SUBMISSION BY WOOLWORTHS LIMITED

TRADE PRACTICES ACT REVIEW

AUGUST 2002

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Submission to the Trade Practices Act Review Committee

To the Secretary, Trade Practices Act Review Committee

c/- Department of the Treasury

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Woolworths Limited (Woolworths) is pleased to provide this submission in response to the Committee's Inquiry into the effectiveness and administration of the Trade Practices Act.

INTRODUCTION

"Effective competition and Fair Trading laws, such as the Trade Practices Act, 1974 (TPA) are an essential pre-requisite for the efficient functioning of a deregulated market economy....by promoting efficient markets and fair trading practices which seek to maximise consumer welfare."[1]

Woolworths fully endorses this view of the purpose and intent of the TPA. The elements which are critical to this are the creation and maintenance of efficient markets aimed at consumer benefits and within the framework of fair trading practices.

The Review Committee's Terms of Reference are broadly based to ensure "a wide ranging and comprehensive review"[2] of the competition provisions of the TPA, having regard to the significant changes in the structure of the Australian economy and the impact on Australian businesses of global economic forces over the past three decades and looking forward.

[1] Prof. A Fels, AO, Chairman, Australian Competition & Consumer Commission, January 2002 Preface to Millers Annotated Trade Practices Act, 1974, 23rd Edition

[2] The Hon. P Costello, MP, Treasurer of Australia – June 2002

It is important to ensure that the TPA Review does not, unintentionally create barriers to the "efficient functioning of a deregulated market economy", through legislated or regulatory protection from the forces of fair and genuine competitive activity.

A. EXECUTIVE SUMMARY

Competitive Retail Sector

The retail sector in Australia has been the subject of, or catalyst for, a number of Federal Parliamentary and Australian Competition and Consumer Commission (ACCC) Inquiries over the last 3 years, relating to the competitiveness of the food retail industry and the alleged market concentration of the major food retailers.

It is in this context that Woolworths will demonstrate that the retailing sector, including food retailing, is intensely competitive and provides real and measurable benefits to consumers. Consumers across the country can choose a 'world standard retail food shopping experience' at retail prices significantly lower than comparative markets in the United States, Europe and the United Kingdom.

Artificial Protection is Anti-Competitive

Woolworths will show that Australia is a unique market, with challenges posed by large distances and a small population with low population growth. We will demonstrate that competition is both vigorous and healthy and that the end beneficiary is the Australian consumer. Finally, we will show that existing competition regulations are sufficient, and that artificial protection of inefficient and uncompetitive players will lead to higher retail prices, lower retail investment, lower employment and economic stagnancy, in metropolitan, rural and regional areas.

Claims made by some interest groups for additional regulation that is retail specific (which in effect grants artificial protection to the members of these retail groups) are not justified on competitive or economic grounds. Such claims appear to be directed at diverting attention, from the real issue, which must be the protection and enhancement of a healthy, competitive market for the benefit of all consumers.

Small and Large Retail Businesses are Complementary

The retail industry in Australia is a hierarchy of over 20,000 retail operators in which each has a market niche and each must attract customers to survive.

The Australian food retail market is unique in that around 50% of the national market is in the hands of independent operators, the highest such share compared to similar such markets around the world.

The Australian Economy and the Retail Sector

Strong consumer spending is essential to maintain the current overall growth trend in Australia in the context of any global economic downturn. It is underpinned by lower prices driven by dynamic competition that ensures security and growth in all of the industries with which retail does business. Conversely, increased retail prices and less competition, through regulated competitive constraints, will adversely impact on consumers and the economy.

All retailers, at all levels, compete strongly against each other, regardless of size. Australia has a small population compared to most major developed countries and low net population growth. This together with a broad geographical population spread, has resulted in the major national food retailers investing in systems and facilities to ensure the efficient handling, storage and distribution of grocery and fresh food products daily to their stores, across Australia, to the benefit of all consumers.

Retail Food Market Share/Market Concentration

By any measure the Australian food retail market has a strong and vigorously competitive independent sector (around 50% of the total market one of the largest independent market shares in the world) complemented by larger retail chain operators comprising domestic businesses which make up the remaining 50% of the Food, Liquor and Grocery (FLG) retail market.

Australia is only a relatively small market in terms of consumers, and has a large geographic spread. Therefore achievement of sufficient domestic market share is necessary to generate economies of scale and enable the efficient delivery of a generally consistent retail "offer" to all Australians. Similar or greater market concentration levels exist for the same reason in many of the overseas countries as

well as in other Australian industries where there are national operators, including the food manufacturing industries.

Retail Globalisation

The increasing move towards a globalised food retail market means that the continued drive for improved efficiency by domestic retailers should not be impeded by the protection of less efficient operators.

To be able to give Australians the benefits of world standard operations, domestic retailers should not be restrained by market concentration based legislation or other regulatory controls which inhibit investment and innovation and result in lower costs and lower retail prices.

There are three major international food retailers in Australia, two of whom have entered the market in the last 2 years. Their market position in Australia, whilst at present, relatively small, is matched by their much larger overseas markets including significant financial resources and strong domestic markets upon which they can rely to support what are often initially unprofitable Australian operations.

Trade Practices Act Amendments

The ACCC and a number of other parties have suggested amendments to the TPA all of which are based on the assumption that the competition laws in Australia are not working to benefit consumers. This has not been clearly established, in any legitimate way, such that further restrictions on competitive conduct are justified.

There are a significant number of these claims aimed at the misuse of market power provisions of the TPA. The Australian Courts have considered these provisions in a series of recent decisions and any intrusive attempt to pre-emptorily override judicial authority, cannot be in the interests of settled and certain legal analysis and precedent.

At their extreme, the proposed 'effects' test amendments to S.46 TPA can only have far-reaching anti-competitive implications for Australian business.

ACCC Accountability/Transparency

Woolworths considers that the broad scope and significant implications of the ACCC's powers for Australia's competition policy demands a governance structure that demonstrates full and open accountability for the ACCC's decisions and activities. Parliamentary and judicial review alone do not meet the needs of the commercial environment in which the ACCC has significant influence.

The creation of an independent body of representatives of business, professional, academic and government interests, empowered to review the activities, decisions, procedures and policies of the ACCC, would serve the dual purposes of 'appeal' and 'audit' of the ACCC, without inhibiting or hindering the performance of its statutory function.

B. WOOLWORTHS' CONTRIBUTION TO FOOD RETAIL COMPETITIVENESS

Employment and Career Opportunities

Woolworths employs around 145,000 Australians and is Australia's second largest private sector employer, offering employment ranging from long-term career opportunities (complete with training), to part-time and casual positions for those with other responsibilities such as study or family. In rural and regional Australia, Woolworths employs around 50,000 people, including 20,000 young people under 25 years of age.

Retail Food Margins – Australia/United Kingdom/United States/Europe

Woolworths also brings benefits to those who are not directly associated with the company through the delivery of high-quality, affordable food to families across Australia. In comparison to grocery retailers overseas, Woolworths' operates on very low retail margins. In the past year, Woolworths' EBIT (Earnings Before Interest and Tax) averaged around 2%-3% (after tax), compared to similar large scale grocery/food retailers in the United Kingdom; United States and Europe which EBIT average is 6% (after tax). Woolworths also effectively subsidises freight costs to ensure that stores in non-metropolitan locations are able to offer the choice, quality and low prices expected by all Woolworths' customers.

