the state of COMPETITION

THE AUSTRALIAN GROCERY SECTOR: structurally irredeemable?

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By all appearances, the grocery sector in Australia is less than ideally competitive and indeed less competitive than most other advanced economies. It may be that the size of the Australian economy imposes a natural limit on the market structure whereby the available economies of scale and scope mean that there is only room for two large players. The evidence suggests that, while Coles and Woolworths may have substantial market power, they do not take advantage of such market power by systematic monopoly pricing. Rather, any uses of market power are episodic and appear largely related to non-price conduct. Indeed, it seems the biggest impact for Australian consumers of our present market structure is reduced choice and innovation as sources of supply are rationalised. Australians may therefore need to consider the extent to which they prefer increased choice over lower prices and the convenience of one-stop shops. In considering these issues, this paper attempts to assess anecdotal claims – particularly in relation to 'must have' brands and private labels – by reference to available data. In doing so, we highlight several potential uses of publicly available information which may go some way to proving or disproving market power problems in the Australian grocery sector.

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Outline of paper

In Section A, we examine the structure of the Australian grocery sector, in particular the role of economies of scale and scope. We consider the extent to which the independents constrain Coles and Woolworths, before examining the impetus for, and consequences of, the majors' expansion into non-grocery sectors (using petrol as a case study).

In Section B, we then review the role of brands as a potential source of punch and counter-punch in the relationship between retailers and their suppliers. In particular, we examine claims about 'must have' brands and – using publicly available information – we consider ways in which such brands can be identified and their strength weighed. We then discuss the role of private labels, reviewing retail data in an effort to analyse their impact over recent years.

Section C touches upon the inevitability or otherwise of supplier rationalisation, using a recent deal between Coles and Murray Goulburn as a case study. This section largely lays a foundation for future work – while we discuss the theoretical likelihood of rationalisation, further quantitative work would be desirable to test this theory against reality.

Finally, in Section D, we draw some conclusions as to the state of effective competition in the Australian grocery sector and the likely impact of our current market structure. In essence, we conclude that, while price competition is relatively strong – particularly given the majors' economies of scale and scope – non-price competition is likely affected, particularly in relation to choice and innovation. Although the independent sector may compete with relative effectiveness in this space, the decisions of the majors will reduce choice and innovation across the board, as their desire to maximise economies inevitably impacts upon the number and nature of suppliers to the retail grocery sector.

A. The structure of the Australian grocery sector

Key economic characteristics

In 2010-2011 the Australian grocery industry was worth $130.6 billion, accounting for around 10% of the Australian economy. The industry comprises two distinct distribution channels: the vertically integrated chains (Coles and Woolworths) and the independents comprising wholesaler Metcash and a large number of generally small retail outlets, most of which are members of banner groups such as IGA and Foodworks (see *Figure 1*).

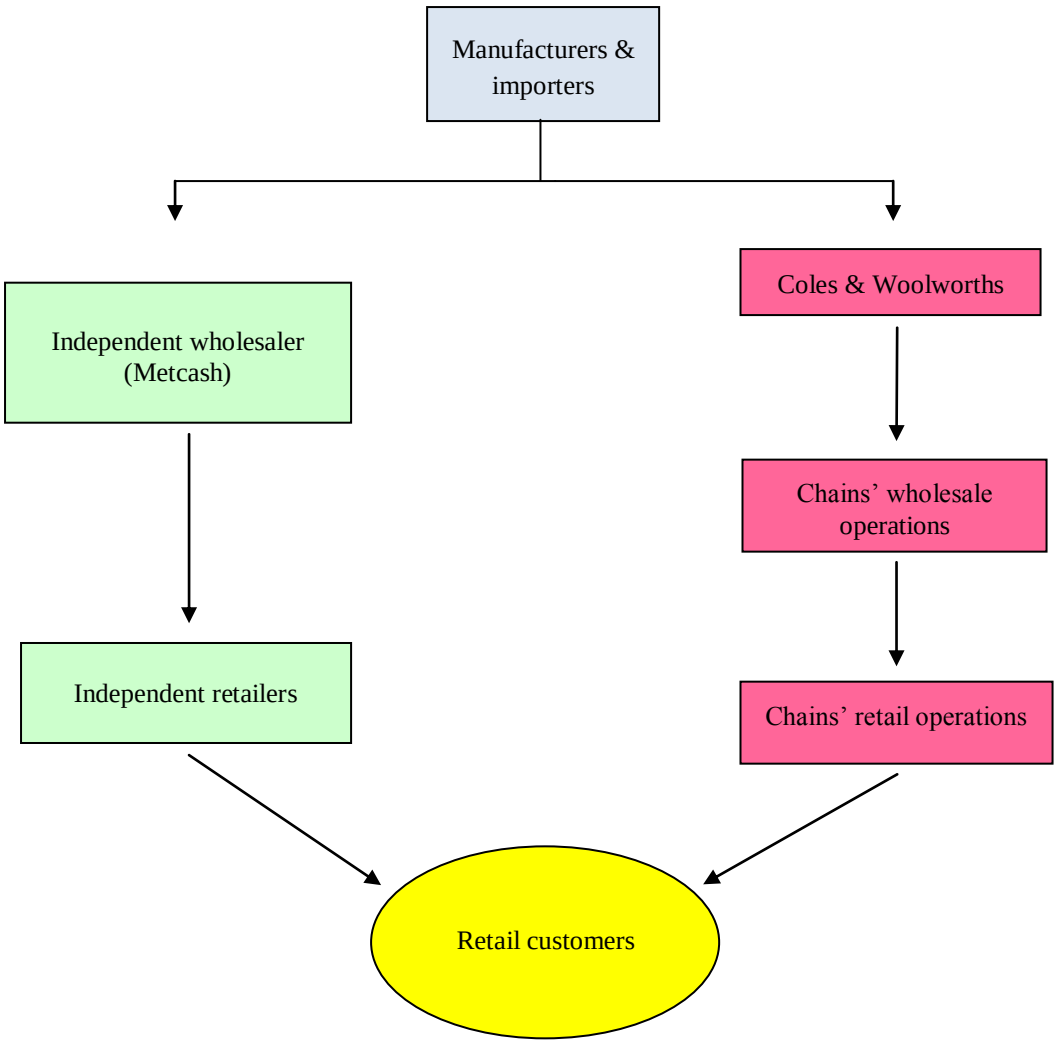

Figure 1: Grocery supply channels

At both wholesale and retail levels, the industry is characterised by high fixed costs, most of which are common costs. The output of both wholesalers and retailers is not

simply the merchandise that they supply but the services, including access, that enable buyers to purchase the merchandise.[2] Wholesalers and retailers add value to the manufacturers' products by transporting and displaying the items for sale and by other services associated with sale. Some service costs can be adjusted in response to changes in turnover, but the relationship between cost and turnover may not be close as costs vary with the number of customers, not just with sales. In these circumstances economic concepts such as average and marginal cost are difficult to apply.

Economic theory provides little guidance as to how common costs should be allocated across products. In practice, generally the variable cost of the product is used as the base for determining the price, and a margin is added to cover the common costs as well as a return on capital. Margins are likely to be set to influence the consumer's choice of product bundle, the choice of store and the consumer's perceptions of price level – some products or groups of products carry above average margins, for example fresh fruit and vegetables, while staple items and specials carry a smaller margin. The overall effect must be to collect enough revenue to cover all costs and contribute to profit, while using pricing strategically to maximise the appeal to consumers.

Economies of scale

The industry cost structure means that economies of scale are extremely significant in explaining how the industry operates and the observed changes in industry structure. They make it more difficult for small operators to compete with the large vertically integrated chains. At the retail level, historically small stores attempted to justify their higher cost structure by claims of better customer service as well as longer trading hours. However, with deregulation of trading hours, this key advantage has been eroded. In addition, customer preferences have favoured the store format adopted by the chains and most small retailers lack the access to capital necessary to convert to a similar format. Thus, while some independent retailers have a large store format and compete directly with the major chains and others have developed specialist offerings such as gourmet foods, in general independent retailers have struggled to adapt. Typically consumers shop locally for grocery products and so economies of scale are accessed by creating a *network* of stores, not simply by expanding store size. Again, lack of access to capital limits this option for

[2] It is useful at the outset to clarify the nature of the product supplied by participants in this industry. Grocery wholesaling involves not only the acquisition and supply of products to be sold by retailers, but also the supply of services such as arranging promotional support by manufacturers, and provision of, or access to, financial and accounting services.

Similarly, retailers supply a variety of goods ranging from fresh produce to dry goods to non-grocery products. In addition, they supply services such as location, parking, and in-store amenities. Thus, grocery wholesalers and retailers supply a bundle of goods and services. Although the composition of the bundle may vary (for example, a particular store may not provide parking or it may supply less of a particular service, eg fewer check outs), these products cannot be completely unbundled.

independents. As a result, the unit costs of the independent retailers tend to be high relative to those of the chains and in some cases have caused exit. Often when this has occurred, the stores have been acquired by the chains.

With increasing competition from the chains, loss of retail business raised the unit costs of the independent wholesalers. The initial response was significant rationalisation of the wholesaling sector. In the early 1990s there was at least one major independent wholesaler in each state whereas today there is just one, Metcash.[3]

The significance of common costs means that economies of scope are also important in shaping the grocery industry. Within the limits imposed by shelf space, the more products offered for sale through a grocery outlet, the lower the costs associated with supplying any one product group. Thus, grocery retailers, particularly the supermarket chains, increasingly have expanded their range to include products traditionally sold by specialty retailers (fresh fruit, bread, meat and fish) and other items such as paper products, plants, newspapers and magazines. Services such as in-store banking facilities and insurance have been added.

Dealing with suppliers

In the past manufacturers of branded products undertook their marketing but today this role has largely passed to the supermarket chains and Metcash. Coles, Woolworths and Metcash negotiate with manufacturers and other suppliers for 'promotional monies' to be used for various purposes, including to pay for the 'rental' of display space and to fund periodic price discounts. It is here that the independent sector has claimed to receive poorer terms, in part reflecting an inability on the part of the independent wholesaler to guarantee that retailers would abide by the terms negotiated with suppliers. More recently, Metcash has largely addressed this via the conditions on which it supplies its retailers. Metcash does not directly charge its retailer customers for its service but retains part of the promotional money for this purpose, which has caused friction between the parties.

Negotiating and enforcing supply terms with hundreds of suppliers imposes significant transaction costs on the chains and Metcash. As part of their efforts to reduce costs within the supply chain, Coles and Woolworths have rationalised the number of proprietary brands carried in each product group, although it has continued to expand the range of products carried in-store. Whether this is also motivated by the prospect of further increasing their bargaining power is uncertain but, together with the proliferation of private label products, it has had that effect (see discussion in Section B).

