

WOOLWORTHS LIMITED



Response to the Competition Policy Review Draft Report

November 2014

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Professor Ian Harper
Chair, Competition Policy Review
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Professor Harper

Woolworths Limited response to the Competition Policy Review Draft Report

Woolworths welcomes the opportunity to provide its second submission to the Competition Policy Review in response to the draft report, which was released on 22 September 2014.

Woolworths strongly supports the direction of the Panel's report and its focus on ensuring the Australian economy is well placed to meet the challenges it faces now and in the future. The recognition that competition policies, laws and institutions best serve the nation's interest, when focused on the long term interest of consumers, provides a strong foundation for our competition policy framework. Similarly, the Panel's identification of the impact of the forces of globalisation and new technologies ensure the draft recommendations are relevant to contemporary market behaviour.

The draft report outlines a comprehensive and clear vision for a competition policy reform agenda, which recommends a range of essential microeconomic reforms. The implementation of these reforms has the potential to significantly improve economic growth, productivity, and consequently, national prosperity. Woolworths especially welcomes the Panel's commitment to eliminating some of the barriers to competition that exist in the retail sector such as deregulation of trading hours, planning and zoning reforms and other examples of red tape and unnecessary regulation.

We believe that the Panel has the opportunity to leave a long-term legacy over our competition policy framework by providing a clear road map to government, including a specific timeline and milestones, for the delivery of these essential reforms. By outlining a framework to deliver on much of the "unfinished agenda" of Australian competition policy, the Panel will clearly distinguish itself from previous reviews.

While Woolworths is highly supportive of the vast majority of the Panel's recommendations, we do not support its suggested changes to the misuse of market power provisions in section 46 of the *Competition and Consumer Act 2010*. We believe that the Panel should reconsider its position as we do not believe that the case for change has been adequately established. This is particularly important given the considerable uncertainty that these changes will impose on business and the significant harm this could cause for consumers and the economy.

In this submission we have focused on responding to the findings that are relevant to our business and the retail sector. If you have any further questions, please feel free to contact Mr Andrew Thomas, Head of Government Relations on (02) 8885 0219.

We thank the Chair and the Panel for consideration of our submissions in this critical review of Australia's competition policy.

Yours sincerely



Mr Grant O'Brien
Managing Director and Chief Executive Officer
Woolworths Limited





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Executive summary

Woolworths Limited welcomes the Competition Policy Review's draft report that is aimed at ensuring that our nation's competition policies, laws and institutions are focused on the long-term interests of consumers.

In this submission, we outline our support for the vast majority of the draft recommendations. However, we call on the Panel to provide a clear road map to government, including a specific timeline and milestones, for the delivery of the essential reforms it has outlined.

Part 1: A fiercely competitive retail sector

Woolworths supports the Panel's finding that competition in the Australian grocery sector is intensifying as retailers seek to respond to the impact of technology and the entry and expansion of global retailers like ALDI and Costco.

This competitive rivalry and changing consumer behaviour has been driving retailers to compete fiercely and innovate. The modern "anywhere, anytime" consumer is choosing to shop at more places, on all days of the week, and through many different channels both physical and online. As the Panel notes, few concerns have been raised about prices as significant cost savings have been delivered for consumers – saving households around \$445 per year over the last 5 years.

This competition will further intensify as incumbent retailers look to grow and compete against new entrants and online retailers. Since the release of the draft report in September, global retailers ALDI and Costco have announced expansion plans.

Part 2: Driving competition and cutting red tape

The Panel has focused on completing the "unfinished agenda" of previous competition reviews by eliminating the competitive barriers that damage productivity and economic growth.

This will assist Australian business remain internationally competitive so that we can take advantage of our global opportunities, particularly with the rise of Asia.

Woolworths welcomes the removal of the following impediments faced by Australian retailers as we believe these reforms will foster even more competition in our market, delivering the benefits of innovation and lower prices for consumers:

- Deregulation of trading hour restrictions (Recommendation 51)
- Competition principles inserted into planning and zoning legislation (Recommendation 10)
- Establishing a public interest test to apply to all existing and future regulation to assess its competitive impact (Recommendation 11)
- Removing all remaining parallel import restrictions (Recommendation 9).

Woolworths notes that many of these reforms have long been suggested and represent much of the "unfinished business" of the Australian competition policy reform agenda envisaged in previous inquiries, such as the Hilmer Review in 1993.

Part 3: Institutional settings to drive reform

Woolworths supports the Panel's focus on establishing an institutional framework to drive implementation of the competition reform agenda. However, we submit that the Panel needs to go further if this review is to distinguish itself from those of the past. By developing a road map for implementation by government, including a clear timeline and milestones, the Panel has the opportunity to leave a long-term legacy over competition policy.

It is appropriate that a specific body be given responsibility for driving delivery of the competition policy reform agenda and independently monitoring progress on implementation.

We also welcome competition payments being more closely linked to resulting revenue gains rather than just set payments allocated from a pool of funding.

In terms of market studies, we believe that this responsibility best lies with the Productivity Commission given its expertise and experience in past reviews, such as its comprehensive review into the retail sector in 2011. Given the significance of these studies, these are most appropriately initiated by government acting on clear evidence of significant public or industry concerns.

Woolworths supports a review of the ACCC's guidelines governing the use of section 155 notices but we ask that the Panel consider recommending that an independent body, such as Treasury, conduct the review. We also support the ACCC developing a media code of conduct so that parties are better informed about when it will make public comment during investigations.

Part 4: Improving the competition policy framework

Woolworths has consistently argued that as competition in the retail sector has been working well and delivering for consumers, only minor changes to the competition policy framework are required. Therefore, we welcome the Panel's view that the overarching competition policy and legal framework, including the central concepts, prohibitions and structure of the *Competition and Consumer Act 2010 (CCA)*, should be retained.

We support the following recommendations that protect and improve the competition law framework:

- The definition of "competition" in the CCA be amended so that global sources of competition are considered in market analysis (Recommendation 20)

- No specific prohibition on price discrimination to be introduced in the CCA (Recommendation 26)
- Greater flexibility in the notification process for collective bargaining by small business (Recommendation 50)
- Third-line forcing amended from a *per se* prohibition to one based on a substantial lessening of competition test (Recommendation 27)
- Retaining resale price maintenance as a *per se* prohibition (Recommendation 29).

However, Woolworths has concerns about two of the Panel's proposed changes to the CCA:

- Re-framing the misuse of market power provisions under section 46 of the CCA
- Extending section 45 of the CCA to cover "concerted practices".

In our view, the case has not been made that these significant changes are required. Indeed, we believe that the resulting uncertainty would have a chilling effect on competition and be harmful to the long-term interests of consumers.

We are particularly concerned about the proposed changes to section 46 of the CCA. The introduction of an "effects test" has long been debated but eleven different reviews stretching back to the 1970s have examined the case and rejected any change on each occasion.

There appears to be no substantive case made in the Panel's findings that justifies this significant change, especially given the uncertainty it will create for business and its likely chilling effect on competition. We therefore urge the Panel to re-examine its draft recommendation and to more fully consider its potential ramifications for competition and ultimately, consumers.

Part 1:

A fiercely competitive retail sector

Woolworths believes that the competition reform agenda should focus on protecting and enhancing healthy, competitive markets for the benefit of consumers.

The Competition Policy Review's draft report addresses many issues that will impact upon the retail industry. In Part One of this submission, we examine the Panel's findings in relation to the retail sector and fuel retailing.

1.1 Fierce competition in the Australian grocery sector

1.1.1 Intensifying retail competition

PANEL FINDING – Grocery market

Australia's grocery market is concentrated, but not uniquely so. Competition appears to have intensified in recent years with Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco; consequently, few concerns have been raised about prices.¹

Woolworths supports the Panel's draft conclusion that competition in the Australian grocery market is intensifying, pointing to the impact of Wesfarmers' acquisition of Coles and the expansion of ALDI and Costco.

Competition between retailers in Australia is intense, and this rivalry has delivered major benefits to consumers in the form of lower prices, better access and rapid innovation. Woolworths considers that competitive rivalry in the grocery sector has never been stronger, with competition between retailers further intensifying in the past few years as they seek to respond to the impact of technology and the entry and expansion of global retailers.

The Panel's findings reflect those of other comprehensive reviews of the Australian grocery sector. The Productivity Commission's review into the "Economic Structure and Performance of the Australian Retail Industry"² in 2011 found:

For retail generally, the entry of new major international players in the grocery sector, such as ALDI and Costco, and also in the clothing sector, such as Zara and Gap, as well as a large number of other new entrants, indicate that barriers to entry are not substantial. Online competition (both local and offshore) is further reducing the impact of existing barriers to entry in bricks and mortar retail. The rise of online retailing is having a substantial impact in opening up the Australian retail market- competitors are not just down the street or in the next suburb, but are now national and international.³

1 *The Australian Government Competition Policy Review, September 2014, p 184 (hereinafter Draft Report).*

2 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, No. 56, 4 November 2011, pp 35-40.

3 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, 2011, p 39.



Likewise, the ACCC's comprehensive 2008 inquiry concluded that the Australian grocery sector was "workably competitive".⁴

1.1.2 Changing consumer behaviour

The Panel has identified the importance of innovation by retailers and the benefits that this brings for consumers.⁵ It is important to note that this innovation is driven by retailers adapting to continually changing consumer behaviour.

In recent years, the Australian retail environment has fundamentally changed due to the emergence of the modern "anywhere, anytime" consumer. As we outlined in our original submission, this consumer is choosing to shop at more places, on all days of the week, and through many different channels both physical and online. Retailers have had to adapt rapidly to meet these changes in behaviour, or risk losing customers to a vast array of retailers around the world who can offer innovative new products and services.

The modern consumer is also much more price conscious than in the past, knowing that retailers are having to compete hard every day to offer the best value. This has resulted in intense price competition across the whole industry, which has seen consumers benefit through lower prices.

As noted in our original submission, since 2008, the cost of a typical basket of groceries has grown at just half the rate of inflation. As a result, prices for food and non-alcoholic beverages have fallen in real terms to be 7 percentage points lower than it was 5 years ago. This fall in real terms translates into an average savings per household of over \$2,250 in total or \$445 per year.

1.1.3 Competition to only intensify further

Woolworths believes it is important to note that competition in the retail sector will continue to intensify. Incumbent retailers will be looking to grow and we will continue to see the influence of global retailers, such as ALDI and Costco, on the Australian market as they expand even further. For example, ALDI nearly doubled its store footprint in Australia between 2008 and 2014 and plans to double this again by 2020.

