



Australian National Retailers Association (ANRA)

**Submission
in response to the
Treasury Discussion Paper**

Creeping Acquisitions – The Way Forward

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EXECUTIVE SUMMARY

The Australian National Retailers Association (ANRA) supports an open competitive retail market in Australia. Competitive markets respond to consumers' needs and maximise economic growth.

Far from protecting competition, the Government's proposals for 'creeping acquisitions' amendments to the Trade Practices Act 1974 would put at risk competitive markets. The shift to a "substantial market power" model threatens to stifle business growth and investment across the economy, to the detriment of all Australians.

Hitherto, governments have insisted that the Trade Practices Act must protect competition, not competitors: the proposed changes would overturn this principle and replace it with a crude view that the growth of successful businesses must be capped. This is a radical change.

The proposed amendments seek to solve a problem which simply does not exist. Neither the Government nor the Australian Competition and Consumer Commission have demonstrated that creeping acquisitions are occurring and harming competition. The argument for legislative change is at best theoretical – addressing what the Commission itself has called a "potential concern". Australia would be the only jurisdiction in the world to adopt such legislation.

The existing s.50 of the Trade Practices Act is effective and sufficiently flexible to allow the Australian Competition and Consumer Commission to veto any acquisitions threatening competition.

INTRODUCTION

The Australian National Retailers Association (ANRA) represents the leading national retailers in Australia, including the most trusted household names in supermarket chains, department stores and speciality retailers. ANRA members have a combined annual turnover of more than \$80 billion and employ about 450,000 Australians.

A full list of ANRA members is included in Appendix A.

ANRA seeks to ensure that public policy makers understand the retail sector and support policies which enhance the capacity of the sector to meet consumer needs and contribute to economic growth.

ANRA has been closely engaged in the debate over so-called “creeping acquisitions” on behalf of all its members. Proposals to amend the Trade Practices Act 1974 to address this issue will inevitably affect all major businesses in Australia, putting at risk their opportunities for growth. As major employers and investors, ANRA members have a strong interest in open, competitive markets.

As the debate has often been focused on competition and acquisitions in the retail grocery sector, ANRA would refer the Government to its October 2008 submission which provides detailed information on the state of that sector. The submission demonstrates that creeping acquisitions are NOT occurring in the sector (a point recognised by the Australian Competition and Consumer Commission).

As a starting point for assessing any proposal for regulatory change, ANRA endorses the Council of Australian Governments’ (COAG) Competition Principles Agreement and the COAG Principles of Best Practice Regulation. These documents state that legislation should not restrict competition unless it is demonstrated that the community benefits of restricting competition outweigh the costs and that the regulatory aim can only be achieved by restricting competition.

In the specific case of mergers and acquisitions, ANRA believes that Australia should maintain an international best practice regime which promotes competition and provides regulatory certainty for businesses. Acquisitions are essential to an efficient, competitive market. Acquisitions can enhance competition, save jobs placed at risk by business failure, provide retirement income for sellers and encourage local and foreign firms to invest in new products and markets. Australia’s existing system is proven and comparable to leading jurisdictions such as the United States and the European Union.

Any proposal to change Australia’s successful mergers regime must be carefully assessed and only adopted when a significant public benefit is proven.

THE GOVERNMENT’S PROPOSALS

The latest proposals from the Government would apply the concept of market power found in s.46 of the Act to the assessment of mergers and acquisitions under s.50.

The Government proposes for consideration a new provision:

(1) *A corporation that has a substantial degree of power in a market 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 enhancing that corporation's substantial market power in that market.

The Government proposes two options for applying this new test.

Under the first option, the new test would be inserted into the legislation to “complement” the established substantial lessening of competition test in s.50, applying to all mergers and acquisitions.

The second option would see the new provision apply only to mergers and acquisitions involving a specific corporation or a product/service sector which has been “declared” by the responsible Minister. The discussion paper provides virtually no information on how such a discretionary process would work. The discussion paper would have benefitted from an explanation of the factors to be considered as ground for declaration.

The second option implies that the new provision would be unnecessary or even damaging in the majority of cases. It implicitly concedes that ‘creeping acquisitions’ are the exception rather than the rule. Since 1995, governments have extended the Trade Practices Act to apply across the economy, without sectoral exclusions. The second option would break with this trend towards a consistent national framework.

