Coles' Submission on the Draft Report of the Competition Policy Review

November 2014

Overview

The Draft Report of the Harper Review Panel provides a constructive contribution to the debate surrounding competition policy in Australia. The Draft Report is timely in light of the Commonwealth Government's commitment to an innovation and competitiveness agenda aimed at strengthening the economy and leveraging opportunities for future prosperity.

This submission focuses predominantly on three key elements of the Draft Report:

- the principle that the interests of the consumer must always be at the heart of the competition policy debate;
- creating a more competitive economy through winding back cumbersome government regulation, including by liberalising retail trading hours nationally so that consumers are able to shop where they want at a time that is convenient for them;
- the risk that the inclusion of an "effects test" in s46 of the *Competition and Consumer Act*, as advocated in the Draft Report, will add a layer of uncertainty to business decision-making that could hinder investment and jobs growth and lead to higher prices for consumers.

Coles recognises the importance of building Australian businesses that can meet the challenge of global competition. As a retailer employing 100,000 team members, Coles has set itself the ambition of providing a customer experience in our stores that is world-class in quality, service and value.

In recent years Coles has improved its operating performance and competitiveness, leading to lower food and grocery prices for Australian consumers. But Coles acknowledges it has to make further improvements to achieve world's best practice.

The entry into the market of new foreign-owned retailers and the emergence of on-line competitors has changed the operating environment for many retailers in Australia. This means that businesses like Coles have to strive harder to improve efficiency and lower prices in order to deliver better value and choice to customers. Policies to encourage strong competition and productivity-boosting investment and innovation should be priorities for all levels of government.

The Draft Report by the Harper Review recognises these realities and has proposed an approach to competition policy based on sound principles, better institutions and improved frameworks.

Coles welcomes the Draft Report's conclusion that concerns with the structure of key markets, such as grocery retail, can be addressed effectively through better use of existing frameworks rather than by sector-specific changes to competition law.

The Draft Report also emphasises best-practice regulation as essential to improving the competitiveness and productivity of business. The removal or reduction of costly red tape should deliver better outcomes and lower prices to consumers. The Draft Report has identified a number of good proposals to improve regulatory processes. These include recommendations regarding de-regulation of trading hours and improved planning and zoning laws.

In relation to Competition Law, Coles supports the Review Panel's ambition to simplify the *Competition and Consumer Act.* We support a principled approach aimed at ensuring the law is clear and predictable.

However, in relation to issues around misuse of market power, Coles is concerned at the Review Panel's proposal to amend significantly section 46 of the Act.

The Review Panel has recommended an entirely new section 46 of the *Competition and Consumer Act* that increases dramatically its scope. Essentially, a new effects test will act in unison with a substantial lessening of competition test – i.e., the new section would prohibit a business with market power from engaging in any conduct that has the purpose, effect or likely effect of substantially lessening competition.

The risk is that the combination of the two will make businesses wary about engaging in pro-competitive actions that benefit consumers but harm competitors. The changes may in future force businesses to defend pro-competitive conduct before the courts.

The Review Panel has noted that the challenge is to frame a law that captures anti-competitive behaviour but does not constrain vigorous competition: "Such a law must be written in clear language and state a legal test that can be reliably applied by the courts to distinguish between competitive and anti-competitive conduct."

The goal of achieving clearer, more predictable law is sensible. However, we believe the basis of what the Panel has presented regarding s 46 is unlikely to achieve this objective.

The proposed misuse of market power provisions including the proposed defences appear not to have been sufficiently developed or explained. This heightens the risk of unintended consequences.

Coles is concerned that the new prohibition and defences will increase uncertainty as to the risk of ACCC investigation and legal action and will result in less dynamic, less responsive and more conservative decisions by businesses that are considered to have market power.

In a tough operating environment characterised by increasing global competition, businesses have to strive to lower their costs and increase their productivity if they are to offer value to customers. Proceeding with the changes to section 46 as framed will add to uncertainty and will cut across the objectives of Government around sensible regulation and pursuit of a pro-growth agenda.

