SUBMISSION TO THE COMPETITION POLICY REVIEW CHAIRED BY IAN HARPER:

RETAIL GUILD OF AUSTRALIA

11 June 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 of general application affecting the Australian economy as a whole. The Retail Guild is therefore delighted to take the opportunity offered by the Competition Policy Review to outline its experiences and views concerning Australia's competition framework.

OUTLINE OF SUBMISSION

This submission is divided into four sections:

- issues concerning market power, with a particular focus on section 46 of the *Competition and Consumer Act* (Cth) 2010 (the **CCA**);
- examination of current merger processes, including the role of the Australian Competition and Consumer Commission (the **ACCC**);
- red-tape issues affecting small business; and
- general measures to improve business engagement with Australia's competition framework.

SUMMARY OF CONCLUSIONS

The Retail Guild's findings and recommendations are summarised below.

FINDINGS	RECOMMENDATIONS
Market power	
Using the grocery sector as an example of broader issues, substantial market power on the part of the major supermarket chains has persisted for decades, with no apparent sign of "self-correction" *See discussion at paragraphs 2-11*	***Expanding the mergers prohibitions for corporations which already have substantial market power*** *See discussion in Section II (Mergers) at paragraphs 79-81*
Notwithstanding this market power and persistent complaints about the behaviour of the major supermarket chains, there has been virtually no enforcement action in the last decade *See discussion at paragraphs 11-15*	***Implementing measures to assist victims of misuse of market power to place complaints with the ACCC as well as to assist the ACCC to consider such complaints expeditiously*** *See discussion at paragraphs 37-39* ***Implementing measures to expedite the Court process and to reduce the costs associated with litigation (with a particular focus on encouraging private litigation)*** *See discussion at paragraphs 40; and in Section IV (Improving engagement), at paragraphs 123-131*
A review of section 46 cases suggests there is no obvious flaw in its drafting or application by the Courts, excepting to the extent it fails to address unilateral conduct which results in – rather than relies upon – substantial market power *See discussion at paragraphs 17-21*	***The creation of a prohibition similar to the attempt prohibition contained in section 2 of the* Sherman Act *(US), addressing unilateral conduct which has the likely effect of creating substantial market power*** *See discussion at paragraphs 32-33*
Nonetheless, the ACCC is bringing very few cases and private litigation – once an expected and essential contributor to the law's development – is decreasing. This appears due to the time, expense and risk involved in legal proceedings, as well as the inadequacy of the available remedies *See discussion at paragraphs 22-30*	***Including divestiture as a remedy available to the Courts for contraventions of section 46*** *See discussion at paragraphs 34-36*

FINDINGS	RECOMMENDATIONS
Mergers	
Even a revitalised section 46 is not capable of addressing all the inefficiencies that result when firms are allowed to obtain substantial market power A review of the ACCC's merger decisions in the grocery sector reveals that – notwithstanding the substantial market power of the major supermarket chains – almost no mergers are opposed *See discussion at paragraphs 43-44*	***Consideration should be given to the mandatory pre-notification of acquisitions by corporations with a substantial degree of power in a market*** *See discussion at paragraphs 84-87*
While the ACCC almost invariably identifies state and national markets in the grocery sector, it rarely analyses such markets. Likewise, on occasion, the ACCC's assessment of the counterfactual appears lacking *See discussion at paragraphs 45-62*	***Formal independent reviews of ACCC merger decisions should be undertaken on a regular basis and the results published*** *See discussion at paragraphs 88-91*
There remains no adequate solution to the problem of creeping acquisitions, notwithstanding the more expansive approach to greenfields acquisitions recently adopted recently by the ACCC *See discussion at paragraphs 63-71*	***A new merger prohibition should be created for corporations with substantial market power, such that* any *lessening of competition in a market would be prohibited*** *See discussion at paragraphs 79-81*
	The formal review process should be simplified to make it a viable option for parties. Failing this, it should be removed *See discussion at paragraph 92*
Reducing red tape	
Per se prohibitions rest on the presumption that the prohibited conduct is so likely to harm competition that it is not worth the time and effort to consider it closely. This presumption does not hold for small business *See discussion at paragraph 94-98*	***The* per se *prohibitions should be competition-tested for businesses below a certain size*** *See discussion at paragraphs 99-103* ***At the very least, the 3 year renewal period for collective bargaining notifications should be removed*** *See discussion at paragraph 105*

FINDINGS	RECOMMENDATIONS
The compliance costs of successfully (and legitimately) navigating Australia's very complex *per se* provisions are beyond the reach of small business. This means small business is constrained in its range of competitive strategies in ways that larger businesses are not *See discussion at paragraphs 96-98, 110*	***Work should be undertaken to assess the costs associated with various ACCC processes (such as compliance with section 155 notices, preparing notifications, seeking informal clearance etc) and approximate ranges should be published*** *See discussion at paragraphs 111-112*
The requirement that merger authorisations go directly to the Tribunal excludes all but the largest businesses from this process *See discussion at paragraphs 106-108*	***Merger authorisations should revert to the ACCC in the first instance*** *See discussion at paragraph 109*
General measures to improve business engagement with the competition framework	
Private litigation has made a very important contribution to the development of competition law overseas and in Australia, but is in decline *See discussion at paragraphs 113-122*	***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*** ***Relief from costs should be granted as a matter of course, should merger clearances continue to be heard by the Australian Competition Tribunal in the first instance*** *See discussion at paragraphs 123-131*
While every effort should be made to simplify the CCA to the extent possible, it will inevitably remain complex legislation. Such complexity means that smaller businesses are less able to compete effectively, thereby reducing their overall contribution to efficient, innovative markets and the nation's productivity levels *See discussion at paragraph 132*	***A clearing-house should be created, allowing for the development of capacity and expertise in competition (and other legal) issues within a small business context. The new Small Business and Family Enterprise Ombudsman may be an appropriate vehicle for such a clearing-house*** *See discussion at paragraphs 133-135*

I. Regulating market power in Australia

SUMMARY

The Retail Guild makes the following submissions in relation to market power, as currently regulated and enforced in Australia:

- ***Using the grocery sector as an example of broader issues, substantial market power on the part of the major supermarket chains has persisted for decades, with no apparent sign of "self-correction"***
- ***Notwithstanding this market power and persistent complaints about the behaviour of the major supermarket chains, there has been virtually no enforcement action in the last decade***
- ***A review of section 46 cases suggests there is no obvious flaw in its drafting or application by the Courts, excepting to the extent it fails to address unilateral conduct which results in – rather than relies upon – substantial market power***
- ***Nonetheless, the ACCC is bringing very few cases and private litigation – once an expected and essential contributor to the law's development – is decreasing. This appears due to the time, expense and risk involved in legal proceedings, as well as the inadequacy of the available remedies***

Accordingly, the Retail Guild RECOMMENDS:

☑ ***The creation of a prohibition similar to the attempt prohibition contained in section 2 of the* Sherman Act *(US), addressing unilateral conduct which has the likely effect of creating substantial market power***

☑ ***Including divestiture as a remedy available to the Courts for contraventions of section 46***

☑ ***Implementing measures to assist victims of misuse of market power to place complaints with the ACCC as well as to assist the ACCC to consider such complaints expeditiously***

☑ ***Implementing measures to expedite the Court process and to reduce the costs associated with litigation (with a particular focus on encouraging private litigation)***

☑ ***Expanding the mergers prohibition for corporations which already have substantial market power***

1. Throughout the Australian economy, there appear to be many pockets of substantial market power. Although the use of market power can amount to a contravention of the CCA, there is very little enforcement activity. Even without being "misused", substantial market power distorts competitive outcomes, leading to inefficiency. Accordingly, the following discussion considers the grocery sector as an example of an industry distorted by the impact of substantial market power. While the context is specific to the grocery sector, the issues raised are of broad application. Indeed, the Retail Guild considers that the shortcomings identified below suggest the need for solutions that apply generally throughout the Australian economy. Failure to do so will mean reduced innovation and productivity, as the efficient operation of markets continues to be impeded.

