

**Report to the Senate by the
Australian Competition and
Consumer Commission on prices
paid to suppliers by retailers in
the Australian grocery industry**

September 2002



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42 August 2002

Senator the Hon. Paul Calvert
President of the Senate
Australian Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Calvert

In accordance with the Order of the Senate of 8 February 2001, I am pleased to present you with the Australian Competition and Consumer Commission's report on its inquiry into prices paid to suppliers in the Australian grocery industry.

In presenting this report, I acknowledge the assistance given by the grocery industry in responding voluntarily to the survey questionnaires and for the comments freely given during the inquiry. I also acknowledge the assistance of the Commission's consultant, Ms Rhonda Smith, for the economic analysis of price discrimination used in this report.

Yours sincerely

Professor Allan Fels AO
Chairman



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Glossary

Act	The <i>Trade Practices Act 1974</i> .
AFGC	The Australian Food and Grocery Council—the peak national organisation representing Australia’s processed food, drink and grocery products industry.
Baird Committee	The Joint Select Committee on the Retailing Sector of the Australian Parliament that reported in August 1999 and is scheduled to reconvene in 2002.
Banner groups	Grocery retailers that operate within a cooperative arrangement with a wholesaler to purchase bulk supplies and to sell those groceries under an identifiable store image or ‘banner’—technically, banner groups fall within the definition of a franchise.
Buyer power	Manifests itself as a firm’s market power in being able to demand lower prices for inputs and reduced terms and conditions from its suppliers compared to that firm’s competitors.
Buyers	The independent wholesalers and the major retail supermarket chains.
Case deal	An arrangement between a supplier and a buyer in which a discount, rebate or special deal (e.g. free supply of product included with a larger order) is given in addition to standard terms of trade. (See an explanation of the term at paragraph 43 of <i>ACCC v Australian Safeway Stores Pty Limited</i> (No. 2) [2001] FCA 1861.)
Category management	Generally refers to the allocation of shelf space to a particular product or products and the location of a supplier’s product in a supermarket. The supermarket may do its own category management or outsource that task to a particular supplier.
Commission	The Australian Competition and Consumer Commission established under the <i>Trade Practices Act 1974</i> .
Customers	Wholesale buyers—can include independent retail outlets who deal directly with some suppliers.
Front-end supply (or upstream supply)	For the purposes of this study refers to the business relationship and terms of trade that operate between suppliers and their customers which is usually limited to wholesale purchases in bulk quantities but also includes direct supply to retail outlets in some circumstances.

Grocery	For the purposes of this study is specified as 'a selected basket of groceries' that includes food items, beverages, tobacco products, paper products and domestic cleansers (see p. 6 of the Commission's discussion paper on the ACCC's website).
Independent wholesalers	Suppliers to the grocery market. They supply to banner groups and independent retailers—this sector is in competition with the major retail supermarket chains.
Investment buying	When a buyer takes the opportunity to buy in bulk when a wholesale supplier offers special price deals. The buyer may decide to warehouse the product and then on-sell to the retail market at the usual market price when the bulk wholesale discount price is over.
Market power	The ability of a firm to behave persistently in a manner different from the behaviour that a competitive market would enforce on a corporation facing otherwise similar cost and demand conditions. (Kaysen and Turner, <i>Antitrust Policy</i> (1959)).
Misuse of market power	A term used to describe a contravention of s. 46 of the Trade Practices Act. A contravention of s. 46 occurs when a firm with substantial market power takes advantage of that power for one of three proscribed purposes, namely eliminating or damaging a competitor, preventing entry into a market, or deterring or preventing competitive conduct.
Off-invoice	Special discounts or rebates agreed between the supplier and buyer (additional to the standard terms of trade that usually appear on invoices accompanying delivery).
Order	The order of the Australian Senate agreed to by the Senate on 8 February 2001 and transmitted to the Commission requiring reporting to the Senate on matters specified in the order (the details of the order are shown at chapter 2.1 of this report).
Price	For the purpose of this study and consistent with the Senate order. The total funding support given by suppliers to their buyers and not the individual price for a single product (see the discussion about the expanded meaning of 'price' used in the grocery industry at paragraphs 1024 to 1027 of <i>ACCC v Australian Safeway Stores Pty Limited</i> (No. 2) [2001] FCA 1861).
Price differences	For the purpose of this study—any difference paid to suppliers by wholesale buyers of bulk groceries where the difference is a comparison in annual percentage terms of the 'net net' price paid after adjustment for standard discounts and any off-invoice or deferred terms. 'Price difference' does not relate to any particular unit or 'shelf price' of a grocery product.

Price discrimination	<p>It has both a legal and an economic connotation. For convenience, these are expressed as:</p> <ul style="list-style-type: none"> ● in a legal context it is charging buyers of goods of like grade and quality different prices or setting different terms of trade (including discounts, allowances and rebates) for those goods; price discrimination in itself is no longer subject to a general prohibition under the <i>Trade Practices Act 1974</i> (the prohibition, until its repeal in 1995, appeared as section 49) ● in an economic sense it is usually taken to mean setting different prices for different market segments even when the cost of supplying is much the same.
Retailers	<p>The major retail supermarket chains (or sometimes referred to as the major chains) that are vertically integrated with both wholesale and retail grocery divisions. For convenience, this study largely confines the use of the term to Woolworths and Coles. Historically, it might have been argued that Franklins could also fit the term, but Franklins has been the subject of a recent sell-down. ('Retailers' are more commonly known as the outlet for sales to consumers).</p>
Retail outlet	<p>The point of sale to consumers.</p>
Street money	<p>The funding support that an independent retailer may receive directly from a supplier to promote a particular product to consumers. Street money may take a variety of forms including training, conference support, display cabinets, fit-outs and financial supplements.</p>
Supermarket chains	<p>For the purposes of this study comprises Woolworths and Coles, also referred to as the 'major chains'. (See the comments in 'retailers'.)</p>
Suppliers	<p>The major manufacturers, producers, processors, suppliers, brokers and importers (comprising no more than 50 for the purposes of this study) and listed in the questionnaires as suppliers to 'wholesalers' and 'retailers' on the ACCC's website.</p>
UK grocery code	<p>The Code of Practice on Supermarkets' Dealings with Suppliers that was publicly announced by the United Kingdom's Department of Trade and Industry in London on 31 October 2001.</p>
Unconscionable conduct	<p>When a firm in a stronger bargaining position in a business relationship exploits a vulnerable weaker business without regard to conscience. Part IVA of the <i>Trade Practices Act 1974</i> contains the unconscionable conduct provisions.</p>

ACKNOWLEDGMENT

The Commission relied upon the goodwill and cooperation of a range of participants in the grocery industry to complete this voluntary inquiry. That cooperation is appreciated.

The data collected is commercially sensitive and the reluctance of all respondents to provide confidential price sensitive data is recognised.

Price data was supplemented in some cases by useful commentaries on the operation and dynamics of the grocery industry in Australia. In some cases, only comments were provided.

There are obvious limitations in the data. These limitations have resulted in an inability to fully use some of the comprehensive submissions when the material, say, from a smaller wholesale buyer did not have the corresponding coverage in the top ranking by suppliers. This was, in one case, a geographical feature, particularly for Tasmania and Tasmanian Independent Wholesalers (TIW).

All responses were valued, but some participants offered assistance in making time available for additional comments. These included the Australian Food and Grocery Council, the National Association of Retail Grocers of Australia, Coles, Metcash, Coca-Cola Amatil and Woolworths.

The comments provided by Ms Rhonda Smith on the Australian grocery industry are also acknowledged.

chapter 1 Summary

Conclusions

Findings in study limited to data voluntarily provided to the inquiry

This study was conducted on the basis that responses were voluntary. The subject matter of the inquiry involved price sensitive commercial data. The Commission did not expect to receive a complete set of returns to its publicly released questionnaires. From a survey field of 50 suppliers, the Commission received 19 submissions that contained financial data. Some other submissions contained comments only. The Commission is not able in this inquiry to invoke its statutory powers to compel the submission of information from any person or business.

In the financial data that was voluntarily supplied, the Commission was unable to identify whether the sample was biased in favour of the major retail chains or the independent wholesalers.

One issue in the study of the financial data was how to categorise the pricing data for the then supermarket chain, Franklins. Franklins at one stage held 16 per cent of the retail market, but was eventually sold-down in 2001. The Franklins name was then acquired by the South African supermarket giant Pick 'n Pay. Franklins stores were sold to several buyers. The survey period of 1999–2000 and 2000–01 relates to Franklins up to the period to its sell-down. Prices paid by Franklins in the survey period may not be typical of the usual market arrangements. In addition, it is open to assume that the terms of the Senate order are largely confined to a comparison with the major 'retailers' Woolworths and Coles. The 'Franklins factor' has presented the inquiry with difficulties in terms of categorisation. The Commission notes that the survey period may have been atypical.

Two forms of price discount operate in wholesale market

Broadly stated, buyers of bulk grocery supplies at the wholesale end of the grocery market will encounter two layers of discounts. There is a standard price list that is subject to standard discounts and rebates e.g. for volume (or quantity) buying from a supplier. Then a second layer of discounts on price that is tied to mutually agreed promotional activities. This second layer is sometimes referred to as off-invoice or deferred terms. These two layers of discounts result in price differences paid by some buyers who may compare prices.

In Australia a buyer of grocery products from a supplier does not have a legally enforceable right to buy those products at the same price as a customer of a similar scale. The general prohibition on price discrimination was removed from the *Trade Practices Act 1974* (the Act) in 1995. Other provisions in the Act address anti-competitive conduct involving price discrimination, notably s. 46 (misuse of market power).

Consistent with the terms of the Senate order, the Commission confirms that 'price' at the wholesale end of the market does not mean the individual price of a product—it has an expanded meaning. It means the price paid less the amount of 'funding support' provided by suppliers to wholesale buyers and, in some cases, direct to retail outlets. When the two layers of discount impact on the purchase price they produce a 'net net' price.

Data does not indicate any specific breach of the Trade Practices Act

Buyer power is present in the Australian grocery market but, on the data received, the suppliers do not favour any single buyer. Allowing for the 'Franklins factor' (see above), the data can be presented in several ways. An aggregate of Woolworths, Coles and Franklins as 'retailers' compared to other wholesale buyers shows that the better wholesale prices are more often obtained by the 'retailers'. Independent wholesalers do, however, receive some of the better wholesale prices in the same period but to a lesser extent.

A comparison that excludes the 'Franklins factor' altogether shows that Woolworths and Coles receive better wholesale prices more often than the independent wholesalers.

Suppliers did not necessarily give the same buyer the best deal in both of the periods.

In this inquiry, the Commission has been asked to consider whether there are any likely breaches of the Act, such as s. 46 (misuse of market power). The Commission has not reached the view that there has been a breach of the law. In addition, this inquiry has not concluded that the extent of price differences apparent in the front-end (or upstream) part of the supply chain for groceries is likely to breach the competition provisions of the Act at this stage.

From the data obtained, the price differences that are apparent do not give rise to concerns about public benefit issues.

Codes of conduct

The Commission supports periodic review of the voluntary Retail Grocery Industry Code of Conduct and recommends that the UK Code of Practice on Supermarkets' Dealings with Suppliers be examined as a useful comparison, particularly in the area of offering greater transparency in standard terms of trade.

The principle of 'like terms for like customers': the market

The principle espoused in the Baird Report (1999) of 'like terms for like customers' has been articulated quite differently by the independent wholesalers on one hand and the retail chains and the suppliers' representative (Australian Food and Grocery Council) on the other.

The view of the independent wholesalers is that the market is determined by reference to the size of each central wholesale distribution warehouse. Consistent with the terms of the Senate order, the independent wholesalers articulate the principle as 'like terms for a customer of a similar scale'. It is an argument that, broadly stated, says that if a supplier is sending the same size truck to the same size wholesale warehouse then the price for that product delivered into the warehouse should be the same. In some cases, independent wholesalers also provide promotional services for suppliers. The concern of the independent wholesalers is that, if wholesale competitors do not start out paying essentially the same price at the wholesale end of the supply chain (for comparable deliveries into a distribution warehouse), then that will impact along the supply chain to the retail end of the market.

In contrast, the retail chains tend to view the wholesale distribution warehouse as a delivery point for products destined for retail outlets. Suppliers regard the presentation and promotion of their product to consumers as a critical aspect of the grocery supply chain and one that affects terms of trade. To that extent the retail market has an appreciable impact at the wholesale or upstream end of the grocery chain. This view results in an articulation of the principle as 'like terms for like performance'.

A factor not fully revealed in the data but recognised by the Commission and others in the grocery industry is the presence of multi-level funding support by some suppliers, usually referred to as 'street money'. The retail chains are integrated structures and the supplier negotiates at one point. In the independent sector, the supplier may spread the price support over both the independent wholesaler and the independent retail outlet. The aggregate of funding support in the latter example may be only marginally different in total to the single point pricing support agreed with the major retail chains. This inquiry was unable to estimate the total value of street money in the Australian grocery market.

The Commission notes the debate in the industry and the divergence of views about the principle that should apply to terms of trade. The issues are explored more fully in the body of this report.

Fresh fruit and vegetables

In the course of its inquiry, the Commission received representations to consider addressing the issue of prices offered to primary producers for fresh fruit and vegetables. For the same reasons as expressed by the Baird Committee (1999) and in the UK Competition Commission's report on supermarkets, the Commission recognised that the complex variables facing these sectors would take the inquiry into issues that are special to

those sectors. These include pricing issues arising from consignment and sale of fresh produce at the metropolitan markets, cooperatives and processors and for export. For that reason, the Commission cautions against applying the findings in this report on price differences to the fresh fruit and vegetable sectors.

The Commission has undertaken its own in-house study of the complexities impacting on supply chain issues affecting primary producers and will issue an explanatory publication in the near future to assist these small businesses.

An economic hypothesis on price discrimination

The Commission was asked to provide an outline of the circumstances in which differences in prices paid might amount to a breach of the anti-competitive conduct provisions of the Act. The Commission has provided those views in a hypothetical form in this report.

chapter 2 Introduction

2.1 Senate order

On 8 February 2001 the Australian Senate agreed to the following order:

- (1) That there be laid on the table, as soon as practicable after 30 June 2001, a report by the Australian Competition and Consumer Commission on the prices paid to suppliers by Australian grocery retailers for the goods that they re-sell, and whether retailers and wholesalers of a similar scale, as customers of suppliers, are offered goods on like terms and conditions, and including:
 - (a) an assessment, based on a sampling of key suppliers and major retailers of:
 - (i) the extent of any price differences,
 - (ii) the impact of any such price differences on competition in the relevant markets, and
 - (iii) whether there is public benefit in the existence of price differences;
 - (b) subject to paragraph (2)(b), identification of any conduct found by the commission in the course of preparing the report that is likely to be in breach of the *Trade Practices Act 1974*, together with an account of action taken or proposed to be taken by the commission in respect of such conduct; and
 - (c) an outline of the circumstances in which, in the commission's view, differences in prices paid to suppliers by the various industry participants would amount to a breach of the anti-competitive conduct provisions of the Act.
- (2) That, in carrying out the requirements of paragraph (1), the commission:
 - (a) is to take 'prices' to include all aspects of the terms and conditions of dealings between retailers or wholesalers and their suppliers, including the total funding support given by suppliers to the major retailers and wholesalers; and
 - (b) may withhold genuinely commercially sensitive information from the report provided that the withholding of such information does not prevent the commission from giving the Senate a clear account of the matters mentioned in paragraph (1).

2.1.1 Brief background

On 30 August 1999, the Joint Select Committee on the Retailing Sector tabled its report, *Fair market or market failure? A review of Australia's retailing sector*.¹ The Joint Committee was chaired by the Hon. Bruce Baird MP. The work of the committee is referred to in this study as the 'Baird Committee'.

Included in the Baird Committee report was a recommendation (Recommendation 5) that the Commission be empowered, in association with a proposed mandatory code of conduct, to address the 'general principle of like terms for like customers'. The recommended role of the Commission was to seek information from corporations on confidential terms and condition of contracts for the supply of groceries.

On 8 June 2000 the government responded to the Baird Committee recommendations. On the matter of the proposed role for the Commission, the government stated:

In addition, the proposal for the ACCC to be able to obtain information about supply terms raises a number of issues. First, there is the question of whether it is the role of the ACCC to monitor price discrimination per se. Second there is the question of whether the ACCC should have a right of access to information about supply terms. The government believes that these would be inappropriate.²

On 8 February 2001 the Senate agreed to the above order.

In the grocery industry it is generally accepted that suppliers operate from a price list and they offer standard discounts to all buyers at the wholesale point in the supply chain. This produces a net price. What is of key concern to independent wholesalers is that there are additional discounts and rebates that are usually tied to promotional support of a supplier's product. This produces a 'net net' price. The independent wholesalers argue that not all buyers are assured of getting the same 'net net' price.

The terminology used to describe this second layer of price reduction is varied. Simply stated, a supplier may offer a product at \$25 per case. Standard discounts for bulk buying (quantity discount) and for a variety of components such as prompt payment and ullage (wastage and shrinkage in the warehouse) offer a price reduction to, say \$20 per case. All buyers are likely to be offered those standard terms of trade. What can then be negotiated are 'deferred' and 'off invoice' terms and allowances that are usually tied to periodic promotional activities at the retail outlet. This may take the form of a 'case deal' where a further reduction of \$4 per case is offered (or it may take the form of a portion of free supply of the product). The supplier invoices the buyer for a net price of \$20 per case and then in accordance with the agreed promotional activity, the buyer invoices the supplier for \$4 per case. The 'net net' price is then \$16 per case at the upstream or wholesale point.

¹ *Fair market or market failure? A review of Australia's retailing sector* by the Joint Select Committee on the Retailing Sector, Parliament House, Canberra, August 1999.

² See *Retailing sector committee report: Government response*, Senator Ian Campbell (Manager of Government Business in the Senate), Senate *Hansard*, 8 June 2000, pp. 14988–14993.

The major retail chains such as Coles and Woolworths are integrated structures (wholesale divisions and retail outlets in one corporate entity) and they are well placed to negotiate and implement these additional terms to obtain further price reductions. Independent wholesalers have various structures and while they are sometimes the conduit for the additional terms of trade, in some other circumstances suppliers will also offer promotional funding direct to independent retailers. Some suppliers argue that when the funding support for both the independent wholesalers and the independent retailers is combined the end result is much the same compared to the price reductions offered at the single contact point of the major retail chains.

The key argument made by independent wholesalers is that the overall funding support should be governed by the 'general principle of like terms for like customers'. They argue that there should be no price discrimination at the upstream point of supply, otherwise the major retail chains will have a price advantage that may produce anti-competitive outcomes.³

As a general observation, price discrimination can also produce a positive outcome and simply reflect competition at work. There is no legal right in Australia for different buyers to be given the same price for the same product. Price discrimination is illegal when the price discrimination is used for an anti-competitive purpose.

On a practical level, the wording of the Senate order also presented some difficulties in matching those words with the varied and creative terminology used in the grocery industry. In this study, the Commission has identified when it has made certain assumptions. The Commission assumed that 'price differences' incorporated all terms of trade, including funding support provided by suppliers and not simply differences in the price list for an individual product at one point in time. This expanded meaning of 'price differences' was accepted in the Federal Court decision *ACCC v Australian Safeway Stores Pty Limited*.⁴ The term 'retailers' was taken to mean the major retail chains (as integrated structures—comprising a wholesale division and retail outlets) and not simply ordinary retail outlets.

Other practical difficulties encountered by the Commission included concerns by respondents about the highly sensitive nature of the data they were asked to provide on a voluntary basis and the likely use of the data.

³ See the media releases by the Australian Democrats (Senator Andrew Murray), *Keeping the suppliers honest*, Press Release Number: 01/65 of 8 February 2001. And by the Australian Labor Party (Mr Joel Fitzgibbon MP—Shadow Minister for Small Business), *Labor supports grocery retailing probe* of 8 February 2001.

⁴ *ACCC v Australian Safeway Stores Pty Limited* (No. 2) [2001] FCA 1861 at paragraphs 1024 to 1027.

2.2 The Commission and the Trade Practices Act

The Commission is the independent statutory authority responsible for, among other functions, ensuring compliance with and enforcement of the Act.

The statutory objective of the Act is to enhance the welfare of Australians by promoting competition and fair trading and providing for consumer protection. The Act proscribes certain anti-competitive conduct and unconscionable, misleading, deceptive or false practices.

When the Act was introduced into law in 1974, it contained a provision (section 49—now repealed) that proscribed price discrimination between purchasers of goods of like grade and quality in relation to:

- the prices charged for the goods
- any discounts, allowances, rebates or credits given for the supply of the goods
- providing services or facilities for the goods
- payments for services or facilities provided for the goods.

Price discrimination was an issue under s. 49 if the discrimination was of such magnitude or was of such a recurring or systematic character that it substantially lessened competition. Section 49 did not apply when the discrimination in price reflected a reasonable allowance for differences in the cost of supply resulting from different delivery destinations or different quantities supplied to purchasers.