Lower Costs/Lower Prices

Woolworths is continuing to push for lower costs across its stores through the "Project Refresh" initiative, and to pass on these benefits to customers through lower retail prices. Woolworths has over the past 3 years continually reduced its own costs (as a percentage of sales), and passed on these cost savings to customers. That has meant that retail prices are lower, so much so that the company's gross profit has also continued to reduce. Growth in the company's net profit, and in the benefits to shareholders, have been achieved through operating efficiencies, thereby reducing costs and prices and increasing turnover. Woolworths 145,000 employees, 16 million customers a week and over 300,000 shareholders (around 70,000 of whom live in rural and regional Australia and 50,000 of whom are Woolworths employees) have all benefited from the efficiencies which Woolworths has achieved as it continues to

drive down its costs and enhance its ability to compete in an increasingly global retail market.

Research commissioned by Woolworths and conducted by Wirthlin International (1999) and Irving Saulwick (2001) has consistently found that consumers value highly the quality, choice and convenience offered by major supermarkets, and want access to a wide range of goods at a competitive prices and a convenient time, regardless of whether they live in a major city or suburban, regional or rural centres.

Consumer Benefits of Volume Efficiency and Quality Improvements

Woolworths' market share, whilst modest in the context of a strong market share in the independent food retail sector, enables it to pass on benefits for consumers and suppliers. Efficiency savings from volume buying flow through to consumers in the form of lower prices and investment in innovative products, service levels and improved food safety and quality. Volume orders allow suppliers to benefit from reduced financial risk and an improved ability to re-invest in their businesses. The efficiency savings also assist Woolworths in promoting the growth of particular product categories, which in turn benefits the supplier and, further down the supply chain, growers, through increased volumes.

Woolworths' business is consumer driven, and to be successful it must continue to meet ever-changing consumer needs. This includes ensuring that products meet consumer requirements, particularly in areas such as range, safety, hygiene and quality. In relation to "fresh" food, Woolworths has set the industry standard by establishing quality specification requirements through its Woolworths Vendor Quality Management System (WVQMS). These high standards are a reflection of consumer demand for quality.

The introduction of WVQMS serves to ensure food safety and quality which are essential for achieving the international standards demanded by the Australian consumer.

Fresh Food/Buying Code of Conduct

Australian supermarkets are a major channel of distribution through which Australian primary producers sell their products, and a significant source of funds that enable the primary sector to grow.

Fresh food is purchased through direct negotiations with primary producers (around 40%-50%) and through market agents, in established distribution centres such as the major produce markets, produce packhouses and saleyards that supply the entire market.

All Woolworths' buyers are required to operate to a strict internal Code of Conduct to ensure that prices and conditions of supply are fairly negotiated. If disputes do arise, Woolworths' internal dispute resolution procedures have been established to ensure that Woolworths' Fair Trading Policy and Procedures have been followed. The supplier may also refer the dispute to the Retail Ombudsman under the Retail Grocery Industry Code of Conduct.

By developing partnerships with suppliers, Woolworths has been able to reduce the volume of imported fresh food sold in its supermarkets to less than 5%. This figure continues to fall as Woolworths implements an aggressive import replacement program.

The Food Retail Market Share Debate

The food and grocery retail industry in Australia has been the subject of much scrutiny in recent years concerning market share and the conduct of the major supermarket operators.

Investigations at an industry, government and ACCC level have found no substantiated evidence of market abuse. In addition, definitions of the size of the retail food market and who holds what share, continue to be misrepresented, particularly by interest groups seeking to exaggerate the market position of the major food retailers. Independent experts (Jebb Holland Dimasi, ABS and AC Nielsen) have recommended that the most accurate measure of market share should include sales across the entire food, liquor and grocery (FLG) market. In this FLG market, according to world

standards, the independents' sector share is the highest at around 50%, with Woolworths at 28%; and Coles/Bi Lo at 22%. **(Attachment A)**

The distinction between any grocery/scan data based market share statistics and the truly representative FLG market shares, is highlighted by the fact that the former statistics only cover around 35%-40% of the products sold in a major supermarket, while the latter covers over 90%.

Comparisons of Concentration Levels Require Extreme Caution

Many markets in Australia have a limited number of participants but remain highly competitive**.** In this unique market, Australian operators must be able to generate sufficient economies of scale to be able to provide world class standards. While there will always be opportunities for innovative specialist operators, a sufficient share of the retail market is required to enable efficient and internationally competitive domestic retailers to survive.

This is not confined to the food retail sector. The Australian food and consumer products manufacturing industries, notwithstanding the extent of market concentration, demonstrates how competitive markets exist, including:

Australian Food & Consumer Products – Market Share

Industry	Number of major market participants	% of market held by major
Cigarettes	3	99
Beer	2	95
Biscuits	2/3	77/82
Coffee	4	92
Tea	3	79
Tomato sauce	3	63
Breakfast cereal	3	92
Carbonated beverages	3	85
Margarine	2	90
Cheese spreads	1	93
Chocolate blocks	1	73
Disposable nappies	1	72
Rice	1	71
Yeast spreads	1	89

International comparisons of market concentration levels should take into account factors such as market size and geographic spread, as well as other factors including consumer behaviour, preferences, cost structures, regulatory considerations and their relative level of efficiency all of which can affect market structure and behaviour.

For example, in the United States, national concentration levels in the food retail industry, are increasing. U.S. Food retailing on a regionalised basis, also demonstrates the same level of concentration as Australia. More specifically, when regions with similar size populations to Australia or Australian States are compared, concentration levels are similar**. (Attachment B)**

In the United Kingdom the equivalent population market concentration levels also demonstrate the higher market shares of the three major supermarket operators. **(Attachment C)**

Concentration Levels in the Food Retailing Sector do not result in Consumer Detriment

There is no direct relationship between concentration levels in the food retailing sector and an anti-competitive effect, in fact, the opposite applies. Each market is unique and needs to be examined individually for its competitiveness. Concentration levels are only used in competition assessment as a precursor to a more thorough analysis of the market.

Assessments of competition start with defining the market, and include factors such as sensitivity to price change, a product's peculiar characteristics, and the customer and increasingly, industry perception of the market parameters. Following this first step, concentration levels for the market are determined and applied against thresholds. Market share and concentration thresholds are used only as a guide for determining further analysis. Conclusions on the competitiveness of the market are not reached at this stage. Many other factors need to be examined including the level of price and non-price competition, efficiency and profitability levels, and barriers to entry. As demonstrated, Woolworths operates in an extremely competitive market in which there is intense rivalry for customers and sales.

Regulatory bodies worldwide agree that each market is unique and should be examined individually for its competitiveness. In respect to the assessment of market concentration, when assessing a merger and its impact on competition, the ACCC Merger Guidelines emphasise that a concentrated market is a necessary but not sufficient condition to enable the exercise of market power. Accordingly, the ACCC must also examine barriers to entry (whether producers outside the relevant market have the ability to enter a market so as to create an effective counterweight to incumbents already operating in that market). Similarly, competition regulators in the United States, Canada and the European Union all recognise that limiting merger analysis to only market concentration is inadequate.