4 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, August 2008, p 210.

5 Draft report, p 183.

EXPANSION PLANS – Global retailers to further expand

Since the release of the draft report, ALDI has announced further expansion plans by investing \$400 million to open 70 to 80 new stores across Western Australia over the next 2 years.⁶ This builds on its existing plans to invest \$300 million in opening 50 stores across South Australia.

ALDI's rapid expansion highlights how it is moving to become a major competitive force across the entire Australian mainland, after having already done so on the east coast with the opening of more than 300 stores in NSW, ACT, Queensland and Victoria.

German discount supermarket ALDI to open up to 80 stores in WA by 2016

– *West Australian*, 9 October 2014

Discount chain Costco opens its first store in Adelaide today

– *The Adelaide Advertiser*, 19 November 2014

ALDI unveils \$700m assault on Western Australia and South Australia

– *Sydney Morning Herald*, 9 October 2014

Costco also continues to grow and expand. In October, it announced that store memberships had risen 7 per cent across the group over the past year in Australia and confirmed that it is continuing to pursue its strategy of opening three warehouse stores a year.⁷ This includes opening the first of three planned South Australian store warehouses at Kilburn in November 2014.⁸

At the same time, incumbent “bricks and mortar” retailers will also need to increasingly compete with both domestic and global online retailers, making physical barriers in retail less relevant. As outlined in our original submission, Australian online shopping expenditure is predicted to be worth \$26.9 billion by 2016, with a compound annual growth rate of 14.1 per cent.⁹

Woolworths has sought to be at the forefront of this technological change in order to ensure we are giving our customers more options in how they shop. At our Woolworths' supermarkets alone, online sales increased by more than 50 per cent in FY13 and we continue to develop more online and convenience options across all of our businesses.

6 Vetti Kakulas, 'German discount supermarket ALDI to open up to 80 stores in WA by 2016', *West Australian*, 9 October 2014.

7 Sue Mitchell, 'Costco's Australian expansion hits existing stores', *Sydney Morning Herald*, 10 October 2014.

8 Loukas Founten, 'Costco's liquor licence request knocked back by Adelaide court ahead of expansion into SA', *ABC news website*, 17 October 2014.

9 PricewaterhouseCoopersAustralia, *Australian online shopping market and digital insights*, July 2012, p 3.

1.2 Modern, scale retail benefits consumers

The history of Australian retail shows that the industry is dynamic and that the continually changing nature of formats, product offerings and participants is being driven by the needs of customers and as a result of rapid innovation by retailers.

The Panel outlines some of the structural changes that have occurred in the operation of supermarkets, which also reflect trends across the entire Australian retail sector such as greater vertical integration. These trends have been facilitated by the emergence of modernised, scale retailing. Woolworths supports the Panel's finding that these trends "do not of themselves raise competition policy or law issues"¹⁰

1.2.1 Benefits of logistics and scale

PANEL FINDING – Scale

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.¹¹

In our original submission, Woolworths highlighted how over the past 50 years Australian retail evolved from a fragmented market of specialty stores towards modern, large-format scale retailing, which has produced significant benefits for consumers. While this reflected similar trends in many other markets, it is clear that the Australian retail sector has some unique characteristics, such as our small population being spread over a large geographical area and a concentrated grocery supplier market.

The Panel notes that the scale and scope of operations can enable retailers to innovate and deliver significant benefits to consumers. Large Australian retailers have been able to achieve this with the development of complex and professional supply chains. This results in an economy of scale that drives down costs and enables high quality, low price products to be delivered across the country, including to rural and remote regions. These structural changes and the associated benefits of scale and modernisation have meant that relative prices for standard groceries have decreased.

Scale and modernisation of supply chains have also enabled retailers to provide access to a broader range of international suppliers and products that consumers could not previously purchase, and offer increased convenience for consumers. Modern supermarkets are able to offer consumers the choice of purchasing a range of products and services needed in one place, rather than requiring visits to multiple retailers.

10 Draft report, p 184.

11 Draft report, p 183.

1.2.2 Expanded private label offering

PANEL FINDING – Retail structural changes

There have been a number of structural changes in the operation of supermarkets, such as greater vertical integration and use of 'home brands', an increase in the range and categories of goods sold within supermarkets, and greater participation by supermarket operators in other sectors. Like all structural changes, these can result in dislocation and other costs that affect the wellbeing of others.

The move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community. While the Panel is sensitive to these concerns, they do not of themselves raise competition policy or law issues.¹²

The Panel has found that retailers have expanded private label offerings in order to be able to compete with global retailers and to satisfy consumer demand. As we outlined in our original submission, global supermarket chain ALDI has fundamentally changed the Australian retail market with its unique business model rapidly gaining market share.

ALDI features an almost exclusively private label offering over a much more limited collection of product lines (with around 1,500 lines) than traditional supermarkets (which hold tens of thousands of lines). This allows it to use its global bargaining power to offer heavily discounted private label products that compete with branded products.

ALDI is certainly not alone. Private label products are increasingly becoming a feature of Australian retail, both in groceries and general merchandise. For example, as noted in our original submission, Zara and IKEA are exclusively private label retailers. Other discount department stores, including Target and K-Mart, are also increasingly stocking private label products.

As a result, Woolworths and other incumbent retailers have generally been forced to expand their private label offering in order to be able to compete with new entrants and to meet customer demands. However it should be noted that Woolworths Own Brand penetration, at around 15 per cent of grocery sales, is still low compared to the global trend.

1.3 Fuel retailing

The Australian fuel retailing industry is both highly competitive and highly regulated. The ACCC undertakes price monitoring and each year publishes a detailed report into the prices, costs and profits of unleaded fuel.

In 2013, the ACCC advised that Australian petrol prices are among the lowest in the OECD and noted that prices are largely determined by international market prices and the level of domestic taxes that are imposed on fuels.

12 Draft report, p 184.

Given the public interest in fuel prices, Woolworths welcomes the Panel's interest in considering the recent regulatory interventions that have impacted on the industry. Woolworths notes in this connection that the undertaking it gave to the ACCC in December 2013 in relation to petrol discounting did "not accept that any of its fuel savings offers" had "adversely affected competition", and the Company maintains this position.¹³ In fact, Woolworths considers that this regulatory intervention has harmed consumer welfare.

1.3.1 Shopper docket

PANEL FINDING – Shopper docket

Shopper docket was a source of considerable concern, particularly for small competitors. These were up to 45 cents per litre but are now limited to 4 cents per litre through undertakings to the ACCC.

The Panel has heard submissions on this issue but at present is not persuaded that consumers are made worse off by, rather than benefitting from, the availability of discounts at their current levels. The Panel notes the undertakings accepted by the ACCC and the availability of the misuse of market power provisions of the CCA should future competition concerns emerge in this context.¹⁴

Woolworths welcomes the Panel's finding that consumers are not made "worse off by the availability of fuel discounts at their current levels" but also submits that there is no clear evidence to support the limiting of these discounts at all. Indeed, we believe that the ACCC's intervention has only served to disadvantage consumers who are no longer able to benefit from higher discounts.

Shopper docket discounts are sought out by consumers who value the savings that the discount scheme provides. Woolworths is proud that it introduced the docket to the Australian marketplace in 1996 and did so to deliver an attractive value proposition to consumers. Each month, millions of Australians use their Woolworths petrol docket to purchase low-priced fuel and take advantage of the savings.

Woolworths maintains that there is no competition problem arising from the pro-competitive discounts offered under the docket scheme. The ACCC's own fuel monitoring report show that the independents' market share is growing, new entrants are interested in the industry, and the reduction in the number of sites (a trend evident in the industry since the 1970s) has come to a halt. The ACCC described the Australian fuel retailing sector as characterised by a "very large number of small businesses" and "many single and multi-site independent retail site owners."¹⁵

13 Undertaking by Woolworths Ltd, 6 December 2013, p 1.

14 Draft report, p 186.

15 ACCC, *Monitoring of the Australian Petroleum Industry*, 2013, p 200.

Other players in fuel retailing are also bringing alternative business models to the Australian market. US retailer Costco has opened fuel retailing opening petrol outlets in Crossroads, NSW and in North Parks, Queensland. Under its new offering, customers are required to pay a \$60 joining fee to be able to purchase heavily discounted petrol. By using this alternative fuel retailing business model, Costco is looking to expand its presence in the Australian retail sector.¹⁶ Woolworths welcomes these new forms of competition in the market.

Woolworths continues to be disappointed that it can no longer offer customers higher discounts, especially as the ACCC's 2007 petrol report found that docket schemes had "not had an anti-competitive effect but has delivered discounts to the benefit of consumers and promoted competition from other retailers".¹⁷

Intervention by regulators in highly competitive markets, such as fuel retailing, should be undertaken only if there is clear evidence that the public benefits from such intervention. Intervention is only warranted if it benefits consumers, not private commercial interests.

1.3.2 NSW ethanol mandate

PANEL FINDING – NSW ethanol mandate

The NSW ethanol mandate should be reviewed against the public benefit test set out at Draft Recommendation 11 and repealed unless it can be shown that it is in the public interest and that its objectives can only be achieved by restricting competition.¹⁸

Woolworths supports the Panel's call for the ethanol mandate in NSW to "be reviewed and repealed unless it can be shown that it is in the public interest and that its objectives can only be achieved by restricting competition".¹⁹ Woolworths does not believe that the mandate, in its current form, would survive such a test.

Woolworths is concerned about the anti-competitive nature of the existing mandate given that retailers operating 20 or less service stations in NSW are exempt from its requirements. Such an exemption regime is highly anti-competitive as it means that some retailers are subject to the mandate and others, which can literally be located across the road, are not. An exemption regime based on the number of sites controlled by an operator is not appropriate. For example, the existing site numbers exemption means that Costco, a multi-billion dollar global retailer, is exempt from the mandate and its associated administration, reporting requirements and red tape.

The existence of exemptions can create unintended consequences, such as providing strong commercial incentives for those that are exempt to use their exemption as a point of competitive differentiation and to criticise the performance and characteristics of ethanol – which must be sold by those that are subject to the mandate.

16 Sydney Morning Herald, *Australia stars as Costco fuels discount plan*, 14 October 2013.

17 Australian Competition and Consumer Commission, *Petrol Prices and Australian Consumers: Report of the ACCC Inquiry into the price of unleaded petrol*, December 2007, p 19.

18 Draft report, p 186.

19 Draft report, p 186.

In January 2014, the NSW Government issued a consultation paper which confirmed that it “remains determined to support ethanol”.²⁰ If the existing ethanol mandate is to be reviewed, Woolworths would like to see the anti-competitive exemption regime removed.

