

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

10 July 2009

General Manager
Competition and Policy Division
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Sir/Madam,

CREEPING ACQUISITIONS – THE WAY FORWARD

Executive Summary

We believe the provisions proposed in the most recent discussion paper, *'Creeping Acquisitions – The Way Forward'*, would be an inappropriate response to a perceived problem which has not been clearly established. We further believe it would have very significant unintended consequences, including adverse consequences for competition, that are potentially far more damaging than those it is intended to address.

We note, however, that according to the Treasury's 'Abstract', "the Government considers reform in relation to creeping acquisitions as an election commitment." This suggests that the Government has already decided to proceed with new laws to address the perceived creeping acquisitions "loophole".

On this basis, the Shopping Centre Council of Australia (SCCA) suggests that any proposed provision should be specifically directed to achieving that end and not directed to putting in a straitjacket some of Australia's most successful businesses. It is our belief that the proposed provision will do this.

Again on the basis that the Government has already decided to proceed with new laws the SCCA supports the recommendation of the American Bar Association that:

To the extent that creeping acquisitions require any special treatment, such concerns are best addressed through appropriate premerger notification procedures, rather than through modifications to the substantive standards of legality for mergers.

Additionally, consistent with the approach adopted in the European Union and to prevent companies in Australia consciously attempting to circumvent the prohibition on acquisitions contained in the existing section 50 of the *Trade Practices Act*, a provision might sensibly be introduced which aggregates, and subjects to the substantial lessening of competition test, consecutive acquisitions by one corporation (or group of companies) of parts of (or individual assets of) another corporation (or group of companies) – i.e. consecutive acquisitions in, say, a five year time frame between the same parties.

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Issues raised in first Discussion Paper

In preparing this paper the SCCA has had the benefit of reading the submissions lodged in response to the first discussion paper, released on 1 September 2008. We note that the majority of those submissions put forward compelling arguments that:

1. Currently "Australia is widely regarded as having a well-developed merger control regime that reflects international best practices in merger enforcement"¹.
2. If Australia were to introduce new laws specifically addressing creeping acquisitions [such as those contemplated by both discussion papers] then Australia would be out of kilter with the rest of the developed world - where there is no relevant international precedent².
3. In Australia no clear case has been established for change to deal with the said problem of creeping acquisitions - even in the grocery industry³ which seems to be the main impetus for the discussion papers.
4. To avoid excessive compliance and administrative costs and so as not to interfere with the operation of the market in unintended ways - such as by discouraging efficiency, discouraging investment and delaying proposed acquisitions - amendments should not be made to section 50 of the *Trade Practices Act 1974 (Cth)* (the Act) unless a case for change is clearly established⁴.

In short, these submissions suggest that Australia will be blazing a trail with the proposed amendments, with guaranteed associated costs; unknown unintended consequences; and without any clear need having been established.

Notwithstanding the force of these submissions, the SCCA understands that the Government has decided to proceed with new laws addressing so called "creeping acquisitions" so as to meet its election commitments and because of a perception (supported by the Australian Competition and Consumer Commission) that creeping acquisitions currently constitute a "loop-hole" in the coverage of section 50.

This we take from comments made in the most recent discussion paper which states:

"As canvassed in the first discussion paper, the Government considered that creeping acquisitions concerns related to a potential loophole in section 50, which currently prohibits acquisitions that would, or would be likely to, substantially lessen competition in the market. This loophole was understood to relate to a series of small acquisitions that individually would not substantially lessen competition in the market, but collectively may have that effect over time."

¹ American Bar Association, Section of Antitrust Law submission p 2

² Law Council of Australia Trade Practices Committee Business Law Section submission p 6-7, Speed and Stracey submission p. 5

³ Law Council of Australia Trade Practices Committee Business Law Section submission p 1-2, Business Council of Australia submission p 2 attachment p 2, Coles and Woolworths submissions

⁴ Law Council of Australia Trade Practices Committee Business Law Section submission p 1-2, 13, Speed and Stracey submission p 1-2

On the basis that the Government has already decided to proceed with new laws addressing this "loop-hole", the SCCA proposes to limit our comments in this submission to Question 1, that is:

"What are your views on the two regulatory options mentioned [in the discussion paper]? What potential unintended consequences need to be considered? How might these unintended consequences be addressed?"

What are creeping acquisitions?

To properly assess and then comment upon the regulatory options referred to in the most recent discussion paper it is first necessary to identify the particular "loop-hole" the Government has committed itself to closing.

Until recently what constituted "creeping acquisitions" was well settled. In 1999, for example, the Joint Select Committee on the Retailing Sector (the Baird Committee), in its report entitled "*Fair Market or Market Failure? A Review of Australia's Retailing Sector*", described creeping acquisitions as follows:

"5.32 'Creeping acquisitions' refers to the long-term strategy of a major chain increasing its market share through numerous individual acquisitions of other existing supermarkets, rather than by building new stores or expanding existing stores."

