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12 June 2009

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**Submission on 'Creeping acquisitions - the way forward' discussion paper**

This submission is made by the National Board of IGA Retail Network Limited. The members of the IGA National Board represent the owners and operators of over 1,000 independent supermarkets that trade under the IGA banner across Australia. These independent supermarkets are the main competitors to the two major supermarket chains that have come to dominate the supermarket industry and which now have a combined market share of 70 to 80%.

The IGA National Board is pleased to provide a submission on the Government's latest discussion paper on 'Creeping acquisitions - the way forward' (the **discussion paper**). As stated in our submission on the Government's original discussion paper in September 2008, we strongly support amendments to the *Trade Practices Act 1974* (Cth) (**TPA**) to address creeping acquisitions.

**Summary of our submission**

The IGA National Board welcomes the proposed way forward set out in the discussion paper. We consider that the amended version of the significant market power (**SMP**) model that is proposed in the discussion paper is the most effective mechanism to address the problem of creeping acquisitions. We are pleased that the Government has recognised that the 'aggregation model' that was proposed in the 2008 discussion paper is unlikely to be effective and that a SMP model is a more appropriate solution.

We consider that either form of the amended SMP model that is proposed in the discussion paper will be effective. It would, however, be beneficial for the final drafting of the new section to include provisions mirroring the relevant subsections of section 46 of the TPA so that 'substantial degree of power in a market' has the same meaning as in section 46, and for the Explanatory Memorandum to the amendment Bill to clarify the intended meaning of 'enhancing' market power.

If the Government adopts the second option, where the SMP model would only apply to corporations or sectors that are declared by the Minister, then it will be critical that the grocery industry is immediately declared to be subject to the SMP model. The grocery industry has already been clearly identified by the ACCC as a sector where creeping acquisitions are a significant concern and where immediate action is necessary.

## **The problems associated with creeping acquisitions in the grocery industry**

Our submission on the original discussion paper explained in detail why creeping acquisitions are a serious problem in the grocery industry. We reiterate our view that creeping acquisitions are a very real and current issue in the grocery industry, and not simply a theoretical issue as has been claimed in submissions by Coles and Woolworths.

In the nine months since the release of the 2008 discussion paper, the ACCC has cleared six separate acquisitions by Woolworths or Coles of existing supermarkets, supermarket leases or supermarket development sites. The ACCC is also currently considering Woolworths' proposed acquisition of the eight Macro Wholefoods stores and one additional development site. This high number of acquisitions clearly shows that urgent action on creeping acquisitions is required.

We endorse the comments that the ACCC made in its submission on the 2008 discussion paper, including the following comments explaining why creeping acquisitions are an issue that requires legislative change:

- there is a significant risk that competition in various industries could be substantially damaged as a result of a loophole in the TPA that allows creeping acquisitions;
- the current TPA provisions do not cover situations where a business that is small in competitive terms is acquired by a firm that has substantial market power;
- the grocery industry is a key area of the Australian economy where the ACCC has identified risks of competitive concerns if creeping acquisitions are allowed to continue unchecked; and
- the ACCC is concerned that there appears to be a misconception that the current TPA provisions are adequate to deal with creeping acquisitions problems in the supermarket sector, when in fact the ACCC is currently unable to prevent most such acquisitions and is unable to address the broader impact of those acquisitions on lessening competition in grocery wholesale markets.

We also support the following definition of creeping acquisitions provided by the ACCC in its submission:

The term 'creeping acquisition' encompasses a range of situations. While it can refer to a series of acquisitions over time that individually do not raise competitive concerns, but when taken together, the acquisitions have a significant competitive impact, the term creeping acquisition also refers to a firm with substantial market power enhancing its market power through one (or more) acquisitions which individually do not lessen competition.

This definition clarifies that competition concerns arise not only in relation to a series of small acquisitions over time, but also in relation to a firm with substantial market power making a single acquisition of a smaller competitor. As the ACCC notes in its submission, this latter scenario is of significant concern and the ACCC is not currently able to act in relation to acquisitions of small firms under the current test in section 50 of the TPA.

## **We support the amended SMP model proposed in the discussion paper**

The discussion paper proposes an amended version of the SMP model, which would apply to a corporation with substantial power in a market and would prohibit an acquisition that has the effect or likely effect of 'enhancing' that corporation's market power. The IGA National Board supports this amended SMP model and considers that it will be the most effective way to address creeping acquisitions.