1.3.3 Petrol price boards

PANEL FINDING – Petrol price boards

In relation to the regulation of petrol price boards, the Panel considers that the case for regulation to require the undiscounted price (only) to be displayed has not been made out.²¹

Woolworths agrees that the case for the regulation of price boards has not been made out and suggests that the regulations in NSW and South Australia should be repealed unless it can be shown that they are in the public interest and that their objectives can only be achieved by restricting competition. This would be appropriate in the context of the “public interest test” that the Panel has deemed should apply to any policy or rule that restricts competition.²²

Unfortunately, NSW and South Australia acted ahead of consideration of the proposed national standard for fuel price boards. In those states, Woolworths incurred compliance costs as hundreds of signs had to be modified or replaced. The introduction of the regulations was perplexing as the old price boards were perfectly functional, had been in place for many years, and had not been the source of any significant level of consumer complaints in either NSW or South Australia.

Woolworths takes feedback from customers very seriously and centrally records and responds to all customer complaints. Each year Woolworths completes approximately 120 million fuel transactions. The number of complaints about price boards arising from these transactions is extremely low. A review of our central complaints data identified 27 complaints about price boards in the 2 years from August 2010 to August 2012. While every complaint is important, and is properly responded to, such a low complaint rate does not indicate a widespread or systemic problem that warranted the intrusive and expensive regulatory responses undertaken in NSW and South Australia.

The expenditure on new signs in NSW and South Australia was therefore a regulatory cost imposed on industry for no public benefit.

Woolworths welcomes the fact that the Consumer Affairs Ministerial Forum decided to resist the advance of red tape and did not extend the regulations that apply in NSW and South Australia to other jurisdictions. Importantly, the Forum noted that there was no need to “introduce further regulation where the Australian Consumer law may address issues of concern.”²³

It is now appropriate that the NSW and South Australian regulations be subject to credible and independent net public benefit tests.

20 NSW Government Trade & Investment, *Ethanol Mandate Consultation Paper*, 2014.

21 Draft report, p 186.

22 Draft report, p 24.

23 Joint Communique, Meeting of Ministers for Consumer Affairs, 13 June 2014.

1.4 Protecting and enhancing healthy, competitive markets for the benefit of consumers

1.4.1 Long-term interests of consumers

DRAFT RECOMMENDATION 1 – Competition principles

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers...²⁴

Woolworths supports the Panel's endorsement of the overarching principle of competition policy being focused on "making markets work in the long-term interests of consumers" and its outline of a set of key principles to guide policy.²⁵ This reflects the long stated objective of the CCA to "enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection".²⁶

Woolworths believes that the competition reform agenda should focus on protecting and enhancing healthy, competitive markets for the benefit of consumers. It is important to always maintain the interests of consumers at the heart of Australia's competition policy rather than any acting to protect any specific sector or interest of the economy.

1.4.2 Public interest test

DRAFT RECOMMENDATION 1 – Public interest test

Applying these principles should be subject to a "public interest" test, so that:

- the principle should apply unless the costs outweigh the benefits; and
- any legislation or government policy restricting competition must demonstrate that:
 - it is in the public interest; and
 - the objectives of the legislation or government policy can only be achieved by restricting competition.²⁷

Woolworths strongly supports the Panel's recommendation that the above public interest test becomes the "central tenet" of competition policy. This would mean that the implementation of any policy or regulation that restricts competition by the Commonwealth, state, territory or local governments will only be permitted if considered in the public interest and is the only means of achieving the policy's stated objective.

24 Draft report, p 24.

25 Draft report, p 23.

26 Section 1 of the *Competition and Consumer Act 2010*.

27 Draft report, p 24.

We agree with the Panel that there are circumstances in which intervention in a market is required by regulators, such as where conduct has a clear anti-competitive intent (e.g., cartel conduct or price fixing) or where major structural changes to markets are likely to substantially lessen competition and harm consumers (e.g., mergers).

However, as the Panel has established with these principles, any intervention should only be considered where there is harm being caused to the competitive process or to consumers. In our original submission, we outlined a number of reasons why such intervention should be limited:

- There is a real risk of unintended consequences that impede competition and/or benefits for consumers
- The retail sector is dynamic and it is hard to predict future outcome – regulatory intervention can stifle innovation
- Retailers are unlikely to be able to achieve durable competitive advantages so there is a low risk in allowing the market to continue to evolve.

Part 2:

Driving competition and cutting red tape

In the draft report, the Panel has outlined how important competition policy will be in ensuring that Australia is well placed to take advantage of the opportunities provided by the rise of Asia and in “securing the benefits of this shift in global economic activity”²⁸ However it is important to note the Panel’s caution that we cannot assume that the “rise of Asia will remain an uncontested opportunity”²⁹ Woolworths agrees with the draft report’s conclusion that we will need “policies, laws and institutions that help us make the most of the opportunities we face”³⁰

This means that the right policy settings are needed to ensure that Australian business can adapt and respond to the dynamic opportunities that will arise in Asia. As the Panel states, “a heightened capacity for agility and innovation will be needed to match changing tastes and preferences with our own capacity to deliver commodities, goods and services into Asia and elsewhere in the developing world”³¹

As a result, Australia’s competition policy framework must reflect this new competitive landscape and encourage productivity and innovation. Therefore, we strongly support the Panel’s draft recommendations that, if implemented, will help drive increased competition and growth across the Australian economy. With the proposed breaking down of barriers to entry and unnecessary regulatory constraints, the Panel’s recommendations would also increase the international competitiveness of Australian business and improve our capacity to compete in the global economy.

In doing so, we believe that the removal of these impediments will also foster even more competition in our market, which will help to deliver the benefits of innovation and lower prices for Australian consumers. As these barriers to competition are broken down even further, the less we will need to worry about the effectiveness of other competition policy factors.

Woolworths therefore welcomes the Panel’s commitment to reform and hopes this remains a central feature of its final recommendations. It is vital that the Panel’s strong agenda of reducing barriers to competition receives the deserved support of policy makers and the wider public.

28 Draft report, p 13.

29 Draft report, p 13.

30 Draft report, p 13.

31 Draft report, p 13.



2.1 Opportunity to remove impediments to competition

The 1993 Hilmer Review signalled the start of a comprehensive competition policy reform agenda across Australia through the development of National Competition Policy (NCP). Under the NCP, there was a coordinated examination of all laws at a Commonwealth, state and territory level in order to reform anti-competitive regulation that was not deemed in the public interest.

At the Panel notes, the NCP led to a significant reform program and many impediments to competition were removed. However, Woolworths agrees with the Panel's finding that while much was achieved, there are still significant inefficient and anti-competitive regulatory constraints that apply across our economy, but we stress this is particularly true in the Australian retail sector.

These constraints are not typically contained within competition law or policy but are set down under Commonwealth, state and territory and local government legislation, and continue to act as barriers to competition and reduce competitiveness.

Therefore, the Panel's draft recommendations to address many of the regulatory constraints faced by retailers are welcome given the obvious benefits for consumers, business and the economy, which we will discuss below. In effect, they serve as a means of dealing with the "unfinished business" of the Australian competition policy reform agenda envisaged by Hilmer. However, it should be noted that many of these reforms have long been called for, so it is critically important to establish an institutional framework that will drive their implementation.

2.1.1 Boosting the competitiveness of the retail sector

The Panel's draft recommendations in many instances build on the reform agenda that was established in the wake of the Hilmer review and the establishment of National Competition Policy. This review has therefore provided a timely opportunity to extend competition and grown Australia's retail international competitiveness.

In an increasingly competitive retail landscape, it follows that retailers need to be increasingly adaptable and responsive in order to compete and win customers. Regulation that impedes the ability and speed in which retailers can restructure or innovate to more effectively compete simply detracts from Australia's potential growth.

Put simply, implementation of the Panel's reform agenda would mean Australian consumers continuing to benefit from shopping in an internationally competitive retail environment. This translates to domestic retailers competing fiercely, not only with each other, but with global retailers who have expanded rapidly into our market with both a physical and online presence.

2.1.2 Consumer-centric retail laws and regulations

Woolworths believes that the overarching priority for a competition policy reform agenda in the retail sector is that retail laws and regulations should be more consumer-centric. Regulatory barriers often serve only to impede genuine competition in the retail sector by reducing the incentive for retailers to continue to innovate and provide the best value products and services to consumers.

In Draft Recommendation 51, the Panel has recommended that all remaining restrictions on retail trading hours to be removed with the exception of those relating to Christmas Day, Good Friday and ANZAC Day morning. While we will discuss trading hours in more detail below, we note that the Panel's call for reform on this issue is an example of how unnecessary regulation continues to impede unfettered competition, impose significant compliance costs and restricts the options available to consumers.

Consumers ultimately bear higher costs as these impacts result in retailers invariably increasing prices of products and services or alternatively, accepting lower profits and suffering a competitive disadvantage. Therefore, Woolworths welcomes the Panel's findings and recommendations in relation to many of these regulatory impediments, such as retail trading hour restrictions, that are reducing competition and harming consumers.

2.1.3 Harmonise inconsistent laws, regulations and licensing restrictions

Woolworths also welcomes the Panel's recommendations that seek to reduce the significant compliance burden imposed on retailers by a range of inconsistent laws and unnecessary regulations, often at a state and territory level. This red tape imposes significant costs on national retailers that operate across multiple state and territory jurisdictions.

Our experience is that these costs combine to create major relative cost differences between Australian states and territories. For a national business such as Woolworths, these costs create localised disincentives to investment that are ultimately detrimental to consumers, employment and economic growth.

For example, in Draft Recommendation 11, the Panel calls for a regulation review by all levels of government in their jurisdictions to ensure that unnecessary restrictions on competition are removed unless they meet a public interest test. As the Panel notes in its draft report, liquor regulation that differs within each state and territory jurisdiction is an area that needs to be examined in the context of the significant compliance burden placed on retailers.

2.2 National reform of retail trading hour restrictions

DRAFT RECOMMENDATION 51 – Retail trading hours

The Panel notes the generally beneficial effect for consumers of deregulation of retail trading hours to date and the growth of online competition in some retail markets. The Panel recommends that remaining restrictions on retail trading hours be removed. To the extent that jurisdictions choose to retain restrictions, these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day.

Woolworths supports the Panel's recommendation that all remaining retail trading hour restrictions be removed, with the exception of Christmas Day, Good Friday and the morning of ANZAC Day.

