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REGULATING SUPERMARKETS: THE COMPETITION FOR SPACE

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I THE STUDY

The purpose of this article is to evaluate the case for a proposed competition policy law reform. If implemented, the reform would roll back land-use planning regulation, so that supermarket businesses have greater freedom to regulate privately where and with what format they site their stores.¹ With planning regulation reduced, the check on this greater freedom to site will be competition regulation; this regulation should also be light touch. Competition policy continues to insist that we shall be better off if public regulation defers to the market and private regulation.

In Australia, such a reform has considerable impetus and must be taken seriously. In March 2015, the Government's Competition Policy Review ('Harper Review' or 'Review') recommended that planning regulation be reduced. The Review takes the view that, '[p]lanning and zoning requirements can restrict competition by creating unnecessary barriers to entry'.² To counter these restrictions, the Review picks up on a line of recommendations running through Australian Competition and Consumer Commission ('ACCC')

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1 For the definition of 'siting' used in this study, see below n 50.

2 Ian Harper et al, 'Competition Policy Review' (Final Report, Competition Policy Review, 31 March 2015) 130 ('*Harper Review Final Report*').

and Productivity Commission ('PC') enquiries.³ The Review recommends that planning regulation defer to competition in the marketplace. It insists that competition between individual businesses and the impact on the viability of existing businesses should not be a planning consideration. Arrangements that explicitly favour or implicitly favour particular operators should be regarded as anti-competitive and should be avoided in planning regulation.⁴

The recommendations go beyond principles to target specific planning restrictions. The Review recommends that business zones be cast as broadly as possible and specifically that '[r]estrictions on the number of a particular type of retail store contained in any local area' and '[p]roximity restrictions on particular types of retail stores' should be lifted.⁵ Regarding planning processes, the Review recommends that development permit processes be simplified, with planning systems kept consistent and transparent to avoid creating incentives for those seeking to game appeals.⁶

The Government has indicated it will follow through on these recommendations.⁷ The Commonwealth Treasury is now encouraging the states and territories to reduce land-use planning regulation.⁸ In a new agreement, the Commonwealth government will offer incentive payments to the states to scrap such regulatory barriers.⁹ The agreement adds to the deregulatory pressure which planning regulation has been under for several decades now.¹⁰

What indications are there that this reform will have a net community benefit, whether in terms of competitive outcomes or broader public interests? The

3 Ibid 122–4. See Australian Competition and Consumer Commission, 'Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries' (July 2008) ('*Competitiveness of Retail Prices Report*'); Productivity Commission, 'Relative Costs of Doing Business in Australia: Retail Trade' (Research Report, September 2014) ch 6; Productivity Commission, 'Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments' (Research Report, April 2011).

4 These Recommendations are outlined in a table in *Harper Review Final Report*, above n 2, 45, 131.

5 Ibid 129. The wording of these recommendations is picked from a New South Wales government report: Department of Planning and Better Regulation Office, NSW Department of Premier and Cabinet, 'Promoting Economic Growth and Competition through the Planning System' (Review Report, April 2010) 15.

6 *Harper Review Final Report*, above n 2, 45.

7 The Treasury (Cth), 'Australian Government Response to the Competition Policy Review' (2015) 10–11.

8 John A Fraser, 'Address to the ACCC/AER Regulatory Conference 2015' (Speech delivered at the ACCC/AER Regulatory Conference, Brisbane, 6 August 2015). The Secretary's speech emphasises restrictions on the size and space of supermarkets. Lifting planning controls has also become a favoured solution of the Commonwealth Government to the housing affordability problem: see Scott Morrison, 'Keeping Home Ownership within Reach' (Speech delivered at the Urban Development Institute of Australia, Sydney, 24 October 2016). The Treasurer also criticised the Victorian Government's wish to be involved in the design of shopping centres.

9 Council of Australian Governments, 'Competition and Productivity-Enhancing Reforms' (Intergovernmental Agreement, 9 December 2016). A top priority for reform is 'commercial planning and zoning': see at Appendix A: Regulatory Reforms, [4]. Queensland, South Australia and Victoria have not signed; they say the payments are not sufficient: see David Crowe, 'COAG Meeting: Labor Premiers Oppose Plan to Boost the Economy', *The Australian* (online), 9 December 2016 <<http://www.theaustralian.com.au/national-affairs/coag-meeting-jay-weatherill-tells-pm-his-job-on-the-line-over-carbon/news-story/bba23b610542a4af7478b6599a9b19c4>>.

10 Stephen Hamnett, 'The Late 1990s: Competitive versus Sustainable Cities' in Stephen Hamnett and Robert Freestone (eds), *The Australian Metropolis: A Planning History* (Allen & Unwin, 2000) ch 10.

Review acknowledges concerns that deregulation of the kind proposed might strengthen the major supermarket duopoly (Coles and Woolworths), rather than make space for small independent stores or even other corporate supermarkets such as ALDI. However, in its view, ‘the important issue for competition is not whether the market is concentrated but whether some businesses engage in anti-competitive conduct. Other important factors include barriers to entry and the ability to switch to other suppliers, products or customers’.¹¹ The Review has a general view that such competition advantages consumers, especially through lower prices.

The Review recognises concerns about the social costs of competition: ‘[t]he move of larger supermarket chains into regional areas can also raise concerns about a loss of amenity and changes to the community’.¹² But the brief it was given was to identify and eliminate regulatory restrictions on competition, not make a social cost-benefit analysis of regulatory reform. ‘While the Panel is sensitive to these concerns, they do not of themselves raise issues for competition policy or law’.¹³ On the impact of the large supermarkets and big box stores siting outside existing shopping centres and town centres, the Review considers that; ‘these concerns are not matters to be addressed by the competition law. They reflect broader economic and social changes that are often the outcome of competition’.¹⁴

In our view, before favouring one type of regulation over others, the reform should view regulation in the round – in this case, it should gauge the overall effect of changing the mix of private regulation, planning regulation and competition regulation. To do so, policy analysis must cover more ground and accommodate more nuance than a single-minded focus will allow. Good regulation, we suspect, is usually a mix of give and take, freedom and responsibility, and private and public sources. This article considers the impact on retail competition and public benefit overall, should reform, as recommended by the Harper Review, have the effect of favouring private regulation over the public expressions of planning and competition regulation.

The article first identifies the insights and methods we have enlisted to shape the enquiry. It then provides an assessment of market constraints on the major supermarket chains (‘MSCs’) and their power to regulate privately where their stores and those of their rivals are sited. Next it considers whether, and for what purposes, public land-use planning regulation restricts (or indeed facilitates) the freedom of the MSCs to site supermarkets where and how they wish. Here we have chosen as a key indicator the siting of stores out of town and the regulatory reception given to ALDI as a new entrant into this market. Then, to identify how competition regulation checks that freedom, the article examines the clearances that the ACCC gives to the MSCs to acquire sites and its application of the new test for the misuse of market power. On this basis, the article evaluates the case for law reform. The research sought answers to these inquiries:

11 *Harper Review Final Report*, above n 2, 285.

12 *Ibid* 89. In its text, the Review acknowledges submissions that argued against these reforms: at 283, 287.

13 *Ibid* 89.

14 *Ibid* 287.

- How do supermarkets compete for space?
- How does land-use planning regulate such competition for space and what public benefit does it represent?
- How does competition law regulate such competition and what substitute does it provide for planning regulation?

II INVESTIGATION AND ANALYSIS

To investigate and analyse the regulation in contention, our research drew on insights from a mix of perspectives and gathered information from documents and interviews in the field. While appropriately the focus is on the legal elements of the regulation, the research had first to step outside the law to gain a sense of the competition that the national competition policy ('NCP') was intended to unleash. How do supermarkets compete over space? We tap these extra-legal perspectives to identify the regulation that needs to be evaluated.

Here the research started with the perspective on which that competition policy has been based, principally that of neoclassical economics and specifically the Chicago School of law and economics. In this view, free market competition favours the most efficient operators as they maximise wealth accumulation overall and enhance consumer welfare.¹⁵ Supermarkets gain efficiencies from economies of scale and scope such as integrated supply chains, financial disciplines, and product bundling and standardisation. The cheaper grocery prices which ensue have been the strongest justification for light-touch regulation that lets the MSCs have their way.¹⁶ Such efficiencies explain why the two MSCs, Coles and Woolworths, have together come to dominate most grocery markets (subject now to pressure from ALDI) and why so many independent and small supermarkets and specialist grocery stores have disappeared.

Nonetheless, our inquiry found it necessary to supplement this rather benign view of the MSCs with insights from other disciplines; first to stress the importance of space to competition, and then to ascertain how large supermarkets act strategically to shape and control retail space. For instance, in taking a far more critical view, the geographer David Harvey argues that as an economic factor space is often underrated.¹⁷ Yet the cycle of creation and destruction, the opening of new spaces and the abandonment of old spaces, is vital to what he sees as a capitalist dynamic of development and accumulation.¹⁸ Post-war, that dynamic has helped spread the city; a combination of technological, organisational and regulatory changes has freed developers from many of the constraints of centre and place. When it is most pervasive, this dynamic

15 Patrice Bougette, Marc Deschamps and Frédéric Marty, 'When Economics Met Antitrust: The Second Chicago School and the Economization of Antitrust Law' (2015) 16 *Enterprise & Society* 313, 337.

16 *Competitiveness of Retail Prices Report*, above n 3, 385–6. See Misa Han, 'Labor Fights Test Price Effects', *The Australian Financial Review* (Melbourne), 6 September 2016, 4.

17 David Harvey, *The Ways of the World* (Profile Books, 2016) ch 3.

18 *Ibid* 49–50.

concentrates the whole of the world of food within the walls of the one store and disperses that model of store around the city and country.

It is likely that MSCs do site within certain constraints (physical topography might be one, consumer habits another), but we might hypothesise that they will act strategically to acquire land and leases, format and build stores, and relate to shopping and community spaces in ways that promulgate their model. So much so that it is worth entertaining the notion that the MSCs are themselves regulating others.¹⁹ Their regulation has implications for other grocers and indeed the configuration of cities and the way we live today (such as the dependence on cars).

In seeking insights into siting strategies, we have borrowed as best we can from studies within business disciplines such as management and marketing, then, with location in mind, within urban geography, town planning and economic sociology. Because the process is dynamic, and because it should be situated locally, it was also necessary to gather information from a variety of contemporary documentary sources about recent siting trends.

The research sought that information in a variety of sources. As well as legal documents, tribunal cases for instance, they included submissions to inquiries, reports by professional consultancies, government reports, administrative decisions, news media articles, commercial real estate promotions and popular commentaries. Then, because we expected some strategies not to be documented, the research involved interviews with participants in the field. Between September 2015 and May 2017, the researchers have conducted more than 70 interviews to date, many in Victoria where the researchers are based, but also further afield with travel to Canberra, Sydney and elsewhere.²⁰

For the siting study, the interviews began with retail economists who consult to supermarkets, town planners who engage in strategic and statutory planning of sites, and business and city desk journalists who follow retail developments. Once the interviewers had gained a sense of siting constraints and strategies, they sounded out the supermarket executives, both in the MSCs and the independents. They then met with officers in the public planning and competition agencies. Interviewees were given a common set of written questions that were tailored to their particular background and experience, to which some responded initially in writing; then the researchers met with the interviewees in person for an hour or

19 Regulatory studies take the view that private actors can be regulators as well as regulatees: they regulate themselves and other private and public actors. To regulate is to compel action. See Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) ch 6. In the case of the MSCs, see, eg, Amy J Cohen, 'Supermarkets in India: Struggles over the Organization of Agricultural Markets and Food Supply Chains' (2013) 68 *University of Miami Law Review* 19, 28; Jane Dixon, 'Supermarkets as New Food Authorities' in David Burch and Geoffrey Lawrence (eds), *Supermarkets and Agri-food Supply Chains: Transformations in the Production and Consumption of Foods* (Edward Elgar, 2007) 29; Christine Parker and Gyorgy Scrinis, 'Out of the Cage and into the Barn: Supermarket Power Food System Governance and the Regulation of Free Range Eggs' (2014) 23 *Griffith Law Review* 318, 321.

20 The interviewees are listed on the project website: Caron Beaton-Wells et al, 'Supermarket Power Project – List of Individuals Interviewed to Date for the Supermarket Power Project Case Studies' (University of Melbourne, 1 June 2017) <<http://law.unimelb.edu.au/centres/cfen/research/supermarket-project/developments/interviews>>.

more. The transcripts from these recorded interviews were then analysed.²¹ While respecting the anonymity of the interviewees, the references in this article show where the interviews provided insights and evaluations.²²

The study of siting seeks to gauge the regulatory effect in part of material things like buildings and roads.²³ So the researchers, as participant observers, have also been visiting city suburbs and country towns, shopping in a variety of supermarkets and stores, in malls and strip centres, again principally in Victoria but also on their travels to the Australian Capital Territory, New South Wales and elsewhere.

While the private regulation finds expression in some part in property and contract law, the two expressions of public regulation relevant to this study, planning and competition, required the study of the key legal provisions and judgments. To investigate and analyse the laws in contention, the study turned to the perspective offered by regulatory studies. In doing so, we found Ebner's exposition of Polanyi's concept of the 'double movement' most helpful in selecting and assessing the relevant legal regulation.²⁴

Ebner recommends that research begin with the role that regulation plays in capitalist economies providing institutional support to the market.²⁵ As Robert Reich has recently stressed, the choice in policy is not between regulation and the free market but the ways in which regulation will shape the market and endowments within it.²⁶ In key periods, the early 19th century was one,²⁷ the late 20th century another,²⁸ law is deployed to open the way for the market and to implement and normalise its decisions. Such a regulatory policy dismantles established industry arrangements, as we have seen in the food sector with reforms like the collapse of producer cooperatives, the decommissioning of statutory marketing boards and the removal of restrictions on imports, which make way for the operation of global agri-business supply chains.²⁹ Now the

21 A template questionnaire for the siting study is also available on the project website: Caron Beaton-Wells et al, 'Supermarket Power Project – Planning Case Study – Interview Questionnaire Template' (University of Melbourne, 2017) <<http://law.unimelb.edu.au/centres/clen/research/supermarket-project/developments/interviews>>.

