

**Creeping Acquisitions plus Obligation to Divest
The Way Forward for a Competitive Australian Retail Sector**

Report Submitted for Consideration

**The RETAiL Alert Group (Australia)
13th May 2009**

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Basis of Submission

The Government welcomes any submissions regarding the issues identified above, or any other matter related to the issue of creeping acquisitions.

Submissions will be made publicly available on the Treasury website. If a submission, or any part of it, is to be treated as confidential, please indicate this clearly on the submission.

Submissions should be made by Friday 12 June to:

The General Manager
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Creeping Acquisitions plus Obligation to Divest **The Way Forward for a Competitive Australian Retail Sector**

Submission Report

The RETAiL Alert Group's focus is the Australian Retail Sector.

Currently there are damaging free market major competition imbalances within Australian retail sector Shopping Centres needing to be addressed.

There is no doubt that 'Creeping Acquisitions' and 'Obligation to Divest' powers provided to the ACCC will progressively address the current retail sector market imbalance in the process promote the ACCC to one of the leading Competition Regulation retail authorities in the OECD.

The admirable intent of the first discussion paper was to address concerns raised by the Australian Competition and Consumer Commission (ACCC) that section 50 of the *Trade Practices Act 1974* (TPA) may not be able to deal with creeping acquisitions that, according to the ACCC, have the potential to cause competition concerns in certain concentrated industries.

- The Australian Retail Sector is an example where there is genuine community concern that there are competition concerns; particularly in Australia's closed market Shopping Centres.
- Current imbalanced competition market and negotiating tenancy lease terms and conditions are damaging Australia's retail free market environment demanding competition legislation change; the casualties, the high employing and mostly efficient specialty chains, medium and SME retail sector plus the Farmgate and the associated Australian retail supply chain.

Although commending the ACCC initiative it the view of The RETAiL Alert Group that there should be Obligation to Divest provisions similar to those in the US anti-trust legislation embedded in the *Trade Practices Act 1974* (TPA).

The Obligation to Divest to cover market uncompetitive retail market conditions where it is deemed necessary to divest divisions and parts of a business creating an uncompetitive balanced retail market but also divest contract terms and conditions creating and uncompetitive balanced retail market.

Question 1 The RETAiL Alert Group believes that there are little or no unintended consequences to be considered in the two regulatory options mentioned for the Australian Retail Sector.

Creeping acquisition legislation as proposed will support, protect and encourage growth in the high employing and mostly efficient small retail sector and associated supply chain suppliers, including the Farmgate.

Question 2 there are alternative regulatory options that are appropriate responses to creeping acquisitions concerns in the Australian Retail Sector.

Following are The RETAiL Alert Group's appropriate responses as enhancements to the proposed creeping acquisitions legislation to answer those concerns raised from the 1 September 2008 Creeping Acquisitions discussion paper.

- Canvassed in the first discussion paper were concerns related to a potential loophole in section 50¹, which currently prohibits acquisitions that would, or would be likely to, substantially lessen

- As canvassed in the first discussion paper, the Government considered that creeping acquisitions concerns related to a potential loophole in section 50ⁱ, which currently prohibits acquisitions that would, or would be likely to, substantially lessen competition in a market.

This loophole was understood to relate to a series of small acquisitions that individually would not substantially lessen competition in a market, but collectively may have that effect over time.

Many submissions found that the loophole in itself may not be a problem in all situations, but that it could cause considerable competitive harm and consumer detriment in certain circumstances.

Subsection 46(3D) states that more than one corporation may have a substantial degree of power in a market.

- The concept of market power is well established in competition law, and is far more effective than a focus on market share, as it allows a court to take into account all the relevant characteristics of a market.
- For example, the Federal Courtⁱⁱ has previously imposed penalties for misuse of substantial market power where a corporation had only around 16-20 per cent of the share in the relevant market.

The RETAiL Alert Group's view is that there are 'obligation to divest' words in the US anti-trust legislation that should be considered as import in style and affect in the Australian Trade Practices Act.