Section 49 was repealed in 1995 following the recommendation of the independent review of National Competition Policy (the Hilmer Committee).⁵ The repeal of section 49 had also been the recommendation of two previous trade practices advisory committees in 1976 and 1979.⁶ The Hilmer Committee's view of the inappropriateness of a specific price discrimination prohibition was stated as follows:

The Committee considers that price discrimination generally enhances economic efficiency, except in cases which may be dealt with by s. 45 (anti-competitive agreements) or s. 46 (misuse of market power). To the extent that s. 49 has had any effect it seems to have been to diminish price competition. The Committee does not consider that competition policy should be distorted to provide special protection to any interest group, including small business, particularly where this is potentially to the detriment of the welfare of the community as a whole.⁷

⁵ *National Competition Policy*, report by the Independent Committee of Inquiry, Australian Government Publishing Service, Canberra, August 1993.

⁶ Trade Practices Act Review Committee: *Report to the Minister of Business and Consumer Affairs*, 20 August 1976, AGPS, Canberra, and Trade Practices Consultative Committee: *Report on small business and the Trade Practices Act*, 10 December 1979.

⁷ *op cit.*, pp. 79–80.

Any anti-competitive conduct that arises from price discrimination is considered under the remaining provisions of Part IV (restrictive trade practices) and s. 51AC (unconscionable conduct in business transactions) in Part IVA of the Act. The remaining provisions of the Act are subject to ongoing review in the context of reform of the Act.

In its public discussion paper prepared for this inquiry, the Commission included the following brief summary of provisions of the Act that may apply to anti-competitive conduct relevant to this study:

- anti-competitive agreements that have the purpose or effect of substantially lessening competition; these include contracts, arrangements or understandings that restrict dealings or affect competition (s. 45)
- agreements that fix prices (s. 45A)
- misuse of market power, such as predatory pricing—lowering prices to drive a competitor from the market with a view to then raising prices to recoup losses (s. 46)
- exclusive dealings (s. 47)
- resale price maintenance—specifying a minimum price for sale of a product (ss. 48, 96–100)
- mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services (ss. 50 and 50A)
- unconscionable conduct in business transactions—taking advantage of a weaker party in a business transaction without regard to conscience (s. 51AC)
- misleading or deceptive conduct—misrepresentations (s. 52).

The issue of anti-competitive conduct and 'price differences' is discussed in more detail in this report under the consideration of paragraphs 1 (a) and (c) of the Senate's order in chapters 5 and 7 of this report.

2.3 Inquiry and reporting powers of the Commission

Paragraph 28(1)(c) of the Act empowers the Commission to conduct research into matters affecting the interests of consumers, being matters with respect to which the Parliament has power to make laws. The Parliament does not have the constitutional power to pass laws dealing with price control, but has the power to make laws on such matters as price surveillance and monitoring and on restrictive trade practices involving corporations.

Subsection 29(3) of the Act allows the Parliament to require the Commission to furnish information concerning the performance of the functions of the Commission under the Act.⁸

The Commission, where it has reason to believe that there has been or there may be a contravention of the Act, may invoke its power under s. 155 to obtain information, documents and evidence. In the matter of this grocery pricing inquiry, the Commission did not have occasion to invoke its powers of compulsion under s. 155 of the Act. This inquiry has been conducted therefore on the basis that the responses from the grocery industry are given on a voluntary basis.

In any voluntary inquiry by a government agency, the agency must recognise that the parties from whom information is sought are under no legal obligation to provide all the information requested. This has been recognised by the High Court of Australia in the clear statement:

At common law, there is no obligation to answer questions asked by an executive agency or to produce documents requested by an executive agency.⁹

Those who are invited to provide information to a voluntary inquiry may decline to do so and no adverse inference may be drawn from that action.

The information sought by the Commission deals with price sensitive data and in most cases it is commercially confidential. The Senate order recognises the confidentiality of the data and it allows the Commission to exclude that data from publication in its report provided that the withholding of such information does not prevent the Commission from giving the Senate a clear account (paragraph 2(b) of the Senate order).

Several invitees exercised their right to claim confidentiality and specifically declined to provide responses. The Commission respects the right of the invitees to decline to provide information.

⁸ Subject to public notification, the Commission may report on matters referred to it by the minister (s. 28(1)(b)).

⁹ Stated by Brennan J in *Pyneboard Proprietary Limited v Trade Practices Commission* (1983) 152 CLR 328: at p. 351.

The Commission's report is therefore limited to the evidence that was provided voluntarily and in good faith by respondents to its questionnaires. Comments made by the grocery industry indicated that the key pricing data would be that provided by the 'Suppliers' category. The Commission selected a target group of 50 suppliers and received responses from 35. Of those responses, 19 provided financial data on prices in varying degrees of detail for a total of 24 product lines.¹⁰

Wherever possible the Commission provided transparency in how it conducted the inquiry and published on its website:

- a discussion paper
- three sets of questionnaires (separate questionnaires for suppliers, retailers and wholesalers)
- telephone, facsimile and email contacts of inquiry staff.

Because of the clear limitations on the collection and use of the data obtained during the inquiry, the Commission regards its report as qualified by the limitations of the amount of data received. The Senate, after its deliberation on the content of this report, may consider that it is appropriate to use the range of questions formulated by the Commission for use in one of the Senate's own committee inquiries.

¹⁰ See tables 5.3.1 and 5.3.2.

chapter 3

Key wholesale buyers: others

The primary focus of this study is centred on the price that is paid by buyers at the wholesale or upstream end of the grocery market. This price is the starting point in the supply chain. The buyers examined or discussed in this study are representative of a larger number of buyers and include¹:

ALDI Australia

A new entrant to the Australian supermarket sector. ALDI Australia is an arm of Aldi International, a major supermarket chain in Europe which is expanding into the United States and Australia.

Australian Independent Wholesalers (AIW)

During the period relevant to this report, AIW (a wholly-owned wholesale business of Woolworths), was affiliated with the FoodWorks Banner (Victoria), Food-way (Victoria) and 5 Star Banner (Queensland). Under its franchise activities, it is the SPAR licence holder for Australia.

Bi-Lo

This company is a discount supermarket group. The parent company is Coles Myer Limited. The store banner groups are Bi-Lo and Farmland.

Coles Supermarkets

A major retail chain and includes a wholesale division and multiple retail outlets. It is the supermarket arm of Coles Myer Limited.

¹ The corporate description of the buyers is drawn from a variety of sources but mainly *Foodweek and Liquor Week—Industry Yearbook and Directory*, 2000 edition, Huntleys' Publications Pty Ltd, Cremorne, New South Wales.

Foodland Associated Limited (FAL)

This company has wholesale grocery operations and distributions centres in Western Australia and New Zealand. Its affiliates are Farmers Deka Limited and Progressive Enterprises Limited. Its franchises are Foodand, Supa Value, Rules, Dewson and Four Square. In Australia, it has mainly operated retail outlets in Western Australia through Action Supermarkets. Recently, it acquired 40 of the former Franklins stores on the eastern seaboard to operate under the Action Supermarkets name.

Franklins Limited

The business entity examined in this inquiry is relevant to the period 1999–2001. Franklins no longer exists in that form. Franklins parent company is Dairy Farm International Holdings Limited. Franklins store banners are No Frills, Franklins Big Fresh, Franklins Fresh and Liquorsave. The Franklins chain was subject to a sell-down to several buyers during 2001–02. The name has been acquired by the South African supermarket giant Pick 'n Pay.

Metcash Trading Limited Australia (Metcash)

A major independent grocery wholesaler. It has three operating divisions, IGA Distribution, Campbell's Cash and Carry and Australian Liquor Marketers. Its website refers to itself as the 'Champion of the Independent Retailers'. It services 4500 independent retail stores on the eastern seaboard of Australia and in South Australia.

Statewide Independent Wholesalers Ltd (SIW)

This company operates a wholesale grocery and hardware variety group in Tasmania. SIW are suppliers to Woolworths supermarkets and store banners including Festival, Value Plus, Sams Cut Price, Rite-Way supermarkets, Four Square, Fabulous supermarkets, Family Fare Food Stores, the Food Market and Tasmanian Independent Wholesalers. The company is owned jointly by Woolworths Limited and Northern Wholesalers Co-operative Society Limited.

Tasmanian Independent Wholesalers (TIW)

TIW is the trading division of Northern Wholesalers Co-operative Society Limited.

Woolworths Limited

The largest grocery supermarket chain in Australia with a stock range covering food, general merchandising and speciality retailing. The company includes a wholesale division and multiple retail outlets. It operates several subsidiaries in the grocery industry.

3.1 The market share of key wholesale buyers

The following pie charts were constructed from the financial information provided by 19 suppliers (see chapter 5 for the details of the survey response rate). The figures represent annual totals of gross sales by suppliers to key buyers at the wholesale level. This study sought figures by reference to a basket of groceries identified publicly in the questionnaires (see table 4.4.1.). The pie charts are limited to the data provided so the charts do not represent the buyers' share of the wholesale grocery market for all grocery products.

The above charts, using the financial data received in this inquiry, show that Woolworths and Coles (including Bi Lo) are major buyers of grocery products at the wholesale end of the market. The charts must be viewed in a way that allows for the fact that the data received in the inquiry is incomplete and that the inquiry was based on a selected basket of groceries (see table 4.4.1). The most recent statistics from the Australian Bureau of Statistics (Wholesale Industry catalogue 8638.0, released in October 2000) is for the year 1998–99. It records a total figure of \$28,688.8 million for food groceries including liquor and tobacco. The selected basket of groceries used in the inquiry is a retail value representing some \$12,770.7 million, excluding a value for tobacco for the year 2000. The data received in the inquiry covered gross wholesale sales totalling \$2,836.9 million for 1999–2000 and \$2,469.3 million for 2000–01.

3.2 The supply chain

The following diagram of the supply chain does not claim to be definitive of the grocery industry in Australia. It indicates where profit margins can affect the supply chain.

An important qualification must be made to the following diagram. The independent sector can also resemble the integrated supply chain for the major retail chains when the independent wholesalers operate their own retail outlets. In other cases, there is a separation between the independent wholesaler and the independent retailer that buys from the wholesaler. The diagram is only a simplified representation of the supply chain.

Figure 3.1.1 Wholesale grocery gross sales 2001

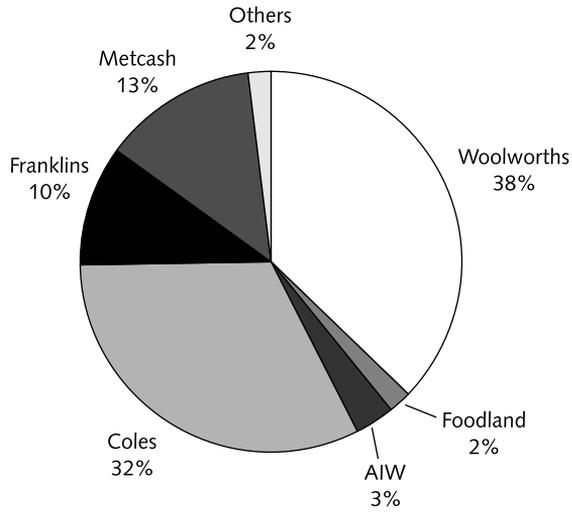


Figure 3.1.2 Wholesale grocery gross sales 2000

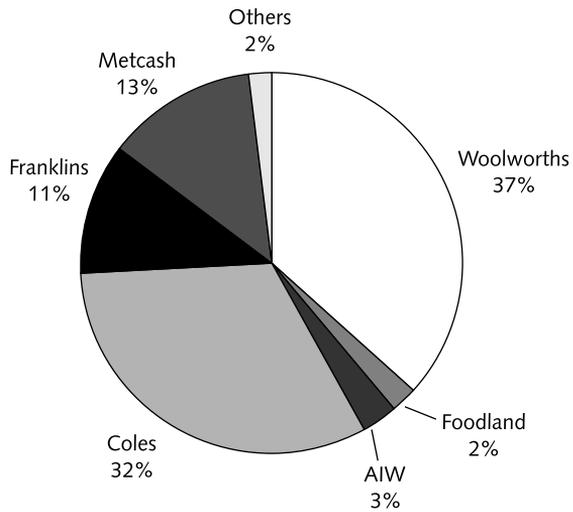
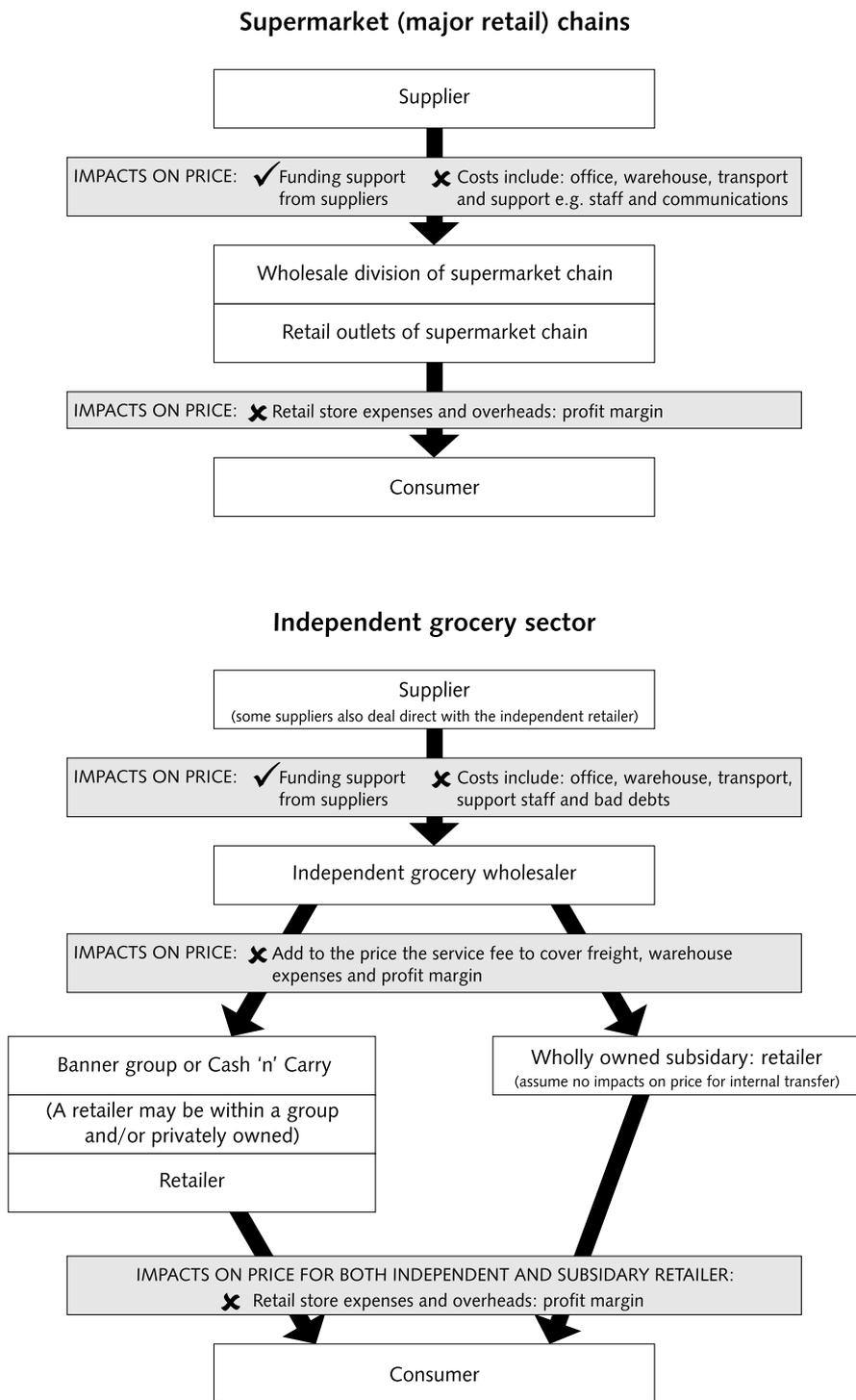


Figure 3.2.1 The supply chain



chapter 4 Methodology and source of material

In preparing for its own inquiry into price differences in the supply of groceries, the Commission examined the experience of other inquiries. A study on supermarkets, conducted over the period 1999–2000 in the United Kingdom, was of considerable assistance. The study was a response to a reference issued by the Director General of Fair Trading under the monopoly provisions of the *Fair Trading Act 1973* (UK).

Other reports that were examined included the reports of the Australian Parliament and some overseas studies on competition and the grocery sector. Those reports and studies are referred to in the text of this report.

4.1 United Kingdom's Competition Commission inquiry

Over the period 8 April 1999 to 31 July 2000, the United Kingdom's Competition Commission investigated and reported on monopoly issues arising from the supply of groceries from multiple stores (self-service supermarkets).¹ The inquiry had its origins in critical comments on the prices and profits of UK supermarkets during the late 1990s. The Competition Commission concluded that, taking all matters into consideration, the UK grocery industry was broadly competitive and that overall prices were not excessive. However, the Competition Commission identified three areas where competition is distorted and operates against the public interest. These were:

- the relationship between supermarket chains and their suppliers, including farmers (the issues being undue exercise of buyer power and lack of clarity, and predictability in terms of trade)
- persistent selling by supermarkets below cost
- price flexing by supermarkets (varying prices in different geographical areas in the light of local competition).

On 31 October 2001 the Director General of Fair Trading released a code of practice (Code of Practice on Supermarkets' Dealings with Suppliers) to address relations between

¹ *Supermarkets: a report on the supply of groceries from multiple stores in the United Kingdom*, Competition Commission, London, CM 4842, October 2000.

supermarkets and suppliers. The code applies to supermarkets with a market share of 8 per cent or more. The code forms a schedule to a legally enforceable undertaking. Suppliers will be able to obtain details of the standard terms of trade available to all suppliers and details of their particular terms of trade. The code also includes an obligation for dispute resolution including mediation. When mediation is unsuccessful, the matter may be referred to the Director General for investigation.

In preparing to address the Australian Senate's order of 8 February 2001, the Commission examined the UK report on supermarkets and extracted a set of questions used in the UK investigation. Those questions were modified to match the Australian grocery industry and the terms of the Senate order. The Commission compiled a selected basket of groceries largely based on high volume products or easily identified items. The basket included non-food items such as paper products, household cleaning products and tobacco. Fresh milk and dairy case items were included, but the Commission excluded fresh fruit, vegetables and fresh meat because it decided that the price variables involved between farm gate and supermarket shelf warrant a separate detailed study. The Commission noted that the UK supermarket study experienced difficulty in collating reliable data on fresh produce (other than meat) largely because the response rate from suppliers was low and because of the complexity of the price variables involved. The information that was provided to the UK study lacked detail.²

4.2 Some primary producer issues

The Commission readily acknowledges that prices paid to primary producers and the terms of trade for fresh produce are significant issues, but the supply chain for such products often involves intermediaries such as farmers' cooperatives, produce market commission agents and independent wholesalers as well as supermarket buyers. Seasonal variations and cool store supply are also important variables. In its report, *Fair Market or Market failure? A review of Australia's retailing sector*³ (August 1999), the Baird Committee made the following observation about variables that affect fruit and vegetable growers:

The Committee appreciates that fruit and vegetable growers have to deal with a range of market characteristics, including perishability, market volatility and a high degree of risk exposure, which collectively contributes to an unhealthy degree of vulnerability with respect to the major chains.⁴

The Baird Committee recommended a mandatory code of conduct to address the problems. In response to the Baird Committee report, the government sponsored the development of a Retail Grocery Industry Code of Conduct and a Retail Grocery Ombudsman. The code and the ombudsman officially commenced on 13 September

² *ibid.*, p. 70 of volume 1, pp. 258–259 of volume 2 and appendix 11.9 in volume 3.

³ *Fair market or market failure? A review of Australia's retailing sector*, report by the Joint Select Committee on the Retailing Sector, Parliament House, Canberra, August 1999: (see Recommendation 5 of the report).

⁴ *ibid.*, p. 72.

2000. The code includes provisions that offer guidelines to assist in business relationships between primary producers in vertical dealings (but not with horizontal competitive relationships) with grocery supermarkets and, by extension, with processors. The ombudsman provides a mediation service to assist in dispute resolution under the code.

The Commission notes that, in the subsequent operation of the code, there is a reluctance by some producers to be identified as complainants and that the code itself states that it is to be independently reviewed within three years of its release. The Commission suggests that primary producer pricing issues may be better addressed in that review.

The recently released UK grocery code attempts to deal with the fear of retaliation by implementing a system where a supplier may be represented by a trade association and may also go directly to the Director General of Fair Trading with a dispute. One significant aspect of the recently released UK grocery code is the move towards greater transparency in terms of trade between supermarkets and growers.

The Commission's decision to exclude fresh fruit and vegetables from its basket of groceries means that the conclusions made in this report should not be generally applied to those sectors, or generally applied to any other sector.

The Commission has recently carried out internal studies of supply chain issues affecting primary producers and it intends to issue information brochures in the near future.

4.3 Commission's discussion paper and three questionnaires

To accompany its survey questionnaires, the Commission prepared a discussion paper. Drafts of these documents were circulated to selected industry representatives asking for comments on the suitability of the material. The initial set of questions was considered overly detailed and the questionnaires were revised. Only minor adjustments were made to the discussion paper. The selected basket of groceries was considered appropriate with only limited additions. The primary focus of the data collection was annual summaries for the financial years 1999–2000 and 2000–01 of total funding support provided by 50 suppliers.