The *Office of Consumer Affairs,* Canada, has reported *(Rethinking Consumer Protection Policy)* that it is not possible to predict the pricing behaviour of a market simply on the basis of market concentration, nor is it possible to say how many firms it takes to make a market competitive. The report therefore suggests that competitive pricing may emerge with relatively few firms in a market, and that even markets with many firms may be characterised by non-competitive pricing.

Furthermore, in a report from the European Union on Community Competition Rules (1998), it is acknowledged that market share is not a substitute for market power. In each individual case when considering market power, it is important to assess all aspects of market structure and market behaviour. The European Union views the use of a market share threshold test as a tool to trigger some further analysis of certain types of mergers, rather than to establish an infringement of competition policy.

The following table summarises how regulatory bodies in the United States, New Zealand, the United Kingdom, Canada and European Union assess whether a merger application should proceed. In all cases, factors other than the level of market concentration are considered.

COUNTRY	MERGER 'TEST'	THRESHOLDS	DETAILS
United States	Substantially lessening competition or tend to create a monopoly.	The merger will result in a transfer of assets worth more than $10M; or the acquiring firm has more than $100M in assets or annual sales; or the merger will increase concentration in the market above	Clayton Act has principal focus on whether mergers change incentives and ability of competitors to such a degree that competition would be substantially lessened. The thresholds play a gatekeeper role. Mergers which do not exceed the thresholds are deemed not to substantially lessen competition. Most of the mergers which require further investigation are also found not to lessen competition.
New Zealand	Substantial lessening of competition (since 2002).	No formal procedure or threshold test	Similar to Australia.
Canada	Prevents or lessen, or is likely to prevent or lessen, competition substantially	The parties have assets in Canada, or have gross annual revenues from sales in, from, or into Canada that exceed $400 million or; with respect to asset acquisitions, the aggregate value of the assets or the gross annual revenue in or from Canada, generated by, those assets exceeds $35 million	Market concentration is not prima facie evidence of a substantial lessening of competition.
United Kingdom	On public interest grounds	A merger generally qualifies for investigation. if it involves the acquisition of gross assets worth 70 million (Pounds) or more, or the creation or enhancement of a share of 25% or more in the market. for goods or services of any description.	The thresholds are used to screen mergers requiring further examination. There is no presumption that a merger which exceeds the thresholds is contrary to the public interest. The thresholds allow smaller mergers to proceed without regulatory intervention.

COUNTRY	MERGER 'TEST'	THRESHOLDS	DETAILS
European Community	Creates or strengthens a dominant position	A merger will be considered where the aggregate worldwide turnover of all of the parties concerned is more than EUC 5,000 million and tie aggregate Community-wide turnover of each of at least two of the parties involved in the merger is more than 'ECU 250 million, unless each of the parties achieves more than two-thirds of its aggregate Community-wide turnover within one and the same member state.	Mergers (or concentrations) are seen as incompatible with the common market where the merger creates or strengthens a dominant position as a result of which effective competition is significantly impeded in the common market. If it is found that the merger creates or strengthens a dominant position, as with the other jurisdictions, the test is then effectively a substantial lessening of competition test.

The Increasing Trend of Retail Globalisation and Concentration

The increase in concentration levels seen in Australia's food retail sector over the past 5 -10 years is not limited to Australia. Increasing growth of major food retailers at the expense of the smaller independent operators is occurring at the same or greater rate in most overseas countries. Worldwide consumers are demanding more choice of quality products and services at retail prices which are lower, in relative terms, than 5-10 years ago. It is the major chains rather than the smaller independent operators that are meeting these changing demands.

The drive by major food retailers across the world, for increased efficiencies in their logistics and distribution systems, has meant that those retailers willing to invest in these areas benefit from a lower cost structure, enabling them to continually 'invest' these cost savings in lower retail prices, making them increasingly more competitive than those retailers unwilling to make this commitment.

The consumer is the beneficiary of these strategic developments in retail logistics, and they can only suffer at the hands of any regulatory regime which penalises a business for investing in future efficiencies.

In addition to increasing global retail concentration , the consumer goods industry has changed dramatically during the 1990s and moved towards global marketing. Both retailers and suppliers must now make decisions on a global basis because converging consumer tastes, saturation in home markets, lower trade barriers and the opening of country economies have combined to force retailers to expand their market view. There has been growing intensity in the foreign expansion of food retailers for these very reasons.

Australia needs to ensure that its Australian-owned large retailers remain internationally competitive. In the context of global retail expansion, it is worth noting that both Metcash and Franklins are already owned by overseas interests and that Aldi, a large privately owned international food retailer, has established a strong and expanding retail base in Australia.

By world standards, Australia's major food retailers are considered to be relatively small. In the latest "World's 100 Largest Retailers Ranked by Sales" list, Woolworths is ranked around 45th and is even smaller when comparing market capitalisation, where Woolworths is ranked around 55th.

Supermarket industry concentration will grow dramatically; the stores will be fewer, bigger and better. However, whilst Woolworths is at world class levels in terms of its standards of quality, range and the price of its "offer" to consumers, its operating efficiencies are not yet at world class levels and require considerable investment. It needs to continue to strive for efficiency, domestically, to enable it to compete with the larger overseas chains in their quest for domestic market expansion.

Any regulatory intervention that has the effect of inhibiting domestic retailer market dynamism runs the risk of reducing the competitiveness of players such as Woolworths, and leaving Australia exposed to further growth of international operators in the Australian retail market.

In order for Australian companies to attain efficiencies necessary to meet a competitive world market, there needs to be a competitive and growing domestic market. The placing of artificial regulatory restrictions on consumer-based market growth reduces domestic competitiveness. These restrictions would remove the

incentive for companies to be innovative, to improve service levels and efficiencies, and to offer a high quality, broad range of products and services at consistently lower prices.

The Independent Food Retailers and Competitive Pricing

Food retailers in Australia operate in a demanding market with rapidly increasing consumer expectations of price and service levels, together with low population and demand growth. There has been significant new market entry by specialist food retailers that have been able to successfully develop niche markets. Woolworths constantly faces competition, not only from its traditional supermarket rivals, but from convenience stores, service stations and "fresh food" specialists such as bakeries, seafood and health food stores, delicatessens, meat and fruit and vegetable retailers, as well as other specialist franchise chains.

In addition to this new competition, intense rivalry between the major domestic food retailers is the driving force of increased service levels and lower prices for metropolitan, regional and rural consumers across Australia.

To further demonstrate the competition benefits being received by consumers, in 1999 Woolworths commissioned a comprehensive independent survey of supermarket food prices, product range and quality. The survey was nationally based and included 186 supermarkets and a basket of 66 products. The methodology was based on that used by the Australian Consumers Association (ACA) in its annual surveys. The findings were as follows:

- the retail grocery market in Australia is price competitive;
- the major chain stores are cheaper overall in packaged consumer goods;
- the independent stores offer a significantly reduced product range - particularly in regional areas;
- it was not appropriate to make price and quality comparisons for fresh food due to significant problems in determining quality and its impact on price;
- there were only very slight difference between prices in metropolitan areas and regional areas for the chain stores, while the price variance for the independents was much greater.

