

**Public Submission to ACCC Grocery Inquiry by the
Australian Honey Bee Industry Council on
11 March 2008**

Contents

1	Introduction	2
	<i>Summary of Recommendations</i>	3
2.	Buyer Power in the Retail Grocery Industry	4
2.1	Defining Buyer Power.....	4
2.2	Quasi-Rents in the Agricultural Sector and the Exercise of Buyer Power.....	6
2.3	The Exercise of Buyer Power in the Australian Context and Overseas Experience...	8
2.4	Conclusions on Buyer Power	12
3	Proposed Remedies for the Exercise of Buyer Power	12
3.1	Section 50 of the Trade Practices Act	13
3.2	Code of Conduct.....	14
4	Product Labelling of Organic Foods	16
	References.....	18

1 Introduction

This is a submission by the Australian Honey Bee Industry Council (AHBIC) to the Australian Competition and Consumer Commission (ACCC) inquiry into the competitiveness of retail prices for standard groceries. The Australian Honey Bee Industry Council is the peak body representing the apiary industry in Australia. Its members include:

- Federal Council of Australian Apiarists' Associations;
- Honey Packers' and Marketers' Association of Australia;
- Australian Queen Bee Breeders' Association; and
- National Council of Pollination Associations.

The Australian honeybee industry has a gross value of production of around \$80 million per annum. Of this, \$60 million comes from honey production, with the remainder coming from other products such as paid pollination services, beeswax production, queen bee and packaged bee sales, pollen, bee venom, royal jelly, and propolis.

There are around 9600 registered beekeepers with around 500 000 hives. However, over 70 per cent of hives are operated by commercial beekeepers with more than 200 hives. Most commercial apiarists operate between 400-800 hives but some have more than 3000 hives.

Annual production of honey is approximately 30,000 tonnes, one third of which is exported. However, this amount can vary significantly due to adverse weather conditions such as drought. New South Wales accounts for around 41 per cent of honey production in some years. About a third of honey produced is exported to over 38 countries. Key markets are the United Kingdom, Indonesia and other South East Asian countries, North America and Saudi Arabia.

There are two major issues of concern to the AHBIC in regard to the ACCC inquiry. First and foremost is concern regarding the exercise of buyer power in the Australian grocery industry. The second issue relates to product labelling claims made in relation to the "organic" attributes of certain products.

Summary of Recommendations

The AHBIC makes the following recommendations to the ACCC inquiry:

Recommendation 1: **Subsection 50(3) of the *Trade Practices Act 1974* should be amended to include consideration of buyer power through the inclusion of a new provision subsection (j) that should read “the level of buyer power in the market”.**

Recommendation 2: **Building on the intent of the Produce and Grocery Industry Code of Conduct, a more comprehensive code of conduct should be developed to address concerns relating to the exercise of buyer power by the major grocery chains. As part of this new code of conduct, much greater transparency should be introduced in the tendering processes of the major grocery chains for their own-label products.**

Recommendation 3: **In regard to false and misleading labelling claims made in regard to the “organic” attributes of certain products that the provisions of Part V of the *Trade Practices Act 1974* are effectively and vigorously administered and enforced by the ACCC.**

2. Buyer Power in the Retail Grocery Industry

The terms of reference for the inquiry conducted by the Australian Competition and Consumer Commission (ACCC) into the competitiveness of retail prices for standard groceries announced by the Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen, on 22 January 2008 included consideration of the following matters:

- the current structure of the grocery industry at the supply, wholesale and retail levels including mergers and acquisitions by the national retailers;
- the nature of competition at the supply, wholesale, and retail levels of the grocery industry;
- factors influencing the pricing of inputs along the supply chain for standard grocery items; and
- any impediments to efficient pricing of inputs along the supply chain. (Bowen, 2008a)

The AHBIC will specifically address the terms of reference referred to above as they relate to the supply of inputs to the major supermarket chains (MSCs) in Woolworths and Coles for standard grocery items. As the ACCC correctly identifies in its *Issues paper* for this inquiry, “MSCs dominate the national grocery landscape” (Australian Competition and Consumer Commission, 2008a, p. 14).

In this submission the AHBIC will outline its concerns regarding the exercise of buyer power by the MSCs in regard to the purchasing of inputs for standard grocery items and the detriment caused not only to the domestic honey bee industry but also to the wider Australian community arising from the exercise of buyer power. The next section will discuss the issue of buyer power.

2.1 Defining Buyer Power

Professor Roger Noll of Stanford University has defined the term *buyer power* and described the exercise of *market power* on the demand side of a market in the following terms:

“buyer power” refers to the circumstance in which the demand side of a market is sufficiently concentrated that buyers can exercise market power over sellers. A buyer has market power if the buyer can force sellers to reduce price below the level that would emerge in a competitive market. (Noll, 2005, p. 589)

A monopsony is a market form in which there is only a single buyer, called a monopsonist, facing many sellers. The outcome achieved in a monopsony is considered to be analogous to that of a monopoly. While a monopolist is able to cut back on output in order to profitably raise the price of a good, a monopsonist engages in underbuying of an intermediate good in order to profitably reduce its purchasing price for that intermediate good.