IS THERE A PROBLEM WITH MARKET POWER GENERALLY IN THE AUSTRALIAN GROCERY SECTOR?[1]

2. Before considering such distortions, it is first necessary to establish that the grocery sector is indeed impacted by substantial market power. Australia is one of the two most concentrated food retail industries in the world – only New Zealand's industry is significantly more concentrated. In Australia the two major chains account for around 80% of grocery sales compared to the United Kingdom where, in 2009, the four largest chains accounted for just over 75% (with Tesco and Sainsbury together accounting for 48%). The industry in the United States is considerably less concentrated than in the United Kingdom.[2]

[1] The following discussion is largely based upon research by Dr Alexandra Merrett and Dr Rhonda Smith, as published in "The Australian grocery sector: structurally irredeemable?" (paper presented at Supermarket Power in Australia: A Public Symposium, Melbourne, 1 August 2013); used with the authors' permission.

[2] Stuart Alexander, "Australian market: market overview", http://www.stuartalexander.com.au/aust_grocery_market_woolworths_coles_wholesale.php (last accessed 6 July 2013).

Market share estimates

3. Retail shares of the two major chains have increased significantly over the last several decades:

Share of products sold through grocery stores

Year	Coles	Woolworths
1975	15	16
1985	23	23
1995	26	32
2005	32	42
2011-12	37	43

Source: Australian Food and Industry Council[3] *& Ferriers Focus*[4]

4. While sources differ regarding current breakdowns of market shares – in part due to disagreements as to what products should be included[5] – the following points stand. The major supermarkets account for a very large segment of total sales: in excess of 70% for some product lines.[6] The next largest competitor is now Aldi, estimated to have a market share of around 6% (although Aldi's market share has not been determined with any certainty – there are only general estimates available). After Aldi, there is the independent sector, comprising tens of 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.

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[3] Australian Food and Grocery Council, *2020 Industry at the crossroads (*2011); available at: http://www.afgc.org.au/doc-library/category/1-publications.html?. Data for all but 2011-12.

[4] Ferrier Hodgson, "Supermarket shootout" (May 2011) *ferrier focus*; available at: http://www.stuartalexander.com.au/userfiles/file/FerriersFocusMay-Supermarketshootout.pdf (last accessed 6 July 2013).

[5] See for example Department of Agriculture Fisheries and Food, *Price determination in the Australian food industry:* (2004), 113; available at: http://www.daff.gov.au/__data/assets/pdf_file/0003/182442/food_pricing_report.pdf

[6] See n14 for estimated market shares, as at 2008, broken down by product category.

Barriers to entry and constraints

5. Market share numbers are, of course, only meaningful to the extent they are protected (or otherwise) by barriers to entry and expansion. In the grocery industry, it is generally accepted that such barriers are high.[7] There are numerous factors contributing to these barriers, including the significance of sunk costs; access to suitable sites; network effects (as discussed, for example, in the *Safeway* case[8]); large economies of scale and scope; and the extent of vertical integration in the industry.

6. In particular, independent retailers struggle to effectively constrain the conduct of the major supermarket chains where their supply terms are less favourable. This may occur if the chains have sufficient buyer power to negotiate supply prices below the competitive level. If the two major chains negotiate below average prices, other buyers will have to pay more (the "waterbed effect");[9] given the share of sales accounted for by the chains, this will be substantially more. An ACCC study of supply prices in 2002 concluded that Woolworths and Coles receive better wholesale prices more often than the independent wholesalers.[10] Industry sources confirm this remains the case, although there can be disagreement as to the extent of the differential.

7. The higher costs of the independent sector are reflected in higher shelf prices. Consequently, while aiming to keep the price differential to a minimum, independent retailers generally compete on non-price aspects of supply – friendly

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[7] 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.

[8] *ACCC v Australian Safeway Stores Pty Limited (No 3)* (2001) 119 FCR 1, [1072] (emphasis added).

[9] For a discussion of the waterbed effect, see Paul W Dobson and Roman Inderst, "Buyer power and the waterbed effect: do strong buyers benefit or harm consumers?" (2007) 28 *European Competition Law Review* 393; available at http://www.wiwi.uni-frankfurt.de/profs/inderst/Competition_Policy/Differential_Buyer_Power_07.pdf. See especially Section 4 of the paper.

[10] See Australian Competition and Consumer Commission (**ACCC**), *Report to the Senate by the Australian Competition and Consumer Commission on prices paid to suppliers by retailers in the Australian grocery industry* (2002), 2; available at: http://www.accc.gov.au/system/files/Report%20to%20Senate%20-%20Grocery%20Pricing.pdf

staff, high service levels, convenience, specialty products etc. Nonetheless, higher retail prices make it more difficult to attract customers. This competitive disadvantage for the independent sector is exacerbated by the barriers to entry referred to above, including economies of scale and scope and the advantages conferred by vertical integration.

What to make of new entry?

8. Despite dominance by the chains and high barriers to entry, new entry has occurred. Aldi entered the Australian market in 2001, while Costco entered in 2009. Others have entered the convenience store sector – for example SPAR and Seven & I Holdings (a Japanese company), both multinationals operating convenience stores. Aldi's business model is based mainly on private label products and, once it began to establish its stores, the major chains realised that they were vulnerable to a loss of sales to Aldi. Nevertheless, it took Aldi almost ten years to become profitable, far longer than most entrants could endure. The ACCC noted that the major supermarket chains both price more keenly where an Aldi store is present, indicating that the presence of Aldi has had a significant influence on their pricing behaviour.[11] Aldi now has 230 stores, a relatively small number of stores compared with the chains – for example, as at 2011, Coles had 741 supermarkets and 620 convenience stores[12] – although it has an ambitious expansion programme. Costco has an even smaller number of stores and has only a marginal influence on the Australian grocery sector.

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[11] ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008) (the ***Grocery Report***), 168-169.

[12] *All about Coles 2011,* http://www.coles.com.au/portals/0/content/images/about-coles/sustainability/246974_Coles_CommunityReport_2011_A4L_KIND2_LR.pdf (last accessed 6 July 2013).

The ACCC's market assessment at the time of the Grocery Report

9. Notwithstanding the ACCC's success in showing that Safeway/Woolworths (and, by implication, Coles) had substantial market power as at 1997,[13] the ACCC appeared markedly sanguine about the position of the two chains when producing the *Grocery Report* a decade later (even though the market had become further concentrated in the interim). "Broadly speaking, public debate overstates the structural problems within grocery retailing."[14] According to the ACCC, such debate failed (and, presumably, fails) to take into account barriers to entry and expansion.[15] Yet the ACCC's own assessment of the likelihood of entry was hardly encouraging.[16] Nonetheless, the ACCC concluded that competition at the retail level was "workably competitive".[17]

10. The ACCC found that one of the main reasons for this was the constraint imposed by the independent sector, a contention that is not borne out by the above analysis

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[13] *ACCC v Australian Safeway Stores Pty Limited (No 3)* (2001) 119 FCR 1; as upheld on appeal in *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (2003) 129 FCR 339.

[14] ACCC, *Grocery Report*, above n11, 67. See further at 57 for the ACCC's estimates of Coles' and Woolworths' (the major supermarket chains or **MSCs**) category share of sales:

Category	MSC share of sales
Packaged groceries	Approximately 70 per cent
Fruit and vegetables	Up to 50 per cent
Fresh meat	Approximately 50 per cent
Bakery products	Up to 50 per cent
Dairy products	50–60 per cent
Deli products	50–60 per cent
Eggs	Approximately 50 per cent

In the context of these estimates, the ACCC concluded, "with the exception of packaged groceries, the share of sales attributable to each of Coles and Woolworths are not at a level that raises significant concerns about the current market structure". See also at 64, where the ACCC states that Coles and Woolworths "clearly dominate large format supermarket sites, with around 87 per cent of supermarkets of sales area above 2000m^2, and around 96 per cent of supermarkets of sales area above 3000m^2".

[15] The report, *ibid*, continues at 67: "The MSCs maintain a large share of sales for packaged groceries and this may raise concerns, but this position needs to be assessed in conjunction with other factors such as barriers to entry and expansion before any conclusions are drawn."

[16] See for example *ibid*, 213: "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."

[17] *Ibid*, 210.