22 In respecting the anonymity of the interviewees, observations are attributed to occupations rather than to individuals.

23 See Susan S Silbey and Ayn Cavicchi, 'The Common Place of Law: Transforming Matters of Concern into the Objects of Everyday Life' in Bruno Latour and Peter Weibel (eds), *Making Things Public: Atmospheres of Democracy* (MIT Press, 2005) 556.

24 See Alexander Ebner, 'The Regulation of Markets: Polanyian Perspectives' in Bettina Lange, Fiona Haines and Dania Thomas (eds), *Regulatory Transformations: Rethinking Economy–Society Interactions* (Hart Publishing, 2015) 31.

25 Ibid 40.

26 Robert B Reich, *Saving Capitalism: For the Many, Not the Few* (Alfred A Knopf, 2015) ch 5. See also Brett Christophers, 'The Law's Markets: Envisioning and Effecting the Boundaries of Competition' (2015) 8 *Journal of Cultural Economy* 125.

27 Morton J Horwitz, *The Transformation of American Law, 1780–1860* (Harvard University Press, 1977) 111.

28 Reich, above n 26, 12.

29 David Burch, Jane Dixon and Geoffrey Lawrence, 'Introduction to Symposium on the Changing Role of Supermarkets in Global Supply Chains: From Seedling to Supermarket: Agri-food Supply Chains in Transition' (2013) 30 *Agriculture and Human Values* 215.

policy reaches further, overtaking public non-market systems for ordering space, unleashing corporate energies once again, and giving greater freedom to developers to configure suburbs and towns.³⁰

In Australia, this market-making regulatory tendency has been the main thrust of the NCP since the 1980s.³¹ Some would say that this policy has always had influence within the administration of this state-level public planning regulation.³² Now, from the national centre, the Review and the Government response seek to carry it further with reforms to the scope of this regulation.

In principle, the reforms the Harper Review is seeking, for greater freedom to locate and format supermarkets, might ease entry and establishment for all manner of grocery stores. Thus they might increase competition across the board. But as the Review concedes, they might also work in favour of the large supermarkets and the competition conducted between the two MSCs. This is why restrictions on size and proximity are highlighted. The apparent calm about the consequences is consistent with the view of competition as a ruthless drive for efficiency in which there are likely to be winners and losers. As one former Minister for Competition has observed; '[c]ompetition is rarely fair, knocking out hard-working business owners who lack the technology, logistical support or cost-reducing scale of bigger businesses'.³³

Such a view insists that regulation is about maintaining the competitive process, not about protecting competitors from harm. Regulation should accept that competition may leave only one or two corporations in the market; it should not be about the number of competitors or the size of corporations and their market shares.³⁴ In an address to food industry executives, the then Coalition Government Minister for Trade, Andrew Robb, counselled; '[w]e are an oligopoly community. We shouldn't fight it. We should make the most of it. It does provide us with the critical mass and the size and innovation and for that ability to compete with overseas countries'.³⁵ This view may also colour the legislation and administration of competition regulation.³⁶

30 See Harvey, above n 17, ch 6.

31 Bronwen Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Ashgate, 2003) 63–73.

32 See, eg, Leonie Sandercock, *Property, Politics, and Urban Planning: A History of Australian City Planning 1890–1990* (Transaction Publishers, 2nd ed, 1990) ch 7; Michael Buxton, Robin Goodman and Susie Moloney, *Planning Melbourne: Lessons for a Sustainable City* (CSIRO, 2016) ch 3. In the United Kingdom, where a similar planning system has operated, Patrick McAuslan's legal analysis was insightful: see especially Patrick McAuslan, *The Ideologies of Planning Law* (Pergamon Press, 1980).

33 Craig Emerson, 'Our Anti-competitive Effects Test That Small Business Is Hoping For', *The Australian Financial Review* (online), 13 September 2016 <<http://www.afr.com/news/policy/the-anticompetitive-effects-test-that-small-business-is-hoping-for-20160912-greb67>>. Emerson is speaking of the MSCs and their rivals in his opposition to a test that would toughen the *Competition and Consumer Act 2010* (Cth) measure of misuse of market power. Emerson was a minister in the Rudd-Gillard Labor Governments.

34 Graeme Samuel and Stephen King, 'Competition Law: Effects Test Would Have Shackled Competition', *The Australian Financial Review* (online), 9 September 2015 <<http://www.afr.com/opinion/competition-law-effects-test-would-have-shackled-competition-20150908-gjhg5l>>. Samuel was a chair and King a commissioner of the ACCC.

35 Damon Kitney and Andrew White, 'We Are an Oligopoly Economy: Robb', *The Australian* (online), 19 August 2013 <<http://www.theaustralian.com.au/business/companies/we-are-an-oligopoly-economy->

Seeking to explain the resilience of this ‘neoliberal’ view, regulatory studies recognises its appeal to hard-pressed ministers, legislators, administrators and judges.³⁷ Characterised as the economisation of justice and the privatisation of regulation, the view allows them to take a clear-cut, hands-off approach to policymaking.³⁸ On this view, it can be assumed the benefits of such market competition are greater than the benefits of non-market arrangements. There is little role for protection or coordination. Indeed, there is little time for the social values and collective processes of public regulation. If such regulation is to survive, then it is for its defenders and proponents to demonstrate its public benefits.³⁹

Yet there are signs that this development phase is reaching its limits. Its large-scale logistics are beginning to seize up in traffic congestion and environmental waste;⁴⁰ consumers and citizens are looking for value in a variety of providers and in shared community spaces.⁴¹ It appears such private regulation stimulates a public counter-movement. Various groups, among them, small retailers, concerned consumers, local residents, food activists and environmental campaigners, are calling on governments to moderate growth of the incumbent food providers and enhance benefits for communities.⁴² Could it be, as Ebner puts it, that ‘the impact of market competition on social areas that are decomposed by the market mechanism itself should be the primary domain of regulatory efforts’?⁴³ Granted, in Polanyi’s ‘double movement’, planning regulation has played a role in opening spaces, activating markets and facilitating development.⁴⁴ Still, planning regulation has also been a point of attachment for the representation of social, environmental and structural components of the

robb/news-story/606fcf2f0e789689d39fd40f19b8a1e9>. For a more critical view, see Richard Denniss, *Econobabble: How to Decode Political Spin and Economic Nonsense* (Redback Quarterly, 2016) ch 5.

36 See, eg, Vivienne Pham, ‘The Treatment of Efficiencies Under the Informal Merger Clearance Process’ (2013) 21 *Competition and Consumer Law Journal* 127. For a review of the policy debate: Robert Pitofsky (ed), *How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on US Antitrust* (Oxford University Press, 2008).

37 Angela Wigger and Hubert Buch-Hansen, ‘Explaining (Missing) Regulatory Paradigm Shifts: EU Competition Regulation in Times of Economic Crisis’ (2014) 19 *New Political Economy* 113. See also William Davies, *The Limits of Neoliberalism: Authority, Sovereignty and the Logic of Competition* (Sage Publications, 2014).

38 Bougette, Deschamps and Marty, above n 15; Morgan, above n 31.

39 *Harper Review Final Report*, above n 2, 43. Some indication of the acceptable public benefits can be seen in the competition regulation authorisation determinations: see Vijaya Nagarajan, ‘The Paradox of Australian Competition Policy: Contextualizing the Coexistence of Economic Efficiency and Public Benefit’ (2013) 36 *World Competition* 133.

40 Jane-Frances Kelly and Paul Donegan, *City Limits: Why Australia’s Cities Are Broken and How We Can Fix Them* (Melbourne University Press, 2015) ch 6.

41 Jane Dixon and Bronwyn Isaacs, ‘There’s Certainly a Lot of Hurting Out There: Navigating the Trolley of Progress down the Supermarket Aisle’ (2013) 30 *Agriculture and Human Values* 283.

42 Parker and Scrinis, above n 19, 325; Amy J Cohen, ‘The Law and Political Economy of Contemporary Food: Some Reflections on the Local and the Small’ (2015) 78 *Law and Contemporary Problems* 101.

43 Ebner, above n 24, 52. The treatment of land as a commodity ‘inevitably dislocates it from an integral natural whole’: Ernest Sternberg, ‘Justifying Public Intervention without Market Externalities: Karl Polanyi’s Theory of Planning in Capitalism’ (1993) 53 *Public Administration Review* 100, 105.

44 Ebner, above n 24, 45 ff.

public interest, such as the search for synergies, community and sustainability in land use.⁴⁵ This now should be the priority.

To evaluate planning regulation, our research drew again on both the documentary sources and the face-to-face interviews. At this point, legal provisions and decisions became most pertinent. However, our research faced the challenge that planning law is distributed between multiple state and territory jurisdictions; furthermore, it is often submerged within the processes and outputs of a repertoire of specialist law making agencies such as commissions, authorities, councils, panels, tribunals, courts and ministerial offices. In making our evaluation, we must be careful to appreciate the variations between jurisdictions, for instance in their pathways to decision-making, the constitution of their forums and their allowances for third party participation.⁴⁶ Yet, like the Harper Review does in its recommendations, we take the view that they have enough in common to evaluate how they regulate competition and represent other public interests across the board.

Our analysis here tends to employ the Victorian jurisdiction as its example, partly as a way to give the expected particularity to the lawmaking (around retail zoning, shopping centre hierarchies and out of town developments), but partly too because the Victorian reforms have been cited by the reviews and the government as the way forward for all jurisdictions.⁴⁷

At this level of analysis, the task is greatly assisted by the amount of law on the public record. The Australasian Legal Information Institute ('AustLII') is a valuable source for this purpose and there are specialist planning regulation websites too.⁴⁸ Here, we make use of studies by planning academics as a map of the regulation and an indicator of the trends. The interviews with all the participants were again informative, especially to learn about the regulation that was off the public record and to take soundings of the impact of the regulation on competition and other interests.

The second body of public regulation to connect in the evaluation of the Review's reforms is national competition regulation. Under NCP, this regulation acts as a check on the anti-competitive conduct and structure that corporations might adopt if the markets were free. The regulation has limited objectives; it is not meant to be a substitute for the industry or planning regulation that is repealed. Furthermore, in checking anti-competitive conduct and structure, the NCP has generally adopted the Chicago School's light-touch approach to the decisions of the market.⁴⁹ Could this be changing? For the siting study, the findings about private regulation focus the research here on the ACCC scrutiny of MSC acquisitions of established independent stores and vacant land lots, then

45 Sternberg, above n 43, 106.

46 In New South Wales, see, eg, Amelia Thorpe, 'Land Use Planning' in Peter Williams (ed), *The Environmental Law Handbook* (Thomson Reuters, 6th ed, 2016) 89.

47 *Harper Review Final Report*, above n 2, 128; Fraser, above n 8.

48 See, eg, Department of Environment, Land, Water and Planning (Vic), 'Planning Schemes Online' (Database, 29 September 2016) <<http://planning-schemes.delwp.vic.gov.au/>>.

49 In respect of supermarkets, see Carole Richards et al, 'A Toothless Chihuahua? The Australian Competition and Consumer Commission, Neoliberalism and Supermarket Power in Australia' (2012) 21 *Rural Society* 250.

on the conversation around the strengthening of the legislative test for the misuse of market power as it relates to the treatment of land banks. To test the regulatory policy, academic studies of this competition regulation were supplemented by the more recent documentary sources of working policies and decisions and, once again, our interviews, especially with supermarket executives and public competition authorities.

III PRIVATE REGULATION

Why does the regulation of siting matter?⁵⁰ We appreciate that supermarkets compete in several ways and factors such as scale economies and resultant lower prices help to explain why the two MSCs have come to dominate the grocery market and why so many independent small supermarkets and specialist food stores have closed.⁵¹ Yet these factors combine with the siting of stores and we find that siting is a significant strategy that the MSCs employ to gain customers over their rivals. Certainly, the MSCs plot and develop sites emphatically, with smaller or newer rivals needing to work around their strategies. What drives these strategies and their impact on retail competition and public benefit?

A Siting for the Market

In conventional market analysis, competition is seen as the response of retailers to social trends and consumer preferences. The huge success of Coles and Woolworths reflects the aspirations of consumers in post-war Australian society. Bright, spacious, abundant, and convenient stores are a key element in the modernisation and suburbanisation of our cities and towns.⁵² With this understanding, our study was alert to the commercial demands placed on the MSCs and the shifts in the market around them. In the language of competition policy, they are constrained by the market and they must respond to such constraints by acting pro-competitively, including their siting of stores.

To assess this proposition, we must draw on knowledge of shopping. In constructing the market, retail economists and town planners operate with a

50 By siting we mean the geographical location of the store, the size and particularly the floor space of the store, and the format of the store to be found in such design features as its built form and its orientation to other businesses and the locale.

51 Since supermarkets entered the market decades ago, many small grocers have disappeared: see Kim Humphery, *Shelf Life: Supermarkets and Changing Cultures of Consumption* (Cambridge University Press, 1998) 77. Closures are still occurring. Approximately 30 full-line IGAs closed in the 2015–16 financial year: Patrick Hatch, ‘Metcash Shares Crash despite Shoppers Returning to IGA’, *The Sydney Morning Herald* (online), 20 June 2016 <<http://www.smh.com.au/business/retail/metcash-shares-crash-despite-shoppers-returning-to-iga-20160619-gpmwua.html>>. Between 2010 and 2015, the IGA share of the groceries market dropped from 20 to 14 per cent: Eli Greenblat, ‘Ritchies Bulks Up with Victorian Supermarkets Buy’, *The Australian* (Canberra), 26 November 2015, 21. These businesses are seeking ways to cooperate and innovate, so they can be competitive with the MSCs: see, eg, Catie Low, ‘Ritchies Goes Gourmet to Keep Discounters at Bay’, *The Sydney Morning Herald* (online), 18 November 2016 <<http://www.smh.com.au/business/retail/ritchies-goes-gourmet-to-keep-discounters-at-bay-20161117-gsr6d.html>>.

