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John Hawkins
Senate Economics References Committee
PO Box 6100
Parliament House
Canberra ACT 2601

Dear Mr Hawkins

The impact of supermarket price decisions on the dairy industry – Questions on notice

At the hearing of the Senate Economics Committee inquiry into the Impacts of Supermarket Price Decisions on the Dairy Industry on 9 March 2011, the Australian Competition and Consumer Commission (ACCC) took eight questions on notice.

Please find enclosed our responses to these questions.

Yours sincerely

Brian Cassidy
Chief Executive Officer

RESPONSES TO QUESTIONS ON NOTICE

FROM SENATE INQUIRY INTO

THE IMPACTS OF SUPERMARKET PRICE DECISIONS ON

THE DAIRY INDUSTRY

QUESTION 1:

Senator O'BRIEN—Did Coles or Woolworths consult with the ACCC about their generic brand pricing practices at all?

Mr Cassidy—Over what period?

Senator O'BRIEN—Let's say over the last three or four years.

Mr Bezzi—We have lots of interactions with Coles and Woolworths on a whole range of investigations that we conduct from time to time. If you are asking whether they came to us and ask for clearance, the answer is no.

Senator O'BRIEN—How they conduct themselves to engage with you to ascertain a view might be described in a variety of ways. I am trying to ascertain whether they have come to the ACCC in any way which could be described as seeking the ACCC's view of certain business practices relevant to their operations.

Mr Grimwade—There is one area where they may have, and that is in the merger space. There is a process the ACCC conducts where parties intending to merge or acquire can come in and seek the commission's view in relation to a proposed acquisition.

Senator O'BRIEN—But what about other than that?

Mr Cassidy—Other than that I would say it would be so unusual that the answer would be no. We are talking about some very well-heeled, well-resourced players here—

Senator O'BRIEN—We will agree with you on that comment!

Mr Cassidy—Yes, and I do not just mean the retailers, in terms of the milk supply chain. They have their own sources of legal advice. It is simply not the case that, other than as Mr Grimwade said, in the merger space, they come to us asking, 'Is this all right' or 'Is that all right'.

Senator O'BRIEN—For completeness, can you check and confirm that?

Mr Cassidy—We will take that on notice and check. As Mr Bezzi said, we will be a bit careful, because obviously we may well have had discussions with one or more of the retailers on one or more issues over periods of time. But we will check on that specific issue.

ACCC response:

For the period 1 January 2005 to 21 March 2011, the ACCC has not located any record of communication initiated by either Coles or Woolworths seeking to consult with the ACCC about generic brand pricing practices. The ACCC did however, hear from industry on a variety of issues related to generic brands in the context of the 2008 ACCC inquiry into the competitiveness of retail prices for standard groceries.

QUESTION 2:

Senator O'BRIEN—The parliament repealed section 49 on the basis of the advice of Professor Hilmer's committee that sections 45 or 46 would do the same job, and that therefore section 49 was unnecessary. Have those sections dealt with the issue of price discrimination on the same product between businesses?

Mr Cassidy—As you would know, we have had a number of problems with section 46 arising out of a number of High Court cases where the law was not clarified until 2007. I would probably take it on notice, if I could, just to check. I will say that to the best of my knowledge and recollection, there was never a successful case under section 49.

Senator O'BRIEN—We are told there was. We are told there were private proceedings; it is J Cool and Sons v O'Brien Glass Industries in 1981.

Mr Cassidy—Let us take that on notice as well and we will have a look at it.

Senator O'BRIEN—We are going to do the same, but that is the submission we have, and that it was a successful case, and that damages were awarded. That is what we have been told in evidence so far.

Mr Cassidy—We will check on that for you as well, if that helps.

ACCC response:

Until it was repealed by the *Competition Policy Reform Act 1995*, section 49 of this Act prohibited price discrimination if it was likely to substantially lessen competition within a market. The Hilmer Review recommended section 49 be repealed as it only appeared to diminish price competition.[1]

In the case of *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd*[2] a section 49 claim was successful. This is considered the leading case on the meaning of 'discrimination' for the purposes of section 49.[3] In a number of subsequent cases, however, claims under section 49 were unsuccessful. The then Trade Practices Commission did not commence any action under the now repealed section 49.