2.2.1 Trading hour restrictions are at odds with consumer desire and behaviour

As the Panel noted, the inconsistent and complex maze of different trading hour restrictions across the jurisdictions of Western Australia, South Australia, Queensland and New South Wales represent an example of obvious anti-competitive regulation, that has the following impacts on competition:

- Impeding retailers' ability to meet consumer demand
- Discriminating among retailers on the basis of factors such as products sold, size of retailer or location of retailer
- Imposing costs on consumers by creating inconvenience and congestion
- Creating compliance costs for business given often complex nature of rules.³²

2.2.2 Reform will benefit consumers, competition and create jobs

As outlined in our original submission and recognised by the Panel, the benefits of allowing consumers (not regulations) to decide when to shop are well recognised. Deregulation would enable Woolworths and other retailers to provide the widest choice and convenience for our customers across the country, and would further encourage innovation. Importantly, reforms would offer large potential economic benefits, which are easy to implement (at no cost to taxpayers) and which could be secured immediately.

It is also positive that the Panel recognised that reform at this time is particularly important, as the retail sector is responding to the structural changes brought about by the growing impact of online retailing. Domestic retailers employ hundreds of thousands of employees in their 'bricks and mortar stores' all over the country. While the competition that online retailers are bringing to the market is welcome and good for consumers, it is inherently unfair that domestic retailers are still competing on an uneven playing field when it comes to restrictive trading hours.

32 Draft report, p 103.

The restrictions that currently apply in many regional towns are especially anachronistic given that the primary competition posed is increasingly by online retailers, who do not face the same trading hour restrictions. Regulation that prevents these stores from opening obstructs their ability to compete with online retailers that are not subject to such heavy handed regulation. This can only have serious implications for employment opportunities in these towns, with jobs not only lost from bricks and mortar stores but from the town altogether.

CASE STUDY – Trading hours in QLD

Trading hours in Queensland are regulated under the *Trading (Allowable Hours) Act 1990*, which runs to over 57 pages, plus eight pages of regulations. There are therefore 65 pages of legalese governing which types of physical stores can open in specific regions, creating a complex and inconsistent regulatory environment.

Even within the most populated south-east region of the state, consumers and retailers are confronted with a complex maze of complications and exemptions. For example, non-exempt stores in the region must close on Saturdays by 5.00pm, but in inner city Brisbane stores must close by 5.30pm, in the “City Heart” of inner city Brisbane by 7.00pm, in New Farm by 9.00pm and in the Gold Coast tourist area by 10.00pm.

If the Panel’s recommendation is implemented, it would not only clear a large compliance burden and accompanying red tape for retailers, but it would allow them to vary their trading hours to meet consumer demand as well as generate growth and employment. But reform remains blocked.

In late October 2014, the National Retailers’ Association (NRA) submitted an application to the QLD Industrial Relations Commission – the body responsible for hearing trading hours cases – requesting all stores in the south-east part of the state be able to trade from 7.00am to 9.00pm, Monday to Saturday.

The NRA argues that the current system, which involves the state being carved up into more than 50 different trading zones, creates confusion for consumers as well as a significant amount of red tape for retailers. It also estimates that the overly restrictive regime costs the state more than \$100 million in revenue and reform would generate over 100 jobs.³³

2.2.3 Time for reform

The need to lift the restrictions imposed on retailers has been exhaustively examined, studied and reviewed. In 1986, almost thirty years ago, the Kelly Report concluded:

“...it appeared clear to me that such a law could only be justified if it demonstrably saved the community from serious and clearly perceived harm, or conferred on it some almost universally approved benefit.

33 Anthony Gough, ‘Shops to open for longer’, *Courier Mail*, 31 October 2014, p 1.

At the end of the Inquiry I am satisfied that the present law in Western Australia serves neither of these purposes....It gives an advantage to some retailers over others;...and to retailers in some areas of the State over retailers in other areas. It protects some retailers from competition from other retailers. It creates obstacles to competition in an area in which the community is best served by competition. It makes judgements about what the community wants in a sphere of activity in which the community itself should be left to demonstrate by its patronage what it wants.”³⁴

And yet reform has been painfully slow. In the table below, Woolworths notes the reviews that have recommended deregulating retail trading hours over recent years.

PERIOD	BODY	RECOMMENDATION
1986	WA Minister for Industrial Relations	Found that the WA trading hour regime was in place to protect certain retailers and consumers should be given increased choice about when to shop.
2011	Productivity Commission	Found that Queensland, WA and South Australia had the most restrictive trading hour regimes. Recommended that retail trading hours should be fully deregulated in all States, including trading on public holidays. ³⁵
2012	NSW Government Finance & Services	Recommended allowing trading on Boxing Day provided that staff have freely elected to work. ³⁶
2013	QLD Competition Authority	Recommended the full deregulation of retail trading hours in QLD and noted that this could result in a net potential economic benefit to the state of \$200 million per annum. ³⁷
2014	WA Economic Regulation Authority	Recommended that retail trading hours be deregulated in WA with the exception of Christmas Day, ANZAC Day morning and Good Friday, during which time only filling stations and retailers that employ 18 (or fewer) staff may open. ³⁸
2014	Productivity Commission	Found that relaxation of retail trading hour restrictions in some jurisdictions had been popular with consumers. Recommended full deregulation of retail trading hours. ³⁹

And still the retail sector today faces a myriad of regulations that is in many cases no better than the situation described by the Kelly Report more than a quarter of a century ago.

³⁴ Kelly, E.R. 1986, *Retail trading hours in Western Australia – a report prepared for the Minister for Industrial Relations and Employment and Training*, Government of Western Australia, p 120.

³⁵ Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry Inquiry*, No. 56, 4 November 2011, Recommendation 10.1, p XLII.

³⁶ NSW Government Finance & Services, 2012, *Report of the Review of the Retail Trading Act 2008*, p 5.

³⁷ Queensland Competition Authority, *Measuring and Reducing the Burden of Regulation*, 2013, p 33.

³⁸ WA Economic Regulation Authority, *Inquiry into Microeconomic Reform in Western Australia: Final Report*, 2014, p 275.

³⁹ Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade*, September 2014, p 111.

CASE STUDY – Trading hours in WA

As outlined in our original submission, our *Masters Home Improvement* stores face significant anti-competitive restrictions on its permitted trading hours as compared with our major competitors. To be eligible to trade as a “domestic development shop”, Masters must only sell goods which are prescribed by the *Retail Trading Hours Regulations 1968*.

The regulations give rise to all sorts of inconsistencies and anomalies. For example, the regulation:

- Allows the sale of light bulbs but prohibits the sale of light fittings
- Allows the sale of outdoor lighting but prohibits the sale of indoor lighting
- Allows the sale of kitchen sinks but prohibits the sale of dishwashers
- Allows the sale of wood-fire heaters but prohibits the sale of gas heaters
- Allows the sale of indoor television antennae but prohibits the sale of outdoor television aerials.

This leads to the absurd situation where because Masters stores sell both light bulbs and light fittings, they are considered “general retail shops” instead of “domestic development shops”. The practical effects is that Masters stores have their trading hours limited (i.e., cannot open before 8am on a weekday).

Competitors who stock a smaller range of products and who are considered “domestic development shops” are able to open for extended hours – thereby placing Masters at a significant competitive disadvantage. The situation is inconvenient and limits the retail choices available to customers and represents an anti-competitive restriction on the Masters business.

Woolworths remains concerned that even if the Panel recommends deregulation of retail trading hour restrictions in its final report, it will be ignored or blocked by regulatory capture at a State Government level unless appropriate institutional settings are put in place to drive reform.

Without a process that encourages reform, the Productivity Commission believes it is likely that State Governments will continue a process of “creeping deregulation” that “further distorts decisions by consumers and retailers”.⁴⁰

40 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade*, September 2014, p 111.

2.3 Planning and zoning

DRAFT RECOMMENDATION 10 – Planning and zoning

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

The principles should include:

- a focus on the long-term interests of consumers generally (beyond purely local concerns);
- ensuring arrangements do not explicitly or implicitly favour incumbent operators;
- internal review processes that can be triggered by new entrants to a local market; and
- reducing the cost, complexity and time taken to challenge existing regulations.

In our original submission, Woolworths raised concerns over planning, zoning and other land development regulatory restrictions that have an adverse impact on competition and restrict our ability to provide convenience and choice for consumers. Therefore, we called for a more modern, best practice and efficient planning system that looks to promote competition and reduce costs for retailers as these are usually passed on in higher prices for consumers.

The Panel accepts that “effective economic objectives and proper consideration of competition are lacking from planning and zoning legislation” and that planning requirements are a “significant source of barriers to entry, particularly in the retail sector”.⁴¹ Woolworths supports the draft recommendation proposed by the Panel as the incorporation of these economic factors will help to alleviate some of the issues faced by retailers.

The draft report notes that these planning restrictions have been considered in a number of reviews including the 2008 ACCC inquiry, the 2011 Productivity Commission retail inquiry and the 2014 Productivity Commission retail case study. However, progress has been slow due to the political difficulties inherent to planning law amendments. The Panel notes that a “number of governments have recognised the current problems presented by planning but they tend to be seen through the prism of deregulation, red-tape and economic development”, but not on their impact on competition.⁴²

41 Draft report, p 97.

42 Draft report, p 96.

2.4 Regulation review

DRAFT RECOMMENDATION 11 – Regulation review

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- they are in the public interest; and
- the objectives of the legislation or government policy can only be achieved by restricting competition.

Woolworths strongly supports any measure aimed at reducing the significant compliance and regulatory burden imposed on retailers by a range of inconsistent and unnecessary regulations at all levels of government. This red tape imposes significant costs on national retailers that operate across multiple state and territory jurisdictions.

In our original submission, we provided an extensive description of the many regulatory imposed costs that are in place across various Australian government jurisdictions. Concern over these costs recently prompted the Commonwealth Government to task the Productivity Commission to undertake a case study of the cost of doing business for retail businesses in Australia. The Commission released its final report – *The Relative Costs of Doing Business in Australia* – in September 2014, which offered the following insights into the costs faced within the retail sector:

- The costs of doing retail business are largely driven by geography, markets and commercial decisions
- Retailers continue to operate under several regulatory regimes that unnecessarily inflate their costs and restrict their ability to innovate, and
- Despite the extensive Productivity Commission inquiry into the retail sector in 2011 that made many recommendations to improve the performance of the Australian retail sector, with the exception of Victoria, reforms have been piecemeal and incomplete across most Australian jurisdictions.⁴³

43 Productivity Commission, *The Relative Costs of Doing Business in Australia*, September 2014, p 2.

CASE STUDY – WA liquor licensing

The Panel has identified liquor licensing restrictions in Western Australia as an example of a regulatory restriction that harms competition. It highlights how packaged liquor can be sold by hotels in regional Western Australia on a Sunday but not by packaged liquor stores.