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[3] For an explanation of the consolidation of the wholesale sector, see Appendix E of Australian Competition and Consumer Commission (**ACCC**), *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (2008) (the ***Grocery Report***); available at: http://www.accc.gov.au/about-us/public-consultations/grocery-inquiry-2008

One of the achievements of the two supermarket chains in recent years has been to increase efficiency within their supply chain. Perhaps inevitably this has created tensions with its suppliers. One concern raised about the chains is their power relative to suppliers. In the past it was assumed that retailers needed suppliers so suppliers had the greater bargaining power. Today, given the increased concentration of grocery retailing, the need to have access to the major chains, the expanded range of products carried and the preference of consumers for the one-stop shop, the position has reversed. Scarcity of shelf space increases the competitive tension between rival suppliers of products and the risk of de-listing may result in deals that, if offered to all of a supplier's customers, would be unsustainable.[4]

Consumer characteristics

When considering the grocery sector, often little attention is paid to the role of consumers. In this industry, however, consumers tend to have characteristics that differ from those described in standard microeconomic textbooks. The nature of grocery retailing creates information problems for consumers (and for retailers). With constant adjustment of service and prices, (textbook) consumers would be expected to engage in continual price searching up to the point where the marginal cost of searching equals the marginal benefit.[5] However, price and service levels are difficult to observe and compare. This is because of the number of items available and the continuous introduction of new items. Bar-coding has removed the need for items to bear a price label, and prices change frequently including due to 'specials'. The most obvious consumer guide to prices is the amount paid for the weekly groceries but this varies from week to week as the purchases themselves vary. It also reveals nothing about pricing in stores not visited. Thus, at any given time, consumers will have incomplete information regarding prices.

Incomplete information on the part of consumers creates a situation in which retailers build a reputation based on their price-service offer. Given this, consumers identify the best value package for them and they tend to become loyal to (customers of) a particular retailer. As a consequence, search activity is reduced, as is search cost, on the assumption that the retailer will maintain this relative value. Consumers have access to partial information regarding the activities of competing retailers, for example from media advertising, and this information may raise doubt about relative values and so may trigger search. If, as a consequence, consumers find that their chosen store has not maintained the value of its offering relative to other stores, they

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[4] This has been described as the 'waterbed effect' and has implications for competition at the retail level. It is discussed further below. For a discussion of the waterbed effect, see Paul W Dobson and Roman Inderst, "Buyer power and the waterbed effect: do strong buyers benefit or harm consumers?", (2007) 28 *European Competition Law Review* 393; available at http://www.wiwi.uni-frankfurt.de/profs/inderst/Competition_Policy/Differential_Buyer_Power_07.pdf. See especially Section 4 of the paper.

[5] This aspect is discussed more fully below.

are likely to leave the original store and will be extremely hard to win back – restoring the original offering will not be enough; a better offering will be needed. This may well have been the reason why Coles supermarkets lost sales in the latter half of the 1980s – they had built a reputation for low prices but then their pricing deteriorated relative to that of their competitors.

In addition to the reward to customers associated with shopper dockets (discussed below), the chains have introduced loyalty programs. Coles' FlyBuys program is the older of the two, having been introduced in 1994 as a joint venture between Shell, Coles Myer and the National Australia Bank. The program has been revamped several times since then, most recently in 2012. Woolworths' program, Everyday Rewards, was introduced in 2007 and was later expanded via an arrangement with Qantas. Both loyalty programs enable customers to accrue points that can be redeemed for merchandise or services, including travel.

Convenience stores

Another feature of the grocery industry has been the development of convenience stores. The Australian Competition and Consumer Commission (**ACCC**) described the nature of convenience stores as being about 'top-up shopping' with a focus on "convenience through choices about location, store layout and opening hours".[6] It went on to state:

> *Greater convenience enables their customers to briefly enter and exit the store, with less importance given to the range of products available, which is more important to one-stop shoppers. In addition to other important elements such as car parking, there appears to be less scope for commonality in the retail offers of convenience stores and supermarkets.*[7]

Through its Coles Express outlets Coles has sought to introduce a small format store for city locations and this has also proved a suitable format for extending operations into country locations too small for its typical supermarkets. Woolworths has its Big W stores as well as its convenience offering through its own petrol retail outlets and via its joint venture with Caltex. Coles has a corresponding convenience outlet through its Shell petrol outlets.

Differences compared to overseas

Australia is one of the two most concentrated food retail industries in the world – only New Zealand's industry is significantly more concentrated. In Australia the two major chains account for around 80% of grocery sales[8] compared to the United Kingdom where, in 2009, the four largest chains accounted for just over 75% with

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[6] ACCC, *Grocery Report*, above n3, 78.

[7] *Ibid*.

[8] See n37 for estimated market shares, as at 2008, broken down by product category. For more current figures (without any breakdown), see *Table 1* on page 9.

Tesco and Sainsbury together accounting for 48%. The industry in the United States is considerably less concentrated than in the UK.[9]

The actual and potential effectiveness of the independent sector as a constraint on the chains

In *ACCC v Metcash*, the trial judge found that "[t]here is clearly vigorous competition at the retail level".[10] This comment, however, should be considered in the context of the questions before the Court, including whether retailers supplied by Metcash competed with Coles and Woolworths. For its own part, in 2008, the ACCC concluded:

> *Viewed overall, supermarket retailing is workably competitive, but there are a number of factors that currently limit the effectiveness of price competition. These include high barriers to entry for large-format supermarkets, a lack of incentives for Coles and Woolworths to compete strongly on price and the limited price competition from the independent sector.*[11]

Yet the highly concentrated nature of the Australian grocery industry suggests that its competitiveness is less than optimal. To assess this, consideration needs to be given to what constraints there are on the conduct of the major chains and the strength and effectiveness of such constraints.

When assessing the market power of the supermarket chains, one must consider the existence of alternative suppliers to whom consumers can turn, and their market shares, the height of barriers to entry into the industry and the countervailing power of consumers (and, in this case, suppliers – see Section B), as well as other factors relevant to assessing the degree of competitive constraint on the chains including from the independent sector.

Market share estimates

Retail shares of the two major chains of products sold through grocery stores have increased significantly (see *Table 1*).

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

[10] *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967 (25 August 2011), [341].

[11] ACCC, *Grocery Report*, above n3, xvi.

Table 1: Share of products sold through grocery stores

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

Source: Australian Food and Industry Council[12] *& Ferriers Focus*[13]

The share of the various retailers in 2011-12 is shown in Table 2. It is apparent that the shares of retailers other than Coles and Woolworths are small.

Table 2: Share of sales by retailer 2011-12

Retailer	Share (%)
Woolworths	41.1
Coles/Bi-Lo	31.0
Aldi	7.3[14]
Other supermarkets	15.2
Specialty stores	5.9

Source: Deloitte Access Economics[15]

Despite this, there are several reasons why one should not place too much weight on such data when assessing market power. First, it is not unanimously agreed exactly what products and what retailers should be included when estimating market shares.

> *In measuring shares of the retail food market, the major retailers contend that the definition of the 'food market' is much wider than grocery retail and that the major chains hold less than 50 per cent of the food-liquor-groceries market. Industry analysts vary in their recognition of the relevant dimensions of the market and some see it differently, preferring a definition based on the mode and format of grocery retail as distinct from other forms of food sale.*[16]

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

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

[14] Ferrier Hodgson places Aldi's share in 2011-12 at 3%.

[15] Deloitte Access Economics, *Analysis of the grocery industry* (October 2012), 34; available at: http://www.coles.com.au/Portals/0/content/pdf/Shareholders/Grocery%20Industry%20Report.pdf

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

More importantly, a sole supplier will have no significant market power if barriers to entry are low even if it presently accounts for 100 per cent of sales. Equally, a firm with a very small market share may be able to use that share strategically and so may have a very significant impact on market outcomes.

Barriers to entry and expansion: the difficulties of creating a network

Nonetheless, it is generally accepted that barriers to entry into the grocery industry are high.[17] First, sunk costs are not insignificant. Although retail stores can be used to sell various types of products, fittings and fixtures are specialised. Establishing supply arrangements and administrative systems and investment in marketing and advertising are likely to be sizeable and are sunk costs.

Second, sites are an essential input into establishing a grocery retail business but access to sites is often limited, including by planning arrangements and by strategic behaviour by rivals, as evidenced by Aldi's experience. Further, when sites do become available, they are likely to be acquired by the chains for whom they are more valuable and who are therefore prepared to pay more (this factor may well contribute to the problem of creeping acquisitions). Likewise if retail leases are lengthy and contain punitive provisions, exit is difficult and this deters entry.

Third, entrants must be able to access customers and in the grocery industry customers tend to shop relatively locally. For this reason, to compete effectively, a network is advantageous. In *Safeway*,[18] Goldberg J 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****. Any new entrant that could impinge upon or erode Safeway's market power would have to be able to set up a network of stores of significant size throughout Victoria.*[19]

From this he concluded that barriers to entry were high – the requirement to establish a network increases the risk associated with entry, as well as the cost.

Economists take different views about whether economies of scale are a barrier to entry. However, when an incumbent has a large market share and consequently access to significant economies of scale, this may deter entry if the potential entrant decides that it will take too long to win sufficient market share to achieve a cost structure similar to that of the incumbents. This is likely to be the position for grocery retailing. In particular, loyalty programs tend to lengthen the time taken to build market share.

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[17] For a detailed discussion of entry barriers into grocery retailing in the United Kingdom, see Office of Fair Trading, "Competition in Retailing" (Research Paper No 13, September 1997), 64 ff.

[18] Safeway was, of course, a trading name of Woolworths.

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

Can the independents obtain comparable supply terms?