A growing, vibrant economy relies on confident businesses that are prepared to take risks, innovate and invest. Exposure to strong competition facilitates this. It will be important not to overreach on any proposed changes to section 46.

More detailed comments on the Draft Report are outlined below.

Key Retail Markets

Coles welcomes the Draft Report's analysis of the key retail markets of grocery and fuel retailing. In grocery retailing, Coles supports the Panel's finding that:

> Australia's grocery market is concentrated, but not uniquely so. While concentration is relevant, it is not determinative of the level of competition in a market. A concentrated market with significant barriers to entry may be conducive to weak competition, but competition between supermarkets in Australia appears to have intensified in recent years following Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco; consequently, few concerns have been raised about prices charged to consumers by supermarkets.

Coles has long maintained that the supermarket sector is subject to vigorous competition and that this competition has intensified in recent years. The Draft Report recognises barriers to entry are not significant and that prices to consumers have been lowered due to increased competition and improved efficiencies.

The Draft Report concludes that any concerns with the structure of these key markets can be addressed by reducing regulatory impediments to competition and otherwise taking advantage of existing frameworks rather than by any sector-specific changes to competition law or policy:

> [T]he Panel can reaffirm that these provisions should only prohibit conduct that harms competition, not individual firms. In particular, the CCA does not, and should not, seek to restrain a competitor because it is big, or because its scale or scope of operations enables it to innovate and thus provide benefits for consumers.

Similarly, the Draft Report finds in accordance with previous ACCC reviews that the fuel retailing market is competitive, that the participation of supermarkets is important, and that shopper dockets are adequately addressed by the existing law.

The Impact of Regulation on the Cost of Doing Business

Coles supports the Panel's **Draft Recommendation 11** that "all Australian governments should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed".

As a basic principle of good public policy, regulations should, wherever practicable, apply uniformly and consistently and new regulations should only be introduced where there are clear public benefits from doing so. A sound regulatory framework should neither impose burdens on, nor seek to exempt, one class of business over another.

Among the biggest challenges for a national business are the cumulative impact of red tape and the inconsistent adoption of regulation in different jurisdictions.

The lack of harmonisation of Federal, State and local government regulations imposes significant compliance costs on our business and ultimately on our customers.

In its initial submission to the Competition Policy Review, Coles highlighted the issues of multiple regulators imposing multiple compliance costs across retail.

Coles manages relationships with approximately **450 local councils** and up to **100 regulatory agencies** nationally. Coles Supermarkets reported more than **500 regulator contacts** in three months to August, 2014. In FY14, we conducted over **594,920 hours** of formal training across food, convenience and liquor.

Coles believes there are strong arguments for review and reappraisal of the regulatory framework nationally.

Coles contends strongly that it should be a national priority for all Australian governments to aim to align regulations to achieve maximum uniformity across jurisdictions, benchmarked to the most efficient best-practice model.

Retail trading hours

Coles supports the Panel's **Draft Recommendation 51** for the removal of remaining restrictions on retail trading hours. It also notes the Panel's recommendation that, to the extent that jurisdictions choose to retain restrictions, these should be limited to Christmas Day, Good Friday and the morning of Anzac Day, consistent with the best-practice model operating in Victoria and Tasmania.

Coles urges the Commonwealth Government to take the lead in seeking to harmonise and streamline state and territory trading hours across the economy.

A patchwork of restrictions on retail trading within and between state and territory jurisdictions imposes significant compliance costs on business, adds to complexity, and denies consumers the right and convenience to shop where they choose at the time they wish. It also ignores the changing dynamics of retail globally, given the freedom of consumers to purchase products online at any time.

As an example of the anomalies, the WA Retail Trading Hours Act 1987 only applies to retail outlets operating south of the 26th parallel. Trading hours for retail outlets operating north of the 26th parallel are deregulated.

In the popular holiday resorts of Margaret River and Dunsborough, trading hours are deregulated because the Shire of Augusta-Margaret River and City of Busselton applied to the State Government for an exemption, after consulting with the local community. Yet the nearby township of Busselton, which is approximately 20km from Dunsborough and in the same local government area, has restricted hours.