The difficulties associated with assessing the quality of fresh food emphasise why conclusions reached on results from fresh food price surveys are suspect in terms of compatibility.

While there are significant variables that may explain the differences in costs between countries and regions, the relatively low cost of food for Australian consumers indicates that they have benefited from strong competition between food retailers. Australian consumers, including those in rural and regional areas, enjoy low food prices with high standards of quality and safety by comparison with the developed world. The considerably lower net margins for the major retail food operators is evidence of this.

Australia's Current Competitive Safeguards

Suggestions that there is a need for further regulation to protect competition implies that current competitive safeguards are inadequate. This is not substantiated. The TPA is vigilantly administered by the Australian Competition and Consumer Commission (ACCC). Growth by acquisition is addressed by Section 50 of the Act, while concerns over organic growth are covered by the restrictive trade practices provisions in Part IV of the Act, including in particular, section 46 which prohibits the misuse of market power.

With the addition of Section 51AC of the Act, which protects small business from the unfair conduct of large businesses, Australians have one of the most comprehensive pieces of competition legislation in the world.

The following section examines the provisions of the TPA most applicable to retail concentration and market power.

Growth through Acquisitions

The increase in market share through mergers or acquisition is subject to scrutiny by the ACCC. Section 50 of the TPA prohibits mergers or acquisitions where they have or are likely to have the effect of substantially lessening competition in a substantial market.

Assessment of competition starts with a definition of the market. Market definition is an economic and legal concept, however, determining the boundaries of a market is purely a factual issue. The factors which are likely to impact on the outcome include sensitivity to price change, the product's peculiar characteristics, distinct customers and increasingly, industry perception of the market parameters.

The ACCC's Merger Guidelines state that following completion of the first stage (defining the relevant market), concentration levels are determined and applied against thresholds. The ACCC will use these as a guide only for deciding to continue through a process of rigorous analysis in order to determine whether there is likely to be a substantial lessening of competition.

The Industry Commission (IC) has endorsed the broad direction of the ACCC's draft Merger Guidelines and warned against the prevention of efficiency enhancing mergers or acquisitions:

> *"The IC's assessment reflects its view that the emergence of a less regulated Australian economy, increasingly open to international competitiveness, has enhanced the dynamism of marketforces and significantly reduced the scope for firms to price above competitive levels for sustained periods. The lC also considers that, while any market power and its attendant costs will generally be eroded over time through new sources of competition (often associated with technological change) the economic benefits foregone when efficiency-enhancing mergers or acquisitions are prevented or deterred can be durable".*

The ACCC has continued to strictly enforce Section 50, requesting substantial evidence of public benefits in cases where competition may be affected, prior to permitting certain mergers.

Woolworths' Supermarket Acquisitions

In new locations where Woolworths wishes to establish a store, it prefers to construct a new supermarket rather than acquire an existing supermarket business. Acquisition tends to be a more costly option. In addition to the purchase cost, most acquired stores require extensive refurbishment in order to meet the Woolworths' standards.

Pricing Behaviours

From time to time there are suggestions that the size of the supermarkets, both in range and number of stores, might lead to predatory pricing in particular areas. These suggestions are unfounded.

Woolworths' Pricing Policy

Woolworths' pricing policy in supermarkets is to sell competitively. Woolworths' prices are determined by the market and our ability to reduce our costs of operating through investment in efficiency enhancing technology in logistics and store operations. These reduced costs have meant lower prices to customers and have provided shareholders with adequate return on their investment.

In the absence of efficiency improvements and reduced operating costs, Woolworths would not be able to achieve the world class standards necessary to remain an independent Australian retail operator.

Competitive Price Checking

To maintain a competitive pricing policy Woolworths has a monitoring programme of all competitor prices. A similar monitoring exercise is also maintained by Woolworths' competitors for the same purpose.

In addition to the monitoring of prices at Buying Office level, managers of individual stores monitor local competitors to ensure that they are competitive on key products. Managers are empowered to match prices in their local area on certain items.

Price Comparisons

Woolworths' policy is to sell at the lowest price structure which it can sustain dependant upon cost and a reasonable return.

In addition, most supermarket operators regularly run programmes of in-store product promotions (specials). These weekly or monthly reduced prices will often result in those products selling more cheaply than in other non-participating outlets during the period of the promotion.

Predatory Pricing

Woolworths' prices competitively and within the boundaries of the TPA. Pricing can be challenged under section 46 of the TPA if it can be shown to be 'predatory'.

Predatory pricing is normally understood as a strategy whereby a business may temporarily sell its products below its average net variable cost in order to drive competitors out of a market. The business then aims to recoup its losses through increased "monopoly" pricing.

Predatory pricing requires the business to have a substantial degree of power in a market, using that power for the purposes of deterring or damaging competitors from competing by deliberately selling below its own cost base, or otherwise pricing in a way designed to eliminate a competitor.

It should be clearly understood that, with the benefits of technological and volume based efficiencies, some businesses will have a lower net variable cost than their competitors. It is not predatory pricing to sell at prices which reflect such cost structure, despite the fact that such cost may be below or even materially below the cost structure of its competitors.

Because much normal competitive behaviour involves responding and reducing a businesses' prices to meet competition, it is not thought of as "predatory" for any competitor in a market no matter what their respective size, to reduce its prices to match prices of another competitor.

Further, the fact that, in some locations, a business reduces its prices to meet localised competition, but does not reduce its prices to the same extent in other locations where the same level of competition is not encountered, is not regarded as contrary to the Act or a matter for criticism. Localised 'hot spots' of competition do and will occur in many markets for many reasons. Consumers are astute enough to be aware of these issues. Consumers often seek out such low prices, even if they are not available at the closest and most convenient locations to where the consumers reside. An example can be seen in the extent of price cutting in petrol in parts of the Sydney metropolitan region, where prices vary widely from suburb to suburb, due to localised competition.

As noted in the Hilmer Committee Report, predatory pricing can be difficult to distinguish from strong competitive behaviour. Economic theory has not provided a clear definition of what is meant by selling products at prices below "cost". Low prices in most instances are good for consumers and section 46 is designed to protect the interest of consumers (see High Court in *Queensland Wire),* not competitors who are not successful or who are unable to compete as successfully, as their rivals.

Our submission, therefore corrects some of the assumptions and misrepresentation of the facts and puts the issue of retail competition in the context of Australia's unique blend of distance and small population – in a global economy where efficiency and cost effectiveness is needed to continue to deliver lower prices and meet the needs of the Australian consumer.

C. WOOLWORTHS EXPERIENCE WITH ACCC

C.1. Woolworths has had a number of dealings with the ACCC over the past 10 years, both in its former and current administrative structures.

C.2. These have related to:

(i) proposed acquisitions of businesses;

(ii) investigations into alleged breaches of the TPA;

(iii) mediation and litigation by the ACCC;

(iv) responses to ACCC enquiries into market effects of proposed businesses in the food/retailing sector;

(v) responses to ACCC in relation to Inquiries undertaken in the food / retailing / petroleum sectors.

