

## CREEPING ACQUISITIONS – DISCUSSION PAPER

1. On 5 August 2008, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, released the Government's preliminary action plan in response to the *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries* (Grocery Inquiry).<sup>1</sup>
2. As part of its preliminary response, the Government indicated that it would release a discussion paper by the end of August 2008 to gauge the best way forward in relation to the issue of creeping acquisitions.
3. This paper does not put forward recommendations in relation to the issues raised, and its contents do not necessarily reflect a settled position on the issues by the Government.

### Mergers and acquisitions

4. Mergers and acquisitions<sup>2</sup> are important for the efficient functioning of the Australian economy. They can allow firms to achieve efficiencies, such as economies of scale or scope, and diversify risk across a range of activities. Acquisitions can promote the efficient allocation of resources where the control of a company's assets is transferred and the assets are put to a more productive use.
5. Similarly, new management may be able to improve the productive efficiency of the company to produce goods or services at a lower cost, for example, from economies of scale or scope through integration with existing operations. New corporate ownership and control may also facilitate dynamic efficiencies by making the company more responsive to changes in technology, creating opportunities for innovation or improved production processes. Moreover, the threat of being acquired is likely to be important in fostering competition and facilitating efficiencies.
6. In many markets, sufficient competitive tension remains after an acquisition to ensure that consumers and suppliers are no worse off. In many cases, consumers or suppliers benefit from acquisitions. In 2007-08, the Australian Competition and Consumer Commission (ACCC) conducted 397 informal merger reviews for compliance with section 50. Of these, 5 were publicly opposed by the Commission outright, and 6 were resolved with

---

1 Report available from <http://www.accc.gov.au/content/index.phtml/itemId/809228>.

2 Referred to as 'acquisitions' for the purposes of this paper. Unless otherwise indicated, all references to sections relate to provisions of the Trade Practices Act 1974.

court-enforceable undertakings. Of the 212 matters considered by the ACCC on a confidential basis, 6 were opposed or had concerns expressed confidentially.

7. However, acquisitions can have anticompetitive effects. By altering the structure of markets and the incentives for firms to behave in a competitive manner, some mergers can result in significant consumer detriment.

## Regulation of acquisitions in Australia – competition law

8. The regulation of acquisitions under section 50 prohibits acquisitions that would have the effect, or likely effect, of a substantial lessening of competition in an Australian market.<sup>3</sup> Section 50 provides the ACCC with the legislative framework to consider and address potential competition concerns posed by mergers and acquisitions in Australia.
9. Prospective acquirers have three avenues available to have a proposed acquisition considered and addressed:
  - assessment of the proposed acquisition on an informal basis;
  - an application for formal clearance of a proposed merger;<sup>4</sup>
  - assessment by the Australian Competition Tribunal of an application for authorisation of a merger, using a net public benefits test.<sup>5</sup>
10. No applications for formal clearance or direct assessment by the Australian Competition Tribunal have been lodged since these processes commenced on 1 January 2007.
11. As parties are not required by legislation to notify the ACCC of a proposed acquisition, they also have the option of proceeding with the transaction without seeking any regulatory consideration. However, this would not prevent the ACCC from subsequently investigating the merger, including making public inquiries, using its formal information-gathering powers and taking enforcement action.
12. The ACCC conducts reviews of acquisitions using a forward-looking ‘with or without’ test. It considers the state of the market both with and without the proposed transaction, to establish the impact of the transaction on competition. The ‘without’ position is not simply the status quo, but is the expected position the market will be in, absent the acquisition, in the future.

---

<sup>3</sup> Regarding the meaning of ‘substantial’ see French J in *Australian Gas Light Company v Australian Competition and Consumer Commission* (No. 3), as something ‘commercially meaningful or relevant to the competitive process’.

<sup>4</sup> Part VII, Division 3, Subdivision B.

<sup>5</sup> Part VII, Division 3, Subdivision C.