Similarly in January 2003 the Trade Practices Act Review Committee (Dawson Review) described creeping acquisitions as follows:

"The term 'creeping acquisitions' generally refers to the acquisition of a number of individual assets or businesses over time that may have a cumulative effect upon the market share of a competitor. However, no individual acquisition by itself would necessarily constitute a substantial lessening of competition in the relevant market so as to fall within the prohibition imposed by section 50."

In June 2003, the then Chairman of the ACCC, Professor Allan Fels, also defined creeping acquisitions in the following terms:

"The issue of creeping acquisitions arises when bit by bit a business acquires small units of business. A problem arises when no single acquisition will result in a substantial lessening of competition, particularly as the acquisitions are spread out in time and space..."

The issue of creeping acquisitions raises a problem for the ACCC. At what point can or should the ACCC view such a small and often insignificant event in its wider context.⁵"

⁵ Professor Allan Fels, Chairman, ACCC, 18 June 2003, "A Small Business Friendly Trade Practices Act", Speech to the Council of Small Business Organisations of Australia.

Consistent with this settled understanding, in the September 2008 discussion paper, the term "creeping acquisitions" was used by Treasury to describe:

"...conduct that comprises the accumulated effect of a number of small individual transactions which, when considered in isolation at the time that each transaction occurred, would not breach section 50 [of the TPA]. That is, while each transaction considered at the time it occurred may have a limited impact on competition, and would therefore not fall within the scope of section 50, over a longer period a series of such transactions may have the cumulative effect of substantially lessening competition in a market."⁶

Likewise, in the Law Council of Australia's submission in respect of that discussion paper, creeping acquisitions were described as follows:

"The concept of 'creeping acquisitions' generally refers to the acquisitions of a number of individual assets or businesses over time which, individually, are unlikely to contravene the mergers test in the Act, but which, when taken together, may have such an effect."

In late 2008, however, contrary to the then settled understanding of creeping acquisitions as referred to above, the ACCC in its submission in response to the first discussion paper sought to radically redefine creeping acquisitions as follows:

"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 existing substantial market power enhancing its market power through one (or more) acquisitions which individually do not substantially lessen competition."
[Emphasis Added]

Until this intervention there was no suggestion that the concept applied to all acquisitions (including single, one-off acquisitions) by larger corporations which enhanced the market power of those corporations. Not only did the ACCC, in its submission, seek to radically expand the concept of creeping acquisitions, but it proceeded to shift the emphasis by stating:

"The ACCC believes that while the concept of creeping acquisitions may encompass a range of scenarios, the latter type of creeping acquisition is the area of greatest concern."

With respect, the ACCC's attempt to radically redefine and expand the concept of creeping acquisitions should be seen for what it is. True creeping acquisitions, i.e. the perceived "loop-hole" which the Government appears committed to addressing, refer to a series of smaller acquisitions which collectively result in a substantially lessening of competition in a relevant market or markets. Acquisitions (whether singular or more) by entities with substantial power in a market which enhance that substantial market power are something quite separate (as set out below) and should be assessed separately. A provision directed at prohibiting such acquisitions is not a provision directed at closing a perceived "loophole" in Section 50 of the Act. Rather it is a provision directed to achieving an entirely different result (as discussed later).

⁶ *The Treasury, Discussion Paper on Creeping Acquisitions, p 3 (para 17).*

Closing the loophole

Whilst suffering from a large number of deficiencies the 'aggregation model' canvassed in the first discussion paper did at least have the attribute that it was specifically directed to addressing the perceived problem of creeping acquisitions (as properly understood) and was consistent with Part IV of the Act, and in particular section 50, by ultimately requiring proof of a "substantial lessening of competition".

Even the 'substantial market power model' canvassed in that paper was directed to a lessening of competition (albeit any lessening).

The test proposed in the most recent discussion paper, however, neither requires there to be a series of acquisitions, "a substantial lessening of competition", nor "any lessening of competition". Rather that test goes much further than its original purpose by seeking to expand existing competition law in a manner that extends well beyond anything currently contemplated or envisaged by the Act.

The test now proposed is open to many of the criticisms made of section 50 as it was prior to amendment in 1993. At that time section 50(1)(b) prohibited acquisitions by corporations in a position to dominate a market for goods or services if the "*acquisition would or be likely to substantially strengthen the power of the corporation to dominate that market*". The 1991 Cooney Report, which led to section 50 changing back to a substantial lessening of competition test, criticised the then existing provision (detailed above) in the following terms which remain pertinent:

"3.96 A return to a substantial lessening of competition test for mergers would, it is said, reintroduce a degree of compatibility with the Act, would bring Australia more into line with the approach taken in major Western economies, and would leave the availability of authorisation on public benefit grounds unaffected."

"3.109 The philosophy underlying Part IV of the Trade Practices Act is the protection and enhancement of competition. Implicit in Part IV is the assumption that acts or occurrences which substantially lessen competition contravene the Act, unless authorised by the Trade Practices Commission on public benefit grounds."