In the standard static model of monopsony with many sellers facing an upward sloping supply curve, a profit maximising monopsonist with buyer power leads to market failure arising from a contraction in the amount of an intermediate good produced and sold relative to the competitive market outcome. This contraction in the amount of an intermediate good produced and sold results in the loss of allocative efficiency in that society would prefer that

more of the intermediate good should be produced and sold but this outcome is prevented through the exercise of buyer power. Just as in the case of monopoly, a monopsony will result in too few resources being devoted towards the production of a good. The ACCC has previously observed that the theoretical case for competition laws has been traditionally founded on the need to protect allocative efficiency (Australian Competition and Consumer Commission, 2002, p. 226).

In the case of a monopsonist of an intermediate good, consumers of the final end product do not necessarily receive any benefit from the lower price extracted for the intermediate good by the monopsonist. As Professors Roger Blair and Jeffrey Harrison of the University of Florida explain:

The monopsonist does *not* pass on these lower costs because the relevant costs for pricing decisions are marginal costs, and these are not lower... (Blair & Harrison, 1991, p. 304)

... lower input prices resulting from the exercise of monopsony power do *not* ultimately translate into lower prices to the monopsonist's customers and increased overall consumer welfare. (Blair & Harrison, 1991, p. 339)

In this case, the lower price for the intermediate good extracted by the monopsonist will be retained as profit. If the monopsonist is selling their final end good into a competitive market, then the price of the good will be determined in the market. In this situation, while the exercise of monopsony power reduces allocative efficiency it does not necessarily do any harm to consumers. However, if the monopsonist also exercises market power in the market for the final end good then consumers will face higher prices (Blair & Harrison, 1991, p. 306). Professor Noll has commented that in most cases monopsony harms consumers because the distortions it creates in an input market reduce efficiency in final goods markets (Noll, 2005, p. 613).

According to Professor Noll the exercise of buyer power will result in the transfer of wealth from sellers to buyers:

Like monopoly, the motivation behind monopsony behaviour is to transfer wealth in the form of economic rents from one side of the market to the other. (Noll, 2005, p. 589)

In order for the monopsonist to exploit any buyer power, there has to be the presence of economic rents on the supply side of the market (Noll, 2005, p. 592). Rents can take three general forms:

1. Ricardian rent;
2. Quasi-rent; and
3. Monopoly profits.

The next section will outline the existence of quasi-rents in the agricultural sector and concerns related to the exercise of buyer power.

2.2 Quasi-Rents in the Agricultural Sector and the Exercise of Buyer Power

Professor Noll has defined quasi-rents as the difference between a supplier's total revenues and short-run total costs (Noll, 2005, p. 593). A quasi-rent value of an asset has also been defined as the excess of its value over its salvage or its value in its next best use to another renter (Klein, Crawford, & Alchian, 1978, p. 298).

In a production process that requires some investment in sunk cost inputs (costs incurred but cannot be recovered), these inputs need not receive any short-run financial return to keep them producing for the market (Noll, 2005, p. 593). However, in the long-run, a firm must earn sufficient quasi-rents to yield a competitive return or it will not be willing to replace capital investments as they wear out or become obsolete (Noll, 2005, p. 593). Professor Noll observes that a monopsonist can extract quasi-rents from a producer for a period of time, but only for as long as the remaining useful life of the assets that are committed to supply the market (Noll, 2005, p. 601). According to Klein, Crawford and Alchian, investment in a specialised asset creates quasi-rents which provide the potential scope for opportunistic behaviour (Klein, Crawford, & Alchian, 1978).

Agricultural producers are often required to undertake significant investment in assets that have large sunk costs associated with them thus creating quasi-rents. According to Professor Richard T. Rogers of the University of Massachusetts and Professor Richard J. Sexton of the University of California at Davis:

Farmers are specialised to the supply of particular commodities through extensive investments in sunk costs. These assets represent exit barriers for farmers and cause raw product supply to be inelastic. (Rogers & Sexton, 1994, p. 1143)

Asset specialisation coupled with significant sunk costs make agricultural producers particularly vulnerable to the appropriation of their quasi-rents from purchasers able to exercise buyer power. Where purchasers can appropriate the quasi-rents of agricultural producers you have an example of a hold-up, which is defined as the situation that occurs where an agricultural producer making an investment is unable to receive all of the benefits that accrue from the investment (Felli & Roberts, 1999, p. 1). Former Industry Commission economist Jim Rose has explained the problem of a hold-up in the following terms:

Asset specialisation creates openings for opportunistic behaviour in which one party to the relationship manoeuvres to extract wealth from the other; and that wealth is wealth that could not be extracted in the absence of the interdependence. Specialised assets are vulnerable to hold-ups. When one party to the relationship refuses to pay the other party more than the highest value of the specialised asset elsewhere, we have a hold-up. (Rose, 1999, pp. 81-82)