C.3. Woolworths has co-operated with the ACCC in providing information, materials and where requested, comment in relation to (iv) and (v) above and has met its legal obligations in complying with all due processes instigated by the ACCC under the TPA.

C.4. Woolworths has also, consistent with its rights, acted to contest some ACCC allegations. This has been done regardless of whether or not there was any legal obligation to do so, as a responsible member of the corporate community. This has often incurred substantial time and cost and inconvenience to Woolworths. It is part of an agreed relationship protocol between Woolworths and the ACCC, developed at the most senior levels of both organisations to ensure that there is an open dialogue, subject to the usual protections where the ACCC seeks to pursue formal processes which Woolworths does not consider appropriate.

C.5. The first observation is that, whilst at the senior levels of the ACCC there is a general understanding and acknowledgment of the significant commercial impact and implications of TPA investigation and enforcement activities, there are some instances where in Woolworths' view this does not appear to be followed. The instances of this include:

(i) investigations into an acquisition of a retail business in 1998 which Woolworths proposed to make and which, according to its legal advices would not contravene s.50 TPA but which was nevertheless, referred to the ACCC for informal 'clearance'. Market enquiries by the ACCC were undertaken in a situation where there were two keen 'bidders' for the business. After almost 6 weeks of Woolworths providing all ACCC requested information, attending meetings with ACCC officers, Woolworths was forced to proceed without any ACCC response as the competing bidder demanded the vendor commit to immediate acceptance of its offer. Woolworths advised the ACCC it intended to proceed with the acquisition. Woolworths' senior executives and lawyers were then advised by the ACCC that if it subsequently determined the acquisition to be in contravention of s.50, action would be taken against Woolworths, the senior executives and legal advisors involved in the transaction. No action was ever taken by the ACCC.

(ii) Following receipt of a s.155 Notice in late 1998, which Woolworths was advised was so broadly drafted that it could not be properly complied with, requests for specificity were made to the ACCC lawyers over an extended period of 12-18 months. Ultimately, after reviewing a large volume of documents 13 folders of material were provided to the ACCC. No advice has been received as to the outcome of the ACCC's investigations notwithstanding that it took about 18 months of management time and approximately $711,000 in legal costs to investigate the allegations made, and to comply with the ACCC's Notices.

(iii) whilst accepting that the pursuit of 'technical' contraventions of the TPA (ie. with no real competitive or consumer detriments) can be a useful example to others, where there are genuine community interests involved there is a need for the ACCC to balance such community / public interest against the perceived benefits and costs of obtaining formal orders.

This instance related to requests by a senior local government representative for local liquor retailers' support in dealing with a local community concern with alcohol consumption in public places within a remote town in far northern Australia. The request had Liquor Commission support and in addition to non-discounting of certain liquor brands, was accompanied by a request for funding to maintain a clean up program. The agreement by the local liquor retailers to these requests attracted ACCC attention and action to prosecute for anti- competitive conduct.

(iv) a further example of a perceived imbalance in the ACCC's approach to public benefit is a recent case against Woolworths involving a dispute as to whether an advertorial based statement by it in a regional area relating to Woolworths support for the areas major primary producers, was intended to mislead Woolworths customers by representing that our stores in the region involved only sold product purchased from such producers. Further, the orders sought by the ACCC in its proceedings were primarily, a corrective advertisement, and an injunction not to repeat the advertisement, remedies which Woolworths had volunteered some months earlier at the time the issue was first raised by the ACCC. That offer was rejected by the ACCC without reasons and Federal Court proceedings were commenced by the ACCC, seeking the same remedies as informally offered by Woolworths and costs. Eight months later the Court heard and reserved its decision (which is pending).

C.6. These are intended to illustrate that the ACCC does not, in Woolworths opinion, always take a pragmatic and balanced position or properly consider the cost/ public benefit implications on parties when considering the matters which are appropriate to pursue or enforce.

C.7. Woolworths is supportive of the ACCC maintaining an enforcement function though its determinations should be based on clearly expressed Guidelines, where there are demonstrated public/community benefit implications and its reasons open to scrutiny and where appropriate, review.

C.8. The merger function should also be governed by strictly enforced Guidelines as to both the principles and timeframes for decisions with an appeal to an independent panel of business, academic and government representatives also based on the same Guidelines.

C.9. Finally, any investigation by the ACCC based on a 'reasonable belief' as to contravention of the TPA, which results in the provision of extensive documents, files, records or interviews should be balanced, to take account of costs, which should be fully recoverable, over say $5,000, where no breach of the TPA is formally progressed or if it is, is subsequently not determined to have occurred.

D. THE KEY ISSUES FOR COMMITTEE REVIEW ON PROPOSED AMENDMENTS TO THE TRADE PRACTICES ACT

The Proposed Amendment to Section 46 – "Effects Test"

D.1 There are proposals to amend section 46 of the Act by adding a section as follows:

> *A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose or with the effect or likely effect of:*
>
> *(a) eliminating or substantially damaging a competitor in a market;*
>
> *(b) preventing the entry of a person into a market; or*
>
> *(c) deterring or preventing a person from engaging in competitive conduct in a market".*

D.2 This commonly referred to as an "effects test". Such proposed amendment would have widespread and significantly prejudicial implications for competitive behaviour and for the ability of all Australian businesses to strive for competitive efficiencies.

D.3 The introduction of an effects test is unsubstantiated and unwarranted; will greatly add to business uncertainty; and will inhibit investment and stifle productivity. Australian consumers will be substantially worse off as a result, particularly if the test is administered in a way that seeks to protect small and large businesses from normal, vigorous competition that delivers lower prices, better services and increased innovation to the Australian economy. There is no demonstrated need for an effects test, having regard to the ACCC's considerable measure of success in cases it has brought to date, and the high profile in the business community which the ACCC has in enforcing the Act.

Arguments in favour of an effect test

D.4 Woolworths is aware that the ACCC; the National Association of Retail Grocers of Australia ("**NARGA**"); the Queensland Retail Traders & Shopkeepers Association; the Master Grocers Association of Victoria; the Council of Small Business Organisations of Australia and also a number of others, have called for section 46 to be amended to incorporate an "effects" test rather than the current "purpose" test.

Difficulty of Proof?

D.5 The ACCC's arguments generally centre around the perceived difficulty associated with proving that a corporation acted for one of the three illegal purposes under section 46:

> "*Section 46 [should] be extended to cover anti-competitive behaviour by a firm with a substantial degree of market power which has the effect of damaging competition. At present the law required proof of anti-competitive behaviour for a breach of section 46 to be established. It is the Commission's experience that the difficulties in obtaining sufficient evidence to prove the requisite purpose required by the Trade Practices Act diminished the possibility of successful proceedings, require additional resources and cause delay before both interim and final orders can be sought. An effect test will include conduct with significant detriment to the competitive process where powerful firms take advantage of market power but where prescribed purpose is either absent or unable to be proved*."[3]

Whilst asserting difficulty "in obtaining sufficient evidence" the ACCC appears to be is assuming every "effect" has an anti-competitive purpose, but is hampered in being able to prove it. This ignores the 'inference of purpose' available under S.46 (7) TPA and assumes that all competitive effects are unilaterally included or inherently illegal.