52 Humphery, above n 51, 107–11.

notion of shoppers' shifting preferences. For instance, we were told, they have found that shoppers with access to cars in the suburbs and towns will travel 3–5 km or 5–15 minutes to shop for non-discretionary items like groceries.⁵³ They will go no further, but they will go that far. This catchment should be adjusted for local conditions – eg, travel by car might be easier in Canberra or harder in Melbourne – but overall it provides a handy rule of thumb.

A second construct is that traditionally shoppers have preferred to do one big grocery shop each week. They have wanted to shop in the one place and to convey their purchases home by car.⁵⁴ This pattern particularly suits family households in which the parents are working. Top-up shopping is a chore and may be done at convenience stores such as petrol stations. While such one-stop supermarkets can stand alone, it is attractive to site them in private malls and plazas that offer complementary services such as pharmacies, beauticians and coffee shops.⁵⁵

Yet, it can be argued that the MSCs have not simply responded to this demand but have been active in shaping it. While Coles and Woolworths are rivals, they have traditionally promoted a singular model for the grocery store. Tracing the rise of the MSCs, Kim Humphery remarks: 'As food retailing ... became concentrated in fewer hands, and in ever larger retail environments, supermarketing changed the environment *outside* as well as inside the shop'.⁵⁶

The MSC model has several distinctive characteristics. The store is a box with a minimum floor space of around 2500–3500 square metres. It has long, wide aisles lined with shelves for product items. There are few counters and check-outs are at the opening to the store. The store is artificially lit and the focus is turned inwards. The store is situated at ground level, connecting it with a capacious customer car park and the road access and docking stations needed also for large truck deliveries.⁵⁷ While some are in existing shopping strips, most stores are situated in shopping malls or retail plazas on major roads.⁵⁸

The model is in many ways a triumph of intelligence and economy. Success lies in the cheapness, safety and variety of the offer and the convenience of the one-stop, self-service shop, and access by car. For many time-poor families, for instance where both parents are working, the full-line supermarket, with its

53 Interviews with retail economists/town planners.

54 Interview with retail economist.

55 By 2006, there were 1102 shopping centres in Australia, 759 anchored by a MSC: Urbis JHD, 'Australian Shopping Centre Industry' (Information Update, March 2007) 1–3. There was a doubling of shopping centre floor space between 1991–92 and 2005–06, and between 2001 and 2009, Coles, Woolworths and ALDI opened 600 supermarkets, leading the Shopping Centre Council of Australia to say that there was no shortage of retail space: Shopping Centre Council of Australia, Submission No 43 to Productivity Commission, *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, 31 August 2010, 7–14.

56 Humphery, above n 51, 77 (emphasis in original).

57 One interviewee said that the model had to be so many square metres, had to be fitted out in a certain way, and had to be on a highway out of town: Interview with retail executive. Another retail executive stressed the importance of adequate car parking.

58 One retail executive said 80 per cent of its supermarkets were situated in shopping centre environments: Interview with retail executive.

processed and refrigerated foods, fresh produce, dry goods, personal services and car parking, has been considered convenient.⁵⁹

Still, circumstances change. Could changes in demand undermine the dominance of the corporate-style supermarket? Could they create openings for innovative new businesses that compete on produce as well as for corporates like ALDI that compete on price?⁶⁰ Market research suggests that shopping routines are fragmenting.⁶¹ Some households are returning to a more frequent shopping practice, particularly for their fresh foods.⁶² They shop at all hours of the day and night. They cross shop; that is, they are shopping with both the MSCs and with other grocery providers such as the discounters and the ethnic, specialist and independent greengrocers, delicatessens, butchers and fishmongers.

Furthermore, higher population densities, urban sprawl and a lack of infrastructure like rail transport and public pathways, are creating gridlock in the suburbs of the bigger cities.⁶³ The norm of mobility in post-war Australian society is becoming a contrast between the health-conscious rich in walkable inner cities and the more economically disadvantaged in low density fringe suburbs and country towns.⁶⁴ For some (not all) shoppers, the success of the MSC model has a sameness about it; the physical experience impersonal and detached from the community,⁶⁵ the product line increasingly rationalised and standardised (ie, with the rise of private label and the single sourcing of products).⁶⁶ In certain

59 Marty McCarthy, 'Australian Consumers Prefer Greengrocers but Major Supermarkets More Convenient, Research Finds', *ABC News* (online), 29 May 2015 <<http://www.abc.net.au/news/rural/2015-05-29/supermarket-grocery-where-do-shoppers-prefer-to-buy-produce/6505752>>.

60 Sue Mitchell, 'IGA Retailer Sets Benchmark in CBD Supermarket Battle', *The Sydney Morning Herald* (online), 7 December 2015 <<http://www.smh.com.au/business/retail/iga-retailer-sets-benchmark-in-cbd-supermarket-battle-20151207-glhhgw.html>>.

61 Interviews with retail economists. See further the breakdown in Productivity Commission, 'Workplace Relations Framework' (Inquiry Report No 76, 30 November 2015) 426. Some consumers also take delivery of prepared meals at home, not only fast food but also gourmet and health meals: see, eg, Kim Arlington, 'Food Delivery Apps are Changing the Way We Eat and How Restaurants Are Run', *The Sydney Morning Herald* (online), 29 December 2016 <<http://www.smh.com.au/business/consumer-affairs/food-delivery-apps-are-changing-the-way-we-eat-and-how-restaurants-are-run-20161221-gtfm9a.html>>.

62 See Woolworths Ltd, 'Response to Competition Policy Review Issues Paper' (June 2014) 9.

63 Kelly and Donegan, above n 40, 116.

64 Jacob Saulwick, 'Walking around in Sydney? The Good Spots Are Few and Far Between', *The Sydney Morning Herald* (online), 16 September 2016 <<http://www.smh.com.au/nsw/walking-around-in-sydney-the-good-spots-are-few-and-far-between-20160916-grhnp0.html>>; Graeme Davison with Sheryl Yelland, *Car Wars: How the Car Won Our Hearts and Conquered Our Cities* (Allen & Unwin, 2004) 261. One interviewee doubted, however, whether Australians would ever want to walk to the shops: Interview with retail economist.

65 Humphery, above n 51, ch 7. See Carolyn Cummins, 'Shopping Centres Must Change to Survive', *The Sydney Morning Herald* (online), 3 March 2017 <<http://www.smh.com.au/business/property/shopping-centres-must-change-to-survive-20170302-gup6fi.html>>; Madeleine Heffernan, 'Woolworths, Coles Told It's Not Just the Prices, Stupid', *The Sydney Morning Herald* (online), 6 March 2017 <<http://www.smh.com.au/business/retail/woolworths-coles-told-its-not-just-the-prices-stupid-20170302-gupq3l.html>>. One retail executive interviewee said the stores cannot just be boxes, they must relate to the community now: Interview with retail executive.

66 Madeleine Heffernan, 'Supermarket Suppliers Remain "Under Pressure" as Woolies, Coles Cull Product Range', *The Sydney Morning Herald* (online), 23 September 2016 <<http://www.smh.com.au/business/retail/supermarket-suppliers-remain-under-pressure-as-woolies-coles-cull-product-range>>.

quarters, there is resistance to manufactured and processed foods and a turn to local, organic, artisanal and ethical foods.⁶⁷

For others, the prices are not low enough and they struggle with the distance and separation between sites to gain access to fresh food. In some outer suburbs and country towns, shoppers – now dependent on the presence of the MSCs – must rely on car access to reach the supermarket; these supermarkets are rarely within walking distance and public transport is minimal.⁶⁸ Consistent with Harvey's cycle of creation and destruction, our cities have spread in an uncoordinated fashion and our food shopping has become mundane, one of navigating congestion and conformity, rather than experiencing convenience or adventure.⁶⁹

Yet the MSCs appear only to make adjustments to their model where they perceive the market expects this of them. As one interviewee remarked, they vary their model only if they have to do so; for instance they will always prefer one big store to three small stores.⁷⁰ There are some signs that, in the inner cities, the market is encouraging them to accommodate specialist independent food stores alongside their big supermarkets; they may also operate smaller upmarket groceries and convenience stores themselves along public transport lines and in apartment complexes.⁷¹ In the suburbs and small towns, this trend is not as strong. The MSCs make in-store adjustments but retain their hold over outlets. Instead, they increase their fresh food offer across all their supermarkets. Given freer access to casual labour, trading hours are extended. Services such as newspapers, insurance and finance have been added; the MSCs want to provide diagnostic health tests and prescription medicines. They run convenience stores in petrol stations. In some locations, customers are allowed to buy online and then either collect their groceries from depositories in their own time or have the purchases delivered to their door.

20160923-grmqgc.html>; Sue Mitchell, 'Supermarkets Range Cull Rings Alarm Bells', *The Australian Financial Review* (online), 27 December 2016 <<http://www.afr.com/business/retail/supermarket-range-cull-rings-alarm-bells-20161221-gtfjza>>. Price competition cannot be assumed either. As public companies, the MSCs are under pressure from shareholders to return a profit: see Catie Low and Mark Hawthorne, 'Coles, Woolworths, Aldi in Battle for Diminishing Shopper Dollars', *The Sydney Morning Herald* (online), 28 January 2017 <<http://www.smh.com.au/business/retail/coles-woolworth-aldi-in-battle-for-diminishing-shopper-dollars-20170124-gtxwgq.html>>.

67 Esther Han, 'Shoppers Hunger for "Local" Foods at Supermarkets', *The Sydney Morning Herald* (online), 29 June 2014 <<http://www.smh.com.au/national/shoppers-hunger-for--local-foods-at-supermarkets-20140626-zsnc.html>>. See also Parker and Scrinis, above n 19, 323; Yiannis Gabriel and Tim Lang, *The Unmanageable Consumer* (Sage, 3rd ed, 2015) 185–9.

68 Kelly and Donegan, above n 40, 73.

69 Robin Goodman and Eddo Coiacetto, 'Shopping Streets or Malls: Changes in Retail Form in Melbourne and Brisbane' (2012) 30 *Urban Policy and Research* 251, 253.

70 Interview with retail executives.

71 Carolyn Cummins and Julie-anne Sprague, 'Woolworths, Coles to Take on Convenience Stores', *The Sydney Morning Herald* (online), 6 October 2014 <<http://www.smh.com.au/business/property/woolworths-coles-to-take-on-convenience-stores-20141005-10qhgw.html>>. Although retail executives worry about the mix creating tensions between residence and shopping, for example the truck deliveries: *ibid.*

B MSC Siting Strategies

The MSCs employ several siting strategies to maintain the dominance of their model. At times, these strategies eliminate existing retail competition or raise barriers to new competition. Even if they are pro-competitive, the strategies undermine plans to contain large supermarkets in centres in order to coordinate services and enhance amenities. If we are to consider whether they are to be constrained by planning and competition regulation, we must first endeavour to identify these strategies.

We identify several strategies from our field research.⁷² The MSCs do seek to site alongside rivals. We see this in the big shopping malls and town centres where they compete directly against each other. They also set up within or alongside established centres where there is no existing MSC, the siting often leading to the closure of an independent grocer.⁷³

The MSCs also site away from their rivals. A key strategy is to establish a new site on the edge or outside of established centres. This strategy may be adopted because there is not enough space for them in the established centre, or because the incumbent has ways to restrict the accommodation of competitors.⁷⁴ There are situations where this new store relieves pressure mounting on the established centre (such as traffic congestion) or responds sequentially to population growth along a corridor.⁷⁵ But in many cases the development of middle-level centres (each with one MSC and perhaps a few other satellite shops) is a dispersal strategy in the fight for the same market share.⁷⁶ Such siting also undermines the viability of smaller independent grocers in nearby local or neighbourhood centres.

In order to set up a site, the MSC will acquire a piece of land itself from a vendor or lease a site from a shopping centre developer or commercial real estate investor. The MSCs plan ahead, buying suitable land or obtaining leases in advance of development and demographic change.⁷⁷ They have the resources to

72 For conceptualisation of the strategies, see David Bennison, Ian Clarke and John Pal, 'Locational Decision Making in Retailing: An Exploratory Framework for Analysis' (1995) 5 *International Review of Retail, Distribution and Consumer Research* 1; Andrew Simms, *Tescopoly: How One Shop Came Out on Top and Why It Matters* (Constable, 2007) ch 2; Steve Wood and David McCarthy, 'The UK Food Retail "Race for Space" and Market Saturation: A Contemporary Review' (2014) 24 *International Review of Retail, Distribution and Consumer Research* 121.

73 Kate Jones, 'Small Player Loses Woolies Battle', *The Age* (Melbourne), 16 July 2016, 3.

74 One interview stressed the need for planners not to draw the space in town centres too tightly, not allowing for growth and more competitors: Interview with retail executives. One of the key outcomes of the ACCC 2008 Grocery Inquiry was a clamp down on an overt form of exclusion – restrictive covenants written into shopping centre leases: *Competitiveness of Retail Prices Report*, above n 3, 184–9. The ACCC obtained undertakings from the supermarkets to phase out such provisions: see, eg, Australian Competition and Consumer Commission, 'Phase Out of Supermarket Restrictive Lease Provisions: Supabarn Undertaking' (Media Release, NR 079/11, 5 May 2011).

75 Interview with retail economist.

76 Malcolm Knox, *Supermarket Monsters: The Price of Coles and Woolworths' Dominance* (Redback, 2015) ch 2.

77 Simon Johanson, 'Investors Compete for Supermarket Sites', *The Sydney Morning Herald* (online), 24 February 2016 <<http://www.smh.com.au/business/property/investors-compete-for-supermarket-sites-20160222-gn0x40.html>>.

outbid others for a well-positioned piece of land or a lease in a development complex.⁷⁸ Occasionally, according to our interviews, they will intervene in a sale to ‘gazump’ a smaller independent rival that thought it had secured a site.⁷⁹

The MSCs hold some property without developing it. One interviewee stressed that, if the MSCs do at times bank land, they do not do so merely to block rivals.⁸⁰ Yet, if they do develop their sites, as they commonly do, there are times when the development might be seen as over-building to pre-empt the entry of the competition, or squeeze it out, possibly even to the extent of ‘cannibalising’ their own stores in the catchment.⁸¹ We see the suggestion of this strategy in Melbourne in existing suburbs that are gaining population (Coburg) or in green field suburbs extending out along the growth corridors (Frankston-Dandenong).⁸²

The MSCs also buy existing stores and sites from independent grocers, sometimes swapping sites with other grocers.⁸³ Several of our sources suggested that the MSCs have at times foreshadowed they would set up a store nearby, the move encouraging the rival to sell its site to the MSC.⁸⁴ Faced with a quick profitable demise, or watching the value of their business decline, many independent grocers will prefer to sell.