The ACCC has previously recognised the possibility of a hold up occurring in a recent matter before the Australian Competition Tribunal:

... a contracting problem that can arise where (a) incomplete or otherwise limited contracts exist between two or more parties who can engage in a mutually beneficial activity, and (b) prior to the parties engaging in the mutually beneficial activity, one of the parties must make

an investment that is substantially sunk and, as such, the recoverable value of the investment for the investor is significantly below the initial investment cost. 'Hold up' occurs in this situation when the party making the relevant investment cannot, through the contracting process and prior to making his or her investment, be guaranteed to receive an adequate share of the returns from the mutually beneficial activity after the investment is made and the activity occurs. As a consequence of the expectation that he or she will be 'held up' after making the investment, the relevant party will either invest a smaller amount or not invest at all. In the extreme this will make the mutually beneficial activity unviable. (*Re VFF Chicken Meat Growers' Boycott Authorisation [2006] ACompT 2*, para. 103.)

Honey bees and beehives represent a sunk cost to bee keepers as they can only be used for the production of honey and other derivative products such as beeswax and royal jelly.

As the ACCC has previously recognised, the hold-up problem facing agricultural producers can manifest itself in a detrimental impact on investment decisions. Conscious of the fact that they could be held-up by purchasers with buyer power, agricultural producers will cautiously invest in specific assets thus resulting in a sub-optimal level of investment from the perspective of society.¹ According to Professor Noll, because sellers who have their quasi-rents extracted from purchasers with buyer power do not receive enough revenue to justify their investment, they will not reinvest (Noll, 2005, p. 601). As US business and political journalist Barry C. Lynn has commented:

The ultimate danger of monopsony is that it deprives the firms that actually manufacture products from obtaining an adequate return on their investment. In other words, the ultimate danger of monopsony is that, over time, it tends to destroy the machines and skills on which we all rely. (Lynn, 2006, p. 30)

For agricultural producers, a sub-optimal level of investment can have several far reaching consequences as Professor Peter C. Cartensen of the University of Wisconsin has outlined:

While some might regard such exploitative conduct as basically a matter of wealth transfer having no effect on market competition, it is important to appreciate that the long run incentives to participate in production markets are a function of the expected gains from the activity. In a dynamic analysis of incentives, it should be obvious that when others appropriate most of the wealth produced by an activity, the attractiveness of entry or innovation in that activity will be greatly reduced or eliminated. Thus, the greater appropriation of wealth created by farmers through their use of modern technology and efficient methods, the greater is the disincentive for the next generation to enter farming. Moreover, as the markets for agricultural products fail, the fundamental public interest in retaining a viable agricultural sector is likely to call forth further subsidies and other market distortions intended to prop up producers. (Cartensen, 2004, p. 11)

Any contraction in the level of innovation arising from the exercise of buyer power has severe repercussions for dynamic efficiency which is the main driver of economic growth

¹ This is along the lines as suggested by Professor Oliver Williamson of the University of California at Berkeley (Williamson, 1985).

over the longer term.² The marginal product of capital – the increment to output that results from adding one more unit of capital to the current capital stock – decreases as the capital stock gets larger (assuming constant technology). With a diminishing marginal product of capital, the addition of more capital will push the marginal product of capital towards zero. When the marginal product of capital reaches zero, there will be no benefit derived from further capital accumulation. According to Professor Paul Romer of Stanford University, the reason why economies continue to grow despite the diminishing marginal product of capital is due to the cumulative improvements in technique; improvement in the techniques of production have continued to generate economic growth (Romer, 1994). Although capital investments by individual firms remain subject to diminishing returns, improvements in the techniques of production through technological innovation ensure that there is no decline in the marginal product of capital at the aggregate level. Anything that is detrimental to the level of innovation undermines dynamic efficiency and long term economic growth and should be cause for serious public policy concerns.

While the extraction of quasi-rents is only a transitory phenomenon that cannot be sustained in the long run, Professor Noll has observed that the short run for the extraction of quasi-rents can turn out to be very long indeed (Noll, 2005, p. 602).

2.3 The Exercise of Buyer Power in the Australian Context and Overseas Experience

While Australian markets for the supply of inputs to the grocery industry are not characterised as a monopsony market, these markets could indeed be characterised as being at least an oligopsony, which is defined as having relatively few buyers. Indeed, given the dominance of the national grocery sector by the MSCs as even recognised by the ACCC, the AHBIC would submit that the supply of inputs to the grocery industry should be characterised as an effective duopsony between Woolworths and Coles. In the case of honey, it is estimated that Woolworths and Coles account for around 80 per cent of the sales of branded products.

