

# Submission to the ACT Legislative Assembly

## Select Committee on A.C.T. Supermarket Competition Policy

Contact:

Ken Henrick  
National Policy Adviser  
Mob: 0417 849 041  
Phone: 03 9824 4111

Jos de Bruin  
CEO - MGA  
0418 312 723  
03 9824 4111

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**NATIONAL SUPPORT OFFICE**

Suite 5, 1 Milton Parade Malvern Victoria 3144  
Phone +613 9824 4111 Fax +613 9824 4022  
Freecall 1800 888 479 Email [admin@mga.asn.au](mailto:admin@mga.asn.au)  
Website [www.mga.asn.au](http://www.mga.asn.au)

9 December 2011

## Introduction

This submission outlines the need for a competition test in the A.C.T. planning regime to meet the objectives of the A.C.T. Supermarkets Competition Policy

MGA's interest in this area is based on concerns around the high and increasing levels of market concentration in the retail grocery and liquor markets and the increasing need for regulators to address competition issues within planning and development approval processes.

We concur with the objective of the Supermarket Competition Policy which states that:

*'Canberrans are best served by a diverse and competitive retail grocery supermarket sector that supports consumer choice and convenience.'*

We recommend that government review of new grocery or liquor related commercial development or change of use within existing development should include a 'needs' test and a competition test, the latter reflecting the requirements of Section 50 (mergers and acquisitions) of the *Competition and Consumer Act 2010* (the Act), as recently amended. The amendment was necessary to ensure that the Australian Competition and Consumer Commission (ACCC) has power under the Act to examine acquisitions in 'any' market and that such a market no longer needs to be 'substantial'. This amendment ensures that the competition aspects of any acquisition at a local level can be addressed.

In our view, a needs test would ensure that the scale of proposed development does not exceed the needs of the community and the competition test would ensure that each development would enhance competition into the foreseeable future.

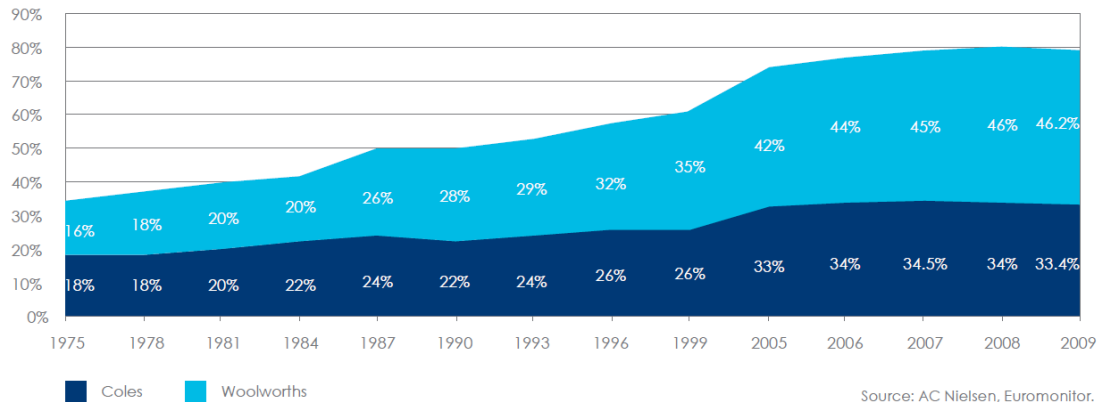
## Background

Levels of concentration in the retail grocery and liquor sectors have steadily increased over the last forty years, in spite of the introduction of the *Trade Practices Act 1974*, which was supposed to empower the regulator – the then Trade Practices Commission, now the Australian Competition and Consumer Commission – to prevent such market concentration and/or to deal with its impacts.

The chart below, taken from a report<sup>1</sup> prepared for the National Association of Retail Grocers of Australia (NARGA) – now part of Master Groccers Australia (MGA) – by Accenture Australia shows how the grocery market has become more concentrated over the period during which the Competition and Consumer Act 2010 (CCA) and its precursor has been in force.

