Reducing Supermarket Dominance Bill 2013

No.  , 2013

(Mr Katter)

A Bill for an Act to provide for a Commissioner for Food Retailing and for various other matters in relation to market share of supermarkets, and for related purposes
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A Bill for an Act to provide for a Commissioner for Food Retailing and for various other matters in relation to market share of supermarkets, and for related purposes

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the Reducing Supermarket Dominance Act 2013.
2 Commencement

This Act commences on the day after this Act receives the Royal Assent.

3 Definitions

In this Act:

business: the meaning of business may be affected by Rules made under section 35.

Commissioner means the Commissioner for Food Retailing.

competition and fairness principle means a principle referred to in paragraph 9(b).

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

constitutional trade or commerce means trade or commerce:
(a) between Australia and places outside Australia; or
(b) among the States; or
(c) within a Territory, between a State and Territory or between 2 Territories.

groceries includes fresh produce.

household retail business means a business that sells any or all of liquor, hardware and petrol to consumers from one or more retail premises, at least one of which is at least 1,000 square metres in size, if at least one of the following applies:
(a) an operator of the business is a constitutional corporation;
(b) the business is engaged in constitutional trade or commerce.

household retail market share: see section 6.

intermediary means a person who acts as an agent or broker, or in any similar role, in the supermarket industry supply chain or in the household retail industry supply chain, between suppliers and supermarket businesses or household retail businesses.
later year means the period of 12 months starting on the day that is
5 years after the day this Act commenced and each subsequent
anniversary of that day.

national household retail market has the meaning given in the
definition of that expression published by the Commissioner under
subsection 6(3).

national supermarket market has the meaning given in the
definition of that expression published by the Commissioner under
subsection 6(3).

operator, of a business, means a person who, whether alone or
together with one or more other persons, operates the business.

penalty level: see subsection 5(4).

permissible level: see subsection 5(4).

related body corporate has the same meaning as in the

Rules means the Reducing Supermarket Dominance Rules made
under section 35.

supermarket business means a business that sells groceries
(whether or not the business also sells household items), to
consumers from one or more retail premises, at least one of which
is at least 1,000 square metres in size, if at least one of the
following applies:
(a) an operator of the business is a constitutional corporation;
(b) the business is engaged in constitutional trade or commerce.

supermarket market share: see section 6.

supplier means a person who, directly or indirectly, supplies items
for sale by a supermarket business or household retail business.

target year: see subsection 5(4).

year 2 means the period of 12 months starting on the day that is
one year after the day this Act commenced.
Section 3

1. *year 3* means the period of 12 months starting on the day that is 2 years after the day this Act commenced.

2. *year 4* means the period of 12 months starting on the day that is 3 years after the day this Act commenced.

3. *year 5* means the period of 12 months starting on the day that is 4 years after the day this Act commenced.
Part 2—Limits on market share for supermarket businesses

4 Limit on market share for supermarket businesses

Market share of supermarket market

(1) The operator of a supermarket business commits an offence if the operator operates a supermarket business that, together with any other supermarket business operated by the operator or a related body corporate of the operator, has a supermarket market share of:
   (a) more than 40% for year 2; or
   (b) more than 35% for year 3; or
   (c) more than 30% for year 4; or
   (d) more than 25% for year 5; or
   (e) more than 20% for any later year.

Penalty: $50 million.

Market share of household retail market for supermarket businesses with at least 20% of national supermarket market

(2) The operator of a supermarket business commits an offence if the operator operates a supermarket business that, together with any household retail business operated by the operator or a related body corporate of the operator:
   (a) has a supermarket market share of at least 20%; and
   (b) has a household retail market share of:
      (i) more than 40% for year 2; or
      (ii) more than 35% for year 3; or
      (iii) more than 30% for year 4; or
      (iv) more than 25% for year 5; or
      (v) more than 20% for any later year.