The questionnaires specifically sought a response that included:

- total annual funding support and total annual gross sales for the suppliers' top 10 buyers
- where relevant, separate details on a per product category basis
- the inclusion of all funding support including investment buying, case deals and deferred and off-invoice terms and allowances.

The supplementary questions accompanying the annual summaries were largely designed to clarify the many and varied components that may constitute terms of trade. It is generally agreed in the grocery industry that suppliers usually have a price list with standard discount terms and that buyers can obtain those terms of trade irrespective of which sector they represent. Additional to the 'base trading terms' is a set of additional discounts and allowances that are usually tied to agreed promotional activities. Whether a buyer receives those additional discounts (or funding support) depends on whether the supplier and the buyer agree that they both have a common understanding of what is the best way to present the supplier's product or accommodate its production plan.

Modern grocery price negotiations increasingly involve the use of business plans containing, for example, sales targets tied to funding support for a range of market activities. This support may include the provision of incentives, display material and cabinets, promotional spending, case deals (a price reduction per case and can include additional free supply of a product) and allowance for ullage (evaporation, shrinkage, wastage or short supply of the product). Views are divided on whether 'business plans' is just another way of describing combining standard and additional terms of trade. What is apparent is that the business plan approach with its key performance indicators lends itself more readily to agreed performance monitoring. Business plans also offer the opportunity to evolve into more streamlined terms of trade.

Funding support may also take the form of 'street money' given to an independent retail outlet, including when a supplier offers incentives directly to a retailer to give its products more prominence in display over a competitor's product. A simple example is that a supplier may want to see its product, not only in the relevant product aisle, but also in strategically located gondolas in other locations in the store.

The supplementary questions also offered respondents the opportunity to comment on whether there is a public benefit in the intervention by the regulator in grocery pricing matters (see paragraph (1)(a)(iii) of the Senate's order).

On 1 August 2001 the Commission publicly released its discussion paper and questionnaires with a return date of 31 August 2001. The return date of 31 August 2001 was flexibly applied and a number of returns arrived well after that date. The material was also made publicly available on the Commission's website to provide transparency in how it was conducting the inquiry. The documents are attached to this report (appendixes 1–4).

4.4 The selected basket of groceries

Due to the vast range of grocery items, the inquiry focused on the prices of a limited range of staple products. In this study, the word 'groceries' includes food and drink, cleaning products, toiletries, tobacco and household goods.

The products selected are listed in the following table by retail category rather than product name. The inquiry did not address generic products (or house brands) and any

implications for pricing differences; rather the focus was on examining any price differences paid to suppliers by different wholesale buyers for the same brand of grocery product.

The following table appeared in the publicly released discussion paper and questionnaires.

Table 4.4.1 The selected basket of groceries used in the inquiry

(This table was used to select the field of suppliers for this inquiry. The table appeared in the publicly released discussion paper and questionnaires.)

Product	Annual grocery value: supermarkets: Yr 2000	Annual grocery volume: supermarkets: Yr 2000
Carbonated/still beverages	\$1300 million	1200 million litres
Confectionery	\$1019 million	582. 5 million units
Biscuits	\$884. 3 million	112,056. 2 tonnes
Bread, rolls and hotplate	\$686. 4 million	327 million units
Breakfast cereals	\$736. 3 million	128,611. 1 tonnes
Dairy case		
• Cheese	\$845. 9 million	108,127 tonnes
• White milk—fresh	\$1032 million	736. 7 million litres
• Dairy dessert/yoghurt	\$503.5 million	123.2m kg
Coffee	\$512.2 million	15,196 tonnes
Tea	\$243.5 million	6.2 billion cups
Pet food	\$991. 4 million	472,487 tonnes
Toilet paper (paper products)	\$538 million	26. 1 million standard units
Ice cream (frozen food)	\$463. 1 million	119 million units
Margarine	\$285 million	79,082 tonnes
Sugar	\$153.1 million	126,243 tonnes
Snack foods	\$851.4 million	64,822 tonnes
Canned fruit	\$228.4 million	
Pasta	\$274.5 million	
Personal items		
• Body wash	\$219. 9 million	31,492 tonnes
• Shampoo (hair)	\$210. 3 million	18 million litres
• Toothpaste	\$193. 5 million	71.1 million litres
Cleaning products		
• Dishwashing—hand	\$104. 9 million	40. 4 million kg/litres
• Dishwashing—auto	\$ 62. 9 million	9. 2 million kg/litres
• Laundry	\$431. 2 million	131,733. 3 tonnes
Tobacco	Not available	25. 1 billion sticks

Source: Retail world, vol. 53, No. 24, December 2000, Parramatta, Sydney, Australia, 34th Annual Report

chapter 5

An assessment of price differences: competition and public benefit

- Senate Order: (1) (a) an assessment, based on a sampling of key suppliers and major retailers of:
- (i) the extent of any price differences,
 - (ii) the impact of any such price differences on competition in the relevant markets, and
 - (iii) whether there is public benefit in the existence of price differences

5.1 Response rate: suppliers, wholesalers and retailers

The Commission asked for voluntary responses from 50 key suppliers. It received responses from 34 and included a combination of comments and figures, comments only, claims of confidentiality and notifications that the supplier did not wish to provide any data. Of the 35 responses from suppliers, 19 provided financial data covering 24 lines of supplier data. The identity of the 19 suppliers who provided financial data and the product mix is not disclosed in this report. The reason for non-disclosure is because disclosure may fuel unproductive speculation about which supplier gives better terms to which category of buyers. The 19 suppliers who provided data responded in good faith and requested that their data be kept confidential. This confidentiality has been extended to their identity.

The Commission also sought corresponding data from seven major buyers, but only received three responses that contained significant financial data. For convenience, the term 'buyer' is used to cover both the 'Wholesalers' and 'Retailers' (major retail chains) categories. The charts in this report draw upon the suppliers' nomination of key buyers.

From suppliers, the Commission asked for details of total sales and total funding support inclusive of all additional terms and allowances for the 'top 10' buyers. Where more than one product category was supplied, the Commission asked for separation of the data. Only two suppliers provided separate product categories. Three suppliers provided a single annual return. Inclusive of the multiple product category, there were 24 lines of supplier data.

The Commission must qualify any assessment of price differences by expressing caution as to how representative the figures are because of the limitations in the voluntary response rate. At best, the data can only be regarded as indicative.

The analytical approach used by the Commission was to list the percentage of total support funding to gross sales provided by suppliers for the major buyers. This basic methodology was a suggestion from the grocery industry itself. As noted above, not all suppliers rated a particular buyer as a 'major buyer'. This resulted in six key buyers for the comparative table of 24 lines of supplier data for each of the financial years 1999–2000 and 2000–01. The confidential financial tables were a comparison of the percentage price differences for 24 lines of product data for each of six key buyers.

These tables are considered highly confidential because they compare the price differences paid by each key buyer across the 24 lines of supplier data. This report provides the indicative results in aggregate charts rather than a display of the tables.

It is important to note that the Commission's survey of suppliers did not seek a state by state or regional breakdown. In conducting the study, however, it became apparent that there are some anomalous regional factors. Tasmania is geographically closer to the eastern seaboard than Western Australia, but retail grocery prices for Tasmania appear consistently higher than Western Australia. Sea freight costs to Tasmania may be an issue, but there may also be other cost factors associated with warehousing and distribution. Western Australia, although some distance from some major suppliers, has better access to long haul transportation by rail, road, air freight and sea.

Overall, supplier responses in terms of separate identification of pricing data for Tasmania is insufficient to be assessed separately in this inquiry. The end result for this study is that the regional variation for groceries delivered to Tasmania is disregarded. The study assumes that the data comprises 'national' figures.

A further difficulty encountered was the likely reliability of data matching between the figures provided by buyers and the figures provided by suppliers. A random matching of the pricing figures received from suppliers with data received from two key buyers was attempted on a limited basis.¹ As a general overview, the data matching was inconclusive and too limited to be reliable. The Commission notes that the data provided would require resource-intensive analysis to explain some significant anomalies. This can be because of differences in how a buyer and supplier may account for 'investment buying'. When special (lower) prices are offered for a promotion of a product some buyers will increase orders and store the bulk purchases for later sale at the usual product price. Technically, this is a form of price support from suppliers, but some buyers may simply regard it as windfall profit.

Other factors such as 'street money' (where a supplier provides direct support to the retail outlet bypassing the wholesaler) may also be significant. The Commission specifically

¹ There were only three buyer responses with financial data.

asked for details of street money but the financial summaries were varied and a measure of the overall incidence of street money is unclear.

One major buyer declined to provide any figures, but provided comments that emphasised that the key data will be found in the 'Suppliers' category, which it suggested was the real focus of the Senate order.² The analysis of price differences is confined to suppliers' data.

5.2 'Price'

'Price' for the purposes of the Senate order is taken to mean the combination of list price less standard discounts plus any additional terms and allowances. The combined figure is called 'funding support' from the supplier to the buyer. Not all buyers get the same level of additional terms and allowances that form a second layer of discounts. This is because the additional discounts are invariably tied to performance criteria and they are largely tied to promotional activities.

The relevant price comparison is therefore not at the level of the individual product. It is not a price check exercise on the same brand and size of a product at a given point in time. At the front end of supply, buyers seldom, if ever, pay 100 per cent of the list price of an individual product. The 'price' is adjusted by a variety of terms of trade which are usually applied on a monthly basis when the invoice is paid. One major buyer explained that over 75 per cent of its major suppliers implement their funding support (or 'price reduction') via the agreed business plan method.³ These plans will include agreed promotional activities when the products will be offered on 'special' at the retail outlet. It was therefore decided to assess price differences by measuring the percentage of **total** funding support to gross sales over a 12-month period. The methodology of this approach was discussed with some industry participants before the Commission issued its questionnaires.

In its submission, one major buyer pointed out that the supplementary questions should have asked for an account of how any gains obtained by investment buying (buyers increasing their inventory when specials are available) are handled.

The Commission's questionnaires specifically identified investment buying. As noted previously in this report, however, such practices may not be considered as a 'term of trade' by a particular buyer and therefore not recorded as part of their funding support.

The criticism by one of the major buyers is that such gains should be included for comparison purposes to reveal to consumers how different buyers deal with gains obtained from investment buying.⁴ The key issue is that the price reduction intended by the supplier to promote the product with consumers may be largely taken by the

² Submission number 38.

³ Submission number 38.

⁴ Submission number 38.

intermediary wholesaler as profit. This comment further highlights how difficult it can be in practical terms to obtain a reliable comparison between what the supplier assesses as funding support compared to what the buyer believes they receive.

5.3 Comparative charts of price differences in funding support 1999–2000 and 2000–01

The following charts represent the number of times the retail chains received the best price compared to 'others' across six major buyers for the years 1999–2000 and 2000–01. The tables were compiled from the figures provided by suppliers as 24 lines of supplier data.

One difficulty encountered in compiling the charts was whether to include Franklins as a 'major retail chain' or 'other'. Historically, Franklins, at one stage, had a 16 per cent market share. Franklins no longer exists in the form it was during the years 1999–2000 and 2000–01. The Franklins chain was sold down in 2001. A further complication is that because Franklins was sold down, the level of funding support it received may be skewed by the inclusion of any second layer funding support (for promotional events) that was not subsequently clawed back by suppliers when Franklins was broken up. Suppliers may have also continued to support Franklins in the survey period and in doing so obtained exposure of their product. In short, the prices paid by Franklins, at a point in time in this particular survey period, may appear to be more advantageous compared to its competitors. This 'Franklins factor' is noted.⁵

Reading the charts

The charts are compiled from confidential tables that listed price differences for 24 lines of product data for six key buyers. In some instances two buyers paid the same price. In a small number of instances, a supplier simply provided one year of data. The buyer who received the best price support for a product line was then aggregated within categories that covered Woolworths, Coles and Franklins combined as the 'major retail chains', compared to the 'Others'. Franklins (as it existed during the survey period) is excluded in the second chart.

⁵ Also, over the period of the two years of the survey there were potentially about 48 occasions when a buyer may have received the best price. One particular buyer received only one best price over the entire two years. That buyer did not readily fall within the categories and was excluded from the charts.

Chart 5.3.1 The number of times the major retail chains (Woolworths, Coles and Franklins) received the best price compared to other wholesale buyers 1999–2000 and 2000–01.

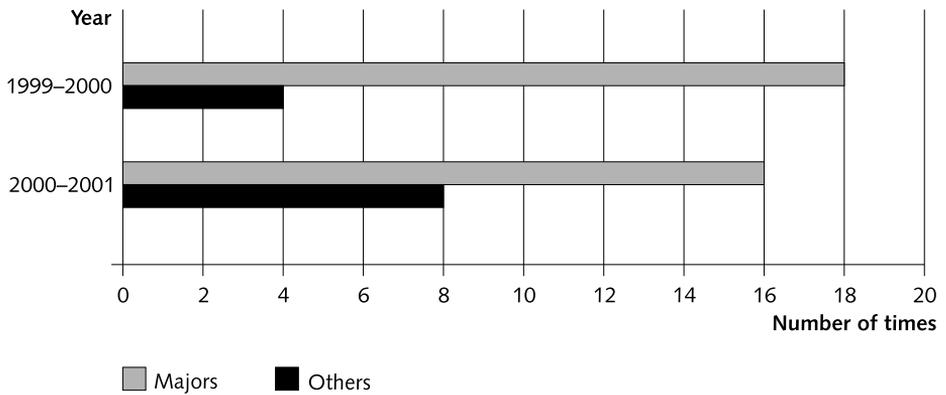
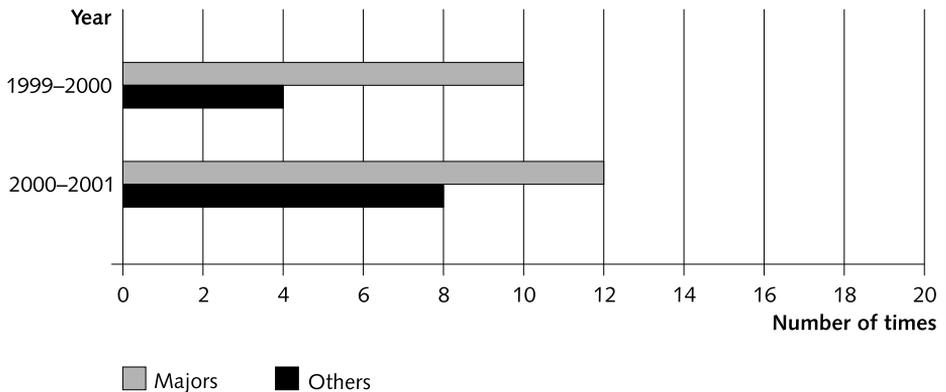


Chart 5.3.2 Excluding Franklins, the number of times the major retail chains (Woolworths and Coles) received the best price compared to other wholesale buyers 1999–2000 and 2000–01.



5.4 A comment on internal relativities associated with the charts

Charts 5.3.1 and 5.3.2 simply measure 'first past the post' in terms of which category of buyer received the best price. The Senate order focused on 'any price differences'. The form of survey summary suggested by the grocery industry focused on annual financial data. What is not taken into account is unit volume other than the assumption of 'like terms for a customer of a similar scale', which looks at a central distribution warehouse of a similar size, largely in terms of volume.

One observation, based on internal relativities, is that if the major retail chains buy twice as much volume then they receive twice as much funding support. Even if the price was the same for both a major retailer and an independent wholesaler, the buyer who takes twice the volume still receives twice the amount of funding support. Price difference in this inquiry simply means whoever has obtained the best price.

The charts show that suppliers do not always favour one particular category of buyers, even allowing for the two forms of presentation of the aggregate of the buyer categories.

5.5 The extent of any price differences

The financial data received enable the Commission to identify which buyer received the least favourable price. That unit was then taken as the 'base unit'. Buyers who received more favourable prices were therefore identified as percentage above the base unit. For example, a 15 per cent discount may be the base unit. Another buyer who receives 17 per cent discount from the same supplier is receiving 2 per cent above the base unit. A table, based on 24 lines of product data for six key buyers was compiled to measure the extent of any price differences.

The results for the years 1999–2000 and 2000–01 are displayed in the following bar charts.

The percentage categories are up to and including 2 per cent, over 2 per cent and up to and including 4 per cent, over 4 per cent and up to and including 6 per cent and so on. The purpose of the bar charts is to identify the extent of the percentage differences above the base unit.

The better prices were largely in the range of up to and including 6 per cent for 1999–2000 and marginally higher in 2000–01. Up to and including 2 per cent is the most common in both years.

Charts 5.5.1 and 5.5.2—extent of price differences in the years 1999–2000 and 2000–01

Chart 5.5.1 Number of transactions identified in 1999–2000

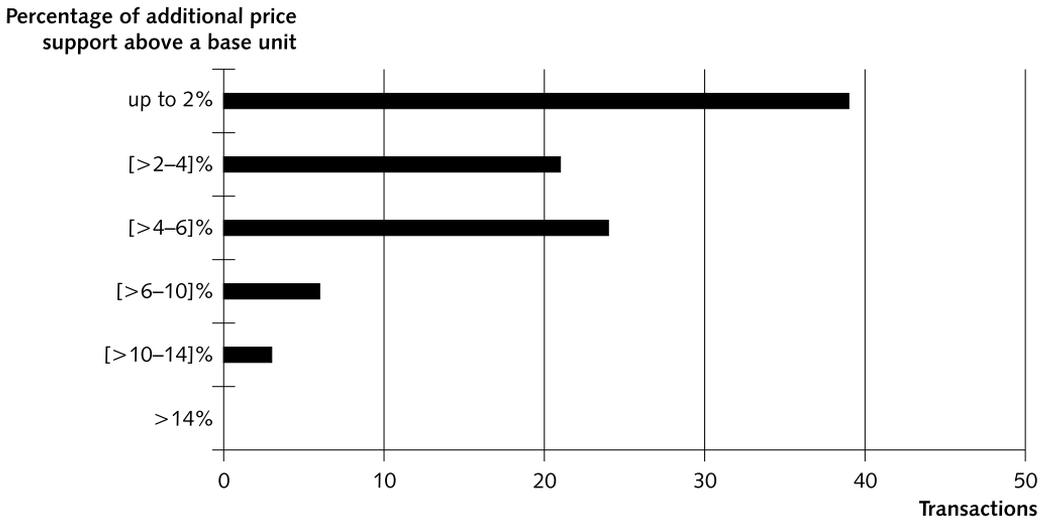
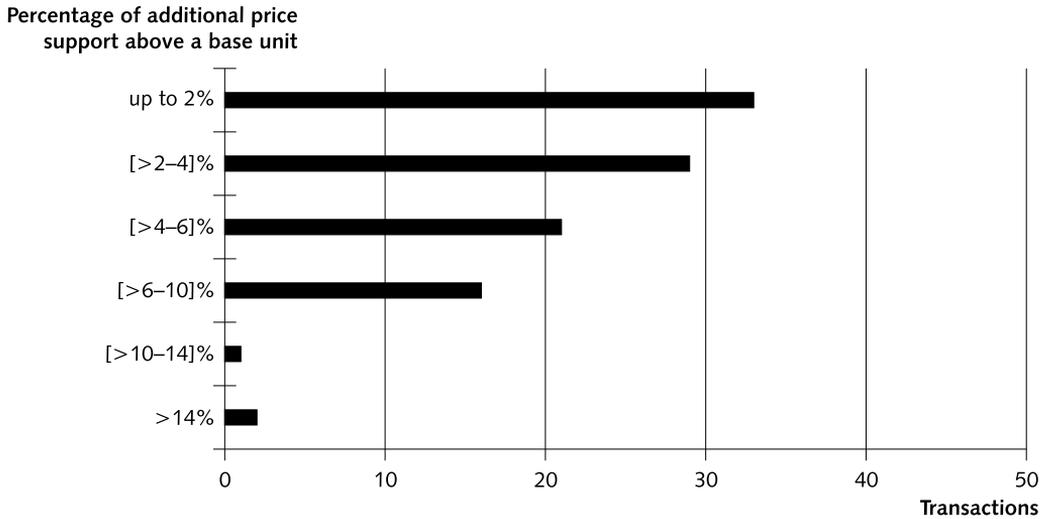


Chart 5.5.2 Number of transactions identified in 2000–01



The grocery industry may feel that a price difference of over 2 per cent is a matter of concern. This is because the wholesale market volumes represent millions of dollars. A simple explanation might be that the differences of up to 6 per cent might represent street money. A more intensive analysis may reveal that it was due to the timing of the promotional funding for a particular buyer compared with another buyer. Inclusion of an investment buying component may also be an explanation. As noted above, there may also be the 'Franklins factor'. The Commission was not satisfied that the data it received contained sufficient detail to allow an extensive analysis.

