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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**REDUCING SUPERMARKET DOMINANCE BILL 2013**

EXPLANATORY MEMORANDUM

Circulated by the authority of Hon Bob Katter MP

## REDUCING SUPERMARKET DOMINANCE BILL 2013

### OUTLINE

The Bill reduces the market share of Australia's supermarket oligopoly by reducing the market share of supermarket businesses to 20% (via enforced progressive divestiture where necessary across a 6 year period). The Bill also establishes a Commissioner for Food Retailing to administer the limits on market share for supermarket businesses and to promote the competition and fairness principles, which include, inter alia:

- the promotion of competition between supermarket business in the best interests of consumers and suppliers;
- stopping supermarket businesses and household retail businesses from engaging in predatory practises that harm other businesses (whether or not supermarket businesses); and
- stopping supermarket businesses, household retail businesses and intermediaries from engaging in unfair practices that harm suppliers.

Under successive governments, Australia has cultivated one of the most highly-concentrated grocery markets in the world - estimated at beyond 80 per cent of market share - with this supermarket oligopoly taking almost 80c in every dollar spent on groceries. In Canada and the United States, a number of reports show their giant supermarket chains comprise only about 45% of the market share.

Australia's supermarket giants are also opening oversized, unprofitable stores in growth areas and rural centres, which is killing off competition and obliterating local small businesses. There exists an under-reported impact on small businesses, employment and local communities across Australia, which substantially lessens competition in local markets. The rise of home brands is further squeezing out competition and reducing consumer choice. Supermarket suppliers, farmers and producers are reticent about criticising the supermarket giants, in fear of retribution.

This Bill provides powers to the Commissioner for Food Retailing to ensure that Australia's colossal supermarket giants' market share is progressively reduced to 20% of the total Australian supermarket market share throughout a 6 year period. It also addresses the supermarket giants' intrusion into hardware, liquor and petrol retail markets, department stores, office supplies, licensed venues and gaming, plus operations in financial services, credit cards, coal mining, energy and investment banking. This Bill also aims to ensure that the supermarket giants' vast operations in "household retail businesses" are progressively reduced to 20% total market share throughout a 6 year period. There is a clause to ensure that if operators have a smaller share of the supermarket market share in Australia, then businesses can have a bigger share of the household retail business market share. This will extend access to market-expanding tools, used by the supermarket giants, to independent stores.

The Commissioner for Food Retailing also has powers to ensure that the colossal supermarket giants treat suppliers fairly and lawfully, and do not engage in predatory practises which may lessen competition. The Commissioner also has the power to launch investigations into suspected breaches, including those arising from confidential complaints.

This Bill will restore a balanced supermarket share in order to promote competition and fairness principles for Australian businesses and consumers alike.

## **FINANCIAL IMPACT STATEMENT**

There is no financial impact associated with the Bill.

## **STATEMENT ON COMPATIBILITY WITH HUMAN RIGHTS**

The Statement of Compatibility with Human Rights appears at the end of this Explanatory Memorandum.

## NOTES ON CLAUSES

### **Part 1 – Preliminary**

#### **Clause 1 – Short Title**

This is a formal provision specifying the short title.

#### **Clause 2 – Commencement**

The Bill's provisions are to commence the day after the Bill receives Royal Assent.

#### **Clause 3 – Definitions**

This sets out the definitions in the Bill

### **Part 2 – Limits on market share for supermarket businesses**

#### **Clause 4 – Limit on market share for supermarket businesses**

##### *Market share of supermarket market*

This clause provides for a limit on the market share for supermarket businesses. The operator of a supermarket business will commit an offence if the supermarket business, together with another supermarket business operated by the same 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.

The purpose of this section is to limit supermarket operators' market share of supermarkets operating within a group of companies. The penalty is \$50 million.

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

This clause only applies to operators of supermarket businesses that have at least 20% of the national supermarket market have a market share of the household retail market. The clause provides that 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, has a supermarket market share of at least 20% and;

- 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.

The purpose of this section is to focus on the household retail market share of any household retail business, including supermarkets operated within a group of companies. The penalty is \$50 million.

*Market share of household retail market for supermarket businesses with less than 20% of national supermarket market*

This clause only applies to supermarket businesses that have less than 20% of the national supermarket market and have a market share of the household retail market. It provides that an 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, has;

- a supermarket market share of less than 20%; and
- has a household retail market share of more than 40% for year 2, year 3, year 4, year 5 or any other later year.