This is a policy based on protecting a particular type of competitor in the packaged liquor market and with that reduced competition; consumers are not able to access cheaper prices and a wider range of products.

Woolworths does not believe that this regulatory constraint would survive the public interest test set down by the Panel in draft Recommendation 11.

The implementation of the Panel's recommendation for a public benefit test to be applied before regulation is imposed would be an important step in trying to reduce regulatory-imposed costs on business by unnecessary and anti-competitive regulation.

The Panel should note however that the capacity of some levels of government, particularly councils, to conduct such a regulatory review may be limited. Whilst we will make further comments on this issue in Part Three of this submission, the Panel needs to ensure its institutional framework incentivises governments to abide by these principles and holds them accountable for their performance.

2.5 Parallel imports

DRAFT RECOMMENDATION 9 – Parallel imports

Remaining restrictions on parallel imports should be removed unless it can be shown that:

- they are in the public interest; and
- the objectives of the restrictions can only be achieved by restricting competition.⁴⁴

Woolworths supports the Panel's draft recommendation calling for the removal of all remaining restrictions on parallel imports. The sourcing of more cost efficient imported products from overseas suppliers can act to promote competition in the Australian market.

In some instances, Woolworths uses parallel import arrangements to deliver lower price products to consumers or to negotiate more efficient local sourcing options. As long as any import restrictions can be removed without raising concerns over the quality and safety of incoming products, Woolworths supports any move that would provide us with more extensive sourcing options and potentially provide greater value to our customers.

44 Draft report, p 31.

Part 3:

Institutional settings to drive reform

Woolworths strongly supports the Panel's draft recommendations aimed at establishing an institutional framework that will provide leadership and drive implementation of the competition reform agenda. This is vital when so much of the reform falls within the responsibility of state and territory governments.

As we outlined in Part Two of this submission, many of these reforms have been recommended in past competition and economic reviews but have not been delivered. This has been primarily due to entrenched opposition or a lack of political will to pursue these pro-competitive outcomes. Microeconomic reform as envisaged by the Panel requires national coordination by all levels of government. Otherwise, it is likely that the impediments to competition identified in the review will remain in place and continue to undermine productivity and economic growth.

Woolworths appreciates that the Panel has prioritised appropriate institutional arrangements to drive implementation. However, Woolworths believes that the Panel needs to go further if this review is to distinguish itself from those of the past that failed to bring about these vital reforms.

The Panel should provide in its final recommendations a clear road map to government on the implementation of the review's microeconomic reform agenda. The opportunity to kick off this process of reform by establishing a clear timeline and milestones for each key draft recommendation is an important way for the Panel to leave a long-term legacy for our competition policy framework.

It would be concerning if the development of a road map, including the necessary timeline and milestones, for implementation is left to some form of competition body that may or may not be established by government upon completion of the review. However, it is our view that if the Panel can successfully outline key milestones to be achieved for each recommendation, this could be used to benchmark progress into the future.



3.1 Institutional framework

3.1.1 Competition institutions

DRAFT RECOMMENDATION 39 – Establishment of the Australian Council for Competition Policy

The National Competition Council should be dissolved and the Australian Council for Competition Policy established. Its mandate should be to provide leadership and drive implementation of the evolving competition policy agenda.

The Australian Council for Competition Policy should be established under legislation by one State and then by application in all other States and the Commonwealth. It should be funded jointly by the Commonwealth, States and Territories.

Treasurers, through the Standing Committee of Federal Financial Relations, should oversee preparation of an intergovernmental agreement and subsequent legislation, for COAG agreement, to establish the Australian Council for Competition Policy.

The Treasurer of any jurisdiction should be empowered to nominate Members of the Australian Council for Competition Policy.⁴⁵

Woolworths supports the Panel's recommendation that a specific body be provided with the responsibility to provide leadership and drive delivery of the competition policy reform agenda. As noted in Part Two, many of the Panel's recommendations represent the "unfinished agenda" of past competition reviews so it is critically important to establish an institutional framework, including a timeline and milestones, to guide implementation.

The Panel proposes that Australian Council for Competition Policy (ACCP) be established through a COAG intergovernmental agreement to carry out this function. The members of the ACCP would be nominated and appointed by state and territory governments and it would be run by a secretariat of independent of any one government.

45 Draft report, p 57.

While Woolworths accepts that the principles underpinning the ACCP have been well considered, we believe that the Panel needs to ensure that its institutional vision is not undermined by the potential difficulty in securing a commitment from government to establish a body that may be cast as another “layer of bureaucracy”. Government will undoubtedly approach the creation of a new body with caution given the obvious costs involved and resources required for it to be effective.

We suggest that the Panel considers the need to ensure its final recommendation does not contemplate a body with a role and resources largely duplicated elsewhere but that fits within a carefully designed institutional framework. The Panel could consider whether the establishment of a new body could be negated by the granting of specific roles and responsibilities to existing bodies such as the Productivity Commission or an organ of the Council of Australian Governments (COAG).

DRAFT RECOMMENDATION 40 – Role of the Australian Council for Competition Policy

The Australian Council for Competition Policy should have a broad role encompassing:

- advocate and educator in competition policy;
- independently monitoring progress in implementing agreed reforms and publicly reporting on progress annually;
- identifying potential areas of competition reform across all levels of government;
- making recommendations to governments on specific market design and regulatory issues, including proposed privatisations; and
- undertaking research into competition policy developments in Australia and overseas.

Woolworths supports the suggested proposed responsibilities set out by the Panel, whether they are to be performed by a newly created body, such as the ACCP, or through an existing institution such as the Productivity Commission. Its primary roles will involve acting as a permanent body promoting competition as well as overseeing the delivery of competition policy reform.

We suggest that its role in independently monitoring progress of the delivery of the Panel’s reform agenda should be its highest priority, given the difficulty faced in the wake of past reviews. The performance of this key role will be vital in putting place the most effective institutional settings to manage ongoing competition reform and policy.

3.1.2 Annual competition analysis

DRAFT RECOMMENDATION 43 – Annual competition analysis

The Australian Council for Competition Policy should be required to undertake an annual analysis of developments in the competition policy environment, both in Australia and internationally, and identify specific issues or markets that should receive greater attention.

Woolworths supports the Panel's recommendation that an annual analysis of competition policy should be conducted by the body given responsibility for competition policy issues. We particularly stress the importance of this analysis being focused on providing an accountability measure for the implementation of the microeconomic reforms recommended by the Panel.

There is significant potential for this annual analysis to serve as a "report card" on the performance of governments in meeting their commitments to implement reform. The public release of this analysis would provide a transparent opportunity for the public, business and government to benchmark progress against the established timeline and milestones.

3.1.3 Competition payments

DRAFT RECOMMENDATION 44 – Competition payments

The Productivity Commission should be tasked to undertake a study of reforms agreed to by the Commonwealth and state and territory governments to estimate their effect on revenue in each jurisdiction.

If disproportionate effects across jurisdictions are estimated, the Panel favours competition policy payments to ensure that revenue gains flowing from reform accrue to the jurisdictions undertaking the reform.

Reform effort would be assessed by the Australian Council for Competition Policy based on actual implementation of reform measures, not on undertaking reviews.

Woolworths supports the Panel's recommendation that any competition policy payments provided to state and territory governments be linked to the revenue gains generated by the reforms instituted by those governments.

This would represent an important change from past practice involving National Partnership Agreements between the states and territories and the Commonwealth Government. This had been based on payments being determined out of a set pool of funding and distributed by the Commonwealth Government according to a list of specific milestones. As was noted by the BCA in their original submission, these milestones were not necessarily linked to reforms being actually delivered on the ground.⁴⁶

⁴⁶ Business Council of Australia, *Submission to the Competition Policy Review: Summary Report*, June 2014, p 26.

As we outlined in Part Two, some Australian jurisdictions maintain highly restrictive trading hour regimes, which are often kept in place as a result of entrenched political opposition and to protect sectoral interests. Deregulation in those jurisdictions would deliver significant productivity and economic gains. For example, the Queensland Competition Authority estimated that deregulation of the restrictive trading hour regime would deliver that state a potential net economic benefit of \$200 million per year. Linking the delivery of the reform by the Queensland Government more closely to the actual benefits generated, such as a share of resulting income tax collected by the Commonwealth Government, could better incentivise its implementation.

Woolworths agrees that the Productivity Commission would be an appropriate body to assess revenue generated by reform.

3.2 Market studies

DRAFT RECOMMENDATION 41 – Market studies power

The proposed Australian Council for Competition Policy should have the power to undertake competition studies of markets in Australia and make recommendations to relevant governments on changes to regulation or to the ACCC for investigation of potential breaches of the CCA.

The Panel seeks comments on the issue of mandatory information-gathering powers and in particular whether the PC model of having information-gathering powers but generally choosing not to use them should be replicated in the Australian Council for Competition Policy.⁴⁷

Woolworths acknowledges that competition market studies can be an important tool in reviewing the competitive nature of particular sectors and to determine whether any policy changes are required. We support the Panel's finding that the power to conduct market studies should not be granted to the ACCC given the inherent conflict between its investigation and enforcement responsibilities.⁴⁸

We note that the Productivity Commission has significant expertise and experience in conducting comprehensive analysis and research of specific industries or sectors of the economy along the lines of that being contemplated in the granting of a market studies power. For example, the Commission has in recent years undertaken two very significant reviews of the retail sector. In 2011, it reviewed the "Economic Structure and Performance of the Australian Retail Industry" and earlier this year, it examined the "Costs of Doing Business" in retail. Both of these Commission studies were conducted at the request of the Commonwealth Government.

47 Draft report, p 58.

48 Draft report, p 284.

DRAFT RECOMMENDATION 42 – Market studies requests

All governments, jointly or individually, should have the capacity to issue a reference to the Australian Council for Competition Policy to undertake a competition study of a particular market or competition issue.

All market participants, including small business and regulators (such as the ACCC), should have the capacity to request market studies be undertaken by the Australian Council for Competition Policy.

The work program of the Australian Council for Competition Policy should be overseen by the Ministerial Council on Federal Financial Relations to ensure that resourcing addresses priority issues.⁴⁹

Woolworths suggests that market studies are most appropriately conducted at the direction of the Commonwealth and state and territory governments, where there is clear evidence of significant public or industry concerns that need to be addressed. We suggest that the Panel should recommend that these studies should in fact only ever be conducted upon the direct approval of the Minister.