13. **Subsection 50(3) prescribes a non-exhaustive list of factors that must be taken into account when assessing whether a merger would be likely to substantially lessen competition. These include the actual and potential level of import competition, the height of barriers to entry, the level of market concentration, and the degree of countervailing market power in the relevant market.**
14. **The relevant market for consideration can include multiple geographical markets including national, state, territory or regional markets in Australia.<sup>6</sup> Market definition is a crucial step in any consideration of the competition impacts of a proposed acquisition. The precise definition used will depend on the particular facts, and a given acquisition may impact on more than one market.**

### Remedies available for anticompetitive mergers

15. **Where an acquisition would, or would be likely, to lead to a substantial lessening of competition in an Australian market, the ACCC can seek to enforce its assessment by:**
  - **applying for a permanent injunction to restrain an anticompetitive acquisition;<sup>7</sup> or**
  - **pursuing pecuniary penalties against those involved in the acquisition.<sup>8</sup>**
16. **If the ACCC is of the view that a completed acquisition has substantially lessened competition, it may also apply to the Federal Court for a divestiture order under section 81 within 3 years of the contravention. An order under section 81 can require a person to dispose of the shares or assets acquired in contravention of section 50, or it can take the form of a declaration that the acquisition is void (resulting in the vendor refunding the consideration for the acquisition).**

### Creeping Acquisitions

17. **The term ‘creeping acquisition’ is generally used 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. 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**

---

<sup>6</sup> Subsection 50(6).

<sup>7</sup> Section 80. A private litigant cannot seek an injunction to restrain a proposed acquisition (subsection 80(1A)).

<sup>8</sup> Subsection 76(1). Under subsections 76(1A) and (1B), the Court may impose a penalty for a breach of section 50 of up to \$10 million for a corporation and \$500,000 for an individual.

such transactions may have the cumulative effect of substantially lessening competition in a market.

18. In practice, concerns typically arise where a supplier with a substantial degree of power in a market acquires small competitors.
19. Creeping acquisitions have been the subject of previous consideration, including by the Parliamentary Joint Select Committee on the Retailing Sector (Baird Committee) in its 1999 *Fair Market or Market Failure* report<sup>9</sup>, the *Review of the Competition Provisions of the Trade Practices Act* in 2003 (the Dawson Review),<sup>10</sup> and the Senate Economics References Committee in its 2004 report on *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*.<sup>11</sup>
20. The Baird Committee in 1999 noted its concerns that section 50 was unlikely to be breached by small but repeated acquisitions of independent grocery retailers. It also noted that there was a 'degree of equivocation' amongst those giving evidence as to whether legislative amendments were required in relation to creeping acquisitions. However, concerns were raised that in some instances the ACCC is unaware until after the fact that an acquisition has even taken place due to the lack of notification requirements.
21. The Dawson Review in 2003 considered a range of measures to deal with creeping acquisitions, including:
  - market share caps, although this approach was rejected by the Dawson Review on the basis that it would inefficiently restrict competition, would be unworkable in the retail sector, and would adversely affect rural consumers in particular.
  - a declaration process, whereby industries declared by the Government to be highly concentrated would have to notify the ACCC of any intended acquisitions. The Dawson Review concluded that this process would lead to large market participants establishing new facilities rather than buying existing stores from smaller rivals willing to sell.
  - a proposal to amend subsection 50(3) to include a reference to creeping acquisitions as a relevant concern in assessments of mergers and acquisitions under section 50.
22. The Dawson Review concluded that under existing arrangements the ACCC could consider creeping acquisitions under section 50. The Dawson Review

---

<sup>9</sup> [http://www.aph.gov.au/Senate/committee/retail\\_ctte/index.htm](http://www.aph.gov.au/Senate/committee/retail_ctte/index.htm)

<sup>10</sup> <http://www.tpareview.treasury.gov.au/content/report.asp>

<sup>11</sup> [http://www.aph.gov.au/Senate/committee/economics\\_ctte/completed\\_inquiries/2002-04/trade\\_practices\\_1974/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/index.htm)

further noted that where a competitive environment exists in a market, the number of players in that environment is a matter for industry policy, not competition policy.

23. The Senate Economics Reference Committee in 2004 noted that ‘as a matter of logic’, creeping acquisitions in concentrated markets must over time substantially lessen competition. The Committee was of the view that section 50 was unable to deal with the issue of creeping acquisitions. It recommended that section 50 be revised to enable the ACCC to prevent creeping acquisitions that would lead to a substantial lessening of competition in an Australian market.