Coles welcomes the recent announcement of an eight-week trial of extended Christmas trading hours in WA, which will mean all general retail shops in metropolitan Perth will be allowed to open as early as 7am on weekdays and Saturday, and 8am on Sundays, with later closing times on Saturdays and Sundays. This will give businesses the ability to better meet consumer demand and compete more effectively with online retailers. More fundamentally, it also means consumers in Perth will enjoy greater convenience, choice and flexibility when doing their Christmas shopping. Coles hopes this trial proves a success.

Consumer choice should be the guiding principle for a more open approach nationally. Trading hour regulations prevent customers from shopping at a time best suited to their needs, and are out of step with changing patterns of work and leisure.

Coles welcomes the extensive analysis of the impact on business, the economy and consumers of this inconsistent regulatory framework in the 10 October 2014 report by the Productivity Commission, ***Cost of Doing Business: Retail Trade***.

The Productivity Commission has identified that restrictions on retail trading hours impose additional costs on retailers, the economy – and, ultimately, consumers – through forgone sales and higher operational and capital costs.

Coles welcomes the Productivity Commission's rejection of much of the myth-making around the impact of trading hours liberalisation. As the Commission points out, the reality is that regional economies can lose out from a restrictive approach, with retailers and consumers suffering comparative disadvantage outside those areas where trading hours are extended.

Less restrictive trading hours help businesses achieve economies of scale, reduce costs of red tape, limit congestion, and allow consumers to shop according to their preference. As the Productivity Commission found:

> The deregulation of trading hours provides greater flexibility to retailers, allowing them to more closely align opening hours with consumer demand. It does not mean that all or even many retailers will trade 24 hours a day, seven days a week. Business will open when they consider it is in their commercial interests and opening hours will reflect consumers' shopping patterns.[1]

Coles would in particular commend to the Panel the Productivity Commission's observations on this question in its overview:

> [T]he evidence does not support the claim that deregulation of trading hours has a material effect on the structure of the retail sector and the viability of smaller retailers. By using the participation of small business in the market as a metric for competition, trading hours restrictions ignore the potential for more than offsetting gains in terms of the lower cost of doing business and increased consumer welfare in such an economically significant sector.[2]

Planning and zoning

Coles welcomes the Panel's recommendation to include competition principles in the objectives of planning and zoning legislation and agrees that planning systems can create barriers to entry, diversification and expansion in retail industries (**Draft Recommendation 10**).

However, these principles should apply equally and neutrally to all market participants, whether big or small, new entrant or incumbent.

Coles advocates an evidence-based strategic approach to planning systems to provide greater certainty and integrity in decision-making for all stakeholders.

Retail developers need a planning system that is consistent and transparent.

Currently, the combination of multiple regimes and multiple state-based regulators means the planning system imposes significant compliance and time delay costs on retailers and developers trying to expand services to meet customer demand.

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1 At p 6

2 At p10

Each State and Territory has its own system of zones, processes, timelines and appeal paths. As an example, the approval of one of our new Coles stores in Queensland had 148 conditions and 37 advisory notes attached, over and above the approved drawings. These were added after Coles had participated in extensive meetings with council and changed the drawings to suit their requests.

As a comparison, a new store in Western Australia, which was a similar size project, had only 34 conditions attached, and another in WA had only 22. The planning and approval for both of these stores were completed in under half the time of the Queensland store and at considerable cost savings.

Reform to State and Territory planning systems and the way they are applied by local government will translate into greater competition for consumers and reduced costs and time delays.

Coles submits that planning and zoning systems need to be reviewed and benchmarked regularly across Australia and internationally to ensure best-practice outcomes are delivered.

Liquor

Coles is supportive of reviews that seek to promote uniformity in regulatory frameworks across jurisdictions, and Coles supports the Panel's view that there is no reason why liquor regulation should not be subject to regular review.

In the case of liquor laws, it is vital that regulation is predicated upon the tenets of evidence-based harm minimisation – not on providing competitive advantage to one class of retailers over another.