Penalty: $50 million.
Part 2  Limits on market share for supermarket businesses

Section 5

1 Market share of household retail market for supermarket
2 businesses with less than 20% of national supermarket market
3
4 (3) The operator of a supermarket business commits an offence if the
5 operator operates a supermarket business that, together with any
6 household retail business operated by the operator or a related body
7 corporate of the operator:
8 (a) has a supermarket market share of less than 20%; and
9 (b) has a household retail market share of more than 40% for
10 year 2, year 3, year 4, year 5 or any later year.
11
12 Penalty: $50 million.
13
14 5 Direction to reduce market share
15
16 (1) If:
17 (a) the operator of a supermarket business commits an offence
18 under section 4 in relation to a year; or
19 (b) there are reasonable grounds to believe that the operator of a
20 supermarket business has committed or will commit an
21 offence under section 4 in relation to a year;
22 the Commissioner may, in writing, direct a person referred to in
23 subsection (2) to take any action necessary to ensure that, before
24 the end of the target year specified by the Commissioner the
25 supermarket business’s supermarket market share or household
26 retail market share is reduced to no more than:
27 (c) the permissible level for the target year; or
28 (d) if more than one direction has been given to the operator in
29 relation to the supermarket business—the penalty level for
30 the target year.
31
32 (2) Directions under subsection (1) may be given to either or both of
33 the following:
34 (a) the operator of the supermarket business;
35 (b) any related body corporate of the operator.
36
37 (3) A person to whom a direction is given under subsection (1)
38 commits an offence if the person fails to comply with the direction.
Penalty: For each month after the end of the target year in which the person fails to comply with a direction in relation to a supermarket business:

(a) $1 million for a first direction; and
(b) an additional $1 million for each subsequent direction.

(4) In this Act:

penalty level means:

(a) for a second direction—5% less than the permissible level for the target year for the second direction; or
(b) for a third direction—10% less than the permissible level for the target year for the third direction; or
(c) for a fourth or later direction—15% less than the permissible level for the target year for the fourth or later direction.

permissible level means:

(a) for an offence under subsection 4(1) or (2):
   (i) if the target year is year 2—40%; or
   (ii) if the target year is year 3—35%; or
   (iii) if the target year is year 4—30%; or
   (iv) if the target year is year 5—25%; or
   (v) if the target year is a later year—20%; and
(b) for an offence under subsection 4(3)—40%.

target year means year 3, year 4, year 5 or a later year, as specified in the Commissioner’s direction.

6 Definition of supermarket market share and household retail market share

(1) The supermarket market share of a business at any time in year 2, year 3, year 4, year 5 or a later year is the business’s share of the national supermarket market for that year as determined by the Commissioner under subsection (5).

(2) The household retail market share of a business at any time in year 2, year 3, year 4, year 5 or a later year is the business’s share
Part 2  Limits on market share for supermarket businesses

Section 7

of the national household retail market for that year as determined by the Commissioner under subsection (5).

(3) As soon as practicable after this Act commences, the Commissioner must, by legislative instrument, publish a definition of:
   (a) the national supermarket market; and
   (b) the national household retail market (which must include the national supermarket market).

(4) At least one month before the start of year 2, year 3, year 4, year 5 and each later year, the Commissioner must publish:
   (a) a list of the supermarket businesses and household retail businesses that the Commissioner considers could be affected by this Part; and
   (b) the Commissioner’s determination, for each such business, of the business’s expected supermarket market share or household retail market share.

(5) As soon as practicable after the end of year 2, year 3, year 4, year 5 and each later year, the Commissioner must publish the Commissioner’s determination, for each business included on the list published under paragraph (4)(a), of the business’s supermarket market share or household retail market share for the year.

(6) None of the following is a legislative instrument:
   (a) a list or determination published under subsection (4);
   (b) a determination made under subsection (5).

(7) Application may be made to the Administrative Appeals Tribunal for review of a determination by the Commissioner under subsection (5).

7  Personal liability of directors

For offence under section 4

(1) If the operator of a supermarket business commits an offence under section 4 in relation to a year, any person who was a director of the
operator at any time during that year commits an offence under this section.

Penalty: $100,000.

For offence under section 5

(2) If a body corporate to whom a direction is given under section 5 commits an offence under that section in relation to the direction, any person who was a director of the body corporate at any time during:

(a) that target year; and

(b) if the direction was given in an earlier year—that earlier year and any year between the earlier year and the target year;

commits an offence under this section.

Penalty: $100,000.

(3) Subsection (1) or (2) does not apply to a person if, while the person was a director of the operator or body corporate, the person took all reasonable steps to ensure that the operator or body corporate did not commit an offence under section 4 or 5.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3): see subsection 13.3(3) of the Criminal Code.