(see particularly paragraphs 4-7). Similarly, it was a contention utterly rejected by the Federal Court and Full Federal Court when the ACCC sought to block Metcash's acquisition of Franklins, arguing that the major chains did not constrain Metcash.[18]

11. To the extent the ACCC did identify any problems in the sector at the time of the *Grocery Report*, it was confident that "its existing powers can be used to encourage competition and enhance dynamic change".[19] Excepting very recent action, however, the ACCC has barely challenged the major supermarket chains in the years since the report's release. The "laundry detergent cartel"[20] – filed in December 2013 – has been the only Part IV action involving the major chains. The issue of whether "shopper dockets" harmed competition was dealt with via a private deal with each of the chains (resulting in Court action but only for a breach of undertaking).[21] There have been just two blocked mergers (only one of which was in the grocery sector)[22] and a range of largely insignificant consumer protection matters.[23] Indeed, until the very recent unconscionability action filed

[18] *Australian Competition and Consumer Commission v Metcash Trading Limited* (2011) 282 ALR 464 (first instance) and *Australian Competition and Consumer Commission v Metcash Trading Limited* (2011) 198 FCR 297 (Full Federal Court).

[19] ACCC, *Grocery Report*, above n11, 215.

[20] See ACCC, "ACCC takes action against alleged laundry detergent cartel", Media Release No 297/13 (13 December 2013). Woolworths is alleged to have been knowingly concerned in the purported cartel.

[21] *Australian Competition and Consumer Commission v Coles Group Ltd* [2014] FCA 363; *Australian Competition and Consumer Commission v Woolworths Ltd* [2014] FCA 364.

[22] See ACCC, "ACCC to oppose Woolworths/Lowe's proposed acquisition of G Gay & Co hardware stores", Media Release No 211/12 (4 October 2012). See also ACCC, "ACCC to oppose Woolworths' proposed acquisition of Glenmore Ridge site", Media Release (6 June 2013). Woolworths also withdrew from the proposed acquisition of Lindisfarne Cellars in Tasmania, following the release of a Statement of Issues in December 2013 which identified some potential competition concerns. Just prior to the publication of the *Grocery Report* in 2008, the ACCC also opposed another Woolworths acquisition: see ACCC, *Public Competition Assessment: Woolworths Limited – proposed acquisition of Karabar Supermarket* (11 July 2008).

[23] Recent activities include proceedings against Coles in relation to baked goods (ACCC, "ACCC institutes proceedings against Coles for alleged false, misleading and deceptive bakery claims", Media Release No 121/13 (12 June 2013)) and infringement notices against Coles concerning country of origin claims (ACCC, "Coles pays infringement notices for alleged misleading country of origin claims", Media Release No 148/13 (1 July 2013)).

against Coles (discussed below at paragraphs 24-25), the only substantive action by the ACCC in the sector was its unsuccessful merger case against Metcash.[24]

Conclusions: what market power problems are not being addressed?

12. Based on the above research, substantial market power clearly pertains in the Australian grocery sector post-*Safeway*. Indeed the market has become more concentrated since that decision; further, as implicit in *Safeway*, *both* major supermarket chains are likely to have substantial market power (although, of course, such assessments need to be made with specific conduct in mind).

13. Notwithstanding this market power, we can see that section 46 is not being used to discipline the conduct of the major chains. This may be because there has been no need. But persistent complaints about pricing strategies (eg milk), the use of private labels, imposing unfair supply terms, "cliffing", risk-shifting strategies (eg for stolen/unsellable stock), demands for rebates, and extensions into adjacent markets (fuel, hardware etc) suggest otherwise. Indeed, economic theory teaches us that parties with substantial market power are likely to use it.[25] Accordingly, there seems to be a chasm between conduct that the current structure of the market facilitates and conduct that is subject to prosecution pursuant to section 46 of the CCA.

14. This chasm may be due to:

    14.1. problems with section 46 as drafted by the legislature and/or applied by the Courts;

    14.2. problems with ACCC processes in dealing with complaints and progressing investigations;

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

[25] Even their failure to "use" their market power comes at a cost to the consumer: as noted by Sir John Hicks, "the best of all monopoly profits is a quiet life" ("Annual survey of economic theory: the theory of monopoly" (1935) 3 *Econometrica* 1, 8.

14.3. a lack of private parties bringing section 46 actions; and/or

14.4. an intentional gap in the law which allows for parties with substantial market power to engage in some forms of conduct but not others.

15. In relation to this last point, the Retail Guild notes, for example, that monopoly pricing is entirely legal. This approach is premised 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) rather than the market self-correcting. Accordingly, as discussed later in this submission, the Retail Guild considers there should be additional measures put in place to aid and accelerate the "self" correcting process by which markets become more competitive over time. These include measures to encourage more private competition cases (see paragraphs 113-131), as well as expanded merger powers (see paragraphs 79-81).

16. The remainder of this part of the submission, however, considers the extent to which the use and interpretation of section 46 has contributed to ongoing market failure in the grocery sector (and all other sectors of the economy subject to persistent market power).

HOW SHOULD MISUSE OF MARKET POWER BE DEALT WITH UNDER THE CCA?

Is there a problem with section 46 as currently drafted/applied?

17. In the late 1990s the ACCC ran a number of unsuccessful cases alleging misuse of market power in contravention of section 46 – *Universal Music*, *Boral* and *Rural Press*.[26] Contrasting with these cases, in *NT Power* (a private action),[27] the High

[26] *Universal Music Australia Pty Ltd v Australian Competition and Consumer Commission* (2003) 131 FCR 529; *Boral Besser Masonry v Australian Competition and Consumer Commission* (2003) 215 CLR 374; *Rural Press Ltd v Australian Competition and Consumer Commission* [2003] HCA 75.

Court had little if any difficulty concluding that there had been a contravention of section 46. Nevertheless, successful litigation under section 46 is generally considered difficult, expensive and risky, with the probability of success difficult to assess in advance; in addition, many cases are appealed, often to the High Court. Why is this the case? Are there shortcomings with the legislation?

Why have cases failed?

18. A close analysis of section 46 cases before the superior Courts in Australia reveals the following:[28]

    18.1. seven such cases have gone to the Full Court or High Court over the last 15 years with a total of 51 judges considering the three elements of section 46;

    18.2. eleven of 51 judges (approximately 20%) did not find the threshold element of substantial market power to be met;

    18.3. Of the 40 who thought there was market power, 16 (or 40%) said the "take advantage" element had not been met; and

    18.4. Of the 24 who considered there had been a taking advantage of market power, 23 said the purpose element had been met. Only one judge thought there was a misuse of market power that escaped section 46 because the "purpose" element was not met (Dowsett J – dissenting on this point – in *Baxter* (Full Court)[29]).

19. There has been just one case (a first instance decision) which failed *only* by reason of an inability to establish a proscribed purpose: *RP Data*.[30] A close reading of this case, however, suggests that it was an appropriate outcome.

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[27] *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

[28] Rachel Trindade et al, "The grass is always greener? The effects vs purpose debate resumes" (2013) 14 *The State of Competition*, 7; available at http://thestateofcompetition.com.au/newsletter-archive/.

[29] *Australian Competition and Consumer Commission v Baxter Healthcare Pty Ltd & Ors* (2006) 153 FCR 574.

[30] *RP Data Limited v State of Queensland* [2007] FCA 1639.

20. In light of this analysis, there does not appear to be a systemic difficulty in proving a section 46 case before the Courts. Indeed a gap in timing – the point at which section 46 is triggered – has been the only structural problem with section 46 that has been identified by the Courts. This gap was observed by McHugh J in the *Boral* case, when he noted that "one of the difficulties in forcing a 'predatory pricing' claim into the straight-jacket of section 46 is that its terms may fail to catch conduct that ultimately has anti-competitive consequences".[31] This is considered in further detail below.

21. Nonetheless, taking the cases as a whole, there appears little wrong with the current drafting of section 46 or with its application by the Courts. While there may be have been some concern that the Courts were applying an excessively high standard when assessing substantial market power in the early 2000s, these concerns appeared to have resolved in more recent cases. Accordingly, we do not appear to see an abnormally high rate of failure in section 46 cases, such as to indicate that there is an urgent need for legislative intervention, whether to fix problems in the drafting of section 46 or to re-direct the Courts in relation to its interpretation.

Why does the ACCC bring so few cases?