While any market participant should be able to make a request for a market study to be undertaken, the Panel needs to ensure that these requests must ultimately be considered and determined by government. This is an important restriction given market studies can impose significant costs on industry participants and can have serious consequences on the composition of markets.

3.3 ACCC matters

3.3.1 Section 155 notices

DRAFT RECOMMENDATION 36 – Section 155 notices

The ACCC should review its guidelines on section 155 notices having regard to the increasing burden imposed by notices in the digital age.

Either by law or guideline, the requirement of a person to produce documents in response to a section 155 notice should be qualified by an obligation to undertake a reasonable search, taking into account factors such as the number of documents involved and the ease and cost of retrieving the documents.⁵⁰

49 Draft report, p 59.

50 Draft report, p 53.

Woolworths supports the Panel's view that "the ACCC should accept a responsibility to frame section 155 notices in the narrowest form possible, consistent with the scope of the matter being investigated" and that in complying with a section 155 notice, "the recipient should be required to undertake a reasonable search". In our view, such limits would be reasonable and be similar to those imposed on parties in the context of Federal Court proceedings and pre-trial discovery. We therefore suggest that the Panel consider inserting this obligation to frame notices, in the narrowest form possible, into the language of section 155 itself.

As we outlined in our original submission, Woolworths has significant concerns over the high cost burden and business impact of complying with section 155 notices imposed by the ACCC. Since 1 January 2012, Woolworths has responded to 19 compulsory production notices issued during the course of informal merger reviews and enforcement investigations. This has resulted in significant costs for the business as thousands of documents have required review by Woolworths' staff and external lawyers.

Woolworths further submits that an external agency, such as Treasury, would be best placed to conduct a review of the ACCC's guidelines, in relation to the increasing burden imposed by notices in the digital age, rather than the regulator itself.

3.3.2 ACCC Media Code of Conduct

DRAFT RECOMMENDATION 48 – Media Code of Conduct

The ACCC should also develop a Code of Conduct for its dealings with the media with the aim of strengthening the perception of its impartiality in enforcing the law.⁵¹

Woolworths supports the Panel's recommendation that the "ACCC should establish, publish and report against a Media Code of Conduct".⁵² This is in line with the view put forward in our original submission that regulators should adhere to transparent media policies that govern how and when public comment is made in relation to ongoing investigations and regulatory actions.

As the Panel noted, the Dawson report recommended that the ACCC develop a media code of conduct in 2003 but this has not been acted upon. This development of a publicly available policy would make it clear when the ACCC was to make public comment and bring it into line with other regulators such as the Australian Securities and Investments Commission, which has had such a code since 1993.

51 Draft report, p 63.

52 Draft report, p 293.

While Woolworths firmly supports the Panel's draft recommendation, we do submit that the Panel should further recommend the inclusion of some key elements within any code based on comments of the Dawson Committee:

- "it is the responsibility of the ACCC to ensure that its provision of information to the media is consistent with due process", and
- "whilst there may be circumstances in which it may be necessary for the ACCC to confirm or deny the existence of an investigation, the ACCC should avoid any comment on investigations it may be undertaking, even when the media has learnt of the investigation from another source".⁵³

The incorporation of these elements into a media policy by the ACCC would ensure that it balances the importance of informing the public with the need to protect parties from potential prejudice and associated harm to reputation, particularly during the course of an investigation.

53 Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, Chapter 12: Use of the media, pp 181-190.

Part 4:

Improving the competition policy framework

Woolworths supports the Panel's general findings that the overarching competition policy and legal framework, including the central concepts, prohibitions and structure of the CCA, remains appropriate and should be retained. This is in line with our view that as competition in the retail sector has been working well and delivering for consumers, only minor changes to the competition policy framework are required.

We also welcome the Panel's outline of a number of principles that should underpin Australia's competition laws, including:

- Competition policy should foster choice and increased responsiveness to consumers⁵⁴;
- The CCA, and competition policy in general, should not support a particular number of participants in a market or protect individual competitors but should protect the competitive process⁵⁵;
- The language of the law should be clear to market participants and enforceable by regulators and the courts⁵⁶; and
- The law should keep pace with international best practice.

In our view, these principles provide the appropriate prism through which any proposed changes to the CCA, or the competition policy framework in general, should be assessed. As we outline below, we support many of the draft recommendations on the legal framework and believe that they fit within the principles established by the Panel.

However, we do have significant concerns over the Panel's recommended changes to sections 45 and 46 of the CCA. In our view, we believe that these changes are not consistent with the principles established by the Panel and are not in the long-term interests of consumers. We outline our concerns in detail below.

4.1 Structure of the CCA

4.1.1 Competition law concepts

DRAFT RECOMMENDATION 17 – Competition law concepts

The Panel recommends that the central concepts, prohibitions and structure enshrined in the current competition law be retained because they are the appropriate basis for the current and projected needs of the Australian economy.⁵⁷

54 Draft report, p 187.

55 Draft report, p 187.

56 Draft report, p 187.

57 Draft report, p 38.



Woolworths supports the Panel's draft recommendation that the central concepts, prohibitions and structure enshrined in the current CCA be retained. The Panel "supports the general form and structure of the CCA", that is:

- The law prohibits specific types of anti-competitive conduct, with economy-wide, not sectoral-specific application
- Only conduct that is anti-competitive in most cases is prohibited *per se* – other conduct is only if it substantially lessens competition
- Enforcement actions for the CCA can be commenced by the regulator or private action and determined by the court
- Exemptions from the law in individual matters can be sought on public interest grounds.⁵⁸

Woolworths supports these views of the Panel. As we outlined in our original submission, we believe that competition in the retail sector has been working well and delivering for consumers. Therefore, we have argued that only limited changes are required for the competition policy framework to ensure the ongoing protection and enhancement of healthy, competitive retail markets for the benefit of consumers.

4.1.2 Competition law simplification

DRAFT RECOMMENDATION 18 – Competition law simplification

The competition law provisions of the CCA should be simplified, including by removing overly specified provisions, which can have the effect of limiting the application and adaptability of competition laws, and by removing redundant provisions.

The Panel recommends that there be public consultation on achieving simplification. Some of the provisions that should be removed include:

- subsection 45(1) concerning contracts made before 1977;
- sections 45B and 45C concerning covenants; and
- sections 46A and 46B concerning misuse of market power in a trans-Tasman market.

This task should be undertaken in conjunction with implementation of the other recommendations of this Review.⁵⁹

58 Draft report, p 38.

59 Draft report, p 39.

Woolworths supports the concept of simplifying the CCA in principle. However in our view, any proposed amendments to the CCA must provide as much certainty and consistency as possible to ensure that the legislation remains capable of being understood and applied by business.

As the Competition and Consumer Committee of the Law Council of Australia noted in its original submission to the Panel, previous piecemeal amendments intended to “clarify” meaning have actually resulted in making parts of the CCA unworkable and inconsistent.⁶⁰

The pursuit of simplifying the legislation must not act to overturn any currently enshrined and well understood concepts within the CCA. We believe it must not also be used to justify significant changes in the law that would damage consumer welfare. Therefore, we support the Panel’s view that any change should involve public consultation.

4.2 CCA improvements to ensure Australian retailers remain internationally competitive

4.2.1 Definition of market

DRAFT RECOMMENDATION 20 – Definition of market

The current definition of ‘market’ in the CCA should be retained but the 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.⁶¹

Woolworths strongly supports the Panel’s recommendation that the definition of “competition” be amended to ensure that global sources of competition are considered and that this included competition from potential not just actual imports.

Current market analysis is static and narrow

In our original submission, we outlined our concerns that current market analysis by regulators in Australia has not kept up with new business models and changing consumer demands and expectations. In our view, there has been tendency for competition in retail markets to be defined in a formalistic, static and narrow way (in terms of technology, geography, products, customers and/or suppliers).

The consequence of this has been competition analysis tending to be similarly static and narrow, too focused on concentration levels and individuals and failing to have regard to the broader dynamics that represent commercial reality, such as the impact of online retailers both domestically and globally.

⁶⁰ Competition and Consumer Committee of the Business Law Section of the Law Council of Australia, *Submission on the Australian Government Competition Policy Review*, June 2014, p 14.

⁶¹ Draft report, p 40.

Market analysis must keep up with new business models

Woolworths faces fierce competition, not only from incumbent domestic retailers, but also from global retailers and the rapidly growing online retail industry. The drive by major retailers across the world for increased efficiencies in their networks, logistics and distribution systems has meant that those willing to invest in these areas benefit from a lower cost structure and offer lower prices. Online retailers are rapidly growing their market share year on year, as their low cost structures allow them to be increasingly more competitive than many “bricks and mortar” retailers.

We welcome this fierce competition and believe that the consumers are the ultimate beneficiaries of these strategic developments. We believe that the competition posed by online retailers should certainly be taken into account in market analysis.

4.2.2 Price discrimination

DRAFT RECOMMENDATION 26 – Price discrimination

A specific prohibition on price discrimination should not be reintroduced into the CCA. Where price discrimination has an anti-competitive impact on markets, it can be dealt with by the existing provisions of the law (including through the recommended revisions to section 46, see Draft Recommendation 25).⁶²

Woolworths supports the Panel’s recommendation that a specific prohibition should not be reintroduced into the CCA. While we acknowledge that Australian retailers have faced retail price anomalies and associated cost price differences as compared with comparable economies, we do not believe that Government should attempt to regulate a solution.

Legislation such as that proposed by the Canadian Government to address country-specific price discrimination is unduly complex and may actually result in driving up costs even further. In addition, global suppliers may react to any specific prohibition by developing ways around any regulation imposed domestically (i.e., changing products in different markets).

4.2.3 Collective Bargaining

DRAFT RECOMMENDATION 50 – Collective Bargaining

The CCA should be amended to introduce greater flexibility into the notification process for collective bargaining by small business. One change would be to enable the group of businesses covered by a notification to be altered without the need for a fresh notification to be filed (although there ought to be a process by which the businesses covered by the notification from time to time are recorded on the ACCC’s notification register).

The ACCC should take actions to enhance awareness of the exemption process for collective bargaining and how it might be used to improve the bargaining position of small businesses in dealings with large businesses.

62 Draft report, p 45.

Woolworths supports measures, such as section 93AB of the CCA, that support small business participating in collective bargaining arrangements. This legislative framework enables two or more competitors, typically small businesses, to collectively bargain with a supplier or customer. The Panel's recommendations would provide more flexibility for small business.

