

selling below cost. If below cost selling were prohibited then such an allowance would no longer be necessary. It would seem, on balance, therefore, that suppliers, after the initial pressures which might arise if some of their real prices became apparent, could gain from a prohibition on below cost selling.

#### *Multiples*

4.38 Multiples would have to increase the price of products which are at present sold below net invoice price. They could also reduce the price of a wide range of products and sell and advertise these products at cost and, if they did this, it would seem that such a prohibition might have very little effect on them. It is possible that they might gain an even larger share of the market. However, they could decide not to reduce the other prices while increasing the below cost products to cost, thus increasing their gross margins. This would narrow the price differential with the independent retailers and, presumably, in time, would reduce the share of the market which multiples might obtain. Another possible response of multiples might be an effort to achieve the lowest possible net invoice prices, in order to lower the minimum price at which they would be permitted to sell their products. This could be achieved by securing that discounts which are not currently included on the invoice — long-term allowances, for example — were included on the invoice, or by securing even better terms than at present from suppliers. This would again widen the differential between the minimum price at which multiples and independents could sell, and thus limit the advantage to independents of prohibiting below cost selling. Multiples might also seek, as a means of continuing to offer low priced products, to increase the range and volume of own brand products and to import more products if these could be purchased more cheaply than home-produced products. In these circumstances, also, the benefits to independents and to suppliers of a prohibition on below cost selling would be lessened. Below cost selling is essentially a promotional device. We are satisfied that the multiples would devise new methods of promotion. Some of these might have a considerable impact on the trade. On balance, it would seem likely that a wider range of products would be sold at cost or just above cost as a substitute for below cost selling so that there would be no net additional cost bearable by the consumer. It seems that the active competition, which appears to be in the trade, would bring this about. The ability of the multiples to increase their share of the market in the future at the same rate as in the past might be impaired by a prohibition on below cost selling. One of the reasons for their rapid expansion would have been denied to them.

#### *Imports*

4.39 Representatives of suppliers argued that a prohibition on below cost selling would not lead to a surge in imports. While the multiples do try to buy Irish manufactured products, it appears that they do not do so at a cost to themselves. Where there is an advantage in

importing, we believe they will import as they have done in the past. It was argued also that it would be easier to obtain invoices which do not represent the true cost of the products where they are imported directly by the multiple or wholesaler and that the invoices could then be presented as evidence of cost to the Examiner. Where products were offered at a price which competitors believed to be below cost, the Examiner would investigate. If there were reasonable suspicions that the invoices presented were not the true cost, then the transaction would have to be looked at in its totality and a check would have to be made to see whether supplementary invoices had been received or supplementary payments made. It would seem, therefore, that there would be little to be gained by producing fraudulent invoices. It was also argued that it would be more difficult to prosecute a company for selling below cost where the goods were imported. This is dealt with elsewhere. If competitive pressures intensified and if, for promotional reasons, it was considered profitable to sell some products at a low cost then there might be increased purchases from abroad. It would seem that this might happen at times but if one assumes that the major buyers are at present purchasing wherever they can obtain the lowest prices, it seems unlikely to have a major impact. We would expect, therefore, on balance, that a prohibition on below cost selling would have only a minor effect on the level of imported food products.

#### *Excluded Products*

4.40 A major factor which dissuaded the Commission from recommending a prohibition on below cost selling in the past was the fact that certain items, in certain circumstances, might have to be excluded from the ban, particularly perishable and seasonal items. Any such exclusions could lead to abuse and make any prohibition unworkable or unenforceable. If a prohibition were to be fully inclusive of all items except those highly perishable items excluded from the order as a whole, then it was thought it would turn out also to be unworkable and even brought into disrepute. Such products might be those which approach or go beyond the "best before" dates or seasonal items like Easter Eggs, Christmas Cakes, Toys, Barm Bracks, after the season or in the day or two before it ends. On the other hand, it was argued that, if every eventuality was to be given legal effect, the law might become unworkable. It was also argued that multiple retailers at present, in many cases, return the "best before" dated products to the supplier when they exceed the date and do not sell them. It would seem also that, with good management of stocks, many of the problems with these and seasonal items might be avoided. If these products were to be excluded from a prohibition, it would probably mean that below cost selling would be directed to them. The other area of concern is fresh meat and vegetables and it would seem that there are good administrative reasons for not including such products in an Order. The danger is that they might become a focus of below cost selling activity. Although these products have always been

excluded, multiples have in general sold them at a higher price than obtained in specialist shops. Because they are highly perishable also, it would seem to be better, if a prohibition were effected, to exclude these products, but to keep their exclusion under review. On balance, then, while retailers might have some difficulties with seasonal goods and "best before" dates and the excluded products could become a focus of below cost selling activity, it seems unlikely that such difficulties would be of major significance.