22. Section 46 is just one basis upon which the ACCC could bring cases which relate to market power. The competition tests in section 45 and 47 (as well as section 50) also allow significant scope for proceedings where there is a concern that conduct creates or enhances market power. While the ACCC is an active litigant, its focus tends to be more on consumer protection or – in the case of Part IV – *per se* conduct. It brings very few cases alleging misuse of market power or conduct which substantially lessens competition. Indeed, there have been only three

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

competition-tested cases filed by the ACCC in the last four years:[32] two misuse of market power cases and just one (unsuccessful) merger case.[33]

23. While there may be many reasons to explain the lack of competition cases by the ACCC, the situation is unlikely to improve. The "efficiency dividend" imposed on the Commonwealth public service as a whole has affected the ACCC as well, and its budgetary limitations are well known.[34] The costs of conducting competition litigation are equally notorious: it is by far the most expensive type of litigation that the ACCC undertakes. Accordingly, it seems unlikely that the ACCC will be in a position to bring more cases in the future than it has over recent years.

24. In this context, the Retail Guild finds ACCC's recent unconscionable conduct action against Coles very interesting.[35] The impugned conduct appears, in many respects, similar to that which formed the basis of the section 46 finding in the *Safeway* case.[36] Nonetheless, the ACCC – perhaps encouraged by the recent Full Court decision in *Lux*[37] – has brought the action under the unconscionable conduct provisions of the Australian Consumer Law. This appears to be an innovative and strategic approach, likely to deliver more effective remedies more quickly than

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[32] 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.

[33] 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).

[34] See, for example, John Durie, "Cassidy goes as ACCC told to get a grip on its finances" *The Australian,* 24 January 2014 (available at: http://www.theaustralian.com.au/business/opinion/cassidy-goes-as-accc-told-to-get-a-grip-on-its-finances/story-e6frg9io-1226809016261#); Noel Towell and Matthew Knott, "Cash-strapped Australian Competition and Consumer Commission to axe jobs" *Canberra Times*, 6 February 2014 (available at http://www.canberratimes.com.au/national/public-service/cashstrapped-australian-competition-and-consumer-commission-to-axe-jobs-20140205-32239.html).

[35] See ACCC, *ACCC takes action against Coles for alleged unconscionable conduct towards its suppliers*, Media Release No. 102/14 (5 May 2014); available at http://www.accc.gov.au/media-release/accc-takes-action-against-coles-for-alleged-unconscionable-conduct-towards-its-suppliers.

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

[37] *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90.

could be achieved via section 46 (*Safeway* famously took nine years from the time of filing until final judgment).

25. That said, the prohibition against unconscionable conduct is not – and cannot be – an adequate substitute for cases brought under section 46. Many section 46 cases cannot be squeezed within the tight confines of the unconscionable conduct prohibition. Some of the most prominent section 46 cases in which a contravention was established would be unlikely to succeed as an unconscionable conduct action; these include *NT Power*,[38] *Baxter Healthcare*[39] and even *Queensland Wire* itself.[40] For those section 46 cases which do fall within the scope of unconscionability, there would still be the issue of relief. Given that the conduct would need to be framed somewhat differently, different remedies would follow. Such remedies are less likely to address the market failure which led to the misuse of market power; they are also less likely to act as a general deterrent, given the substantially lower nature of the penalties available to the Court.

Why do private litigants bring so few cases?

26. When undertaking the first major review of competition policy in Australia, the Hilmer Committee envisaged that the general conduct rules in Part IV would be enforced by way of private action "in most cases".[41] This has not eventuated – indeed private litigation appears to be declining in significance,[42] a position which stands in stark contrast to the United States.[43] Yet, as Maureen Brunt noted in 1994, "more significant judgments on the merits [in competition cases] have

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[38] *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

[39] *ACCC v Baxter Healthcare Pty Ltd & Ors (No 2)* (2008) 170 FCR 16.

[40] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

[41] Independent Committee of Inquiry, *National Competition Policy* (1993), at 335.

[42] Alexandra Merrett, *The assessment and regulation of market power in Australia: an institutional approach* (Lambert Academic Publishing, 2013), 96-97.

[43] See generally Steven C Salop and Lawrence J White, "Economic analysis of private antitrust litigation" (1986) 74 *Georgetown Law Journal* 1001. They note (at 1003) that, since the 1980s, the ratio of private-to-public antitrust cases in the United States has "declined" to 10:1. For a more recent analysis of the role of private litigation in the United States, see Joshua P Davis and Robert H Lande, "Defying conventional wisdom: the case for private antitrust enforcement" (2013) 48 *Georgia Law Review* 1.

stemmed from private than from public actions".[44] Three of the most significant High Court decisions concerning section 46 were private actions: *Queensland Wire*,[45] *Melway*[46] and *NT Power*.[47] Notably, both the United Kingdom[48] and the European Commission[49] have recently taken steps to encourage private competition actions.

27. 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 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.*[50]

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[44] Maureen Brunt, "The Australian antitrust law after 20 years – a stocktake" (1994) 9 *Review of Industrial Organisation* 483, 485.

[45] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

[46] *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1.

[47] *NT Power Generation Pty Ltd v Power and Water Authority* [2004] HCA 48.

[48] 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/

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

[50] 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).

Yet, even in the United States, there have been calls to "strengthen private enforcement so that it can serve as a more effective means of compensating victims and deterring potential transgressions".[51]

28. Given the dearth of public enforcement, private actions are more important than ever. Indeed, their absence is a significant loss to the development of Australian competition law. Accordingly, one must ask why are such cases so infrequent?

29. Two problems are immediately apparent. The time, expense and complexity of competition cases are no less an obstacle for private litigants than they are for the ACCC – indeed, given the absence of investigative tools such as section 155 notices, private litigants face even more difficulties in bringing proceedings. Furthermore, the issue of paying the other side's costs if the case is unsuccessful is far more stark for a private litigant than for the ACCC. These factors are considered in more detail below at paragraphs 124-130.

30. There is also the issue of the available remedies. Even if a claim is successful, the court process is too slow to deliver an appropriate outcome to the victim of a misuse of market power. The prospect of damages may not – and indeed does not seem to – be sufficient to outweigh the time, expense and risk of commencing legal action.

What changes could support a more effective prohibition on the misuse of market power?

31. In light of the issues identified above, the Retail Guild submits that the Committee should give consider the following recommendations:

    31.1. creating a prohibition on anti-competitive attempts to acquire substantial market power, similar to the attempt prohibition contained in section 2 of the *Sherman Act* in the United States;

    31.2. introducing a divestiture remedy for section 46 conduct;

[51] Davis and Lande, above n43, at 8.

31.3. implementing measures to assist:

31.3.1. victims of market power abuse to place complaints with the ACCC; and

31.3.2. the ACCC to assess and act upon complaints expeditiously;

31.4. implementing measures to expedite the Court process and to reduce the costs associated with litigation, with a particular view to encouraging private litigation; and

31.5. expanding the mergers prohibition to ensure that firms which already have substantial market power cannot add to that power via acquisition.

Anti-competitive attempts to acquire substantial market power

32. In the United States, a firm which engages in conduct which will result in it obtaining market power can be found to contravene section 2 of the *Sherman Act*, by reason of it "attempting to monopolize" a market. Such an approach would address the "gap" identified by McHugh J in *Boral*, where a firm engages in unilateral conduct which is likely to result in it obtaining substantial market power.

33. While strictly speaking it is possible to attempt to contravene section 46, no such case has ever been brought. As a matter of logic, such a case would not strike at the harm identified in *Boral* – rather an attempt case would take the form of eg trying to force terms onto suppliers that were not accepted (which in itself might suggest a *lack* of substantial market power). Attempt, in the *Sherman* sense, relates to conduct that has clearly been engaged in, although the outcome of that conduct may not have eventuated at the time of proceedings. Given McHugh J's observations, in the Retail Guild's view, consideration should be given to devising an analogous prohibition.

Divestiture

34. Divestiture is available in numerous jurisdictions for prohibitions equivalent to section 46. These include the United States and the United Kingdom. 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, as was done in the case of The Bell Telephone Company resulting in the creation of the 'Baby Bells'.

35. 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".[52] The remedies of the Court however did not – and arguably 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. [53]

36. In the Retail Guild's view, the prospect of divestiture would:

    36.1. enable, in the right circumstances, structural reform of a market where market failure is otherwise unlikely to be corrected in a timely fashion;

    36.2. 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

    36.3. encourage more private litigation, as the prospect of a "permanent" remedy is likely to be more attractive than the limited options currently available.

