

## Oz Supermarket Duopoly Investigated by Regulator

by Malcolm Maiden via sam - SMH *Thursday, Feb 14 2013, 6:40am*

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### Supermarket giants could be cut down to size

Australian Competition and Consumer Commission chairman Rod Sims' disclosure that the competition regulator has escalated an investigation into the two big supermarket chains over possible anti-competitive behaviour towards suppliers is a watershed moment.



***We win, you lose!***

The competition regulator can demand that information be supplied to it in the formal investigation it is now running, so allegations that the supermarkets misuse their power in dealings with suppliers will finally be thoroughly examined. It may in time come to be seen as the point at which the enormous power of the two retailing giants finally began to be reined in.

When Sims says that the ACCC is now investigating whether the "major supermarkets" breached competition law in their dealings with suppliers he is talking about Woolworths and Wesfarmers-owned Coles, the two chains that dominate grocery retailing in Australia.

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No laws broken, but ...

In his statement to a Senate Estimates Committee hearing on Wednesday night he was careful not to say that the major chains have broken the law, and it is a fact that the use of market power is not illegal.

The misuse of market power is illegal, however. Sims said the ACCC had now collected consistent and credible allegations of several types of behaviour that if proven would show unconscionable conduct on the part of the major supermarket chains in their dealings with their suppliers or the misuse of market power, in the form of discrimination by the big chains in favour of their rapidly proliferating home brands.

Claims that the big supermarket chains ride roughshod over their suppliers have existed for years (and been consistently rejected by Coles and Woolies) but this is the first time the competition regulator has collected enough information to warrant a full-scale investigation.

Supplying evidence

An earlier examination by the ACCC when it was led by Graeme Samuel concluded that there was workable competition between the big supermarket chains, but received very little usable information from suppliers about anti-competitive behaviour by the big chains towards them.

Even if they are fairly dealt with by Coles and Woolies, suppliers depend on their custom for their own commercial viability in this country. They are scared to risk damaging their relationship by levelling detailed allegations of anti-competitive behaviour. After Rod Sims decided early last year that the ACCC would examine the big supermarket chains again in response to concerns that were being amplified by price wars between the supermarket giants in staples including milk, he hit the same evidentiary road-block.

Claims that supermarkets were acting oppressively were mounting by the time Sims decided to take a look, and in Canberra politicians including the-then manufacturing minister Kim Carr were calling for action.

No suppliers were initially willing to break cover and take their concerns in detail to Sims, however. They were scared of the consequences, Sims said in his statement on Wednesday night. "Whether or not that fear was justified, it was certainly held by the suppliers we spoke to," he added.

### Confidentiality

The circuit breaker was a decision by Sims to offer any supplier that came forward complete confidentiality. A total of 50 suppliers eventually made contact and alleged behaviour that Sims told the Senate estimates Committee would amount to either unconscionable conduct or misuse of market power if proved.

The alleged behaviour is not necessarily identical across suppliers, product lines or even supermarkets, Sims said, but it includes:

- Persistent demands for additional payments from suppliers, above and beyond that negotiated in their terms of trade;
- The imposition on suppliers of penalties that did not form part of any negotiated terms of trade, and which apparently do not relate to actual costs incurred by the major supermarket chains as a result of the conduct which has led to the penalty being imposed;
- Threats to remove products from supermarket shelves or otherwise disadvantage suppliers if claims for extra payments or penalties are not paid;
- Failure to pay prices agreed with suppliers; and
- Conduct that discriminates in favour of the supermarkets' home-brand products.

The confidentiality guarantee that Sims gave 50 small and medium suppliers who eventually came forward was the thing that enabled the ACCC to harden up anecdotal reports about misbehaviour by the supermarkets, and Sims has that in mind as he escalates the probe.

### Spreading the net

The ACCC will not rely on any of the information it has collected in confidence from the group of 50 if it decides to take action. Instead it will now compel suppliers to give it information, with the aim of

building evidence it can use. Sims says it has identified "a number of suppliers who are likely to have relevant information. A few of the group of 50 will no doubt be formally re-interviewed in that process, but the bulk of the evidence will come from new and in most cases larger suppliers who have not so far come forward.

Sims was asked by the Senate estimates Committee last October to update on the progress of its inquiries when he appeared before the Committee this month. He told the Committee on Wednesday night that a supermarket and grocery industry working group that includes Coles, Woolworths, the Australian Food and Grocery Council and the National Farmers Federation is now proposing an industry code. It would be enforceable under the Competition and Consumer Act, he said, adding that the ACCC had provided input, and will be critiquing it.

The next stage of this probe will be interesting. Sims will be talking to suppliers including multinationals that are much bigger, and much more powerful. Clearly though, he has momentum. The development of an industry code would not stop the ACCC from taking action if it discovered that competition rules had been breached, he told the committee.

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