Woolworths is committed to collectively bargaining in direct supply arrangements with groups of small and medium sized businesses, where it will provide better outcomes for suppliers and our customers. As outlined in our original submission, Woolworths is making use of such arrangements in the production of Farmers' Own milk for sale in northern New South Wales and Western Australia.

4.2.4 Third-line forcing

DRAFT RECOMMENDATION 27 – Third-line forcing test

The provisions on 'third-line forcing' (subsections 47(6) and (7)) should be brought into line with the rest of section 47. Third-line forcing should only be prohibited where it has the purpose, or has or is likely to have the effect, of substantially lessening competition.⁶³

Woolworths supports the Panel's recommendation that third-line forcing should no longer be prohibited on a *per se* basis and be amended to reflect the other provisions of section 47 of the CCA so that it is prohibited where it is deemed to substantially lessen competition. This amendment would ensure that the current *per se* prohibition does not prohibit conduct that may benefit consumers, and is not anti-competitive. It would also be in line with recommendations made in both the Hilmer and Dawson reviews.

4.2.5 Resale price maintenance

DRAFT RECOMMENDATION 29 – Resale price maintenance

The prohibition on resale price maintenance (RPM) should be retained in its current form as a *per se* prohibition, but the notification process should be extended to include resale price maintenance.

The prohibition should also be amended to include an exemption for RPM conduct between related bodies corporate, as is the case under sections 45 and 47.⁶⁴

Woolworths supports the current *per se* prohibition against resale price maintenance as we believe that this is essential to ensure that retailers are free to compete with one another on price for the benefit of Australian consumers.

The Australian retail sector is fiercely competitive and Woolworths fights every day to deliver the lowest possible prices for our customers. By investing in our supply chain and working to reduce input and operating costs we are generating savings that are passed on in cheaper prices.

While the Panel's recommended changes do not appear to undermine the current prohibition, any changes in this area must only be implemented where not detrimental to consumers.

63 Draft report, p 45.

64 Draft report, p 47.

4.3 Changes that will create uncertainty and chill competition

Woolworths has significant concerns about two of the Panel's recommendations relating to the CCA:

- Recommendation 25: re-framing the misuse of market power provisions under section 46 of the CCA
- Recommendation 24: extending section 45 of the CCA to cover "concerted practices".

In our view, the Panel has not sufficiently established the case that these significant amendments to the CCA are required and would be beneficial to the long-term interests of consumers. Indeed, we believe that these changes may actually be counterproductive, due to the significant uncertainty that it would create for business.

Both of these changes would introduce untested legal concepts into the CCA and there is a genuine prospect that the resulting uncertainty will chill competition and deter business investment. Imposing this uncertainty without a clear case for change will only distract retailers from their focus on reducing prices, innovating and increasing efficiency. We outline our concerns below.

4.3.1 Section 46: Misuse of Market Power

DRAFT RECOMMENDATION 25 – Misuse of market power

The Panel considers that the primary prohibition in section 46 should be re-framed to 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.

However, the Panel is concerned to minimise unintended impacts from any change to the provision that would not be in the long-term interests of consumers, including the possibility of inadvertently capturing pro-competitive conduct.

To mitigate concerns about over-capture, the Panel proposes that a defence be introduced so that the primary prohibition would not apply if the conduct in question:

- would be a rational business decision or strategy by a corporation that did not have a substantial degree of power in the market; and
- the effect or likely effect of the conduct is to benefit the long-term interests of consumers.

The onus of proving that the defence applies should fall on the corporation engaging in the conduct.

The Panel seeks submissions on the scope of this defence, whether it would be too broad, and whether there are other ways to ensure anti-competitive conduct is caught by the provision but not exempted by way of a defence.

Such a re-framing would allow the provision to be simplified. Amendments introduced since 2007 would be unnecessary and could be repealed. These include specific provisions prohibiting predatory pricing, and amendments clarifying the meaning of 'take advantage' and how the causal link between the substantial degree of power and anti-competitive purpose may be determined.⁶⁵

65 Draft report, p 44.

Woolworths does not support the Panel's proposed changes to the misuse of market power provisions in section 46 of the CCA. We do not believe that the case for change has been adequately established nor has the Panel considered the unintended consequences of its proposal. This is particularly important given the considerable uncertainty that the introduction of an effects test will impose on business and the significant harm this could cause for consumers and the economy.

As noted above, the Panel outlines a number of principles that have guided its review of Australia's competition laws. Woolworths submits that the Panel's proposed changes to section 46 do not fit within a number of these principles, including that competition law should be "simple, predictable and reliable"⁶⁶ and it should "not over-reach (by prohibiting pro-competitive conduct)".⁶⁷ Also, we note the Panel's caution that "a law that is unclear creates business and regulatory uncertainty, imposing costs on the economy".⁶⁸

Woolworths concerns regarding the Panel's proposed changes to section 46, are outlined as follows:

- the case for change has not been made and the current provisions are working
- numerous reviews into competition laws and policy have concluded that an effects test is a bad idea
- the proposed changes will not resolve issues as intended, but instead will create significant uncertainty for business and chill competition.

No case for change

Woolworths believes that the current misuse of market power provisions contained in section 46 are working well. The current law is well understood by the business community and there is an extensive body of case law from which business can draw guidance.

The Panel has recommended substantial changes to section 46, including adding an effects test, removing the requirement to prove an anti-competitive purpose and also removing the "taking advantage" element. Instead it proposes the adoption of a "substantially lessening competition" test that "would enable the courts to assess whether the conduct is harmful to the competitive process" and "make the 'take advantage' test redundant".⁶⁹ This is similar to the proposals of the ACCC in its original submission to the review, although the Panel has inserted a defence into its suggested test.

Given the significant nature of the proposed changes, we believe that those proposing these amendments to section 46 must make the case that they are necessary and should bear the onus of demonstrating that the benefits clearly outweigh the detriments. Woolworths does not believe that such a case had been made by the Panel in its draft report.

66 Draft report, p 187.

67 Draft report, p 187.

68 Draft report, p 187.

69 Draft report, p 210.

No evidence has been provided to establish that the current status of section 46 prevents action being taken against anti-competitive behaviour or that the introduction of an effects test “would indeed make proving misuse of market power any easier”.⁷⁰ As outlined in the Box below, an analysis of section 46 cases over the past 15 years shows that it is not correct to say that these cases fail on account of purpose.⁷¹

Analysis of section 46 cases

An article in *The State of Competition* published in November 2013 included an analysis of section 46 cases over the previous 15 years that had been heard by either the Full Court of the Federal Court or the High Court. This had involved 51 judges considering the three elements of section 46 and the analysis found:

- 11 out of 51 did not believe the threshold element of market power had been met. Nonetheless, of these, 8 said the purpose element was met
- Of the 40 who thought there was market power, 16 said the “take advantage” element had not been met. But, of these, 14 said the purpose element was met
- 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 s46 because the “purpose” element was not met (Dowsett J in *Baxter* (Full Court)).
- So of the 28 appeal court judges who thought there was no market power and/or no taking advantage, 22 still found a proscribed purpose.⁷²

Further, neither the Panel nor the ACCC has been able to outline any circumstances where the lack of an effects test has prevented it from prosecuting bona fide cases of misuse of market power. In fact, analysis shows that since 1989, the ACCC has brought eighteen cases under section 46, compared to the US Department of Justice bringing ten cases under its provisions.⁷³ The ACCC has been successful in 70% of those cases.

Numerous reviews into competition laws and policy have concluded that an effects test is a bad idea

There is a very extensive history of reviews of the operation of section 46 beginning in 1979. None of them have gone as far as the Panel’s recommendation on the introduction of an effects test. Woolworths endorses the findings of the seminal Hilmer and Dawson reviews in this respect.

70 Rachel Trindale, Alexandra Merrett & Rhonda Smith, ‘The grass is always greener? The effects vs purpose debate resumes’, *The State of Competition*, Issue 14 November 2013, p 6 (hereinafter ‘The State of Competition’).

71 *The State of Competition*, p 6.

72 *The State of Competition*, p 7.

73 Gina Cass-Gottlieb, Paula Gilardoni & Matt Rubinstein, ‘Competition Policy Review – big business, small business and market power’, *Gilbert & Tobin website*, September 2014.

There are two main reasons why an effects test is a bad idea:

- An effects test would have a negative effect on competition because it will not only catch pro-competitive conduct but will also prevent it from happening in the first place.
- An effects test would introduce uncertainty and ambiguity to every business decision, thereby driving up the costs of doing business and may well result in deferred investment decisions, particularly those relating to innovation.

Previous reviews regarding effects test

In 1993, the Hilmer Report concluded that an effects test “would not, in the Committee’s view constitute an improvement on the current test. It does not address the central issue of how to distinguish between socially detrimental and socially beneficial conduct”.⁷⁴ Woolworths submits that this situation has not changed since 1993.

In 2003, the Dawson review reconsidered the issue and concluded that: *“The introduction of an effects test would mean that at least part of the current jurisprudence surrounding section 46 would be lost. It would take time before a new jurisprudence could be developed. A number of submissions emphasised that the cost of adjusting to the change would be reflected in the uncertainty that business would face while the significance of the change was sorted out”*.⁷⁵

In 2012, the Unilateral Conduct Working Group of the International Competition Network (ICN) considered these issues. While in some respects supportive of an effects-based test, the ICN did not wear “rose coloured glasses”. Some of its concerns mirror those expressed by the Hilmer and Dawson Reviews. The working group stated that:

*The effects-based approach tends to lead to a more accurate assessment of a particular case. However, because this approach generates fact-driven outcomes, it tends to lead to greater delays and costs for the agency and those under investigation. The approach also makes it more difficult for business planners and counsel to predict whether specific conduct is likely to result in an infringement decision. This uncertainty may result in a chilling effect, as firms avoid conduct that may in fact be procompetitive and lawful. The lack of predictability may, to some extent, be offset by competition authorities issuing general guidelines describing the methodology used in their assessments, as well as clearly communicating the methodology used in each individual case.*⁷⁶

Woolworths does not accept that these concerns can be addressed by guidelines, given that it is the court that ultimately will adjudicate the law. It is not the role of organisations, such as the ACCC to interpret the law, nor is any body in a position to be able to anticipate how a Court would interpret the significantly altered law. If guidelines were such an effective solution to the lack of predictability identified by the ICN, then guidelines could be used to address the same alleged uncertainties claimed by the Panel (and the ACCC) in relation to the current formulation of section 46. A change to the law would not be required.