(4) Subsection (1) or (2) does not apply to a person if, having regard to the length of time during the year for which the person was a director of the operator or body corporate, it is not reasonable to expect that the person could have taken any steps to ensure that the operator or body corporate did not commit an offence under section 4 or 5.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4): see subsection 13.3(3) of the Criminal Code.
Part 3—Commissioner for Food Retailing

Division 1—Establishment and functions

8 Commissioner for Food Retailing

There is to be a Commissioner for Food Retailing.

9 Functions of the Commissioner

The Commissioner has the following functions:

(a) to administer Part 2 (Limits on market share for supermarket businesses);

(b) to promote the following principles (the competition and fairness principles):

   (i) competition between supermarket businesses should be promoted in the best interests of consumers and suppliers;

   (ii) supermarket businesses and household retail businesses should be stopped from engaging in predatory practices that harm other businesses (whether or not supermarket businesses);

   (iii) supermarket businesses, household retail businesses and intermediaries should be stopped from engaging in unfair practices that harm suppliers;

(c) to perform any other function conferred on the Commissioner by this Act or any other law of the Commonwealth.
Division 2—Powers of the Commissioner

10 Exercise of powers

Subject to this Division, the Commissioner:

(a) may exercise the Commissioner’s powers under this Division for the purposes of either or both administering Part 2 and promoting the competition and fairness principles; and

(b) in deciding whether and how to exercise powers under this Division, is to act in the Commissioner’s absolute discretion according to the Commissioner’s own judgement.

11 Information gathering for Part 2

(1) For the purposes of Part 2, the Commissioner may, by written notice, require:

(a) the operator of a supermarket business; or

(b) the operator of a household retail business; or

(c) a related body corporate of an operator referred to in paragraph (a) or (b);

to do one or more of the following within the period specified in the notice:

(d) give information of the kind specified in the notice;

(e) produce documents of the kind specified in the notice.

(2) A notice under subsection (1) may require a person referred to in that subsection to give the specified information or documents at regular intervals, if the Commissioner reasonably believes that the supermarket business to which the information or documents relate has a supermarket market share, or a household retail market share, of more than 20%.

(3) A person commits an offence if:

(a) the person was given a notice under subsection (1) requiring the person to do a thing; and

(b) the person fails to do the thing as required by the notice.

Penalty: $5,000.
Section 12

(4) Subsection (3) does not apply if:

(a) the person does not possess the information or document the notice requires the person to provide; and
(b) the person has taken all reasonable steps available to the person to obtain the information or document and has been unable to obtain it.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4): see subsection 13.3(3) of the Criminal Code.

12 Fees

(1) If:

(a) the person was given a notice under subsection 11(1) requiring the person to do a thing; and
(b) the person fails to do the thing as required by the notice; the Commissioner may, by way of a fee charged to the person, recover the costs reasonably incurred by the Commissioner in conducting the investigations required as a consequence of the person’s failure.

(2) Any fees charged must not be such as to amount to taxation.

13 Advice

The Commissioner may, on request, give advice to the operator of a supermarket business, an intermediary, or a supplier, in relation to practices engaged in by the supermarket business or the intermediary.

14 Guidelines

The Commissioner may publish guidelines setting out any or all of the following:

(a) criteria that the Commissioner intends to use in deciding, in the course of an investigation, whether practices are predatory practices or unfair practices that should be stopped in accordance with the competition and fairness principles;
(b) practices and procedures that the Commissioner intends to adopt in conducting investigations;
Part 3
Powers of the Commissioner Division 2

Section 15

(c) criteria that the Commissioner intends to use to decide what action to take on completion of an investigation;
(d) any other matters relating to the functions of the Commissioner.

15 Investigations

(1) The Commissioner may investigate practices engaged in or alleged to be engaged in:
(a) by the operator of a supermarket business or a related body corporate of the operator; or
(b) by intermediaries;
in order to determine whether the practices are predatory practices or unfair practices that should be stopped in accordance with the competition and fairness principles.

(2) On completing an investigation, the Commissioner must:
(a) publish (including online) a report on the outcome of the investigation; and
(b) consider whether to do any or all of the following:
   (i) make recommendations under section 18;
   (ii) give directions under section 19.