While a market characterised as being an oligopoly, in having only a few suppliers, is capable of having numerous possible outcomes arising from interdependence between oligopolists and the opportunity to profit from defecting from any overt or tacitly collusive bargain struck between oligopolists, this situation is far less likely to occur in the case of an oligopsony. In the first instance, there are no incentives nor opportunity to profit from defecting from any overt or tacitly collusive bargain struck in an oligopsony designed to keep input prices down (Cartensen, 2004, pp. 5-6). In the second instance, even in the absence of overt or tacit collusion between oligopsonists to keep input prices low they will still possess an obvious incentive to drive down input prices and increase the price spread between input and output markets (Cartensen, 2004, p. 6).

Given the existence of an effective duopsony in Australian markets for the supply of inputs to the wholesale and retail levels of the grocery industry, the critical question arises as to

² Dynamic efficiency refers to the rate of technological innovation.

whether the MSCs are able to exercise buyer power against suppliers. The AHBIC submits that through a variety of mechanisms the effective duopsony in Australian markets for the supply of inputs to the wholesale and retail levels of the grocery industry has been able to secure and exercise buyer power against suppliers.

As the retail market share of the MSCs has increased, agricultural producers have become more heavily dependent on trading with the MSCs for their livelihoods. This dependence has provided the MSCs with significant bargaining power over agricultural producers which in turn has enabled the MSCs to set the terms and conditions of trade heavily in their favour. This situation has been exacerbated because not only are MSCs customers of individual agricultural producers but they are also their competitors and suppliers.

The MSCs are the customers of agricultural producers in that they purchase their products for resale for final end consumers. Due to the large retail market share enjoyed by the MSCs in grocery retailing, an agricultural producer is readily compelled to do business with MSCs as there is little prospect of making up for lost sales elsewhere due to the highly concentrated nature of Australia's grocery industry at the wholesale and retail levels. This provides the MSCs with enormous bargaining power not just against agricultural producers but against all grocery product suppliers. In the context of the UK grocery industry, Professor Paul W. Dobson of Loughborough University has characterised this situation in the following terms:

... economic dependency in the supply chain lies with producers who have to persuade retailer "gatekeepers" to stock their products. (Dobson, 2005, p. 537)

While the AHBIC accepts that generic products are a fact of life, in recent years the MSCs have dramatically extended their own-label product ranges in direct competition with producer brands. The MSCs have aggressively expanded their range of own-label honey products in particular, even employing similar or copy-cat packaging to major honey brand products and engaging in branding practices designed to persuade consumers that the own-label product is of high-quality. The expansion of own-label products further increases the bargaining position of MSCs in several regards through providing them with the ability to undermine a producer's branded products. This can be achieved through placing producer's products in less well-located shelf positions, raising the retail price of the branded product, or substituting the branded product for their own-label products (Dobson, 2005, p. 538). In the case of the UK grocery sector, Professor Dobson has commented on the implications and ramifications of such bargaining power:

This can afford the retailer a large and credible bargaining lever over the branded goods supplier while allowing it to promote its own franchise with consumers, using own-branded goods to reinforce the retailer's own brand image in consumers' minds as the "consumers' champion". (Dobson, 2005, p. 538)

A related concern is the conduct of the MSCs when tendering for their own-label product requirements. The AHBIC is concerned about the practice of low price bids for tenders coming from small suppliers, who do not possess the necessary production capacity to fill the scope of the tender requirements, being used by the MSCs as further leverage to increase

their bargaining power in order to negotiate the tender prices submitted by other suppliers down lower. The low price bids coming from small suppliers effectively amount to ghost or dummy bids that are being used in an unscrupulous manner by the MSCs to further drive down the prices of suppliers. The AHBIC is gravely concerned about the lack of transparency involved in the tender processes conducted by the MSCs for their own-label product requirements.

The MSCs also exert bargaining power over product suppliers through their role as the suppliers of shelf space and advertising to the producer. Producer brands not only have to compete against other branded products and the own-label products of the MSCs, they also have to compete for limited shelf space. This has further enhanced the bargaining position of the MSCs requiring the payment of listing fees for producer branded products in order to secure limited shelf space, the provision of product discounts to the MSCs as well as promotional support payments. Discounts have often been offered to the MSCs on branded products to lower the price to consumers in an attempt to increase sales of a particular product line, however, there is no guarantee that the discount is actually passed on to consumers. There have been numerous instances of product discounts being pocketed by the MSCs with no effect on the shelf price.

The AHBIC submits that the bargaining power that the MSCs have been able to exert against product suppliers has in turn manifested itself into buyer power. The effect of the exercise of buyer power by the MSCs against honey product suppliers has been to transfer rents, in this case quasi-rents, from honey product suppliers to the MSCs.

The exercise of buyer power by one of the MSCs has already been demonstrated when the ACCC successfully prosecuted Safeways, the Victorian based subsidiary of Woolworths, for the misuse of market power in breach of section 46 of the *Trade Practices Act 1974* (TPA) in regard to the sale of bread in relation to Safeway stores at Frankston, Cheltenham, Vermont and Albury. Collectively, Safeways had penalties imposed of \$8 million by the Federal Court in January 2006 for its misuse of market power. In light of concerns that have been expressed about the difficulty of obtaining successful prosecutions under section 46 of the TPA (Australian Competition and Consumer Commission, 2004), this incident provides hard evidence that the exercise of buyer power by a duopsony operating in the Australia grocery industry is real.

