

fair trading
coalition

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

Dear Sir/Madam

Thank you for the opportunity for the Fair Trading Coalition (FTC) to provide a submission on Creeping Acquisitions – The Way Forward; the second discussion paper exploring options for the introduction of provisions to the *Trade Practices Act 1974* (TPA) to address concerns about creeping acquisitions.

The FTC is an informal coalition of small business organisations committed to reform of the Trade Practices Act. The Members of the Fair Trading Coalition believe that a vibrant small business sector is important if Australia is to sustain a competitive market.

In general, the FTC strongly supports action on creeping acquisitions. Further, the FTC believes that changes to the Act to address concerns about creeping acquisitions need to 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.

The FTC acknowledges the potential consequence a creeping acquisitions law may have on a small business owner's ability to sell their business to the highest bidder. The FTC believes, however, 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.

members of the Fair Trading Coalition:

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| 1 Apple & Pear Growers Association of SA Inc | 7 Australian Petroleum Agents and Distributors Association | 13 Drycleaning Institute of Australia | 20 The Motor Trades Association of the Australian Capital Territory | 26 The Pharmacy Guild of Australia |
| 2 Australian Automotive Aftermarket Association | 8 Australian Private Hospitals Association | 14 Growcom | 21 The Motor Traders' Association of New South Wales | 27 Service Station Association Limited |
| 3 Australian Automobile Dealers Association | 9 Australian Service Station and Convenience Store Association | 15 The Horticulture Council | 22 The Motor Trades Association of the Northern Territory | 28 Victorian Automobile Chamber of Commerce |
| 4 Australian Hotels Association | 10 Chamber of Women in Business | 16 Independent Liquor Group NSW | 23 The Motor Trade Association of South Australia | 29 Western Australian Dental Implant Society AOS (WA) Inc |
| 5 Australian Motor Body Repairers Association | 11 Civil Contractors Federation | 17 Independent Liquor Stores Association | 24 The Motor Trade Association of Western Australia | |
| 6 Australian Newsagents' Federation | 12 Council of Small Business Organisations of Australia | 18 Liquor Stores Association of Victoria | 25 National Institute of Accountants | |
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Fair Trading Coalition (FTC) Submission – First Discussion Paper

The FTC took the opportunity to submit comment on the first discussion paper on creeping acquisitions released by the Government in September, 2008. In the first discussion paper, the Government canvassed two possible solutions to address creeping acquisitions concerns: the ‘aggregation model’ and the ‘substantial market power model’ (SMP model).

In its submission on the first discussion paper, the FTC expressed a preference for the ‘substantial market power’ model. Generally, small business accepted that the SMP model outlined in the first discussion paper was the best solution to a difficult problem. It is assumed that 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:

1. 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.
2. 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 FTC 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

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 FTC’s concern with the underlying test of both options presented in the second discussion paper is that in many cases a corporation’s market power is already at such a high level that most further acquisitions will not have the effect of clearly

‘enhancing’ that corporation’s market power. This will also be an issue where an entity’s market power is due to statutory power. In such instances, any acquisition will not have any material impact on that existing power.

The FTC suggests that a way to alleviate this issue, but not eliminate it altogether, is to have a ‘rebuttable presumption’ that an entity with 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 currently being used in unfair contract terms legislation. Moreover, it is the FTC’s observation that given the way in which it is to be applied in the unfair contract terms context the previous reluctance to use the rebuttable presumptions tool appears to have been overcome.

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 same comments as above apply.

While the FTC could support the ‘declaration’ model outlined in the discussion paper the Association does believe that any new arrangements for address of concerns about creeping acquisitions should be applied broadly to the economy.

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 FTC 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.

In regard to the alternative put forth of the ACCC advising on a declaration; the FTC believes this is feasible, but not as a sole determinant. The FTC 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.

Additional Points

The FTC suggests that a definition of ‘assets’ be added to the draft legislation to overcome any confusion surrounding this term. The FTC suggests that the definition of ‘assets’ include leases, licences and other beneficial interests.

As with the two options presented in the first discussion paper, MTAA believes the options put forth in the second discussion paper do not adequately address the

Authorisation process. The FTC believes there will be instances where the new law will prevent an acquisition where the parties wish to proceed by way of Authorisation. The FTC believes it would be inappropriate for small acquisitions, as contemplated in these amendments, to go to the Australian Competition Tribunal (the Tribunal), as is currently required under the *Trade Practices Act 1974* for merger authorisations.

The Tribunal, in its current form, is not acceptably accessible or practicable for small business. This is due in part to the costs involved for a small business when bringing a case before the Tribunal. The FTC recommends that the current process either be changed, or that a provision be included in the creeping acquisitions amendments which allows the ACCC to consider the issue of Authorisation.

The FTC does not believe concerns about the occurrence of creeping acquisitions will be adequately resolved if the Authorisation process is maintained in its current form.

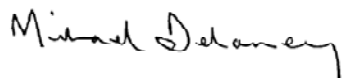
Conclusion

The FTC reiterates its strong support for action on creeping acquisitions at the soonest possible opportunity.

The FTC supports the 'substantial market power' (SMP) model outlined in the first discussion paper. The FTC is also comfortable with the amended SMP model put forward in the second discussion paper; with the reservations and suggestions detailed in this discussion paper taken into account.

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.

Yours faithfully



MICHAEL DELANEY
Executive Director of the Motor Trades Association of Australia
Convenor and Chairman of the Fair Trading Coalition

13 July 2009