Law Council
OF AUSTRALIA

9 March 2011

Mr John Hawkins
Secretary
Senate Economics Committee
Department of the Senate
P O Box 610
CANBERRA ACT 2600

Via email: economics.sen@aph.gov.au

Dear Mr Hawkins

Inquiry into the impacts of supermarket price decisions on the dairy industry

I have pleasure in enclosing a submission to the Senate Economics Committee's inquiry into the impacts of supermarket price decisions on the dairy industry.

The submission has been prepared by the Competition and Consumer Committee of the Business Law Section of the Law Council of Australia. The submission has been approved for lodgement by the Business Law Section.

Thank you for granting the Committee an extension of time in which to lodge its submission.

Yours sincerely

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Secretary-General

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Submission to the Senate Economics Committee Inquiry Into the Impacts of Supermarket Price Decisions on the Dairy Industry

Submission by:

Competition and Consumer Committee
of the Business Law Section
Law Council of Australia

8 March 2011

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1. EXECUTIVE SUMMARY

1.1 The Competition and Consumer Committee of the Law Council of Australia wishes to comment on two of the terms of reference for this inquiry by the Senate Economics Committee (**Inquiry**). These are:

- **term of reference (e):** the recommendations of the 2010 Economics References Committee Report, "*Milking it for all its worth - Competition and Pricing in the Australian Dairy Industry*" (**2010 Report**); and
- **term of reference (f):** the need for any legislative amendments, in so far as these touch on provisions of the *Competition and Consumer Act 2010* (**CCA**).

1.2 The Committee recognises the complexity of the issues before this Inquiry but does not believe that solutions are to be found in the recommendations of the 2010 Inquiry that major changes be made to the CCA to address price discrimination and the test for a misuse of substantial market power.

1.3 The 2010 Inquiry examined a number of issues specific to the supply of fresh milk, including the prices paid for raw milk to producers. The CCA, however, is a statute of broad application across the economy. This Committee is concerned that the law reform proposals from the 2010 Inquiry concerning the CCA would, if enacted, weaken the core objects of the CCA in improving the conditions for open competition and efficiency across the economy.

1.4 The Committee is strongly opposed to amending the CCA in the manner proposed in the 2010 Report, namely that:

- the CCA should be amended to reintroduce a general prohibition against price discrimination[1];
- a test based on market share should be introduced into the CCA to ground a presumption of a firm possessing a substantial degree of market power[2]; and
- the Productivity Commission should be asked to consider the appropriateness of separating the ACCC into separate agencies responsible for the approval of mergers, and the assessment of whether concentration is subsequently excessive. [3]

1.5 In brief, this Committee's reasons for its opposition to these three proposals are:

- the reintroduction of a general price discrimination law across the economy has not found support from any of the numerous previous inquiries and reviews into the CCA, and cannot be reconciled with the objects of the CCA supporting effective competition, the efficiency of the Australian economy and the welfare of Australians generally. The current concerns before this Inquiry do not warrant the reintroduction of those provisions to the CCA;

[1] See Recommendations 1 and 7, p 3.
[2] Recommendation 7, p 4.
[3] Recommendation 9, p 4.

- the provisions of section 46 of the CCA (which deal with conduct of firms possessing substantial market power) have been extensively reviewed and clarified in recent years to address ACCC concerns. A number of those recent reforms appear not to have been considered by the 2010 Inquiry;

- it is still too early for the full effect of these changes to be confirmed, and so it is important that the ACCC be given the opportunity to test those new powers before further reform of section 46 is considered;

- a market share test is not an appropriate proxy for determining whether a firm possesses (or takes advantage of) a substantial degree of market power. Whilst market share may be an indicator of a firm having market power, it is neither the most reliable indicator of market power, nor is it determinative. There are several other well recognised criteria which are more indicative of the presence (or absence) of market power, particularly the existence of substantial entry barriers, and the relative freedom from constraints imposed on a firm by its competitors and customers, which should be considered in order to determine a firm's market power. The effective operation of the CCA would be undermined by seeking to oversimplify the analysis of those matters;

- separating the ACCC into two separate entities would be likely to produce less efficient outcomes, increase costs for the Government (as well as for persons interacting with the ACCC), and raise the possibility of inconsistent approaches emerging which may weaken the ACCC. It is notable that currently the UK Government is proceeding in the opposite direction by announcing the merger of its 2 competition agencies, the Office of Fair Trading and the Competition Commission. There is, in the Committee's view, nothing to be gained by inviting the Productivity Commission to review such a split of the key regulator.