The AHBIC would alert the ACCC to the findings of two inquiry reports produced by the UK Competition Commission in regard to the exercise of buyer power in the United Kingdom. In its 2000 report on competition in the UK grocery sector, the UK Competition Commission found that grocery retailers with as little as an 8 per cent market share could exercise buyer power against product suppliers:

... we believe any main party with more than an 8 per cent share of grocery purchases for resale from its stores, and accordingly all the major buyers ..., are, for the most part, able to control their relationships with suppliers to their own advantage... (Competition Commission, 2000, pp. 97-98)

The UK Competition Commission went on to describe the overall impact of the exercise of buyer power on suppliers in the following terms:

The effect of each of the practices is that suppliers are likely to be less able to devote the resources required to build up their brands or to introduce new products, and innovation is likely thereby to be reduced. This reduces their competitiveness both in terms of the suppliers' expenditure on research and development and in other new investment. We would also expect that in the longer term the practices of the major buyers would increase the pressure on the resources of the weaker suppliers and in extreme cases could contribute to their leaving the market. In addition we would expect that there is less new entry into these markets as a result of these practices, whether on the part of suppliers who are already operating in related markets and have experience of any of these practices when carried out by a major buyer, or on the part of new entrants to the food sector as a whole. As a result of this process the quality and choice available to consumers is likely to be reduced. While the effect of each individual practice may be relatively small, nevertheless we believe each has a detrimental effect on the supplier market, with cumulative effects. (Competition Commission, 2000, p. 137)

Firms innovate and create knowledge through conducting research and development. The concerns expressed above by the UK Competition Commission reiterate the point made in the previous section that the exercise of buyer power can have a detrimental effect upon dynamic efficiency and long term economic growth.

In its 2000 report on the UK grocery industry, the UK Competition Commission recommended that a code of practice should be drawn up to govern relationships between major grocery retailers with their suppliers to ensure that buyer power was not exploited (Competition Commission, 2000). The supermarkets code of practice (SCOP) was negotiated between the UK Office of Fair Trading and some of the major UK grocery chains and came into force on 17 March 2002.

In regard to the impact of buyer power in its most recent report on the UK grocery sector, the UK Competition Commission has found that:

We consider that all grocery retailers and wholesalers are, in certain circumstances, able to exercise buyer power in relation to at least some of their suppliers. The largest grocery retailers, given their size, will have buyer power in relation to more of their suppliers than smaller grocery retailers and wholesalers. (Competition Commission, 2007, p. 15)

In relation to UK primary producers, which often supply grocery retailers indirectly through wholesalers, processors and other intermediaries, we consider that the buyer power of grocery retailers and intermediaries is one of a range of factors that has influenced farming profitability in recent years. Increasing concentration in the grocery supply chain, in the past and in the future, may have an adverse effect on the incomes and profitability of UK primary producers, but other factors will continue to have an important influence on farming incomes. (Competition Commission, 2007 p. 15)

The UK Competition Commission also expressed the opinion that the SCOP had met with some success in limiting the exercise of buyer power of major UK grocery retailers and

warned of the dangers of increased buyer power in the event that the SCOP was scrapped altogether:

... given that the SCOP appears to be constraining the exercise of buyer power by the grocery retailers to which it applies, we consider that any removal of the SCOP would allow these grocery retailers to exercise their buyer power in a way that would further transfer risks and increase costs to suppliers. (Competition Commission, 2007, p. 16)

While expressing no concerns in regard to current trends and levels of product innovation in the United Kingdom, nevertheless the UK Competition Commission has reiterated previous concerns regarding the detrimental impact upon product innovation arising from practices associated with the exercise of buyer power by major UK grocery retailers:

... we are concerned at the possible impact on investment and innovation of a number of supply chain practices carried out by grocery retailers that transfer risks and increase costs to suppliers, including retrospective payments and other unexpected changes to supply agreements. These practices reduce suppliers' incentives to invest in new and improved products. (Competition Commission, 2007, p. 16)

In regard to the UK grocery industry, it should be noted that it is far less concentrated at the wholesale and retail levels than that in Australia, and yet concerns regarding the exercise of buyer power have still emerged.

2.4 Conclusions on Buyer Power

The exercise of buyer power results in several deleterious effects. In particular, the exercise of buyer power results in the loss of allocative efficiency. Concerns have also been raised that the exercise of buyer power can impede research and development activity and the level of product innovation, which in turn can stifle dynamic efficiency with negative implications for long term economic growth. The exercise of buyer power and the extraction of quasi-rents from suppliers can also lead to the contraction of investment, which in turn results in a loss of productive capacity in the economy in the medium to longer term.