#### *Net Invoice Price*

4.41 We have already seen that the High Court in 1979, for the purposes of the prohibition on advertising below cost, established beyond doubt the meaning to be attached to net invoice price. However, the practice has developed, as we shall see later in this report, of giving substantial discounts, rebates, allowances, long term allowances, fidelity bonuses and so on, in addition to the price list discounts. In general, while the invoice conforms to the price list it does not show all of the additional rebates. If this practice were to continue, a prohibition on selling below net invoice price would, as the 1980 Report feared would happen, be allowing the manufacturer to fix a price below which his products could not be sold but which was not the true cost. This would be a form of resale price maintenance. It seems likely that competition will drive the invoice price down to the real price and if it does not do so, it would follow that the market is not as competitive as it appears. Acceptance of the definition of cost in the 1981 Order, because the high Court accepted it, and because it would be likely to be the easiest way for the Examiner to compare cost with the selling price, would seem the best approach if below cost selling were to be prohibited. This acceptance would not mean that there would be any valid reason, in our view, why all or almost all rebates, discounts, or allowances could not be shown on the invoice and this would seem to be one effect of a prohibition on below cost selling. In our view this would be beneficial.

#### *Own Brand*

4.42 If the multiples turned increasingly to own brands or generics the effect on suppliers might be very adverse. one of the major changes which has occurred in the Irish grocery trade in the past five years has been the growth of such products. It would seem that there are many reasons for this and that a similar trend has been experienced in other countries. It may be that competition between the multiples required the sale of low priced products and, in order to achieve this, there was a need for a greater volume of such products to be made available. There was a further factor in the increase of sales of own brands which is relevant to any consideration of what might happen if a prohibition on below cost selling is introduced. While suppliers, because of pressure from their other customers, seemed to try to stop the multiples selling national brands at below cost, either by ceasing to supply or by giving allowances contingent on the products not being

sold below cost, no similar attempt was made by suppliers to stop the sale of own brand products at less than cost. Under the Order, there is no doubt that own brands are subject to all the provisions of the order, except the provision to publish a price list, but the prevention of sales below cost required the supplier to take action to withhold supplies of own brands, which he did not do. Own brand products, which generally sell at less than national brands, were further reduced in price because below cost selling was mainly concentrated upon such products. It seems logical to suggest that the low price of own brand products and the wider than normal differential between own brand and national brand, inflated the sales of own brands. If a prohibition on below cost selling were introduced, it would seem that the price differential between own brand and national brand might be reduced, and own brand sales would decrease, or at least have their growth slowed. On the other hand, if the multiples, in order to emphasise their cheap prices, went even more aggressively for own brands and sold them at cost, then own brand product sales might continue to increase. It is not possible, therefore, to forecast the future trend of own brand sales. It would depend on which of the above factors was of greater importance.

#### *Inability to Match a Competitor*

4.43 A universal prohibition on below cost selling would mean that one outlet could not reduce its selling price below cost to meet competition from another outlet which had purchased the product at a lower price. Independents, up to now, have not apparently attempted to compete with multiples, who generally buy at a lower price, in this manner, but they would be prohibited from doing so in future, even on a selective basis. indeed, if one multiple purchased at a lower price than another multiple, either generally or because it was at that time benefiting from a special promotion, then the second multiple could not reduce its price below cost to match or beat the price of the first multiple selling at cost or even slightly above cost. However, if allowance were made for matching a competitor's price, the prohibition would be of little value because all multiples would in effect be able to drop their prices to the lowest price which any of them was able to receive at that time. The task of enforcement would also be very much more complicated. Similarly, large buyers may have an advantage with own brands where it will be difficult for independents or other multiples to compete. The prohibition must, however, apply fairly to everyone. The restriction on matching a competitor's price, if it means selling an individual product below cost, while an obvious interference with freedom to trade, would not appear to be of major importance. Competition between multiples and independents is, in reality, on the basis of the overall cost of a shopping basket and not the price of individual products. It seems that, if a prohibition were to be introduced, it could not be on the basis of allowing any retailer to match a competitor's price if that retailer had to sell below cost to do so. It seems, however, on balance,

that this should not have a significant effect on any section of a trade as large as, and with as many products as, the grocery trade.