Coles is committed to the responsible service, supply and promotion of alcohol, and we fully support the Panel on the importance of reducing alcohol-related harm in the community.

Coles is supportive of harm minimisation measures that are targeted, evidence-based and proportional, and which do not penalise the vast majority of customers who consume alcohol in a sensible manner and do not cause harm to themselves or those around them.

Competition Law

The Panel has taken a principled approach to its review of the competition laws. The key questions the Panel poses and its characterisation of the form and structure of the Australian competition law are generally supported. Namely:

- Does the law focus on enhancing consumer welfare over the long term?
- Does the law protect competition rather than individual competitors?
- Does the law strike the right balance between prohibiting anti-competitive conduct and not interfering with efficiency, innovation and entrepreneurship?
- Is the law as clear, simple and predictable as it can be?

Coles supports the majority of the Draft Report's recommendations and considers that they are consistent with the approach set out above.

However, in some cases Coles would query the specific application of these principles, and welcomes the opportunity to present some alternative conclusions.

Simplification of the law

Coles agrees with the Draft Report's specific proposals to achieve simplification by:

- **clarifying the cartel conduct provisions and exemptions and removing the residual prohibition of exclusionary provisions**:[3] these changes would appropriately limit the *per se* prohibition of horizontal agreements to the hard-core cartel conduct that is likely to affect competition in Australia, while exempting joint ventures and vertical arrangements on a purposive basis;
- **streamlining the authorisation and notification processes**:[4] these proposals would greatly simplify the process of submitting conduct for administrative exemption and allow businesses to argue, and the ACCC to consider, the likelihood of a lessening of competition and a net public benefit as appropriate;
- **removing the *per se* prohibition of third-line forcing**:[5] this proposal would reflect the accumulated experience of thousands of notifications lodged and only a handful overturned, and would greatly assist in the provision of bundles and combined products that benefit consumers and competition in the vast majority of cases;
- **streamlining the exclusive dealing provisions**:[6] these changes would greatly simplify the interpretation and legal advice needed when considering vertical supply and acquisition arrangements – particularly in conjunction with proposals to exclude these arrangements from the cartel prohibitions using a more purposive mechanism than the current anti-overlap provisions

Market definition and competition

Coles welcomes the Draft Report's recommendation that:

> [T]he current definition of "competition" should be re-worded to ensure that competition in Australian markets includes competition from goods imported **or capable of being imported** into Australia and from services supplied **or capable of being supplied** by persons located outside of Australia to persons located within Australia.[7]

Actual and potential competition from imported goods has a considerable impact on Australian retailers such as Coles and its related businesses. The Managing Director and CEO of Coles's parent company, Richard Goyder AO, spoke about this potential competition in August 2014:

> You know, when I think about competition… I don't think of Wesfarmers' biggest competitor being Woolworths or being Big W or one of the other physical [stores] – I think Amazon. I think Amazon is the biggest threat we've got to our business model at the moment…[8]

Amazon has grown rapidly around the world. Even without any bricks-and-mortar presence, Australian consumers already directly import a wide range of non-perishable goods from Amazon and countless other online providers.

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3 Draft Recommendations 22 and 23.
4 Draft Recommendation 34.
5 Draft Recommendation 27.
6 Draft Recommendation 28.
7 Draft Recommendation 20, emphasis added.
8 National Press Club Address, 5 August 2014.

The cost of shipping to Australia compares favourably with the cost of shipping within Australia, with the result that direct imports exert a competitive influence in a range of product categories – particularly given the convenience of online shopping and the sophistication of global online stores. As Richard Goyder went on to note:

> The concept that a firm must have a physical presence to be a major participant in a market is becoming less and less relevant. Online customers can browse through the offerings of thousands of suppliers across nearly every product category 24 hours a day, seven days a week…

Accordingly, Coles welcomes the Draft Report's recognition of the importance of potential imports in the definition of a market.

The entry of Costco and Aldi in Australia are particularly relevant given their steady increase in market share and the impact they and other discounters are having on the grocery industry and on major supermarkets in particular in the United States and United Kingdom respectively. Costco and Aldi should therefore be included in any consideration of the grocery retail sector in Australia.