Over this period the market share of the major grocery and liquor chains has increased through acquisitions of smaller chains and independent outlets as well as the development of greenfield sites, in spite of the fact that section 50 of the CCA gives the regulator power to oppose acquisitions ‘that have the effect, or be likely to have the effect, of substantially lessening competition in a market’ and where such acquisitions include, as well as the acquisitions of businesses, controlling shares in a business, the acquisition of sites and of leases.

Fig 30. Growth in Market Share of Woolworths & Coles (1975-2009)



Whilst Accenture report focuses on the grocery sector, it also shows that there are high levels of market concentration in the retail liquor sector, as shown in the following chart<sup>2</sup>:

<sup>1</sup> The Challenge to Feed a Growing Nation, Accenture Australia, November 2010, p.27

<sup>2</sup> Ibid p.26

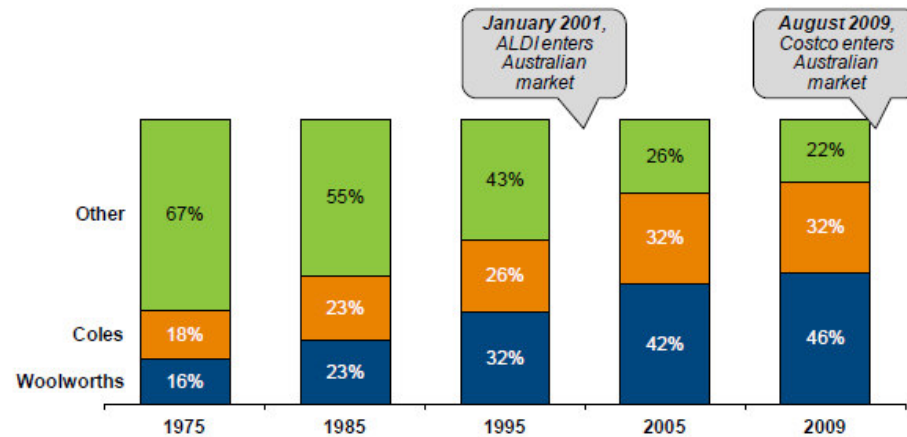
Fig 28. 2009 Turnover by supermarkets players (incl. Liquor sales)

	Turnover (\$ billion)		Cumul		Market share	
	incl. Liquor sales	excl. Liquor sales	incl. Liquor sales	excl. Liquor sales	incl. Liquor sales	excl. Liquor sales
Woolworths	\$32.8	\$27.6	\$32.8	\$27.6	47.4 %	45.6 %
Coles	\$22.5	\$20.1	\$55.3	\$47.7	32.7 %	33.2 %
IGA retail	\$8.2	\$7.7	\$63.5	\$55.4	11.9 %	12.7 %
FoodWorks	\$1.7	\$1.6	\$65.2	\$57.0	2.5 %	2.6 %
Franklins	\$0.9	\$0.9	\$66.1	\$57.9	1.3 %	1.4 %
Aldi	\$2.3	\$2.3	\$68.4	\$60.2	3.3 %	3.8 %
Spar	\$0.4	\$0.4	\$68.8	\$60.6	0.6 %	0.7 %
Total	\$68.8	\$60.6				

Sources: Company reports 2009, Euromonitor and other publications.. Convenience & forecourts retailers and specialist grocery retailers are excluded.

A report released by the Australian Food and Grocery Council on November 2, 2011, confirms market concentration concerns and impacts<sup>3</sup>:

Figure 15: Market Share of the Major Supermarket Channel<sup>10</sup>



Source: Planet Retail

The Kearney report projects market concentration to continue to increase in the future<sup>4</sup>:

<sup>3</sup> 2020 Industry at the cross roads, AT Kearney for AFGC, 2 November 2011, p.16

<sup>4</sup> Ibid p.4

**Retail Environment**

	2009	2020F
Supermarket Share of top 2 players	78%	80%
Private Label Share of Supermarket Sales	25% (2010)	40%

We note here that the combined market share of the top two retail grocery chains in the A.C.T. whilst lower than the national average, still exceeds 72%<sup>5</sup> and thus gives rise to competition concerns.

Both of these reports highlight high and increasing levels of food imports replacing both local fresh and processed foods, with corresponding negative impacts on future employment and investment in the agricultural and food processing sectors.

