

17th October 2008

Mr Scott Rogers
Competition and Consumer Policy Division
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Dear Sir,

Re: Creeping Acquisitions – Discussion Paper

The Retail Traders' Association of Western Australia (RTAWA), which has been in existence for 86 years, is the oldest and the most representative Association of retailers in Western Australia.

The RTAWA appreciates the opportunity to comment on the Creeping Acquisitions Discussion Paper.

Discussion

The RTAWA does not support anti-competitive market monopolies, however, we strongly support free enterprise, our objective always to remove market restrictions and practices that reduce market efficiency and raise business costs. The Association supports government legislation that acts to provide a level playing field for business and facilitates industry development and investment. Government legislation that adds to the complexity, cost or restricts competition, we believe is not meeting business needs or expectations. The Association considers that we are already over regulated in many instances and efforts to remove this burden from business are often too few or ineffective.

The Association considers that competitive mergers and acquisitions are part of the normal free market activity. They contribute to healthy and dynamic economic growth. Small business owners become involved in such activities usually at the point of sale of their businesses, quite often after developing their businesses over their lifetime of enterprise, sacrifice and effort.

We understand at this time, they should be assured of the widest possible range of selling options that can maximise the return on their investment. We further understand that small business owners rely heavily on achieving a competitive price, in fact it is imperative, to repay debt, usually to free up the mortgage over the family home and have sufficient surplus to either re-invest or carry them through retirement.

The Association considers that to further tighten legislation under Section 50 of the Trade Practices Act would not be beneficial to small businesses. From this perspective, prohibiting larger corporations from acquiring smaller competitors, either indefinitely or within a restrictive time period, will possibly prevent small business owners seeking to sell their business from achieving the best offer available and therefore small business will be far worse off than previously.

However, the Association is aware that small business has also expressed concern that acquiring corporations may engage in anti-competitive behaviours. Such behaviour could utilise market power to a level impossible to compete with causing smaller competitors either to close or sell to



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the larger corporation. Larger corporations are often able to cross-subsidise and achieve far better pricing within a market through their volume purchasing. Misuse of this power within any marketplace is not condoned by the RTAWA.

Competing with large corporations is often seen as a genuine difficulty for small business, but often, being small, enables that business to be

- a) far more flexible;
- b) communicate with clientele better;
- c) react to change quicker;
- d) survive and prosper within a niche market.

ABS statistics show that small business numbers have shown a dramatic increase over the past five (5) years, in excess of 50% in some States. Significantly, small business has far out performed larger business when compared on a return on investment basis. This small business growth has been accompanied by the increasing of profit levels over the same period.

Current Market Controls

The Association believes that acquisitions conducted in an anti-competitive manner could lessen competition in the market or create local monopolies. We understand that to prevent this, the Trade Practices Act (Section 50) provides the legal framework for the Australian Competition and Consumer Commission (ACCC) to investigate and seek to remedy anti-competitive acquisitions.

Section 50 of the Act states that:-

‘A corporation must not directly or indirectly:

- a) acquire shares in the capital of a body corporate; or
- b) acquire any assets of a person;

if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market’

The Act also includes a non-exhaustive list of characteristics of the market that must be taken into account in the determination of whether or not competition would be substantially lessened by a given acquisition.

The ACCC uses its legislative power to regulate acquisitions and mergers, which as outlined below is already considered by the RTAWA to be substantial. The ACCC can seek to enforce its assessment by

- Applying for a permanent injunction to restrain an anticompetitive acquisition
- Pursue pecuniary penalties against those involved
- If an acquisition has already occurred that does not meet ACCC acceptance, the ACCC may also apply to the Federal Court for a divestiture order under Section 81 within 3 years of contravention, which can require the disposal of shares or assets acquired in contravention of Section 50, or declare the acquisition void whereby the consideration in the acquisition must be refunded

The ACCC has also published merger guidelines (June 1999) to provide guidelines to the market on the likely approaches when the ACCC considers a merger or acquisition. Whilst these

guidelines do not constitute law or have any legal enforcement, they do provide a useful insight into the thinking of the regulator and are therefore useful to those considering a merger/acquisition. This document outlines the five main stages of consideration, being

- a) market definition;
- b) market concentration;
- c) import competition;
- d) barriers to entry;
- e) other structural and conduct factors

Public benefit may also play a significant part in their consideration as well.

The Association notes that there is no statutory requirement under the Act for a party to notify or seek prior approval from the ACCC for a merger or acquisition because applications to the regulator are purely voluntary. We understand the time taken for a response from the ACCC varies according to the complexity of the situation to hand and the cost to tax payers is not known.

Consideration of Future Models

The issue of 'creeping acquisitions' is not new and we understand that several reviews of this matter have raised contradictory findings as to whether or not the current detail of the Act does in fact cover 'creeping acquisitions'.

The Association notes that 'creeping acquisitions' is commonly used to describe the process by which a business with significant market power gradually acquires several smaller competitors, via several individual transactions that do not in themselves contravene Section 50 of the Act, but when viewed in total, may be deemed to be anti-competitive.

The discussion paper outlines two basic approaches as part of the search for input into this matter. Let us firstly pass comments on these approaches before adding other considerations.

- 1) Aggregation Model: prohibits an acquisition if, when combined with acquisitions made by the corporation within a specific period, the latest acquisition would be likely to 'substantially lessen competition' in a market.

Whilst this model retains the 'substantially lessen competition' test as currently within Section 50, it will add further to compliance costs for both business and the ACCC. It could also add time complexities to negotiations, significantly lower market prices for small businesses and therefore work contrary to the future interests small business owners.

- 2) Market Power Model: prohibits an acquisition if it already has a 'substantial market power' in a market and the acquisition would result in any lessening (as opposed to a substantial lessening) of competition in that market.

This model, if adopted, would introduce 'a substantial market power' test, in addition to the current 'substantially lessen competition' test, further complicating the matter and adding to the complexities and compliance costs mentioned previously.

Issues and Concerns

The RTAWA raises these issues and matters in response to the discussion paper, including both the above models:-

- a) We are concerned that the information included within the discussion paper is not sufficient for many to fully understand and fully comprehend the significance and extent of the topic to hand.
- b) We are strongly supportive of free market operations and opposed to regulations that add complexities and compliance costs without justifiable cause. At this time the significance of 'creeping acquisitions', both in economic impact and pure numbers has not been demonstrated
- c) Introducing further legislation to cover this issue could have a dramatic and costly effect on small business. The significance of this impact on small business has not been considered thoroughly within the discussion paper and demands further research before any legislative action is considered.
- d) Given that a great deal of time and money has been spent on deliberation of this matter and we are concerned that the legislation as it now exists does not already cover the situation and simply adding some discussion within the ACCC Guidelines would resolve this matter.
- e) We note the findings of the Dawson Review (2003) which considered several proposals on this matter were rejected on the basis that such proposals would increase compliance costs for both business and the ACCC.
- f) We understand the ACCC already has access to and uses its extensive legislative power to regulate acquisitions and mergers. We remain concerned that additional legislative power for the ACCC could cause disruption to the market.

Recommendation

The RTAWA, whilst not supportive of anti-competitive market monopolies, does not support further legislation as the costs, conditions, requirements and their respective effects are far from clear in this matter. The RTAWA does not support further ACCC intervention or compliance cost increases which would have a detrimental effect on business owners.

The Association's Director Mr Wayne Spencer would be pleased to provide further detail on this submission if required. Mr Spencer can be contacted on (08) 9365 7606 or by email at wayne.spencer@cciwa.com

Yours sincerely,



Wayne Spencer
Executive Director