[1] Report of the National Competition Policy Review, 1993, pp 79–80.
[2] Full citation: *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) 77 FLR 441
[3] See S G Crones, *Competition Law in Australia*, 3rd Edition, 2004.

QUESTION 3:

Senator XENOPHON—Maybe we could clarify that once and for all. Under the terms of the current contracts between dairy farmers and processors, if there is evidence that their sales of branded milk drop, whilst the processors will still take the same volume of milk from those dairy farmers, the rate at which the remuneration or the contracted price actually drops—because it shifts from tier 1 to tier 2 at a lower rate—is impacted on as a result of this price war. Is that something that the ACCC will look at?

Mr Cassidy—That is something we are aware of and we do have that as part of the current activities we are undertaking. To the best of our knowledge and evidence, so far, the shift between branded to home brand milk following the discounting has been relatively modest.

Senator XENOPHON—On what basis do you make that conclusion?

Mr Cassidy—I make it on the basis of the material we have before us.

Senator WILLIAMS—Which came from where?

Mr Cassidy—The issue is, if I might say, that it has a differential impact geographically. It depends on where the dairy farmers are. Some supply almost exclusively for the branded milk, so they will be impacted on more severely by that modest shift than, say, other dairy farmers who are perhaps supplying for the export market or a range of milk products.

Senator XENOPHON—Let us talk about drinking milk—fresh milk. You say 'modest shift'. What is your definition of modest?

Mr Cassidy—Sorry, I am just not prepared to start giving numbers.

Senator XENOPHON—Do you have those numbers, Mr Cassidy?

Mr Cassidy—We have quantitative data, yes.

Senator XENOPHON—And you are not prepared to share with the committee what the shift has been.

Mr Cassidy—Let me perhaps take it on notice.

ACCC response:

The ACCC has received and is continuing to gather information relating to milk pricing from industry participants. Some information is 'commercial-in-confidence'. A range of information on private label and branded milk market share is publicly available, including in submissions made to the Inquiry.

The February update of the Dairy Australia *Dairy 2011 Situation and Outlook*[4] suggested that the shares of dairy company branded milk and retailer private label milk are split 50:50. This market share is consistent with Dairy Australia's 2010 annual publication, where it compares supermarket branded and private label milk sales.

[4] http://www.dairyaustralia.com.au/Our-Dairy-Industry/~/media/Documents/Our%20Dairy%20Industry/Situation%20and%20Outlook/Dairy%20Situation%20%20Outlook%202011%20%20February%20Update%20final.ashx

QUESTION 4:

Senator XENOPHON—Senator O'Brien asked a series of very pertinent questions on the issue of communications between the major supermarket chains, including Coles, I think, and the ACCC. I have a supplementary question on that issue. You may be prepared to answer it now but you might want to take it as another question on notice. Has the ACCC had any communications with Coles in the last 12 months about its pricing strategy with respect to milk?

Mr Cassidy—Yes.

Senator XENOPHON—You have?

Mr Cassidy—Yes.

Senator XENOPHON—Did that include a pricing strategy in relation to home brand milk?

Mr Cassidy—That is the point at which I will take that question on notice. I repeat: I am simply not going to sit here and start going into the details of our current activities on this. Apart from anything else, that could have an adverse bearing on our ability to take action if we need to somewhere down the track. That is a fairly basic investigative issue.

ACCC response:

At the initiation of the ACCC (as noted in response to question 7 below), in the year to 22 March 2011, ACCC representatives first engaged with Wesfarmers and Coles on the issue of Coles pricing of home brand milk at a high level ACCC and Wesfarmers liaison meeting, on 3 February 2011. During the meeting Wesfarmers representatives undertook to ensure that Coles would provide information to the ACCC in relation to the home brand milk pricing issue.

