



AUSTRALIAN HOTELS ASSOCIATION

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

Dear Sir/Madam

Re: Creeping Acquisitions – The Way Forward;

Introduction

Please find attached a submission from the Australian Hotels Association (AHA) on the second discussion paper exploring options for the introduction of provisions to the *Trade Practices Act 1974* (TPA) to address concerns about creeping acquisitions. We understand that the AHA- NSW has also provided a response.

The AHA is comprised of close to 5000 members across Australia. It is a Federally Registered Industrial Organisation of Employers and has a National Office and Branch Offices in each State and Territory.

Our membership base is made up of both general licensed premises as well as accommodation members. State and Territory branches within the AHA operate autonomously and manage their own finances. A number of hotels linked to casinos are also AHA members.

The overarching objective of the Australian Hotels Association is to effectively contribute to the establishment and maintenance of an economic and social environment that fosters the business success of members and pubs and hotels generally.

In order to achieve such objectives, we are concerned with the stability, viability and growth within the Hospitality and Tourism sector.

AHA members operate in a highly regulated environment and are subject to significant penalties if they are found to breach these obligations. Hotels have traditionally been an integral part of their local community and are often the main social gathering place particularly in regional areas. They generate revenue through a number of ways including:

- the sale alcohol and other beverages both on and off premise,
- food sales in bistros restaurants and functions,
- entertainment
- accommodation

- meetings and conventions
- gambling through keno, wagering and gaming machines.

General hotels compete for consumers spending with a range of other hospitality and retail providers such as clubs, restaurants, casinos, bars, nightclubs, liquor stores and supermarkets as well as a variety of accommodation and entertainment providers.

Current Situation

Since the 1970s the hotel sector has undergone significant change as a result of a reduction in the per capita consumption of alcohol and a shift in where people drink away from license premises to the home and other venues. This has been facilitated by intense competition from liquor stores and supermarkets for the alcohol dollar.

By 1990 many hotels were under significant financial stress and only survived when State Governments allowed EGMs in hotels. This decision followed recognition of the strong consumer demand for EGMs as an attractive means of entertainment.

Hotels and the Economy

Hotels are important contributors to the Australian economy.. The AHA recently commissioned Price Waterhouse Coopers to undertake a review of the industry to support our submission to the Inquiry on Gambling being undertaken by the Productivity Commission. The Executive Summary of this review is attached. It provides a useful overview of hotels and the economic and social contribution to the community.

Hotels and Creeping Acquisitions.

Alcohol products provide a useful case study on how creeping acquisitions can change the vertical and horizontal dynamics of a particular market.

The alcohol market in Australia prior to 2000 was highly regulated and characterised by a large number of small operators. The 1970's saw the beginning of a major shift in what, where and how people drank alcohol. There was a shift away from the consumption on premise to increased purchases of package alcohol consumed away from licensed premises.

In the 1990's the major retail chains identified alcohol as a key growth sector and began establishing and or acquiring liquor outlets across the country. This was assisted in several jurisdictions by the liberalisation of trading arrangements following National Competition reviews. In Queensland licensing laws meant that the major chains were required to purchase hotel licenses in order to progress their growth strategy.

The current state of the Australian alcohol market is outlined in a recent article from the Australian Financial Review which is attached. This shows that 2 major retail chains controls 54% of sales. They hold market power through – (i) pricing ability of alcohol products over competitors (ii) cross promotional and discounting opportunities with other product categories such as groceries and petrol (iii) negotiation advantage over suppliers given the type, size and distribution of the alcohol market in Australia...

Their market position has resulted primarily through a series of creeping acquisitions. The AHA acknowledges that many business operators have benefited from this process and it may have boosted the overall value of hotels in some jurisdictions. We also understand that any creeping acquisitions law may restrict the ability of a hotelier and small business owners more generally to sell their business to the highest bidder.

However, we believe increasing concentration in our sector means that the ongoing benefits of a viable creeping acquisitions law will outweigh any potential disadvantage a small business owner may experience in the sale price of their business.

The AHA therefore recognises the need for some mechanism to address creeping acquisitions. We believe this should be introduced as soon as possible as the issue of creeping acquisitions is an important one and one where many small businesses have immediate and real concerns.