16 Information gathering for investigations

(1) For the purposes of an investigation under section 15, the Commissioner may, by written notice, require a person to do one or more of the following within the period specified in the notice:
(a) attend an interview to answer questions;
(b) give information of the kind specified in the notice;
(c) produce documents of the kind specified in the notice;
if the Commissioner reasonably believes that the person has information or documents that may be relevant to the investigation.

(2) The notice must explain the consequences if the person does not comply with the notice.

(3) A person is not excused from:
(a) answering a question; or
(b) giving information; or
(c) producing a document;
as required by the notice on the ground that the answer,
information or document might tend to incriminate the person or
expose the person to a penalty.

(4) However, in the case of an individual, none of the following:
(a) the information or answer given;
(b) the document produced;
(c) the giving of the information or the answer, or the producing
of the document;
(d) any information or document obtained as a direct or indirect
consequence of giving the information or answer, or
producing the document;
is admissible in evidence against the individual in:
(e) criminal proceedings, other than proceedings for an offence
against section 137.1 (false or misleading information) or
137.2 (false or misleading documents) of the Criminal Code
that relates to this Act; or
(f) civil proceedings, other than proceedings under, or arising
out of, this Act or the regulations.

(5) The Commissioner may:
(a) inspect a document produced in response to the notice; and
(b) make and retain copies of, or take and retain extracts from,
such a document.

(6) The Commissioner may take, and retain for as long as is necessary,
possession of a document produced in response to the notice.

(7) While the Commissioner retains the document, the Commissioner
must allow a person who would otherwise be entitled to inspect the
document or view the thing to do so at the times that the person
would ordinarily be able to do so.

(8) The Rules may make provision in relation to:
(a) notices; and
(b) the form and conduct of interviews; and
(c) the form in which information, documents and answers to questions may or must be given.

17 Offence in relation to information gathering notice

(1) A person commits an offence if:
   (a) the person was given a notice under section 16 requiring the person to do a thing; and
   (b) the person fails to do the thing as required by the notice.

Penalty: $5,000.

(2) Subsection (1) does not apply if:
   (a) the person does not possess the information or document the notice requires the person to provide; and
   (b) the person has taken all reasonable steps available to the person to obtain the information or document and has been unable to obtain it.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2): see subsection 13.3(3) of the Criminal Code.

18 Recommendations to ACCC

(1) The Commissioner may make recommendations to the Australian Competition and Consumer Commission (the ACCC) on matters relating to the functions of the Commissioner in relation to which the ACCC also has functions.

(2) The recommendations may include recommendations for changes in the ACCC’s conduct and priorities.

(3) The ACCC must have regard to any recommendations made by the Commissioner.

(4) If the ACCC decides not to implement a recommendation made by the Commissioner, the ACCC must:
   (a) give the Commissioner written reasons for its decision; and
   (b) publish a copy of the reasons on the ACCC’s website.
19 Binding directions

(1) The Commissioner may, in writing, direct a person referred to in subsection (2) to take or cease to take any action specified in the direction, if the Commissioner is satisfied that taking or ceasing to take the action would be consistent with a competition and fairness principle.

(2) Directions under subsection (1) may be given to any or all of the following:

(a) the operator of a supermarket business;
(b) a supplier;
(c) an intermediary;
(d) a related body corporate of a person referred to in paragraph (a), (b) or (c).

(3) A person commits an offence if:

(a) the person was given a direction under subsection (1) directing the person to take or cease to take an action; and
(b) the person fails to take or cease to take the action as required by the direction.

Penalty: $100,000.
Division 3—Appointment and terms and conditions

20 Appointment of Commissioner

(1) The Minister must, by writing, appoint the Commissioner.

(2) A person is not eligible for appointment as the Commissioner unless the Minister is satisfied that the person has:
   (a) substantial experience or knowledge; and
   (b) significant standing;
   in at least 2 of the following fields:
   (c) the supermarket industry;
   (d) supply chains for the supermarket industry;
   (e) the household retail industry;
   (f) supply chains for the household retail industry;
   (g) competition law;
   (h) business or financial management.

(3) The Commissioner holds office on a full-time basis.

(4) The Minister must appoint the first Commissioner no later than one month after the commencement of this Act.