5.6 Internal relativities in the extent of percentage price differences

A measure of the extent of price differences also contains an internal relativity. Charts 5.5.1 and 5.5.2 do not differentiate between the major retail chains and the independent wholesalers. An analysis can also be made as to whether the major retail chains uniformly receive higher percentage price advantages over the 'Others'. The analysis did not reveal any particular trend by suppliers to favour any one category over the other. Bar charts 5.6.1 and 5.6.2 show the times that Woolworths, Coles and Franklins obtained additional price support above a base unit in the listed percentage ranges. In the same charts these numbers are matched with the other wholesale buyers.

A comparison of the number of times Woolworths, Coles and Franklins (combined) received additional price support in the percentage points above a base unit—compared to other wholesale buyers for 1999–2000 and 2000–01

Chart 5.6.1 Number of transactions identified in 1999–2000

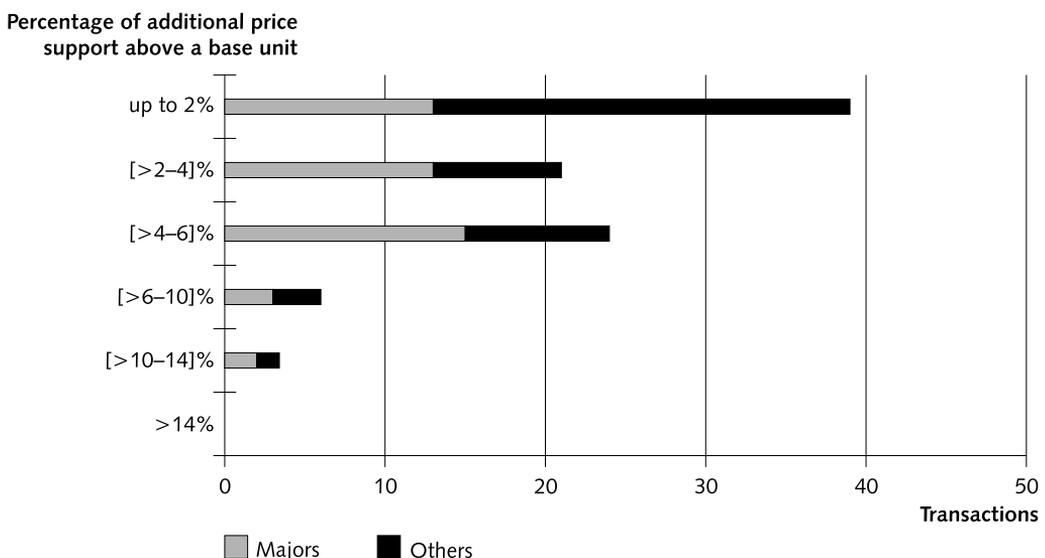
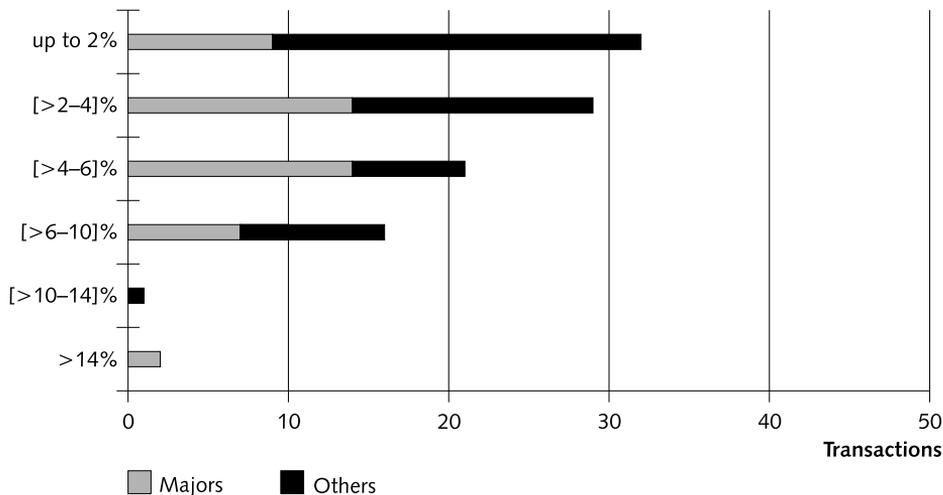


Chart 5.6.2 Number of transactions identified in 2000–01

Percentage of additional price support above a base unit



A comparison of the number of times Woolworths and Coles (combined) received additional price support in the percentage points above a base unit—compared to other wholesale buyers for 1999–2000 and 2000–01

Additional charts 5.6.3 and 5.6.4 recognise the difficulty in categorising Franklins (as it was then) and excludes Franklins.

Chart 5.6.3 Number of transactions identified in 1999–2000

Percentage of additional price support above a base unit

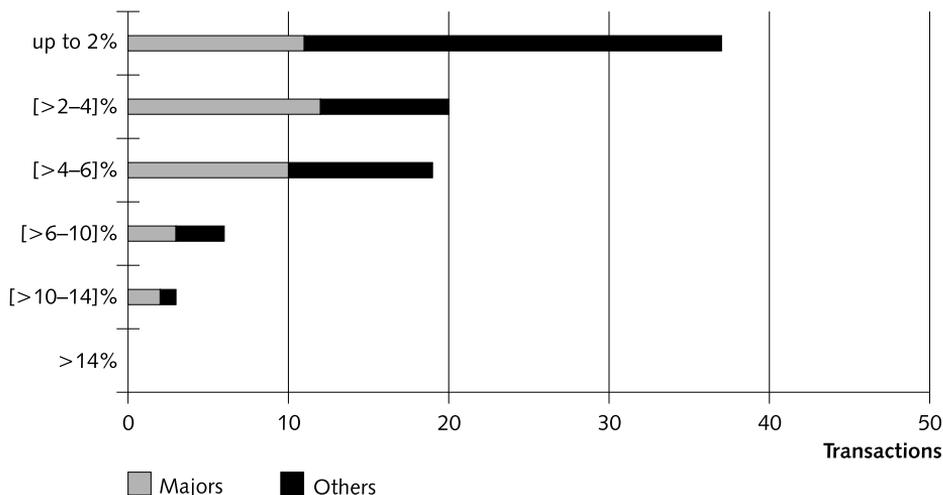
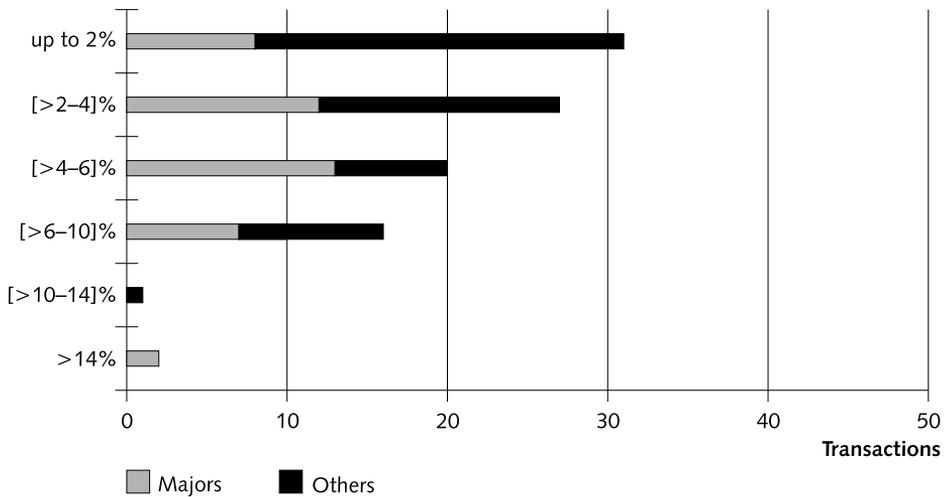


Chart 5.6.4 Number of transactions identified in 2000–01

Percentage of additional price support above a base unit



The above charts show that suppliers offer much the same range of percentage price advantage to both the major retail chains and the independent wholesalers. If the suppliers favoured one particular category of buyer all the time with higher margins the bar charts would have a layered effect with, say, one category in the higher ranges and the other category always in the lower ranges. This is not evident from the data received.

The indicative findings in these bar charts are consistent with the overall finding that no particular buyer is favoured by the suppliers all the time.

The following is a summary of the overall comments on the financial data received.

Table 5.6.5 Comments on price differences

	1999–2000 (based on 19 returns from a survey field of 50)	2000–01 (based on 19 returns from a survey field of 50)
Did suppliers offer buyers different terms of trade resulting in different 'net net' prices?	Yes	Yes
Did the suppliers favour any particular sector of the grocery industry?	No, not on the data received	No, not on the data received
Did independent wholesalers (other than Franklins) sometimes get a better price than the retail chains?	Yes, based on the data received	Yes, based on the data received
Is there a significant difference between the number of times major retail chains (other than Franklins) received a better price compared to independent wholesalers?	On the data received, the ratio in chart 5.3.2 was 10:4 in favour of the retail chains— (NB: across the 2 years in the study, suppliers varied on which buyer they gave the best price)	On the data received, the ratio in chart 5.3.2 was 12:8 in favour of the retail chains— (NB: across the 2 years in the study, suppliers varied on which buyer they gave the best price)
Do the tables take into account the approximate size of the central distribution warehouse of each buyer?	No, the tables reflect financial figures and not 'like customers of a similar scale in warehouse size'.	No, the tables reflect financial figures and not 'like customers of a similar scale in warehouse size'.
Do the overall price differences indicate anti-competitive conduct?	No	No
Is there an indicative reason why some of the additional funding support is markedly higher than the base unit (BU)?	Yes, even though they are annual figures it can simply be a reflection of additional impacts of promotional funding in that period for one particular buyer; or a supplier may have provided separate funding directly to a retailer.	Yes, even though they are annual figures it can simply be a reflection of additional impacts of promotional funding in that period for one particular buyer; or a supplier may have provided separate funding directly to a retailer.

As noted above, cross matching between the **suppliers'** data and the **buyers'** data proved inconclusive and would require a resource intensive accounting analysis. A random selection showed minor variations ranging up to 2 per cent and anomalies of 20–30 per cent and over.

5.7 Multi-level funding support

One issue that came to light in preparing the questionnaires and in examining the figures provided for the study was that the funding support may also be provided direct to retail outlets by some suppliers. This is sometimes called street money. In other words, the level of funding support given to an independent wholesaler may not be the total amount provided by the supplier within that particular supply chain. The combined figure, however, reveals that the supplier does not significantly vary in the total level of funding support it is prepared to give to promoting its product between sectors.

The Commission had specifically requested the identification of street money but the financial responses were varied. The overall amount of street money is unclear, based on the data received. However, it is a factor worth noting. The diagram below shows a simplified example of multi-level funding support.

Figure 5.7.1 Price funding support from a supplier
(*Multi-level price support or 'discount'*)

Major Retail Chain Supplier funded support 20 per cent	Independent Wholesaler + Independent Retailer Supplier funded support 15 per cent	Supplier funded support 5 per cent (street money)
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In this type of multi-level funding support from a supplier, independent wholesalers may prefer that all the funding support from the supplier came to them so that they could pass the support on to the retailers. However, this may inhibit those suppliers who want to be more closely involved in assessing how their product is presented to consumers at the retail outlet and who are prepared to support independent retailers directly at street level to improve their product presentation. Street money appears selective in its operation and not all retail outlets at street level may necessarily receive this type of direct funding support. In addition, some suppliers do not offer street money.

5.8 Some observations on differences between wholesale and retail markets

The Baird Committee report identified a common complaint about product price differences for the same product encountered at different stores at the retail outlet level.⁶ The Baird Committee discussed the apparent anomaly of small retail stores not being able to purchase the same product even at a wholesale rate compared to the price the product

⁶ *Fair market or market failure? A review of Australia's retailing sector*, report by the Joint Select Committee on the Retailing Sector, Parliament House, Canberra, August 1999, paras 5.71 to 5.91.

was on sale at a major retail chain to consumers. In some product lines the product size offered by the retail chain is in the upper range or 'family' size and not the convenience store smaller size of the popular product. Both stores may sell the same product but the major retail chain might focus on the promotion of the larger size while the smaller store has a market for the 'convenience store' size. The retail chain receives funding support for the promotional activity and is therefore able to reduce the price over the promotional period. In other words, the simple comparison of product price at a given point of time between stores can be misleading.

Small retail stores are also able to obtain funding support from suppliers, but it may take the form of cooler cabinets, annual conference and training support (or even street money) that they do not necessarily translate into reduced product prices for consumers.

The Baird Committee quoted one witness as confirming that they have been given a supplier's fridge but the retailer might not equate that with price funding support that can be translated into a discount price.⁷

At the upstream supply point there is invariably the same base price available irrespective of whom the buyer is, with the obvious exception of factors such as a particular freight rate. All buyers then receive some form of basic discount (e.g. the list price less quantity, warehouse allowances and prompt settlement discounts). These are the standard trading terms—the first layer. To that extent, the evidence given to the Baird Committee by suppliers appears consistent and correct. What the Commission's inquiry has attempted to show is that what determines the end price of a particular product is the application of additional funding support that may take the form of support for promotional and other purposes—the second layer. These include such events as supplier initiated deals to reduce a production backlog or to meet production targets and to maintain cash flow.

Of key interest to the independent wholesalers is what happens at the upstream point of supply. They argue that all buyers should receive the same trading terms if they are of a 'similar scale' and, where possible, act as a conduit for distributing relevant promotional funding to the independent retailers. Some suppliers, however, might regard this point of the supply chain as only part of the way to the ultimate consumer and therefore not the point at which all funding support is to be concentrated. For the retail chains, however, it is the relevant single funding point because of their integrated structure.

⁷ *ibid.*, para. 5.81.

5.9 The effect of such price differences on competition in the relevant market

5.9.1 A market can be measured in several ways

The Senate order does not define the relevant market. The language used in the Act is concerned with economic considerations. Factors such as 'market' and 'substantially lessening competition' are economic constructs. A key element of assessing market power or a substantial lessening of competition is to define the relevant market in which those factors apply. Section 4E of the Act defines the term 'market' to include a market for those goods and services and other goods and services that are substitutable for, or otherwise competitive with, the first mentioned goods or services. This indicates that it is the economic concept of a market that is applied under the Act.

In *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd*⁸, Chief Justice Mason and Justice Wilson said:

In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated.⁹

A market involves four dimensions: product, geographic, functional and time. A more detailed explanation of these factors is provided in chapter 7 of this report.

For the purpose of this study, the relevant market appears to be the upstream or front-end market between suppliers and the wholesale divisions of both the major retail chains and the independent wholesalers. In the grocery industry, there is the upstream supplier market at the wholesale level and the downstream market at the retail level. In certain circumstances it may be necessary to look at one whole market, both wholesale and retail, because of the effect that retail sales have on buying at the upstream point.

Even at the retail level it is necessary to recognise that the industry does not have a uniform definition e.g. is it supermarkets of a certain size or does it include those supermarkets as well as general convenience stores and service station outlets? A further refinement is then necessary to determine whether the market is a national market or at a local or regional level. Product category is also a factor to consider.

The representatives of the independent wholesalers stated the issue as:

In considering the relevant markets in the retail grocery sector, it is clear that the major supermarket chains and independent wholesalers compete both on a national level and on a local or regional level. At a national level, independent wholesalers will negotiate with suppliers for that wholesaler's national supply needs. Similarly, the major supermarket chains are increasingly negotiating with suppliers for

⁸ *Queensland Wire Industries Pty Ltd v The Broken Hill Proprietary Company Ltd* (1989) ATPR 40-925.

⁹ *ibid.*, at 50,008.

their national requirements. In both cases, however, the total national supply needs are delivered in smaller lots to the requested central distribution warehouse. These central distribution warehouses, by their very nature, are of comparable sizes whether they are operated by the major supermarket chains or the independent wholesalers.¹⁰

As a simplification, the independent wholesalers argue that irrespective of national or regional markets, 'like customers' are those who maintain a similar size central distribution warehouse. This argument contends that market power exercised by a buyer should be recognised as equivalent when the central distribution warehouse is comparable. The major retail chains and the independent wholesalers should therefore be treated the same in terms of price by the suppliers—with no justification for price differences. Implicit in this argument is the assumption that the major retail chains have disproportionate market power and that they receive more favourable terms of trade.

AFGC offered another view that '... there exists a disproportionate distribution of power in favour of the retailer/wholesaler over the supplier in the Australian grocery sector'.¹¹ Their view is that the level of retailer/wholesaler concentration within the Australian grocery sector is almost unparalleled in the world, but that all the retailer/wholesaler players are vigorous and effective competitors. They added:

With the above as a given market characteristic and regardless of the relevant market being defined on a National, State or other geographical basis, [they] are all customers of significant scale and influence to grocery suppliers.¹²

A further significant point made by AFGC is that the most successful businesses are those that collaborate with suppliers to '... utilise their respective trading relationships to provide offerings most desired by the consumers'.¹³

The Commission maintains the same approach it outlined to the Baird Committee to define a relevant market. In its submission to the Baird Committee the Commission said:

A market is the area of close competition between firms and within there is close price substitutability between one product and another, and close substitutability between one source of supply and another. Each market will differ as circumstances of each case differ. It is inappropriate to have a predetermined view on any dimension of a market, be it product, geographic, or functional. What is crucial is that the Commission applies the relevant principles of defining a market consistently.¹⁴

The Baird Committee developed three measures for the retailing market. Measure 1 included supermarket and grocery stores, including the non-petrol sales of identified convenience stores of petrol stations. Measure 2 included the same plus liquor retailing stores, plus fresh meat, fish and poultry and other food retailing stores, bread and cake

¹⁰ Submission number 32.

¹¹ Submission number 31.

¹² Submission number 31.

¹³ Submission number 31.

¹⁴ Australian Competition and Consumer Commission, submission to the Joint Select Committee on the Retailing Sector, March 1999, p. 31.

stores and other specialised food retailing stores. Measure 3 included Measure 2 plus takeaway food retailing stores. The measures show that market share held by the major retail chains, on a combined basis, can vary by about 20 per cent overall, depending on the elements used to compile the measure.¹⁵

The Commission notes the debate in the industry, including the suppliers' view that it is the relationship developed between the supplier and the buyer with a common focus on presentation of the product to the consumer that probably has a greater influence on price. This applies irrespective of whether the buyer is a retail chain or an independent wholesaler. This view holds that it is not the size of the local central distribution warehouse that solely determines the price, nor the market.

The Canadian Competition Bureau has released *Draft enforcement guidelines: the abuse of dominance provisions (sections 78 and 79 of the Competition Act) as applied to the retail grocery industry*. Those guidelines discuss the steps in defining the relevant markets. The Canadian guidelines state:

No clear-cut standard exists to assess products or geographic parameters for relevant markets at the wholesale or manufacturing level. Instead, products vary considerably, as do their manufacture, distribution and marketing.

At the retail level, the product market has traditionally been viewed as a basket of grocery and food products sold in full-line supermarkets.

...

The Bureau prefers to use sales revenues to assess market shares in the retail grocery industry.¹⁶

As previously noted, the Commission's questionnaires asked for figures on total invoiced sales by suppliers to wholesale buyers. The Commission did not ask for figures based on geographic parameters or on the size of a central distribution warehouse or on volume.

In passing, however, and as an additional observation, the study revealed that the wholesale price for groceries delivered in Tasmania appears uniformly higher than the mainland states. This observation is consistent with separate industry studies of retail prices paid by consumers. *Choice* magazine noted:

[A]s always, the higher costs of getting groceries to remote locations is being passed on to the shopper. This has a huge impact on prices: the basket cost almost \$19 less in the average Newcastle shop than in Launceston (the cheapest and most expensive cities respectively).¹⁷

¹⁵ *Fair market or market failure? A review of Australia's retailing sector*, report by the Joint Select Committee on the Retailing Sector, Parliament House, Canberra, August 1999, chapter 4.

¹⁶ Government of Canada, *Draft enforcement guidelines: the abuse of dominance provisions (ss. 78 and 79 of the Competition Act) as applied to the retail grocery industry*, ss. 5.1.2 and 5.1.5 on website <<http://strategis.ic.gc.ca>>, Competition Bureau, Quebec, Canada, 17 December 2001.

¹⁷ 'Super Competition', *Choice* magazine, January/February 2000.

5.10 Public benefit and price differences

Whether there is public benefit in having price differences in business transactions was emphatically answered in the affirmative by the Hilmer Committee in 1993. The Hilmer Committee pointed out that price discrimination can enhance competition by encouraging price experimentation and can also enhance economic efficiency in some circumstances. In a robust rejection of the then s. 49 (prohibition on price discrimination) of the Act, the committee expressed the view that it was not the role of the competitive conduct rules to protect any particular sector of society. The committee noted that anti-competitive price discrimination can be dealt with under other provisions of the Act.¹⁸ The Government accepted the Hilmer Committee recommendation and repealed s. 49 in 1995.

