACCC had that in mind when talking about planning laws and new entrants as open slather will again help the majors and likely consign new entrants to the fringes.

The UK approach, recently re stated by the Competition Commission, is more to the point. That approach is,

“The Competition Commission (CC) has formally recommended to the Department of Communities and Local Government (CLG)—and the devolved administrations in Scotland, Wales and Northern Ireland—that they take the necessary steps to introduce a competition test in planning decisions on larger grocery stores.

Under the competition test the Office of Fair Trading (OFT) would provide advice to local planning authorities (LPAs) on whether a particular retailer would pass the competition test. Applications would pass the competition test if within the area bounded by a 10-minute drive-time of the development site; the grocery retailer that would operate the new store was a new entrant to that area; or the total number of fascias in that area was four or more; or the total number of fascias in that area was three or fewer and the relevant grocery retailer would operate less than 60 per cent of groceries sales area (including the new store)”.

- “Creeping” acquisitions.

A long running and difficult issue. The Federal Government has made some legislative amendments aimed at such acquisitions but query whether they will have any impact as they simply reflected what the ACCC was already doing.

It may be that the ACCC should be a bit more adventurous in relation to some so called creeping acquisitions and that a review be done of past so called creeping acquisitions to see the actual market place outcome. Often the fear is that an initial pro competitive impact may lead to eventual SLC and other public detriments.

Past ACT Government Intervention.

The ACT Government response to the ACCC Grocery Inquiry.

The ACT Government took the view that the old supermarket competition policy in the ACT required substantial overhaul to address:

- impediments in the planning and development regime;
- a present shortage of full line supermarket capacity particularly in central Canberra and Gungahlin; and
- the projected population growth of 50,000 in the ACT between 2007 and 2019.

A framework taking competition factors in account is required to:

- free up retail zoning provisions particularly in group centres;
- better reflect evolving consumer and market needs; and
- address the barriers to new supermarket entrants at the retail and wholesale levels identified in the ACCC Retail Grocery Inquiry.

The new Supermarket Competition Policy, following a Report by John Martin, was announced on 7 October 2009 and in brief i

- Planning processes to take into account competition issues.[it is to be noted that all ACT is Crown Land and only leases are sold]
- Limits on the number of supermarkets in certain centres to be lifted.

- Supermarket locations to more reflect consumer needs rather than planning concepts.
- Major supermarket chains to be excluded from bidding for a limited number of key sites.
- An overall view that there is a need for greater diversity and hence competition in full service supermarkets.
- The encouragement of a new wholesaler entering the market through the encouragement of independent full service supermarkets.
- No caps on the majors.
- Some unsustainable local shopping centres to be redeveloped into multi use facilities, keeping convenience retailing but adding, say, apartments.
- A fast track implementation process established,
- Reliance on the Competition and Consumer Act (2010) to the extent possible but Government to intervene where ACCC cannot assist aimed at pro competitive outcome.

Where to now?

Competition policy is about,

- fostering competitive markets.
- removing impediments to competitive markets.

Competition policy,

- includes intervention in markets where there is a structure not conducive to competition such as the whole third party access regime.
- also involves intervention to redress market failure.

Intervention is either short term or long term such as the Competition and Consumer Act.

Governments have intervened to foster competition in airlines, banks, energy, petrol, television, telecommunications, ports and more. What the ACT Government is doing is just that and may need to be considered by others.

In all cases it was with the expectation that the intervention would lead to increased competition and a benefit to the public.

Governments cannot force competition or make it work, What they can do is to foster a climate or structure to let it work.

It is assumed that competition provides the best outcome for consumers.

Governments generally struggle with fostering competition in concentrated markets and in fact the pure implementation of competition policy, namely totally free markets will often lead to highly concentrated markets,

Monopolists will also seek to buy up any assets that may harm them or seek to stop entry or expansion. Entry is what competition is all about.

Economists wax lyrical about entry but some then also espouse free market concepts that will prevent entry. competition.