Another reason why independent retailers may not be a very effective constraint on the chains is if their supply terms are less favourable. This may occur if the chains have sufficient buyer power to be able to negotiate supply prices below the competitive level. In order to remain in business, suppliers must at least receive a price that on average is equal to their own costs, including a return on capital. Consequently, if the two major chains negotiate below average prices, other buyers will have to pay more, and given the share of sales accounted for by the chains, this will be substantially more (the 'waterbed effect').[20] European studies have failed to identify any such effect but, as noted above, Australian conditions are different and so those results are not necessarily applicable. However, low retail prices are not necessarily indicative of obtaining below-cost supply prices – these may reflect increased efficiency within the supply chain or greater scale economies (possibly toadied by loyalty programs). An ACCC study of supply prices in 2000 concluded:

> *A comparison that excludes the 'Franklins factor' altogether shows that Woolworths and Coles receive better wholesale prices more often than the independent wholesalers.*[21]

Retail prices

The higher costs of the independent sector are reflected in higher shelf prices. Consequently, while aiming to keep the price differential to a minimum, independent retailers generally compete on non-price aspects of supply – friendly staff, convenience, specialty products etc. Nonetheless, higher retail prices make it more difficult to attract customers. This is not only due to less access to economies of scale but because the profit margin earned by the independent wholesaler is a cost to the independent retailers, whereas this double marginalisation is avoided in the supply chain of the vertically integrated chains.[22]

What to make of new entry?

Despite dominance by the chains and high barriers to entry, entry has occurred. Aldi entered in 2001, while Costco entered in 2009. Others have entered the convenience store sector – for example SPAR and Seven & I Holdings (a Japanese company), both multinationals operating convenience stores. Aldi's business model is based mainly

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[20] See above at n4.

[21] At the time Franklins was a vertically integrated retail chain operating in Eastern Australia and South Australia. However, it was more like the independent sector than Coles and Woolworths, hence its exclusion for comparative purposes. See ACCC, *Report to the Senate by the Australian Competition and Consumer Commission on prices paid to suppliers by retailers in the Australian grocery industry* (2002), 2; available at: http://transition.accc.gov.au/content/item.phtml?itemId=307369&nodeId=23715b6334e67c66ae47b97da39dc469&fn=Report+to+Senate+-+Grocery+Pricing.pdf

[22] Metcash does not charge retailers directly for its wholesale services but instead deducts an amount from the promotional monies provided by suppliers.

on private label products and, once it began to establish its stores, the chains realised that they were vulnerable to a loss of sales to Aldi. This was the catalyst for the chains to revamp their own private label offerings. Nevertheless, it took Aldi almost ten years to become profitable, far longer than most entrants could wait. The ACCC noted that both Coles and Woolworths price more keenly where an Aldi store is present, indicating that the presence of Aldi has had a significant influence on their pricing behaviour.[23] Aldi now has 230 stores, a relatively small number of stores relative to the chains – for example Coles has 741 supermarkets and 620 convenience stores[24] – although it has an ambitious expansion programme. Costco has an even smaller number of stores and has only a marginal influence on the Australian grocery.

Conclusions

The above analysis suggests that independents operate as only a limited constraint on the chains and this seems unlikely to change much in the near future.

The competition implications of product extensions of the major supermarket chains

Over time the major supermarket chains have sought to expand into other, sometimes unrelated markets, such as liquor, hardware and petrol. Some overseas research suggests that this can be pro-competitive, with supermarkets having access to economies of scale and scope via their supply chain which are not available to incumbent competitors. But if there are competition problems in the grocery sector, does the availability of such economies suggest that competition problems are likely to be imported into these relatively competitive sectors? If so, what is the appropriate response: should efficiencies be denied because of the fear of structural change resulting in future competition problems or is there a way to have our cake and eat it too?

As noted above, with significant fixed costs the economic incentive is to not only sell more of the existing product lines but to expand those lines into related product – to the traditional offering of dry groceries the chains added products such as bread, milk, meat and liquor as well as some products traditionally sold though hardware stores, clothing and flowers. Services such as insurance have now been added. For consumers the opportunity cost of time is increasing and entering a store is a fixed cost.[25] Thus, they have reacted positively to the one-stop shop approach. The result has been that the chains have won sales not only from independent grocery retailers but also from specialty retailers – it has been estimated that only 10% of grocery

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[23] ACCC, *Grocery Report*, above n3, 168-169.

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

[25] For this reason, consumers tend to be more loyal to the store than to a particular brand of product.

products are purchased from specialty stores, takeaway stores and department stores. Below, we use petrol as a case study for examining the competition implications of the expansion by the grocery chains into other markets.

Petrol

In 1996 Woolworths added petrol to its product range and offered a 4c per litre discount upon presentation of a shopper docket. Then in 2003 Coles entered into a similar arrangement with Shell. Later that same year Woolworths and Caltex announced a joint venture for the retailing of petrol involving up to 450 petrol retail sites. These arrangements were notified to the ACCC, and permitted to stand on the grounds that they resulted in a net public benefit, particularly lower prices for consumers and more non-price competition.[26]

Since their introduction, there has been considerable debate about whether shopper dockets are likely to adversely affect competition in the grocery industry and/or in petrol retailing. The key competition concern in relation to the shopper dockets of Coles and Woolworths is that the supermarkets may have the ability to leverage their market power in the grocery sector into petrol retailing.

The immediate effect was to increase the volume and share of petrol sales of Woolworths/Caltex and Shell at the expense of other petrol retailers in an industry where volume is critical to cost. According to the ACCC this effect continued until 2005-06.[27] Based on volume of petrol sold, in 2011-12, Shell's share was 2%, BP's share was 16%, the independents had a 17%, share, Caltex 18%, Coles Express 23% and Woolworths 24%.[28] Coles and Woolworths operated 24% of all service stations.[29]

The independent grocery and petrol retailers, as well as refiners/marketers responded in part by offering similar discounts – "over 200 notifications concerning petrol shopper docket arrangements [were] lodged with the ACCC between 1996 and 2003. Many of these notifications were lodged by individual petrol stations".[30] As well as introducing their own shopper docket schemes, many independents increased their

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[26] ACCC, *Petrol prices and Australian consumers – report of the ACCC inquiry into the price of unleaded petrol* (2007), 184 (the ***Petrol Report***); available at: http://transition.accc.gov.au/content/item.phtml?itemId=806216&nodeId=5b47c6be22c63660e7fdf20dbe40f703&fn=Chapter%2012%20Petrol%20shopper%20dockets.pdf

[27] *Ibid*.

[28] Australian Institute of Petroleum, "Facts about the Australian retail fuels market and prices", http://www.aip.com.au/pricing/pdf/Facts%20About%20the%20Australian%20Retail%20Fuels%20Market%20and%20Prices.pdf (last accessed 6 July 2013), citing ACCC data.

[29] *Ibid*.

[30] ACCC, Petrol Report, above n26, 184.

focus on non-fuel/convenience offers and identified niche markets, such as ethanol retailing.[31] The ACCC claims that the loss of market share has been recovered.[32]

Nonetheless, the fragmented nature of the independent sector is likely to mean that their improved offering is more costly for them than it would be for the chains. It seems probable that Coles and Woolworths have attracted sufficient additional sales by linking groceries and petrol that the additional economies cover the cost of the discount. This is consistent with the ACCC finding in relation to Woolworths:

> *Woolworths submitted that the net cost of the fuel discount program is only a fraction of a cent of the average selling price of the 25 000 lines sold in Woolworths supermarkets. It considers that loyalty/reward/promotion schemes are part of the total cost of operating a retail business and enticing customers to come back, to switch brands or to buy more. Woolworths submitted that the cost of the shopper docket scheme is not something that is taken into account in setting individual prices for grocery items and it does not price the over 25 000 product lines it sells on a cross-subsidy or cost recovery basis. Woolworths indicated that the cost of the shopper scheme is borne by the overall business.*[33]

Shopper docket arrangements have implications for grocery sales through convenience stores in petrol stations which in turn affects the competition faced by independent grocery retailers. The ACCC reported:

> *Coles submitted that there is a very important relationship between fuel, fuel margins, fuel customers and convenience store sales. Coles submitted that, at the commencement of the alliance, 60 per cent of alliance revenue came from fuel sales while 40 per cent came from convenience store sales. Over time, revenue from convenience stores has grown so that it now represents about 50 per cent of the alliance's revenue. To illustrate the importance of convenience stores, Coles advised that it offers an additional 2 cpl discount associated with minimum purchases from its convenience stores.*[34]

Nevertheless, the ACCC stated that it had:

> *seen no evidence to suggest a rapid increase in the number of independent retailers exiting the industry since the introduction of the supermarkets' shopper docket arrangements. Information provided to the ACCC suggests a trend of site transfers within the industry. It is likely that the number of retail sites continues to decline in line with the long-term industry trend.*[35]

In summary, at least in the short term, consumers seem to have benefitted from the expansion of the supermarkets into a greater range of in-store products, as well has

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[31] *Ibid*, 194.

[32] *Ibid*, 192.

[33] *Ibid*, 181.

[34] *Ibid*, 182.

[35] *Ibid*, 193.

into other businesses. The risk is that, as the share of other retailers shrink relative to the chains, and given relatively high entry barriers, the market power of the chains will increase. The issue at the retail level is whether competition between the chains themselves will be sufficient to retain a competitive outcome. As the buyer power of the chains increases, another concern is the impact that this may have on suppliers. There is also the question of whether petrol will, in effect, become yet another supermarket product, albeit supplied at a different location. Then for other markets, such as hardware and possibly at some stage pharmacies, will they too be consumed by the chains?

The ACCC's market assessment

Notwithstanding the ACCC's success in showing that Woolworths (and by implication Coles) had substantial market power as at 1997,[36] the ACCC appeared markedly sanguine about the position of the two chains when producing the *Grocery Report* a decade later (even though the market had become further concentrated in the interim). "Broadly speaking, public debate overstates the structural problems within grocery retailing."[37] According to the ACCC, such debate failed (and, presumably, fails) to take into account barriers to entry and expansion.[38] Yet the ACCC's own assessment of barriers was hardly encouraging.[39] Nonetheless, the ACCC concluded that competition at the retail level was "workably competitive".[40]

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

[37] ACCC, *Grocery Report*, above n3, 67. See further at 57 for the ACCC's estimates of Coles' and Woolworths' (the major supermarket chains or **MSCs**) category share of sales:

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

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

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

[39] See for example *ibid*, 213: "Further improvements in the competitive dynamic are most likely to be by the potential entry of new grocery retailers. However, the ACCC has seen no significant evidence to suggest that such a competitor will enter in the near future."

[40] *Ibid*, 210.