The legal expression of these strategies is largely property and contract law. Yet, the MSCs’ private regulation connects with public regulation when they apply to planning authorities for the go-ahead to develop or redevelop a site. They may lobby and negotiate to have their land zoned ‘commercial’ in a new structure plan. They may apply for a discretionary use permit or a spot rezoning amendment in an existing zone.⁸⁵ As several of our interviewees noted, the MSCs are often at an advantage where planning regulation controls the space made available in retail zones.⁸⁶ They have the inside position, with one interviewee suggesting they can also sway planning authorities with promises of employment, additional rate and tax revenue, and contributions to community

78 Interviews with retail economists and retail executives.

79 Interview with retail executive. See also the testimony of Eric Koundouris, Supabarn proprietor, in Australian Competition and Consumer Commission, ‘Grocery Price Inquiry Hearing’ (Transcript of Proceedings, 8 April 2008) 4–34.

80 Interview with retail executives. Cf Alexandra Merrett and Rhonda L Smith, ‘The Australian Grocery Sector: Structurally Irredeemable?’ (Paper presented at the Supermarket Power in Australia Symposium, Treasury Theatre, Melbourne, 1 August 2013) 10 <http://law.unimelb.edu.au/__data/assets/pdf_file/0003/1682805/Session2-MerrettSmithpaper2.pdf>.

81 Interview with retail executive. The Harper Review notes that ‘[m]any small retailers say they disagree with “the principle that more floor space and more entrants in a market equals more competition”’: *Harper Review Final Report*, above n 2, 127.

82 Interview with retail executive.

83 Interview with retail executives.

84 Interview with retail executive; see also Supabarn’s Theo Koundouris, quoted in Ross Peake, ‘Supabarn Needs Protection from Coles and Woolies’, *The Canberra Times* (online), 26 September 2014 <<http://www.canberratimes.com.au/business/supabarn-needs-protection-from-coles-and-woolies-20140924-10lbkh.html>>.

85 Part IV below, on Public Land-Use Planning Regulation, gives references to the legal provisions for these processes, using the Victorian system largely as its example.

86 Interviews with retail executives and town planners.

facilities.⁸⁷ At the same time, the system allows competitors to lobby and litigate to oppose a development on the basis that it undermines sound land-use planning.⁸⁸ This means that, as *both* applicants and objectors, the MSCs deploy their substantial resources – their professional advisors, financial staying power, lobbyists and public relations agents – to negotiate the planning process to their advantage.⁸⁹

The MSCs do not just expand. They end leases, close stores and sell off land. The MSCs sell sites to investors, then lease back those they still require.⁹⁰ Where stores no longer suit their model, they are closed. Recently, Woolworths has foreshadowed a program of shutting a number of stores, reviewing the viability of existing and future stores on a criterion of sales per square metre and return on funds invested.⁹¹ Woolworths has signalled the closure of 21 existing supermarkets, suggesting there has been over-development or at least signifying demographic changes. Thirty-four more are in question, their leases might not be renewed; and the stores that it had planned to open will be reduced from 90 to 45.⁹² Large corporations make mistakes that bear social as well as private costs. Woolworths' closure of its Masters big box sites has led to job losses and big empty buildings in prominent positions.

To sum up, while the market is not fixed, we find enough evidence to suggest that the MSCs can drive a model of supermarket siting. Its impact is strong enough to say that the MSCs often regulate the space for food shopping. It has been argued that the entry of ALDI has strengthened competition, yet, while ALDI is another company, it perpetuates the same siting model. That model has brought benefits for consumers, particularly by way of lower prices. Still, it requires other providers to work around the MSCs and it privatises the space for food supply and social interaction. Thus, consistent with Harvey's view, the MSCs represent the strong influence of capitalism on the configuration of space in our cities. To further free their siting regulation, as the Harper Review recommends, is the first thrust in Polanyi's 'double movement'; viewing the strategies positively, it clears the way for these market forces to operate and normalises their decisions.

87 Interview with retail executive.

88 Planning legislation may afford them the standing to do so: see *Kentucky Fried Chicken Pty Ltd v Gantidis* (1979) 140 CLR 675; *Argos Pty Ltd v Minister for the Environment and Sustainable Development* (2014) 254 CLR 394.

89 Knox, above n 76, ch 2.

90 Simon Johanson, 'Coles to Sell Coburg North Village Shopping Centre', *The Sydney Morning Herald* (online), 14 June 2016 <<http://www.smh.com.au/business/property/coles-to-sell-coburg-north-village-shopping-centre-20160614-gpikqw.html>>. There is a valuable but volatile market in shopping centre real estate: see Carolyn Cummins, '\$1.7 Trillion Set to Enter Global Real Estate', *The Sydney Morning Herald* (online), 29 March 2017 <<http://www.smh.com.au/business/property/us17-trillion-set-to-enter-global-real-estate-20170326-gv6olz.html>>.

91 Sue Mitchell, 'Woolworths Reverses Direction, Applies Brake to New Stores', *The Australian Financial Review* (online), 25 July 2016 <<http://www.afr.com/business/retail/fmcg/woolworths-reverses-direction-applies-brake-to-new-stores-20160725-gqd697>>.

92 *Ibid.*

IV PUBLIC LAND-USE PLANNING REGULATION

Yet, is private regulation always the best guarantee of competition for this space? What expression is to be given to other public interests, such as the synergies and amenities that are achieved by consolidating commercial uses? As we foreshadowed above, planning regulation has been a counter, in Polanyi's 'double movement', to the unfettered commercial development of cities. In this section, the article shows how the planning system pursues a mix of development and consolidation in its regulation of land-use zones and shopping centre hierarchies. The research reveals the pressure planning regulation is under to relax its controls, particularly to allow edge and out of town developments. This influence is to be found within the systems, in the readiness to vary plans and weaken hierarchies, and from outside, in the Victorian changes to zones which national competition policy reform will push further.

A Centre Hierarchies

Planning regulation is not unsympathetic to retail stores; local councils and state government agencies regularly formulate strategic policies and plans with the objective of ensuring there is enough space to meet retail demand. Nonetheless, traditionally at least, planning is pursued within a framework designed to reconcile retail development with other public interest objectives. This can take several forms but, for this study, the regulatory policy of planning a hierarchy of retail centres best illustrates how the tension between competition and coordination, freedom and order, code and discretion, is being resolved.

State planning policy has sought at times to gather retail uses together in centres along with other compatible uses that include offices, services and now some residential facilities too, especially in centres around transport hubs.⁹³ In Victoria, for example, the evidence of this is to be found in the policy framework and the template for the zones which the state government provides the local councils and other planning authorities to employ in constructing their schemes.⁹⁴ Then it is to be found in the particular schemes. Within a precinct or municipality, the scheme might then create a hierarchy of retail centres, principally by graduating the space available for stores, ascending from local centres to district and then town centres and discouraging developments out of centre. This policy is designed to generate land-use synergies and enhance social amenities.⁹⁵ This graduation applies to both the floor space available for all stores

93 For a history of these policies in Victoria, see Buxton, Goodman and Moloney, above n 32, ch 9.

94 See *Planning and Environment Act 1987* (Vic) pt 1A. The current Victorian Planning Provisions can be found on the Planning Schemes Online website: Department of Environment, Land, Water and Planning (Vic), *Victorian Planning Provisions* (14 June 2017) Planning Schemes Online <<http://planning-schemes.delwp.vic.gov.au/schemes/vpps>>.

95 For the thinking behind this policy, see Stephen Wood, Tim Sneesby and Robert G V Baker, 'Maintaining Town Centre Vitality in Competitive Environments: Pedestrian Movements, Land-Use and Built-Form in Armidale and Tamworth, NSW' (2012) 49 *Australian Planner* 172; Mike Quirk, 'Responses to Retailing Changes in Canberra' (2008) 26 *Urban Policy and Research* 445; Hiroki Yamashita, Tadashi Fujii and Satoru Itoh, 'The Development of Diverse Suburban Activity Centres in Melbourne, Australia' (2006) 2 *Applied GIS* 9.1; SGS Economics and Planning, 'An Evaluation of

that are to be located in the centre, and the floor space available to individual stores.⁹⁶ In town centres there will be space for several supermarkets and these may be 2500 square metres or more, though a maximum is usually stipulated. Big box stores will have separate zones. In a district centre, there may only be space for one full-line supermarket and its maximum floor space might be set lower at say 1500 or 1800 square metres. In local or neighbourhood centres, the supermarket might be limited to 1000 square metres. Other restrictions and requirements may also affect the siting of large supermarkets, such as those relating to traffic and parking, building and works, urban design, and contributions to open space and local services.

1 The Impact on Retail Competition

Such planning policy does not aim to zone in favour of particular companies or ration land between them.⁹⁷ Most clearly, planning authorities have not been required to administer a ‘competition test’; they do not need to ensure that no one single company gains ‘too many’ of the available sites in a catchment.⁹⁸ As we see below, that task has been left to the competition regulator, the ACCC. In a given situation, the plan might, indirectly, favour land that a particular company happens to hold or the model that particular companies apply when building stores. In principle, however, no company is favoured by the arrangement of the hierarchy. Any company may benefit from the hierarchy, provided that company has land in the right place and is prepared to tailor its model to the hierarchy, eg, to reduce its floor space in smaller centres. It does not fall foul of the proposed Harper Review injunction that arrangements not favour particular operators.

When a variation from the hierarchy is sought, planning regulators may consider, amongst other factors, whether the development will detract from the vitality and viability of the centres established in the initial plan. It may not. A rule of thumb has been to determine whether it will lead to a loss in custom or a vacancy rate of more than 10 per cent in an established centre.⁹⁹ Should it tip the balance of the factors against the new development, it provides some safeguard for the stores and other services (including public services) that were prepared to invest in the existing centres.

[T]he planning authority is not considering the economic competition between individual businesses but whether the impact of proposed new centres would lead to unacceptable vacancy rates, underutilisation of land and underutilisation of

Planning Systems – Barriers to Entry for Grocery Retailing’ (Report, Department of the Treasury (Cth), July 2010).

96 For a clear exposition of this regulation, see SGS Economics and Planning, above n 95. For a clear example, see Planning and Land Authority (ACT), *Territory Plan 2008*, Republication No 189, 5 July 2017, pt 4.2 (‘*Commercial Zones Development Code*’) pts B–D.

97 The ACT Supermarket Competition Policy was a short-lived exception, favouring Supabarn with Crown land sites: see below nn 185–6 and accompanying text.

98 Such a test was adopted in the United Kingdom; though Tesco endeavoured to block its implementation: see Antony Seely, *Supermarkets: Competition Inquiries into the Groceries Market* (Commons Briefing Papers SN03653, House of Commons Library, Parliament of the United Kingdom, 2 August 2012).

99 See, eg, *Nascon v Maroondah* [1996] VCAT 388.

existing infrastructure, and would have undesirable impacts in terms of lengthening journeys to shop.¹⁰⁰

It does not fall foul of the proposed Harper Review injunction that individual businesses not be considered.

Rather, without discriminating between companies, planning policy limits commercial freedom, placing restrictions on the numbers, locations, proximities, sizes and formats of stores within a precinct or municipality.¹⁰¹ Consequently, any company, even though it has the private resources to do so, may be denied the freedom to establish or extend a store because it falls outside the retail zones and the hierarchy of centres. By limiting geographical locations, floor areas and store formats, planning policy acts as one of the restrictions (along with other factors we acknowledged above such as demographic shifts and transport hold-ups) on the way that companies may choose to compete. So, there is no fundamental legal right of commercial establishment.¹⁰²

Where the retail use is neither a permitted use or a prohibited use, then an applicant will commonly need to apply to the authority for a permit for a discretionary use, for example for a store to be built with extra floor space, or request it to prepare a spot rezoning amendment, for a store to be located in another place.¹⁰³ The development is then subject to public scrutiny. The applicant must submit plans and negotiate clearance with the council or other responsible planning authority. And at this stage, third parties such as commercial competitors or local residents may be entitled to make an objection to the grant of a permit or make a submission opposing an amendment.

Where the council or other authority rejects a developer's application, the applicant may appeal the decision to a tribunal or panel. Here again in some cases they may face opposition from third parties as well as the planning authority, depending on the legislative provision for third party participation and the preparedness of third parties to negotiate the rigours of the process.¹⁰⁴ Even if

100 Des Eccles and Tannetje L Bryant, *Statutory Planning in Victoria* (Federation Press, 4th ed, 2011) 82; see also at 128–9.

101 Productivity Commission, 'Relative Costs of Doing Business', above n 3, ch 6.

102 Cf the constitutional regime in the European Union, see Willem K Korthals Altes, 'Freedom of Establishment versus Retail Planning: The European Case' (2016) 24 *European Planning Studies* 163. There is a bigger story here of supermarket home countries pursuing trade and investment treaties to obtain market access in other countries for their large supermarket 'distribution services': see Cohen, 'Supermarkets in India', above n 19; Frank K Upham, 'Retail Convergence: The Structural Impediments Initiative and the Regulation of the Japanese Retail Industry' in Suzanne Berger and Ronald Dore (eds), *National Diversity and Global Capitalism* (Cornell University Press, 1996) 263, recounting the United States campaign against the Japanese Large Store Law (the dispute would later go to the World Trade Organization).