There is no sign that the expansion of the major grocery chains is going to slow down any time soon. For example Woolworths plans to open 120 new supermarkets by 2016, and also roll out 150 new Masters hardware stores by the end of 2014 in a joint venture with US retail giant Lowe's.

The November 8 print edition of the *Australian Financial Review* (AFR) reports on the land banking activities of Woolworths, suggesting it has extensive land holdings in both NSW and Victoria that are as yet undeveloped. See the table below taken from the AFR.

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<sup>5</sup> Martin J. Review of ACT Supermarket Competition Policy, September 2009

## Trolley loads of land



We suggest, therefore, that the Kearney 2020 projection of major chain market share will be exceeded.

### Land banking

The UK Competition Commission's investigation into the groceries market found that:

9.26 *'In a significant number of cases, however, the land holdings of grocery retailers, as well as their control over other landsites, represent a means by which entry by competing retailers into local markets might be frustrated.'*<sup>6</sup>

In the Australian context, the ability by the major chains to take up sites within shopping precincts that could be used by a retail grocery competitor and use these for another of their businesses – e.g. a liquor store or electronics store, adds to the proportion of retail space that is 'banked' or made unavailable to a competitive entry.

In areas where the major retailer does not yet have a supermarket, the fact that land has been acquired by a major chain deters other competitive entries as well as store upgrades by incumbent independents. An existing store is less likely to invest in an upgrade with the

<sup>6</sup> *The Supply of groceries in the UK market investigation, Provisional findings report, Competition Commission, 31 October 2007,*

knowledge that a major is coming to town and a competing major may also be less likely to consider entering that market, particularly if the local catchment is unable to support two large store entries.

Another form of 'land banking' is the oversized store. It has become the trend for the major grocery chains to build a store in a town or regional centre that is too large for the catchment. This has the advantage not only of deterring a competitive entry, but also of ensuring the more rapid demise of smaller competitors.

Whilst an oversized store may eventually be justified on the basis of population growth, in many cases the town or region's population is in decline and sales growth becomes dependent on the closure of competing stores.

Major chains can afford to carry non-performing stores because of their substantial market share. More profitable stores cross-subsidise the less profitable ones. As a result Australian consumers end up paying more for their groceries than they would if each store in the chain were sized according to the local catchment i.e. if the market as a whole was not propping up underperforming stores.

## **Planning concerns**

Many regional centres have seen the impact that the entry of a major supermarket can have on local businesses and the existing shopping area.

A planning decision that allows the expansion of retail space in a town or region must by its nature result in an impact on existing businesses – businesses that may have been viable for many years if not generations.

The rationale for such expansion is often that it meets community needs, provides additional employment or results in added competition. However there is often little assessment undertaken of the downside – how many businesses disappear, how many jobs are lost or whether, because of the scale of the proposed development, how much of the competition in the local area is destroyed.

The reality is that, in many cases, the presence of a large supermarket in a community sees the gradual destruction of competing businesses – the closure of smaller grocery stores, butchers, bakeries, greengrocers etc. until the supermarket becomes a virtual monopoly in the town or region. Grocery shopping is essentially local.

Increasing market concentration in the retail grocery sector has resulted in the development of a market duopoly built on a series of local monopolies as little by little local competition is wiped out.

Some would say that competition issues are the concern of competition law and competition regulators – the *Competition and Consumer Act 2010* and the Australian Competition and Consumer Commission (ACCC). However, the Act in its current form does not address land banking or scale of entry, nor does it require the prior notification of the acquisition businesses or sites so that these can be assessed under the merger provisions (s50) of the Act.

There is therefore a need and an opportunity to use planning law to strengthen and complement existing commonwealth competition law and make it more effective. Planning decisions could complement competition law rather than produce outcomes that would have to be challenged under the CCA after the fact. Planning law could include mechanisms similar to those used by the ACCC to assess the impact of acquisitions, and apply these mechanisms to additional sites within a retail sector.

Using the supermarket sector as an example we see that the entry of a new competitor to a catchment/market can be pro-competitive provided that the new entry is of an appropriate scale. That is, the new entrant is not so large as to totally dominate the local market and, over time, destroy competition within that market.