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[52] *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), 122.

[53] 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".

Measures to expedite ACCC processes

37. **Improving the quality of complaints**: The victims of misuse of market power are, frequently, small businesses which lack 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.

38. As discussed at paragraphs 133-135 below, it may be possible to build capacity in a body such as the Small Business and Family Enterprise Ombudsman to act as a facilitator between a complainant and the ACCC. This would allow the complainant to make their allegations in a form which would ultimately help the ACCC to conduct a timely and efficient assessment.

39. **Improving ACCC processes**: indeed, one way to assist more expedited investigations by the ACCC may be to improve the quality of the complaints it receives. Accordingly, the Retail Guild would welcome 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.

Measures to expedite Court processes and to encourage private litigation

40. Paragraphs 124-131 below address ways in which private litigation could be encouraged. As a more general proposition, however, it would be useful if the Court processes surrounding section 46 litigation were simplified and expedited. At present, their duration and expense is a significant impediment to proceedings, whether by the ACCC or private parties. To this end, the Retail Guild notes that major jurisdictions such as the United States, the European Commission and the United Kingdom all recognise the contribution that private litigation makes to their respective competition regimes and have taken (or are taking) active steps to encourage it further. This is discussed in further detail below at paragraphs 113-130 below.

Expanded merger prohibition

41. This recommendation is discussed in further detail below at paragraphs 79-81.

II. Mergers

SUMMARY

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

- ***Even a revitalised section 46 is not capable of addressing all the inefficiencies that result when firms are allowed to obtain substantial market power***
- ***A review of the ACCC's merger decisions in the grocery sector reveals that – notwithstanding the substantial market power of the major chains – almost no mergers are opposed***
- ***While the ACCC almost invariably identifies state and national markets in the grocery sector, it rarely analyses such markets. Likewise, on occasion, the ACCC's assessment of the counterfactual appears lacking***
- ***There remains no adequate solution to the problem of creeping acquisitions, notwithstanding the more expansive approach to greenfields acquisitions recently adopted recently by the ACCC***

Accordingly, the Retail Guild RECOMMENDS:

☑ ***Consideration should be given to the mandatory pre-notification of acquisitions by corporations with a substantial degree of power in a market***

☑ ***A new merger prohibition should be created for corporations with substantial market power, such that* any *lessening of competition in a market would be prohibited***

☑ ***Formal independent reviews of ACCC merger decisions should be undertaken on a regular basis and the results published***

☑ ***The formal review process should be simplified to make it a viable option for parties. Failing this, it should be removed***

42. Many of the market power problems identified in the first part of this submission could be reduced if mergers were more effectively controlled. Again, using the grocery sector as an example, it is clear that there are inadequacies in the legal test, as well as the process by which mergers are assessed.

CURRENT MERGER REVIEW PROCESSES: THE GROCERY SECTOR AS EXEMPLAR[54]

43. The following table breaks down the 44 merger proposals in the grocery sector which were considered by the ACCC between 2005 and June 2014.[55]

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

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

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

    45.1. how markets are identified and then considered;

[54] The analysis contained in this section draws on private research commissioned by the Retail Guild.

[55] 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.

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

45.3. how creeping acquisitions can be addressed;

45.4. the processes employed in assessing mergers.

Each of these is considered in more detail below.

Market definition

46. 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:

46.1. a local retail supermarket market;

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

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

47. 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),[56] 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.

48. 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,

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

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.

49. 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 in paragraphs 88-91 below.

Application of the counterfactual test

50. 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.

51. 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 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.

52. 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)

53. 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.[57]

54. 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…*[58]

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

55. 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 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*

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

[58] *Ibid*, at [73].

understands that another developer is willing and able to proceed with a development on the site that would include a full line Drake supermarket.[59]

56. 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…".[60]

Examples where the "future without" may be underdeveloped

57. 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.[61] 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.

58. 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 45-50%; the additional stores which Woolworths sought to acquire would add only a further 5% to that.[62]

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

[60] *Ibid*, [35].

[61] 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].

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

59. 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 .

60. 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.[63] 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.

61. 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 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.

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[63] 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) .

62. 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* case[64] 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 at paragraphs 88-91).

Creeping acquisitions

63. 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.*[65]

64. 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.

65. The taxi industry – in particular, Cabcharge – provides an excellent example of the problem of creeping acquisitions:

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

[65] ACCC, *Grocery Report*, above n11, 422.

65.1. 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";[66]

65.2. in 2012, the Victorian taxi inquiry found that Cabcharge continued to engage in the conduct which had resulted in that early finding;[67]

65.3. since the Federal Court's decision, Cabcharge has submitted three applications for informal clearance without opposition from the ACCC.[68]

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.

66. 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.

67. 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.

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[66] *ACCC v Cabcharge Australia Limited* [2010] FCA 1261). Quote from Victorian Taxi Industry Inquiry, above n52, 122.

[67] See above n53.

[68] 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 46.2 and 46.3 above.

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

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

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

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

69. 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.[69] If a market is not particularly competitive, then even a small absolute reduction in competition may be found to substantially lessen competition.

70. 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 approached 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*

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

corporation or a body corporate related to the corporation in the period of 6 years ending on the date of the first mentioned acquisition together have the effect, or are likely to have that effect.[70]

71. 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).

72. 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

73. 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.[71]

74. 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.

[70] Trade Practices (Creeping Acquisitions) Amendment Bill 2007.

[71] 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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75. 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.

76. 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.[72] 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.[73] 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, not withstanding numerous other supermarkets in the general area. It stated:

[72] ACCC, *SOI: Woolworths / Wallaroo*, above n59.

[73] Australian Competition and Consumer Commission, *Public Competitive Assessment: Woolworths Limited – proposed acquisition of supermarket site at Glenmore Ridge Village Centre* (25 October 2013).

> *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.*[74]

77. 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.

78. 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

79. 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

[74] *Ibid*, [60].

would expect if an effective merger policy (and competition regime generally) were in place.

80. 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.)

81. 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

82. Accordingly, the Retail Guild considers that a robust mergers regime should have *all* the following characteristics:

    82.1. identification and analysis of all relevant markets;

    82.2. correct application of the counterfactual;

    82.3. an additional prohibition to address parties with pre-existing market power; and

    82.4. as discussed later in this submission, a more active role by private parties.

Merger processes

83. Some matters of process are considered in more detail elsewhere in this submission (see paragraphs 106-109 in relation to merger authorisation and paragraphs 113-131 regarding private litigation). Accordingly, in this section, we consider only the following issues: pre-merger notification, the need for post-merger reviews and the formal clearance process.

Notification of mergers

84. 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. However, it appears that Coles rarely notifies the ACCC of any of its acquisitions. In the period 2005-2013, only 5 acquisitions by Coles (in respect of supermarkets) were reviewed by the ACCC. Of these, only 2 were notified to the ACCC in advance (ie on a voluntary basis). The other acquisitions were reviewed after completion by the ACCC either at its own instigation or perhaps following the receipt of complaints. Yet in FY2012/13 alone, Coles opened 19 new supermarkets (as reported in Wesfarmers' Annual Report for that year). This year, Coles has notified the ACCC of the acquisition of 4 supermarkets in Western Australia, although the outcome is yet to be determined.[75]

85. Uncertainty about the "legitimacy" of reviewing greenfields sites (discussed above) may (at least in part) explain Coles' failure to advise the ACCC of any such acquisitions in advance. Note, for example, that the ACCC commenced a public review – presumably at Coles' instigation – of its acquisition of IGAs in Whitford City and Cockburn Gateway in May 2012. In January that same year, however, the review of Coles' acquisition of the Crows Nest Plaza Shopping Centre did not occur until *after* the acquisition was complete. In other words, Coles apparently remains willing to provide the ACCC with advance notice of "traditional" acquisitions, but perhaps not in relation to new leases, sites or developments.

86. Given the low number of Coles' acquisitions that the ACCC has investigated over the period reviewed (just 5 – as well as the 4 currently under review – as opposed to 27 for Woolworths), Coles' strategy of non-notification appears surprisingly effective.

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[75] See above at n55.