2. BACKGROUND

2.1 This Committee notes that the Inquiry will examine a number of issues concerning the impact on the Australian dairy industry supply chain of recent pricing decisions concerning the price of milk. The Committee does not wish to express a view on the general issues raised by this Inquiry.

2.2 However, there are a number of issues under the CCA arising from recommendations made in the 2010 Report in relation to which the Committee does wish to make comments, and to have those comments taken into account by the Senate Economics Committee. The Committee also notes that the collective bargaining procedures available under the CCA[4] to primary producers warrant consideration in the context of the issues raised by this Inquiry.

3. PRICE DISCRIMINATION REFORM

3.1 This Committee does not believe that any proper or principled case has been put forward for the reintroduction of a general prohibition of price discrimination

[4] Sub Division B of Part VII of CCA (ss 88 and 93AB).

(akin to the old section 49 of the TPA (repealed in 1995)) either generally, or for the purpose of requiring retailers to price generic/home brand and private label products at the same level as proprietary branded products. Such a law will more likely be harmful, since it would raise the cost to retailers of offering a discount on any product, because this would be required to be offered more widely than would otherwise have been the case. Such a law is likely to have the effect of increasing prices for consumer goods and staples generally, in all categories where generics or other forms of product differentiation are used, to the detriment of consumers and the economy.

3.2 The 2010 Report noted the repeal of the price discrimination laws in former section 49 has been repeatedly supported by one expert committee after another, including the *Swanson Committee* (1976), the *Blunt Committee* (1979), the *Hilmer Committee* (1995) and the *Dawson Review* (2003).

3.3 This Committee supports the views[5] of a leading writer on the CCA, Justice Heydon, in relation to the repealed section 49:

> *Section 49 was always controversial. The Swanson Committee recommended its repeal in 1976. So too did the Trade Practices Consultative Committee in 1979 in its report on Small Businesses and the Trade Practices Act. The Commission never endeavoured to enforce it. It was occasionally invoked in private litigation, but there were few reported cases on it.*[6]

3.4 One of the reasons section 49 was never really pursued in practice is, as Justice Heydon also notes in his text:

> *It is a rare seller who can operate under a single price with uniform customer benefits and conditions of sale. Markets are never static, nor are prices or terms of dealing...In most markets a firm can only compete if it has the capacity to adapt constantly and change its terms of dealing to suit the daily market conditions. A law which unduly prohibits sellers from offering different terms and buyers from seeking lower prices is inherently suspect in a market economy.*[7]

3.5 Another leading writer on trade practices and competition law, Professor Corones, notes that the Hilmer Committee concluded that price discrimination generally enhances economic efficiency except in cases which may be dealt with by section 45 (anti-competitive agreements) or section 46 (misuse of market power).[8]

3.6 Professor Corones sums up the prevailing economic learning on price discrimination with the observation that differential pricing by suppliers generally promotes efficiency. It achieves this by allowing some customers to acquire products that would otherwise not have been available to them at prices they were willing to pay, thereby enabling those customers to enjoy the benefits of consuming that good or service. Price discrimination occurs widely across the economy and does not depend on the possession of substantial market power.

[5] Heydon, Trade Practices Law, Volume 2, LBC Looseleaf, [4.1660]
[6] Heydon, Trade Practices Law, Volume 2, LBC Looseleaf, [4.1660]
[7] Heydon, Trade Practices Law, Volume 2, LBC Looseleaf, [4.1660]
[8] Corones, *Competition Law in Australia* (5th ed, 2010, LBC, Thomson Reuters), [8.150] (p 468); See Hilmer Report at 79.