#### *Market Shares*

4.44 We have already seen that the share of trade of the multiples, particularly that of the two largest multiples, is significant and could be of concern. As the sales of the multiples have grown, sales of independent grocers have declined. If a prohibition on below cost selling is as important to the independent trade as they believe it is, then the independents must believe it would, if introduced, have an impact on market shares. Because, as we have already discussed, it is unlikely that overall multiple prices will increase relative to independents, it does not necessarily follow that the independents' market share will grow. Nevertheless, the most important argument of the independents was that a prohibition would bring about a greater sense of fairness and that the consumer's perception that independents are very much more expensive than multiples would be altered. If this were a major factor, then it might have an impact on market shares but it seems likely that, in itself, such an impact would be small. There are also other pressures on market shares, such as the expansion plans of the multiples, which would seem to indicate that the shares held by multiples might increase. Overall, the impact may be to slow down the rate of multiple market share increase but, by itself, not to have a major impact.

#### *Enforcement*

4.45 It would be essential that any prohibition on below cost selling should be effectively enforced. This would require that the Examiner, who in the past, both examined complaints and proceeded on his own initiative in connection with possible breaches of the ban on advertising below cost, should enforce a prohibition on selling below cost vigorously. More importantly, it would seem essential that the Examiner be empowered to undertake prosecution of offences rather than the Minister. There would be a need for more speedy action, including the seeking of injunctions to stop suspected infringements, and also for higher penalties, including imprisonment as allowed under the Act, especially for second and subsequent offences. Unless a prohibition on below cost selling were going to be effectively policed and enforced, there would be no point in its introduction. The matter of proving invoices must be attended to, by providing, preferably in the Order, that invoices or other documents produced by an authorised officer should be accepted by the Court without requiring that they be proved by the purchaser or, more particularly, the supplier. Under the Restrictive practices (Amendment) Bill, 1986, there are proposals to transfer prosecution powers from the Minister to the Examiner as well as other changes. The Examiner would then be in a better position to enforce a prohibition on below cost selling.

#### *Allowances for not Selling Below Cost*

4.46 We have already reported that some suppliers give rebates or

allowances to ensure that their national brands are not sold below cost. Such allowances, however, are unlikely to be paid to the independent grocery trade because they do not traditionally sell below cost. This practice may give rise to unfair discrimination. It would seem that, if the need for such allowances were eliminated by prohibiting selling below cost, this would be a desirable development.

#### *Stocking of Goods Prior to Sale Below Cost*

4.47 Where a retailer intends to sell products below cost and where the retailer is aware from past experience that the supplier will cease supplies, then the practice has been for the retailer to purchase additional products prior to the below cost selling campaign. Even if supplies are cut off, he can maintain his campaign until stocks are exhausted. Prices are then increased and, of course, supplies are resumed. This practice might have had undesirable effects on trade and would seem to distort trade patterns. Again, if a prohibition on below cost selling was to have the effect of eliminating this practice, it would seem to be a desirable development.