- *Supervising the mergers and acquisitions of large corporations, including some joint ventures. Transactions that are considered to threaten the competitive process can be prohibited altogether, or approved subject to "remedies" such as an obligation to divest part of the merged business or to offer licences or access to facilities to enable other businesses to continue competing.*

The amended version of the SMP (Substantial Market Power) model might read:

(1) *A corporation or entity that has a substantial degree of power in a market must not directly or indirectly:*

- *Acquire shares in the capital of a body corporate.*
- *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

(2) *If a corporation or entity that has a substantial degree of market power considered to threaten the competitive process in a relevant market then the corporation or entity might have an obligation to divest such market share in an orderly and timely manner but not to materially disturb the financial standing of the corporation or entity during the obligation to divest process.*

(3) *If a corporation or entity that has a substantial degree of market power caused by contract terms and conditions in a relevant market then the corporation or entity might have an obligation to divest itself of such contact contract terms and conditions e in an orderly and timely manner but not to materially disturb the financial standing of the corporation or entity during the obligation to divest the corporation or entity of such terms and conditions.*

- (4) *The SMP model would 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 entity, or in a product/service sector.*
- (5) *The Minister could also make a declaration after receiving an application from the ACCC make an application where it has concerns on market share or uncompetitive terms and conditions requiring an obligation to divest divisions, entities or contract terms and condition deemed by the ACCC as uncompetitive.*
- The RETAiL Alert Group amendments would enhance a range of submissions, particularly those from the independent grocery sector and the ACCC.
 - This amended model would enable the ACCC to address creeping acquisitions and obligation to divest concerns in a timely manner, and could be effectively incorporated into the ACCC's existing informal clearance process.

The RETAiL Alert Group as well as Government is acutely aware that any intervention in this area, while preventing harm and detriment should be seen to be fair and reasonable.

Proposed legislation changes should not stop the legitimate and organic growth of businesses, particularly the Australian small retail sector.

It is crucial that the legislation is framed to increase trading efficiencies in Australia's small retail sector, enhancing the welfare of Australian consumers.

This is particularly important in the current economic environment.

As such, both The RETAiL Alert Group and Government recognise that there is a fine balance to be struck but the current gross competition imbalance in the Australian retail sector has to be addressed.

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Reference 1.

Australian Retail Property Time Period - Occupancy Competition Status

<u>Time Period</u>	<u>Major Retailers and Supermarkets Occupancy as a % of Gross Sales</u>	<u>Specialty Chains/Medium SME Retailers Occupancy as a % of Gross Sales</u>	<u>Australian Retail Property Market Status</u>
Pre 60's	3-7%	4-8%	Free property market, numerous independent landlords. Few Shopping Centres mainly CBD and Strip Shopping
Early 70's	3-7%	4-8%	Free property market, numerous independent landlords. Growing number of Shopping Centres but strong CBD and Strip Retailing Options
2009	3-7%	14 – 20%	Controlled Market Regional Shopping Centre averages for Specialty Chains / Medium and SME Retailers showing occupancy cost competition market imbalance in 2009.

Reference 2.

Strips vs. Shopping Centres Terms and Conditions for consideration

Small Retailer / Specialty Retailer Retail Lease Choices – Strip vs. Shopping Centres

(Summary Only)

Retail Landlord or Shopping Centre Requirement	Normal Strip Lease	Normal Shopping Centre Lease
Lease negotiated with individual property shop owners in a free market environment	Yes	NA
Retailer has choice of alternative sites at lease end	Yes	NA
Retailer has a choice of sites in a new Shopping Centre holding the advantage of sole ownership given by planning authorities' permissions to a sole Shopping Centre owner on retail space allowed in a defined planning authority development catchment.	NA	NA
Landlord Enforced Declaration of Sales	NA	Yes
Landlord % of Sales Negotiated	NA	Yes
Landlord Annual Base Rent Increases normally above CPI	NA	Yes
Landlord Lease Terms Variable; that is Lease and Option Periods with Market Review on Options	Yes	NA
Landlord Outgoings included in Gross Lease	Occasionally	NA
Landlord Outgoings Statuary Charges Only	Yes	NA
Landlord Additional Marketing Charges	NA	Yes
Landlord Marketing Programme Set by Shopping Centre without Tenant Consultation	NA	Yes
Landlord Additional Outgoings Charged based on 'reasonable' spend with no required tender process entered into.	NA	Yes
Landlord Outgoings Charges can increase if Shopping Centre changes ownership during the term of the lease.	NA	Yes

Landlord Management Fees Increases on other Tenants Renewals sometimes included in Outgoings	NA	Yes
Landlord sets Fit-out standard.	NA	Yes
Landlord Decides Trading Hours	NA	Yes
Landlord Sets Standards of Promotional Signing and Promotional Activity	NA	Yes
Landlord Allows Closing Down Signing at Lease End for Business Closure Purposes	Yes	NA

Reference 3.

Four Pillars of Harmonised Retail Lease Legislation for consideration

Article published April 2009

Harmonised National Lease Legislation Reform **Four Pillars of National Retail Lease Reform** **The ARA has got it almost right..!**

Further to the ARA proposal for a Rudd government Retail Tenancy Roundtable we want to congratulate the ARA for taking a retail sector association leadership position on Harmonised National Retail Lease Legislation Reform.

Long overdue and welcome.