74 Draft report, p 70.

75 Dawson Committee, *Review of the Competition Provisions of the Trade Practices Act*, January 2003, p 84.

76 International Competition Network, *Unilateral Conduct Workbook*, April 2012, para 49.

The proposed changes will not resolve issues as intended, but instead will chill competition

Business needs prospective certainty in order to make decisions and compete. Law changes can have a profoundly negative impact on this, and Woolworths submits that the proposed changes to section 46 are more likely to create legal uncertainty as resolve it.

Without this certainty, business will find it difficult to make decisions on investment and strategy given the risk that its actions may impact upon competitors. A business should only be expected to determine the own purpose of its decisions and actions and to assess whether it can be objectively justified against the established criteria of section 46. However the proposal of the Panel would require a business to speculate on the likely effect of its conduct on competitors and the market. This uncertainty will be a risk to the economy and be potentially harmful to consumers.

The Panel has suggested that there is a problem with the current wording of section 46, particularly with respect to the “take advantage” limb. As the panel puts it: *“The issue is whether the ‘take advantage’ limb of section 46 is sufficiently clear and predictable in interpretation and application to distinguish between anti-competitive and pro-competitive conduct.”*⁷⁷

Woolworths suggests that the “take advantage” limb of section 46 has a vital role in the operation of section 46 because “substantial market power” in and of itself is not a problem. “Big” does not equal “Bad”. Equally, the three anti-competitive purposes identified by the section, namely:

- Eliminating or damaging a competitor
- Preventing entry by a person
- Deterring or preventing engaging in competitive conduct,

are not, in and of themselves, *per se* problems. As Justices Mason and Wilson put it in *Queensland Wire*:

*“the object of s. 46 is to protect the interests of consumers, the operation of the section being predicated on the assumption that competition is a means to that end. Competition by its very nature is deliberate and ruthless. Competitors jockey for sales, the more effective competitors injuring the less effective by taking sales away. Competitors almost always try to “injure” each other in this way. This competition has never been a tort (see *Keeble v Hickeringill* [1809] EngR 7; (1809) 11 East 574 (103 ER 1127)) and these injuries are the inevitable consequence of the competition s. 46 is designed to foster. In fact, the purpose provisions in s. 46(1) are cast in such a way as to prohibit conduct designed to threaten that competition – for example, s. 46(1)(c) prohibits a firm with a substantial degree of market power from using that power to deter or prevent a rival from competing in a market. The question is simply whether a firm with a substantial degree of market power has used that power for a purpose proscribed in the section, thereby undermining competition...”*⁷⁸

It is the “taking advantage” of market power for one of the proscribed purposes that damages competition, and jurisprudence has established (since *Queensland Wire*) that this means using market power for a proscribed purpose in a way that would not be possible in a fully competitive market.

77 Draft report, p 209.

78 *Queensland Wire Industries v BHP* (1989) 167 CLR 177 per Mason CJ and Wilson J, para 24.

It is not just the drafting of section 46 that has caused the courts “difficulties in interpreting and applying” the law. It is the fact that, by its very nature, the application of the counterfactual test in section 46 is complex and inherently ambiguous. Once market power has been established, and conduct falling within the proscribed purposes has been identified, the central question still remains:

Did this conduct occur because the firm with market power took advantage of its privileged market position or could this equally have occurred absent the market power?

This question frames the central function of the “take advantage” limb as it exists in the law today. Woolworths submits that tinkering with the wording of section 46 will not make this central question any easier to answer. In fact, the proposed changes simply reverse the onus of proof: the entity alleged to have engaged in unilateral conduct must show, through the proposed defence, that its conduct was legitimate. Woolworths submits that this is a substantial shift and one that is likely to have a competition chilling effect. Again to quote the ICN:

44. *The cost of over-enforcement is a lessening of procompetitive behaviour on the part of dominant firms. This may result in static efficiency losses from the dominant firm's reduced incentives to cut prices or compete hard, as well as from competitors having to compete less vigorously in response. It can also result in the loss of dynamic efficiency due to the dominant firm's lessened incentives to innovate and make initial investments. The negative effects of over-enforcement are, in some jurisdictions, amplified by the presence of strong private litigation.*

45. *The cost of under-enforcement is the risk of exclusion and the resulting reduction in competitive pressure faced by the dominant firm. Under-enforcement may also lead to a loss of dynamic efficiency flowing from competitors' lessened incentives to innovate and enter the market. It may furthermore result in redistribution of resources from consumers to producers, potentially inflated costs by dominant firms, and the inefficient devotion of resources to rent-seeking by firms that seek to obtain or maintain dominance.⁷⁹*

Woolworths submits that there is no evidence in the grocery sector of exclusion, a resulting reduction in competitive pressure faced by the firms with market power, or losses of dynamic efficiency flowing from competitors' lessened incentives to innovate and enter the market. In fact the contrary is true. It follows that it appears there is no under-enforcement problem in this sector.

Policy makers should therefore be deeply concerned about the risks of over-enforcement (as Hilmer and Dawson were): namely a lessening of procompetitive behaviour on the part of dominant firms; static efficiency losses from the dominant firm's reduced incentives to cut prices or compete hard; as well as from competitors having to compete less vigorously in response.”

79 International Competition Network, *Unilateral Conduct Workbook*, April 2012, para 44-45.

Those proposing change must make the case that these concerns are unfounded. It is our view that the Panel has not made the case that “section 46 can be reframed in a manner that will clarify its intended meaning and scope and thereby improve its effectiveness in targeting anti-competitive unilateral conduct”.⁸⁰ In fact, its proposed changes and the establishment of an ambiguous defence, that will take many years for the Courts to interpret and apply, only serves to make the provision less clear for business and consumers.

Woolworths submits that amending the current provisions as outlined in the draft report will lead to unnecessarily lengthy and complex provisions, imposing costs on the economy and reducing firms’ productivity as a result – which will ultimately defeat the purpose of the competition review. We therefore urge the Panel to re-examine its draft recommendation and to more fully consider the potential ramifications for competition and ultimately, consumers.

4.3.2 Section 45: “Concerted Practices”

DRAFT RECOMMENDATION 24 – Price signalling

The “price signalling” provisions of Division 1A of the CCA are not fit for purpose in their current form and should be repealed.

Section 45 should be extended to cover concerted practices which have the purpose, or would have or be likely to have the effect, of substantially lessening competition.

Woolworths supports the Panel’s recommendation that the price signalling provisions set out in Division 1A of the CCA, which apply only to the banking sector, be repealed. These complex provisions were sector-specific and out of step with international competition law best practice.

“Concerted practices”

However, we have significant concerns about the Panel’s recommendation for the general prohibition on anti-competitive agreements in section 45 of the CCA to be extended to cover “concerted practices” (i.e., two or more firms which engage an ongoing practice that has the purpose or likely effect of substantially lessening competition). This would create a “new” prohibition on certain conduct, which Australian courts have been reluctant so far to accept and allow a breach of section 45 to be found based on circumstantial evidence of exchanges of price and/or other strategic information between competitors.

80 Draft report, p 210.

The Panel recommends borrowing the European Union (EU) approach. *Article 101(1) of the Treaty of the Functioning of the European Union* prohibits agreements and concerted practices which have as their object or effect the prevention, restriction or distortion of competition. Conduct that is pro-competitive (benefits outweigh the restrictive effects on competition) is exempt. Under the European approach there is no requirement for any meeting of the minds or commitment.

The European Commission has published guidelines on concerted practices and distinguishes between conduct with the object of influencing the conduct of another and legitimate information exchanges (e.g., websites posting current prices aggregated across competitors).⁸¹

Woolworths understands that the role of concerted practices as a stand-alone ground for challenging cartel conduct is steadily decreasing in the EU.⁸² The US in contrast focuses on establishing a conscious commitment to a common scheme designed to achieve an unlawful objective. Receiving information is not unlawful unless there is a “meeting of the minds/ commitment”. The US approach is not as broad as the EU approach. We outline our concerns below.

No clear problem

Woolworths does not believe that there is a clear problem that justifies the establishment of a “concerted practices” prohibition. The justification that tends to be given is that Australian courts have interpreted the requirement to establish an “agreement” or “understanding” narrowly⁸³ (i.e., requiring a commitment by parties to the understanding). This justification is questionable.

- In relation to “commitment”, that concept is not inherent in the concept of an “arrangement” or “understanding” under the CCA
- The failure to establish an “understanding” in the cases referred to can be traced to a failure to produce the evidence required to establish the allegation. The fact is that the ACCC has been given significantly expanded powers to gather evidence, in particular in relation to cartels through the use of search warrants and s155 notices, eg the ACCC has wiretapping powers
- More recently, the Federal Court has accepted a more expansive approach to the question. In *Norcast S.ar.L v Bradken Limited* (No 2) [2013] FCA 235, an arrangement was found even though it was informal and unenforceable, with the parties free to withdraw or act inconsistently, despite there being an “arrangement”.

Accordingly, Woolworths considers there is no clear demonstrable failure with the existing law in relation to the ACCC’s ability to establish a relevant “understanding” or “arrangement”.

81 European Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, C11/1 (with effect from 24 January 2011).

82 Ingeborg Simonsson, Legitimacy in EU Cartel Control, Bloomsbury Publishing, 23 Feb 2010.

83 See *Apco Service Stations Pty Limited v ACCC* [2005] FCAFC 161.

EU approach unsuited to Australian law

Woolworths does not believe it appropriate for a concept developed in Europe and shaped by EU competition policy, case law and the EU's approach to statutory interpretation to be legitimately transferred into Australian competition law. In particular, Australia would lack the deep European judicial guidance which informs the EU prohibition.

Woolworths considers that the Panel's approach, which appears to adopt the EU approach, greatly oversimplifies the risks involved in transplanting the EU concept, developed under a very different judicial system, to Australia. As a general proposition, reforms should achieve the purpose for which they are intended without creating additional uncertainties. The EU approach, if adopted, would create new additional uncertainties as it appears to capture innocent information exchanges across industry participants, and other pro-competitive behaviours, including innovative responses which respond to known or anticipated competitor conduct.

While the Panel's objective is to bring the regular disclosure or exchange of price information between two firms under the CCA, whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange, the problem is that the Panel offers no clarity as to conduct that is parallel, but unilateral and conduct that is coordinated, but unlawful.

The Panel's recommendation is not a simple change. It introduces new and untested concepts, and fails to draw on concepts already familiar from other contexts of the CCA.