#### *Summary of Possible Effects*

4.48 We have discussed above the effects which a prohibition on below cost selling might have. We have concluded that, while it would increase the prices of some products, it is unlikely to result in overall shopping basket price increases. It seems also that a prohibition might bring about a situation where the consumer's perception of price would be clearer than it might be now. We have concluded that independents and, therefore, wholesalers could, on balance, benefit from the prohibition although it will not be an answer to all the problems of the trade. Suppliers should benefit for several reasons but they may face increased pressure if their real net selling prices become more transparent. We have concluded that the likely impact on multiples might be to reduce their rate of expansion. Imports, although there could be some increase in some circumstances, are unlikely to increase significantly. Given the effects of excluding or not excluding certain products, we are of the opinion that only the food products at present excluded from the Order—fresh and frozen meat and fish, fruit and vegetables—should be excluded in future if a prohibition were to be introduced. A desirable effect, it was considered, might be to encourage the inclusion of all discounts and allowances on invoices. It is not possible to forecast the future trend of sales of own brands. While there might be some disadvantages for a retailer in not being able to match a competitor's price, it would seem to be more beneficial not to allow this to happen if it was necessary for the retailer to sell below cost to do so. It was considered that, if a prohibition were introduced, it might not have any significant effect on market shares although it might slow down the rate of multiple growth. It was considered that, if the proposed new powers were given to the Examiner, enforcement should not be a problem.

If a prohibition were to have the effect of ending the practices of giving allowances for not selling below cost and of stocking up prior to a below cost selling campaign, these would be desirable effects.

## PREVIOUS ARGUMENTS OF COMMISSION

### *Objectives of Commission in 1980*

4.49 The Commission in 1980 again expressed the view that below cost selling was an undesirable practice for a number of reasons and the Commission's recommendation at that time to support the continued ban on advertising products below cost had, as its implied objective, the strong discouragement of such a practice. To that extent, a recommendation to prohibit the practice now would not represent a major departure from the views held by the Commission in 1980 of the undesirability of below cost selling.

### *Freedom to Trade*

4.50 The Commission in 1980 considered that the problem of below cost selling would not justify "so radical an interference with trade" as a prohibition would entail. Most regulations interfere in some way with freedom to trade and it is necessary to consider carefully the advantages which an interference can bring with the general disadvantage of interference. The Commission's views in 1972 and 1980 were that the interference could be limited to a prohibition on advertising below cost. For a number of reasons which could not be foreseen in 1972 and 1980, a prohibition on selling below cost might be justified now and it would be more effective in eliminating below cost selling than a prohibition on advertising alone.

### *Practical Points of Difficulty*

4.51 A further point, which had considerable influence with the Commission in the preparation of its 1980 Report, was the "numerous practical points of difficulty which a prohibition would entail". We have considered these practical points of difficulty and have come to the conclusion that it would be possible to construct the prohibition in a satisfactory way. We have already outlined the issues involved. Essentially, it seems to us that, if there were to be a prohibition, there should be no exceptions to the prohibition except for goods not covered by the Order. There could be difficulties with seasonal goods but we believe that, if allowance were to be made for exceptions such as these, it would be unsatisfactory from the viewpoint of enforcement. We are also aware of the difficulties which a retailer can have when a product is approaching its "best before" date. Our view is that it would be possible for retailers, through a reduction in price, which does not bring the selling price below cost, or through efficient management of their stocks, to anticipate, and by taking action, to avoid such difficulties. There are certainly difficulties with products such as fresh meat, vegetables, and so on and these have been excluded from the Order up to now. Our view is that, if there

were a prohibition on below cost selling these exclusions would have to continue but that, if below cost selling switched to these products; consideration would have to be given to prohibiting below cost selling of these products. However, fresh products are more likely to deteriorate and, by excluding them from the Order, some of the practical difficulties would be avoided.

## OTHER METHODS OF PREVENTING BELOW COST SELLING

### *Minimum time for a Product to be Sold Below Cost*

4.52 We considered the idea that, if retailers sold at a price below cost, they should be required to maintain the price for, say, one or two months. This would make it unattractive to sell below cost and might eliminate the practice. Regrettably, we believe there would be difficulties in ensuring that such a regulation was being observed.

### *Restriction of Offer*

4.53 The 1980 Report considered in detail a proposal that the practice of restricting offers should be prohibited. By "restriction of offer" is meant the practice whereby, in certain circumstances, a retailer restricts his customers to the purchase of only a limited amount of a particular commodity each, or refuses to sell to the trade. The Commission rejected the proposal at the time. We again gave considerable thought to this issue. However, the practical difficulties of differentiating between unreasonable restrictions of offers and restrictions which could reasonably be justified, made us decide not to recommend a prohibition of this practice.