87. In the Retail Guild's view, consideration should be given to mandatory pre-notification of acquisitions by firms with a substantial degree of market power in the relevant market. An effective way to achieve this outcome would be to stipulate by regulation (similar to the process described above at paragraph 81) that the largest players in specific sectors should notify the ACCC in advance of all acquisitions – greenfields or otherwise – occurring within that sector.

Post-merger review

88. 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.[76] Regular, thorough and independent reviews would allow a proper assessment of whether the ACCC is identifying – and analysing – the correct markets, and applying the counterfactual appropriately. Over time, it would also assist the ACCC to develop an understanding of the appropriate weight to give to types of evidence; in due course, this may also facilitate better Court outcomes. It would also 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. All parties need to have confidence that such decisions reflect the law as it would be applied by the Courts.

89. 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. The review should not be undertaken by the ACCC.

90. The aim of such a review would be to establish whether, given the policy objectives of the merger provision, the market structure resulting from the merger decision(s) is better than that which would have emerged from alternative decisions. It would also be directed to determining whether the correct decision

[76] 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.

was made given the information available and within applicable legal constraints and if it was not, why this was the case. The aim is to improve understanding of the assessment process and hence of future decision-making. At the same time it is acknowledged that post-merger reviews are quite difficult to accomplish successfully given the ability of markets to adjust to changed circumstances, confidentiality issues and the lack of incentive for relevant parties to participate in the review process.

91. Whilst allowing flexibility of approach, guidance as to appropriate methodology for reviews should be provided and this should be 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.

Formal clearance process

92. For many years now, parties have been able to approach the ACCC and obtain an informal clearance for a proposed merger. As no *formal* decision is involved, however, the Commission's finding is not – other than to a very limited extent – subject to appeal or review. Following the Dawson Inquiry, the then TPA/CCA was amended to introduce a formal clearance process to address some concerns about the ACCC practices;[77] to date, however, it has not been used. Although there are issues about the relationship between the formal and informal processes, a major reason why the formal clearance process remains unused is the length and complexity of the prescribed form. If there is a good policy reason for retaining this process, then this issue needs to be rectified. Alternatively, formal clearance should be removed.

[77] See Division 3B of Part VII of the CCA.

III. Reducing red tape for small business

SUMMARY

The Retail Guild makes the following submissions concerning "red tape" issues associated with the competition provisions of the CCA:

- **Per se** ***prohibitions rest on the presumption that the prohibited conduct is so likely to harm competition that it is not worth the time and effort to consider it closely. This presumption does not hold for small business***
- ***The compliance costs of successfully (and legitimately) navigating Australia's very complex*** **per se** ***provisions are beyond the reach of small business. This means small business is constrained in its range of competitive strategies in ways that larger businesses are not***
- ***The requirement that merger authorisations go directly to the Tribunal excludes all but the largest businesses from this process***

Accordingly, the Retail Guild RECOMMENDS:

☑ ***The*** **per se** ***prohibitions should be competition-tested for businesses below a certain size***

☑ ***The 3 year renewal period for collective bargaining notifications should be removed***

☑ ***Merger authorisations should revert to the ACCC in the first instance***

☑ ***Work should be undertaken to assess the costs associated with various ACCC processes (such as compliance with section 155 notices, preparing notifications, seeking informal clearance etc) and approximate ranges should be published***

93. While laws dealing with the creation and use of market power address one side of the competition policy equation for smaller players, it is also necessary to consider the other. Are compliance costs for small business so high as to deter effective competition? If yes, what can be done to reduce those costs? If compliance costs render small businesses less able to compete, they will be less efficient and less of a constraint on their larger competitors. Australians consequently lose out as their markets operate less effectively and productively than they should.

PER SE PROHIBITIONS

94. A particular focus of the Retail Guild is the role of *per se* prohibitions in Part IV of the CCA. These prohibitions rest on the presumption that conduct falling within their operation is *so* likely to harm competition that it is not worth the time and effort to engage in a competition assessment. That presumption does not hold for small business, yet there is no scope to rebut it (in contrast with many other legal presumptions). Accordingly, the Retail Guild submits that the operation of the *per se* prohibitions should be seriously reviewed to the extent they apply to businesses whose conduct cannot possibly lessen competition.

The *per se* prohibitions and big business

95. This approach is not intended to result in the special treatment of small business so much as to level the playing field. As they currently stand, the *per se* prohibitions and surrounding machinery are incredibly complicated. The interplay of defences, exceptions, anti-overlap provisions and options for statutory immunity mean that only those who can access high quality legal advice are able to operate using the broadest range of competitive strategies. Small suburban law firms are simply not equipped to handle the complexity of the provisions.

96. In consequence, accurate and detailed advice is generally available only from the very largest law firms, and is simply unaffordable for small business. Accordingly, while a large retailer might engage in a shopper docket scheme (supported by an appropriate notification), its small independent equivalent will rarely be advised under what circumstances this conduct is permitted. In a "best" case scenario, the independent will be told that such conduct amounts to third line forcing which is *per se* illegal such that the independent cannot match the strategy of its competitor. In a worse case scenario, the independent will bypass advice altogether, and simply match its competitor's strategy without understanding the processes by which the large retailer secured its legal position. This of course leaves the independent liable to prosecution, with the prospect of ruinous penalties.

97. As experienced competition practitioners know, however, statutory immunity is often the last resort for protecting particular conduct. Ultimately, *per se* prohibitions are a triumph of form over substance. Accordingly, those with access to good legal advice can simply (and legitimately) structure their arrangements so as to avoid triggering the prohibitions altogether: thus, one might use an agency arrangement, do a "*Paul Dainty*", ensure that the joint venture defence is triggered, or draft an agreement to so that it falls under the competition test in section 47 thereby avoiding the *per se* operation of sections 45/4D. These options are all "simple" ways in which well-advised businesses avoid the strictures imposed by the *per se* prohibitions.

98. Small business, however, cannot access such advice. Free information concerning the CCA can be hard to find and, in any case, tends to be excessively simplified. The ACCC does not give legal advice, and its educative publications do not have the sophistication to deal with some of the strategies outlined above. In any case, it would be a rare enforcer who focused on explaining to parties what they *can* do; the higher priority is to tell businesses what they shouldn't do. Consequently ACCC small business publications tend to take the form of basic "do's and don'ts". As has been observed, however, "Simplified statements of the law are dangerous because they constrain the capacity of small business to compete effectively and engage in the rough and tumble of tough (but fair) competition."[78] Being less able to compete, they are less efficient and less of a constraint on their larger competitors: Australians consequently lose out as their markets operate less effectively and productively than would otherwise be the case.

Possible solutions

Make per se prohibitions competition-tested for small business

99. The Retail Guild submits that the best means of reducing the red-tape created by the *per se* prohibitions and thus to enable small business to compete more

[78] Rachel Trindade et al, "Australia's small business sector: 'Not for the faint of heart'" (2014) 16 *The State of Competition*, 2; available at http://thestateofcompetition.com.au/newsletter-archive/.

effectively would be to adapt their application to small business. Specifically, such prohibitions should, in the case of small business, be competition tested.

100. One manner in which this could be achieved would be the inclusion of a new "defence", similar to that contained in section 47(10). The particular framing of each such defence would depend upon the prohibition in question, but an example would be:

> *Section [47](1) does not apply to the practice of exclusive dealing constituted by a small business engaging in conduct of a kind referred to in subsection [47](6) or (7) unless:*
>
> *(a) the engaging by the small business in that conduct has the purpose, or has or is likely to have the effect, of substantially lessening competition; or*
>
> *(b) the engaging by the small business in that conduct, and the engaging by the small business, or by a body corporate related to the small business, in other conduct of the same or a similar kind, together have or are likely to have the effect of substantially lessening competition.*

101. If the other *per se* prohibitions – resale price maintenance, exclusionary provisions and cartels – were modified in a similar manner, then the impact of the impugned conduct would become the appropriate litmus test. Thus any harm to consumers would still be captured, but small business would be free to compete on a more equal footing with its larger counterparts.

The appropriate threshold for determining what is a "small business"

102. The collective bargaining notification process provides something of a model as to how to define a small business. Parties to such arrangements must reasonably expect that the value of the transactions conducted pursuant to a notification will not exceed $3m in any 12-month period. This has since been increased, via regulation, for a number of industries (petrol retailing: $15m; new motor vehicle retailing: $20m; farm machinery retailing: $10m; primary production: $5m).