The representatives of the independent wholesalers argued that:

Discriminatory pricing between comparable customers is not in the public interest as price differences place the price disadvantaged customer at a competitive disadvantage limiting the ability of that customer to act as a counter weight to the favoured customer. If the price-disadvantaged customer is unable to compete it is likely to lose business to the favoured rival. The price-disadvantaged customer may go out of business to the detriment of final consumers, especially as the remaining previously favoured customer no longer needs to worry about rivals.¹⁹

Price discrimination in itself is no longer proscribed by the Act, and the independent wholesalers argument appears based on an assumption that the retail chains **always** get the best price.²⁰ The data provided by suppliers to this inquiry indicated that that was not always the case. Rather, suppliers employ their pricing strategies to maximise the presentation of their product to consumers to achieve mutually agreed outcomes between supplier and buyer. This will produce price differences that reflect individual negotiations by the suppliers with buyers from the retail chains and the independent wholesalers. In some cases, the data provided to the Commission revealed that the independent wholesalers received the better price.

This study has its limitations and while it may focus on whether buyers at the wholesale end pay essentially the same price for grocery supplies, it was not required to examine whether independent wholesalers apply price differences when they on-sell to independent retailers. In addition, the study does not examine whether the benefits obtained by independent wholesalers when they obtain a better price from the suppliers compared to the major retail chains are ultimately passed on to consumers.

An additional factor to consider is whether there is any benefit from further intervention by the regulator in what is a competitive and dynamic industry simply to ensure that prices

¹⁸ See *National Competition Policy*, report by the Independent Committee of Inquiry, Australian Government Publishing Service, Canberra, 1993, pp. 74–80.

¹⁹ Submission number 32.

²⁰ See, for example, the comments of Mr Andrew Reitzer, the CEO of Metcash, in his interview with the television program *Business Sunday* on 26 May 2002 where he was reported as saying 'I think it is a known fact in our industry that Woolies and Coles get the best prices ...'.

are the same for 'like customers' at the upstream or front-end supply part of the grocery chain. Public benefit is not served by additional compliance costs and intervention by the regulator and the courts, unless it can be shown that the benefits outweigh the compliance costs.

The Commission offers the interim conclusion that price differences in the sale of groceries by suppliers to the major chains and to independent wholesalers do not appear to exhibit anti-competitive conduct and, on the evidence available, do not give rise to concerns about public benefit issues.

chapter **6**

Conduct likely to be in breach of the Trade Practices Act: action taken by the ACCC

Senate order (1) (b) subject to paragraph (2)(b)*, identification of any conduct found by the commission in the course of preparing the report that is likely to be in breach of the Trade Practices Act 1974, together with an account of action taken or proposed to be taken by the commission in respect of such conduct

*[commercially sensitive information may be withheld from publication]

The Commission suggests that this element of the Senate order may have had an inhibiting effect on what was a voluntary inquiry. The Commission is bound by statute to perform its role as a regulator. It performs its role without fear or favour and, when necessary, it will publicise details of conduct that it alleges is likely to be in breach of the Trade Practices Act.

It is then the role of the courts to determine whether the alleged conduct is in breach of the law.

To enable it to obtain data for this inquiry, the Commission was prepared to offer undertakings of confidentiality. As noted previously in this report, significant players in the grocery industry exercised their right not to provide specific data.

The Senate order expressly recognised the issue of genuinely commercially sensitive data and that the Commission may withhold that information from its report provided the Commission could give the Senate a clear account of the matters examined in the inquiry.

On the data provided in response to its survey, the Commission has not identified conduct that is likely to constitute a breach of the Act.

When differences in prices would amount to anti-competitive conduct

Senate Order (1) (c) an outline of the circumstances in which, in the commission's view, differences in prices paid to suppliers by the various industry participants would amount to a breach of the anti-competitive conduct provisions of the Act.

7.1 Factors to consider in any alleged breaches of the Trade Practices Act: a hypothetical analysis

The starting point for analysing an alleged breach of Part IV of the Act is market definition. Once the market is defined, an examination can be made of who exercises market power in that particular market. Market power enables a firm to behave differently from that which a competitive market would impose on firms facing similar costs and demand. Exercising market power in robust competition is not the same as taking advantage of that power for an anti-competitive purpose.

7.1.1 Grocery industry—market definition

Part IV of the Act refers to markets, market power and substantial lessening of competition in a market. The following comments are provided to indicate how, hypothetically, there is more than one approach to defining the market in the grocery industry for the purposes of Part IV.

The aim of market definition is to facilitate analysis of the competition issues that may potentially be associated with the proposed conduct. Market definition is purposive. The relevant market definition depends on the conduct that is the subject of an inquiry. A competition analysis involving similar or even the same industry and industry participants may therefore require different market definitions when the alleged conduct is different. The conduct alleged to involve price discrimination relates to the acquisition of goods for resale by the national grocery chains. Defining a broad market for the acquisition of

grocery products would contrast with the narrower market pleaded in *ACCC v Safeway*¹ but the conduct was different as it concerned a particular product area, bread. However, it corresponds to the approach in the various *Dauids Holdings* cases² which were concerned with whether a merged wholesaler would be able to exercise market power in relation to the supply of the range of grocery products required by independent retailers.

In *Queensland Wire Industries v BHP*³, the High Court referred to the 'market' as an area of close competition between firms or the field of rivalry between them. Within the bounds of a market there is substitution between one product and another, in response to changing prices. A key element of competitive constraint is substitution (actual or potential) on either the demand side or the supply side.

Product dimension

The major retail grocery chains and the independent wholesalers acquire a range of products from manufacturers, importers and sometimes from brokers for wholesale supply to grocery retail outlets. The products acquired for resale through supermarkets/grocery outlets are dry grocery products, a range of fresh products such as fruit and vegetables, meat and baked goods, plus some non-food household items (soaps and detergents, hardware items, newspapers and periodicals, garden needs and so on).

Both wholesalers and retailers supply their customers with a range of services as well. At the wholesale level these services include acquiring products from suppliers and assembling a wide range of grocery products in a particular location, selecting subsets of products from this collection, price labelling, marketing, credit, accounting services and the like. The cost of these wholesaling services is recovered in different ways, partly depending on the business structure. In the vertically integrated chains a whole-of-business approach usually means that while wholesaling services are supplied, they are not separately accounted for; nor do they represent a separate profit centre. Clearly this cannot be the case when an independent wholesaler supplies wholesaling services to an independent retailer. However, while a wholesaling fee may be charged to recover costs, in other cases part of the cost is recovered in this way and the balance is covered by withholding some of the promotional funding paid by suppliers.

At the retail level, retailers provide customers with the convenience of a diverse range of products in one location, store amenities (lighting, display, checkout), trading hours, home delivery, parking and so on. The mix of these services partly forms the basis on which retailers differentiate themselves and compete. One type of retail outlet may provide little by way of service but may offer lower prices. Another retailer may charge higher prices but offer more by way of service. The price paid at the checkout is therefore not simply the price of the grocery products, but includes the cost of the services as well.

¹ *ACCC v Australian Safeway Stores Pty Limited*.

² See *Attorney General (Cwlth) v Davids Holdings Pty Limited* (1993) 42 FCR 255 and *Dauids Ltd, Re* (1995), ATPR 50-185.

³ (1989) 167 CLR 177.

Substitutability

On the supply side, a manufacturer of say cheese, cannot quickly and easily alter its production mix to, for example, biscuits. Substantial investment would be required to make such a change. Substitutability for the supplier in the present context, however, may be in terms of avenue to market. In addition to supplying integrated chains and independent wholesalers, manufacturers also supply product directly to some specialty retailers, hotels, restaurants and the food service industry. Products are also exported. However, these alternative distribution channels tend to be complementary rather than substitutes.

From the demand side, those acquiring at wholesale and ultimately at retail level require a broad range of products, but whether they are able to acquire a particular brand may be of little concern. In some cases, failure to obtain a specific product within a product category may not be much of a concern. This reflects the inconvenience to consumers, who will have to visit another store in search of the item—that is the value of the one-stop shop. There is therefore considerable substitutability from the demand side between quite diverse goods at both wholesale and retail levels.

This suggests that it is inappropriate to define a separate supply market for each product or product group supplied to supermarket chains/wholesalers. Rather, the product market relates to groceries and related goods and services. This approach does not ignore, of course, that within the broader concept of a groceries market there are subsets of that market for particular product groups such as carbonated beverages or dairy.

Geographic dimension

Definition of the relevant geographic market requires consideration of the geographic area or areas in which sellers of the particular product operates and to which purchasers can practically turn for such goods and services. On the one hand, wholesaling is operated on a state basis, at least partly due to the arrangements relating to freight costs within the industry—delivery is free into the company's capital city warehouse. In the past this was reflected in the existence of independent wholesalers who confined their activities more or less to one state. However, mergers between wholesalers have changed this, and integrated chains operate nationally. While the court found a state-based market in *Dauids Holdings (1992)*⁴, the then Trade Practices Tribunal found a national market in the context of the proposed acquisition of Composite Buyers by *Dauids Holdings* in 1995.⁵ Nevertheless, when considering the implications at the retail level of price discrimination in wholesaling, it would appear that the effect is likely to be localised. However, in assessing the effect of conduct such as price discrimination, the aim is to see how this affects a particular sector or group, e.g. independent retailers, rather than to consider the implications for a particular retailer.

⁴ See *Attorney General (Cwlth) v Dauids Holdings Pty Limited* (1993) 42 FCR 255.

⁵ *Dauids Ltd, Re* (1995), ATPR 50–185.

Functional dimension

The steps in the supply chain that might be relevant in considering price discrimination include:

- supply of manufactured grocery products and related products sold through grocery outlets—the supply of input into wholesaling
- supply of wholesale services to grocery retailers
- supply of grocery retail services to consumers.

In the terminology used by the Commission, the first of these could be described as a procurement market; while the second and third could be defined as distribution markets. A procurement market is defined by the OECD as:

... the purchase of inputs in the chain of production. In this broad sense, therefore, procurement is little more than a simple focus on the 'buying' side of economic markets ... procurement issues are about achieving 'value for money' for the buyer.

There is a market for the wholesale supply of grocery and related products sold in grocery outlets by manufacturers, importers and others. Buyers in this market include not only integrated grocery chains and independent grocery wholesalers, but also others who buy directly from manufacturers and the like such as the food service industry and exporters. However, the conduct that has prompted the present inquiry focuses on how wholesalers/chains relate to suppliers and this may be adequately considered in analysing wholesaling activities.

A relevant distribution market could be a wholesale market, a retail market or both—a wholesale-retail market. Possible price discrimination focuses on the relationship between wholesalers and their suppliers. However, it may affect competitiveness between different retailers thereby substantially lessening competition at the retail level. This suggests that, as in the Composite Buyers case (*supra*), it is appropriate to define a market for the supply of groceries and related items, that is, a distribution market, rather than separate wholesale and retail markets. This is because conduct at one functional level has competition effects at another functional level. To understand the competition implications requires consideration of both functional levels. Given the difficulties posed and the overall importance of the vertically integrated chains, it seems to be more commercially realistic to define a single wholesale-retail market.

7.1.2 The role of price in the market

The role of a market is to determine the terms and conditions of sale. Within a market, competition may be in terms of price or it may take other forms such as advertising, product differentiation, credit terms and the like (non-price competition). The Trade Practices Tribunal in *QCMA* stated:

Competition expresses itself as rivalrous market behaviour. In the course of these proceedings, two rather different emphases were placed upon the most useful form such rivalry can take. On the one hand, it was put to us that price competition is the most valuable and desirable form of competition. On the other hand, it was said that if there is rivalry in other dimensions of business conduct—in service, in technology, in quality and consistency of product—an absence of price competition need not be of great concern.⁶

Non-price competition and price competition are inextricably related, for example, an increase in product quality, with no change in nominal price, effectively reduces price to consumers. Pricing decisions and outcomes therefore play a critical role in the operation of a competitive market:

- prices and relative price outcomes provide buyers with information on which to base their decisions about consumption
- prices signal to producers the need/opportunity to alter their product mix in response to changing market conditions (Adam Smith's 'invisible hand') and price changes signal the need to adjust to changed market conditions
- price changes are one way in which the benefits of technical changes in production which reduce costs may be passed through to consumers.

Under perfect competition, all firms charge the same price. However, this is only because all market participants are, by definition, identical. Prices are not fixed; they change as market conditions change. So prices signal market opportunities or the need to adjust through entry/exit.

A competitive market is valued because it results in efficient outcomes, absent market failures. This means that resources are allocated in consumers' interests, producers adopt least cost production methods and are responsive to market changes resulting for example from changes in technology, changes in raw material availability and changes in demand.

The consequences of price fixing or of a unilateral exercise of substantial market power are to prevent the price signals required by firms (and, indeed by consumers) from operating satisfactorily. Signals become distorted. One consequence is that this adversely affects demand and means that a less than optimal amount of resources is allocated to this market. Consumers are therefore forced to accept less satisfactory alternative products. Costs too will be higher to the extent that there are economies of scale. This is because directly or indirectly, the collusive price fixing activity is likely to cause output to be restricted below the cost minimising (competitive) level. A producer with substantial market power or a group of producers, whose conduct is coordinated, though not necessarily by an illegal agreement, are less responsive to changing market conditions and flexibility is lost.

⁶ *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40–012 at 17,246.

7.1.3 A comment on price discrimination

A factor likely to generate price differences in the wholesale grocery market is the differing benefits to the supplier according to the extent to which the buyer is able to deliver on promotional commitments at the retail outlet. A buyer's performance in delivering promotional outcomes could ensure better prices.

Price discrimination occurs when a producer sells a product to different buyers at different prices and those different prices are not related to differences in costs. Some degree of monopoly power is necessary, but not sufficient for price discrimination.

Price discrimination is possible and profitable when:

- suppliers are able to control the amount of supply and the distribution of that supply
- it is possible to identify different classes of customers with different demand elasticities or willingness to pay
- it is not readily possible for the good or service to subsequently be resold.

The independent wholesale sector claims that the major retail chains obtain a better price deal through buyer power and not necessarily through equivalent volume (based, of course, on the same size of a distribution warehouse and not total national volume). However, other factors that influence pricing include the negotiating skill of a buyer with or without the presence of conventional buyer power and differences in promotional commitment.

7.1.4 A comment on 'buyer power'

Market power can manifest itself as 'seller power'—when a firm uses that power to give less but charge more. Seller power usually arises when a firm has a combination of a large market share, high entry barriers and/or a highly differentiated product. In contrast, defining 'buyer power' is more difficult.

A buyer may have market power relative to its supplier/s if a significant reduction in purchases by that particular buyer would substantially reduce the supplier's profits. This will occur if:

- there are inadequate alternative buyers to compensate for the loss of the particular buyer
- there are significant switching costs in changing to supply other buyers, and/or
- the supplier depends on the firm with buyer power to 'underwrite' its cost of production by facilitating economies of scale.

As retailers (especially grocery retailers) typically carry a broad range of products, they could refuse to stock one particular brand with little impact on sales. From the supplier's

perspective, to possess buyer power, the buyer must be able to credibly threaten not to acquire from the particular supplier or to reduce acquisition. The buyer should therefore know of alternative supply opportunities, that its switching costs would be relatively low and that it could either vertically integrate or underwrite an entrant (through a contract).

However, unless barriers to entry/exit into the downstream market are relatively high, the supplier could refuse to agree to the buyer's terms and set up its own downstream (retail) activity. In part, the barrier to entry into retailing results from the economies of scale and scope available to a specialist retailer selling a broad range of products, often through geographically dispersed locations. This is most significant when sales of particular products vis-a-vis alternatives depend on the ease with which consumers can access the product.

In response, a supplier may simply stand its ground and refuse to accept the terms of trade and seek other buyers. The opportunity loss to the supplier is a potential reduction in the presentation of its product in the retail market. The buyer imposing the condition may have a significant number of retail outlets. This type of behaviour was examined in *ACCC v Australian Safeway Stores Pty Ltd* (now on appeal).⁷

The relative bargaining of the supplier and the buyer is critically dependent on consumer loyalty to the brand compared to consumer loyalty to the store. If the former is weak relative to the latter, then the supplier will be in a weak bargaining position relative to the buyer, and vice versa.

It is suggested that there are several reasons why consumer loyalty to the store is greater than that to the brand. First, brand loyalty would be less if products were not highly differentiated and there were at least a few alternative suppliers, even if they were smaller. This provides an incentive for the retail chains to enter into arrangements with small to medium suppliers for alternative supply, including through house brands. It may also encourage the supermarket chains to act in a way that may cause a substantial shift of product promotion away from the manufacturer to the retailers.

Second, the cost to the consumer of switching brands when a preferred brand is not available is generally less than the opportunity cost of going to a second store. The fixed cost of visiting a second store is high, while the cost of buying another item within a store is comparatively low. This is reflected in the growth of the one-stop shop concept. Third,

⁷ *ACCC v Australian Safeway Stores Pty Ltd (No. 2)* [2001] FCA 1861. The Commission's allegations largely centred on the claim that Safeway (a subsidiary of Woolworths) had a policy that if bread products of a manufacturer were on special with another retailer (other than Coles or Franklins), in the vicinity of a Safeway store, at a price less than Safeway, then Safeway would remove that manufacturer's bread from sale while that product was on special at the competitor's store. The Commission alleged that the purpose of the policy was to punish the bread manufacturers for selling bread to independent stores at a price that would enable them to undersell Safeway. The Federal Court found that Safeway's policy was implemented to enable it to be competitive and not to punish the manufacturers or deter them from engaging in competitive conduct with independent stores. (Drawn from Justice Goldberg's summary of his judgment)

the retailer promotes customer loyalty in various ways, including by reducing the shopper's search costs, in part by providing quality assurance or certification, based on the retailer's own reputation and position in the market. This is particularly important for experienced goods and new products. Clearly, consumers benefit from this and may accept some increase in the average price paid to obtain a service supplied in this way. Finally, developments in information systems supply retailers with very detailed information about their customers and their shopping habits and have enabled them to influence both the upstream and the downstream components of the supply chain. This may help to explain the difference in buyer power between vertically integrated chains and the independent wholesalers. The former have direct access to consumers, while the latter do not interact with consumers and have limited influence over the independent retailers who do.

Most suppliers could not afford to lose access to the retail outlets of Woolworths and Coles. On a national basis Woolworths and Coles combined have over 1200 retail outlets. The Baird Committee explained that there are different measures for market share and they depend on whether the measure is just dry good groceries or the addition of fresh produce, bread and liquor, or a market that includes takeaway food. For convenience, one simple assessment of Woolworths and Coles is that they account for about 70 per cent of the grocery market. (This figure will vary depending on the measure that is used.) The buyer power of those major retail chains is significant. It might be expected that the major retail chains would invariably get the best price. Based on the data examined in this inquiry, the major retail chains do not always get the best price.

7.2 Some aspects of the Trade Practices Act: price discrimination

Section 45—contracts, arrangements or understandings that restrict dealings or affect competition

To breach s. 45 of the Act conduct resulting in price discrimination would have to include a contract, arrangement or understanding either between competitors or between a supplier and an acquirer (not exclusive dealing). It must then be established that the conduct within the relevant market/s has the purpose or effect or likely effect of substantially lessening competition. The issues associated with establishing purpose are the same as under s. 46 and for convenience are dealt with in that context. The focus here is on whether the alleged price discrimination has or is likely to have the effect of substantially lessening competition.

The elements required to determine this were spelt out in the Trade Practices Tribunal's decision in *QCMA*⁸ and were subsequently incorporated into the Commission's merger

⁸ *Re Queensland Co-operative Milling Association Ltd and Defiance Holdings Ltd* (1976), ATPR 40–012.

guidelines. The first step is to establish whether there are not too many alternative retailers already in the market that anti-competitive conduct could not succeed as it would simply drive consumers to those alternative retailers. From the earlier discussion of market participants it is apparent that, generally, the grocery market is highly concentrated. It could become more so if price discrimination in supplying grocery products caused non-chain retailers to incur higher costs e.g. the lower price given to the major chains is 'subsidised' by higher price charged to other buyers. It needs to be considered whether price discrimination could result in heightened barriers to entry, either structural or strategic. The same issue was recently addressed by the Commission in the Franklin's case, although the argument in that matter related to a failing firm.

It may be argued that entry at the retail level is relatively easy. Sunk costs are not particularly high. Regulatory requirements are also not a significant barrier to entry. Entry is possible as long as it is at the fringe. However, the issue is not just entry, but the entry of a firm that can effectively constrain firms whose conduct is at issue.⁹ It is likely that the conduct itself raises entry barriers by establishing over a long period the role of the major retail chains as market leaders. If price discrimination resulted in a further increase in market share for one or both of the chains, this would confer even greater economies of scale and scope. It would make viable entry by independents even more difficult and unattractive. Should one (or both) chains raise prices, smaller retailers would then have every incentive to follow suit. Although all independent retailers will not exit, those remaining are therefore unlikely to be a real constraint on the chains.

If price discrimination does have the effect of preventing or limiting independent retailers from competing and ultimately forces significant numbers from the market, it will have a flow-on effect to independent wholesalers whose customers are the independent retailers. However, whether this results in a substantial lessening of competition in the relevant market depends on numerous market factors. A reduction in the number of retailers and in diversity might more easily enable parallel conduct or tacit collusion.

Section 46—misuse of market power

While most price discrimination conduct does not raise anti-competitive concerns, it is arguable that given appropriate circumstances, a powerful buyer could breach s. 46 of the Act. The requirements for establishing a breach of s. 46 are somewhat different from those discussed previously.