The purpose of this section is to create a penalty of \$50 million.

**Clause 5 – Direction to reduce Market share**

Clause 5 provides direction for the reduction of market share. It provides that if

- an operator of a supermarket business commits an offence under section 4 (limits on market share for supermarkets); or
- if there are reasonable grounds to believe that an operator will commit or has committed an offence under section 4 (limits on market share for supermarkets) in relation to a year,

then the Commissioner has the power in writing to direct a person to subsection (2) to take action necessary to ensure that before the end of the target year specified by the Commissioner, the supermarket's market share or household retail market share is reduced to no more than

- the permissible level for the target year; or
- if more than one direction has been given to the operator in relation to the supermarket business, the penalty level for the target year.

Subsection (2) outlines that directions may be given to either or both the operator of a supermarket business or any related body corporate of the operator.

If a person is given direction under this section, he or she commits an offence if the person fails to comply with the direction. The penalty is for each month after the end of the target year in which the person fails to comply with a direction is \$1 million for a first direction and an additional \$1 million for each subsequent direction.

The section also defines target year - meaning in year 2, year 3, year 4, year 5 or a later year, at the Commissioner's discretion.

The penalty level means;

- for a second direction – 5% less than the permissible level for the target year for the second direction; or
- for a third direction - 10% less than the permissible level for the target year for the third direction; or
- for a fourth or later direction – 15% less than the permissible level for the target year for the fourth or later direction.

Permissible levels for offences under section 4 (limits on market share for supermarkets) are;

- a. if the target year is year 2 --- 40%; or
- b. if the target year is year 3 --- 35%; or
- c. if the target year is year 4 --- 30%; or
- d. if the target year is year 5 --- 25%; or
- e. if the target year is a later year --- 20%; and

an offence under subsection 4(3) --- 40%.

## **Clause 6 – Definition of supermarket market share and household retail market share**

### *Supermarket market share*

Clause 6 provides that the supermarket's market share of a business at any time in year 2, year 3, year 4, year 5 or a later year is the business share of the national supermarket market for that year as determined by the Commissioner under subsection (5).

### *Household retail market share*

Clause 6 provides that 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 share of the national supermarket market for that year as determined by the Commissioner under subsection (5).

As soon as practical, when the Bill commences, the Commissioner must publish a definition of the national supermarket market share and the national household retail market (which must include the national supermarket market).

Subsection (4) requires the Commissioner is to publish at least one month before the start of year 2, year 3, year 4, year 5 or a later year

- a list of the supermarket businesses and household retail businesses that the Commissioner considers could be affected by this Part; and
- the Commissioner's determination, for each such business of the business's expected supermarket market share or household retail market share.

Subsection (5) requires the Commissioner is to publish at least one month before the start of year 2, year 3, year 4, year 5 or a later year, the Commissioner's determination for each business included on the list published above, under section (4)(a) of the business's supermarket market share or household retail market share for the year.

Additionally none of the following is a legislative instrument;

- (6)(b) a list or determination published under subsection (4);
- (6)(c) a determination made under subsection (5).

Under subsection (6)(a), a definition under subsection (3) that relates to the definition of the national supermarket market share and the national household retail market (which must include the national supermarket market) is a legislative instrument, and subject to Parliamentary oversight. Additionally, subsection 6(b) is a reviewable administrative instrument and also clarifies the position, rather than creating an exemption under the *Legislative Instruments Act 2003*. Subsection 6(c) simply clarifies the position, rather than creating an exemption under the *Legislative Instruments Act 2003*.

Clause 6 specifies that an application may be made to the Administrative Appeals Tribunal for a review of a determination by the Commissioner under subsection (5).

### **Clause 7 – Personal liability of directors**

Clause 7 outlines personal liability for directors under section 4 (limit on market share for supermarket business). An offence is committed if the operator of the supermarket business commits an offence under section 4 in year, where that person was a director of the operator at any time during that year. The penalty is \$100,000.

Clause 7 outlines personal liability for directors under section 5 (direction to reduce market share). An offence is committed if the operator of the supermarket business commits an offence under section 5 in year, where that person was a director of the body corporate at

any time during the target year and if the direction was given in an earlier year and the target year commits an offence under this section. The penalty is \$100,000.