### Recent findings by the ACCC: Grocery inquiry

24. On 5 August 2008, the Government released the report of the ACCC Grocery Inquiry.<sup>12</sup> During the course of the Inquiry, the ACCC raised the issue of creeping acquisitions in the grocery retail sector.<sup>13</sup>
25. In its final report, the ACCC stated its view that section 50 is unlikely to address all concerns in relation to creeping acquisitions. The ACCC noted that while it does not consider the issue of creeping acquisitions to be a current concern in the grocery retailing industry, it maintains its support for a general creeping acquisitions law. Further, it considers that the supermarket industry is one where creeping acquisitions could potentially become a concern, due to particular structural features of the market.<sup>14</sup>

### Approaches to address creeping acquisitions

26. The Government has stated its intention to address concerns about creeping acquisitions. In doing so, the Government is seeking public submissions on possible options.
27. One approach, referred to as the ‘aggregation model’ would involve a corporation being prohibited from making an acquisition if, when combined with acquisitions made by the corporation within a specified period, the acquisition would be likely to substantially lessen competition in a market.
28. The aggregation model has been raised during past considerations of this issue. It seeks to prohibit the latest acquisition in a series of creeping acquisitions.

---

12 Press release by the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, <http://www.assistant.treasurer.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/065.htm&pageID=003&min=ceb&Year=&DocType=0>

13 ACCC 11 February 2008 issues paper, pp20-21, <http://www.accc.gov.au/content/index.phtml/itemId/809228>

14 Grocery Inquiry, p535.

Another key feature of the aggregation model is that it would retain the substantial lessening of competition test and is, to that extent, consistent with section 50. The test would be applied to a combination of acquisitions made by the corporation within a specified period.

29. An alternative model is to add a new prohibition to section 50. A corporation would be prohibited from making an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to a substantial lessening) of competition in that market.
30. The substantial market power model would supplement the substantial lessening of competition test under section 50. Broadly, the phrase 'substantial market power' would mean a significant, but not absolute, freedom from competitive constraint, the extent of which would be considered in light of the factors set out in subsection 50(3), and the ability to raise prices above competitive levels.
31. A proposed acquisition would not be likely to substantially lessen competition where there is at least one significant competitive constraint on the merged firm, for example, strong import competition. Where such competition exists, the acquirer is unlikely to have substantial market power pre-merger, and hence the substantial market power test would also not be contravened.
32. Practically, a proposed acquisition could pass the current substantial lessening of competition test in section 50, but not a substantial market power test, where:
  - the acquirer faces no significant competitive constraint, and so is likely to have substantial market power; and
  - the merged firm would face no significant competitive constraint but the impact of the proposed acquisition on competition would be less than 'substantial'.
33. In practice, it is envisaged that this outcome would most commonly arise where the target firm has a small market share. Consequently, the major impact of supplementing the substantial lessening of competition test with the substantial market power test would be to prohibit firms with substantial market power from acquiring small firms when this leads to a lessening of competition.
34. Such a change would provide a mechanism for prohibiting acquisitions that could form part of a series of creeping acquisitions, where the acquirer is a significant supplier in the market where competition would be lessened.
35. Either the aggregation model or the substantial market power model would require amendments to the ACCC's merger guidelines, in order to limit the impact of these additional or amended merger tests on the resources of the ACCC and the merger parties.

## Submissions

36. The Government welcomes any submissions regarding the issues identified above, or any other matter related to the issue of creeping acquisitions.
37. Submissions will be made publicly available on the Treasury website. If a submission, or any part of it, is to be treated as confidential, please indicate this clearly on the submission.<sup>15</sup>
38. Submissions should be made by 10 October 2008 to:

Scott Rogers  
Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

Email: [scott.rogers@treasury.gov.au](mailto:scott.rogers@treasury.gov.au)

Facsimile: 02-6263 3964

---

<sup>15</sup> Any request made under the Freedom of Information Act 1982 for a submission marked 'confidential' to be made available will be determined in accordance with that Act.