The amended SMP model is very similar to the original SMP model that we supported in our submission on the 2008 discussion paper. We are pleased that the Government has recognised that the 'aggregation model' that was proposed in the 2008 discussion paper is unlikely to be effective and that a SMP model is more appropriate.

## **The intended effect of the SMP model should be clarified in the amendment Bill and Explanatory Memorandum**

The discussion paper does not discuss the intended application of the amended SMP model in any detail. The proposed amendment to the TPA that is set out in the discussion paper is also very brief and does not give any guidance as to the meaning of some of the key terms that are used in the proposed amendment. As a result, there may be considerable uncertainty about the effect of the new provision and the approach that the ACCC and the Courts will take when applying it.

We recommend that two aspects of the amended SMP model should be clarified: the meaning of 'substantial degree of power in a market' and the meaning of 'enhancing'. Both of these concepts are critical to the effectiveness of the amended SMP model.

### *'Substantial degree of power in a market'*

We recommend that 'substantial degree of power in a market' should have the same meaning as in the current misuse of market power prohibition in section 46 of the TPA. That term has a reasonably well understood meaning in the context of section 46, and it would assist certainty to ensure that the same meaning applies to the amended SMP model.

To achieve this approach, we recommend that the new provision that inserts the amended SMP model also includes subsections that mirror subsections (2), (3), (3A), (3B), (3C) and (3D) of section 46. Including those provisions will ensure, for example, that it is clear that more than one corporation can have substantial power in a market and that a corporation does not need to have absolute freedom from competitive constraint to have substantial market power.

Without those provisions, there would be a risk that the Courts will consider that 'substantial degree of power in a market' was intended to have different meanings in section 46 and in the new creeping acquisitions provision. There would also be a risk that Coles and Woolworths could argue that they compete with each other and as a result neither of them has substantial market power and the new provision does not apply to them.

### *'Enhancing' that market power*

The amended SMP model prevents an acquisition that has the effect or likely effect of 'enhancing' a corporation's substantial market power. 'Enhancing' is not a term that is used elsewhere in the TPA. There also does not appear to be any useful legislative or judicial guidance from other contexts on the meaning of this term.

We recommend that the Explanatory Memorandum to the amendment Bill sets out the Government's intended application of the amended SMP model and the intended meaning of 'enhancing'. In particular, we consider that the Explanatory Memorandum should make it clear that the intention is that an acquisition of a competitor will enhance market power even if that competitor is much smaller and there is only a minor increase in the acquiring firm's market share. Without some guidance as to the meaning of 'enhancing', there is a risk that the major supermarket chains will argue that the purchase of a small independent supermarket will not enhance their market power to a sufficient degree to be prohibited by the new test.

### **The Ministerial declaration proposal is a workable option if the Government wants to limit any possible unintended consequences for other industries**

The discussion paper discusses the possibility of including a Ministerial declaration process, under which the new creeping acquisitions provision would only apply to certain industries that are specified by the Minister. This is a potential model that we suggested in our submission on the 2008 discussion paper.

As explained in our original submission, we consider that such a process could be useful if the Government has significant concerns about possible unintended consequences of the new creeping acquisitions provisions on other industries. In short, we would not want suggestions of possible unintended consequences for other industries to persuade the Government not to take action to address the clear issue of creeping acquisitions in the grocery industry. However, if submissions from other industries do not show that there is a significant risk of unintended consequences in those industries, then a declaration process may not be necessary.

If a declaration process was included, it will be critical that the grocery industry is immediately declared to be covered by the new provisions. That could be achieved either by including an initial list of declared industries in the amendment Bill itself, or by the Minister making a declaration immediately upon commencement of the new provisions. Declarations should apply for a specified period, with the Minister able to renew or extend that period.

The ACCC has already conducted a comprehensive investigation of competition issues in the grocery sector in its Grocery Inquiry. The ACCC reached the view in the Grocery Inquiry that there is a real risk of creeping acquisitions in the grocery industry and that new TPA provisions should apply to the grocery industry to prevent creeping acquisitions. The ACCC reiterated this view in its submissions on the 2008 discussion paper. Another review or recommendation by the ACCC should not be required before applying the new creeping acquisitions laws to the grocery industry.

## **Concluding comments**

The IGA National Board is very pleased that the Government is committed to addressing the problem of creeping acquisitions and we consider that the amended SMP model proposed in the discussion paper is the best way forward.

We would be happy to provide any further information that may be useful and to provide comments on the legislative amendments once they have been drafted.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Michael Daly', with a horizontal line underneath.

Michael Daly  
Chairman, IGA National Board