D.6 Woolworths concern is therefore that, rather than the alleged problem being one of finding "sufficient evidence" of purpose, and "delay", the real

[3] Professor Alan Fels "ACCC, Airports and Aviation - Regulatory and Competition Issues", speech to Airports and Aviation Outlook 2001 Conference, Sydney, 12 November 2001, page 17.

implication of that submission is that the ACCC wants to outlaw conduct where the purpose is not, in fact, contrary to section 46, but nevertheless, the ACCC considers the conduct is otherwise harmful or anti-competitive by its effect.

D.7 At the outset, Woolworths submits that it would be important for the ACCC and any other proponent of reform, to explicitly and specifically identify the alleged conduct which by its effect, rather than by its purpose, should be declared illegal. It is insufficient to seek such significant reforms without clearly pointing to conduct and its consequences which cannot currently be proscribed under S.46.

Ascertaining an illegal purpose is not the problem

D.8 NARGA has argued for an effects test for a different reason:

> *"Thus, conduct under section 46 may, unlike other provisions of Part IV, escape scrutiny where an entity with a substantial degree of market power can show it was motivated by some pro-competitive purpose, no matter how self serving that purpose may have been in the circumstances. This is so even though the conduct may, from an objective point of view, be very effective in removing a rival, discouraging entry into the relevant markets or deterring competitive conduct.*[4]"

D.9 This confirms their position that a pro-competitive purpose, which is conduct encouraged by the ACCC and in the spirit and intent of the TPA, can give rise to a breach of S.46 if the unintended consequences are that a competitor is adversely affected. As NARGA has not adverted to section 46(7), under which the Courts, when applying S.46, can and do infer a corporation's true purpose from its conduct and all the circumstances, irrespective of the corporation's denials or attempts to use "self serving" purposes, it clearly does not regard pro-competitive purpose as legitimate.

D.10 In fact, in any section 46 inquiry, as a practical matter, it is incumbent on the respondent corporation to explain its purpose with reference to what it has done - faced with an ACCC inquiry or notice under section 155 of the TPA, a

[4] "Submission by the National Association of Retail Grocers of Australia to the extent of Legal and Constitutional References Committee - inquiry into the Trade Practices Act 1974, February 2002, page 10.

corporation is required to state its purpose or reasons for acting in the way it has.

A Respondent must explain its conduct

D.11 Those stated reasons can, under the current S.46, be "put under the microscope" and scrutinised very carefully by a Court for consistency with the known facts; other conduct of the corporation; other persons' conduct in the same industry, internal records, files and documents and so on. This process provides the ACCC and the Courts with a powerful check on motive or purpose of alleged illegal conduct.

D.12 It is not likely that a corporation can hide its illegal purpose when the ACCC has these investigative tools available - if in fact, the purpose exists.

D.13 If the matter goes to Court, the corporation will bear an evidentiary onus of proof, in responding to the ACCC case, to prove, to the satisfaction of a court, what was its true purpose, in the face of the allegations brought against it.

D.14 The reluctance by parties asserting the benefits of an effects test to acknowledge the value of S.46(7), suggests that pro-competitive purpose, however genuine, is irrelevant in this context.

ACCC successful in S.46 Cases

D.15 The ACCC has been reasonably successful in prosecuting cases under section 46. The ACCC has only failed where, in Woolworths' submission, the relevant purpose did not exist - not that the purpose could not be "found" or "not proven". After all, the ACCC only has to prove purpose and the other elements on a civil standard, i.e. more probable than not[5]. In Woolworths' view, the proponents of an effects test have not demonstrated the need for the introduction of such a change.

Woolworths, in its submission to the *Senate Legal and Constitutional References Committee Inquiry into section 46 and section 50 of the Trade Practices Act 1974*, noted that it is far from apparent that the ACCC, or any

[5] This is discussed further in Woolworth's submission to the Senate Legal and Constitutional References Committee inquiry into Section 46 and Section 50 of the Trade Practices Act 1974

other person, has significant problems with proving the "purpose" element in section 46 actions.

D.16 We refer the Committee to Woolworths' Submission to the Senate Committee of Inquiry and **attach** it for the Committee's reference.

D.17 Woolworths submits that the "purpose test" as currently framed is a critical element for addressing the core object of a prohibition on misuse of market power. It stops larger corporations from deliberately targeting smaller rivals or setting out to damage the competitive process. The difficulties of establishing purpose are, in Woolworths' view, overstated. Under section 46, the purpose of a corporation may be established by direct evidence or by inference.[6] Further, the purpose in section 46 need not be the only purpose to attract the operation of the section. It need only be a substantial purpose.[7]

Past consideration of an "effect test" reform

D.18 Introduction of an effects test has been considered in a number of reviews of the Act over the past 23 years. On every occasion, the introduction of an effects test was rejected[8].

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[6] Section 46(7). TPA

[7] Section 4F(b) TPA

[8] The following Committees rejected or refused to endorse the idea of incorporating an effect test into section 46 TPA:

(a) the *Trade Practices Consultative Committee (the Blunt Committee), 1979;*

(b) *the House of Representatives Standing Committee on Legal and Constitutional Affairs (the Griffiths Committee), 1989;*

(c) *the Senate Standing Committee on Legal and Constitutional Affairs (the Cooney Committee), 1991;*

(d) *the Independent Committee of Inquiry (the Hilmer Committee), 1993;*

(e) *the House of Representatives Standing Committee on Industry, Science and Technology (The Reid Committee), 1996/97;*

(f) the *Joint Select Committee on the Retailing Sector (The Baird Committee), 1999; and*

(g) *the House of Representatives Standing Committee on Economics, Finance and Public Administration (the Economics Committee, 2001).*

D.19 In addition, the Productivity Commission has recently noted, in its report into the operation of Part XIB of the Act, that after considering the recent experience of the effects test, under Section 151 AJ of the Act, that the test was of doubtful usefulness, in the context of telecommunications.

D.20 Common to all of the findings of these Committees were the concerns that Woolworths endorses, namely:

(a) an effects test would not usefully be able to distinguish between legitimate and illegitimate activity;

(b) an effects test would substantially widen the application of section 46 and create significant and ongoing uncertainty for all Australian businesses;

(c) an effects test would catch pro-competitive behaviour and would therefore have an adverse impact on the competitive nature of Australian businesses by ensuring that those businesses with the lowest productivity and efficiency and highest operating costs would become the benchmark for pricing and competitive activity.

Legal uncertainty and Business Compliance Costs

D.21 Section 46 as currently drafted, is widely recognised, by the judiciary, practitioners and academics as an onerous provision with which to comply. Defending a section 46 investigation or prosecution often requires complex economic and accounting evidence. Adding to this concern for business is the need to constantly tread a fine line between vigorous competition, which is encouraged by the Act and exclusionary conduct which is prohibited by it.

D.22 As the High Court has noted, it is difficult as a matter of law and fact to distinguish "vigorous competition" from "monopolistic practices". As Dawson J said, "*Both here and in the United States, the search continues for a satisfactory basis upon which to make the distinction*".[9]

[9] *Queensland Wire Industries Pty Limited v The Broken Hill Proprietary Company Limited* (1988) 167 CLR 177 per Dawson J at 202.