103 See, eg, *Planning and Environment Act 1987* (Vic) ss 21, 57. Note that New South Wales is altering the process for plan amendments: see Leesha McKenny, 'Planning Minister Rob Stokes Announces Changes to Pre-gateway Reviews', *The Sydney Morning Herald* (online), 2 September 2015 <<http://www.smh.com.au/nsw/planning-minister-rob-stokes-announces-changes-to-pregateway-reviews-20150901-gjcg1x.html>>; now Environmental Planning and Assessment Amendment Bill 2017 (NSW).

104 Some jurisdictions are less accommodating of third party participation, especially at the appeal stages, and it is a target for reformers who wish to expedite the development assessment process. For a review, see Madeleine Figg, 'Protecting Third Party Rights of Appeal, Protecting the Environment: A Tasmanian Case Study' (2014) 31 *Environmental and Planning Law Journal* 210.

the planning authority does approve of the application, the applicant may face a challenge. For example, in Victoria, if the planning authority cannot accommodate the objections to the rezoning, the matter must go before a panel at the state level (Planning Panels Victoria ('PPV')).¹⁰⁵ Should the council or other planning authority grant a permit for a discretionary use within a zone, third party objectors can still appeal to a tribunal at state level (Victorian Civil and Administrative Appeals Tribunal ('VCAT')).¹⁰⁶ It is the use of this process by commercial competitors to challenge and delay the development which the Harper Review and others see as allowing these parties at times to 'game the system'.

When compared with a right of establishment, this process adds to the time and transaction costs incurred in developing supermarkets and sometimes it leads to outright refusals. As such, it might be regarded as a barrier to entry by a new store or a new business. But in making this determination it is important to assess the impact of these extra costs. For instance, the Shopping Centre Council of Australia did not think that the planning regulation, and specifically the centre policies, had restricted the space available to supermarkets or led to higher rents for retailers.¹⁰⁷ Research from a similar planning system in the United Kingdom suggests that grocery prices are increased where the planning regulation restricts the entry of large supermarkets, but other research finds that the impact is often overstated.¹⁰⁸

2 *The Impact on Public Benefit*

On the other hand, planning regulation has benefits for both large and small retailers. Zoning makes land available for retail that the market might otherwise allocate to residential, industrial, office or other uses that are considered more profitable. Planning controls gather the larger supermarkets together with other shops and services in town centres. They allow consumers 'to shop around in the one location, compare products and prices and make more informed decisions'.¹⁰⁹ They give some certainty to the investment of the shopping centre owners and the supermarkets which have come into the centres.¹¹⁰ They generate custom for the small shops and services which are sited alongside them. Such 'agglomeration' also reduces the impact on others should one large supermarket be closed. The controls guard against the blight of empty shops and failed shopping centres strung along the road.¹¹¹

105 *Planning and Environment Act 1987* (Vic) pt 3.

106 *Planning and Environment Act 1987* (Vic) pt 4.

107 Shopping Centre Council of Australia, above n 55, 9, 13–14.

108 Paul Cheshire, Christian Hilber and Ioannis Kaplanis, 'Land Use Planning: The Impact on Retail Productivity' (2011) 16 *CentrePiece* 25. Cf Rachel Griffith and Heike Harmgart, 'Supermarkets Competition in England and Planning Regulation' (2012) 22 *International Review of Retail, Distribution and Consumer Research* 1.

109 City of Sydney, Submission to Competition Policy Review, *Competition Policy Review: Draft Report*, 17 November 2014, 10.

110 Shopping Centre Council of Australia, above n 55, 21.

111 Cf USA, a looser planning regime in many places: see Lydia DePillis, 'Towns Fear for Life after Walmart: The Company's "Big Box" Killed Off Local Stores, and Now It Is Leaving', *Washington Post*

Planning also enables government infrastructure agencies to co-locate public transport and other publicly subsidised services such as crèches, schools, gardens, libraries and post offices together with retail and other commercial uses. It is worth remembering that the MSCs also benefit from the provision of public infrastructure; the road networks make the supermarkets accessible, not only to customers by car, but also to the trucks that deliver the produce just in time from ports, cool stores and warehouses. Such logistics realise the economies of scale and scope of the MSCs' long supply chains.¹¹²

At the same time, the controls reserve space for small (and it so happens commonly independent) businesses to run small grocery stores in local residential areas. Indeed, governments can do more than reserve space; should they choose, they can provide infrastructure for enterprising new businesses. While they may struggle with business regulation of various kinds, small stores do not generally face planning regulation restrictions on their establishment. Rather, small stores face economic challenges. As one interviewee advocates, such initiatives provide incubation spaces for cooperative stores, food stalls, farmers markets, food banks and urban gardens.¹¹³ A more traditional example is the municipal market. In Melbourne, the upgrade to the Dandenong market has been a success, although some fear the corporatisation that may accompany the refurbishment of the Queen Victoria market.¹¹⁴

Such initiatives are part of a broader plan to create urban alternatives. Some municipalities are trying to design localities that once more make off-road walking and cycling feasible.¹¹⁵ They are looking for ways to stimulate local

(Washington), 12 February 2016, 14; Liam Plevin, 'US Malls Go Back to the Drawing Board', *The Australian* (online), 26 November 2015 <<http://www.theaustralian.com.au/business/wall-street-journal/us-shopping-malls-go-back-to-the-drawing-board-as-sales-fall/news-story/2e9c98ea5cef1f96d5ccc3ed54cab9f>>; Nicolas Copeland and Christine Labuski, *The World of Wal-Mart: Discounting the American Dream* (Routledge, 2013) ch 6.

- 112 See, eg, Leorey Marquez, Andrew Higgins and Silvia Estrada-Flores, 'Understanding Victoria's Fruit and Vegetable Freight Movements' (Final Report, CSIRO, November 2010). See also Aisha Dow, 'Could Cargo Bikes Replace Delivery Vans?' *The Age* (online), 15 June 2016 <<http://www.theage.com.au/victoria/could-cargo-bikes-replace-delivery-vans-20160615-gpjvaa.html>>; Caroline James, "'Choking' Fears if Home Delivery Left Unregulated', *The Sydney Morning Herald* (online), 16 January 2017 <<http://www.smh.com.au/small-business/managing/choking-fears-if-home-delivery-left-unregulated-20170110-gtoyuj.html>>. The geography of supply chains, such as 'food miles' and food security, is beyond the scope of this article. MSC relations with growers and suppliers are the subject of another study in the project, see Caron Beaton-Wells and Jo Paul-Taylor, 'Problematising Supermarket-Supplier Relations: Dual Perspectives of Competition and Fairness' (2017) forthcoming *Griffith Law Review*.
- 113 Interview with retail economist. See Tracie McMillan, *The American Way of Eating: Undercover at Walmart, Applebee's, Farm Fields and the Dinner Table* (Scribner, 2012) 238. Furthermore, creative legislators and lawyers develop hybrid legal forms that will facilitate social enterprises such as food cooperatives: see Bronwen Morgan and Declan Kuch, 'The Socio-legal Implications of the New Politics of Climate Change' (2016) 39 *University of New South Wales Law Journal* 1715, 1722.
- 114 Aisha Dow, 'Queen Victoria Market: Actor Sigrid Thornton Joins Chorus Opposing Redevelopment', *The Age* (online), 21 August 2016 <<http://www.theage.com.au/victoria/queen-victoria-market-actor-sigrid-thornton-joins-chorus-opposing-redevelopment-20160821-gqxqip.html>>.
- 115 See, eg, the City of Wodonga in Victoria: Jenny Donovan, Kirsten Larsen and Julie-Anne McWhinnie, *Food-Sensitive Planning and Urban Design: A Conceptual Framework for Achieving a Sustainable and Healthy Food System* (National Heart Foundation of Australia, March 2011) 52; Environment, Planning and Sustainable Development Directorate, 'Incorporating Active Living Principles into the Territory

employment and entertainment opportunities, thereby reducing the number of long journeys across the city and increasing a sense of local community.¹¹⁶ Community centres provide public benefits additional to the contribution they make to competition. The best centres also build softer but vital values such as sociality and shared spaces.¹¹⁷ These need not all be town centres at transport hubs; there is a place for more local centres with small grocery stores, cafes, services, seats and so on.

Finally, it is important to appreciate that the planning process mediates anti-development conflict that might otherwise spill into the courts or onto the streets. One aim of this process is to enable participation by those without deep pockets, such as small businesses and local residents; in this way it informs decisions and serves democracy.¹¹⁸ The need for approvals creates a point at which public authorities such as roads, transport, heritage and environmental as well as planning agencies can attach urban design conditions to development. The benefits of development can be compared with those of social coordination and amenity, even if the latter may seem less tangible and more diffuse across the community than the direct financial benefits of development. But the process assists developers too. Planning agencies and tribunals work with the parties at the plan and application stages.¹¹⁹ There is also provision, more controversially, for the state minister to call-in applications for permits or make amendments, bypassing normal planning processes and giving the go-ahead to developments.¹²⁰

B Edge and Out of Town Developments

The contest between private and public planning regulation is at its sharpest in the go-ahead for new middle-level centres (purpose-built malls with one full-line supermarket and complementary services) on the edge or outside of centres

Plan: Draft Variation Number 348' (Information Paper, Australian Capital Territory Government, December 2016) 24–9. The Victorian Planning Authority is endeavouring to do this with its design of town centres in the greenfield growth areas, see Victorian Planning Authority, 'Precinct Structure Planning Guidelines' (State Government of Victoria) <<https://vpa.vic.gov.au/greenfield/psp-guidelines/>>, and, as an example, the Draft Plan for the Rockbank major town centre in Melton: Victorian Planning Authority, 'Rockbank: Precinct Structure Plan' (Report, State Government of Victoria, August 2016) <<https://vpa.vic.gov.au/project/rockbank-precinct-structure-plan/>>. See also Jeff Speck, *Walkable City: How Downtown Can Save America, One Step at a Time* (North Point Press, 2012).

- 116 Outer Suburban/Interface Services and Development Committee, Parliament of Victoria, *Inquiry on Growing the Suburbs: Infrastructure and Business Development in Outer Suburban Melbourne* (2013) 79–80.
- 117 Ian Clarke and Sunil Braga, 'The Economic and Social Role of Small Stores: A Review of the UK Evidence' (2010) 20 *International Review of Retail, Distribution and Consumer Research* 187, 191–2. More broadly speaking, this can be seen as putting 'place' back into regulation: see Morgan and Kuch, above n 113, 1730, suggesting that property law (a form of private regulation) disembodies place.
- 118 Elizabeth J Taylor, 'Fast Food Planning Conflicts in Victoria 1969–2012: Is Every Unhappy Family Restaurant Unhappy in Its Own Way?' (2015) 52 *Australian Planner* 114, 121–2.
- 119 With their advisors, the MSCs are experienced at this and they conduct their own consultations with communities now too: Interviews with retail executives.
- 120 See, eg, *Planning and Environment Act 1987* (Vic) ss 21, 97B; see Eccles and Bryant, above n 100, 28, 98, expressing reservations about these powers. Though Buxton, Goodman and Moloney still see this power as part of the neoliberal approach: certainty and transparency are sacrificed so long as development is facilitated: Buxton, Goodman and Moloney, above n 32, 35.

designated in the plan. Their restriction is a target of the Harper Review's recommendation that restrictions be lifted on the number and proximity of any type of supermarket in an area. To see how the contest is currently played out, we start with two examples from Melbourne, one in a new growth area and one in a recently established suburb. We then review the regulatory response to ALDI's strategy to site out of centre.

In the municipality of Whittlesea, Coles proposed (with its consortium partner Ascenzio) to build a centre with a 3300 square metre supermarket and other shops and services.¹²¹ The development was to be sited in the new growth suburb of Mernda where it would stand in Plenty Road along the road from the Mernda town centre where Woolworths had committed to build a \$100 million shopping centre under the Mernda Town Centre Comprehensive Development Plan, the Plan having been approved by the Melbourne Metropolitan Planning Authority. The town centre was to have two department stores, 80 shops and services, and two supermarkets.

Coles argued that the permit was necessary because Woolworths, as the developer of the town centre, could block Coles from entering the centre or impose unfavourable lease terms on its participation.¹²² In 2014, the Whittlesea Council granted the Coles development a permit. The owner of the land for the town centre, Fabcot Pty Ltd, sought review of this decision and VCAT overturned the grant, finding that the use and development, including a supermarket, was not in accordance with the Mernda Town Centre Plan. The Plan envisaged that core retailing would be integrated into a main street and urban village environment.¹²³ In this instance, it was the Coalition Government Minister for Planning, Matthew Guy, who offered to amend the planning scheme to enable the development to go ahead, saying, '[i]t is not good enough to have a single supermarket provider controlling every designated retail site in the growth corridor'.¹²⁴

In 2014, the sites for these two competing centres were green fields. By 2016, *The Age* newspaper was running a story of a resident who was moving closer in to the city because the roads in Mernda had become gridlocked, and residents

121 The background information provided here regarding this development is drawn from the VCAT decision and subsequent media coverage: see *Fabcot Pty Ltd v Whittlesea CC* [2014] VCAT 600; Simon Johanson, 'Woolies Blocks Coles Bid for Growth Suburb', *The Sydney Morning Herald* (online), 11 June 2014 <<http://www.smh.com.au/business/woolies-blocks-coles-bid-for-growth-suburb-20140610-39vd8.html>>.

122 Johanson, 'Woolies Blocks Coles', above n 121.

123 *Fabcot Pty Ltd v Whittlesea CC* [2014] VCAT 600, [66].

124 Simon Johanson, 'Planning Minister Seeks to Break Deadlock in Coles and Woolworths Supermarket Stoush', *The Age* (online), 16 July 2014 <<http://www.theage.com.au/victoria/planning-minister-seeks-to-break-deadlock-in-coles-and-woolworths-supermarket-stoush-20140715-zt7nm.html>>. See Minister for Planning (Vic), 'Whittlesea Planning Scheme: Amendment C193' (Explanatory Report, State Government of Victoria). The amendment was approved in John Phillips, 'Whittlesea Planning Scheme – Notice of Approval of Amendment – Amendment C193' in Victoria, *Victoria Government Gazette*, 16 October 2014, 2427.

were finding it difficult to move round Mernda or to get out of the suburb.¹²⁵ Public Transport Victoria says the South Morang train line will be extended to the Mernda town centre by the year 2027.¹²⁶

In the municipality of Melton, the Caroline Springs Comprehensive Development Plan designated land within the residential development of Caroline Springs as the town centre.¹²⁷ The centre was built with a shopping mall, a car park and a lake. Government offices, schools and other services are adjacent. Buses run to the centre from railway stations and a new Caroline Springs railway station has now opened.¹²⁸ Our visit to the centre finds that the shopping mall houses a large Coles supermarket; there is also now an ALDI and several specialist grocery stores, along with many other retail shops.

