Mr John Hawkins
Secretary
Senate Standing Committee on Economics
The Senate
Parliament House
CANBERRA ACT 2600

11 December 2009

Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Act 2009 – submission,

This Bill, I assume, arises from a concern by Senator Xenophon that the current merger law is too permissive and that some mergers, that he has concerns about, are not opposed by the ACCC.

The Bill proposes a "material" lessening of competition test, which would lower the threshold for determining whether a merger or acquisition is anti-competitive and in the Senators words “would allow the merger or acquisition to be tested by reference to whether it has a pronounced or noticeably adverse affect on competition, rather than on whether the merged entity would be able to exercise substantial market power post-merger, as is currently the case.”

The Bill also seeks to prevent so called creeping acquisitions.

Under this Bill, a corporation that already has a substantial share of a market must not directly or indirectly merge with or acquire shares or an asset which would have the effect of lessening competition in the market. This according to the Senator is to prevent corporations with substantial market share from gaining greater share, thereby lessening competition by acquiring smaller competitors or assets to the detriment of competition and consumers.

Comment.

The change to “material.”

It is hard to see what this Bill will achieve, except confusion. How different will “material” be to “substantial” .Further substantial lessening of competition is a well known concept in competition law globally.

I am also of the view that this change will not result in more mergers being opposed, there are other issues at play in merger assessment than the substantial lessening of competition issue.

In a merger review the following are relevant.

- The market definition
- Is there are a substantial lessening of competition?
- Can a breach of section 50 be proven in a court if the answers to above is-yes?

Many merger decisions rise or fall on the market definition. This Bill will do nothing about that.

A critical issue is the fact that Australia does not have mandatory merger pre notification and a system that mergers that have to be notified cannot proceed unless not opposed by the ACCC. This would take away the huge issue for the ACCC to prove matters in Court, a very difficult issue in a small market where evidence is almost impossible to obtain.

Creeping acquisition.

This has always been a vexed issue. A balance between stopping further concentration and allowing small businesses to sell their business at the best price.

A relevant issue that many so called creeping acquisitions are pro competitive in the short term but maybe not in the longer term. However that is all too uncertain and such mergers are usually not considered to be in breach of section 50.

There is some merit to what the Bill proposes as it will ensure ACCC review of many small mergers by big players, however the test is a lessening of competition, not slc. That will stop many mergers but after all the Government proposed something similar in some of its creeping acquisition options.

An associated issue is that it may cause parties to seek authorisation. That currently is to go to the ACT, a mistaken policy by the previous Government. It is strongly suggested that the Act be amended to go back to the previous situation of authorisation going to the ACCC with appeal to the ACT.

Conclusion

I would oppose the change to “material” but see some merit in the creeping acquisition amendment.

Yours truly,

Hank Spier

Contacts

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