If there is a real concern about the grocery industry, then Governments can act. The ACCC can do what it can, but that is limited. The ACCC can only act to stop anti competitive conduct, it cannot take action to encourage or foster pro competitive conduct.

Suggested options for action.

- The Planned Market

We have seen the dominance by the majors in the ACT but have always assumed that they would be in the town and group centres and be large format supermarkets. There is no reason why the majors cannot have smaller formats, in the UK the large supermarkets all have smaller versions in CBD; s. That is happening here. The end result will be that the majors will have the large and small stores. IGA; s and others are likely to be bought out or pushed out. The ACCC is unlikely to be able to intervene in most such cases.

The ACT Government needs to enforce its planning hierarchy and the recommendations and spirit of the Martin Inquiry. Give others a chance. This will not hold back the majors to any detrimental extent. They will remain the dominant force but the ACT regime should be able to facilitate others.

The ACT Government should limit local centres to 1,000sqm GFA and also ensure that the master planning process is not used to further enhance the growth of Coles and Woolworths. If a potential supermarket site is not able to be direct sold (as per the Martin Report Eligibility Criteria) to a new entrant, then the current status should apply until a new entrant is identified.

- Constraints on independents

A problem with IGAs is that they are convenience stores and not all that competitive, some of the reason is that they are locked into Metcash as the only wholesaler, 90% tie. This stops other wholesale supply or more direct supply.

It is suggested that the ties should not be more than 50% and the ACT Government as part of NCP either pass its own legislation along those lines or ask the Commonwealth to do so. Legislation that puts a 50% cap on ties by monopoly wholesalers. This could be specific legislation or a mandatory code of conduct along the line of the Oil Code or Horticultural Code. In fact Oil Code has a 50% tie provision.

- Fair dealing

Another tool that will assist independents in dealing with wholesalers and suppliers is business to business unfair contracts law. The Federal Government proposed such a law some time ago but retreated from the industry wide proposals and limited these to consumer contracts only.

The Federal Government proposals had a monetary cap that may be too low for retailers but that can be revisited.

It is suggested that the ACT could press the Federal Government to revive the earlier proposals. Or even pass its own such laws.

- A balancing of sites.

The majors have about 80 % of the ACT market, to cap that would be difficult but the expansion of the majors could be linked to commensurate expansion of smaller competitors. So a new majors site must be countered by a site to an independent.

- Retailing over capacity.

Another issue is over capacity, a classic tactic of competitors is to build in overcapacity and then that deters any one new or expansion by others. Canberra might be at that stage and additional capacity by the majors, especially in older parts of Canberra is a real barrier to others or a push to force others to exit.

Conclusion.

At the end of the day the majors do not really compete against each other, that is largely counter productive for them. They are after the approximately 20 % market share they do not have. Not to mention petrol and liquor.

The majors already have a great foothold in Canberra, there is no suggestion of winding that back but serious consideration should be given to assist others to be competitive and not just on price, price is important but so is choice and service.

It is unlikely that, with the exception of niche overseas operators such as ALDI and Costco, there will be new entrants into the ACT market.

The best that can be expected that others already in the market become larger and more competitive. That will only happen if they can get good sites and can buy competitively. The Martin Report sought to tackle the first but is taking a while to have an impact, in the meantime some of the majors are moving to expand in existing shopping centres. To some extent finding ways around the Martin recommendations and contrary to what they submitted to that Inquiry.

Apart from the majors, ALDI and Costco, all others in the ACT market must buy from Metcash and the Metcash contracts tie them to 90%. Supabarn buys from Metcash but is not subject to the 90% tie- at the moment but that might change as Metcash is the monopoly wholesaler.

The recent ACCC Franklins litigation might have given the opportunity for the establishment of another wholesaler but that is not likely now. We still await the results of the ACCC appeal on the Federal Court decision to allow Metcash to acquire Franklins.

However if IGA's and others were not fully tied to Metcash another wholesaler might emerge and they might be more direct supply by suppliers to independents. It is even possible that IGA's establish their own warehouse.

Hank Spier