In 2011, property developers proposed to expand a middle-sized shopping centre 2 km outside the Caroline Springs town; the Burnside centre is sited on the Western Highway next to a retirement village and residential estate. This centre already contained Coles and ALDI supermarkets. Woolworths had expressed interest in securing tenancies for a supermarket, discount department store, liquor store and petrol station. The Melton Council supported an amendment to the zones in the planning scheme to accommodate this development. To provide more retail space, land would be rezoned from Mixed Use to Business 1; more space was also to be made available for office use. When objections were made, one from Lend Lease, the developer of the Caroline Springs town centre, the amendment was assigned to a PPV panel for consideration. The Panel was also to consider an expansion to the Caroline Springs centre.

After conducting a hearing and examining the submissions, the panel recommended against the Burnside amendment.¹²⁹ It found that the development would undermine the viability of the Caroline Springs town centre expansion, breaching state retail planning policies and the plan for the municipality, without providing a net community benefit. The panel also found against the development on other planning grounds such as traffic and transport. At the time, the Coalition Minister of Planning, Matthew Guy, did not exercise his power to move against the recommendation. However after the state election, on 15 July 2013, the Minister's new commercial zones came into operation; in commercial zone 1 supermarkets became uses 'as of right' (see Part IV(D) below). In 2015,

125 Clay Lucas, 'Driven Out of Mernda by Two-Hour Traffic Jams', *The Age* (online), 29 April 2016 <<http://www.theage.com.au/victoria/driven-out-of-mernda-by-twohour-traffic-jams-20160428-gohgee.html>>.

126 Now the Government has promised three stations: see Adam Carey, 'Hawkestone Is Go: Third Train Station Announced for Mernda Rail Extension', *The Age* (online), 15 November 2016 <<http://www.theage.com.au/victoria/hawkestone-is-go-third-train-station-announced-for-mernda-rail-extension-20161114-gspb8i.html>>.

127 The background information provided here regarding this development is drawn from the PPV report and the authors' visits to the area: Jenny Moles and Kevin Breen, 'Melton Planning Scheme – Amendments C91 and C112 – Proposed Floorspace Expansion at Caroline Springs and Burnside Activity Centres' (Panel Report, 21 September 2012).

128 'New Caroline Springs Train Station May Reach Capacity on Second Day, Mayor Says', *ABC News* (online), 28 January 2017 <<http://www.abc.net.au/news/2017-01-28/caroline-springs-train-station-may-reach-capacity-on-second-day/8219938>>.

129 Moles and Breen, above n 127, 78.

the new Labor Government Minister for Planning, Richard Wynne, cooperated with the Melton Council on amendments to ensure the developer had enough land in this zone to go ahead with the shopping centre expansion.¹³⁰ To date, the Woolworths supermarket has not been built.

These two cases illustrate the regulatory tension that arises when private and planning regulation are in conflict. The process of planning approval can be complicated and costly. But it is flexible enough, too flexible perhaps, to let supermarkets build outside the hierarchy. On the one hand, the process provides the planning authorities with opportunities to consider, with the input of other stakeholders, net community benefit. Yet it also provides opportunities for ministers to do deals with developers.¹³¹ Is the corrective to this messy process to make development as-of-right or rather to strengthen planning principles?

C ALDI Experience

We can now examine more systematically the principle and process of out-of-town supermarkets with an evaluation of the experience of one high profile entrant – ALDI. Based in Germany, ALDI is a privately owned internationally coordinated operation. The ALDI model is a pared down version of the MSC model. It has a limited range of products, around 1350 items, many of which are exclusive private label products. ALDI stores have a smaller but still large floor space of around 1600–1800 square metres and follow a strict box design with minimal adornment; many of the groceries are stacked in their pallets and ALDI stores have few staff on the floor. Rivals might well envy the simplicity and modality of ALDI's logistics.¹³² ALDI competes with the MSCs squarely on price. Comparisons put a basket of its groceries significantly below the MSC equivalent.¹³³ ALDI has tapped a demand and has gained a substantial market share.¹³⁴ As ALDI has gained a foothold, it has begun to vary its offer with more fresh food, and liquor, along with its signature sales of quirky products such as ski wear and power tools.¹³⁵

130 See Melton City Council, 'Minutes of the Ordinary Meeting of the Melton City Council' (Minutes, 24 June 2014) 28–30. See also Michael Kirsch, 'Melton Planning Scheme Amendment C171' (Panel Report, Planning Panels Victoria, 3 May 2017).

131 See Cameron K Murray and Paul Frijters, 'Clean Money in a Dirty System: Relationship Networks and Land Rezoning in Queensland' (Discussion Paper No 9028, Institute for the Study of Labor, April 2015). A more outlier issue, beyond the scope of this article, is highlighted in Independent Commission Against Corruption, 'Anti-corruption Safeguards and the NSW Planning System' (Report, February 2012).

132 Richard Dunford, Ian Palmer and Jodie Benveniste, 'Strategy for Successful Entry into a Concentrated and Highly Competitive Market' (Paper presented at the Australian and New Zealand Academy of Management, Canberra, 7–10 December 2005).

133 Rachel Clemens, 'Want to Spend Less at the Checkout?', *Choice* (online), 5 June 2017 <<https://www.choice.com.au/shopping/everyday-shopping/supermarkets/articles/cheapest-groceries-australia>>.

134 Roy Morgan Research, 'Aldi Hits New High in Supermarket Wars' (Press Release No 7234, 17 May 2017) <<http://www.roymorgan.com/findings/7234-woolworths-coles-aldi-iga-supermarket-market-shares-australia-march-2017-201705171406>>.

135 Retail World Editor, 'Aldi Reveals New Business Strategy', *Retail World* (online), 19 May 2017 <<https://www.retailworldmagazine.com.au/aldi-reveals-new-business-strategy/>>.

The MSCs are meeting the competition from ALDI in several ways. They play on the advantage of their full-line offer and seek ways to bring their own prices down further. They also look to comfort from regulation, asking, for instance, that ALDI reveal the taxes it is paying for fear it might be receiving a competitive advantage.¹³⁶

Siting is another way that ALDI can compete, and planning regulation is implicated in the competition for space. ALDI has complained of difficulty obtaining the go-ahead for suitable sites and has made submissions to competition inquiries, seeking more ‘as-of-right’ siting for supermarkets in and around town centres.¹³⁷ ALDI’s stated concern was that the zones for town centres were being drawn too tight to give them space alongside the MSCs. However, a key objective of ALDI early on was the right to establish their middle-sized supermarkets on the edge or outside of the town centres, away from the MSCs. This locus favoured cheap sites in old shopping strips and village centres, where ALDI would also be close competition for the smaller IGAs. ALDI wanted development to be as-of-right because it found the spot rezoning process too slow, costly and unpredictable. According to ALDI’s submissions, the process needed to be streamlined and fast-tracked, with only limited third party participation, especially for anti-competitive objections.¹³⁸

While the discretionary system remained, ALDI was obliged to obtain amendments and permits for its out of town supermarkets. Initially, its applications received a positive reception from the planning authorities. Indeed, one of our interviewees, a rival, felt that ALDI had enjoyed ‘a dream run’.¹³⁹ In Victoria, the state government, keen to facilitate its entry into the market, met with ALDI executives. Where councils opposed amendments, state ministers called in decisions. For example, in June 2010, the Victorian Labor Government Planning Minister, Justin Madden, constituted an advisory committee from PPV to hear applications to rezone land, from residential to business, for five new ALDI stores around Victoria. The five amendments were approved, though a permit to build a store in Geelong West was at that time refused on design and heritage grounds.¹⁴⁰

While ALDI’s strategy has sometimes breathed life into struggling small centres and other sites, it breaches the logic of the centre hierarchy. In a consultancy disposed towards competition, prepared for the Commonwealth Treasury, urban planning consultancy SGS Economics and Planning recommends that planning regulators rigorously apply a sequential test to

136 Madeleine Heffernan, ‘Aldi Accounts Shed Some Light on Australian Operations’, *The Sydney Morning Herald* (online), 29 August 2016 <<http://www.smh.com.au/business/retail/aldi-accounts-shed-some-light-on-australian-operations-20160828-gr2yef.html>>. In Australia, ALDI takes the form of a limited partnership rather than a public company.

137 ALDI Stores, Submission to Competition Policy Review, *Competition Policy Review: Draft Report*, 11 June 2014.

138 Ibid. The ALDI experience is analysed in SGS Economics and Planning, above n 95, ch 4.

139 Interview with retail executive.

140 Mark Marsden et al, ‘ALDI Proposals Boroondara, Mornington Peninsula and Greater Geelong’ (Report of the Advisory Committee, 24 June 2010) 5–6.

proposals for supermarkets outside of town centres.¹⁴¹ The test requires that the first question be whether there was no existing space available in the town centre. The consultancy wonders whether ALDI was protesting too much about its experience; perhaps the company was simply not prepared to pay the market price for leases in the centres.¹⁴² Only where space is not available in the town centres, it recommends, should the proposal to relax floor space limitations outside then be considered.¹⁴³ Approvals should then be determined on a net community benefit basis. While the decision should appreciate the demand for more retail space and the fresh competition for the MSCs, the amenity of places must also be respected. The emphasis should be on innovative designs and formats rather than simply conceding more floor space.

As ALDI gained ground, planning authorities became more critical of its applications to locate stores on the edge or outside of town centres. They also began to question the box format of ALDI when it was going to dominate a small centre. Consistently with the sequential test, in denying an ALDI application to build in Turrumurra, the New South Wales Planning Department told Ku-ring-gai Council that supermarkets should be sited in retail centres near railway stations, not along roads outside residential areas.¹⁴⁴ Likewise when refusing an application in Busselton, Western Australia, the Council determined that it would fragment the city centre, stop shopping in the central business district ('CBD'), and do nothing for social interaction.¹⁴⁵ And again when denying an ALDI application to build in Hilton, the Fremantle Council said that it was not a sensible urban design, demolishing small shops for a big box store that would be turned inwards away the street.¹⁴⁶ Even in the supportive state of Victoria, VCAT has ruled against an edge of centre ALDI store.¹⁴⁷ These decisions have come after the process accepts expert and community input.

It is notable that ALDI, more recently, has been siting its stores in town centres alongside one or other of the MSCs. This siting corresponds to the view that ALDI is complementary as much as competitive with the MSCs. Shoppers buy basics cheap from ALDI's limited range but also shop at the MSCs in the

141 SGS Economics and Planning, above n 95, 35.

142 Ibid 26. See also Madeleine Heffernan and Simon Johanson, 'Aldi Amasses \$2 Billion Property Portfolio as It Introduces Stores across Australia', *The Sydney Morning Herald* (online), 23 June 2017 <<http://www.smh.com.au/business/retail/aldi-amasses-2-billion-property-portfolio-as-it-introduces-stores-across-australia-20161026-gsatqr.html>>.

143 Ibid.

144 Mike Coles, 'Aldi Supermarket Rejected in Turrumurra', *The Kuringai Examiner* (online), 12 March 2016 <<http://www.kgex.com.au/aldi-supermarket-rejected-turrumurra/>>.

145 Emma Kirk, 'Busselton Aldi Store Decision Likely to be Appealed', *Busselton-Dunsborough Mail* (online), 17 February 2016 <<http://www.busseltonmail.com.au/story/3733932/fight-for-busselton-aldi-store-to-continue/>>.

146 Brendan Foster, 'Supermarket Giant Aldi Cans Its Plans for a Discount Supermarket in Fremantle', *WA Today* (online), 23 July 2015 <<http://www.watoday.com.au/wa-news/supermarket-giant-aldi-cans-its-plans-for-a-discount-store-near-fremantle-20150723-giix2r.html>>.

147 *Aldi Stores v Whitehorse CC* [2014] VCAT 273.

same centre for further items. ALDI's biggest impact economically may thus be on the business of smaller independent supermarkets.¹⁴⁸

Despite the challenges it has faced, ALDI does not appear to have been constrained significantly by planning regulation, successfully employing siting strategies to establish more than 400 stores thus far. With most located in Victoria, New South Wales, the Australian Capital Territory ('ACT') and Queensland, ALDI has recently moved into South Australia and Western Australia.¹⁴⁹ Currently Coles operates 800 and Woolworths 992 stores across Australia.¹⁵⁰

D The New Victorian Zones

Welcomed by the Harper Review and the Commonwealth Treasury, the recent reform of the commercial zones in Victoria may be the prototype for the reform initiatives being sought through the Council of Federal Financial Relations.¹⁵¹ While reforms in other states are still in progress, it is worth noting the direction of this reform.

Following from the report of a special committee,¹⁵² the Coalition State Government recast the zoning system and placed the siting of retail stores on a more liberal basis.¹⁵³ Under the reform, business zones are replaced with commercial zones.¹⁵⁴ Commercial 1 Zone replaces Business 1, 2 and 5 Zones. In Commercial 1 Zone, retail shops become uses as of right, whereas in Business 5 Zone they were prohibited.¹⁵⁵ The reform also removes the caps that councils may

148 Elizabeth Knight, 'The Aldi Effect: Why Your Grocery Bill Is Shrinking', *The Sydney Morning Herald* (online), 20 June 2016 <<http://www.smh.com.au/business/retail/the-aldi-effect-why-your-grocery-bill-is-shrinking-20160620-gpn157.html>>; Simon Evans, 'Aldi Boss Says No Fine-Tuning Needed for SA, WA', *The Sydney Morning Herald* (online), 2 February 2016 <<http://www.smh.com.au/business/retail/aldi-boss-says-no-finetuning-needed-for-sa-wa-20160201-gmj94u.html>>.