The ACCC found that one of the main reasons for this was the constraint imposed by the independent sector. This sector, however, was bedeviled by market power problems and, indeed, monopoly pricing at the wholesale level owing to the lack of competition facing Metcash.[41] How the independent sector could simultaneously endure monopoly pricing at the wholesale level and suffer other cost disadvantages (due to a lack of scale)[42] but remain relatively stable in terms of market share[43] *and* effectively constrain the vertically integrated chains was not explained by the ACCC in its lengthy report. The logic of how such propositions could all hold true at the same time escapes the authors. It was a logic that also escaped the Federal Court and Full Federal Court when the ACCC sought to block Metcash's acquisition of Franklins, arguing that the major chains did not constrain Metcash.[44]

To extent there were any problems in the sector, the ACCC considered "its existing powers can be used to encourage competition and enhance dynamic change".[45] Since the *Grocery Report*, however, the ACCC has rarely taken on Coles or Woolworths. There has been no Part IV action, two blocked mergers (only one of which was in the grocery sector)[46] and a range of insignificant consumer protection matters.[47] Indeed, the only substantive action by the ACCC in the sector has been the unsuccessful merger case against Metcash.

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[41] *Ibid*, see generally Chapter 7. For the findings re monopoly pricing, see generally the discussion at 7.5; also earlier at 128. The basis for this finding was unclear and surprising, given how reluctant the ACCC was to form firm views about many issues in the *Grocery Report*. It also seems to be founded upon a logic which the ACCC abandoned when considering Woolworths' incentives to engage in monopoly pricing in its capacity as a wholesaler in the hardware sector: see ACCC, *Public Competition Assessment: Woolworths Limited/Lowe's Companies Inc – proposed acquisition of Danks Holdings Limited* (14 January 2010), especially at 13-14, also at 16.

[42] ACCC, *Grocery Report*, above n3, especially at section 7.4.

[43] *Ibid*, 48ff.

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

[45] ACCC, *Grocery Report*, above n3, 215.

[46] See Australian Competition and Consumer Commission, "ACCC to oppose Woolworths/Lowe's proposed acquisition of G Gay & Co hardware stores", Media Release No 211/12 (4 October 2012). No Public Competition Assessment has been released (as at 6 July 2013). See also ACCC, "ACCC to oppose Woolworths' proposed acquisition of Glenmore Ridge site", Media Release (6 June 2013). The ACCC also opposed another Woolworths acquisition just before the publication of the *Grocery Report*: see ACCC, *Public Competition Assessment: Woolworths Limited – proposed acquisition of Karabar Supermarket* (11 July 2008).

[47] Most recently, the ACCC has instituted proceedings against Coles in relation to baked goods (ACCC, "ACCC institutes proceedings against Coles for alleged false, misleading and deceptive bakery claims", Media Release No 121/13 (12 June 2013)) and it issued infringement notices against Coles in relation to country of origin claims (ACCC, "Coles pays infringement notices for alleged misleading country of origin claims" Media Release No 148/13 (1 July 2013)).

Conclusions

What conclusions, then, can be drawn from the structure of the Australian grocery sector? First, substantial market power is likely to pertain post-*Safeway* (indeed the market has become further concentrated since that decision); further, as implicit in *Safeway*, both Woolworths *and* Coles are likely to have substantial market power – although, of course, such assessments need to be made with specific conduct in mind. Any (mis)use of such power, however, is likely to be episodic, not systematic. Indeed, while competition between Coles and Woolworths may be relatively comfortable, Australians are likely benefitting from low prices, due to the size of both major retailers and – more specifically – their ability to access economies of scale and scope.

Pricing has been driven down by a two-fold combination: enhanced efficiency in the supply chain as well as some transfers from suppliers to retailers. Once efficiencies in the supply chain are exhausted, the question becomes on what basis will competition between the majors proceed? Product innovation may become key. Nonetheless, relentless squeezing of the supply chain may take its toll – by the time innovation becomes more valued, the supply chain may be less able to deliver.

B. Brand power and the role of countervailing power

If constraints on the majors are not to be found in the form of direct competition, it must then be considered whether they can come from other points of the supply chain. On occasion, it is argued that suppliers are sufficiently 'big and ugly' to take care of themselves – indeed, it is not uncommon to suggest that suppliers may have market power and thus be able to keep the major retailers in line. While it is unarguable that certain brands/suppliers may be market leaders and may even have market power, this does not necessarily resolve competition issues.

For one, bilateral monopoly does not lead to efficiency – rather it means the parties concerned fight over the rents instead of them automatically lying with one or the other. Further, as will be seen from the study below, the number of 'must have' brands appears to be quite limited and, when broken down by supplier, is smaller still. If there are pockets of market power on the supply-side, they are relatively isolated. Finally, any power on the supply-side which may be said to constrain the major retailers will not assist the independent sector. When all is said and done, market power on the supply-side does not mean consumers get a better deal, regardless of their preferred retail outlet.

The growth of private labels in Australia has, in any case, been seen as a check on any such supply-side power. Anecdotally, private labels appeared to have grown extensively in recent years and many consumers seem unhappy with a resulting 'lack' of choice. What then are the competition effects of private labels and does the evidence support the anecdotes? The following discussion addresses these issues and outlines some potential quantitative uses of available information.

'Must have' brands

The notion of 'must have' brands is bandied about with frequency, but generally there is little evidence to support a claim that a given brand falls within this category. Most often, one party or another merely contends that a particular brand is 'must have' resulting in 'findings' such as this one drawn from a recent Public Competition Assessment:

> *The ACCC understands that the brands supplied by Nestlé and Pfizer Nutrition are 'must have' brands for the major supermarket chains and that retail consumers that purchase infant formula are typically high value grocery customers.*[48]

At best, there will be qualitative assessments based on evidence from parties (with vested interests) to the effect that they consider consumers would go elsewhere to buy Brand X if they themselves did not stock it.

We have no doubt that brand power claims can be tested on a more quantitative basis, although the best data are privately held. What then can one draw from publicly available information? One means to assess the importance of given brands is to consider how frequently they are advertised. This brings into play the notion of "Known Value Items" (**KVIs**)[49] – items by which consumers assess whether pricing is competitive. The precise relationship between 'must have' brands and KVIs is not clear: are they one and the same? While it may be possible that a brand is 'must have' but is not used as a measuring stick on price, this seems unlikely. Accordingly, if one analyses advertised brands, one is likely to see over time a pattern whereby a retailer's competitiveness is established by showing that it has particular brands available at attractive prices.

One factor which skews this assessment, however, is that promotions tend to be funded by the supplier, not the retailer.[50] That said, some catalogue spreads are said to be an "advertiser promotion" – we are not sure what distinguishes these promotions from general catalogue appearances which are also funded by supplier.[51] In any case, regardless of this funding aspect, we consider promotional activity provides a useful basis to draw some conclusions about 'must have' brands.

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[48] ACCC, *Public Competition Assessment: Nestlé – proposed acquisition of Pfizer Nutrition* (3 May 2013), 8.

[49] A term used frequently in the *Grocery Report*.

[50] ACCC, *Grocery Report*, above n3, 138: "promotions are largely funded by the product suppliers…".

[51] Anecdotally, it also seems that stand-alone promotions (eg television advertisements for particular brands) are less common than was previously the case – as with many issues in this industry, however, there appears to have been little engagement with available measures to undertake any quantitative assessment.

Notes and qualifications

In order to assess which brands the supermarket retailers use to attract consumers, we reviewed all catalogues released by the major supermarket retailers in June 2013 (as downloaded from the websites of Aldi, Coles, IGA and Woolworths respectively).[52] Where the choice was given, we selected catalogues for the Bayside area in Melbourne (or Victoria more generally) and, in the case of IGA, we opted for the nearest Supa-IGA (being the largest format store and thus the most comparable with the local Coles and Woolworths).

Advertised brands are necessarily influenced by both location and seasonal factors. This may mean that brands more commonly purchased in warmer months/locations are under-represented. Conversely brands such as Campbells and Heinz (strong in soups) may be over-represented; nonetheless, a brand that is 'must have' only for a certain period of the year remains 'must have'.

In each case, we recorded every brand that appeared in a catalogue, but did not take into account multiple appearances of a brand in the same catalogue. We also only noted photographed brands – on occasion, specials for brands are written in a catalogue without any accompanying picture. On our assessment, such brands are less likely to attract consumers' attention and thus can less appropriately be claimed to be influencing buying decisions.

Where multiple brands appear on a product, the most 'prominent' brand has been recorded. This can be a matter of judgment, particularly where a well-known brand established by one company is subsequently purchased by another (eg Vegemite is now owned by Kraft, but Vegemite is clearly the more prominent brand) or where there is a well-known umbrella brand (eg Kellogg's against opposed to Coco-Pops). In general, we have recorded the better known brand, although again that's a matter of judgment.

To the extent we could readily identify them, we have disregarded home brands or private labels.

Finally, only brands for "packaged groceries" were recorded. Items such as vitamins, mobile phones and accessories, cooking utensils, DVDs, stationery, liquor, pantyhose, medicines and make-up were excluded. Likewise, fruit, vegetables and meats (excepting packaged smallgoods and the like) were not taken into account.

[52] Commencement sales dates for each catalogue are: Aldi (5 June, 12 June, 19 June and 26 June 2013), Coles (5 June, 12 June, 19 June and 26 June 2013), IGA (3 June, 10 June, 17 June and 24 June 2013) and Woolworths (5 June, 12 June, 19 June and 26 June 2013).

Observations

Across 16 catalogues, there were 465 distinct brands identified. Given Aldi's particular approach to branded products (and advertising), it may be thought to distort the analysis;[53] if one excludes Aldi, there were 431 brands over 12 catalogues.

Almost 20% of the 461 brands appeared only in IGA catalogues, and a further 6% appeared only in Aldi. The IGA-only brands include many well-known names such as Chum, Eveready, Glad, Handy Andy, Johnson's, Oral B, Pampas, Paul Newman and Tetley. There were many other such brands, which were ultimately owned by key suppliers (see the portfolios section below). Their failure to appear in Coles' and Woolworths' catalogues may mean that they are not carried by these chains; in many cases, however, it simply means that they were not promoted during the relevant period. Some well-known brands – which may have been thought to be 'must have' brands – were not promoted by any retailer, eg CSR[54] and Bushells. Only Heinz and Kellogg's appeared in catalogues for all four retailers, although it was common for brands to appear in each of Coles, Woolworths and IGA.