First, it is necessary to establish that a corporation has substantial market power. Based on the discussion of buyer power, it seems probable, hypothetically speaking, that it could be established that each of the major retail chains has market power, or possibly that each has substantial market power.

⁹ There was no finding of a breach of s. 45 in *ACCC v Australian Safeway Stores Pty Ltd (No. 2)* [2001] FCA 1861 (see the discussion of the issue of barriers to entry at paragraph 1069-1072). Justice Goldberg found that Safeway's market power as an acquirer in the wholesale bread market could not be constrained, except by a new entrant of a size and store coverage comparable to that of Safeway.

Assuming substantial market power, the next step would be to establish that a corporation has engaged in conduct that took advantage of, or used, that market power. The 'take advantage' element distinguishes between competitive and non-competitive conduct. To determine whether advantage has been taken, it is necessary to consider whether a corporation without market power would be likely to engage in the same conduct in a competitive market. If a corporation acted in a manner that was significantly different from the behaviour that a competitive market would enforce on the firm, such conduct could be called 'taking advantage of the market power'.

The third requirement to establish a breach of s. 46 is to prove that a firm's conduct had the anti-competitive purpose of eliminating or damaging a competitor or preventing a person from entering a market, or deterring or preventing competitive conduct in a market. Notwithstanding the ability to infer purpose from conduct or circumstances, it is becoming more difficult in the absence of 'smoking gun' documents to prove a proscribed purpose.

When undertaking a s. 46 analysis, it may also be important to consider how price discrimination can or could interrelate with other strategies. Other related factors may have an effect on whether conduct is competitive or anti-competitive in the long run, or establish a proscribed purpose. These might include:

- agreements with suppliers such as a 'most favoured customer' clause or a 'meet the competition' clause, but this too is ambiguous in its objectives. It entitles the buyer to terms that are at least as good as those offered to other buyers. This may be to protect the firm's competitiveness and to ensure that its retail customers receive the best possible price. However, it may result in reduced price flexibility or even in price fixing depending on the circumstances
- the role of creeping acquisitions
- changes in relationship with suppliers/nature of business—e.g. payment only after products sold, or by category management (where a supplier negotiates access to the retail outlets to plan how its products and those of its competitors are presented by the retailer in terms of shelf space and prominence—usually retail stores plan their own category management but that practice is changing)
- the significance of reputation
- policy with respect to suppliers—generally only want two main suppliers and perhaps a minor one in a category.

As s. 46 currently stands, a misuse of market power cannot be directly established on the basis of anti-competitive effects. In its submission to the Committee of Inquiry for the Review of the Trade Practices Act 1974, the Commission has supported the introduction of an effects test in s. 46 to supplement the existing purpose test. Such an amendment would align s. 46 with the other competition provisions, focusing the prohibition on illegitimate conduct that has the purpose or effect of damaging competition, thereby promoting competition and fair trading generally. The ability to establish a use of market

power based on an effects test would also reduce the evidentiary difficulties associated with the existing purpose test.

7.3 Conclusion

Price discrimination may occur when different buyers pay different prices, when supply costs are the same, or when all buyers pay the same price when supply costs are different. What identifies the pricing conduct as discriminatory is variation in the ratio of price to marginal cost across different buyers. There are reasons for expecting that the costs incurred by manufacturers supplying the retail grocery chains and independent wholesalers may be different and from an economic perspective it would be anticipated that these differences would be reflected in the prices paid for supply. Based on the data received in this inquiry, suppliers do not appear to be setting prices on that basis.

Some independent wholesalers occasionally receive better prices than the major retail chains.

chapter 8

Some reform proposals: like terms for like customers

8.1 Some legislative reform proposals

The Senate's order requires the Commission to outline the circumstances in which differences in prices paid to suppliers by the various industry participants would amount to a breach of the *Trade Practices Act 1974*. This largely involves a discussion of Part IV (restrictive trade practices) of the Act.

Over a period of time, misuse of market power has been considered concurrently with reform proposals for the Act. The Baird Committee deliberated on strengthening the Act to combat alleged predatory pricing by the major retail chains. The major chains refuted the allegations. The Baird Committee decided to leave open the issue of a reversal of the onus of proof under s. 46 of the Act for review when the committee is reconstituted in 2002.

In its public discussion paper for this inquiry, the Commission identified relevant provisions of the Trade Practices Act that might be applicable to this inquiry. During the period of this study, the Government announced an independent review of the competition provisions of the Act. On 2 July 2002 the Commission's submission was filed with the Committee of Inquiry for the Review of the Competition Provisions of the *Trade Practices Act 1974*. The submission is publicly available on the Department of Treasury website at <http://www.tpareview.treasury.gov.au> and the document covers the provisions of the Act relevant to this inquiry.

8.2 Like terms for like customers: variations on a theme

There is no legally enforceable right under the Act for a buyer to be offered the same price as another buyer. The primary question about whether price discrimination per se is anti-competitive has been asked and answered emphatically by the repeal of the prohibition on price discrimination in the Act (s. 49) in 1995. Significant additional predatory factors are necessary to take price discrimination into the area of anti-competitive conduct. An allegation of unlawfulness simply because there are observable price differences is inconsistent with the law as it now stands and with accepted economic theory.

In chapter 7 of this report the Commission has outlined its views in more detail on a hypothetical basis of when price differences are likely to be anti-competitive.

In Recommendation 5 of its report, the Baird Committee refers to the concept of 'like terms for like customers' as a general principle to describe fair pricing conduct in the context of terms and conditions of contracts of supply. The origin and status of the principle is not explained. The Baird Committee recommended that the Commission be empowered to seek information from corporations, on a confidential basis, to monitor compliance with the general principle. As previously noted, the government did not adopt the committee's recommendation.

The Senate's order states the concept as '... whether retailers and wholesalers of a similar scale, as customers of suppliers, are offered goods on like terms and conditions, ...'.

The representatives of the independent wholesalers argued that a like customer is to be judged at the wholesale level by reference to the size of the central distribution warehouse, irrespective of whether that central warehouse is operated by the major retail chains or independent wholesalers.¹ The independent wholesalers also pointed out that they were a conduit to the independent retailers for the funding support provided by suppliers. They argue that if the retail chains receive a lower price for the same product then they not only have a competitive advantage at the ultimate point of sale but they are better able to mount a price reduction campaign. Under the Act, such pricing is not unlawful unless its purpose is to damage or eliminate a competitor. Proof of a proscribed purpose in predatory pricing is often a difficult task.

The Australian Food and Grocery Council (AFGC), in its submission to the Commission, argues that 'like terms for like performance' is a more robust, equitable and transparent business-pricing model.² Performance is said to be a more relevant measure and it encapsulates efficiency, business goals and strategic elements that are important to governing the business relationship as a whole. AFGC argues that the 'first price' applied to a product is the same within the relevant market, allowing for limited exceptions such as transport costs. Consideration of performance, including business efficiency exhibited by the customer, then determines the ultimate supplied price. The suppliers argue that 'like terms' is not a legal right—it is an opportunity to obtain a good price provided the business goals and strategies of the buyer and the supplier align. They argue that the best measure for determining the net price in this approach is **performance**.

The issue of 'like terms for like customers' is one of the key issues in this inquiry. The different interpretations given to the 'general principle' mean that there is a wide divergence in the perception adopted by suppliers to that adopted by the independent wholesalers.

One major supplier said of the 'general principle':

¹ Submission number 32.

² Submission number 31.

The retail environment is complex with participants constantly trying to differentiate themselves to consumers. Customers [buyers at the front-end or upstream of supply] differ in their willingness and capability to work with suppliers to create business growth. To attempt to equate customers on simple metrics such as volume or store size ignores the complexity of the retail environment and runs the risk of adopting the lowest common denominator approach. Such an approach will inevitably result in reducing the level of innovation and differentiation between retailers and that would not be in the interests of suppliers, retailers or consumers.³

Another major supplier also supported the concept of 'like terms for like performance' and in doing so explained that the 'general principle' needs to recognise additional elements. The comments made included:

In addition to the question of scale, or 'like for like', there remains a service element to any agreement with retailers. To the extent that a retailer is able to deliver better retail execution, stock management and brand exposure, the opportunity to differentiate trading terms remains. Again, we believe this is consistent with the principles of equity and fairness and amounts to payment for service.⁴

The AFGC explained its view with '... similar terms and conditions can only occur when similar value is exchanged ... and this value should be expressed in a performance based manner'.⁵

Performance translates into a price reduction which usually take the form of funding support given by the supplier to the buyer. The level of support is reflected in the agreed business plan negotiated between the supplier and the buyer and the plan is subject to periodic review.

One observation expressed anecdotally was that a business plan is just new terminology for standard terms of trade plus additional terms of trade rolled into one document. They are really one and the same concept. It is a feature of the grocery industry that it is creative in the terms it uses.

A business plan does, however, offer a more sophisticated approach in addressing the identification of key performance indicators and agreed common goals. The Commission accepts that business plans have evolved from more prescriptive and itemised terms of trade in the grocery industry.

An example of the elements included in a business plan is shown on the next page.

³ Submission number 12.

⁴ Submission number 37.

⁵ Submission number 31.

Table 8.2 A sample business plan⁶

A business plan will usually include agreed targets and markers for:

- sales volume, value and profit projections for the plan period
- specific business growth opportunities (taking into account individual store business plans, consumer trends and retailer gap analysis*)
- initiatives to realise the identified growth opportunities
- areas for potential cost savings in the supply and administration chain, along with initiatives to realise those cost savings
- the price promotional program
- an outline of the integration of the supplier's marketing plans with the buyer's marketing plan
- a business performance score card to map actual versus plan key performance indicators
- plan review requirements.

[* retailer gap analysis is a review of the planned performance results compared to the actual results]

Specific growth incentives are usually negotiated on an individual basis and can include elements such as training and conference support for the buyer. Each business plan is individually tailored and therefore the 'net net' price for the product will vary between buyers. Other factors affect the agreed price and these include the unwritten but self-evident factor of whether the buyer presents the supplier's product in a clean and consumer friendly environment.

Consideration of the 'general principle' is further complicated by a range of other important factors. These include 'investment buying'—when a buyer will stock up on bulk supplies of a product during a promotional campaign by a supplier. Suppliers do not favour 'investment buying' which involves stockpiling products in warehouses. Most suppliers prefer to see the 'specials' carry through to the consumer to enhance brand promotion.

There are other price impacts that carry through to the consumer. The retail chains have wholesale divisions within their integrated structure that are distribution points for their retail stores. The independent sector, in its simplest form, often has the wholesaler as a separate entity entitled to apply a profit margin to the price. The retail chains apply a cost impact for internal transfer that is added to the price but the impact does not include a profit margin or provide for bad debts.

⁶ Drawn from Submission number 12.

Unlike the retail chains the independent wholesaler must carry the cost of bad debts, slow payment and smaller volume distribution for the grocery products it in turn sells to the individual independent retailers. As noted above, the independent wholesaler also applies its mark-up. The comparison favoured by the independent wholesalers of 'like customers' stops at the point of front-end/upstream supply at the local central distribution warehouse, which is an artificial construct for an integrated retail chain which may operate on a state-wide or national marketing plan.

There is a trend for the major retail chains to rationalise their wholesale divisions and to centralise decision-making, therefore offering the suppliers greater efficiency in marketing their products. In an October 2000 Staff Research Paper, *Productivity in Australia's wholesale and retail trade*, Productivity Commission staffers observed:

There has been widespread centralisation of the distribution function by firms such as Philips, Coles Myer and Kodak (industry consultation) ... Centralisation has been aided by improvements in transport which enable goods to be moved overnight from (say) Melbourne to Adelaide, thereby reducing the need for warehouses in source and destination sites. These developments have resulted in further savings from better inventory management.⁷

Combined with improved efficiencies from the introduction of electronic systems such as bar coding applied to orders, warehouse operations are becoming more sophisticated. The bar coding system allows automatic triggering of replenishment orders for stock. This in turn means smaller inventories to maintain and less storage space. The modern trend is for more rapid flow-through of goods from the supplier to the consumer rather than a focus on the size of the warehouse.

Until there is uniform acceptance on what the 'general principle' of like terms really means, the participants in the grocery industry will continue to disagree over what is a fundamental concept that governs terms of trade. From an examination of the submissions it has received, the Commission makes the observation that the terminology used in the Senate order of 'retailer and wholesalers of a similar scale' reflects the views of the independent wholesalers rather than the grocery industry as a whole. There are strong and divergent views within the industry on this concept.

⁷ Johnson, Alan and others, *Productivity in Australia's wholesale and retail trade*, staff research paper, Productivity Commission, Canberra, October 2000, p. 55.

Appendixes

Appendix 1	Discussion paper
Appendix 2	Questionnaire for suppliers
Appendix 3	Questionnaire for wholesalers
Appendix 4	Questionnaire for retailers

appendix 1 Discussion paper

Senate order to the Australian Competition and Consumer Commission on prices paid to suppliers by retailers and wholesalers in the Australian grocery industry

Discussion paper

AUGUST 2001

Australian Competition and Consumer Commission

IMPORTANT NOTICE

The purpose of this discussion paper is to provide a general focus for the issues to be examined in retail grocery supply at the front-end of the supply chain. The issues and questions identified by the Commission are not intended to restrict the content of submissions or comments to be provided by those participants to be contacted by the Commission. The Commission welcomes frank and open discussion. The discussion is about the issues involved in retail grocery supply with a primary focus on prices paid, including the terms and conditions of supply in the relevant markets.

The Commission seeks information and clarification of the issues so that it is better informed in compiling its report to the Australian Senate.

Where a participant has been identified or a name implied in this discussion paper, the Commission does not assert nor imply that the participant identified has contravened the *Trade Practices Act 1974* by any association whatsoever with the questions raised in this discussion paper.

Purpose

The purpose of this discussion paper is to provide an outline of some of the issues that arise in a consideration of the pricing of retail grocery supplies at the manufacturing, supply and wholesaling end of the grocery market, including any price differences between customers. 'Price' is given an expanded meaning in this paper to include all aspects of the terms and conditions of dealings between retailers or wholesalers and their suppliers, including the total funding support given by suppliers to the major retailers and wholesalers (which may include deferred discounts, volume rebates, co-operative advertising, growth incentives, point of sale promotions, etc.).

This discussion paper is not intended to be definitive about the issues or the questions that need to be raised. Its purpose is simply to provide a general focus arising from the order of the Australian Senate of 8 February 2001 (see attachment to this paper). The discussion paper is made publicly available. The Australian Competition and Consumer Commission (Commission) is required to report to the Australian Senate within a relatively short timetable.

The Commission recognises the importance of small, independent retail grocery outlets and the interests of consumers. However, the Senate order requires the Commission to direct its inquiries to 'a sampling of key suppliers and major retailers'. The Commission is therefore not making a general request for submissions. Rather, the Commission will ask a sample group of manufacturers, suppliers, wholesalers of grocery products and retail chains to respond to a specific range of questions, some of which are mentioned in this paper and also attached.

As noted in the Senate's order, responses to those specific questions may involve genuinely commercially sensitive information. That information will be accorded appropriate protection.

Background

On 8 February 2001, the Australian Senate agreed to an order that a report be presented to the Senate, as soon as practicable after 30 June 2001, by the Commission on the prices paid to suppliers by Australian grocery retailers for the goods they resell, and whether retailers and wholesalers of a similar scale are offered goods on like terms and conditions. The order also dealt with related matters concerning price differences and market conduct.

Independent wholesalers and their retail customers have concerns that they are unable to obtain goods on the same terms as the major grocery chains.

These concerns were considered by the Parliamentary Joint Select Committee on the Retailing Sector and were addressed in Recommendation 5 in the Committee's report *Fair Market or Market Failure? A review of Australia's retailing sector* (August 1999). The

Committee recommended a mandatory code of conduct that would include specific provisions to address the general principle of ‘like terms for like customers’, with the Commission empowered to seek information on key terms and conditions of contracts of supply.

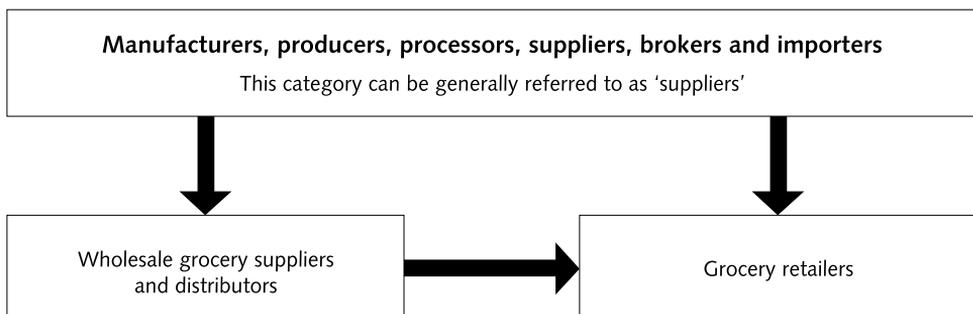
While supporting the general thrust of the committee’s report, the government’s response of 17 December 1999 favoured a **voluntary** code of conduct to foster self-regulation in the grocery industry. The government did not consider it appropriate for the code to deal with ‘like terms for like customers’, noting that the provision in the Trade Practices Act dealing with price discrimination (s. 49) had been repealed following the Hilmer Inquiry on national competition policy. The government also queried whether it was the role of the Commission to have right of general access to a company’s commercial information about supply terms. The Commission uses its statutory powers to obtain information for specific enforcement action where the Commission has reason to believe that there has, or may be, a contravention of the Trade Practices Act.

A voluntary Retail Grocery Industry Code of Conduct and a Retail Grocery Ombudsman’s Scheme commenced in September 2000.

Relationships that interact in the grocery industry: front-end bulk supplies of groceries

The prices paid by wholesalers and retailers in their bulk purchases from suppliers will inevitably flow through to the end consumer but this discussion is about the relationships between the major suppliers, wholesalers and Australian grocery retailers—that is, those at the front-end of the supply chain.

The parties that interact at the front-end of supply include:



Groceries reach the shelves of retail stores in three main ways:

- direct supply by the manufacturer, supplier or processor (e.g. bread, milk and tobacco)
- supply by the manufacturer or supplier to the distribution centre of a major retail chain which then delivers the goods to its own stores
- delivery by the manufacturer or supplier to the warehouse of grocery wholesalers who then sell the goods to retail outlets.

Grocery wholesalers, and sometimes suppliers, may provide other services and support to independent retailers to assist the retailers in developing their businesses, business skills, market share and profitability. A fee, based on warehouse withdrawals, may be levied. Grocery wholesalers also face different commercial relationships in their dealings with independent grocery retailers, compared to the integrated retail chains. For example, a supply of groceries within an integrated chain is an 'internal transfer'. Grocery wholesalers carry a debt risk for the individual retailers they supply.

Supply and trading terms: some main issues

The agreement between a supplier or manufacturer and its customer is constituted by a series of trading terms. These include various discounts, allowances and promotional support offered by the supplier or manufacturers to their customers.

A grocery wholesaler or integrated chain will negotiate specific trading terms with suppliers and manufacturers. These terms will usually cover a broader range than would apply to a direct agreement with a retailer. The broader range of terms will include, but is not limited to, settlement discounts, warehouse allowance, quantity purchase allowances, ullage (allowance for shrinkage and damage in bulk supply), case deals (contributions to support a particular product promotion), bonus stock and co-operative advertising. Fluctuations in a supplier's prices, including through case deals, may lead to volume buying patterns by customers that take advantage of the lower prices (known as 'investment buying'), which can impact on production, storage and distribution costs.

For a retailer dealing through an independent wholesaler accessing grocery products from a supplier or manufacturer, the wholesaler's costs and profit margin are part of the costs of distribution. The integrated chains also incur costs in distributing grocery products to their retail outlets. However, it is clear that the full price support that a wholesaler receives in its terms of trade from suppliers is not passed on to independent retailers, some is retained by the wholesaler to cover its costs and profit margin. Some suppliers also provide price and promotional support direct to independent retailers as part of banner group deals or in 'street money' to individual stores. Independent retailers may thus receive price support from suppliers directly and/or through their wholesaler.

It appears that the structure of grocery trading terms, at least between some suppliers and customers, has changed significantly in recent years. The 'old' approach of a price list and range of conditional discounts, rebates and allowances is being overtaken by individual business plans that are tailored to suit the mutual goals of the supplier and customer. These business plans focus on factors such as the customer's sales performance, revenue targets, promotional plans, product range and presentation in reaching an agreed level of funding support by the supplier.

Primary producers, processors and retailing

The buying power of the integrated grocery chains and major wholesalers may have an effect on the price paid to primary producers. To some extent producers of fruit and vegetables may have some opportunity to export or sell through city/town markets, but meat (except for live exports) and dairy products are usually marketed through processors. The voluntary Retail Grocery Industry Code of Conduct (which covers all grocery participants in vertical relationships with one another and not just fruit and vegetable suppliers) has been implemented to assist participants to conduct their dealings in a way that recognises the right of:

- the retailers to buy the best produce at the best price
- suppliers to have their produce fairly evaluated for purchase against clear and objective standards and specifications.