D.23 It is no answer to this judicial process to legislate to make all "vigorous competition" deemed "monopolistic practice".

Moreover, in Woolworths' view, the introduction of an effects test will not provide this satisfactory basis. Indeed, it will add to the difficulties of legal interpretation to which section 46 has been prone and will lead to an uncertain and increasingly uncompetitive market for goods and services and an uncompetitive economy in an increasingly competitive global market.

D.24 An effects test will not be easier for courts or businesses to apply than the present "purpose" test and will accordingly not provide greater certainty or consistency in the law. It will be necessary to prove the relevant harmful effect or likely effect, and also that the effect was or will be caused, by the 'taking advantage' of the firm's market power.

D.25 The major uncertainty is to distinguish those cases where a corporation may use its strengths - its technologies, brand, selective distribution system, buying power - to drive greater efficiencies,- but the impact is to make it more difficult for less efficient, less innovative or less effective rivals to compete. This is the fundamental dilemma which this reform poses. How can companies know, before embarking on conduct whether it will be lawful?[10]

D.26 The proposition that the element of "taking advantage" of market power will "screen out" innocent cases is highly problematic. The "taking advantage" phrase is enigmatic, as shown by the history of the Melway litigation. Its precise meaning is yet to be settled and cannot be regarded as a reliable base upon which to protect pro-competitive conduct, in the absence of a purpose test.

D.27 Markets are by their very nature, dynamic environments. It will be very difficult to establish whether a reduction in competition (assuming that the effects test is phrased in this manner) has been caused by particular unilateral conduct, or a combination of conduct by different firms, or, indeed,

[10] see, for eg, *Melway Publishing v Robert Hicks* [2001] HCA 13 at [8] "provisions such as s46 should, if such, on construction is fairly open, be construed in such a way as to enable the monopolist, before he enters upon a line of conduct, to know with some certainty whether or not it is lawful." (Telecom Corporation of New Zealand v Clear Communications Ltd) per Gleeson CJ, Gummow, Hayne and Callinan JJ.

contributed to by the inefficiency of, or poor decision making by, an aggrieved competitor. This is particularly so when one considers that section 46 litigation often involves conflicting economic evidence.

An effects test will catch legitimate competitive conduct

D.28 In Woolworths' view, an effects test is an inappropriate tool to distinguish between "vigorous competition" and "monopolistic practices".

D.29 There is a significant range of activity which could be constituted as "taking advantage of market power" which may have an incidental anti-competitive effect or an effect of excluding rivals, while having a pro-competitive purpose. Some examples would be as follows:

(a) the creation of an exclusive distribution system;

(b) matching the price of a smaller competitor to remain competitive in the market;

(c) tying products and services to take advantage of supply chain efficiencies and economies of scope;

(d) expanding into different brands and product lines to target different economic segments of the market;

(e) putting legitimate pressure on suppliers to reduce the prices of product inputs; and

(f) entering into most favoured nation trading arrangements with certain larger customers.

D.30 The above activities all can have significant benefits for customers and reflect efficiencies that larger businesses are able to take advantage of. However, it is possible that these activities could also have an effect of establishing barriers to entry or damaging rivals. If an effects test is introduced into section 46, which of the above practices could be illegal, and when, regardless of the corporation's motivations? Woolworths submits that the above practices should only be illegal when done for an illegal purpose as they can be, by their nature, quite likely to damage a competitor, often unintentionally.

An effects test will result in a "chill" in business activity

D.31 The introduction of an effects test will inevitably be "over inclusive" in prohibiting some activity that is neutral or beneficial from a competition perspective and will:

(a) increase the uncertainty surrounding section 46; and

(b) catch legitimate competitive activity under section 46

D.32 The effect of this will be to significantly alter the way that all businesses in Australia operate. Market share is no longer the determinant of market power (see Melway). This puts pressure on all businesses, uncertain of their likely impact on competitors, from assuming legitimate competitive activity will not be caught by Section 46.

D.33 Corporations who may have some degree of market power will have to take into account the impact of every business decision on their competitors and assess whether it may cause damage. This is an unsatisfactory way for businesses to operate. Compounding this problem is the reality that many decisions made by a large business in Australia will, in some way, almost by definition, cause some damage to a competitor. That is the nature of the competitive process. Rivals constantly attempt to secure an advantage for themselves which, naturally, is accompanied by some degree of disadvantage to a rival.

D.34 The proposal to introduce an effects test will radically alter many aspects of business activities, from pricing decisions, to negotiations with customers and suppliers, to market entry to service and product development.

D.35 It is submitted that the proposal to introduce an effects test is contrary to the objects and intent of the Act. The introduction of an effects test would not be to the benefit of the end consumer but, rather, would often be to the sole benefit of smaller, less efficient businesses.

Comparison with the United States

D.36 As a final point, the ACCC has suggested that the introduction of an effects test will bring Australia into line with the United States[11]. In Woolworths' submission, this is not accurate.

D.37 Section 2 of the Sherman Act (US) provides that it is an offence to monopolise, or attempt to monopolise, any part of trade or commerce. The offence of monopolisation has two elements:

(a) possession of monopoly power in the relevant market; and

(b) wilful acquisition or maintenance of that power.

D.38 In Woolworths' submission, an Australian effects test would be more onerous than the United States law for three reasons:

1. The United States prohibition is directed only towards attainment or use of monopoly power, whereas the Australian section 46 is directed to firms with a lower threshold of substantial degree of market power. Recent decisions have demonstrated that the Australian courts have found that corporations have a substantial degree of market power where they have 15% market share[12]. In the U.S., if the corporations' market share is lower than 70%, courts become much more reluctant to find monopoly power. Some U.S. courts hold as a matter of law that a share less than 50% is insufficient[13]. Compare this to Australia where there is a low market power threshold and the introduction of an effects test would affect a very significant part of the Australian business community.

   The range of cases which may be brought under section 46 is therefore already wider than under section 2 of the Sherman Act.

[11] Sydney Morning Herald, *ACCC to push for jail terms*, 2 July 2002

[12] *Australian Competition & Consumer Commission v Universal Music Australia Pty Limited; Australian Competition and Consumer Commission v Warner Music Australia Pty Limited* [2001] FCA 1800

[13] Federal Antitrust Policy, 2nd ed., H Hovenkamp, (1999) p.270

2. Further, the United States Courts, in interpreting section 2 of the Sherman Act have been willing to grant exemptions to remove from the scope of section 2 the acquisition or maintenance of monopoly power which has arisen from growth or development as a consequence of a superior product, business acumen or historic accident.[14].

   In Woolworths' view, Australian courts are unable to read such a limitation into section 46 if the relevant test was simply changed to an analysis of the effect of the conduct on competition.