Brands averaged almost three catalogue appearances during the period reviewed. The distribution of appearances was as follows:

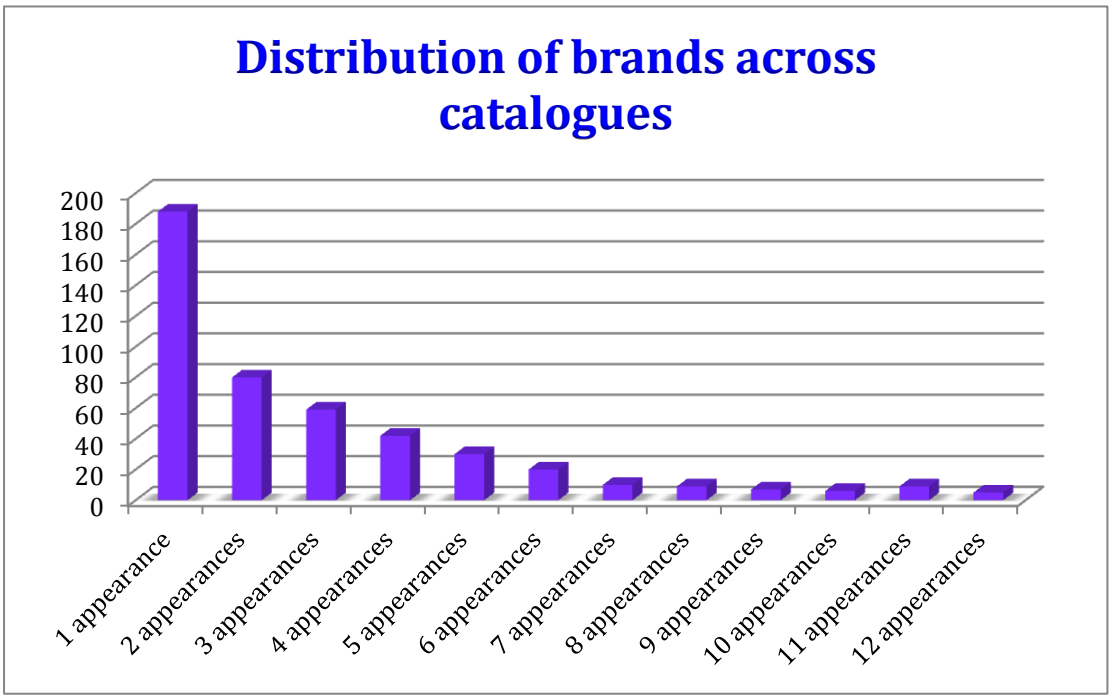

Figure 2: Number of catalogue appearances per brand (June 2013)

[53] ACCC, *Grocery Report*, above n3, 43: "Ninety per cent of products are Aldi's own exclusive brands…" – noting that Aldi stores stock around 900 products, as opposed to the major chains who were said to stock in excess of 25,000 product lines.

[54] Note, as indicated in the section below, private labels are very prominent in sugar.

Focusing on Coles and Woolworths

In the eight catalogues of Coles and Woolworths that were reviewed, 346 distinct brands were pictured. Of these, 222 (or 64%) appear in only one or two catalogues.

Of those brands appearing frequently:

- 41 (12%) appeared 6 or more times;
- 21 (6%) appeared 7 or more times; and
- 12 (3.5%) appeared 8 times, ie in every catalogue reviewed.

Those appearing in every Coles and Woolworths catalogue for the relevant period were: Arnott's (which appeared in 12 catalogues all up, ie in all IGA catalogues as well); Cadburys (12), Coke (12), Colgate (11), Huggies (11), Kellogg's (12, including one appearance in an Aldi catalogue), M&Ms (8), McCain (11), Nestlé (12), San Remo (11), Sara Lee (10) and Tip Top (11).

Occasionally, brands featured only in Coles or Woolworths catalogues. There were also some brands that featured in Coles catalogues every week (Energizer, John West, Lint, Snickers – which did not appear elsewhere at all – and Steggles) without regularly appearing elsewhere; for Woolworths, this occurred with just one brand (South Cape).

The average number of appearances of a brand in Coles' and Woolworths' catalogues was 2.6.

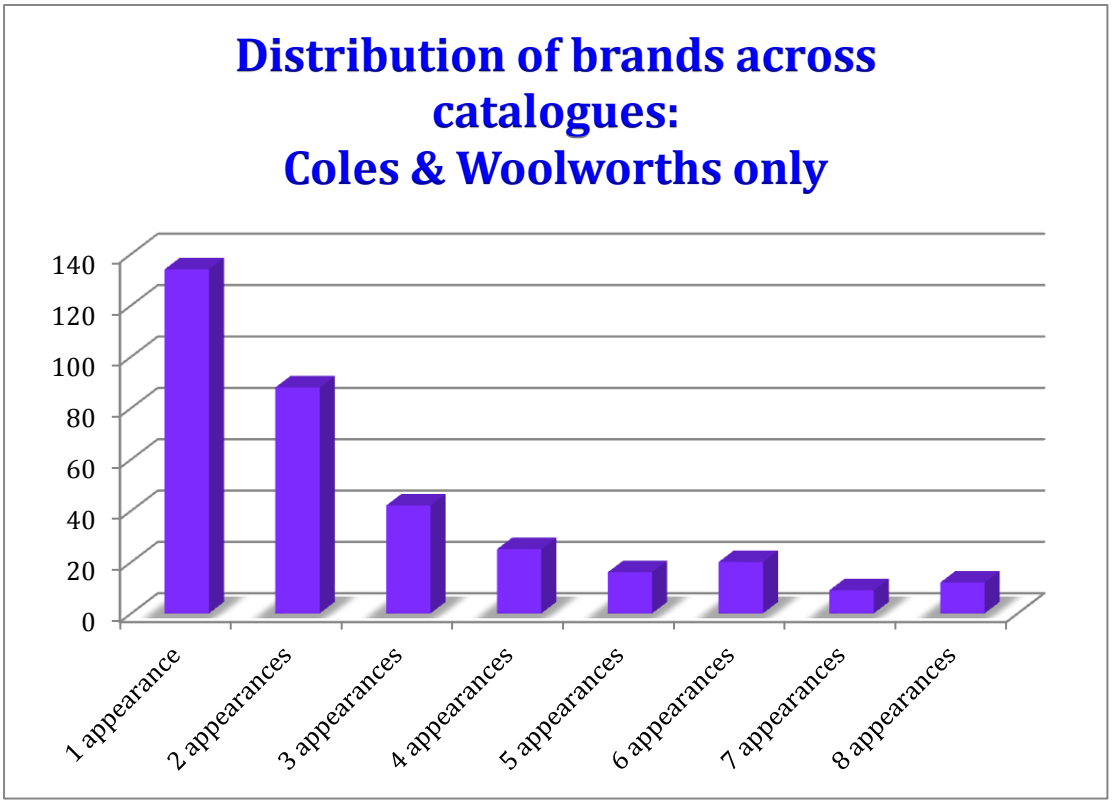

Figure 3: Number of catalogue appearances per brand (June 2013) – Coles and Woolworths only

Brand portfolios

The above analysis both overstates and understates the power of the supermarket chains vis-à-vis brands. It understates it, in the sense that many of these brands actually fall under common ownership, meaning that – relatively speaking – the 'rats and mice' are even more insignificant. Conversely, it overstates it in the sense that there are clearly some very significant suppliers with many reputable brands and, consequently, significant bargaining strength.

We reviewed the ownership of the top 41 brands[55] (all those with at least six appearances in Coles' and Woolworths' catalogues). Of these 41 brands, five appeared *only* in Coles and Woolworths catalogues (John West, Lean Cuisine, L'Oreal, M&Ms and Natural Confectionary Company).

Manufacturers of the top 41 brands accounted for 124 brands, or 29% of total brands listed in Coles, Woolworths and IGA catalogues. Several companies supply multiple brands falling within the top 41. Ownership is something of moving feast (and frequently difficult to discern), although over time ownership of the top brands appears to be becoming more concentrated between the major companies (Peters, which recently became 'independent', appears to be an exception to this). Extraordinarily, Nestlé owns five of the top brands, with Simplot and Colgate owning three each. Four companies (Coca-Cola Amatil, Nestlé, Mars and Unilever) account for 56 distinct brands identified during our review of catalogues (or 13% of non-Aldi brands).

Private labels

Private labels are frequently seen as a counter to the power of brands. Sometimes they are manufactured by the retailer itself (as a straight-forward means of vertical integration); more frequently, however, their production is outsourced via tolling arrangements with third parties. Indeed, often, those manufacturing on the supermarket chain's behalf[56] are actually existing suppliers of branded products. The identity of the manufacturer is essentially irrelevant, with all intellectual property rights and goodwill residing with the retailer.[57] An example recently occurred in Europe when production of a private label butter shifted from an Austrian company to a Dutch company, with virtually no changes to the packaging.[58]

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[55] Note: this review may not reveal all ownership ties, as sometimes links between companies can be quite opaque.

[56] Or, in the case of independent supermarkets (eg IGAs), Metcash as their wholesale supplier.

[57] See the discussion in Chris Doyle and Richard Murgatroyd, "The role of private labels in antitrust" (2011) 7 *Journal of Competition Law and Economics*, 631, 634 and Landbouw-Economisch Instituut BV, "The impact of private labels on the competitiveness of the European food supply chain" (2011) *European Commission DG Enterprise and Industry Magazine*, 132.

[58] Landbouw-Economisch Instituut, *ibid*.

The strategic value of private labels

There are several reasons why the supermarket chains may find private labels an attractive strategy. These include:

- the significantly higher margins that they can achieve for private labels as against branded products;
- improved bargaining power vis-à-vis their suppliers (eg manufacturers of name brands), which may enable them to achieve price concessions, or other favourable terms, which are perhaps unavailable to their competitors; and
- improved customer segmentation, consequently enabling more effective price discrimination.[59]

Several key factors distinguish private labels from their branded counterparts. These include quality (with notable pricing consequences); approaches to investment – both in product development and in promotion; and the purpose which they serve. These are each addressed in more detail below.

In Australia, consumers have tended to be leery of the quality of private label products in supermarkets. Recently, however, the large supermarket chains have reinvigorated their private label strategy and have substantially improved the quality of their products, as well as introducing products at various price (and quality) points (a so-called 'tiered' approach). Quality – actual and perceived – has a close relationship with price. Research suggests that, overseas, private labels typically cost 15-20% less than the leading brand.[60] Steiner observes that where there is too great a price spread between a private label and a name brand, consumers interpret this to mean that the private label is low quality.[61] Consequently, name brands create a price umbrella under which private labels can sit.[62] This umbrella is reinforced by price asymmetry – price cuts by private labels hurt private labels more than name brands, while an increase in price by a name brand means a less significant loss of customers than for a private label.[63]

In producing private labels, the supermarket chains spend substantially less on product development than do their branded competitors. Indeed, it has been observed that private labels will normally copy successful name brands.[64] Empirically, private

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[59] Victoria Daskalova, "Private labels (own brands) in the grocery sector: competition concerns and treatment in EU competition law" (TILEC Discussion Paper DP 2012-002, Tilburg University, 2012), 10. See also Robert L Steiner, "The nature and benefits of national brands/private label competition" (2004) 24 *Review of Industrial Organization* 105, 113.

