

Friday, 10 July 2009

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

**RE: Submission in response to the Treasury Discussion Paper: Creeping Acquisitions –  
The Way Forward**

Franklins supports the Government's efforts to address the problem of creeping acquisitions by powerful organisations.

Franklins notes that the Government's efforts are meeting with the vigorous opposition that could be expected from powerful organisations which wish to continue to make acquisitions essentially unfettered by the current law and encourages the Government not to be deterred by such opposition.

The second option canvassed by the Government in its Discussion Paper, namely the ability of the Minister to designate certain organisations as possessing substantial market power and for acquisitions by those organisations which enhance that market power to be prohibited is, in Franklins' submission, a sensible approach to the problem. The need for Ministerial designation will ensure that the impact of this change is limited only to those sectors which require attention.

Franklins anticipates that it will be contended that this approach will be a radical change to the law governing acquisitions in Australia. To address such objections Franklins suggests that option 2 could be modified to read:

*The direct or indirect acquisition of shares in the capital of a body corporate or of any asset of a person by a corporation that has a substantial degree of power in a market which could have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market is deemed to have the effect of substantially lessening competition for the purposes of section 50 of the Act.*

This approach will make it clear that the test for prohibiting acquisitions remains the familiar substantial lessening of competition test but will provide a means by which acquisitions which enhance substantial market power in particular sectors can be prohibited.

Franklins considers that the fact that the deeming effect would only apply to designated corporations under its suggested approach addresses concerns about the impact of this approach on the economy generally. If, however, further flexibility was thought appropriate, the approach outlined above could be to create a rebuttable presumption rather than an outright deeming, of substantial lessening of competition. Franklins considers that such additional flexibility is not required.

The approach proposed by Franklins would be in line with the approach to merger control in Europe. The European Community Merger Regulation makes it clear that effective competition in the common market is significantly impeded by any acquisition which creates or strengthens a dominant position. This is essentially the approach which Franklins is suggesting.

It will no doubt be said against the approach suggested by Franklins that preventing powerful organisations from growing by acquisition will deprive consumers of the benefits of scale and scope efficiencies. Powerful organisations have asserted that incremental acquisitions result in efficiencies of scale and scope. The Government should not accept these assertions without clear evidence to support them. It would be surprising if the acquisition of a single store would have any material effect on the very substantial efficiencies which an already powerful major grocery retailer enjoys. Franklins submits that treating the acquisition of a single store or site by a major grocery retailer as presumptively anti-competitive will not, in fact, deprive consumers of any meaningful improvements in efficiency.

On the other hand, the exclusion of major grocery retailers from the acquisition of a store, or of a lease in a shopping centre, will enable smaller retail operators, such as Franklins, either to avoid the loss of scale or to gain scale. Given the current size of Franklins' operations the impact of this will be material. The loss of 5 stores (by the acquisition of leases, or the real estate on which the stores are currently located) out of the total of [? number of stores] operated by Franklins would materially impair Franklins' ability to continue to compete effectively. The addition of 5 stores would materially improve Franklins' scale and its ability to impose a more significant competitive constraint on the major national grocery retailers.

It is commonly accepted that grocery retailing in Australia is more concentrated than anywhere else in the world dominated by the two major national retail chains Coles and Woolworths and the monopolistic grocery wholesaler Metcash. As a consequence, these three organisations are too powerful. The major retail chains and Metcash are able to thwart effective entry and expansion by a wide variety of tactics (including acquisitions of stores, leases and sites). The unfettered growth of the major national grocery retailers and the inability of new entrants to expand and provide effective nationwide competition are evidence of market failure in this sector.


The Government has not hesitated, in recent times, in other instances of market failure, to intervene and introduce elements of market re-engineering (mortgage guarantees, assistance for car dealers, etc).

Similarly, in Franklins' submission, the market failure in the grocery retailing and wholesaling sector is serious and the Government should intervene to facilitate some necessary re-engineering of the sector to ensure that smaller participants have an opportunity to enter, expand and introduce additional competition. This will be to the long term benefit of consumers.

If the Government considers that such re-engineering is best achieved through amendments to the *Trade Practices Act*, Franklins supports that approach. Franklins encourages the Government not to be deterred by assertions that such re-engineering is incompatible with the general application of the competition law. The extent to which the grocery retailing sector is dominated by two organisations is indicative of market failure in this sector. That market failure cannot be rectified by leaving the sector to the forces of competition. Government intervention is required.

We look forward to the Government adopting amendments to the *Trade Practices Act* that addresses this matter which will ultimately result in greater levels of competition for the benefit of all consumers.

Yours faithfully



Roni Perlov  
Company Secretary