These offences do 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. Here, the defendant bears an evidential burden (this places a burden on the defendant to demonstrate all reasonable steps were taken, to escape conviction).

Also, these offences do 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 the body corporate did not commit the offence under section 4 or 5. Here, the defendant bears an evidential burden (this places a burden on the defendant to demonstrate all reasonable steps were taken, to escape conviction).

### **Part 3 – Commissioner for Food Retailing**

#### **Division 1 - Establishment and Functions**

##### **Clause 8 - Commissioner for Food Retailing**

This Clause establishes that there is to be a Commissioner for Food Retailing.

##### **Clause 9 –Functions of the Commissioner**

Clause 9 outlines the functions of the Commissioner which include;

- to administer Part 2, which limits market share for supermarket businesses;
- to promote the following principles (the competition and fairness principles):
  - competition between supermarket businesses should be promoted in the best interests of consumers and suppliers;
  - supermarket businesses and household retail businesses should be stopped from engaging in predatory practices that harm other businesses (whether or not supermarket businesses);
  - supermarket businesses, household retail businesses and intermediaries should be stopped from engaging in unfair practices that harm suppliers;
- to perform any other functions conferred on the Commissioner by this Bill or other laws of the Commonwealth.

#### **Division 2 – Powers of the Commissioner**

##### **Clause 10 – Exercise of powers**

This provides that the Commissioner may exercise their powers and functions to administer Part 2, which limits market share for supermarket businesses and promotes the competition

and fairness principles. In deciding how and whether to exercise these powers, it is to the Commissioner's absolute discretion; according to the Commissioner's own judgement.

### **Clause 11 – Information gathering for Part 2**

For the purposes of Part 2, which limits market share for supermarket businesses, Clause 11 provides that the Commissioner may by written notice require the operator of a supermarket business, or operator of a household retail business, or a related body corporate of an operator of either a household retail business, or supermarket business, to do one or more of the following;

- provide information of the kind specified in the notice;
- produce documents of the kind specified in the notice.

Here, the Commissioner may also require the person/s to also provide specified information or documents at regular intervals.

A person commits an offence if the person fails to adhere to a written notice requiring the person to take a specified action. The penalty here is \$5000. However, the offence does not apply if the person does not possess the information or document that the written notice requires the person to provide; or if the person has taken all reasonable steps available to obtain the information or document and has been unable to obtain it. Here, the defendant bears an evidential burden (this places a burden on the defendant to demonstrate all reasonable steps were taken, to escape conviction).

### **Clause 12 - Fees**

Clause 12 provides that if a person was given notice under subsection 11(1) requiring them to take a specified action, and the person fails to take that specified action required by the notice, the Commissioner may by way of fee charge the person to recover costs reasonably incurred by the Commissioner when conducting the investigation, as a result of the person's failure. These fees charged must not be such to amount to taxation.

### **Clause 13 - Advice**

This clause states that the Commissioner may on request provide advice to the operator of a supermarket business, an intermediary or a supplier in relation to practises engaged in by the bodies.

### **Clause 14 - Guidelines**

The Commissioner has the power to publish guidelines containing any or all of the following:

- criteria the Commissioner intends to use in deciding in the course of an investigation, whether practices are predatory practises or unfair practises that should be ceased in accordance with the competition and fairness principles;

- practises and procedures that the Commissioner intends to adopt in conducting investigations;
- criteria that that Commissioner intends to use to decide what action to take on completion of an investigation;
- any other matters relating to the Commissioner’s functions.

### **Clause 15 - Investigations**

Clause 15 states that the Commissioner has the power to investigate practises engaged or alleged to be engaged in by intermediaries or by the operators of a supermarket business or a related body corporate of the operator. The purpose of this power is for the Commissioner to determine whether practises are predatory practises or unfair practises that should be ceased in accordance with the competition and fairness principles.

Once the Commissioner completes an investigation, the Clause provides that the Commissioner must publish (including online) a report on the outcome of the investigation and consider whether to make any recommendation under section 18 (Recommendations to the Australian Competition and Consumer Commission) or give directions under section 19 (binding directions).

### **Clause 16 – Information gathering for investigations**

Clause 16 provides that for the purposes of investigations under section 15 the Commissioner may require (by written notice) a person to do one or more of the following (if the Commissioner believes that the person has information or documents that may be relevant to the investigation);

- attend an interview to answer questions;
- provide information of the kind specified in the notice; and
- produce documents of the kind specified in the notice.