Farm production involves complex variables that affect prices. Seasonal influences are an obvious factor but deregulation and the trend towards contract farming, including the development of new fruit and vegetable varieties, as well as a growth in the marketing of organic foods, make price assessment less predictable. In addition, the perishable nature of fresh produce and the trend for only top quality items invites a conclusion that there may be less scope for the suppliers and processors to stipulate extended terms of trade with the integrated chains and other retailers.

Also, there may be only a weak correlation between the price paid for primary produce and the retail price for a number of reasons including the simple factor of pricing to take account of product spoilage, shelf life and seasonal variation. The existing voluntary retail grocery industry code is aimed at assisting primary producers of fresh fruit and vegetables in the supply chain relationships.

Given the number of variables involved in supply of primary products, this inquiry will exclude consideration of the price of fresh fruit and vegetables and fresh meat. The inquiry will, however, discuss items included in the retail category 'dairy case', such as fresh white milk and cheese. The Commission notes that the comparison of prices paid at the farm gate to the price paid by consumers at the end of the supply chain is an important issue but a detailed analysis of that issue is beyond the scope of this inquiry.

A selected basket of groceries

Due to the vast range of grocery items, and consistent with the terms of the Senate order, this discussion paper proposes that the inquiry focus on prices of a limited range of staple products. In this paper, the word 'groceries' includes food and drink, cleaning products, toiletries and household goods.

The products selected are listed below by retail category rather than product name. The Commission will write to the suppliers of grocery products to seek specific pricing information on their particular brands. The inquiry will not address generic products and any implications for pricing differences; rather the focus will be on examining any price differences for the same brand of grocery.

The range of products is:

Product	Annual grocery value: supermarkets: Yr 2000	Annual grocery volume: supermarkets: Yr 2000
Carbonated/still beverages	\$1300 million	1200 million litres
Confectionery	\$1019 million	582. 5 million units
Biscuits	\$884. 3 million	112,056. 2 tonnes
Bread, rolls and hotplate	\$686. 4 million	327 million units
Breakfast cereals	\$736. 3 million	128,611. 1 tonnes
Dairy case		
• Cheese	\$845. 9 million	108,127 tonnes
• White milk—fresh	\$1032 million	736. 7 million litres
• Dairy dessert/yoghurt	\$503.5 million	123.2m kg
Coffee	\$512.2 million	15,196 tonnes
Tea	\$243.5 million	6.2 billion cups
Pet food	\$991. 4 million	472,487 tonnes
Toilet paper (paper products)	\$538 million	26. 1 million standard units
Ice cream (frozen food)	\$463. 1 million	119 million units
Margarine	\$285 million	79,082 tonnes
Sugar	\$153.1 million	126,243 tonnes
Snack foods	\$851.4 million	64,822 tonnes
Canned fruit	\$228.4 million	
Pasta	\$274.5 million	
Personal items		
• Body wash	\$219. 9 million	31,492 tonnes
• Shampoo (hair)	\$210. 3 million	18 million litres
• Toothpaste	\$193. 5 million	71.1 million litres
Cleaning products		
• Dishwashing—hand	\$104. 9 million	40. 4 million kg/litres
• Dishwashing—auto	\$ 62. 9 million	9. 2 million kg/litres
• Laundry	\$431. 2 million	131,733. 3 tonnes
Tobacco	Not available	25. 1 billion sticks

Source: Retail world, vol. 53, No. 24, December 2000, Parramatta, Sydney, Australia, 34th Annual Report

Participants in the inquiry

The Commission will direct specific questions in respect of the above range of products to the main suppliers, as well as the retail chains and grocery wholesalers.

Relevant market: metropolitan: regional and rural

The Senate order asks the Commission to report on the impact of price differences on competition in the relevant markets. As noted previously, price differences in markets at the front-end of the supply chain may flow through to consumers in retail prices. Thus, differences in the prices of supplies may affect competition at the retail end of the supply chain.

The approach adopted by this inquiry will involve an analysis of evidence derived from suppliers and customers. The relevant data to be ascertained could include (but is not limited to):

- number and sales volume of suppliers and customers
- prices and supply efficiencies to different customers
- the importance of dealing with one major supplier
- the product range of the supplier
- whether the purchaser is prepared to switch to another supplier due to a price increase
- distribution efficiencies of retail chains and wholesalers.

A further matter to consider is whether the pricing issue to be discussed varies markedly between metropolitan and regional and rural areas. Issues to consider here also include state-wide pricing by grocery chains, and any change in the type of retail stores, e.g. smaller-size stores operated by grocery chains and independents.

Public benefit

An important consideration is the 'public benefit'. This concept is not defined by the Trade Practices Act but the Commission must identify the public benefit when it considers both enforcement and authorisations. One concept of public benefit is 'anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of economic goals of efficiency and progress'.¹

¹ See *Re 7-Eleven Stores Pty Ltd* (1994) ATPR 41-357.

Again, the issue to determine is what weight should be put on the benefit to the public generally and should that include the private benefit to grocery retailers in removing what is perceived as alleged discriminatory pricing they encounter in their dealings with suppliers?

The Senate's order specifically poses the question—is there public benefit in the existence of price differences? The question raises the issues of whether the price differences are a consequence of a competitive market place (that is, do price differences reflect different costs of supply taking into account volume and distribution efficiencies, etc?), or an exercise of market power. Variations in city and country price levels may also be an issue.

'Price' is the central theme to the Senate's order but are other public benefit factors equally as important in grocery retail, such as quality and choice? Also, what consideration should be given to the costs and benefits of greater regulation of the market?

Trade practice conduct issues

Broadly speaking there are several provisions in the Trade Practices Act that may be relevant to this inquiry. These include anti-competitive conduct, unconscionable conduct in business transactions and misleading and deceptive conduct.

Anti-competitive practices may include:

- anti-competitive agreements that have the purpose or effect of substantially lessening competition; these include contracts, arrangements or understandings that restrict dealings or affect competition (s. 45)
- agreements that fix prices (s. 45A)
- misuse of market power, such as predatory pricing—lowering prices to drive a competitor from the market with a view to then raising prices to recoup losses (s. 46)
- exclusive dealings (s. 47)
- resale price maintenance—specifying a minimum price for sale of a product (ss. 48, 96–100)
- mergers or acquisitions which would have the effect or likely effect of substantially lessening competition in a substantial market for goods or services (ss. 50 and 50A)
- unconscionable conduct in business transactions—taking advantage of a weaker party in a business transaction without regard to conscience (s. 51AC)
- misleading or deceptive conduct—misrepresentations (s. 52).

As noted above, details of the Senate's order of 8 February 2001 and the questionnaires to commence the inquiry are attached to this discussion paper.

Contact point for additional information

The contact for additional information is:

Ian Searles or Brendan Bailey

National Office
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Telephone: (02) 6243 1111

Facsimile: (02) 6243 1199

Email: grocery.pricing@acc.gov.au

AUSTRALIAN SENATE
PARLIAMENT HOUSE
CANBERRA ACT

ATTACHMENT

Clerk of the Senate

8 February 2001

00/879

Professor Allan Fels
Chairman
Australian Competition and Consumer Commission
470 Northbourne Avenue
DICKSON ACT 2602

Dear Professor Fels

I transmit to you the text of an order agreed to by the Senate today. The order is as follows:

- (1) That there be laid on the table, as soon as practicable after 30 June 2001, a report by the Australian Competition and Consumer Commission on the prices paid to suppliers by Australian grocery retailers for the goods that they re-sell, and whether retailers and wholesalers of a similar scale, as customers of suppliers, are offered goods on like terms and conditions, and including:
 - (a) an assessment, based on a sampling of key suppliers and major retailers of:
 - (i) the extent of any price differences,
 - (ii) the impact of any such price differences on competition in the relevant markets, and
 - (iii) whether there is public benefit in the existence of price differences;
 - (b) subject to paragraph (2)(b), identification of any conduct found by the commission in the course of preparing the report that is likely to be in breach of the *Trade Practices Act 1974*, together with an account of action taken or proposed to be taken by the commission in respect of such conduct; and
 - (c) an outline of the circumstances in which, in the commission's view, differences in prices paid to suppliers by the various industry participants would amount to a breach of the anti-competitive conduct provisions of the Act.
- (2) That, in carrying out the requirements of paragraph (1), the commission:
 - (a) is to take 'prices' to include all aspects of the terms and conditions of dealings between retailers or wholesalers and their suppliers, including the total funding support given by suppliers to the major retailers and wholesalers; and
 - (b) may withhold genuinely commercially sensitive information from the report provided that the withholding of such information does not prevent the commission from giving the Senate a clear account of the matters mentioned in paragraph (1).

Yours sincerely

Harry Evans

appendix 2 Questionnaire for suppliers

Australian Competition and Consumer Commission

Report by the Australian Competition and Consumer Commission on prices paid to suppliers by wholesalers and retailers in the Australian grocery industry.

List of questions on factors that may affect prices.

Questions for suppliers

Notes for answering the questions:

- (a) The information sought is for the period since 1 July 1999.
- (b) Manufacturers, importers and distributors are referred to as 'suppliers'.
- (c) There are many factors that can affect the final cost of goods, including (but not limited to) rebates, discounts and other allowances. For the purpose of these questions, these terms and 'support' are used to generally describe such factors.
- (d) The answers sought should relate to the categories of products listed in the table of 'A selected basket of groceries' (attachment 1). Please exclude 'generic' grocery items. Where more than one product category is supplied, please answer on a per product category or divisional basis for CQ 1.
- (e) In relation to CQ 7, where a pricing arrangement is based on a 'business plan' approach, please provide an explanation of the approach and the features of such plans including the support provided.
- (f) Please indicate information that you consider to be commercially sensitive.
- (g) In presenting its list of questions, the ACCC does not imply that any participant has contravened the *Trade Practices Act 1974*.
- (h) Responses to questions are requested by close of business **31 August 2001** to:

Addressee name Ian Searles
Grocery Pricing Inquiry

Postal address National Office
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Email address grocery.pricing@acc.gov.au

Facsimile (02) 6243 1199

(i) Please provide the following details in respect of your business:

Trading name

Contact officer name and contact details

Please indicate how long it took to prepare this response

No. of person hours:

No.	Question	Action required
Customer and pricing information		
CQ 1 (see note (d) on first page)	Please complete the following tables for your top 10 grocery wholesaler and retailer customers for the periods 1 July 1999 to 30 June 2000 and 1 July 2000 to 30 June 2001	Please complete tables and briefly explain any differences in the level of funding support

For the period: *1 July 1999 to 30 June 2000*

Wholesaler or retailer name	Total support funding to customer (a) \$	Total gross sales to customer (b) \$	Percentage of total support funding to gross sales (a/b) %
Total 'net' revenue from all your sales (to all customers, not only the above, and not only grocery wholesaler and retailer customers)			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In providing wholesaler/retailer name

Please provide information by wholesaler or retailer banner or division (e.g. IGA, Campbells Cash & Carry, Metro, Express)

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	
- Please exclude any field force or merchandiser costs from total funding support figures, and record any such cost as separate items in column (a)

In completing column (b)

Total gross sales (invoice value before any deferred or on/off invoice case deals)

For the period: 1 July 2000 to 30 June 2001

Wholesaler or retailer name	Total support funding to customer (a) \$	Total gross sales to customer (b) \$	Percentage of total support funding to gross sales (a/b) %
Total 'net' revenue from all your sales (to all customers, not only the above, and not only grocery wholesaler and retailer customers)			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In providing wholesaler/retailer name

Please provide information by wholesaler or retailer banner or division (e.g. IGA, Campbells Cash & Carry, Metro, Express)

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	
- Please exclude any field force or merchandiser costs from total funding support figures, and record any such cost as separate items in column (a)

In completing column (b)

Total gross sales (invoice value before any deferred or on/off invoice case deals), inclusive of GST

No.	Question	Action required
CQ 2	<p>(a) Apart from the funding support listed in answer to CQ 1, do you (for example, through your sales representatives) provide extra funding support directly to individual retail grocery stores (sometimes known as 'street money')?</p> <p>(b) If you provide such 'street money' support, please advise the total \$ amount of this support provided for the periods 1 July 1999 to 30 June 2000 and 1 July 2000 to 30 June 2001 to each of the following:</p> <ul style="list-style-type: none"> ● Woolworths ● Coles ● Franklins ● other grocery retailers 	<p>Yes or no? Please provide information</p>
CQ 3	Of the customers listed in answer to CQ 1, please indicate which customers you consider to be of a similar scale	Please provide information
CQ 4	In your experience, why are grocery retailers and wholesalers most likely to switch suppliers?	Please provide information

Price Lists

CQ 5	<p>Do you issue a comprehensive price list on a regular basis to any buyers or potential buyers?</p> <p>(a) If you issue a comprehensive price list are the prices the same for all buyers?</p> <p>(b) If there are different price lists for the same products, what are the reasons for the difference in prices?</p>	<p>Yes or no? Please provide advice</p>
CQ 6	<p>Do you issue promotional and special price lists to buyers or potential buyers?</p> <p>(a) If you issue promotional and special price lists to buyers and potential buyers are the prices the same for all buyers?</p> <p>(b) If there is a different price list for the same products on offer for promotional or 'specials', what are the reasons for the difference in prices?</p>	<p>Yes or no? Please provide advice</p>

Discounts, rebates and other allowances

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers

CQ7	<p>Do you provide payments or other support to your grocery retailer and wholesaler customers:</p> <p>(see note (e) on first page)</p> <p>(a) to have your products stocked in grocery outlets (or 'slotted' in wholesale outlets); or</p> <p>(b) for better position of products in the grocery outlet; or</p> <p>(c) if a grocery outlet increases the range or volume of your products that it stocks; or</p> <p>(d) for the stocking of new products in grocery outlets; or</p> <p>(e) to have your products promoted within grocery outlets during the year; or</p>	<p>Yes or no? Do you provide such support to all customers on the same basis? If not, could you please briefly explain the basis of different treatment</p>
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No.	Question	Action required
CQ7 cont.	<p>(f) for specific promotions of your products in grocery outlets; or</p> <p>(g) for retrospective discounts to customers (i.e., which reduce the price of products agreed at the time of sale or where the margins from the sale of your products were less than the customer expected); or</p> <p>(h) for retrospective support for promotions instigated by a customer, or the grocery outlets they supply, without your agreement; or</p> <p>(i) when your products are discounted by a retailer, for competing retailers to match the lower retail price; or</p> <p>(j) for credit to customers for unsold products when 'sale or return' was not one of the terms of sale; or</p> <p>(k) based on the volume of purchases of your products; or</p> <p>(l) for warehouse ullage (evaporation, leakage, shrinkage or wastage) in your products; or</p> <p>(m) by allowing them to purchase larger amounts of stock at 'special' prices for sale later when special retail prices have ceased (known as 'investment buying'); or</p> <p>(n) as compensation for consumer complaints without proof that the product was at fault or that a complaint had been made; or</p> <p>(o) for hospitality purposes including sponsorship of conferences and overseas study tours; or</p> <p>(p) for training, or business planning purposes; or</p> <p>(q) for refurbishment of retail outlets or the opening of new outlets; or</p> <p>(r) for procedural or administrative changes in product distribution in retail outlets; or</p> <p>(s) other forms of support (for example, painting of stores, advice on store layout, provision of equipment, etc.)?</p>	<p>Yes or no?</p> <p>Do you provide such support to all customers on the same basis?</p> <p>If not, could you please briefly explain the basis of different treatment</p>
CQ 8	<p>Do you have standard credit terms for your grocery retailer and wholesaler customers?</p> <p>(a) Do you allow such customers discounts for payments made prior to the 'due date'?</p> <p>(b) Do you allow such customers to not pay for goods until the point of wholesale or retail sale (i.e., a 'pay on scan' approach)?</p>	<p>Yes or no?</p> <p>Do you provide such support to all customers on the same basis?</p> <p>If not, could you please briefly explain the basis of different treatment</p>
CQ 9	<p>What is the rationale for the various discounts, allowances, rebates and other support that you provide to your grocery retailer and wholesaler customers? For example, what are the costs or benefits for your company? What is expected in return?</p>	<p>Please provide explanation</p>

No.	Question	Action required
Supply arrangements		
CQ 10	Are your supply arrangements with customers: (a) long-term formal contracts; or (b) short-term formal contract; or (c) on a less formal periodic request, or other basis? Do these supply arrangements have a rise and fall clause for prices?	Yes or no? Please provide explanation
Public policy matters		
CQ 11	Do you consider that there is public benefit in the intervention by a regulator in pricing matters between suppliers and their grocery retailer and wholesaler customers, including examination of related terms of trade?	Yes or no? Please provide explanation
CQ 12	Do you consider that any public benefit in such intervention by a regulator would be outweighed by compliance costs and other requirements?	Yes or no? Please provide explanation
CQ 13	In the context of suppliers and their grocery retailer and wholesaler customers, what is your understanding of the principle of 'like terms for like customers'? (a) How far should the principle be taken?	Please provide explanation
CQ 14	What other issues do you consider to be relevant?	Please provide explanation
CQ 15	What options, if any, do you consider are appropriate for addressing the concerns underlying the Senate order?	Please indicate any options

If there is any other information that you would like to provide that relates to this inquiry, please do so.

ATTACHMENT 1

A selected basket of groceries

Product	Annual grocery value: supermarkets: Yr 2000	Annual grocery volume: supermarkets: Yr 2000
Carbonated/still beverages	\$1300 million	1200 million litres
Confectionery	\$1019 million	582. 5 million units
Biscuits	\$884. 3 million	112,056. 2 tonnes
Bread, rolls and hotplate	\$686. 4 million	327 million units
Breakfast cereals	\$736. 3 million	128,611. 1 tonnes
Dairy case		
• Cheese	\$845. 9 million	108,127 tonnes
• White milk—fresh	\$1032 million	736. 7 million litres
• Dairy dessert/yoghurt	\$503.5 million	123.2m kg
Coffee	\$512.2 million	15,196 tonnes
Tea	\$243.5 million	6.2 billion cups
Pet food	\$991. 4 million	472,487 tonnes
Toilet paper (paper products)	\$538 million	26. 1 million standard units
Ice cream (frozen food)	\$463. 1 million	119 million units
Margarine	\$285 million	79,082 tonnes
Sugar	\$153.1 million	126,243 tonnes
Snack foods	\$851.4 million	64,822 tonnes
Canned fruit	\$228.4 million	
Pasta	\$274.5 million	
Personal items		
• Body wash	\$219. 9 million	31,492 tonnes
• Shampoo (hair)	\$210. 3 million	18 million litres
• Toothpaste	\$193. 5 million	71.1 million litres
Cleaning products		
• Dishwashing—hand	\$104. 9 million	40. 4 million kg/litres
• Dishwashing—auto	\$ 62. 9 million	9. 2 million kg/litres
• Laundry	\$431. 2 million	131,733. 3 tonnes
Tobacco	Not available	25. 1 billion sticks

Source: Retail world, vol. 53, No. 24, December 2000, Parramatta, Sydney, Australia, 34th Annual Report

appendix 3 Questionnaire for wholesalers

Australian Competition and Consumer Commission

Report by the Australian Competition and Consumer Commission on prices paid to suppliers by wholesalers and retailers in the Australian grocery industry.

List of questions on factors that may affect prices.

Questions for wholesalers

Notes for answering the questions:

- (a) The information sought is for the period since 1 July 1999.
- (b) Manufacturers, importers and distributors are referred to as 'suppliers'.
- (c) There are many factors that can affect the final cost of goods, including (but not limited to) rebates, discounts and other allowances. For the purpose of these questions, these terms and 'support' are used to generally describe such factors.
- (d) The answers sought should relate to the categories of products listed in the table of 'A selected basket of groceries' (attachment 1). Please exclude 'generic' grocery items. Where more than one product category is supplied, please answer on a per product category or divisional basis for CQ 1.
- (e) In relation to CQ 7, where a pricing arrangement is based on a 'business plan' approach, please provide an explanation of the approach and the features of such plans including the support provided.
- (f) Please indicate information that you consider to be commercially sensitive.
- (g) In presenting its list of questions, the ACCC does not imply that any participant has contravened the *Trade Practices Act 1974*.