### *Other Options*

4.54 Other possibilities include having no regulations on selling or advertising below cost whatsoever. However, we were concerned about the effects of such a change. We also considered the concept of total transparency of terms. While the effect of transparency might have a much greater impact on the trade than a prohibition on below cost selling, we were concerned that, until we had time to study the question in greater detail, a matter which is considered in Chapter 5, it might have adverse effects on competition among suppliers and the often beneficial aspect of the present negotiations between buyer and seller. A further alternative was a voluntary agreement by the multiples to refrain from below cost selling. This seemed inappropriate to the Irish grocery trade.

## EFFECT OF THE 1980 RECOMMENDATIONS

4.55 It would seem that the hopes expressed in the 1980 report that the prohibition on advertising, the right of suppliers to withhold supplies, the undertaking of private prosecutions by the independent trade and increased surveillance by the Examiner, would be effective constraints on the practice of below cost selling, have not been borne



out in practice. Although we are convinced that the Examiner made every reasonable effort to enforce the prohibition on advertising below cost, it was not as effective as it might have been for several reasons. The requirement that the prosecution of offences under the Order should be undertaken by the Chief State Solicitor's office after receiving instructions from the Minister for Industry and Commerce, is, to say the least, unwieldy and unsatisfactory. In addition, so far as we are aware, there were no private prosecutions undertaken by the independent trade to enforce the prohibition on below cost advertising as there had been in 1979. Suppliers, with a few exceptions, found it excessively costly to withhold supplies if their products were being sold below cost. The multiples were able to switch below cost selling to own brand or generic goods without threat of action by the suppliers. Increasingly, it became obvious that, with the increase in the sales of the multiples and with the volume of customers being handled by them, it was no longer necessary for them to advertise in the media to obtain the benefits of selling below cost.

## RECOMMENDATIONS ON BELOW COST SELLING

### *Prohibition*

4.56 We have decided, after considering the intrinsic unfairness of the practice and the effects which a prohibition on below cost selling might have, to recommend that selling below net invoice price be prohibited by Order with no exceptions apart from products excluded from the scope of the Order. There are some recommendations which arise as a consequence of this proposal and we give these below.

### *Intoxicating Liquors*

4.57 We recommend that intoxicating liquors, not for consumption on the premises, should no longer be excluded from the Order and should, therefore, be subject to all of the provisions of the Order, including the recommended prohibition on below cost selling.

### *Own Label*

4.58 In the definition of grocery goods, we recommend the inclusion of a statement to remove any doubt about the applicability of the Order to own label or generic products.

### *Exclusions*

4.59 The 1981 Order excludes fresh fruit, fresh vegetables, fresh and frozen meat and fresh fish and frozen fish which has undergone no processing other than freezing with or without the addition of preservatives. We recommend the continued exclusion of these products because of the administrative difficulties involved. It is apparent also that these products have not been a focus of below cost selling by the multiples in the past. However, if they were to be sold below cost the position should be reviewed and consideration given to their inclusion in the Order.

#### *Advertising Below Cost and Withholding of Supplies*

4.60 While the introduction of a prohibition on below cost selling might appear to make it unnecessary for the continuance of the existing prohibition upon advertising below cost and the permitting of a supplier to withhold supplies of goods which have been sold below cost, nevertheless it appears desirable to maintain in operation these provisions of the present Order and we recommend accordingly. If a person infringes the ban by selling below cost he should not be permitted to compound the offence by not being penalised for advertising his breaching of the Order. A supplier should also be allowed to withhold goods, even more so when the offence is committed of selling below cost, especially since such withholding has proved effective in the past in curtailing below cost selling, admittedly in only isolated circumstances.

#### *Proving an Invoice for Imports*

4.61 There is the possibility that enforcement of a prohibition could be more difficult in the case of imported products than of those of domestic suppliers. In particular, if an invoice has to be proven to the Court by an authorised officer of the Examiner, as well as by the supplier and the purchaser, it must be recognised that attendance of a foreign supplier at the Court cannot be required, unlike attendance by a person based within the national territory. It is recommended, therefore, that the Order be amended to provide as follows — “When an authorised officer acting in the course of his duties visits the premises of any retailer or wholesaler and finds therein (or receives later from the retailer or wholesaler) any invoices, documents or other records purporting to indicate, or appearing to indicate, the net invoice price of any goods, then in any proceedings under this Order against that retailer or wholesaler, those invoices, documents or other records or anything shown to be a true copy of or extract from such invoices, documents or records shall, unless the contrary is shown, be sufficient evidence as to the net invoice price of the relevant goods”. This would greatly facilitate the prosecution process and would ensure that imports were treated on the same basis as the products of Irish suppliers.