While price discrimination does imply that some consumers pay more than others, once account is taken of the extra sales made to those customers offered the lower price, consumers as a whole are generally better off. The effect of these extra sales is that overall market output increases, which is the opposite effect of a monopoly.[9] In addition, price discrimination very often benefits consumers who are on low or fixed incomes.[10]

3.7 In this Committee's submission no case has been made for the general reintroduction of a price discrimination provision.

4. MISUSE OF MARKET POWER - SECTION 46

4.1 The 2010 Report next considered that section 46 should be strengthened to address price discrimination. The 2010 Report recommended that "market power" in section 46 be expressly defined so that it is less than market dominance and does not require a firm to have unfettered power to set prices.

4.2 However, the Senate Committee's discussion of section 46 appears to be based on concerns around the 2003 *Boral* case[11] and comments by the ACCC Chairman in 2004 that the Court, in interpreting section 46, did not take into account the lower threshold than "dominance" in the words "substantial degree of market power".[12]

4.3 In short, the 2010 Report seems to have proceeded on the basis that section 46 was inadequate because it required proof that a firm was dominant in a market[13].

4.4 In this context, the 2010 Report does not appear to take account of the amendments to section 46 introduced by the *Trade Practices Legislation Amendment Act (No. 1) 2007*, as recommended by the Senate Economics References Committee in 2004. These amendments were introduced to provide clarity to section 46 to address the ACCC concerns over the 2003 *Boral* case, and to increase the law's effectiveness. The amendments commenced on 25 September 2007 and relevantly added the following new provisions to section 46:

- **sub-section 46(3C):** without limiting the matters to which the Court may have regard, a body corporate may have a substantial degree of market power even though it does not substantially control the market, or does not have absolute freedom from constraint by the conduct of its competitors or persons to or from whom it supplies goods or services;

- **sub-section 46(3D)**: more than one corporation may have a substantial degree of power in a market;

[9] Corones, *Competition Law in Australia* (5th ed, 2010, LBC, Thomson Reuters), [8.150] (p 469)
[10] See the example of lower cinema prices for pensioners and children, Corones, *Competition Law in Australia* (5th ed, 2010, LBC, Thomson Reuters), [8.150] (p 468)
[11] *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374.
[12] See 2010 Report, [4.33]
[13] See 2010 Report, [4.33]

- **sub-section 46(1A):** a new prohibition against the supply of goods or services for a sustained period at a price less than the relevant cost to the corporation for a prohibited anti-competitive purpose.

4.5 Further amendments to section 46 were made by the *Trade Practices Legislation Amendment Act 2008* which commenced on 22 November 2008, as follows:

- **sub-section 46(4A):** the Court may have regard to any conduct consisting of supplying goods or services for a sustained period at a price less than the relevant cost to the corporation in deciding whether there has been a breach of section 46;
- **sub-section 46(1AAA):** a corporation may breach s 46 even if the Corporation cannot and might not ever be able to recoup the losses incurred by supplying goods or services below cost;
- **sub-section 46(6A):** in determining if a corporation has taken advantage of its substantial degree of power in the market the Court may have regard to factors such as:
  - whether the conduct was materially facilitated by the corporation's substantial degree of power in the market;
  - whether the corporation engaged in conduct in reliance on the substantial degree of power in the market;
  - whether it is likely the corporation would have engaged in the conduct if it did not have a substantial degree of power in the market; and
  - whether the conduct is otherwise related to the Corporation's substantial degree of power in the market.

4.6 In this Committee's view, these amendments have clarified section 46.

4.7 The discussion in the 2010 Report concerning the purported weaknesses of section 46 does not appear to take these important developments into account.

4.8 In this Committee's view the ACCC is now in a position where it could, in an appropriate case, more confidently prosecute conduct in breach of section 46.

4.9 This Committee does not consider that any further amendment to section 46 is warranted to address the 2003 *Boral* case and that the law, as it stands, could be used to address any conduct of concern which had the necessary anticompetitive purpose.

5. MARKET SHARE TEST - SECTION 46

5.1 The 2010 Report also proposed that possession by a firm of a level of market share should be presumed to confirm market power under section 46, unless there is strong evidence to the contrary.