149 'Aldi's Four-Year Expansion Begins', *Inside Retail Australia* (online), 1 February 2017 <<https://www.insideretail.com.au/blog/2017/02/01/aldis-four-year-expansion-begins/>>.

150 See Wesfarmers, 'Coles Creates 115 Jobs at Its Milestone 800th Supermarket' (Latest News, 22 June 2017) <<http://www.wesfarmers.com.au/util/news-media/article/2017/06/22/coles-creates-115-jobs-at-its-milestone-800th-supermarket>> and Woolworths Group, *Woolworths Supermarkets* <<https://www.woolworthsgroup.com.au/page/about-us/our-brands/supermarkets/Woolworths>>.

151 *Harper Review Final Report*, above n 2, 128; Fraser, above n 8. For reforms so far in other states and territories up to 2014, see issue 51(2) of *Australian Planner*, 'Planning Reform in Australia', published in 2014; see also Peter Williams, 'The Course of Statutory Planning System Reform and Fast-Tracking Development' (2014) 31 *Environmental and Planning Law Journal* 439. Several have major reforms in process now, including New South Wales, Queensland and South Australia.

152 Reformed Zones Ministerial Advisory Committee, 'Commercial and Industrial Zones Report' (Report, 28 February 2013) chs 5–7.

153 See Department of Transport, Planning and Local Infrastructure (Vic), 'Reformed Residential, Commercial and Industrial Zones for Victoria' (Advisory Note No 52, July 2013).

154 The new zones are posted on Planning Schemes Online, above n 89; see Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC100, 15 July 2013, cl 34.01 (Commercial 1 Zone), 34.02 (Commercial 2 Zone). For their introduction, see Minister for Planning (Vic), 'Victoria Planning Provisions Amendment VC100' (Explanatory Report, 12 July 2013) [15], also available at Planning Schemes Online.

155 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC100, 15 July 2013, cl 34.01-1 s 1 (condition for 'Shop').

put on the floor spaces for shopping centres overall.¹⁵⁶ Commercial 2 Zone replaces Business 3 and 4 Zones. In Commercial 2 Zone, supermarkets up to a floor area of 1800 square metres are now as-of-right, together with other shops to a floor area of 500 square metres, whereas in Business 4 Zone they were prohibited.¹⁵⁷ Furthermore, permits may be sought for larger supermarkets.¹⁵⁸

These changes consolidate the capacity of the large retailers to construct stand-alone centres outside the designated activity centres.¹⁵⁹ They also allow freer use of the MSC model to remake existing centres and build in residential apartment developments. Of course, the impact will depend on how much land is zoned ‘commercial’ and where it is placed. Discussing a new growth area in Melbourne, one of our interviewees said there was already too much B1Z land (the Business 1 Zone predecessor to Commercial 1 Zone). The interviewee gave an example of where this led to a string of MSC centres along the main road; the suggestion being that the MSCs may have ‘over-estimated’ the population growth in the suburb.¹⁶⁰ A commentary said that the changes were significant because their B3Z, B4Z and B5Z predecessors were generally out-of-centre office, big box and industry based locations away from public transport.¹⁶¹ The Commercial 2 Zone’s 1800 square metre allowances were seen as especially favourable to ALDI.¹⁶²

In keeping with a neoliberal approach, such as-of-right development pre-empted strategic planning: the zones become the limits of the plan and the zones generally accept the market’s decisions as to location and size.¹⁶³ There is less of a need to observe the planning policies and engage the processes in order to obtain a permit or an amendment. The fiercest critics discern a political agenda in such reforms, an attack on planning red tape and a distraction from the failures of the markets.¹⁶⁴ It is interesting then that the Victorian reform drew resistance from within the Liberal-National Party coalition. After consultations, the Government exempted municipalities outside the Melbourne metropolitan region

156 Ibid cl 34.01. For implementation of Amendment VC100, see further Minister for Planning (Vic), *Banyule, Boroondara, Brimbank, Cardinia, Casey, Darebin, Glen Eira, Greater Dandenong, Hume, Kingston, Knox, Manningham, Maribyrnong, Melbourne, Melton, Monash, Moreland, Mornington Peninsula, Whitehorse, Whittlesea, Wyndham and Yarra Planning Schemes*, Amendment GC6, 5 June 2014.

157 Ibid cl 34.02-1 s 1 (condition for ‘Supermarket’).

158 Ibid cl 34.02-1 s 2 (condition for ‘Supermarket’).

159 Michael Buxton and Robin Goodman, ‘The Impact of Planning “Reform” on the Victorian Land Use Planning System’ (2014) 51 *Australian Planner* 132, 137–8. The VPPs do include Policy Framework 17, ‘Economic Development’, which speaks on managing out-of-centre developments and discouraging single use centres unless they have a net community benefit: Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC100, 15 July 2013, cl 17.01-2.

160 Interview with retail executive.

161 Buxton, Goodman and Moloney, above n 32, 148.

162 Simon Johanson, ‘Planning Changes Set in Motion’, *The Sydney Morning Herald* (online), 3 July 2013 <<http://www.smh.com.au/business/property/planning-changes-set-in-motion-20130702-2p9vz.html>>.

163 Buxton, Goodman and Moloney, above n 32, 44.

164 Buxton and Goodman, above n 159, 134. The campaign is reminiscent of the contest in a similar planning system: see Alex Lord and Mark Tewdwr-Jones, ‘Is Planning “Under Attack”? Chronicling the Deregulation of Urban and Environmental Planning in England’ (2014) 22 *European Planning Studies* 345; Fiona Reynolds, *The Fight for Beauty: Our Path to a Better Future* (Oneworld, 2016) ch 9.

from the full force of the changes. Responding to a concern about the viability of country town centres, it provided two safeguards. In Commercial 1 Zone, these municipalities may still place caps on the leasable floor area for shopping centres overall.¹⁶⁵ In Commercial 2 Zone, they may not grant permits for supermarkets exceeding 1800 square metres.¹⁶⁶ Here again we see the tension between unfettered competition and social concerns.

The Government also attended to process. To centralise and expedite the making of precinct structure plans, the Government has established a growth areas authority (which has become the Victorian Planning Authority). However, where planning permits (VCAT) and zone amendments (PPV) are still needed, it retains the review processes. This includes the rights of third party objectors to participate, though fees have increased for third parties to initiate proceedings.¹⁶⁷

Our extended analysis produces two main findings. First, it shows that planning regulation already practises considerable flexibility in accommodating variations from its consolidation and coordination policies to provide space for Harvey's restless capitalist development. It shows second that the reform impetus is towards a more market driven configuration of space in keeping with Ebner's characterisation of regulation's first thrust. Neoliberalism remains attractive; a counter movement is active again but it is on the defensive in policy-making.

V COMPETITION REGULATION

While the NCP is to roll back public regulation, it recommends that a general competition regulation be maintained as a check against the accumulation and exercise of private power where it would substantially lessen competition in a market. It is important to assess just how much of a check this is on the private regulation of supermarket siting; we are interested in whether it adds to planning regulation of siting or indeed substitutes for it should planning regulation be reduced. This section first assesses the ACCC's oversight of the acquisition of supermarket sites. It then notes the ACCC's response to the strengthening of the test for misuse of market power.

A Acquisitions

Section 50 of the *Competition and Consumer Act 2010* (Cth) regulates corporations making acquisitions of businesses and property. These corporations need not have substantial market power already; the concern is that the acquisition will create such power and thereby substantially lessen competition in

165 Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC100, 15 July 2013, cl 34.01-1 s 1 (condition of 'Shop (other than Adult sex bookshop)').

166 Ibid cl 34.02-1 s 2 (condition of 'Supermarket'). In the most recent amendment to this clause, VC123, Greater Geelong has been made equivalent with metropolitan Melbourne: Minister for Planning (Vic), *Victoria Planning Provisions*, Amendment VC123, 13 November 2014, cl 34.02-1 ss 1–2.

167 Clay Lucas, 'New VCAT Charge Will Stop Objections, Help Developers, Say Resident Groups', *The Age* (online), 25 April 2016 <<http://www.theage.com.au/victoria/new-vcat-charge-will-stop-objections-help-developers-say-resident-groups-20160424-godu31.html>>.

a market. The section requires a definition of the market and then the application of a competition analysis.

In the supermarkets market, section 50 has been applied to the acquisition strategies of the MSCs.¹⁶⁸ Acquisitions in this context include the acquisition of a store on a site or the acquisition of a site itself – the ownership of land or the lease of it. The section allows for the market to be defined as local, regional or national.¹⁶⁹ An amendment to the section has removed the requirement that the market in question be substantial.¹⁷⁰ Responding to concerns about whether the provision dealt adequately with creeping acquisitions (the accumulation of individual stores that has the cumulative effect of substantially lessening competition over time), the amendment was intended to make clear that the acquisition of one store or site in a local market can fall within the purview of the section.¹⁷¹ Within local catchments, individual acquisitions become more sensitive. In the wider markets, each MSC might argue that it faces substantial competition from the other MSC and perhaps from others.¹⁷²

Also shaping the impact of the section is the analysis of the competition in that market. According to the section, factors to be taken into account when analysing the effect on competition include: the number of competitors and degree of concentration; the extent of substitutes available; the removal of a vigorous and effective competitor; the raising of barriers to entry by competitors; any countervailing power; and the nature of vertical integration.¹⁷³

The analysis might find that the competition remaining after the acquisition is enough to offset the acquisition; conversely the acquisition might even strengthen the competition. We noted above that the prevailing competition policy has been comfortable with two large corporations competing for the market. We turn now to the ACCC clearance practice to gauge the impact of this regulation.

Notification of proposed acquisitions is not compulsory under the Australian legislation. In 1999, a Parliamentary Committee recommended mandatory notification for the retailing sector.¹⁷⁴ This recommendation was not adopted. However, in 2007 a voluntary code of conduct did oblige those who were signatories to notify the ACCC of intended acquisitions.¹⁷⁵ The code was short-

168 Australian Competition and Consumer Commission, ‘The ACCC’s Approach to Merger Reviews’ (Factsheet No 04/14_851, 16 April 2014).

169 *Competition and Consumer Act 2010* (Cth) s 50(6).

170 *Competition and Consumer Legislation Amendment Act 2011* (Cth) sch 1 cl 2.

171 See Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2011 (Cth) [1.14]; see also at ch 4, providing the argument for regulation.

172 Note that the Harper Review recommends no further changes to strengthen section 50 against creeping acquisitions. The Review was of the view that changes would only complicate the law; it recalled the ACCC’s view in 2008 that the MSCs had grown more ‘organically’ than by acquisitions: *Harper Review Final Report*, above n 2, 321–3.

173 *Competition and Consumer Act 2010* (Cth) s 50(3). See generally Peter Armitage, ‘The Evolution of the “Substantially Lessening of Competition” Test – A Review of Case Law’ (2016) 44 *Australian Business Law Review* 74.

174 Joint Select Committee on the Retailing Sector, Parliament of Australia, *Fair Market or Market Failure: A Review of Australia’s Retailing Sector* (1999) xxii.

175 See Produce and Grocery Industry Code Administration Committee, ‘Produce and Grocery Industry Code of Conduct’ (December 2007) cl 8.1.

lived and in 2008 the ACCC did not press for mandatory reporting.¹⁷⁶ Notwithstanding, the MSCs did for a time cooperate with the ACCC in voluntarily notifying proposed acquisitions.¹⁷⁷ Now the MSCs use their discretion to decide whether an acquisition is significant enough to warrant clearance.¹⁷⁸

The ACCC applies an informal, graduated approach to clearance.¹⁷⁹ Most acquisitions (around 80 per cent, we were told) are considered low risk and are cleared privately at a pre-assessment stage without the ACCC conducting market inquiries.¹⁸⁰ There is no publicly available breakdown for these clearances. Clearances only go public if they are deemed significant, for instance, if there is opposition to the acquisition. The ACCC may then publish short findings of investigations on its website or occasionally undertake a full public competition assessment. We have tallied 33 such public clearances to the beginning of 2016, 25 concerning Woolworths and 8 Coles, 21 of the 33 concerning the acquisition of other stores and 12 the acquisition of land for new stores. In the overwhelming majority, clearances have been given, with a short statement that the acquisition will not substantially lessen competition, citing the presence of other competitors in the market.

There are instances in which the ACCC has refused or conditioned its clearance. In one, Woolworths failed to gain clearance for the acquisition of a land site at Glenmore Ridge in Western Australia, a catchment in which it ran the only full-line supermarket and the opportunity for competing supermarkets to enter the market elsewhere was limited. An ALDI store was already operating, but the ACCC felt it would be better if there were three different grocery businesses in all.¹⁸¹ In another, to gain clearance for the acquisition of a land site in Lakelands, Western Australia, Coles was required to undertake to divest, to a purchaser approved by the ACCC, another site it held in the catchment. The ACCC found that Coles already had the nearest supermarket; the only other supermarket proposed was an ALDI.¹⁸²

The clearest indication of the ACCC's permissive approach is the clearance given to Coles to acquire nine Supabarn stores in Canberra and Sydney.¹⁸³ There is not space to analyse this decision in detail, rather we should note its narrow focus when compared to planning regulation.

176 *Competitiveness of Retail Prices Report*, above n 3, 426–7.

177 *Ibid* 427. See also Australian Competition and Consumer Commission, 'Only Limited Acceptance by the Major Supermarket Chains of ACCC's Proposed Streamlined Acquisition Assessment Protocol' (Media Release No NR257/12, 7 December 2012).

178 Interview with retail executive.

179 Australian Competition and Consumer Commission, 'Informal Merger Review Process Guidelines' (September 2013).

180 Interview with government officers.

181 Australian Competition and Consumer Commission, 'ACCC to Oppose Woolworths' Proposed Acquisition of Glenmore Ridge Site' (Media Release, 6 June 2013).

182 Australian Competition and Consumer Commission, 'ACCC Requires Coles to Divest Supermarket Development Site to Secure Approval for New Supermarket at Lakelands, WA' (Media Release, 2 July 2015).