#### *Net Invoice Price*

4.62 We recommend to suppliers and purchasers that all allowances, rebates, discounts and so on allowed to purchasers should be shown on the invoice and that, therefore, the invoice should show the true cost of the goods supplied. While we recommend this, and discuss it further in Chapter 5, we do not propose to make it mandatory by recommending an amendment to the Order.

#### *Enforcement*

4.63 It was said to us by a number of those we met, manufacturers, independent retailers, as well as multiples, that, as the share of the market enjoyed by the multiples has increased, the multiples have

had to become more sensitive to public opinion and, in particular, more conscious of the need to conform to the laws of the State. While we believe this to be so, nevertheless, for us to recommend the making of Orders which cannot be enforced or for which there are practical enforcement problems, would be undesirable. It is obvious that reliance cannot be placed solely on investigating complaints as a means of enforcement. In particular, it has been shown that manufacturers or suppliers are unwilling to complain about their customers. With below cost selling, however, the likelihood is that wholesalers, independent retailers and other multiples would not be inhibited from complaining. Nevertheless, we recommend ongoing monitoring by the Examiner's office and believe that this is essential for the success of our proposals. We welcome the proposal in the Restrictive Practices (Amendment) Bill, 1986 to transfer responsibility for enforcement to the Examiner from the Minister.

#### *Price Surveys*

4.64 We recommend that regular price surveys such as were carried out in the past by the National Prices Commission be undertaken by the Examiner. We regard it as being essential that an extensive survey of prices in multiple and other grocery outlets be undertaken both before, and regularly after, the introduction of a ban on below cost selling in order to ascertain the effects on consumer prices of such a prohibition.

#### *Definition of Sale Price*

4.65 We recommend that the sale price of grocery goods in relation to the prohibition on selling below cost should be defined as it was in the 1981 Order in relation to the advertising provision, as a price "after the deduction of the cost to the retailer of any discount or other benefit given by him on the sale of the goods".

### REASONS FOR RECOMMENDATIONS ON BELOW COST SELLING

#### *Increases in Market Share since 1980*

4.66 Since the 1980 Report was prepared by the Commission there has been a significant increase in the market share of the major multiple companies and a consequent reduction in the market share of the independent retail sector. While there may be disagreement about the exact share of the multiples, there can be no doubt that the share is large and increasing.

#### *Increases in Own Brand or Generic Goods since 1980*

4.67 The prohibition on advertising below cost, and the decision by suppliers not to withhold supplies of own brand or generic products where they were sold below cost were, we believe, factors in what has been a rapid growth of own brand and generic products. This increase in own brand share has altered the power relationships

between sellers and buyers and is a significant change since 1980. In addition, below cost selling has been concentrated on own brands.

#### *Previous Concerns of the Commission*

4.68 The Commission, in 1980, and previously, considered that below cost selling was an undesirable and unfair practice. It expressed the view that below cost selling was out of harmony with basic trading principles, was an artifice, could cause considerable harm and that it presented, on occasion, some of the features of predatory pricing. The Commission has always wanted to see the practice of below cost selling ended, and it was hoped that the prohibition of advertising goods below cost would help achieve this. We differ only with previous Commission Reports on the methods to eliminate the practice.

#### *Unfair Practices*

4.69 The Commission operates under the Restrictive Practices Act, 1972. The Act requires, in the exercise of its functions, that the Commission shall have regard to the unfair practices listed in the Third Schedule to the Act. In our opinion, the practices particularly relevant to the question of below cost selling are those which—

- (a) have or are likely to have the effect of unreasonably limiting or restraining free and fair competition,
- (c) have or are likely to have the effect of unjustly eliminating a competitor, and
- (e) secure or are likely to secure unfairly or contrary to the common good a substantial or complete control of the supply or distribution of goods or any class of goods . . .