[60] Daskalova, *ibid*, 12.

[61] Steiner, above n59, 114.

[62] Daskalova, above n59, 11ff.

[63] Steiner, above n59, 116.

[64] *Ibid*, 118: "Although there have… been scattered instances of real innovation by [private labels], they normally wait to see if the latest [leading name brand] innovation is selling well, and if so, they

labels have been shown to find it more difficult to compete in lines where there are well-established 'must have' brands,[65] so it is unsurprising that they try to imitate those brands in order to gain consumers' trust. Promotional expenses are also significantly reduced for private labels – single products are rarely extensively promoted. That said, a private label such as *Coles Finest* or *Woolworths Select* will appear across multiple product categories, so general promotion may still be quite substantial; any promotional costs, however, are broadly defrayed in a way not available to the suppliers of name brand products. Furthermore, any promotion frequently constitutes only a small incremental cost, given the extensive promotion that the chain undertakes anyway.

Private labels also serve a very different purpose to branded products. Ultimately, they are about making money for the supermarket chain as a whole, as against making money in a particular product category. Consequently, when a supermarket chain is considering whether to 'sponsor' a private label, the following factors are relevant:

- its primary competitive focus is generally other supermarkets, *not* competing manufacturers of specific products;
- it is trying to establish a reputation across many product lines, particularly through the use of 'umbrella brands'. Once an umbrella brand is accepted by consumers, it is easy to add further products to (or delete products from) the range, with limited impact upon the reputation of the umbrella brand;
- given the diversified nature of its 'investments', along with the benefits of an umbrella brand, the cost of creating (or removing) new products is low – effectively, the supermarket buys the expertise it needs at the time, and discards it when no longer required. This allows for extremely quick entry and exit in particular product lines; and
- it can 'create' a product entirely for strategic reasons, eg to flex its muscles against a particular supplier or – as recently seen in Australia with the 'milk wars'[66] – as part of a broader competitive strategy.

These factors all combine to have an interesting impact on the competitive dynamic. First, manufacturers/suppliers are now competing with their gateway to the consumer, the supermarket. Second, they are competing while facing a significant cost disadvantage, which – due to the price umbrella – is largely reflected in the supermarket's margin (rather than the price offered to consumers). Finally, manufacturers/suppliers and the supermarket chains are competing with markedly different end-games in mind. Supermarkets still need the name brands – after all, they provide the price umbrella and the notion of 'must have' brands clearly has some

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copy it."

[65] *Ibid*.

[66] As discussed in Alexandra Merrett and Rhonda L Smith, "Crying over spilt milk: buyer power and the rise of private labels" (2 July 2012), 1 *The State of Competition*; available at: http://www.thestateofcompetition.com.au/newsletter-archive

force – but they don't need as many, and they don't need any particular brand as much as they used to.

The positive impacts of private labels

Earlier research tends to conclude that private labels are a positive competitive development. Basic reasons for this include:

- the mere threat of private label competition has been shown to force the price of name brands down. To this end, private labels can be seen as 'fighting brands';[67]
- private labels (actual or threatened) can prompt non-price competition, such as advertising and product proliferation;[68] and
- private labels have a positive impact on innovation.[69]

On the last issue, Steiner observes that "True product innovation is one of the strongest competitive weapons against private labels in the manufacturer's arsenal. A major innovation by the manufacturer leaves the category's private label in the unfortunate position of imitating yesterday's favourites".[70] Indeed, this sort of innovation helps a name brand maintain its high prices. Conversely, supermarkets may be better placed than manufacturers to identify gaps in the market – given their face-to-face contact with consumers – which drives a different sort of product innovation.[71]

In light of these factors, private labels are credited with reducing price, (often) improving quality and increasing the bargaining power of retailers as against their suppliers.[72] This last point is revealing, as it contains an underlying premise as to where the bargaining power initially lies, and may explain why the Australian experience is not quite the same as overseas.

More recent concerns

Of course, everything has its downside. While economists generally seem enamoured of private labels, consumers can be distinctly reluctant to buy them. Resistance varies by country and indeed by product line, but Australians are amongst the most stubborn resistors. Manufacturers, too, can be unwilling to be pushed into a competitive relationship with those to whom they supply. Indeed private labels provide considerable scope for supermarkets to manipulate customers and manufacturers into

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[67] Steiner, above n59, 114.

[68] *Ibid*, 115.

[69] ACCC, *Grocery Report*, above n3, 376.

[70] Steiner, above n59, 118.

[71] Doyle and Murgatroyd, above n57, 639.

[72] See, for example, Daskalova, above n59, 5.

certain behaviours. Manipulation – whether as punishment, to gain leverage or for some broader competitive strategy – is possible via control of two key 'inputs':

- shelf space; and
- promotion.

In terms of shelf space, manufacturers are increasingly 'buying' shelf space, whether in terms of actual slotting fees or more obliquely through the terms and conditions attaching to shelf space (consider the requirements to stack shelves mentioned in *Safeway*[73]). And space is not the only consideration – the supermarket also ultimately controls placement (eg whether a product is at customers' eye level, where it is placed relative to competing products), pricing and promotion.[74]

One could argue that a retailer has no particular incentive to divert sales from name brands to private labels – a sale, after all, is a sale. Nonetheless, preferencing private labels results in greater leverage as against name brands, which may mean better supply terms or prices.[75] Over the longer term, it can also break the link between consumers and specific brands – this creates a feedback effect as the more the link breaks down, the more leverage private labels create. Finally, as already noted, the margins are better: supermarkets simply make more money from the sale of private labels than they do from branded products. These factors provide considerable – some might say enormous – leverage, enabling retailers to squeeze manufacturers. If retailers squeeze their manufacturers too much on price, the latter of course will have less profit to invest in innovation, leaving them in a difficult position given, as noted earlier, innovation is their best "weapon" in the fight against private labels.[76]

Given this analysis, one might ask why a producer of a name brand would ever agree to manufacture a private label on a supermarket's behalf. In broad terms, manufacturers' incentives for entering into a tolling arrangement may be one or more of: making use of excess capacity; achieving/improving economies of scale; putting in place a form of 'insurance' via (albeit limited) diversification; or simply taking advantage of their expertise in circumstances where they do not view private labels as a genuine threat to sales of their own products. Excess capacity was a particular factor in the milk wars. Discussing the impact of Coles' foray into private label milk – selling at just $1 a litre – large producer Parmalat argued that "wholesale prices

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[73] *ACCC v Australian Safeway Stores Pty Limited* (2001) 119 FCR 1, [1097].

[74] See, for example, Steiner, above n59, 123.

[75] See for example *Kesko/Tuko* (Case IV/M784) Commission Decision 97/277/EC [1997] OJ L110/53: a private label "enables retailers, who are inevitably privy to commercially sensitive details regarding the branded goods producers' product launches and promotional strategies, to act as competitors as well as customers of the producers. This privileged position increases the leverage enjoyed by retailers over branded-goods producers" (at [152]).

[76] Steiner, above n59, 118.

were driven down by… excess capacity, creating a gap between wholesale prices for branded and private label products which then expanded over time".[77]

Ultimately, the growth in private labels can be seen as a manifestation of interbrand competition at the expense of intrabrand, with the 'brands' in question being the supermarkets themselves. Consumers are generally much more loyal to a store than they are a brand (consider your own experience of the frustrations of shopping away from 'home'). Accordingly, one can see that the pro-competitive effects of private labels are only as strong as competition in the downstream market.

When buyer power and private labels intersect

Daskalova observes, "*The strongest competitive constraint on retailer pricing is other retailers.* As concentration increases, it is more difficult for consumers to make informed decisions about relative prices between brands and private labels".[78] Ultimately, she concludes "retailers carrying [private labels] do not have incentives to engage in genuine competition".[79] When parties with buyer power embark upon a private labels strategy, therefore, manufacturers have the following specific concerns:

- copycatting;
- misuse of supplier information (including costs and pricing information, as well as the types and timing of product innovations);
- de-listing; and
- falling profitability, as their ability and incentive to innovate are eroded.

The impact on innovation is a recurring theme. Whilst analysis initially suggested that innovation would be enhanced by the introduction of private labels, this does not appear to have been borne out. The European Commission, for example, found that the role of private labels in stimulating innovation is not comparable to that of brands, with the latter being the driving force for product innovation.[80] While retailers are indeed closer to consumers and therefore in a better position to meet their desires, they:

- are keen to keep costs low to maintain their margins, a goal which is inimical to maintaining a large R&D budget; and
- struggle to develop the specialist knowledge needed to excel at making *all* products within a broad private label strategy.

Furthermore, there is a limited market for any private label produced by the supermarket chains: ie their own retail outlets. Branded products, on the other hand,

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[77] Economic References Committee (Senate), *The impacts of supermarket price decisions on the dairy industry* (final report) (November 2011) (the ***Senate Report***), 3.5.

[78] Daskalova, above n59, 12 (emphasis added).

[79] *Ibid*, 23, citing work by Kim and Parker.

[80] *Kimberly-Clark/Scott* (Case IV/M623) Commission Decision of 16 January 1996, [161].

operate across the broader market and indeed often compete internationally. Ultimately, if private labels are free-riding on the reputation of name brands (through copycat packaging and imitating product developments), then one might expect to see innovation which results in lower costs of production, but less in the way of genuine advances in the nature of the product itself.

As for the concerns regarding copycatting and misuse of information, unsurprisingly evidence suggests that suppliers to retailers with buyer power are less likely to 'invoke their rights', by bringing actions such as trade mark infringement or passing off.[81] Bringing such matters to court might not just affect sales of their name brand products to the retailer in question; there may also be private label contracts at risk.

Australia's experience with private labels

Australia's experience with private labels has been vastly different to that overseas. They were first introduced here in the 1960s, and were generally regarded as of very poor quality, failing to achieve significant market penetration. In recent years, however, the major chains have reinvigorated their respective private label strategies. Estimates show that in 2007 private labels accounted for approximately 12% of sales in packaged groceries;[82] now, this number is more like 25% of total sales (being about 20% of sales for each of Coles and Woolworths).[83] Nonetheless, about one third of total sales in the United States are made up of private labels, with that number as high as one half in Europe.[84]

Indeed, it is the European influence of Aldi which is credited with the re-emergence of private labels in Australia.[85] When entering the Australian market, Aldi imported its standard business model, relying heavily on the prominent use of private labels and 'maverick' strategies such as selling parallel imports.[86] While that might have prompted a renewed focus on private labels, the recent *success* of private labels in Australia is more generally attributed to:

- an initial focus on homogenous products (meaning quality is not such an issue), thereby establishing consumer confidence in the umbrella brands;
- a tiered approach, with two or more of a 'high end', mid-tier and basic private label offered in many product lines; and

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[81] See for example the discussion in Landbouw-Economisch Instituut, above n57, 158-59.