The notice must also explain the consequences if the person does not comply.

The Clause provides that a person is not excused from answering a question or providing information or a document required by the notice, on the grounds that the answer may incriminate the person or exposes the person to a penalty. This overrides the usual privilege against self-incrimination, noting that the following section does limit the use to which self-incrimination information can be put. This provision is based on the *Australian Sports Anti-Doping Authority Amendment Bill 2013*, currently before the Parliament at the date of writing.

This section provides that in the case of individuals, none of the following is admissible in evidence against the individual in criminal proceedings (other than in proceedings for an offence against false or misleading information, or false or misleading documents, or

*Criminal Code* or civil proceedings (other than proceedings arising out of this Act). This includes;

- the information or answer given;
- the document produced;
- the giving of the information or the answer, or the producing of the document; and
- any provision of information or document obtained as a direct or indirect consequence of providing the answer or information or producing the document

The Commissioner may also inspect a document produced as a result of a notice and make and retain copies of it (including extracts). The Clause gives the Commissioner the right to take and retain as long as necessary the possession of a document produced in response to a notice. If the Commissioner retains the document, the Commissioner must allow a person who is entitled to inspect the document or view the item to do so, at reasonable times. It also states that the Commissioner may make provisions in relation to notices, form and conduct of interviews, and form in which information, documents and answers must or may be given.

#### **Clause 17 – Offence in relation to information gathering notice**

Clause 17 provides that a person commits an offence if the person was given notice under section 16 (information gathering for investigations) and was asked to with take a specified action and the person failed to take the specified action as required by the notice. The penalty here is \$5,000.

However, this offence does not apply if the person does not possess the information or document that the notice requires the person to provide, or the person has taken all reasonable steps available to obtain the information or document and has been unable to obtain it. Here, the defendant bears an evidential burden (this places a burden on the defendant to demonstrate all reasonable steps were taken, to escape conviction).

#### **Clause 18 – Recommendations to ACCC**

Clause 18 provides that the Commissioner may make recommendations to the Australian Competition and Consumer Commission (ACCC) on matters relating to the function of the Commissioner in which the ACCC also has functions. These recommendations may include changes to the ACCC's conduct and priorities. The ACCC must have regard to these recommendations. If the ACCC decides not to implement the recommendations made by the Commissioner, then the ACCC must give the Commissioner written reasons for its decision and publish a copy of the reasons on the ACCC's website.

#### **Clause 19 – Binding directions**

The Commissioner has the power in writing to direct any of the following;

- an operator of a supermarket business;
- a supplier;
- an intermediary;
- a related body corporate of a supplier, intermediary or supermarket business;

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 the competition and fairness principle.

A person commits an offence if the person was given these directions (directing the person to take or cease to take action) and the person failed to take or cease to take action as required. A penalty of \$10,000 applies.

### **Division 3 – Appointment and terms and conditions**

#### **Clause 20 – Appointment of the Commissioner**

Clause 20 specifies that the Minister in writing must appoint the Commissioner, no later than one month after the commencement of the Bill. The Commissioner is to hold that office on a full time basis.

The Clause states that a person is not eligible for appointment as the Commissioner unless the Minister is satisfied that the person has;

- substantial experience and knowledge; and
- significant standing; in at least two of the following fields
  - the supermarket industry;
  - supply chains for the supermarket industry;
  - the household retail industry;
  - supply chains for the household retail industry;
  - competition law;
  - business or financial management.

#### **Clause 21 – Period of Appointment**

Clause 21 provides that the Commissioner holds the office for the period specified in the instrument of the appointment and the period must not exceed 5 years.

#### **Clause 22 – Acting Commissioner**

Under Clause 22, the Minister has the power to appoint a person to act as the Commissioner (Acting Commissioner) during a vacancy in the office of the Commissioner (this is regardless of whether or not an appointment has previously been made to the office) or if the Commissioner is absent from duty in Australia or cannot perform the duties of the office.

A person is not eligible for appointment as an Acting Commissioner if he or she has not met the eligibility criteria for the Commissioner.

### **Clause 23 – Remuneration**

This Clause section provides that the Remuneration Tribunal determines payment remunerations of the Commissioner. If there is no determination of that remuneration, the Commissioner is to be paid the remuneration that is prescribed.

It also provides that the Commissioner is to be paid the allowances prescribed. This section is subject to the *Remuneration Tribunal Act 1973*.