In the week commencing 7 February 2011 Wesfarmers provided information to the ACCC about the home brand milk pricing issue. On 8 February 2011 ACCC representatives held a teleconference with Wesfarmers and Coles representatives.

In February 2011, Coles wrote to the ACCC on two occasions in relation to the home brand milk pricing issue.

ACCC officers will continue to liaise with Coles, Wesfarmers and their representatives as the ACCC's inquiries require.

QUESTION 5:

Senator HURLEY—We certainly did hear some quite strong concerns from processors about the whole process and about the action by the big retailers, Coles and Woolworths in particular. Have you received any complaints from those milk processors?

Mr Bezzi—We might need to take that on notice to be sure that this is the correct answer, but I think the answer is no. We have had complaints from some industry associations and from one retailer that I can think of and a whole lot of form complaints from dairy farmers.

ACCC Response:

A search of the ACCC's complaints database for the period 22 March 2010 to 22 March 2011 did not reveal any complaints received from the following milk processors concerning the milk pricing of Coles or Woolworths:

- National Foods Australia Limited
- Parmalat Australia Limited
- Murray Goulburn Co-Operative Co Limited, or
- Fonterra Co-operative Group Limited.

QUESTION 6:

Senator RYAN—One of the other things that has been put, in private conversation, to a number of us on this side of the table is that there is a reluctance—I am not trying to substantiate the claim; it was observation rather than judgment—by some suppliers in the retail grocery sector to come forward and speak publicly to us, even if it were in camera, because of the market power and the fact that their businesses are often dependent upon one retailer or the other, sometimes both. It has also been put to me that that actually is a challenge for the ACCC. What is your response to those claims?

Mr Cassidy—Again, talking in general terms, we do encounter this. There can be a reluctance on the part of parties to come forward, particularly when they are dealing with some powerful interests. That is one of the reasons why we are very protective of our investigations and about whether or not we are carrying out investigations. Part of encouraging people to come forward is that we do what we can to protect our sources. There are provisions in the act that provide that harassing someone or taking action against someone because they have assisted us with an investigation constitutes an offence.

Senator RYAN—Have you had grounds to utilise that provision?

Mr Cassidy—We have.

Senator RYAN—Is it an oft-used provision or is it rarely used? I am not familiar with it.

Mr Cassidy—It is not oft-used, but it is there. We have used it.

Senator RYAN—Do you find it is an effective deterrent to misbehaviour and that it sends a signal to those who would like to come forward that it is an effective incentive for them for protection to speak to you, or do you think there needs to be something else operating?

Mr Cassidy—I would not say we need anything else operating, but we are terribly conscious of the issue you raise. We do all we can. Again, this is one of the reasons we do not like talking about our investigations and our processes. We go to quite considerable lengths to protect those who do come forward.

Senator RYAN—Is it possible for you to take on notice how many times that process has been used in recent years with a short description of the case or the circumstances?

Mr Cassidy—Sure. We can do that.

ACCC response:

Under section 162A of the *Competition and Consumer Act 2010* it is an offence to threaten, intimidate or coerce persons, or cause or procure loss or damage to them, because they have provided, or are intending to provide, information or documents to the ACCC or the Australian Competition Tribunal. The penalty is a fine of up to $2,200 or 12 months imprisonment.

Under section 149.1 of the *Criminal Code* it is an offence to obstruct, hinder, intimidate or resist a Commonwealth public official in the performance of their functions. The penalty is a term of imprisonment for 2 years.

Destruction of documents when legal proceedings are anticipated or on foot is prohibited under the *Crimes Act 1914*, as is giving false testimony, fabricating evidence, intimidating witnesses, corruption of witnesses, deceiving witnesses and preventing witnesses from attending court. Terms of imprisonment apply from between 1 and 5 years. Conduct of this type may also constitute contempt of court, which is punishable at the court's discretion.