[82] ACCC, *Grocery Report*, above n3, 362, citing IBIS World.

[83] *Senate Report*, above n77, 3.2. IGA stores and Aldi sell a higher proportion of private label products.

[84] *Ibid*, 3.4. Note, however, that the rapid growth that we see in our own market is also occurring overseas, so Australia may be some way off bridging the gap.

[85] *Grocery Report*, above n3, 360.

[86] The subject of the decision in ACCC, *Notice in respect of a notification lodged by Nestlé Australia Ltd*, Notification number N31488 (3 August 2006).

- increased market power on behalf of the supermarket chains, meaning more leverage vis-à-vis suppliers as well as influence over customers.

When considering the role of private labels in its *Grocery Report*, the ACCC identified four key concerns:

- retailers may allocate premium shelf space to their own brands in preference to competing suppliers, which could affect competition at the retail level;
- branded products may be de-listed to make way for private labels, which could affect competition at the supply level;
- private labels may weaken incentives for product innovation; and
- the impact of copycat packaging by private labels.[87]

The ACCC acknowledged evidence that supermarket chains favoured their own products, but appeared to accept Woolworths' claim that this couldn't go too far – if customers couldn't buy what they wanted, they would go elsewhere. "There is little evidence that [the major supermarket chains] are able to override consumer preferences *because if they were to do so, they would risk losing customers to other retailers*".[88] This is a peculiar assertion, given the foundation of cases such as Safeway and *Liquorland*[89] was the ACCC's assertion of market power. A finding of substantial market power, albeit in an upstream market, is somewhat at odds with notions of empowered customers at the retail level. Ultimately, in its assessment, the ACCC appeared to adopt the 'old view' world of private labels, generally interpreting them as a pro-competitive development, encouraging price competition.

While the ACCC's analysis of the impact of private labels is distinctly superficial – although, goodness knows, the *Grocery Report* was long enough as it was – one has a certain sympathy for its position. In many respects, the impact of private labels on a market can be akin to predatory pricing. Where a monopoly tends to result in under-supply, driving prices up, the converse is true of a monopsony. A party with buyer power may over-buy, forcing prices down, or it may under-buy in order to force some change on the market. Where there is an over-buying strategy (such as in milk), consumers often appear to be the winner.

In the case of milk, the Senate Economics Reference Committee (**SERC**) observed that "The fact that consumers are saving over $1 million dollars a week on what is, for many, a basic staple is not a benefit that should be dismissed lightly".[90] It reproduced a figure showing the movements of the CPI, food price index and milk price index over the past ten years (see *Figure 4*), clearly demonstrating the upside for consumers.

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[87] ACCC, *Grocery Report*, above n3, 371.

[88] *Ibid*, 368 (emphasis added). See also at 377.

[89] *ACCC v Liquorland (Australia) Pty Ltd* [2006] FCA 826.

[90] *Senate Report*, above n77, 4.25.

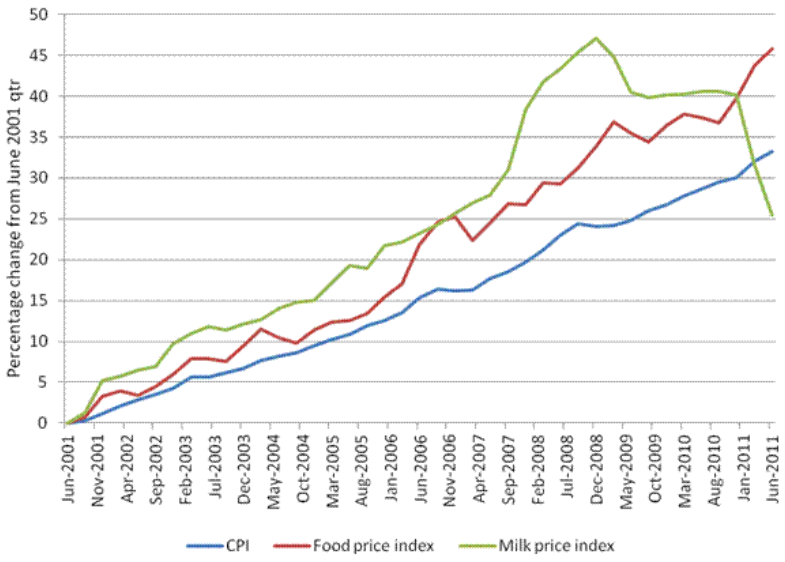

Figure 4: Movement of indices 2001 – 2011

Source: Economic References Committee (Senate), n77, Figure 4:10

Contrary to the ACCC, the SERC readily acknowledged the adverse impact on competition, with the squeeze by supermarkets on milk producers being passed on too readily to the farm gate (with farmers having no role in the negotiation of any private label contracts, but quickly suffering from the low prices promised by the milk producers). It suggested that an increased use of the collective bargaining processes may provide something of a solution. This, however, falls short – at best, it may go close to mimicking a bilateral monopoly (with the large dairy companies sitting between a dairy farmer collective and the large supermarket chains). Bilateral monopoly – as noted above – does not lead to efficient outcomes. Rather, it is likely to result in an under-supply, leading to supra-competitive prices and adversely impacting on allocative efficiency.

Private label products sold in Australia: what the data shows

With the theory in mind, what evidence can we draw upon to assess the use of private labels in Australia? There is scope to review the promotion of private label products (in an exercise similar to the analysis of catalogues above). The only relatively available hard data, however, are contained in the *Retail World Grocery Report*.[91] These data, however, are far from ideal for this purpose. First, the data published in 2012 (the most recent available) relate to 2011. As the rate of change is likely to have accelerated in 2012, this is not captured by the data and so the role of private label products is probably understated. Nor is it possible to distinguish the changes in the role of private label products in the two major chains from that in the grocery sector more generally – the entry of Aldi with its reliance on private labels could be expected to impact increasingly on the share of private labels as its rollout of stores

[91] This publication has been around for many years but its title has changed from time to time.

occurred. Second, private labels are combined with generics and housebrands.[92] Third, there appear to be changes in product definition over time, as well as changes in the popularity of particular products. For example, canned vegetables have diminished in popularity while frozen and fresh vegetables have become more significant. Similarly, muesli bars were a separate category in 1999 but possibly due to the proliferation of health bars/snacks, by 2009 (possibly earlier) they were included in the Nutritious Snacks category.

Despite these data shortcomings it is possible to draw some preliminary conclusions concerning private label products. The perception is that private label products have increased in importance in recent years and that the rate at which they have appeared has been accelerating. The reality is more varied. Private label products account for approximately 20% of sales through grocery retail outlet (compares with 40% for the Tesco chain in the United Kingdom).

First, as expected, the product categories most susceptible to the introduction of private labels are those that are relatively homogeneous (commodity products where consumers are not attached to a particular brand). This is illustrated as follows:

Table 3: Private labels (2012) – highest rating product categories

Product category	Value (%)	Volume (%)
Fresh milk	35.8	52.4
Cotton products	29.1	44.8
Mineral water	20.5	35.9
Sugar	46.0	64.0

Source: Retail World Grocery Report

These tend to be the product categories where generics and housebrands have been offered for many years. What has changed in some cases in recent years is the additional offer of generally higher quality private label products.

It is not surprising that the share of volume is generally significantly greater than the share of value – private labels offer value for money. This is demonstrated on the follow page (see *Table 4*).

[92] The retailers tend to distinguish – presumably on the basis of quality – between private labels, housebrands and generics. Part of the change by the chains in recent times has been to reduce reliance on generics and housebrands and to increase the offerings of higher quality private label products. To some extent this should be reflected in an increase in the ratio of value share to volume share. However, the efforts to reduce the cost of these products will reduce this ratio as well.

Table 4: Private labels (2012) – selected products by value and volume

Product category	Value (%)	Volume (%)§
Bread, loaf	28.5	40.6
Canned fish	18.9	32.4
Dry dog food	21.5	38.2
Eggs	38.7	50.9
Plastic bags, foils, wraps	29.3	40.4

Source: Retail World Grocery Report

While the significance of private labels has increased in a number of product categories, in some it has decreased. This is shown below for the period 2009 to 2012:

Table 5: Private labels value and volume – 2009 vs 2012

Product category	Value 2009	Value 2012	Volume 2009	Volume 2012	Value/Volume 2009	Value/Volume 2012
Butter & blends	39.1	16.3	54.3	26.6	66.5	62.0
Cheese	22.5	20.8	32.8	31.4	68.6	66.2
Disinfectants	13.7	12.4	25.7	21.5	53.3	57.7
Eggs	47.9	38.7	60.1	50.9	79.7	76.0
Fresh milk	42.9	35.8	56.6	52.4	75.8	68.3
Mineral water	21.5	20.3	36.3	35.9	59.2	56.5

Source: Retail World Grocery Report

With the exception of disinfectants, the ratio of the share of value to the share of volume decreased, suggesting that the decrease in the share of value may reflect lower relative prices. In the case of fresh milk, however, both the volume and value shares decrease, although the value decreases more than the volume.

The existence of a dominant brand does not mean that private labels are not significant. For example, private label tomato paste products account for 20-21% by value and 34-37% by volume, despite the presence of well-known brands such as Leggos.[93] Mixers is another product with a well-known branded supplier (Schweppes)[94] but where private labels have a relatively high share. Generally, however, private label products have been introduced earlier in product categories which either were commodities or lacked a strong well-known brand.

[93] Interesting, Leggo's appeared in only four of the surveyed catalogues.

[94] Schweppes products appeared in seven of the surveyed catalogues.

Conclusions

What then should one draw from these observations? First, the power of brands will not 'save' competition at the retail level. Market power on the part of suppliers will not advance consumers' interests. As for private labels, if one accepts that private labels enhance interbrand competition at the cost of intrabrand competition then – unless one is happy with the state of Australia's grocery sector – competition issues are likely to arise.