The AHBIC submits to the ACCC that the MSGs exercise of buyer power against agricultural producers, including honey producers, has resulted in a significant anti-competitive detriment which is antithetic to the public interest. In the next section, the AHBIC will forward some remedies to address the exercise of buyer power in the Australian grocery industry by the MSCs.

3 Proposed Remedies for the Exercise of Buyer Power

The AHBIC has two recommendations to make to the ACCC inquiry in order to address concerns regarding the exercise of buyer power by the MSCs. The first recommendation provides for a minor amendment to subsection 50(3) of the TPA. The second recommendation provides for the development of a more comprehensive code of conduct covering the Australian grocery industry, with consideration to be given to other possible structural remedies in the event that a more comprehensive code of conduct proves to be ineffective.

3.1 Section 50 of the Trade Practices Act

While the latest version of the ACCC's draft merger guidelines does use the term "buyer power" (Australian Competition and Consumer Commission, 2008b, p. 42), no attention is paid to the anti-competitive detriment caused by the exercise of buyer power in the context of a merger. Given that the exercise of buyer power can result in a loss in both allocative and dynamic efficiency, its exercise should be subject to thorough scrutiny as well as sanction under competition law. Many prominent antitrust jurists have argued that despite being largely neglected, the exercise of market power on the buying side of the market or buyer power should be subject to some level of sanction comparable with the exercise of market power on the selling side of the market. According to Professors Blair and Harrison:

Antitrust policymakers and, to some extent, antitrust scholars have never fully incorporated the symmetry of markets into their analysis. They have focused almost exclusively on the behaviour of sellers. Yet the simple truth is that there is a buyer for every seller, and anticompetitive conduct by buyers can cause adverse economic consequences similar to those caused by anticompetitive conduct by sellers. (Blair & Harrison, 1991, p. 339)

According to Professor Noll:

While some have argued that increases in concentration on the demand side of an input market are likely to be beneficial to consumers, these arguments are based on an incomplete analysis of incentives and outcomes in monopsonised markets. The argument for prohibiting monopsony practices, but not the corresponding monopoly practices, has no theoretical or empirical foundation in economics. (Noll, 2005, p. 591)

... prohibiting the acquisition of monopsony power through anticompetitive means, regardless of the state of competition on the supply side of the market, is consistent with the general purposes of antitrust law. (Noll, 2005, p. 624)

In this regard, the AHBIC believes that the existing mergers law contained in section 50 of the TPA could be more effectively administered and enforced through the explicit consideration of matters relating to the exercise of market power on the demand side of the market or buyer power. Subsection 50(3) currently contains a list of non-exhaustive matters that must be taken into account to determine whether a merger or acquisition is likely to result in a substantial lessening of competition in breach of section 50. In order to ensure that the exercise of buyer power receives the due consideration that it deserves, the AHBIC recommends that subsection 50(3) should be amended to include consideration of buyer power through the inclusion of a new provision subsection (j) so that subsection 50(3) would now be:

(3) Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;

- (b) the height of barriers to entry to the market;
- (c) the level of concentration in the market;
- (d) the degree of countervailing power in the market;
- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market;
- (j) the level of buyer power in the market.**

The AHBIC notes that there have been longstanding concerns regarding creeping acquisitions of independent supermarkets by the MSCs despite the ACCC never having objected to any such acquisition based exclusively on consideration of market power on the seller side of any relevant market. In order to address community concerns regarding creeping acquisitions by the MSCs, the ACCC has even attempted to address the issue through facilitating the development of a Charter for the Competitive Sale of Independent Supermarkets. The AHBIC submits that creeping acquisitions by MSCs may have created a serious anti-competitive detriment which has so far been overlooked due to insufficient consideration being given to the exercise of market power on the demand side of the market.

The AHBIC notes previous commitments given by the Labor Party to provide the ACCC with the power to deal with creeping acquisitions (Bowen & Emerson, 2007). The AHBIC believes that consideration of buyer power may be a more effective means of addressing concerns relating to creeping acquisitions which has a solid foundation predicated on economic theory than other suggested remedies.

3.2 Code of Conduct

As referred to above, the UK Competition Commission has observed that the SCOP has been beneficial in combating some of the adverse effects of buyer power by retailers in the UK grocery industry. Despite the apparent success of the SCOP in combating some of the adverse effects of buyer power, the UK Competition Commission has made a provisional decision recommending the enactment of a more comprehensive code of practice to replace the existing SCOP. As part of a more comprehensive code of conduct to replace the SCOP, the UK Competition Commission has suggested that increased transparency could be employed:

Increased transparency would be of significant assistance in revealing supply chain practices and the exercise of buyer power, which might in turn benefit those points of the groceries supply chain with little or no market power. (Competition Commission, 2008)

Following the release of the report of the Commonwealth Parliamentary Joint Select Committee on the retailing sector entitled *Fair Market or Market Failure?* in August 1999, the Retail Grocery Industry Code of Conduct was developed and launched in September 2000, and later renamed the Produce and Grocery Industry Code of Conduct. Building on the intent of the Produce and Grocery Industry Code of Conduct, the AHBIC recommends that a more comprehensive code of conduct should be developed to address concerns relating to the exercise of buyer power by the MSCs.

