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Mr John Hawkins
Committee Secretary
Senate Economics Committee
The Australian Parliament
Canberra

economics.sen@aph.gov.au

Dear Mr Harris

Trade Practices (Creeping Acquisitions) Amendment Bill 2007

NARGA represents the independent retail grocery sector.

We use this submission to support the need to address the issue of 'Creeping Acquisitions' in our sector and in any other sector where market concentration is affecting competition. Our recent submissions to government and the ACCC have highlighted the fact that in the grocery sector, the two major players together have a share of the packaged grocery market approaching 80%.

We also understand that the government has committed to amending Trade Practices Act to address creeping acquisitions and suggest that the Bill currently before the Committee is heading in the right direction towards addressing this issue, but stress that we have no information at this time about the government's approach.

We note that the Bill proposes to combine the acquisitions made by an entity in a market over a six year period in the determination of whether the most recent acquisition or proposed acquisition has the effect or is likely to have the effect – when considered together with previous acquisitions – of substantially lessening competition in a market.

We offer the following comments:

- The proposed legislation makes it clear that all acquisitions made in the period of six years prior to the most recent acquisition will be taken into account in determining the impact on competition. We support the concept of taking into account the previous history of acquisitions and assessing their combined impact. To do this, any proposed legislation needs to ensure that the time period to be considered is clearly specified and that it is, in effect, a retrospective review.
- We note that Section 50 of the Act defines a market, in the context of this section, as 'a substantial market for goods or services in:

- (a) Australia; or
- (b) a State; or
- (c) a Territory; or
- (d) a region of Australia'

but suggest that the assessments of acquisitions in the past do not appear to have taken account of the potential for impact on competition in each of these geographic categories; rather, the tendency appears to have been to chose to assess the acquisition on a national or state or regional basis, as the case may be, but not against each of the criteria.

We believe that it is important that the need to do this is emphasised and perhaps included in administrative guidelines for the ACCC.

- It is also noted that the definition of 'market' in Section 50 of the Act refers to products. We believe that, in the past the definition of 'product' used by the ACCC in its assessment of mergers in the grocery sector has been too broad and has failed to recognised the high degree of concentration in, say, the packaged grocery sector. This is evidenced by the discussion taking place re the market share of the major supermarket chains in the context of the current Grocery Inquiry.

The generally accepted means of addressing the question of the impact of a merger or acquisition is the SSNIP test described as: 'the smallest group of products and the smallest geographic area in relation to which sellers, if acting as a single firm (a 'hypothetical monopolist') that was the only seller of those products in that area, could profitably impose and sustain a significant and non-transitory price increase above levels that would likely exist in the absence of a merger.'

Given the local nature of competition in the grocery sector the assessment of the potential impact of an acquisition would need to be conducted on a locality by locality basis.

Again, such matters could be addressed via administrative guidelines.

The current Act relies on entities that wish to acquire another entity in their sector determining for themselves whether or not they may be in breach of Section 50 of the Act, the downside risk being that the acquirer might be asked to divest themselves of the acquisition should they are later found to be in breach. i.e. there is no requirement to notify the ACCC of a relatively small acquisition.

Given the high degree of market concentration in the retail grocery sector (and other sectors), should there be a notification requirement on the part of entities that already have a significant share of the market? If so, should such notification be mandated under the Act or be made a part of administrative guidelines?

We trust that the Committee find these comments helpful.

Yours sincerely

Ken Henrick
Chief Executive Officer