Misuse of market power

Coles is concerned by the Draft Report's proposal to replace the current treatment of misuse of market power under the CCA with a significantly amended section 46:

> [T]o prohibit a corporation that has a substantial degree of power in a market from engaging in conduct if the proposed conduct has the purpose, or would have or be likely to have the effect, of substantially lessening competition in that or any other market.[9]

This proposal would remove the requirement to establish a proscribed purpose and a taking advantage of market power, two of the key tests that the Australian courts have applied to help distinguish between vigorous and beneficial competition – which may inadvertently damage or exclude a competitor – and conduct that damages competition and thereby harms consumers.

These tests are also used by business decision-makers and their advisers to determine whether an aggressive campaign to win customers and market share is likely to be challenged by the ACCC or a competitor. It is easy to discern whether conduct is actually engaged in for a particular purpose or whether the circumstances would suggest a particular purpose. Additional certainty can be provided by the requirement that the conduct does not involve a taking advantage of market power.

Coles considers that to require businesses to predict effects of their conduct, and putting the onus on business to prove that a decision is in the long term interests of consumers, is potentially unworkable, and will reduce business certainty.

The current section 46 has the advantages of providing certainty for business decisions and activities, being well understood by businesses and their advisers, and drawing on a substantial body of established case law to guide decision-making.

Coles has seen no evidence that the current section 46 is failing to capture any conduct that should be captured, and certainly no evidence that it is failing to capture any conduct that would be captured appropriately by the proposed section 46.

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[9] At p 210.

The courts have stated in the strongest terms that section 46 is designed, and operates, to protect competition and not competitors. Indeed, the most passionate advocates of change to section 46 are competitors who argue that they are not adequately protected by current law.

The current section 46 is not concerned with the protection of competitors; it is concerned with the prevention of exclusionary conduct – that is, conduct that damages the competitive process to the detriment of consumers.

The ACCC has explained that its proposed section 46 – substantially adopted by the Draft Recommendation – is also designed to capture exclusionary conduct, which it describes as "behaviour that excludes others from the market"[10] or "when a business takes steps to prevent competitors from entering a market".[11]

The current section 46 is no more – or less – directed towards the protection of individual competitors than the ACCC's test, and the Panel's test, would be.

This focus on exclusionary conduct is common to antitrust regimes around the world. The most common categories of abuse of dominance, monopolisation or misuse of market power – predatory pricing, raising rivals' costs, refusals to deal, tying and bundling – are exclusionary in nature and necessarily or explicitly involve a conduct directed at competitors. Again, this is not to protect competitors but to protect the competitive process by discouraging damaging exclusionary conduct.

The law must still distinguish between legitimate competition on the merits and unfair competition, where each may result in the exit or prevent the entry of competitors. The existing section 46 does so on the basis of purpose, whether a subjective purpose (since a business with substantial market power is likely to achieve such a purpose) or a purpose inferred from the circumstances, for example where an exclusionary purpose is the only reasonable explanation for the firm's conduct.

The "substantial lessening of competition" (SLC) test proposed is far less certain than the "purpose" and "take advantage" elements it would replace.

The courts have never interpreted an "SLC" test in a case of unilateral conduct. The ACCC has asserted that the test would single out exclusionary conduct – and presumably damaging exclusionary conduct in particular – but there is little in the language or judicial treatment of the "SLC" test to give Coles any confidence in this interpretation. Nor does the defence suggested by the Panel address these concerns.

The first limb is apparently intended to replace the "take advantage" element, but it is unclear that the language adopted – that the conduct "would be a rational business decision by a corporation that did not have substantial market power" – is a sufficient improvement over the judicial interpretation of the "take advantage", as supplemented by the section 46(6A), to justify the sacrifice of the accumulated jurisprudence. The added requirement of the second limb to prove conduct in the long-term interests of consumers is too vague to serve as a defence.

Further, there can be no justification for requiring both limbs to be proved: either limb, more appropriately worded, should be a sufficient defence – as they would be in most jurisdictions. The defence proposed will not reduce uncertainty and will introduce uncertainties of its own.