"3.110 While most other conduct caught by Part IV of the Act is subject to a competition test, section 50 is subject to a less rigorous test. The existence of a dominance test in the area of merger regulation is difficult to reconcile with the essential thrust of the Act which is directed to preventing anticompetitive conduct."

"3.116 The Committee considers that the essential thrust of the Trade Practices Act should be to prohibit acts which substantially injure competition, except where public benefit can be demonstrated. This principle is embraced elsewhere in Part IV of the Act, and should also be incorporated in the merger regulation provisions."

In the most recent discussion paper Treasury seeks to justify the proposed reliance on a "substantial degree of market power" test rather than a "substantial lessening of competition" test on that basis that:

"4. Substantial market power is a concept that is currently used in section 46, but has previously not been used in mergers and acquisitions provisions of the TPA."

"5. The concept of market power is well established in competition law..."

"13. By amending the SMP model to deal directly with the "enhancement" of market power, this model seeks to complement, rather than undermine, the existing substantial lessening of competition test in section 50. The Government continues to be committed to the existing section 50, and considers that it is functioning well in the majority of mergers and acquisitions cases."

With respect, the substantial market power model now proposed will not complement section 50 as suggested. It is not specifically drafted to address creeping acquisitions (a series of smaller acquisitions) and will not therefore, as a general rule, close the perceived loophole. Nor does it ultimately require proof of a substantial (or indeed any) lessening of competition. Rather the proposed substantial market power model will add to the ACCC's power over corporations with substantial market power (section 46). If anything, whilst the test now proposed might be said to complement section 46 (not section 50) of the Act, in fact it opens up a new area of business regulation not contemplated in the original discussion on creeping acquisitions. It should be seen in that light.

To the extent that the proposed provision might prohibit some acquisitions which are in truth creeping acquisitions (in the accepted sense) this would result directly from the excessively wide ambit of the proposed provisions as discussed below. If the Government wishes to close the perceived creeping acquisitions loophole the SCCA submits that it would be better served by legislation specifically directed to that perceived loophole (see our **Recommendations** below).

Problems with the proposed test

A large number of the criticisms made of the 'substantial market power' test, canvassed in submissions to the first discussion paper, apply with equal force to the new test and are worth repeating here.

- "To introduce a standard of "enhancing" a corporation's substantial market power for some firms may come close to an absolute prohibition on any acquisitions by those firms in the relevant market."⁷
- "...the "substantial market power model" will therefore prevent particular acquisitions, even where any increase in the acquirer's market power will be insignificant or transitory".⁸

⁷ Law Council of Australia Trade Practices Committee Business Law Section submission p 16

⁸ Law Council of Australia Trade Practices Committee Business Law Section submission p 17

- "...the "substantial market power model" would effectively "cap" the market share of any firm which had a substantial degree of power in a market, save for organic growth. Thus, firms which have achieved a position of substantial market power – even if by superior products, better efficiency or other means – will have growth prospects only by organic means. Any acquisitions of small competitors or small suppliers/customers – no matter how trivial – will be either denied to those firms or made the subject of an uncertain and untested regulatory review."⁹
- "This uncertainty could inhibit larger firms from making efficiency-enhancing acquisitions that would have significant consumer benefits for fear that such actions might run foul of special antitrust standards applicable only to large firms."¹⁰
- "There is a very real risk that the proposed "substantial market power model" will prevent businesses right across the Australian economy that might be viewed as having market power from considering or proceeding with any acquisitions, as it may, in many cases, be impossible for them to be certain that the proposed acquisition may not have some effect on competition (albeit not substantial, material or more than transitory). As a result, it may have the undesirable effect of preventing businesses from entering geographic locations to offer more choice and lower prices, and instead protect less efficient and higher price competitors. In this sense, the "substantial market power model" may operate as a de facto market share cap and limit larger companies to organic growth."¹¹
- "The substantial market power model will, in effect, place a "market cap" on the growth of successful Australian businesses in all sectors of the Australian economy. It would significantly limit the ability of many efficient, innovative and competitive firms in Australia to achieve the efficiencies of scale, scope and risk diversification they require in order to drive Australia's economic growth and development. The side-effects of this include, but are not limited to, reductions in research, development and efficient capital investment, the undermining of Australia's international competitiveness and an overall loss in the consumer welfare of Australians."¹²
- "In blocking their ability to acquire less efficient firms, the Substantial Market Power Model would significantly limit the ability of many efficient firms in Australia to achieve further efficiencies of scale, scope and risk diversification that they require to drive Australia's economic growth and development. More specifically, in preventing efficient and successful firms from acquiring their less-efficient competitors, the Substantial Market Power Model would put a ceiling on the growth of Australian companies and:
 - limit opportunities and resources for research, development and efficient capital investment;
 - hinder industrial rationalisation that results in efficient allocation of resources and lower unit production costs;

⁹ Law Council of Australia Trade Practices Committee Business Law Section submission p 17

¹⁰ American Bar Association, Section of Antitrust Law submission p 3

¹¹ Coles submission p 3

¹² Woolworths Limited submission p 20