A RADICAL CHANGE

Both the first and second options represent a radical departure from the long-established principles of the Trade Practices Act.

The Trade Practices Act requires the ACCC and the Courts to assess an acquisition or merger in terms of its potential impact on future competition, taking into account a host of factors:

“Without limiting the matters that may be taken into account for the purposes of subsections (1) and (2) in determining whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market, the following matters must be taken into account:

(a) the actual and potential level of import competition in the market;

(b) the height of barriers to entry to the market;

(c) the level of concentration in the market;

(d) the degree of countervailing power in the market;

- (e) the likelihood that the acquisition would result in the acquirer being able to significantly and sustainably increase prices or profit margins;
- (f) the extent to which substitutes are available in the market or are likely to be available in the market;
- (g) the dynamic characteristics of the market, including growth, innovation and product differentiation;
- (h) the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor;
- (i) the nature and extent of vertical integration in the market.”

Considering some of the claims advanced in the debate about creeping acquisitions, it is worth noting the inclusion of “(c) the level of concentration in the market” as a factor in this non-exhaustive list.

Nevertheless, the discussion paper describes as “an inherent limitation to the existing s.50” that the Act “does not prevent acquisitions that increase existing positions of substantial market power but do not substantially lessen competition”.¹

To remedy this alleged shortcoming, the Government proposes that acquisitions should be assessed in terms of whether the acquisition “would have the effect, or be likely to have the effect, of *enhancing* that corporation’s *substantial market power*” (italics added). The discussion paper suggests that substantial market power is in itself a concern requiring legislative action, regardless of any effect on competition.

With the proposed change, the Government would see acquisitions vetoed in cases where there is no substantial impact on competition or even in cases where competition would be strengthened. For example, a major retailer may find it difficult to enter a local market because of a lack of development sites. Acquiring an established business may be the only avenue available to enter the market. Although the acquisition could boost competition in the local market (satisfying the existing s.50 test), the acquisition could be opposed by the ACCC or third parties on the grounds that the market power of the acquiring business would be “enhanced”.

The use of the term “enhance” is problematic. As the Law Council of Australia has noted, the term is not defined in the Trade Practices Act (or, for that matter, in the discussion paper).² It lends itself to being a crude quantitative measure which would treat any acquisition by a major business as “enhancing” its market power. This approach would prevent any business deemed to have substantial market power from making acquisitions.

There is also the potential for the legislation to stop other avenues for business growth. The ACCC suggests that s.50 of the Act applies to commercial leases and the purchase of greenfield sites as well as the acquisition of existing businesses. With this broad interpretation of “acquisitions”, a business held to have substantial market power would face the very real prospect of a market cap, losing the opportunity to expand beyond its existing locations.

1 . Treasury, *Creeping Acquisitions – The Way Forward*, p.2.

2 . Law Council of Australia. *Creeping Acquisitions – The Way Forward Submission*, June 2009, p.9.

It cannot be argued that the requirement for a firm to have “substantial market power” would restrict the provision to a handful of large businesses. Even the ACCC admits that the case law allows businesses with a relatively modest share of the market (e.g. 20 per cent or less) to be held to have substantial market power.

Nor is it clear how an amended bill would treat an acquisition by a business in a new market. It is possible that a business seeking to acquire a presence in an upstream or downstream market would be captured by the Act. While the business would not be regarded as having “substantial market power” in the upstream or downstream market, its acquisition could still be vulnerable to challenge on the grounds that it would enhance the firm’s market power. A similar situation may arise in an unrelated market where the risks of diminished competition would, presumably, be nil.

NO EVIDENCE SUPPORTING THE CASE FOR CHANGE

The Government and the Australian Competition and Consumer Commission (ACCC) have presented no evidence that creeping acquisitions are occurring and are diminishing competition in any market in Australia.

In its report into the retail grocery sector, the ACCC found that creeping acquisitions were not occurring (growth in the sector was overwhelmingly due to new sites and the growth of established stores) and could only claim that creeping acquisitions were a “potential” concern. Some of the ACCC’s comments in their report are worth noting:

“None of the submissions ... identified specific markets where there had been a substantial lessening of competition” [due to creeping acquisitions].

“The ACCC has not been able to identify any supermarket acquisitions in the last five years where the result would have been different” [if a creeping acquisitions law was in place]

ANRA would recommend a review of its submission to the first discussion paper which provides irrefutable evidence that acquisitions have been a negligible factor in the retail grocery market for the last five years.