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[10] ABC, "The World Today", 2 September 2014.

[11] ACCC Media Release, "Our economy needs more competition on the merits", 13 September 2014. https://www.accc.gov.au/media-release/our-economy-needs-more-competition-on-its-merits

This uncertainty will introduce real and significant burdens on business decision-making, and will discourage vigorous competition that would benefit consumers.

At Coles, business decisions about price reductions are made every day of the week. In any one year in the supermarket business, Coles reduces the prices of thousands of products through specials, Down Down and regular price decreases.

Our supermarket business supports more than 30,000 active stock keeping units (**SKUs**). Frequent reviews and updates across this range continue to drive value and relevance for our customers.

We estimate that Coles actions over 400 range change projects annually, where category and range teams review and make decisions across the numerous products in our range, which are then implemented across our 760+ stores.

We are customer-led in our approach to product ranging and shelf allocation:

- product ranging principles are focused on ensuring customers have a choice of products available to meet their various needs in our stores; and
- shelf allocation principles are designed to help customers make choices as easily as possible.

To require an assessment of likely market effects of each of these decisions would make decision-making unwieldy, and introduce untold complexity to these day-to-day operations.

Information-gathering powers

Coles welcomes the Panel's recommendation that the ACCC's information-gathering powers under section 155 should be exercised in a way that recognises and is responsive to the burden that these powers can place on business (**Draft Recommendation 36**). In Coles' experience, section 155 Notices can be framed very broadly and can be extremely costly and disruptive to comply with.

Over the past three years, the Coles Group has received 13 section 155(1) (b) Notices and 24 section 155(1)(c) Notices across nine investigations.

For section 155(1)(b) Notices, on average, Coles can search across as many as one million documents, review up to 40,000 documents, and then ultimately produce up to 1000 documents to the ACCC.

The average cost (in terms of legal fees) to respond to section 155(1)(b) Notices is about $300,000 but for some Notices, the legal fees have been in excess of $1 million. For section 155(1) (c) Notices, the cost can be in the region of $100,000.

In light of the above, Coles agrees with the Panel that:

> The ACCC should accept a responsibility to frame a section 155 notice in the narrowest form possible, consistent with the scope of the matter being investigated.

However, this principle does not appear to form part of the Draft Report's recommendations. Coles believes that it should.

Including this principle by amendment to section 155 itself, or by a Ministerial Direction that the ACCC must include this principle in its section 155 guidelines and its informal merger review process guidelines, would have a significant impact on the burden imposed by section 155 Notices and on public confidence in this process.

Coles also agrees with the Panel that:

> In the digital age businesses retain many more documents, such as emails, than was the case 20 years ago. As a consequence compliance with a section 155 notice may require electronic searches of tens of thousands of documents, which can occasion very large expense…
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> [I]n a digital age, the obligation to search for documents should be subject to a requirement of reasonableness, having regard to factors such as the number of documents involved and the ease and cost of retrieving the document.

This ties in very closely with the ACCC's responsibility to frame a notice in the narrowest form possible, since a minor change to a search query may result in thousands of documents more or less to be examined and produced. Qualifying the obligation of a recipient of a section 155 Notice according to what is reasonable will encourage the ACCC to frame notices more responsively and give recipients an avenue where notices are framed too broadly.

Small Business and Dispute Resolution

Coles works with businesses of all sizes and fully supports the development of alternative dispute resolution processes and other appropriate access to remedies for small business.

Coles does not consider that a specific dispute resolution scheme dedicated to issues arising under the CCA is necessary or advisable.

Ideally these disputes would be addressed as part of an ongoing relationship between the parties, with a rigorous third-party arbiter or mediator where necessary.

To this end, Coles has developed its own Coles Supplier Charter which includes a process for resolving commercial disputes. The Charter is a transparent and formal framework under which Coles commits:

- to good faith dealings and transparent commercial processes;
- to transparent grocery supply arrangements;
- to transparency around ranging and de-listing;
- to respect the integrity of suppliers' businesses, and
- to a fast-track, low-cost supplier dispute resolution framework.