103. The Retail Guild suggests that – while not entirely analogous – this general approach could be adapted to define a "small business". Any definition should err on the conservative side, as the issue goes to the heart of the presumption of harm to competition. Accordingly, it would be appropriate to set a threshold amount, perhaps based on the annual turnover of a business (including – to pre-empt avoidance measures – related bodies corporate engaged in similar activities). This amount could be increased via regulation for particular industries where such an amount would be too low to be effective. For example, in the case of grocery and fuel retailing, the business model is premised upon very small margins achieved over high volumes; accordingly, the annual turnover figure may need to be higher than the standard threshold. Conversely, if the ACCC were able to establish to the Minister's satisfaction that the standard threshold was too *low* for certain sectors, then it could be decreased for those sectors.

FURTHER OPTIONS TO REDUCE RED TAPE

104. The Retail Guild also makes the following observations and recommendations.

Collective bargaining notifications

105. There appears little reason for requiring collective bargaining notifications to be renewed every 3 years. This creates an unnecessary burden for small business, adding to its already high compliance costs. If the Retail Guild's recommendations as set out above at paragraphs 99-101 were to be accepted, the need for collective bargaining notifications would largely, if not entirely, fall away. If this recommendation were not adopted, however, the Retail Guild submits that the renewal period should be removed; rather, collective bargaining notifications should be subject to the same revocation process as for other notifications.

Merger authorisations

106. The requirement that merger authorisations go directly to the Tribunal means that all but the largest businesses are effectively precluded from this process. While this is not an issue for small business per se, the Retail Guild queries a process

which – by reason of its expense – is unavailable to the vast majority of Australian businesses.

107. This is particularly pertinent in smaller markets which, for whatever reason, are declining. Authorisation in such circumstances can be an important way of achieving rationalisation. This allows for an efficient reduction in supply as demand declines.

108. Authorising a merger has never been a cheap strategy, but requiring all parties to proceed directly to the Tribunal imposes a substantial expense. It is notable that this process came about largely at the request of large businesses dissatisfied with the ACCC process; few alternative views were sought or expressed. In any case, there are myriad flaws in the scheme. In addition to the effective preclusion of smaller businesses from this process, requiring some types of authorisation to go to the ACCC whilst others go directly to the Tribunal ignores the reality that many modern business transactions involve multiple aspects. A relatively recent example was Qantas' attempted partnership with Air New Zealand in 2003.[79] This involved conduct falling under both sections 45 and 50. Under the current regime, it would be unclear how authorisation for such a transaction should proceed.

109. Accordingly, merger authorisations should revert to being determined by the ACCC in the first instance. This would avoid unnecessary expense, ensure the option become more widely available and reduce confusion for more complex transactions.

COMPLIANCE COSTS

110. The Retail Guild also suggests that work should be undertaken to assess exactly what are the compliance costs of certain processes. For example, it is not uncommon for the ACCC to issue standardised section 155 notices on businesses

[79] *Qantas Airways Limited* [2004] ACompT 9.

who may be able to provide insight into a given merger, even where those businesses have no direct involvement in the merger. Such notices impose a disproportionate burden on small business, both in terms of the expense and management time required to ensure compliance. These notices should not be issued unless the ACCC has some understanding of the costs involved in compliance. While the ACCC Chair must be satisfied before issuing a notice that it is not unduly burdensome, the Retail Guild submits that a more nuanced understanding of the burden involved with undertaking a range of processes is required. This should include both processes where businesses has no (actual or effective) choice but to be involved, such as investigations or section 155 notices. But it should also include those voluntary processes that enable a business to take advantage of the subtlety of the CCA as a whole thereby engaging in tough but fair competitive conduct to the fullest extent possible.

111. Accordingly, the Retail Guild submits that a study should be commissioned to ascertain the average costs – including lodgement fees, legal costs and management time – associated with:

    111.1. responding to a section 155 notice (issued pursuant to section 155(1)(a) or (b));

    111.2. attending an examination (following receipt of a notice under section 155(1)(c));

    111.3. responding to/"defending" an investigation – perhaps this could be broken down into simple, average and complex investigations;

    111.4. making a third-party submission in response to an application for informal merger clearance;

    111.5. making an application for informal merger clearance;

    111.6. lodging a notification (including the costs of preparing the submission in support and the legal advice which prompted the application in the first place); and

111.7. lodging an authorisation with the ACCC (including the costs of preparing the submission in support and the legal advice which prompted the application).

112. While the Retail Guild accepts that it would be difficult to determine a precise cost associated with these various processes, it would be possible to ascertain a range. That range should be published, so that:

112.1. businesses can understand, before engaging in a particular process, what may be involved; and

112.2. the ACCC can appreciate the burden imposed on businesses, particularly as it manages particular merger or investigative processes. To this end, an analysis of average costs could be seen in the same light as a regulatory impact statement – something which should be borne in mind before businesses engage with the ACCC (whether at their own instigation or that of the ACCC's).

IV. General measures to improve engagement

SUMMARY

The Retail Guild makes the following submissions outlining general measures to improve business engagement with the competition framework

- ***Private litigation has made a very important contribution to the development of competition law in Australia and overseas, but is in decline***
- ***While every effort should be made to simplify the CCA to the extent possible, it will inevitably remain complex legislation. Such complexity means that smaller businesses are less able to compete effectively, thereby reducing their overall contribution to efficient, innovative markets and the nation's productivity levels***

Accordingly, the Retail Guild RECOMMENDS:

☑ ***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***

☑ ***Relief from costs should be granted as a matter of course, should merger clearances continue to be heard by the Australian Competition Tribunal in the first instance***

☑ ***A clearing-house should be created, allowing for the development of capacity and expertise in competition (and other legal) issues within a small business context. The new Small Business and Family Enterprise Ombudsman may be an appropriate vehicle for such a clearing-house***

ENCOURAGING PRIVATE ENFORCEMENT

113. As noted above at paragraphs 26-27, the competition provisions of the CCA were intended to be enforced by way of private action "in most cases".[80] While section 83 of the CCA specifically envisages what are known as "follow-on" actions (ie

[80] Independent Committee of Inquiry, *National Competition Policy* (1993), at 335.

matters which piggy-back on public enforcement), the role of stand-alone litigation is also critical. 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.

114. Although private litigation has proven incredibly important to the development of Australia's competition laws, it has never been particularly common. Moreover, in recent years, it appears to be declining.[81] Over time, the CCA has increasingly become the exclusive terrain of the ACCC, entrenching what Crane ironically refers to as the "governmental monopoly over enforcement".[82] For example, in 1977 the Government withdrew the right for private parties to seek injunctions concerning section 50;[83] some years later, the Commission was granted a statutory right of intervention in TPA (now CCA) proceedings.[84] Although the Attorney-General had certain enforcement rights, particularly in relation to section 50, Brunt notes that "in practice the Commission has taken almost exclusive public enforcement responsibility".[85] Consequently, she observes, "The practical effect is that the Commission has become the main enforcer – and indeed interpreter for the time being – of the law…".[86]

115. In addition to the in-built disincentives, competition litigation itself is expensive, time consuming and – even when "successful" – not always capable of delivering a useful outcome. The first and most significant section 46 case to go to the High

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[81] Merrett, above n42, 96-97.

[82] Daniel A Crane, "Optimizing private antitrust enforcement" (2010) 63:3 *Vanderbilt Law Review* 675, 722. Note, however, that Crane's article in general is the subject of heavy criticism in Davis and Lande, above n43.

[83] Maureen Brunt, "The use of economic evidence in antitrust litigation: Australia" (August 1986) *Australian Business Law Review*, 294.

[84] Pursuant to section 87CA. Prior to this amendment, the Commission was permitted to intervene only in accordance with general legal principles. Note eg that its application to intervene in the High Court hearing of *Queensland Wire* ((1989) 167 CLR 177) was refused.

[85] Brunt, "The Australian antitrust law after 20 years…", above n44, 485.

[86] Brunt, "The use of economic evidence…", above n83, 294.