We believe that below cost selling is one of the unfair practices which the Act seeks to eliminate and is contrary to the common good.

#### *Difficulties for Suppliers*

4.70 The right which the Order gave to suppliers to withhold goods, if they were being sold below cost, while the practice of selling below cost itself was not prohibited, gave rise to a great deal of difficulty for suppliers. These difficulties were mainly the aggravation caused to the supplier by requests from other multiples and independent retailers that the supplier withhold his products. Because the supplier might be dependent on the customer who was selling below cost for a substantial share of his business, the supplier was placed in an unenviable position. In addition, below cost selling causes distortions in product demand which also brings about many difficulties for suppliers. The need for increasing stocks, prior to selling below cost, distorts trade patterns unnecessarily. If, however, the selling as well as the advertising of goods below cost were to be prohibited, most of these difficulties for suppliers would be removed.

#### *Own Brands*

4.71 As already stated, there has been a significant growth in own

brands in recent years and below cost selling has been concentrated upon such goods. It is to be hoped that, with own brand and generic goods clearly included in the prohibition of selling below cost, this distortion of demand will be ended. We have little doubt, however, that own brands will continue in the future to have a significant share of the market in many product areas.

#### *Consumers*

4.72 The frequent price changes which below cost selling brings about contributes to the situation where the consumer is generally unable to remember more than a small number of prices. We would expect that a prohibition on below cost selling would bring about greater price stability and, in time, through a knowledge of prices, make the consumer more resistant to price changes and more conscious of the real value being offered by different retailers.

#### *Allowances for Not Selling Below Cost*

4.73 We find the practice of giving allowances, conditional on the products not being sold below cost, to be a most undesirable feature of the trade. The fact that it has become necessary for some suppliers to concede such allowances is symptomatic of multiple buying power. We suspect, also, that such allowances may not be made available to the independent trade and may, therefore, be unfairly discriminatory. A prohibition on below cost selling would eliminate the need for such allowances.

#### *Prices of Independent Retailers*

4.74 Below cost selling by multiples leads to unfair pressure on independent retailers by consumers, who wrongly feel that these retailers are over-charging simply because they cannot compete with the multiples.

#### *Effectiveness of Prohibition on Advertising*

4.75 The Commission in 1972 and 1980 was of the view that a prohibition on advertising and the right of suppliers to withhold supplies if their goods were being sold below cost would be effective in ending the practice. These constraints did not achieve their objective for a number of reasons, including the inability of suppliers to withhold supplies of their goods, the redirection in many cases of below cost selling to own brands, the unwieldy nature of the prosecution process and the continued growth in the area of selling space by the multiples which meant that their prices became widely known, without the necessity of advertising. The prohibition on advertising below cost, in particular, has not diminished the extent or reduced the effectiveness of below cost selling. We believe, therefore, that, in order to eliminate the practice of below cost selling, which the Commission has always regarded as unfair, we must now recommend the prohibition of the practice by Order.

#### *Difficulties of a Prohibition*

4.76 With the exclusion of highly perishable products such as fruit and vegetables, meat and fish, from the scope of the Order, we believe that the main practical difficulties in implementing a prohibition on below cost selling will not arise. We do not consider that major difficulties will be caused by not exempting seasonal goods or goods with "best before" dates from the prohibition, or by not allowing a retailer to sell below cost in order to match or better the price of a competitor.

#### *Overall Conclusion*

4.77 We do not want to halt the development of new supermarkets or to interfere with market inter-action which brings about new shopping centres. We have stated, however, in Chapter 3, our concern about the level of concentration of buying power. It seems to us that, although we have examined the effects of a prohibition in considerable detail, they are difficult to predict with certainty. We cannot overlook, however, the views of manufacturers and independent retailers that it would make a significant difference to them. The view of some of the multiples, that it is a valuable promotional device for obtaining additional customers, seems to confirm the views of the independent retailers that below cost selling is to their disadvantage. We cannot ignore the trend of increasing concentration. It would be unwise to postpone taking any action until an excessive level of concentration had occurred and until it had become impossible for the independent retail sector to survive. The prohibition of below cost selling may have some impact in reducing the rate of increase in multiple market share, although we do not expect it to have a major impact.