### **Clause 24 – Disclosure of interests to the Minister**

Clause 24 states that the Commissioner must give written notice to the Minister of all interests, pecuniary or otherwise, that the Commissioner has or acquires that conflicts or could conflict with the proper performance of his or her functions as Commissioner.

### **Clause 25 – Outside Employment**

This Clause provides that the Commissioner must not engage in any paid employment that conflicts or may conflict with the proper performance of the Commissioner's roles and duties.

### **Clause 26 – Leave of Absence**

This Clause allows the Minister to grant leave of absence to the Commissioner, with terms and conditions that the Minister deems appropriate.

### **Clause 27 – Resignation**

Clause 27 provides that the Commissioner may resign his or her appointment by giving written resignation to the Minister. The clause provides that the resignation will take effect on the day it is received or if a later date is specified in the resignation then on that later day.

### **Clause 28 – Termination of appointment**

Clause 28 outlines that the Minister may terminate the appointment of the Commissioner;

- for misbehaviour; or
- if the Commissioner is unable to perform his or her duties due to physical or mental incapacity; or
- if the Commissioner engages in paid employment which conflicts or may conflict with the proper performance of his or her duties; or
- if the Commissioner fails, without reasonable excuse to comply with disclosing their interests to the Minister; or

- the Commissioner becomes bankrupt; or
- the Commissioner applies to take the benefit of any law for the relief of the bankrupt or insolvent debtors.

#### **Clause 29 – Other terms and conditions**

Clause 29 provides that the Commissioner holds the position/office on the terms and conditions in relation to matters that may not be covered in the Bill, at the Minister's determination.

#### **Division 4 – Miscellaneous**

##### **Clause 30 – Assistance to the Commissioner**

Clause 30 specifies that the Department, the ACCC and any other Department, agency or authority of the Commonwealth may assist the Commissioner in the performance of the Commissioner's roles and functions.

##### **Clause 31 – Disclosure of information**

This section only applies to controlled information which is provided to the Commissioner in full confidence relating to the Commissioner's functions. If the Commissioner is satisfied that the controlled information will assist a person or authority to perform any of the person's or authority's functions or powers, then the Commissioner has the ability to disclose that controlled information.

Additionally, this section provides that a Commissioner may in writing impose conditions on the use and disclosure of controlled information by the particular person or authority. A person commits an offence if the Commissioner imposed conditions and the person fails to comply with the conditions. The penalty is \$5,000.

##### **Clause 32 – Recommendations to Commissioner by Minister or Parliament**

This clause provides that the Commissioner may consider, and decide whether or not to give effect to recommendations made to the Commissioner by the Minister (notice in writing) or by resolution of the Houses of Parliament.

##### **Clause 33 – Annual Report**

Clause 33 states that the Commissioner must as soon as practicable after the end of the financial year prepare and provide to the Minister, for presentation to the Parliament, an annual report. The report must include the Commissioner's activities during that year and any other matters relating to the Commissioner's role and functions.

#### **Part 4 – Miscellaneous**

##### **Clause 34 – Application of Crimes Act 1914**

The *Crimes Act 1914* does not apply to this Bill.

**Clause 35 – Reducing Supermarket Dominance Rules**

Clause 35 provides that the Minister may, by legislative instrument make rules to be known as the Reducing Supermarket Dominance Rules which may require or permit the Bill to be prescribed or to give effect to the Bill.

## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **REDUCING SUPERMARKET DOMINANCE BILL 2013**

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Bill**

The Bill reduces the market share of Australia's supermarket oligopoly by reducing the market share of supermarket businesses to 20% (via enforced progressive divestiture where necessary across a 6 year period). The Bill also establishes a Commissioner for Food Retailing to administer the limits on market share for supermarket businesses and to promote the competition and fairness principles, which include, inter alia:

- the promotion of competition between supermarket business in the best interests of consumers and suppliers;
- stopping supermarket businesses and household retail businesses from engaging in predatory practises that harm other businesses (whether or not supermarket businesses); and
- stopping supermarket businesses, household retail businesses and intermediaries from engaging in unfair practices that harm suppliers.

#### **Human rights implications**

This Bill does not engage any of the applicable rights or freedoms.

#### **Conclusion**

This Bill is compatible with human rights as it does not raise any human rights issues.

**Hon Bob Katter MP**