We think a meeting of retailers would be beneficial before any proposed round table with government and the shopping centre industry.

Expect to see the Shopping Centre Industry carry the normal banner 'leave things as they are, it is working' and try to disparage the ARA's initiatives.

For us it is shades of the Retail 'Black Hand' society 1992-1994 all over again.

Compromises which benefited the Retailers and the Shopping Centre Industry happened then and will happen now.

Maybe this is the cause that will bring the ARA, NRA and the QRTSA together into that one Federated Retail Sector Association we have been asking for?

Although covering most of the RETAIL Alert Group's Four Pillars of Harmonised Retail Lease Legislation Reform there are some gaps we want to speak to.

Our recommendations are for a set of simplified 'rules' based on four principles.

1. Lease Harmonisation Legislation; general agreement; a basis for discussion.
2. Gross Leases; a basis for further discussion.
3. Sales to be given to an independent Third Party reported at Category Level only; a basis for further discussion.
4. Annual Rents Increased / Decreased based on Sales per Meter by Category by Centre; some questions for readers to consider.

All ready for COAG (Council of Australian Governments) National Tenancy Group consideration (Stage 1 Concept Discussion Form) for the Australian Retail Sector Harmonised Lease Legislation Reform.

Although in firm agreement with the thrust of the ARA's recommendations there are comments;

- We believe that there should be one gross lease structure for shopping centres and the high street; administration and legal costs slashed for Shopping Centres, Retailers and State Governments.

- To have two sets of lease structures will defeat the exercise of having a reduction in red tape and State government legislation costs; two formats will create confusion and create unnecessary costs for all parties.
- The proposed code of conduct for Shopping Centre Landlords regulated by the ACCC will not work.
- Codes of conduct have failed in the past and the ACCC does not have our proposed 'Obligation to Divest' anti-trust powers to force divestment of uncompetitive lease terms and conditions disadvantaging the chains, medium size and SME retailers vs. major retailers.
- Lease length and terms and conditions to be similar in competitive market nature between major retailers and Australian Specialty Chains, medium size and SME retailers.
- We are in total agreement with the Disclosure of Sales Figures being reported to an independent third party reported at category level but we want to add also sales per meter by category.
- Our recommendation is for the ABS to be the independent sales hold party with an open 'pay by view' structure to;
 - 1 Allow landlords to assess retail category weaknesses by centre for marketing support.
 - 2 Allow retailers to assess the sales potential of a Shopping Centre.
 - 3 To provide Federal, State and Local governments access to performance of the retail sector by category by State / Local Government Area.
 - 4 Allow the ACCC to have qualified data on which to assess retail sector competitiveness.
 - 5 The ability to use the sales per meter by category by centre to calculate annual retailer category rent increases or decreases.
- The initial software patterned on the Westfield best practice Monthly reports.
- Non complying retailers subject to two auto-email warnings then penalties applied as per non BAS disclosure.
- Our view, annual rental reviews performance based by sales per meter by category by Shopping Centre will progressively rebalance the gulf in competitive occupancy costs, major retailers vs. the Australian chains, medium and SME Retail Sector.
- As with declaration of sales to a third party we are total agreement in the establishment of an open National Retail Lease Register where all occupancy costs and inducements are registered.
- Again costs of the National Retail Lease Register funded by an open 'pay by view' mechanism.

The key purpose of our Harmonised Four Pillar Retail Tenancy Reforms is to provide certainty to Australian Retailers on the risks and opportunities of entering into an exciting but risky retail business venture.

- Having solid Harmonised Four Pillars of Retail Tenancy Legislation Reforms will also streamline the plethora of confusing and costly State retail lease legislation and ACCC dispute matters currently in play.

The RETAiL Alert Group wants to congratulate the ARA on having the courage to present the Harmonised Retail Lease Legislation Reforms to market.

As indicated we welcome the ARA taking the retail industry association market leadership position.

The RETAiL Alert Group's comments should not be seen as a criticism of the ARA's initiative but seen as complimenting and enhancing the Australian Retailers Associations proposals.

We believe that our modifications based around the RETAiL Alert Group's Four Pillars of Retail Legislation Harmonisation to the ARA's position delivers a fair and balanced set of a Harmonised 'retail leasing platform' and should be the basis of any ARA Tenancy Committee proposals to the Rudd government and the Australian Shopping Centre Industry.

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Submissions

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i Unless otherwise indicated, all references to sections relate to provisions of the *Trade Practices Act 1974*.

ii *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Limited* (No 4) [2006] FCA 21 (31 January 2006)

iii Any request made under the Freedom of Information Act 1982 for a submission marked 'confidential' to be made available will be determined in accordance with that Act.