Response to the Discussion Paper

The AHA is a member of the Fair Trading Coalition (FTC) which submitted comments on the first discussion paper released in September, 2008. In that paper, the Government canvassed two possible solutions to address creeping acquisitions concerns: the 'aggregation model' and the "substantial market power model" (SMP model).

The AHA supports the preference expressed by the FTC for the 'substantial market power' model. We believe small business accepted that this SMP model was the best solution to a difficult problem and assume the previous SMP model is still being considered.

Second Discussion Paper

The second discussion paper released by the Government includes two further possible solutions to address concerns about creeping acquisitions:

- An amended version of the SMP model introduced in the first discussion paper. This model would prohibit mergers and acquisitions that enhance a corporation's existing substantial market power.
- An approach which could trigger the application of a creeping acquisitions law for a set period of time in certain restricted circumstances only, similar to the Price Surveillance provisions in Part VIIA of the TPA. Under this proposal, the Minister would have the power to unilaterally, 'declare' a corporation or a product/service sector, where the Minister has concerns about potential and/or actual competitive harm from creeping acquisitions, or acquisitions by corporations with substantial market power. Alternatively, this model could be designed so the Minister could only make a declaration after receiving an application from the ACCC. The ACCC would make an application where it has concerns regarding creeping acquisitions by a particular corporation, or in a product/service sector. The AHA understands that the same underlying test would apply to both possible solutions presented in the second discussion paper. However, the method of application would be different.

Questions posed by the Government

The AHA generally supports the response provided by the FTC in relation to these questions.

Question 1

What are your views on the two regulatory options mentioned above? What potential unintended consequences need to be considered? How might these unintended consequences be addressed?

The AHA remains concerned with the underlying test presented in the second discussion paper will apply in cases where the market power of a corporation is already at such a high level that any further acquisitions will not have the effect of clearly ‘enhancing’ that corporation’s market power. In such instances, any acquisition will not have any material impact on that existing power. This therefore will require a definition of “enhance”.

The AHA suggests that a way to alleviate this issue, but not eliminate it altogether, is to have a ‘rebuttable presumption’ that an entity with substantial market power or deemed market power that makes an acquisition in a relevant market will be presumed to enhance its market power unless the proposed acquirer can show otherwise. This would work in a similar fashion to the ‘rebuttable presumptions’ tool that was proposed in unfair contract terms legislation.

Question 2

Are there alternative regulatory or non-regulatory options that might be appropriate responses to creeping acquisitions concerns? How might these work in practice? What are the costs and benefits?

The AHA supports the ‘declaration’ model outlined in the discussion paper. However it remains concerned that this may be “too little too late” and be applied selectively. Any new arrangements to address concerns about creeping acquisitions should be applied broadly across the economy consistent with the intent of the Trade Practices Act..

In relation to the issue of a declaration, it is proposed that the enhanced market power test would apply generally, but where the Government felt it appropriate to do so, it would ‘declare’ a business or any industry. That declaration would deem the declared businesses to have market power and would make notification of any acquisition in the relevant market by that business mandatory.

The AHA believes there will be an inherent analytical problem associated with the fact that deeming an acquirer to have market power does not, for the purpose of the legislation, mean they have that power. The ACCC or the Courts will still have to assess whether the acquirer has market power before they can assess if that power will be enhanced.

The AHA believes the alternative put forth that the ACCC advise on a declaration is feasible, but not as a sole determinant. The AHA believes the matter of a declaration is ultimately a matter for the Minister, not the ACCC. Further, the Minister should be able to decide to declare without an ACCC request.

Conclusion

The AHA reiterates its support for action on creeping acquisitions and

- supports the ‘substantial market power’ (SMP) model outlined in the first discussion paper
- is comfortable with the amended SMP model put forward in the second discussion paper; with the reservations and suggestions detailed in this submission Taken into account
- accepts the “declaration proposal” subject to it being part of a broader “substantial market power” model.

I trust these comments are of assistance to you in your consideration of a solution to the issue of creeping acquisitions. If you wish to discuss any aspect of this submission in more detail please do not hesitate to contact me on 0419 627 693.

Yours sincerely

Bill Healey
Chief Executive Officer
Australian Hotels Association