183 Australian Competition and Consumer Commission, 'Coles – Proposed Acquisition of 9 Supabarn Supermarkets' (Informal Review No 57681, 10 March 2016).

Supabarn has been a rare full-line supermarket competitor to the MSCs. With stores located predominantly in the ACT, the family-owned business had managed to gain a foothold despite the superior economic resources of the MSCs.¹⁸⁴ Supabarn was given a boost by the ACT's Supermarket Competition Policy which, for a while, allocated new growth sites on Crown land to it in preference to the MSCs.¹⁸⁵ However, that policy attracted fierce political opposition and the ACT Government jettisoned it in 2013.¹⁸⁶ In 2015, Supabarn decided it would sell the majority of its stores and sites to Coles. The ACCC embarked on a clearance review, which included a statement of issues and consultations with industry and the public.¹⁸⁷ In March 2016, the ACCC advised that it would not oppose Coles' acquisitions in the Canberra Civic Centre and the suburbs of Kaleen and Wanniasa or the acquisitions at Five Dock and Sutherland in Sydney.¹⁸⁸

The ACCC found that, in each of the local catchments, sufficient competition would remain, from rival existing supermarkets and from potential entrant supermarkets, if the acquisitions went ahead. Defining those catchments as 3–5 km wide, the ACCC worked with the car driven model of supermarket shopping. While the ACCC recognised that in certain respects the Supabarn offer differed from that of the MSCs, it was reassured that Coles would retain elements of that offer (such as the continued use of some local suppliers) and that Supabarn would still have a material presence in the Canberra and Sydney markets.¹⁸⁹

The regulation employed by the ACCC operates defensively, to stop one company from employing an acquisition strategy to dominate a market; it arrives too late to make much difference to the market's structure. Supabarn's struggle to establish and sustain stores is indicative of this; by the time the ACCC conducts the review, Supabarn wants to sell its stores to Coles, worn down by the struggle to survive against the power of the MSCs. Even though Supabarn survives in some form for the time being, the comment of the former Chief Minister of the ACT that the ACCC decision consolidates the duopoly of Coles and Woolworths would resonate with many.¹⁹⁰

It is possible that ACCC oversight has acted at times as a deterrent. We did receive feedback that the acquisition of independents had slowed since the

184 See, eg, Australian Competition and Consumer Commission, 'Grocery Price Inquiry Hearing', above n 79, 4–6, including the resources to acquire strategic sites (as land or leases) and obtain planning approval for their development: at 9.

185 Department of Land and Property Services, 'ACT Supermarket Competition Policy Implementation Plan' (Report, ACT Government, 22 January 2010).

186 Larissa Nicholson, 'ACT Scraps Supermarket Competition Policy', *Canberra Times* (online), 7 May 2013 <<http://www.canberratimes.com.au/act-news/act-scraps-supermarket-competition-policy-20130507-2j52u.html>>.

187 Australian Competition and Consumer Commission, 'Coles – Proposed Acquisition of Nine Supabarn Supermarkets in New South Wales and the Australian Capital Territory' (Statement of Issues, 11 September 2015).

188 Australian Competition and Consumer Commission, 'Informal Review', above n 183.

189 Ibid.

190 Scott Hannaford, 'Coles Buys Independent Supabarn Supermarkets in Canberra and NSW', *The Sydney Morning Herald* (online), 19 June 2016 <<http://www.smh.com.au/business/coles-buys-independent-supabarn-supermarkets-in-canberra-and-nsw-20150619-ghs5gj.html>>.

ACCC sent a letter to independents advising them not to sell to the MSCs.¹⁹¹ It seems possible too that the ACCC became more cautious in its reviews after it lost the Metcash appeal and failed to prevent the wholesaler's acquisition of the beleaguered Franklins chain.¹⁹² In the Supabarn case, the clearance process put Coles to the test and it is notable that before the ACCC made a decision, Coles did withdraw from two of its Supabarn acquisitions in Canberra. But the notification process is voluntary and one possible consequence of the onus placed on it by the Supabarn clearance is that Coles may no longer routinely notify the ACCC of acquisitions, making oversight more difficult.

B Misuse of Market Power

The Harper Review recommends that an 'effects test' be applied to the conduct of corporations with substantial market power.¹⁹³ The recommendation provoked strong debate, setting large corporations against small business and its advocates.¹⁹⁴ The groceries sector was very much engaged. While the small retailers pinned hopes for protection on the change, the MSCs warned that it would threaten investment plans and increase grocery prices.¹⁹⁵ Without recounting the debate, we note its implications for the regulation of siting strategies.

The Review recommends substantial modification to section 46. No longer would it be necessary to show that the impugned corporation had an anti-competitive purpose, rather the effect or likely effect of substantially lessening competition will be enough. Furthermore, it will not be necessary to show that the corporation was taking advantage of its market power; it will be enough to show that a corporation with such power was having that effect. Opponents argued that this change would cast in doubt conduct that would be regarded as pro-competitive if it were pursued by corporations without such power.¹⁹⁶

In 2016, the Government released an exposure draft that is in keeping with the recommendation of the Review.¹⁹⁷ To meet the concern about catching pro-competitive conduct, the proposed amendment specifies in sub-section (2) that certain effects are to be regarded as increasing, not lessening, competition. Such effects include those that enhance efficiency, innovation, product quality and

191 Interview with retail executives.

192 Dave Poddar, 'Is There a Need to Change the Australian Informal Merger Clearance Process Following the Metcash Decision?' (2012) 20 *Australian Journal of Competition and Consumer Law* 249, 249.

193 *Harper Review Final Report*, above n 2, 347.

194 For an appraisal, see Allan Fels, 'The Australian Controversy over Abuse of Market Power Law – A Study in Political Economy' (Paper presented at the Competition Policy at the Intersection of Equity and Efficiency Conference, Brussels, 8 June 2016) (copy on file with author).

195 Julie-anne Sprague and Sue Mitchell, 'Woolworths Says "Effects" Test Will "Chill" Competition', *The Australian Financial Review* (online), 31 March 2015 <<http://www.afr.com/about-us/woolworths-says-effects-test-will-chill-competition-20150331-1mbw4j>>.

196 Samuel and King, above n 34. For a historical legal analysis of the issue, see Shirley Quo, 'Unilateral Conduct and the Role of the Purpose Test in Section 46 of the *Competition and Consumer Act 2010* (Cth)' (2016) 24 *Australian Journal of Competition and Consumer Law* 114.

197 Commonwealth Government, 'Exposure Draft – Competition and Consumer Amendment (Competition Policy Review) Bill 2016' (Exposure Draft Explanatory Materials, 2016).

price competitiveness. Other possibilities such as diversity, access or amenity are not mentioned. The Government approved these changes and on 28 March 2017 the amending Bill passed the House of Representatives.¹⁹⁸

The ACCC Chairman, Rod Sims, has sought to reassure the MSCs about the scope of the amendments, pointing out that the new section is more, not less, forgiving of tough competition. In line with other sections, the purpose or effect must be to lessen competition substantially. The proposed amendment removes from section 46(1) the injunction that the corporation must not have the purpose of harming an individual competitor.¹⁹⁹

The Chairman has advised it would not be a breach simply where a MSC opens a store near incumbents.²⁰⁰ Opening new stores, with very few exceptions, is to be regarded as pro-competitive, even if an existing business is significantly harmed.²⁰¹ Indeed, it is accepted that such pro-competitive conduct could drive the opposition out, leaving only one company in a market.²⁰²

The ACCC has released (for comment) a framework for the guidelines it will publish to illustrate its approach to breaches of section 46.²⁰³ Such lists of black, white and grey practices can serve to pre-empt misuses but they also give comfort to corporations. In the framework, land banking is listed as a type of conduct that is likely to breach the section. However, the example that the ACCC provides is at the extreme of the siting strategies we identified above. In this example, the hypothetical firm operates seven out of eight retail fuel sites in a major town. The local planning authority has designated two other sites as suitable for fuel sites. A potential new entrant is considering purchasing the sites but the incumbent firm buys the first option to them. The firm has no plans to use the sites.²⁰⁴ For supermarket catchments, it would have been more instructive to choose a corporation not quite so dominant and one willing to operate on the site. The resolution of such grey cases will turn on litigation.²⁰⁵

VI CONCLUSIONS

These conclusions gather our findings from the research. First, they concern the approach to be taken to policy-making and law reform. We find that the

198 Competition and Consumer Amendment (Misuse of Market Power) Bill 2016 (Cth).

199 Rod Sims, 'Bringing More Economic Perspectives to Competition Policy & Law' (Speech delivered at the RBB Economics Conference, Sydney, 7 November 2014).

200 Ibid.

201 Rod Sims, 'A New Section 46 Will Boost Competition – Not Kill It', *The Australian Financial Review* (online), 21 March 2016 <<http://www.afr.com/news/policy/a-new-section-46-will-boost-competition--not-kill-it-20160321-gnnawe>>.

202 Michael Roddan, 'ACCC Slams Big Business for Effects Test Distortion', *The Australian* (online), 25 July 2016 <<http://www.theaustralian.com.au/business/accc-slams-big-business-for-effects-test-distortion/news-story/853198f8a750acc671597cb50108f218>>.

203 Australian Competition and Consumer Commission, 'Framework for Misuse of Market Power Guidelines' (September 2016).

204 Ibid 10.

205 See also Law Council of Australia, Submission to Australian Competition and Consumer Commission, *Framework for Misuse of Market Power Guidelines*, 26 October 2016, 6.

current approach is often an assertion of neoliberal principles, rather than the study of regulation grounded in the economic and political competition for space. The single-mindedness of neoliberalism has more appeal than the multidisciplinary and collaborative approach that might potentially be practised in public regulation. While public regulation is often weak and slow, deregulation is not necessarily the answer. If deregulation is not meant to give support to oligopoly, it shows great faith that the market will provide spaces for innovative new businesses, when the evidence suggests that unfettered competition will spread the corporate model.²⁰⁶ More holistic regulation is needed, not less, if food outlets are to be diverse and amenable.

As Ebner observes, in certain periods, such as the current period of globalisation and neoliberalism, public regulation makes way for market regulation.²⁰⁷ We find that private regulation by the MSCs has become a key driver of competition and indeed of land-use configuration and social space allocation. The biggest reform priority therefore should not be to roll back public regulation but to seek regulatory measures that engage and moderate the strategies of the MSCs. We accept that the MSCs are not immune to shifts in the market; however, they can and do prosecute strategies that imprint their model for food retail on our cities and towns. That imprint brings social benefits, including fresh food to low socio-economic status ('SES') suburbs and towns, but at the same time it squeezes out diversity, independence and amenity. Historically, MSC strategies have tended to eliminate competitors, privatise centres, and spread cities.

Public planning regulation does not appear to be a substantial restriction on the private regulation of siting. Indeed, principle-based planning regulation is tempered by neoliberal influences. Those influences are to be found inside the planning systems, in the readiness to vary plans and weaken hierarchies, and outside, in the Victorian changes to zones, which NCP would push further. It is relatively easy for the MSCs to site their large supermarkets along the highway, breaking with the policy of siting supermarkets in town centres and neighbourhood places. Planning regulation has accommodated the ALDI strategy of siting out of centre, yet ALDI now sees the merits of a centre policy and co-locating with the MSCs.

Nonetheless, principled planning regulation retains the potential to congregate large corporate retailers in town centres with other retailers, uses and services and to provide space for small independent retailers in walkable shopping and community places. Our findings suggest the state governments should not be persuaded to implement the Harper Review's recommendations that they relinquish their powers to regulate the types and proximities of retail stores across a suburb or a town. Planning authorities should retain the legal powers to pursue centre hierarchy policies. Out-of-town centres should be discouraged. Effective planning regulation is a point at which Polanyi's counter-movement finds expression and conditions can be attached to coordinate land

206 Shopping Centre Council of Australia, above n 55, 19.

207 Ebner, above n 24, 51–2.

uses in the public interest. Governments have a role in designing shopping centres. The MSCs may also find some comfort in these controls. At the same time, the plans should be careful to provide enough space in town centres for competition and responsive enough to approve new centres when populations grow.

Competition regulation is not a substitute for planning, but it is a complement. Competition regulation has a different purpose, which, as we have seen, is concerned with checking the power of individual companies rather than consolidating commercial uses. In principle, competition regulation is a safeguard against any one corporation acquiring all the suitable sites for supermarkets in a catchment. That includes the risk that one company obtains too many of the positions rationed by planning regulation.

However, competition regulation is currently rather forgiving of MSC strategies. As the clearances show, it provides little brake on the consolidation of a market into a MSC duopoly; and it remains to be seen whether the amended section 46 will be a check on the use of such power. Yet, if planning regulation is rolled back, this light-touch regulation of competition will be what remains of public regulation of siting strategies. Our findings suggest that the competition authorities need encouragement to view the land and store acquisitions more strictly under section 50 and explore the application of an effects test under section 46 to siting strategies more comprehensively.

Finally, we note that, even with improvements, planning and competition regulation cannot do enough to nurture small innovative food stores. Governments should also be proactive in providing space and support in neighbourhood locations, incubator centres, and municipal markets, especially in low SES suburbs and towns where dependence on the MSCs for fresh food is greatest and United States-style food deserts could emerge if they decide to close shop.²⁰⁸ The MSCs may see complementarities in these developments rather than competitors.

In his recent reflection on the urban imagination, historian Graeme Davison remarks:

At the heart of the conflicts between motorists and other citizens were big questions about the nature of the city itself. Was it a market: a system for the exchange of commodities and services, to be run on purely commercial lines? Was it a community, where shared interests and social cohesion were paramount? Or was it an ecological system where human demands must be balanced against those of the natural environment?²⁰⁹

208 Kylie Ball, Anna Timperio and David Crawford, 'Neighbourhood Socioeconomic Inequalities in Food Access and Affordability' (2009) 15 *Health & Place* 578, 582.

209 Graeme Davison, *City Dreamers: The Urban Imagination in Australia* (NewSouth Publishing, 2016) 174.