Court – *Queensland Wire*[87] – is a paradigmatic example of a pyrrhic victory. After losing at first instance and on appeal, Queensland Wire was able to persuade the High Court that BHP's refusal to supply amounted to a misuse of market power and the matter was remitted to the first instance judge to assess remedies. Before its relief could be determined, however, Queensland Wire went out of business.

What practical steps can be taken to encourage private litigation?

The American way

116. The United States has for many years successfully encouraged private litigation principally by way of treble damages – that is, if the victim of anti-competitive conduct can prove a loss entitling it to $x damages, it is awarded 3*$x. This approach occurs in an environment where, in the general course, costs *do not* follow the event. Nonetheless, the specific encouragement of private action is considered to be warranted in recognition of the public good that occurs when a private party intervenes to stop anti-competitive conduct. Indeed, the Supreme Court has described treble damages as "a chief tool" in the antitrust enforcement scheme, providing a "crucial deterrent".[88]

117. From an outsider's perspective, the American approach appears to have been highly successful. Indeed, there have been claims that it has been too successful.[89] Recent research by Davis and Lande, however, suggests that more should be done to encourage private actions. Noting that private litigation involves far more than simple follow-on cartel actions, they report that:

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[87] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

[88] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc*, 473 US 614, 635 (1985). See also *Hawaii v Standard Oil Co*, 405 US 251 (1972): "By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as 'private attorneys general'."

[89] See for example Crane, above n84. Nonetheless, Davis and Lande, above n43, observe that critics appear to claim simultaneously that US moves to encourage private litigation have been both too successful (in that too many claims are brought) and not sufficiently successful (in that it does not serve as an adequate deterrent).

> *... 'a substantial portion of private recoveries occurred in cases subject to the rule of reason, as well as in cases in which it was unclear whether the rule of reason or a per se rule would apply'... These findings suggest that private litigation may play an important complementary role to public litigation by challenging conduct that the government – and especially the DOJ – may rarely address.*[90]

118. Accordingly, they recommend that "consideration [should be given to] ways to strengthen private enforcement so that it can serve as a more effective means of compensating victims and deterring potential transgressors".[91] That such a recommendation should be made in the United States – given the rate of private litigation in that jurisdiction – highlights just now valuable a role it has in supporting an effective and vigorous competition regime.

Alternative approaches

119. The English and European approaches are, in many respects, more akin to the Australian. But encouraging private litigation has been a significant priority in those jurisdictions as well. In explaining why private enforcement is important, the European Commission observed:

> *More effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules. Safeguarding undistorted competition is an integral*

[90] Davis and Lande, *ibid*, 31.

[91] *Ibid*, 8.

> *part of the internal market and important for implementing the Lisbon strategy. A competition culture contributes to better allocation of resources, greater economic efficiency, increased innovation and lower prices.*[92]

120. The European Commission found that the limited extent of private actions were "largely due to various legal and procedural hurdles".[93] While many of those hurdles do not apply in Australia, several do. In particular it was interesting to note the EC's position on costs:

> *The Commission considers that 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…*[94]

121. It continued that the "'loser pays' principle [for costs]… could… discourage victims with meritorious claims".[95] Other recommendations included consideration of mechanisms to encourage the early resolution of cases, and limitations on court fees.

122. Following the release of the *EC White Paper*, the United Kingdom conducted its own consultation process.[96] This resulted in a range of proposals designed to ensure private claims constituted "a credible and effective complement to the public enforcement of competition".[97] While principally these reforms concerned

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[92] *EC White Paper*, above n49, 3.

[93] *Ibid*, 2.

[94] *Ibid*, 9.

[95] *Ibid*.

[96] 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)

[97] Dimopoulos et al, above n48.

the role of the Competition Appeals Tribunal, they also included the introduction of a "fast-track procedure for simpler antitrust claims in the CAT (principally for the benefit of SMEs)".[98]

Recommendations for the Australian framework

123. The Retail Guild acknowledges that section 83 of the CCA – findings of fact – is clearly intended to encourage private litigation to a degree. Nonetheless, it is not the only measure that can or should be adopted. As a first point, section 83 only assists in relation to follow-on actions but, as demonstrated above, many of the most significant competition cases have been stand-alone. Even within the confines of follow-on actions, 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.[99] Accordingly, there is rarely the opportunity to take advantage of findings of fact.

124. Many of the approaches overseas are specific to the jurisdiction in which they have arisen. Nonetheless, it may be possible– in limited circumstances – to remove some of the disincentives that are currently in place for bringing private action. Principal amongst these is the prospect that, should a party lose a case, it may be liable for the costs of the other party. As has already been noted, these cases can be extremely expensive: it is not uncommon, for example, for each party to retain the services of multiple experts, along with three or more barristers in addition to its team of solicitors.

125. When considering the respective positions of defendants (respondents) and plaintiffs (applicants), Davis and Lande observe:

> *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*

[98] *Ibid*.

[99] See for example *ACCC v Visy Industries Holdings Pty Limited (No 3)* [2007] FCA 1617.

> *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…*[100]

126. Davis and Lande make these observations in the context of the American regime. As noted above, in the United States, costs do not as a general rule follow the event. Accordingly, these observations are even more apt in jurisdictions where the "loser pays" principle applies.

127. The Retail Guild therefore recommends 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. Such an application may, for example, involve a preliminary hearing whereby the judge could assess the basic merits of the claim: if the judge 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 or because an important aspect of the law was being tested), then the judge could make an appropriate order relieving the applicant of costs, regardless of the outcome of the case. It may also be appropriate for a substantial bond to be put up by the applicant, to discourage frivolous use of the process; this bond could be returned to the applicant at the end of the proceedings or – if the judge considered the case had not been conducted in an appropriate manner – provided to the respondent.

128. The Retail Guild recognises that such an approach would need to be carefully considered, as it creates a burden on respondents. Nonetheless, it would also help to contain costs generally, discouraging larger companies from "gearing up" in an intimidatory fashion to prompt the withdrawal of actions.

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[100] Davis and Lande, above n43, 68-69.

129. In the Retail Guild's view, such relief should only be available to businesses below a certain size (whether based on market capitalisation, in the case of listed companies, or annual turnover). Given that the cost of competition litigation regularly runs into the millions, however, the Retail Guild suggests that a high threshold would be appropriate.

130. The Retail Guild notes that – if the merger authorisation process is not amended (as discussed above at paragraphs 106-108) – relief from costs should be granted as a matter of course. Costs are not relevant to authorisations determined by the ACCC and should not act as a further deterrent to use of the merger authorisation process.

131. As an alternative to relief on the issue of costs, section 170 could be expanded in its operation. In the Retail Guild's view, however, this would be a second-best approach. Private litigation should not be encouraged through the use of financial handouts; rather, existing obstacles should be removed.

PROVIDING SPECIALISED SUPPORT TO SMALL BUSINESS

132. Regardless of any amendments that might be made to the competition law framework as a consequence of this review, the CCA is likely to remain complex. Ready access to qualified legal advice will thus continue to provide larger businesses with a substantial advantage over their smaller counterparts. This will mean smaller businesses are less able to compete effectively, thereby reducing their overall contribution to efficient, innovative markets and the nation's productivity levels.

133. One way to address this systemic problem is to create a clearing-house, allowing for the development of capacity and expertise in competition (and other legal) issues within a small business context. The new Small Business and Family

Enterprise Ombudsman[101] may be the appropriate vehicle for the creation of such capacity.

134. The Small Business and Family Enterprise Ombudsman may be able to assist with:

    134.1. the development of 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: see further paragraph 98);

    134.2. advice in relation to the preparation and presentation of complaints to the ACCC (see further paragraphs 37-39). This would allow for spurious complaints to be dismissed promptly, saving ACCC time and resources, but also allowing for more serious complaints to be presented a manner that is most likely to assist a timely and efficient investigation by the ACCC;

    134.3. assistance to small businesses responding to enquiries from the ACCC or which are the target of an investigation; and

    134.4. assistance with the preparation of various submissions to the ACCC, such as in support of notifications or third-party comments on proposed mergers.

135. The Small Business and Family Enterprise Ombudsman may also be the appropriate body to commission research into compliance costs for small business (see further paragraph 111).

[101] Currently the subject of a public consultation process: see http://www.treasury.gov.au/ConsultationsandReviews/Consultations/2014/Small-Business-and-Family-Enterprise-Ombudsman.