3. The United States law on section 2 of the Sherman Act has developed over a century of active jurisprudence. The United States courts have been forthright in interpreting and changing the approach to section 2. They have a history of crafting glosses and exceptions to the prohibition and amending their interpretation of the section over time. At one time in history, section 2 resembled a "per se" prohibition on the possession of monopoly power.[15] The courts have recently retreated from this approach.[16]

   It is submitted that Australian courts are simply not able to read glosses and significant limitations and exceptions into legislation. It is unlikely that Australian courts could "exempt" pro-competitive behaviour unless the legislation expressly provided.[17]

D.39 To be applied with any degree of certainty, it would appear that an "effects" test would have to be literally construed in Australia. This would not assist in the differentiation between legitimate competitive and illegitimate monopolistic conduct referred in *Queensland Wire*.

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[14] *United States v Grinnell Corp* 384 US 563 (1966)

[15] eg *United States v Aluminium Co (America)* (1945) 148F 2 d 416 - an often cited - never followed decision

[16] Eg, *MCI Communications Corp v American Telephone Telegraph Co* (1983) 708 42d 1081

[17] On Australian Courts' reluctance to put "glosses" on legislation see, eg, *Mills v Meeking* (1990) 91 ALR 16 at 30-31 per Dawson J; *R v L* (1994) 122 ALR 464 per Burchett, Miles and Ryan JJ at 468-9

D.40 The proposed amendments to the TPA to introduce a 'Reversal of Onus of Proof in S.46 cases' and 'Divestiture for S.46 Contraventions' have been dealt with, in detail, by Woolworths in its Submission to the Federal Senate Legal & Constitutional Committee in December, 2001. Rather than repeat the Company's position on these proposed amendments, a copy of Woolworths' Submission is **attached** for reference.

E. ACCC ACCOUNTABILITY AND TRANSPARENCY

Summary

E.1 The ACCC currently has very broad powers, and regularly makes decisions or initiates processes which have an immediate and significant effect on businesses and industries and has a significant and lasting impact on the Australian economy.

There is genuine concern in the Australian business community with the lack of transparency or accountability for such ACCC decisions.

An independent Competition Review Board is proposed which would monitor the direction and focus of the ACCC, and review individual cases in prescribed circumstances.

E.2 The full time ACCC, acting as a Commission or independent Commissioners, are not appropriate, from a governance perspective, to perform this independent review function. They cannot be expected to independently review the balance and impact of their own decisions. The presentation of a broad based report to Parliament annually is also not sufficient to make the ACCC as open and accountable as it needs to be, to maintain business and public confidence and to generate certainty and a balanced approach to competition regulation.

Why is there a need for oversight and review of the ACCC?

E.3 The ACCC has, over recent years, taken a prolific role in regulating, investigating, prosecuting and influencing the structure of, Australian businesses and the nature of how they operate. The cost burden and business effect of complying with ACCC requests, section 155 notices, general enquiries, litigation and the reputation implications of ACCC-generated publicity is high.

E.4 Woolworths supports an efficient ACCC administrative process that operates and is, perceived to operate to preserve and foster competitive markets. Woolworths submits that there is a lack of transparency in the ACCC's decision making processes. Although the ACCC, in a prosecution,

must ultimately prove any allegations in court, only a small part of its role, function, activity and interface with businesses involves prosecutions or legal action. It has a significant role in making decisions which have a very direct and immediate effect on Australian business and the economy - such as mergers, merger undertakings, choice of cases to pursue, and regulatory powers.

E.5 It is the immediacy of many of the ACCC's decisions, the large impact that such decisions can have on a particular business, industry or the economy and its broad powers that require the ACCC ‘s decisions to be transparent and to be accountable to a review body.

E.6 For example, the ACCC's involvement in

- granting informal clearances to mergers under section 50;
- deciding whether or not to proceed with a s.46 investigation (and contacting all of the relevant corporation's customers); and
- making public statements which criticise various interests in the business community;

are not open procedures and are not subject to any form of merits review. Virtually no merger decision is reviewed in Court, and very few go through an authorisation process. Authorisation is a rarely used process, and the timetable involving in a rehearing in the Tribunal does not account for the commercial consequences of a delayed process.

E.7 The ACCC adopts an adversarial position in its enforcement functions and may engage in tough litigation tactics in an attempt to reach its desired outcome. This may be necessary in some cases, especially in cases of egregious breaches of the Act. However, the ACCC should be open enough to be answerable for its actions. Given the ACCC's focus on the investigation or prosecution at hand, it is ill equipped to step back and assess the merits of its own actions or whether or not its activities and approach are desirable.

E.8 The ACCC Commissioners all participate in the actual decision making processes of the ACCC in relation to specific matters. They are therefore

not able to monitor independently the overall direction and value of the ACCC's activities, or whether a particular investigation or decision is warranted.

E.9 Woolworths submits that an annual report to Parliament does not go far enough in holding the ACCC decisions and processes to account. The Administrative Appeals Tribunal and the Ombudsman have a very limited role in relation to the ACCC and do not provide a satisfactory check. Nor do Senate Estimates Committees have the time, nor the expertise to investigate issues which involve scrutiny of individual decisions or actions, in advance of their implementation.

E.10 The ACCC's decisions on more contentious issues are not subject to any form of review or high level consideration or justification. Indeed, the ACCC's various roles in terms of prosecution, merger control, law reform, authorisations and investigations often put it in a position of conflict of interest.

E.11 Woolworths submits that, in such circumstances, there should be an independent Competition Review Board, which could monitor and review the ACCC's decision on an individual case and overall ACCC policies and guidelines.

E.12 A Competition Review Board would boost the public's and business' confidence that the ACCC is acting openly, fairly and effectively.

What would be the function and activities of an Independent Competition Review Board?

E.13 Woolworths submits that a Competition Review Board would meet monthly and receive a report by the ACCC on its activities, priorities and recent decisions. The Review Board could be empowered to issue directions to the ACCC in relation to policies and aspects of the ACCC's operations and to ask questions and seek responses from the Commissioners or any other parties on issues relating to ACCC decisions, activities, policies and processes.

E.14 Further, the Review Board could be empowered to review individual cases upon application by a party (obviously, criteria would have to be developed).

E.15 Woolworths envisages that the Competition Review Board could be required to be consulted in relation to major ACCC decisions and would be empowered to request information from the ACCC to ensure that it is complying with its legislative mandate and not exceeding its powers.

What would be the composition of a Competition Review Board?

E.16 While the composition of a Review Board is a matter for the Government, Woolworths submits that it could be made up of a member from the National Competition Council, representatives of the Treasury, and of the States, an economist, a legal representative, a representative of business and a consumer representative. Such a composition would bring together a collection of independent experienced individuals who would be able to use their expertise to review the ACCC's performance.

E.17 The Competition Review Board's involvement in the day to day activities of the ACCC would be limited. It would act like a board of non executive directors of a company and be able to direct the ACCC on general policies. It would be primarily concerned with the "bigger picture" issues, with, perhaps a limited role in relation to reviewing individual decisions.

E.18 In this way, the business community and the public would be confident that the ACCC is acting properly, is subject to review and is accountable for its actions.

F. CONCLUSION

F.1 The Chief Executive Officer of Woolworths Limited would be happy to appear in person before the Committee to address the issues raised in this submission and any other issues that the Committee is considering as part of its review. Woolworths' contact in relation to this matter is Rohan Jeffs, Company Secretary, Woolworths Limited, Level 5, 540 George Street, Sydney NSW 2000.

Woolworths Limited

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