The evidence is no stronger for other markets. The Commission has only asserted that “Industries where the ACCC has observed significant numbers of acquisitions include taxis, liquor stores, pathology services, waste services, childcare, optical dispensing, packaging and funeral services”.³ The ACCC submission provides no other comment: the claim is made without any data to substantiate that acquisitions in these industries are unusually common or are leading to reduced competition. This seems a very flimsy basis to justify broad ranging legal change.

3 . ACCC Submission, October 2008, p.6.

The ACCC's claim that the Trade Practices Act should be amended to deal with a *potential* risk – what might more properly be called a hypothetical risk – conflicts with long established best practice principles which require a demonstrated market failure for government intervention.

Moreover, as recent decisions show, the existing Act can support action to prevent small acquisitions. Typically, s.50 cases turn on the definition of the market in question. The ACCC has wide discretion in defining the relevant market. While advocates for creeping acquisitions legislation claim that small acquisitions occur 'under the radar' of the Act, this is not necessarily the case. In the case of suburban supermarkets, for example, the Commission defines the relevant market as the area within 3 to 5 kilometres of the supermarket in question. Defining the market in this way allows the Commission to intervene in very small markets.

CASE STUDY - KARABAR

A recent competition assessment by the ACCC of a supermarket acquisition confirms that the Commission can prevent the sale of a supermarket when it believes that a sale would diminish competition in a small local market.

On 25 June 2008, the ACCC announced that it would oppose the acquisition of the Karabar Supabarn by Woolworths. The ACCC stated that the proposed acquisition would be likely to substantially lessen competition in the Queanbeyan retail supermarket market.

The ACCC noted that Woolworths operates two supermarkets in the vicinity of the Karabar store. Coles operates another full-line supermarket in the area. An Aldi supermarket offers a limited range of goods. The ACCC noted that, at only 1,250m², the Karabar supermarket does not "provide a strong competitive constraint on the major supermarkets in Queanbeyan and Jerrabomberra."

Nevertheless, the ACCC opposed the acquisition on the grounds that the most likely alternative buyer would be a new entrant to the local market and would create more "competitive tension" in the market. For these prospective reasons, the ACCC opposed the acquisition.

Missing from this debate is any consideration of the implications of change for business owners and shareholders. The market for business assets would be fundamentally changed: many of the most likely bidders in the market for business assets are likely to be excluded. In addition bidders are unlikely to try and bid in some circumstances due to the additional cost and risk involved. This will mean that assets are less liquid and less valuable.

The number of potential buyers for assets would be reduced with only smaller parties deemed not to have "substantial market power" assured of having the opportunity of purchasing the asset.

Reducing competition in this way effectively devalues assets. This is especially damaging for small business owner operators. Their investment in their business is effectively their superannuation.

CONCLUSION

ANRA welcomes the fact that the Government has withdrawn its earlier proposal to prohibit acquisitions which could lead to “any lessening of competition”.

However, the latest proposal for a “substantial market power” prohibition on acquisitions is equally flawed. Despite the lack of evidence that creeping acquisitions are occurring, let alone jeopardising competition, the Government is effectively contemplating imposing market caps on successful Australian businesses. Such a cap could prevent a business from acquiring new assets as well as existing businesses, regardless of the implications for competition. Importantly acquisitions which could stimulate greater competition could be vetoed on the grounds that such acquisitions may “enhance” the market power of a firm.

ANRA would urge the Government to withdraw this second set of proposals. The Trade Practices Act should continue to be focused on protecting the primacy of competition rather than applying constraints on the capacity of businesses to compete. A firm’s substantial market power may seem to regulators or competitors undesirable but such power should only prompt regulatory constraints in those instances where it clearly harms competition.

Appendix A

Membership of the Australian National Retailers' Association

Woolworths Ltd
Coles Group Ltd
Bunnings Group Ltd
David Jones Ltd
Harvey Norman
Best and Less Pty Ltd
Franklins*
McDonalds
Just Group
Angus and Robertson
Borders
Luxottica Australia
Reece
Spotlight
Forty Winks

**** ANRA members reserve the right to make separate submissions on issues of particular interest to their company. In the case of creeping acquisitions, Franklins intends to lodge a separate submission covering their particular viewpoint and is not a contributor to this paper.***