(h) Responses to questions are requested by close of business **31 August 2001** to:

Addressee name Ian Searles
Grocery Pricing Inquiry

Postal address National Office
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Email address grocery.pricing@acc.gov.au

Facsimile (02) 6243 1199

(i) Please provide the following details in respect of your business:

Trading name

Contact officer name and contact details

Please indicate how long it took to prepare this response

No. of person hours:

No.	Question	Action required
Supplier and pricing information		
CQ 1 (see note (d) on first page)	Please complete the following tables for the periods 1 July 1999 to 30 June 2000 and 1 July 2000 to 30 June 2001, in respect of the following suppliers that supplied your products in our basket of groceries (see attachment 1):	Please complete tables
	<p>Coca-Cola Amatil</p> <p>Cadbury Schweppes</p> <p>Pure & Natural Beverages</p> <p>Berri</p> <p>Nestle Australia</p> <p>Mars Confectionery</p> <p>Arnott's Biscuits</p> <p>George Weston Foods</p> <p>Lanes Biscuits</p> <p>Goodman Fielder</p> <p>Sanitarium Health Food</p> <p>Kellogg</p> <p>Dairy Farmers</p> <p>Bonlac Foods</p> <p>Kraft Foods</p> <p>National Foods</p> <p>Murray Goulburn</p> <p>Pauls</p> <p>Douwe Egberts</p> <p>Cantarella Bros</p> <p>Dilmah</p> <p>Uncle Ben's</p> <p>Safcol</p> <p>Kimberly-Clark</p> <p>Paper Converting Co</p>	<p>Carter Holt Harvey Tissue</p> <p>Cosco Holdings</p> <p>Unilever Australia</p> <p>Bulla Dairy Foods</p> <p>Sara Lee</p> <p>Colgate-Palmolive</p> <p>Proctor & Gamble</p> <p>Cussons</p> <p>FH Faulding & Co</p> <p>Johnson & Johnson</p> <p>Glaxo SmithKline</p> <p>Reckitt Benckiser</p> <p>Campbell Brothers</p> <p>British American Tobacco</p> <p>Philip Morris</p> <p>Imperial Tobacco</p> <p>Bundaberg Sugar</p> <p>Sugar Australia</p> <p>The Smith's Snackfood Co</p> <p>Snack Brands Australia</p> <p>Ardmona Foods</p> <p>SPC</p> <p>Golden Circle</p> <p>San Remo Macaroni Co</p> <p>Green's Foods</p>

For the period: 1 July 1999 to 30 June 2000

Supplier name	Total support funding from supplier (a) \$	Total gross purchases from supplier (b) \$	Percentage of total support funding to gross purchases (a/b) %
Total 'net' cost of all products purchased for resale (from all suppliers, not only the above)			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In providing supplier name

Please provide information by your banners or divisions (e.g. IGA, Campbells Cash & Carry, Metro, Express)

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	

In completing column (b)

Total gross purchases (invoice value before any deferred or on/off invoice case deals)

For the period: *1 July 2000 to 30 June 2001*

Supplier name	Total support funding from supplier (a) \$	Total gross purchases from supplier (b) \$	Percentage of total support funding to gross purchases (a/b) %
Total 'net' cost of all products purchased for resale (from all suppliers, not only the above)			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In providing supplier name

Please provide information by your banners or divisions (e.g. IGA, Campbells Cash & Carry, Metro, Express)

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	

In completing column (b)

Total gross purchases (invoice value before any deferred or on/off invoice case deals), inclusive of GST

No.	Question	Action required
CQ 2	Apart from the suppliers listed in answer to CQ 1, who are your current suppliers of products in our basket of groceries?	Please provide information
CQ 3	Are there other major suppliers of products in our basket of groceries who you do not currently purchase such products from?	Please advise the names, the product categories in our basket of groceries that they supply, and the reasons you do not purchase from them
CQ 4	When was the last time that you amended the list of suppliers from whom you purchase products in our basket of groceries, and what was the reason?	Please provide information

Price lists

CQ 5	Do you receive comprehensive price lists or promotional and special price lists from your suppliers?	Yes or no?
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Discounts, rebates and other allowances

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers

CQ 6	Do you receive payments or other support from your suppliers of products in our basket of groceries:	Yes or no?
(see note (e) on first page)	<ul style="list-style-type: none"> (a) to have their products stocked in grocery outlets supplied by you (or 'slotted' in your wholesale outlets); or (b) for better position of their products in grocery outlets supplied by you; or (c) if the grocery outlets supplied by you increase the range or volume of the supplier's products that they stock; or (d) for the stocking of new products in the grocery outlets supplied by you; or (e) to have their products promoted during the year within the grocery outlets supplied by you; or (f) for specific promotions of their products in the grocery outlets supplied by you; or (g) for retrospective discounts to you (i.e., which reduce the price of products agreed at the time of sale or where the margins from the sale of their products were less than you expected); or (h) for retrospective support for promotions instigated by you or the grocery outlets that you supply without the supplier's agreement; or (i) when their products are discounted by a competing retailer, for the grocery outlets that you supply to match the lower retail price; or (j) for credit to you for unsold products when 'sale or return' was not one of the terms of sale; or (k) based on the volume of your purchases of their products; or (l) for warehouse ullage (evaporation, leakage, shrinkage or wastage) in their products; or 	<p>Has a request for such support been denied? If so, please provide information.</p> <p>If you receive such support, please indicate:</p> <ul style="list-style-type: none"> (a) which suppliers provide that support (b) have you required that suppliers provide such support (c) is such support passed through by you to your grocery retailer customers? If so, in full or part?

No.	Question	Action required
CQ 6 cont.	<p>(m) allowing you to purchase large amounts of stock at 'special' prices for sale later when such prices have ceased (known as 'investment buying'); or</p> <p>(n) as compensation for consumer complaints without proof from you that the product was at fault or that a complaint had been made; or</p> <p>(o) for hospitality purposes including sponsorship of conferences and overseas study tours; or</p> <p>(p) for your training, or business planning purposes; or</p> <p>(q) for refurbishment of retail outlets or the opening of new outlets that you supply; or</p> <p>(r) for procedural or administrative changes in product distribution in retail outlets that you supply; or</p> <p>(s) other forms of support (for example, painting of stores, advice of store layout, provision of equipment, etc.)?</p>	As above (cont.)
CQ 7	What is the rationale for the various discounts, allowances, rebates and other support that you receive from your suppliers of products in our basket of groceries? For example, what are the costs and benefits for your company? What is expected in return?	Please provide explanation
Public policy matters		
CQ 8	Do you consider that there is public benefit in the intervention by a regulator in pricing matters between suppliers and their grocery retailer and wholesaler customers, including examination of related terms of trade?	Yes or no? Please provide explanation
CQ 9	Do you consider that any public benefit in such intervention by a regulator would be outweighed by compliance costs and other requirements?	Yes or no? Please provide explanation
CQ 10	<p>In the context of suppliers and their grocery retailer and wholesaler customers, what is your understanding of the principle of 'like terms for like customers'?</p> <p>(a) How far should the principle be taken?</p>	Please provide explanation
CQ 11	What other issues do you consider to be relevant?	Please provide explanation
CQ 12	What options, if any, do you consider are appropriate for addressing the concerns underlying the Senate order?	Please indicate any options

Customer information

No.	Question	Action required
Customer and pricing information		
CQ 13	Please complete the following tables, in respect of each group of customers mentioned below, for the periods 1 July 1999 to 30 June 2000 and 1 July 2000 to 30 June 2001 (a) each of your banner groups, (b) retail outlets owned and operated by you, and (c) other customers	Please complete the tables and briefly explain any differences in the level of funding support

For the period: *1 July 1999 to 30 June 2000*

Customer group	Total support funding to group (a) \$	Total gross sales to group (b) \$	Percentage of total support funding to gross sales (a/b) %
(1) (Banner group)			
(Banner group)			
(Banner group)			
(Banner group)			
(Banner group)			
(Banner group)			
(2) Own stores			
(3) Other customers			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	

In completing column (b)

Total gross sales (invoice value before any deferred or on/off invoice case deals)

For the period: 1 July 2000 to 30 June 2001

Customer group	Total support funding to group (a) \$	Total gross sales to group (b) \$	Percentage of total support funding to gross sales (a/b) %
(1) (Banner group)			
(Banner group)			
(Banner group)			
(Banner group)			
(Banner group)			
(Banner group)			
(2) Own stores			
(3) Other customers			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	

In completing column (b)

Total gross sales (invoice value before any deferred or on/off invoice case deals)

No.	Question	Action required
CQ 14	Please advise the criteria (e.g., store size, departments, turnover, etc.) for grocery retailers to qualify for membership of each of your current banner groups	Please provide information
CQ 15	Please advise the number of grocery retailers, and retail outlets, within each banner group	Please provide information
CQ 16	In respect of banner groups: (a) what advantages do grocery retailers obtain from banner group membership? (b) what types of financial, promotional and other support is provided to or through you for the banner group? (c) what part do banner group members play in the negotiation, administration and distribution of such support? (d) what procedures are in place to ensure that banner group members comply with any conditions (e.g. display position, promotional period, 'special' retail price, etc.) under which such support is given?	Please provide information

No.	Question	Action required
CQ 17	Do you own and operate any grocery retail outlets?	Yes or no? If yes, please advise the location of each such outlet, and the banner group to which it belongs
CQ 18	Do you have standard credit terms for your grocery retailer customers? (a) Do you allow such customers discounts for payments made before the 'due date'? (b) Do you allow such customers to not pay for goods until the point of retail sale (i.e. a 'pay on scan' approach)?	Yes or no? Do you provide such support to all customers on the same basis? If not, could you please briefly explain the basis of different treatment
CQ 19	Do you provide training and business planning support to your grocery retailer customers?	Yes or no? If yes: (a) do you provide such support to all such customers on the same basis? (b) is a fee charged, or a margin added to product prices?
CQ 20	What is the rationale for the various discounts, allowances, rebates and other support that you provide to your grocery retailer customers? For example, what are the costs and benefits for your company? What is expected in return?	Please provide explanation
Price lists		
CQ 21	Do you issue a comprehensive price list on a regular basis to any buyers or potential buyers? (a) If you issue a comprehensive price list are the prices the same for all buyers? (b) If there are different price lists for the same products, what are the reasons for the difference in prices?	Yes or no? Please provide advice
CQ 22	Do you provide promotional and special price lists to buyers or potential buyers? (a) If you provide promotional and special price lists to buyers and potential buyers are the prices the same for all buyers? (b) If there is a different price list for the same products on offer for promotional or 'specials', what are the reasons for the difference in prices?	Yes or no? Please provide advice

No.	Question	Action required
Supply arrangements		
CQ 23	<p>Are the supply arrangements with your grocery retailer customers:</p> <p>(a) long-term formal contracts; or</p> <p>(b) short-term formal contracts; or</p> <p>(c) on a less formal periodic request, or other basis?</p> <p>Do these supply arrangements have a rise and fall clause for prices?</p>	<p>Yes or no?</p> <p>Please provide explanation</p>
CQ 24	<p>What service or other fees do you charge your grocery retailer customers, and what is the rationale for such fees?</p>	<p>Please provide explanation</p>
Retail pricing		
CQ 25	<p>(a) Are you involved in the arrangements for determining the retail prices of products on sale in grocery retail outlets that you supply?</p> <p>(b) How are such prices determined?</p> <p>(c) How are prices and price changes advised?</p>	<p>Please provide explanation</p>
CQ 26	<p>Do the same retail pricing arrangements apply when particular products are promoted as weekly, monthly or long-term special price reductions through the outlets of the grocery retailers that you supply?</p>	<p>Please provide explanation</p>

If there is any other information that you would like to provide that relates to this inquiry, please do so.

ATTACHMENT 1

A selected basket of groceries

Product	Annual grocery value: supermarkets: Yr 2000	Annual grocery volume: supermarkets: Yr 2000
Carbonated/still beverages	\$1300 million	1200 million litres
Confectionery	\$1019 million	582. 5 million units
Biscuits	\$884. 3 million	112,056. 2 tonnes
Bread, rolls and hotplate	\$686. 4 million	327 million units
Breakfast cereals	\$736. 3 million	128,611. 1 tonnes
Dairy case		
• Cheese	\$845. 9 million	108,127 tonnes
• White milk—fresh	\$1032 million	736. 7 million litres
• Dairy dessert/yoghurt	\$503.5 million	123.2m kg
Coffee	\$512.2 million	15,196 tonnes
Tea	\$243.5 million	6.2 billion cups
Pet food	\$991. 4 million	472,487 tonnes
Toilet paper (paper products)	\$538 million	26. 1 million standard units
Ice cream (frozen food)	\$463. 1 million	119 million units
Margarine	\$285 million	79,082 tonnes
Sugar	\$153.1 million	126,243 tonnes
Snack foods	\$851.4 million	64,822 tonnes
Canned fruit	\$228.4 million	
Pasta	\$274.5 million	
Personal items		
• Body wash	\$219. 9 million	31,492 tonnes
• Shampoo (hair)	\$210. 3 million	18 million litres
• Toothpaste	\$193. 5 million	71.1 million litres
Cleaning products		
• Dishwashing—hand	\$104. 9 million	40. 4 million kg/litres
• Dishwashing—auto	\$ 62. 9 million	9. 2 million kg/litres
• Laundry	\$431. 2 million	131,733. 3 tonnes
Tobacco	Not available	25. 1 billion sticks

Source: Retail world, vol. 53, No. 24, December 2000, Parramatta, Sydney, Australia, 34th Annual Report

appendix 4 Questionnaire for retailers

Australian Competition and Consumer Commission

Report by the Australian Competition and Consumer Commission on prices paid to suppliers by wholesalers and retailers in the Australian grocery industry.

List of questions on factors that may affect prices.

Questions for retail chains

Notes for answering the questions:

- (a) The information sought is for the period since 1 July 1999.
- (b) Manufacturers, importers and distributors are referred to as 'suppliers'.
- (c) There are many factors that can affect the final cost of goods, including (but not limited to) rebates, discounts and other allowances. For the purpose of these questions, these terms and 'support' are used to generally describe such factors.
- (d) The answers sought should relate to the categories of products listed in the table of 'A selected basket of groceries' (attachment 1). Please exclude 'generic' grocery items. Where more than one product category is supplied, please answer on a per product category or divisional basis for CQ 1.
- (e) In relation to CQ 7, where a pricing arrangement is based on a 'business plan' approach, please provide an explanation of the approach and the features of such plans including the support provided.
- (f) Please indicate information that you consider to be commercially sensitive.
- (g) In presenting its list of questions, the ACCC does not imply that any participant has contravened the *Trade Practices Act 1974*.

(h) Responses to questions are requested by close of business **31 August 2001** to:

Addressee name Ian Searles
Grocery Pricing Inquiry

Postal address National Office
Australian Competition and Consumer Commission
PO Box 1199
DICKSON ACT 2602

Email address grocery.pricing@acc.gov.au

Facsimile (02) 6243 1199

(i) Please provide the following details in respect of your business:

Trading name _____

Banner group(s)
(where applicable) _____

No. of stores	Total	NSW	VIC	QLD	SA	WA	TAS	ACT/NT

Size of stores	Total	NSW	VIC	QLD	SA	WA	TAS	ACT/NT
>3000 sqm								
1400–2999 sqm								
< 1400 sqm								

Turnover	Total	NSW	VIC	QLD	SA	WA	TAS	ACT/NT
1/7/1999 to 30/6/2000								
1/7/2000 to 30/6/2001								

Contact officer

Name _____

Designation/title _____

Phone _____

Fax _____

Email _____

Please indicate how long it took to prepare this response

No. of person hours:

No.	Question	Action required
Supplier and pricing information		
CQ 1 (see note (d) on first page)	Please complete the following tables for the periods 1 July 1999 to 30 June 2000 and 1 July 2000 to 30 June 2001, in respect of the following suppliers that supplied your products in our basket of groceries (see attachment 1):	Please complete tables
	Coca-Cola Amatil	Carter Holt Harvey Tissue
	Cadbury Schweppes	Cosco Holdings
	Pure & Natural Beverages	Unilever Australia
	Berri	Bulla Dairy Foods
	Nestle Australia	Sara Lee
	Mars Confectionery	Colgate-Palmolive
	Arnott's Biscuits	Proctor & Gamble
	George Weston Foods	Cussons
	Lanes Biscuits	FH Faulding & Co
	Goodman Fielder	Johnson & Johnson
	Sanitarium Health Food	Glaxo SmithKline
	Kellogg	Reckitt Benckiser
	Dairy Farmers	Campbell Brothers
	Bonlac Foods	British American Tobacco
	Kraft Foods	Philip Morris
	National Foods	Imperial Tobacco
	Murray Goulburn	Bundaberg Sugar
	Pauls	Sugar Australia
	Douwe Egberts	The Smith's Snackfood Co
	Cantarella Bros	Snack Brands Australia
	Dilmah	Ardmona Foods
	Uncle Ben's	SPC
	Safcol	Golden Circle
	Kimberly-Clark	San Remo Macaroni Co
	Paper Converting Co	Green's Foods

For the period: 1 July 2000 to 30 June 2001

Supplier name	Total support funding from supplier (a) \$	Total gross purchases from supplier (b) \$	Percentage of total support funding to gross purchases (a/b) %
Total 'net' cost of all products purchased for resale (from all suppliers, not only the above)			

NOTES

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers.

In providing supplier name

Please provide information by your banners or divisions (e.g. IGA, Campbells Cash & Carry, Metro, Express)

In completing column (a)

- Total funding is to include all deferred and off invoice terms and allowances including case deals, viz:

promotional spend (co-op)	case deals	settlement
ullage	marketing support	new line support
rebates (national/state)	investment buy/scan rebate	incentives
business plan (rolled up terms)	any other allowance/funding support	

In completing column (b)

Total gross purchases (invoice value before any deferred or on/off invoice case deals)

No.	Question	Action required
CQ 2	Apart from the suppliers listed in answer to CQ 1, who are your current suppliers of products in our basket of groceries?	Please provide information
CQ 3	Are there other major suppliers of products in our basket of groceries who you do not currently purchase such products from?	Please advise the names, the product categories in our basket of groceries that they supply, and the reasons you do not purchase from them
CQ 4	When was the last time that you amended the list of suppliers from whom you purchase products in our basket of groceries, and what was the reason?	Please provide information

Price lists

CQ 5	Do you receive comprehensive price lists or promotional price lists from your suppliers?	Yes or no?
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Discounts, rebates and other allowances

The Senate order of 8 February 2001 gives 'prices' an expanded meaning to include all aspects of the terms and conditions of dealings including the total funding support given by suppliers

CQ 6	Do you receive payments or other support from your suppliers of products in our basket of groceries:	Yes or no?
(see note (e) on first page)	(a) to have their products stocked in your grocery outlets; or	Has a request for such support been denied? If so, please provide information.
	(b) for better position of products in your grocery outlets; or	If you receive such support, please indicate:
	(c) if you increase the range or volume of their products that you stock in your grocery outlets; or	(a) which suppliers provide that support
	(d) for the stocking of new products in your grocery outlets; or	(b) have you required that suppliers provide such support
	(e) to have their products promoted within your grocery outlets during the year; or	(c) is such support passed through by you to your grocery retailer customers? If so, in full or part?
	(f) for specific promotions of their products in your grocery outlets; or	
	(g) for retrospective discounts to you (i.e., which reduce the price of products agreed at the time of sale or where the margins from the sale of their products were less than you expected); or	
	(h) for retrospective support for promotions instigated by you without the supplier's agreement; or	
	(i) when their products are discounted by a competing retailer, for you to match the lower retail price; or	
	(j) for credit to you for unsold products when 'sale or return' was not one of the terms of sale; or	
	(k) based on the volume of your purchases of their products; or	
	(l) for warehouse ullage (evaporation, leakage, shrinkage or wastage) in their products; or	
	(m) allowing you to purchase large amounts of stock at 'special' prices for sale later when such prices have ceased (known as 'investment buying'); or	
	(n) additional direct allowances at the store level from suppliers' representatives (sometimes known as 'street money'); or	

No.	Question	Action required
CQ 6 cont.	(o) as compensation for consumer complaints without proof from you that the product was at fault or that a complaint had been made; or (p) for your hospitality including sponsorship of conferences and overseas study tours; or (q) for your training, or business planning purposes; or (r) for your refurbishment of retail outlets or the opening of new outlets; or (s) for procedural or administrative changes in product distribution in your retail outlets; or (t) other forms of support (for example, painting of stores, advice on store layout, provision of equipment, etc.)?	As above (cont.)
CQ 7	What is the rationale for the various discounts, allowances, rebates and other support that you receive from your suppliers of products in our basket of groceries? For example, what are the costs and benefits for your company? What is expected in return?	Please provide explanation

Public policy matters

CQ 8	Do you consider that there is public benefit in the intervention by a regulator in pricing matters between suppliers and their grocery retailer and wholesaler customers, including examination of related terms of trade?	Yes or no? Please provide explanation
CQ 9	Do you consider that any public benefit in such intervention by a regulator would be outweighed by compliance costs and other requirements?	Yes or no? Please provide explanation
CQ 10	In the context of suppliers and their grocery retailer and wholesaler customers, what is your understanding of the principle of 'like terms for like customers'? (a) How far should the principle be taken?	Please provide explanation
CQ 11	What other issues do you consider to be relevant?	Please provide explanation
CQ 12	What options, if any, do you consider are appropriate for addressing the concerns underlying the Senate order?	Please indicate any options

Retail pricing

CQ 13	Are particular grocery products on sale at the same retail price at the same time within all your retail outlets: (a) across Australia; or (b) in metropolitan, regional and rural areas with an individual state or territory; or (c) in the same metropolitan, regional or rural area; or (d) on some other basis?	Please provide information on retail grocery pricing arrangements within your business, including the management level responsible for setting retail prices and the authority of individual store managers to set or vary retail prices
CQ 14	Do the same retail pricing arrangements apply when particular products are promoted as weekly, monthly, or long-term special price reductions through your retail grocery outlets?	Please provide information

If there is any other information that you would like to provide that relates to this inquiry, please do so.

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