As part of this new code of conduct, the AHBIC believes that much greater transparency should be introduced in the tendering processes of the MSCs for their own-label products. The AHBIC advocates the introduction of a tendering process where both the tenderer's identity and tenderer's price are revealed to all parties following the submission of all tenders. This will guard against the accumulation of additional bargaining power by the MSCs through the use of effective ghost or dummy bids as has been outlined above.

Greater transparency has often been advocated as a desirable means for promoting competition and countering anti-competitive practices. Indeed, under the model of perfect competition in economics, which is used as the basis with which to compare and assess real world outcomes, it is assumed that firms and consumers each possess perfect and complete information regarding the prices set by all firms. As outlined above, the UK Competition Commission has suggested increased transparency as one possible means of addressing the buyer power of major grocery retailers.

There are numerous examples of policy initiatives implemented in the downstream petroleum industry designed to improve transparency with the intention of improving competition. The Victoria and Western Governments have introduced regulatory arrangements that are intended to improve transparency and competition at wholesale and retail levels (Australian Competition and Consumer Commission, 2007a, p. 3). One of the aims for the introduction of the new Oilcode in the downstream petroleum industry was to improve transparency in wholesale pricing and was also designed to help industry participants make informed decisions when entering, renewing or transferring a fuel re-selling agreement through the disclosure of specific information (Australian Competition and Consumer Commission, 2007b, p. 3). The Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen, has recently commented that the new Commonwealth Government is continuing to look at measures to increase retail petrol price transparency (Bowen, 2008b).

If a more comprehensive code of conduct should prove ineffective in addressing concerns relating to the exercise of buyer power by the MSCs, then the AHBIC believes that serious consideration should be given to other policy options to address buyer power such as the introduction of a divestiture provision in the TPA. The AHBIC notes that the inclusion of a divestiture provision in the TPA was part of the policy platform of the Australian Labor Party at the 2004 federal election. Divestiture, while used sparingly, has been used as an effective

remedy to address market power problems in the United States as seen in regard to Standard Oil³, American Tobacco⁴ and AT&T⁵.

4 Product Labelling of Organic Foods

One of the matters to be considered by this inquiry is “any impediments to efficient pricing of inputs along the supply chain” (Bowen, 2008a). The AHBIC believes that there is a serious impediment to efficient pricing as it relates to some products claiming to have “organic” attributes.

Organic foods carry the presumption that they are products of superior quality which generally command a price premium by consumers. As the Commonwealth Department of Agriculture, Fisheries and Forestry has commented:

Organic products, where sold as organic, often attract premiums at every step of the supply chain. (Department of Agriculture, Fisheries and Forestry, 2004, p. 55)

According to Dr Christie Chang, a Senior Lecturer with the School of Business, Economics and Public Policy at the University of New England:

Consumers are paying premiums for organic products, ranging from 20 to 200 per cent over the price for conventionally produced foods. (Chang, 2004, p. 3)

The AHBIC is concerned that many consumers are being misled on the basis of product labelling claims made in regard to certain “organic” honey products available on Australian retail markets. The AHBIC believes that consumers are paying more for honey products in the expectation that it is of superior quality as a consequence of labelling claims made as to its “organic” status when these claims are palpably untrue. Dr Chang has summed this problem up in the following terms:

... the high price premiums ... have provided an economic incentive for some producers, processors and marketers to falsely claim or label their products as organic. This is easily done since organic products cannot be readily distinguished from conventionally produced products. (Chang, 2004, p. 3)

According to Dr Chang, this has led to the abuse in the labelling of products in Australia as “organic”:

Since organic attributes cannot be verified easily and there is no control over the use of the word “organic” in the Australian market, the organic label has been subject to abuse. (Chang, 2004, p. 2)

Section 2 of the TPA outlines the objectives of the TPA as the following:

³ *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

⁴ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁵ *U.S. v. AT&T*, Civ. Action No. 74-1698 (D.D.C. filed Nov. 20, 1974).

The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Part V of the TPA covers provisions relating to consumer protection. The AHBIC submits that untruthful labelling claims about the “organic” status of honey products raises issues under several provisions contained in Part V of the TPA including the following:

- Section 52 which is a general prohibition against misleading and deceptive conduct.
- Subsection 53(a) which prohibits the making of false representations that goods are of a particular standard, quality, value, grade, composition, style or model or have had a particular history or particular previous use.
- Section 55 which prohibits conduct that is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose or the quantity of any goods.