21 Period of appointment

The Commissioner holds office for the period specified in the instrument of appointment. The period must not exceed 5 years.

Note: For reappointment, see the Acts Interpretation Act 1901.

22 Acting Commissioner

(1) The Minister may appoint a person to act as the Commissioner:
   (a) during a vacancy in the office of the Commissioner (whether or not an appointment has previously been made to the office); or
   (b) during any period, or during all periods, when the Commissioner:
       (i) is absent from duty or Australia; or
Part 3 Commissioner for Food Retailing  
Division 3 Appointment and terms and conditions

Section 23

(ii) is, for any reason, unable to perform the duties of the office.

(2) A person is not eligible for appointment to act as the Commissioner unless the person is eligible for appointment as the Commissioner.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the Acts Interpretation Act 1901.

23 Remuneration

(1) The Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the Commissioner is to be paid the remuneration that is prescribed by the regulations.

(2) The Commissioner is to be paid the allowances that are prescribed by the regulations.

(3) This section has effect subject to the Remuneration Tribunal Act 1973.

24Disclosure of interests to the Minister

The Commissioner must give written notice to the Minister of all interests, pecuniary or otherwise, that the Commissioner has or acquires and that conflict or could conflict with the proper performance of his or her functions.

25 Outside employment

The Commissioner must not engage in any paid employment that conflicts or may conflict with the proper performance of his or her duties.

26 Leave of absence

The Minister may grant leave of absence to the Commissioner on the terms and conditions that the Minister determines.
27 Resignation

(1) The Commissioner may resign his or her appointment by giving the Minister a written resignation.

(2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.

28 Termination of appointment

(1) The Minister may terminate the appointment of the Commissioner:

   (a) for misbehaviour; or

   (b) if the Commissioner is unable to perform the duties of his or her office because of physical or mental incapacity.

(2) The Minister may terminate the appointment of the Commissioner if:

   (a) the Commissioner:

       (i) becomes bankrupt; or

       (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or

       (iii) compounds with his or her creditors; or

       (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or

   (b) the Commissioner engages in paid employment that conflicts or may conflict with the proper performance of his or her duties (see section 25); or

   (c) the Commissioner fails, without reasonable excuse, to comply with section 24.

29 Other terms and conditions

The Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.
Division 4—Miscellaneous

30 Assistance to the Commissioner

Any or all of the following may assist the Commissioner in the performance of the Commissioner’s functions:

(a) the Department;
(b) the ACCC;
(c) any other Department, agency or authority of the Commonwealth.

31 Disclosure of information

(1) This section applies to controlled information, which is information given to the Commissioner in confidence in relation to the performance of the Commissioner’s functions.

(2) The Commissioner may disclose controlled information to a person or authority if the Commissioner is satisfied that the information will enable or assist the person or authority to perform any of the person’s or authority’s functions or exercise any of the person’s or authority’s powers.

(3) The Commissioner may, in writing, impose conditions on the further use and disclosure of controlled information by the person or authority.

(4) A person commits an offence if:
(a) the person is subject to a condition imposed under subsection (3); and
(b) the person fails to comply with the condition.

Penalty: $5,000.

32 Recommendations to Commissioner by Minister or Parliament

The Commissioner must consider, and decide whether or not to give effect to, any recommendation made to the Commissioner:
(a) by the Minister by notice in writing; or
(b) by resolution of a House of the Parliament.
Section 33

33 Annual report

The Commissioner must, as soon as practicable after the end of each financial year, prepare and give to the Minister, for presentation to the Parliament, a report on:

(a) the Commissioner’s activities during that year; and

(b) any other matters relating to the Commissioner’s functions that the Commissioner considers appropriate to include.
Section 34

Part 4—Miscellaneous

34 Application of *Crimes Act 1914*

Section 4AB of the *Crimes Act 1914* does not apply to this Act.

Note: Section 4AB of the *Crimes Act 1914* has the effect of converting penalties expressed in dollars into a number of penalty units.

35 Reducing Supermarket Dominance Rules

(1) The Minister may, by legislative instrument, make rules to be known as the Reducing Supermarket Dominance Rules prescribing matters:

   (a) required or permitted by this Act to be prescribed; or
   
   (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

(2) Without limiting subsection (1), the Rules may prescribe criteria for determining what constitutes a business for the purposes of this Act.