While the Commonwealth Director of Public Prosecutions has not commenced any prosecutions relating to ACCC matters, the ACCC regularly warns parties of the offence of obstructing Commonwealth officials and occasionally raises its concerns about the possibility of parties engaging in conduct that may intimidate potential witnesses or obstruct ACCC investigations.

QUESTION 7:

Senator XENOPHON—On notice, in relation to any communications between the ACCC and Coles on milk pricing in the past 12 months, can you advise on what date or dates such communications took place? Secondly, were the communications in person, by phone, in writing or by other means? Thirdly, who were the parties to such communications?

ACCC response:

At the initiation of the ACCC (as noted in response to question 4 above), in the year to 22 March 2011, ACCC representatives first engaged with Wesfarmers and Coles on the issue of Coles pricing of home brand milk at a high level ACCC and Wesfarmers liaison meeting, on 3 February 2011. During the meeting Wesfarmers representatives undertook to ensure that Coles would provide information to the ACCC in relation to the home brand milk pricing issue. The meeting was held in the ACCC office, Melbourne. Those in attendance were:

- Mr Graeme Samuel, Chairman, ACCC
- Ms Sarah Court, Commissioner, ACCC
- Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division, ACCC
- Mr Richard Goyder, Managing Director, Wesfarmers
- Mr Paul Meadows, Group General Counsel, Wesfarmers.

In the week commencing 7 February 2011 Wesfarmers Group General Counsel provided information to the ACCC about the home brand milk pricing issue. On 8 February 2011 ACCC representatives held a teleconference with Wesfarmers and Coles representatives. Those involved in the teleconference were:

- Mr Marcus Bezzi, Executive General Manager, Enforcement and Compliance Division, ACCC
- Mr Rob Ghali, Director, Enforcement Operations New South Wales, ACCC
- Mr John Durkan, Merchandise Director, Coles
- Mr Paul Meadows, Group General Counsel, Wesfarmers.

In February 2011, Coles provided the following correspondence:

- Letter (dated 11 February 2011) – from Mr John Durkan, Merchandise Director, Coles, addressed to Mr Rob Ghali, Director, Enforcement Operations New South Wales, ACCC
- Letter (dated 22 February 2011) – from Mr Ian McLeod, Managing Director, Coles, addressed to Mr Graeme Samuel AC, Chairman, ACCC.

ACCC officers will continue to liaise with Coles, Wesfarmers and their representatives as the ACCC's inquiries require.

QUESTION 8:

Senator XENOPHON—...My next question on notice: in terms of the advertising slogans 'Down, down' and 'Staying down', surely there must be parameters as to what time frame that will be in? And is there a potential conflict between being misleading if you do not keep prices down low enough and, if you keep them down too long, a potential impact on the issue of predatory pricing?

ACCC response:

Consumer protection issues may arise in circumstances where a business advertises reduced prices will stay down and then increases those prices prior to the expiration of a reasonable period of time. The *Australian Consumer Law* does not set out timing parameters in respect of alleged misleading or deceptive conduct under section 18. Ultimately it would be up to a court to determine what is meant by the representation that prices are 'staying down' and based on the actual period of time that prices were reduced whether a business had engaged in misleading or deceptive conduct.

In respect of predatory pricing, timing is only one element in establishing a contravention of the *Competition and Consumer Act 2010* (CCA).

Predatory pricing is unlawful under section 46(1) and section 46(1AA) of the CCA.

Section 46(1) prohibits businesses that have substantial market power from taking advantage of that power for the purpose of eliminating or substantially damaging a competitor, preventing the entry of a person into a market or deterring or preventing a person from engaging in competitive conduct in a market.

To constitute a breach of section 46(1AA) it must be proved that in engaging in the pricing practices:

- the corporation has a substantial share of the market
- the corporation offered the particular goods or services in question for a sustained period at a low price
- the low price must be less than the cost to a company of supplying the goods or services
- the corporation has offered or sold goods at the low cost for the purpose of eliminating or substantially damaging a competitor, to prevent a person from becoming a competitor or to deter a person from acting competitively.