A proposed new supermarket in a defined catchment/market could be assessed on the basis of need. Such an assessment would determine whether additional retail space is warranted within the catchment on the basis of the population within the catchment and on whether the scale of the proposed new entrant is appropriate – i.e. likely to enhance competition in the catchment rather than destroy it in the longer term.

The UK Competition Commission (CC) following its Groceries Investigation recommended that a competition test be applied at the local level for any new development:<sup>7</sup>

*‘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).*

We note here that the CC was concerned about the lack of competition in the UK retail grocery sector - where four major chains make up around 80% of the UK groceries market. The CC has suggested that floor space could be used as a proxy for the measurement of sales share or market share.

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<sup>7</sup> Ibid

We also note that in the UK CC detailed assessment of the retail groceries market they concluded that the market consisted of three tiers – large supermarkets, medium sized supermarkets and convenience stores with the competitive pressure coming from the larger stores – it is these that would be assessed under a competition test. A fourth category – Limited Assorted Discount stores (LADS) such as ALDI, Netto and Lidl were not considered part of this market as they did not substitute for full service supermarkets.

The legal basis for the use of such a test in Australia would be Section 50 of the Act which prohibits an acquisition that would result in a substantial lessening of competition in any market. Guidelines issued by the ACCC use the Herfindahl-Hirschman Index (HHI) as a measure of market concentration to determine whether competition is likely to be an issue.

Again, we suggest that a pre and post comparison of relative floor-space ratios could be used as an indicator of competitive tension.

Canadian Competition Bureau guidelines<sup>8</sup> suggest the following levels of market concentration as unlikely to raise competition concerns:

- *The Commissioner generally will not challenge a merger on the basis of a concern related to the unilateral exercise of market power when the post-merger market share of the merged firm would be less than 35 percent.*
- *The Commissioner generally will not challenge a merger on the basis of a concern related to a coordinated exercise of market power when*
  - the post-merger market share accounted for by the four largest firms in the market (known as the four-firm concentration ratio or CR4) would be less than 65 percent; or*
  - the post-merger market share of the merged firm would be less than 10 percent.'*

It would be possible to use an agreed measure of market concentration similar to those used by competition regulators to develop planning guidelines to address competition concerns by using floor space as a proxy for market share. These guidelines could be used to determine whether a new entry or an expansion of an existing business would raise competition concerns. They could be used either within the planning regime or as a basis for referral of a proposal to the ACCC.

Such a mechanism would be a good example of the coordination of regulatory matters across governments – in this case planning authorities at local and state government levels would be helping address competition concerns that are part of commonwealth competition law, either by implementing a competition test themselves or by using such a test as a screening mechanism for referring to the ACCC those developments that raise competition concerns.

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<sup>8</sup> *Merger Enforcement guidelines*, Competition Bureau, Canada, June 2011

## Conclusion

The retail grocery market has become increasingly concentrated to a point where it is totally dominated by Woolworths and Wesfarmers/Coles. Other retail markets, for example the retail liquor market are showing similar trends.

Every available indicator suggests that the trend to increasing levels of market concentration is likely to continue to the detriment of competition in these sectors. The effect of market concentration is acutely felt in smaller centres where the entry of large scale retail entities can be particularly damaging.

There is an opportunity for the planning regime to draw down the competition principles within the CCA to better manage the competition impacts of new developments, either by administering a competition test within the planning regime or by applying a simple competition assessment as a basis for referring competition concerns to the ACCC.

The benefit of such an approach would be to improve the reach and effectiveness of Australian competition law and to avoid the need to challenge the outcome of planning decisions on the basis of a breach of Section 50 of the CCA.

We suggest that the competition focus provided by the A.C.T. Supermarket Competition Policy provides an appropriate policy framework for the introduction of a competition test into the planning regime that aims to promote greater competition in the sector.

In our view, the recent amendment to s50 of the *Competition and Consumer Act 2010* supports and potentially strengthens the current A.C.T. Supermarket Competition Policy.

We support the continuation of the three-tier hierarchy of retail planning in the A.C.T. and urge that that approach not be diluted by allowing inconsistent decision-making to blur the distinctions between the three tiers.