Under this dispute resolution framework, Coles provides three alternative procedures for suppliers to resolve disputes with Coles:

- **referral to a Dispute Resolution Manager** who is independent of any Coles merchandise team and will respond to written complaints, conclude an investigation of the dispute within 15 business days and provide confidential reports to the Managing Director of Coles and the complainant setting out proposed steps to resolve the complaint;

- **internal review by senior management** under a Protocol that ensures a dispute can be elevated through senior levels of management as necessary for resolution, to Business Category Managers, General Managers and ultimately the Managing Director, to be resolved within 15 business days; and

- **referral to an Independent Arbiter** for resolution, either directly or if a complainant is not satisfied with any of the other procedures. The Independent Arbiter can make a binding decision imposing a financial settlement of up to $5 million.

All of these processes are aimed to protect the confidentiality of the supplier.

Coles has appointed Mr Jeff Kennett AC as the first Independent Arbiter under the framework and will bear the costs of complaints under the framework.

The framework will not preclude any party from raising complaints or disputes directly with the ACCC or under any applicable industry code (including the proposed Food & Grocery Code), or from commencing proceedings in relation to a dispute that has been or may be subject to dispute resolution under the framework.

The Charter has helped Coles improve the parameters of best practice conduct for its buyers, provide clear expectations for its supply base and establish an accessible framework to manage any issues that might arise from its trading relationships in as expeditious and efficient a manner as possible.

Industry Codes of Conduct

Coles supports the Panel's characterisation of the nature and benefits of industry codes:

> Codes of conduct play an important role under the CCA by providing for a flexible regulatory framework to set norms of behaviour, and are generally applied to relationships between businesses within a particular industry.

Coles considers that self-regulatory approaches such as industry codes assist in reducing regulatory burdens and red tape on businesses, as they can be appropriately tailored to apply broader principles and policy outcomes to a particular industry's circumstances. However, they can only be at their most effective if they include all relevant industry participants.

Coles has contributed to the development of the Food and Grocery Code of Conduct currently before the Commonwealth Government and is fully committed to that Code.

Competition institutions

Coles notes the recommendation of the Panel (**Draft Recommendations 39 and 40**) that a proposed new body to be known as the Australian Council for Competition Policy would assume a key leadership role in identifying potential areas for reform of competition policy, and in making recommendations to governments on specific market design and regulatory issues.

These recommendations reflect the practical reality that regulations relating, for example, to trading hours, planning and zoning and liquor sales sit predominantly within the jurisdiction of state and local governments. In these areas, the Commonwealth has no direct power to seek or to legislate for regulatory reforms.

As noted by the Productivity Commission report on *Costs of Doing Business – Retail*, the appetite for reform can vary significantly across state and local jurisdictions – and, in some cases, that appetite for reform is weak.[12]

[12] Productivity Commission's Report into the Costs of Doing Business: Retail, October, 2014, p5

Coles acknowledges efforts by the Commonwealth to reinvigorate this reform process through its ongoing resolve to cut red tape and reduce unnecessary regulatory burden, in particular the red tape repeal process undertaken through the Prime Minister's parliamentary secretary for deregulation, Mr Josh Frydenberg. Coles would submit that an urgent review of regulations stifling pro-competitive outcomes in the retail sector should be among the priorities.

Achieving greater uniformity and consistency of regulation in areas such as trading hours will require much greater commitment to reform by state and local governments, and one way that can be driven is through the leadership of the Commonwealth and its agencies.

In that context, the proposed ACCP could become a strong advocate for reforms that will benefit competition, the economy – and, critically, consumers. As the Panel proposes, an intergovernmental agreement and oversight by a specific Ministerial council of Treasurers could be an appropriate mechanism to generate the impetus for reform.

Coles believes reforms that will promote competition, enhance productivity, and increase choice and value to consumers should be a public policy priority for all levels of government. Overlapping, duplicative and cumbersome regulation comes at a significant cost not only to business – but also to jobs and investment and, therefore, to the economy and to society.