5.2 This Committee does not support any presumptions based on market share and does not believe such a reform would be consistent with best international practice, as suggested in the 2010 Report, or the objects of the CCA.

5.3 It is widely accepted internationally that market share is not a good indicator of market power. This Committee has consistently opposed the introduction of a market share test in the Birdsville amendment in section 46(1)(AA) because it is inconsistent with the principle that the CCA should address competition concerns by addressing issues based on market power, not market share.

5.4 For example, in its 19 September 2007 submission opposing the *Birdsville* amendment, this Committee submitted that "*using market share as a threshold test for predatory pricing, while apparently attractive as a simpler filter mechanism, is not appropriate, as aggressive conduct by a corporation without market power can* [and should] *be presumed to be pro-competitive*."[14]

5.5 The ACCC has similarly recognised that market share is not a proxy for market power. In its submission to Treasury on the second Creeping Acquisitions Discussion Paper published on 6 May 2009, the ACCC stated its view as follows:

> *…the ACCC considers existing legal interpretation of the term "substantial market power", developed in relation to section 46 of the TPA, has made it very clear that the concept is influenced by a range of factors, not just a firm's market share.*[15]

5.6 This Committee recognises that market share is already considered by the Australian Courts as one factor in considering whether a firm possesses a substantial degree of market power[16] and that is a factor to be considered in the law that applies in the European Commission and other jurisdictions.

5.7 However, market share is neither the most reliable indicator of market power, nor is it determinative. Further, its quantification is dependent upon often very subjective and debatable views on market definition.

5.8 There are several other well recognised criteria which are much more indicative of whether there is market power, particularly the existence of substantial entry barriers, and relative freedom from constraints imposed on a firm by its competitors and customers. These are the factors to which primary regard should be had in order to determine whether a firm possesses substantial market power, along with other factors such as market shares.

5.9 The effective operation of the CCA would be profoundly undermined by seeking to simplify the analysis of whether a firm possesses substantial market power to having regard only to its market share.

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[14] Law Council of Australia, Letter to Peter Costello entitled *"Trade Practices Legislation Amendment Bill (No. 1) 2007 - Birdsville Predatory Pricing Changes to the Trade Practices Act"* (19 September 2007), <http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=FD47FB45-1E4F-17FA-D274-83CE1BB14E2B&siteName=lca> (accessed 3 March 2011), p 2.

[15] ACCC, *Submission to the Minister for Competition and Consumer Affairs - Creeping Acquisitions: The Way Forward* (July 2009), <http://www.treasury.gov.au/contentitem.asp?ContentID=1583&NavID=037> (accessed 3 March 2011), at [103] (p 28).

[16] See, for example, *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 189; section 50(3) of the CCA.

6. SPLITTING UP THE ACCC?

6.1 Recommendation 9 of the 2010 Report[17] was that a review be undertaken of the appropriateness of separating the functions and powers of the ACCC with the effect that separate agencies became responsible for the approval of mergers and the assessment of whether concentration is subsequently excessive.

6.2 This Committee has strong concerns about that recommendation. Separating competition bodies into separate organisations is likely to lead to increased cost, loss of efficiency and loss of effectiveness. This Committee notes that in the United Kingdom the Office of Fair Trading will soon be merged with the Competition Commission in order to achieve greater harmony and effectiveness in UK's competition policy.[18]

6.3 This Committee cannot see any benefits to be gained from splitting the ACCC into separate bodies as suggested. This recommendation is not likely to be of assistance to primary producers in the milk industry or in any other sector.

[17] See 2010 Report, [4.65]

[18] See Department for Business, Innovation and Skills (UK), *Reform of Competition and Consumer Bodies* (2010), < http://nds.coi.gov.uk/content/detail.aspx?NewsAreaId=2&ReleaseID=415972&SubjectId=16&AdvancedSearch=true> (accessed 3 March 2011); see also Office of Fair Trading (UK), *OFT Response to Announcement on Competition and Consumer Regimes* (2010), < http://www.oft.gov.uk/news-and-updates/press/2010/107-10> (accessed 3 March 2011).