The ACCC is responsible for the administration and enforcement of Part V of the TPA. The AHBIC notes the ACCC’s announcement in November 2006 calling on food and beverages manufacturers to curb their use of potentially misleading labels when marketing goods to customers and the comments by ACCC Commissioner John Martin:

The ACCC is particularly concerned by the apparent upswing in terms like *organic* and *free-range* where business seeks to take advantage of strong consumer demand and where the absence of regulation may provide opportunity for some business to engage in unlawful conduct. (Australian Competition and Consumer Commission, 2006)

While the AHBIC strongly endorses the sentiments expressed by the ACCC in this regard, we respectfully submit that the ACCC has not yet done enough in regard to investigating and preventing untruthful labelling claims in regard to the sale of alleged “organic” honey products. Untruthful labelling claims made in regard to “organic” honey products not only mislead consumers, but erode the sales and competitive position, and thus compromising the livelihoods, of honey producers who play by the rules. The inaction of the ACCC so far in this regard is providing a powerful message to unscrupulous honey producers that it is alright to break the law as no sanction will be taken against their conduct.

The AHBIC recommends in regard to false and misleading labelling claims made in regard to the “organic” attributes of certain products that the provisions of Part V of the TPA are effectively and vigorously administered and enforced by the ACCC.

References

- Australian Competition and Consumer Commission (2002) *Submission to the Trade Practices Act review*. Canberra.
- Australian Competition and Consumer Commission (2004) *Inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business: Second Supplementary Submission by the Australian Competition and Consumer Commission to the Senate Economics References Committee*. Canberra.
- Australian Competition and Consumer Commission (2006) ACCC calls for fair trading in food and beverage industry. News Release, 16 November.
- Australian Competition and Consumer Commission (2007a) *Petrol Prices and Australian Consumers: Report of the ACCC inquiry into the price of unleaded petrol*. Canberra.
- Australian Competition and Consumer Commission (2007b) *The guide to the Oilcode for industry participants in the downstream petroleum retail industry*. Canberra.
- Australian Competition and Consumer Commission (2008a) *ACCC Inquiry into the competitiveness of retail prices for standard groceries: Issues Paper*. Canberra.
- Australian Competition and Consumer Commission (2008b) *Merger guidelines: Draft 2008*. Canberra.
- Blair, R. D., & Harrison, J. L. (1991) Antitrust Policy and Monopsony. *Cornell Law Review* 76, 297-340.
- Bowen, C (2008a) ACCC Inquiry into Grocery Prices. Media Release, 22 January.
- Bowen, C. (2008b) Government Moves to Appoint Petrol Commissioner. Media Release, 16 February.
- Bowen, C., & Emerson, C. (2007) Labor Moves to Strengthen the Trade Practices Act. Media Statement, 7 August.
- Cartensen, P. C. (2004) Buyer Power and Merger Analysis - The Need for Different Metrics. Prepared for the Workshop on Merger Enforcement held by the Antitrust Division and the Federal Trade Commission, 17 February, Washington DC.
- Chang, H. S. (2004) *Labelling Issues of Organic and GM Foods in Australia*. Working Paper Series in Agricultural and Resource Economics, University of New England.
- Competition Commission (2000) *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom*. London.

- Competition Commission (2007) *The Supply of Groceries in the UK market investigation: Provisional findings report*. London.
- Competition Commission (2008) *Provisional decision on remedies relating to supply chain practices*. London.
- Department of Agriculture, Fisheries and Forestry (2004) *The Australian Organic Industry: A Profile*. Canberra.
- Dobson, P. W. (2005) Exploiting Buyer Power: Lessons from the British Grocery Trade. *Antitrust Law Journal* 72, 529-562.
- Dowrick, S. (1992). *A Review of New Theories and Evidence on Economic Growth: their Implications for Australian Policy*. Centre for Economic Policy Research Discussion Paper No. 275, Australian National University.
- Felli, L., & Roberts, K. (1999) Competition and Hold-ups. London School of Economics. June.
- Klein, B., Crawford, R. G., & Alchian, A. A. (1978) Vertical Integration, Appropriable Rents, and the Competitive Contracting Process. *Journal of Law and Economics* 31, 265-297.
- Lynn, B. C. (2006) Breaking the Chain. *Harper's Magazine* July, 29 -36.
- Noll, R. G. (2005) "Buyer Power" and Economic Policy. *Antitrust Law Journal* 72, 589-624.
- Office of Fair Trading. (2004) *The supermarkets code of practices: Report on the review of the operation of the code of practice in the undertakings given by Tesco, Asda, Sainsbury and Safeway to the Secretary of State for Trade and Industry on 18 December 2001*. London.
- Re VFF Chicken Meat Growers' Boycott Authorisation [2006] ACompT 2.*
- Rogers, R. T., & Sexton, R. J. (1994) Assessing the Importance of Oligopsony Power in Agricultural Markets. *American Journal of Agricultural Economics* 76, 1143-1150.
- Romer, P. A. (1994) Beyond Classical and Keynesian Macroeconomic Policy. *Policy Options* July-August.
- Rose, J. (1999) The ACCC and the Market Power of the Oil Majors - Part 2. *Trade Practices Law Journal* 7, 74-87.
- Williamson, O. E. (1985) *The Economic Institutions of Capitalism*. Free Press, New York.