Analysing the competition effect of brands also explodes some myths about "countervailing" power – a frequently used, but rarely understood, term. The ACCC, in considering nappies, for example, considered that Huggies was "likely to have significant countervailing power", being a "key item that attracts consumers to stores…".[95] While Huggies did indeed appear 11 times in the course of our catalogue survey, its owner (Kimberly-Clark) does not have countervailing power, as the major grocery retailers remain the principal gateway to market. Kimberly-Clark could not bypass the chains and maintain its position in the market. Similarly, in the context of biscuits, the ACCC considered:

> *Arnott's is a very important supplier from the retailers' point of view, accounting for 57 per cent of supermarket sales of biscuits. Enhancing Arnott's position is the strength its brands names have built up over time [eg Tim Tams]... which means that Arnott's is likely to have significant countervailing power in negotiations with the [major supermarket chains].*[96]

This is simply not an accurate understanding of countervailing power. Rather, as Beaumont J observed at first instance in *Arnott's*, "Whatever power the chains may exercise over the smaller players… the evidence indicates a recognition by Arnott's and by the chains that *they need each other*…".[97] Interestingly, even though the *Arnott's* decision is more than 20 years old, Arnott's was one of just 12 brands that appeared in every Coles and Woolworths catalogue published in June 2013, as well as every IGA catalogue.

Nonetheless, parties regularly attempt to use the existence of "countervailing power" as an attempt to justify a merger that would otherwise create (or enhance) market power. Despite the ACCC's loose language in the *Grocery Report*, however, it rarely seems to fall for this line. Recent examples where it has been argued include: P&M Quality Smallgoods,[98] Nestlé/Pfizer[99] and Heine/Rafferty's Garden (in which it was

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[95] ACCC, *Grocery Report*, above n3, 277.

[96] *Ibid*, 281.

[97] *Trade Practices Commission v Arnott's Ltd & Ors* (1990) 93 ALR 657 at 696-97 (emphasis added). Beaumont J's decision was upheld by the Full Court in *Arnott's Limited & Ors v Trade Practices Commission* (1990) 24 FCR 313, see generally at 341-42.

[98] ACCC, *Public Competition Assessment: P&M Quality Smallgoods Pty Ltd – proposed acquisition of Hans Continental Smallgoods Pty Ltd Nutrition* (13 March 2009). See especially at 8: "while there is

argued that the grocery retailers' position was enhanced by genuine countervailing power, in the form of private label products).[100] In the latter two cases, the role of brands and reputation was highly significant, such that private labels were considered unlikely to be an inadequate constraint should the merger proceed.

C. Is supplier rationalisation inevitable? A foundation for further work

Economies of scale are considerably influenced by transaction costs. Bearing in mind that large format supermarkets carry approximately 25,000 distinct product lines, one obvious way in which to increase efficiency in the supply chain is to reduce the number of suppliers. It would therefore appear supplier rationalisation is inevitable, as the major chains try to enhance their supply chain management. Although not yet rigorously analysed, anecdotal evidence together with the reduction in the number of suppliers reported in *Retail World* indicates that, in recent years, the major chains have been rationalising the number of suppliers with whom they deal. In combination with the private label strategy discussed earlier, this may well feed into a growing perception that consumers face less choice than previously.

The recent deal between Coles and Murray Goulburn may be one example of the means by which such rationalisation could occur.[101] In April 2013, Coles and Murray Goulburn announced a ten year deal under which Murray Goulburn would supply Coles' private label milk. At the same time, its Devondale brand will be reinvigorated with its cheeses returning to Coles' shelves (following a dispute with Coles last year that had resulted in their removal). Further, at least initially, Coles will become the exclusive supplier of Devondale fresh milk.

A deal of this duration – which, in fact, is a form of vertical integration – means that competing milk producers are locked out of a significant portion of the grocery market. Depending on what else they can do with their milk, this may reduce competition in the dairy sector. This is particularly likely if Woolworths follows suit with a similar deal.

The co-operative structure of Murray Goulburn also provides an interesting twist. Arguably, it's the absence of a profit-making middleman that provides the foundation for this win-win arrangement. It also means that more dairy farmers will inevitably

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some scope for the major supermarket chains to support or sponsor the expansion of a smaller competitor gradually, such an expansion would be likely to take a number of years, and consequently would only provide a limited constraint…".

[99] ACCC, *Public Competition Assessment: Nestlé – proposed acquisition of Pfizer Nutrition* (3 May 2013).

[100] ACCC, "ACCC to oppose proposed acquisition of Rafferty's Garden", Media Release No 116/13 (6 June 2013).

[101] This deal is the subject of Alexandra's recent piece in *The Conversation*: "Coles' milk deal gives supermarket suppliers a reason to be sour" (23 April 2013) *The Conversation*; available at http://theconversation.com/coles-milk-deal-gives-suppliers-a-reason-to-be-sour-13600.

join the Victorian-based co-operative. If this should occur, however, the other major producers are likely to suffer – not only will their access to customers be restricted, but they may also have to pay more for their inputs as their supplier base decreases. Over time this may reduce their economies of scale, making them less effective competitors.

The deal may also have broader ramifications – as we have observed, a logical consequence of a duopoly is a reduction in competition in all upstream markets. That is, over time, we would expect to see fewer suppliers to the supermarkets. This can create a vicious circle: the more that related markets become concentrated, the harder it is for effective competition to emerge in supermarkets. Smaller players can't access the large-scale efficient producers (who are locked up by the major chains) and there are fewer 'left-over' suppliers to deal with.

D. Concluding thoughts

Once customers have become accustomed to the benefits of economies of scale and scope, it is hard to put the genie back in the bottle. Indeed, it may be that Australia is simply too small to support more than two players *and* benefit from such economies. If we want lower prices, it may mean that – in the case of packaged groceries at least – the best case scenario is an essentially duopolistic structure, constrained (to varying degrees) by a 'maverick' independent sector. For non-packaged groceries, however, there are many more paths to market,[102] giving smaller players a better chance to survive. That said, they face inevitable (and significant) barriers to expansion.

There will be some problems inherent in such a market structure, and we should be alert to potential (mis)uses of market power or other anti-competitive activity. Nonetheless, present evidence suggests that supra-competitive pricing is unlikely to be the main problem to result from the market structure. But a lack of competition is likely to adversely impact on choice and innovation. The major chains are not know for trialling new products – generally such products 'debut' via the independent sector and only once they've demonstrated some success do they move to the shelves of Coles and Woolworths. As such, the independent sector can be seen as very important to the overall competitive dynamic. An unfortunate consequence of the market structure and the available economies, however, is that the choices of the major supermarket chains inevitably impact the independent sector as well. If, as we expect, supplier numbers reduce over time due to an ability to access that very substantial portion of the market shopping at Coles and Woolworths, inevitably the range of suppliers able to distribute via the independent sector will be reduced.

[102] See for example ACCC, *Grocery Report*, above n3, at 308. Also ACCC, *Public Competition Assessment: Woolworths Limited – proposed acquisition of Macro Life Pty Limited* (14 July 2009).

Appendix. 'Must have' brands and brand portfolios

The following list is based upon the top 41 brands (as identified in the course of the catalogue exercise discussed in Section B), with all such brands shown in *italics*. The total number of times the brand appeared in the reviewed catalogues is shown in brackets.

Where a brand forms part of a broader portfolio, other brands from that portfolio which appeared in the course of the catalogue exercise are listed. Note: several of these portfolios included additional brands, but they were not recorded if they did not appear during our review of the catalogues. As noted in the body of the paper, at times ownership can be difficult to discern (and may change with reasonable regularity).

- *Arnott's (12), Bulla (10), Campbell's (11), Heinz (10), Huggies (11), Kellogg's (12), Kleenex (9), McCain's (11), Natural Confectionary Company (7), Red Rock Deli (8), S-26 (7),*[103] *San Remo (11), Sanitarium (9), Sara Lee (10)*: in each case, the relevant supplier appears to sell by reference to a single dominant brand
- Coca-Cola Amatil: *Coca-Cola* (12), Sprite (4), *Fanta* (7), Lift (1), Deep Spring (1), Mother (4), Kirks (5), Mt Franklin (2), Powerade (6), Goulburn Valley (6), SPC (7), Ardmona (1) and IXL (1)
- Colgate: *Colgate* (11), *Palmolive* (8), Ajax (1), Fluffy (6), *Cold Power* (8), Dynamo (4), Fab (5) and Sard (2)
- Kraft: *Kraft* (11), Philadephia (5), Oreo (1), Premium (1), Vegemite (5) *Cadbury* (12), Pascall (4)
- Simplot: *Lean Cuisine* (6), Edgell (1), *John West* (6), I&J (3), *Bird's Eye* (10) and Leggo's (4)
- L'Oreal: *L'Oreal* (6) and Garnier (4)
- Nestlé: *Maggi* (10), *Nestlé* (12), *Nescafe* (11), *Uncle Toby's* (10), Allens (4), Country Cup (3), Milo (8), Musashi (3), International Roast (5), *Fancy Feast* (7), Purina (3), Supercoat (5), Friskies (2) and Lucky Dog (2)
- Mars: Pedigree (8), *Whiskas* (9), Bounty (1), *M&Ms* (8), Mars (7), Snickers (4), Starburst (5), Dolmio (4), Masterfoods (4) and Uncle Ben's (1)
- Schweppes: *Schweppes* (7), Cottees (5), Extra Juicy (1), Gatorade (5), *Pepsi* (9), Solo (3) and Sunkist (1)

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[103] Technically, the S-26 brand is now owned by Nestlé, but pursuant to undertakings given to the ACCC, the brand must be licensed to an independent party on a long-term basis. Post this licensing-arrangement, the S-26 brand is subject to a 'black out' period, during which Nestlé remains unable to use it (as well as other specified brands): ACCC, *Public Competition Assessment: Nestlé – proposed acquisition of Pfizer Nutrition* (3 May 2013).

- Peters (formerly part of Nestlé): *Peters* (8), Skinny Cow (1) and Connoisseur (2)
- Smiths: *Smiths* (8), Doritos (5), Grainwaves (5), Twisties (3), Parker's (1) and Sakata (3)
- Sorbent: *Sorbent* (9), Purex (2), Handee (4), Tena (3) and Libra (3)
- Unilever: Sunsilk (2), Jif (1), Rexona (4), *Streets* (8), Radox (2), Omo (4), Continental (6), Lynx (2), Surf (2), Impulse (2), Dove (5), Comfort (3), Vaseline (3), Lipton (3), Raguletto (1), TRESomme (4), Flora (3), Simple (1) and Bertolli (2)
- Snackfoods Australia: *Thins* (9), CC's (4), Kettle (4), and Natural Chip Company (3)
- George Weston Foods: *Tip Top* (11), Don (3) and KR (1)
- Yoplait: *Yoplait* (11) and Fruche (1)