Australian National Retailers Association

Submission to the Senate Economics Legislation Committee Inquiry into Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009

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EXECUTIVE SUMMARY

The Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009 seeks to lower the competition test for acquisitions and mergers. No evidence has been provided for this change which would create considerable uncertainty, calls for judicial interpretation, and would have adverse effects on the economy.

The additional proposed competition test to deal with creeping acquisitions is similarly not supported by economic argumentation, creates significant uncertainty and involves economic distortions.

Consequently, ANRA does not support the proposed amendments.

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.

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.

PROPOSED CHANGE TO THE COMPETITION TEST

This Bill seeks to change the fundamental legislative framework of competition law in Australia in a breathtaking way. The essence of the proposal is to change the competition test applying under s50 of the Trade Practices Acts 1974 (the TPA) from a test based on a substantial lessening of competition to a material lessening of competition.

The statutory intent of s50 of the TPA is to ensure that there continues to be workable competition in Australian markets. ANRA supports this objective and states again that its members operate in a highly competitive and contestable market environment.

The proposed amendment threatens this objective and if passed into law would erode the safeguards for consumers and firms provided for under what is a relatively strong and effective competition code in Australia. This threat is principally driven by the considerable uncertainty that the proposed test of a 'material' lessening of competition would involve.

The threat of uncertainty, cost and delay

The substantial lessening of competition test has been operative in s50 of the Trade Practices Act for some 20 odd years. It is established as the hinge constraint on constraining monopoly power through acquisitions. While there is always scope for debate on the operation of provisions of the Trade Practices Act ANRA considers that the current merger test provides a sound and workable mechanism for firms to assess the likelihood of a proposed acquisition being opposed by the Australian Competition and Consumer Commission (ACCC) or the Court. In addition, it is supported administratively by an effective informal merger clearance process and formal merger clearance process.

The proposed change to the competition test, were it become law, would threaten this well-functioning merger review regime. No definition of the new change of a "material' lessening in competition" is provided in the Bill. The Court has already held that the current substantial lessening of competition test operates to protect "workable" competition. So it is difficult to see what legal and economic meaning could be given to a "material' lessening in competition". The Court has also interpreted "substantial" to mean that the effect on competition be not merely transitory but "commercially meaningful or relevant to the competitive process". This suggests if the Bill became law an acquisition would be blocked even it has no real or meaningful effect on the level of competition in a market. Assuming even that the Court was able to give the term some proper legal and economic meaning, this would only occur after a likely complex and expensive test case. Further, such a test case may not occur for many years due to the commercial and legal complexities involved in s50 litigation.

Consequently, the operation of the competition law in Australia would become fundamentally uncertain if the Bill became law. As a result there would be added cost and delay with likely no positive economic or social outcome. In terms of practicality, ANRA's members would have no clear workable guidance as to whether a commercial acquisition could proceed without being opposed by the ACCC or the Courts. Further, the uncertainty, cost and delay would be magnified for retailers who already provide pre-notification to the ACCC of proposed acquisitions pursuant to the *Produce and Grocery Industry Code of Conduct*.

The lack of legal or economic justification given for the proposed change

The Explanatory Memorandum states that the proposed new competition test is intended to establish a lower threshold upon which the ACCC or the Court would be able to oppose an acquisition. However, there is no cogent legal, economic or policy argument for this lower threshold contained in the Explanatory Memorandum to the Bill. Further, as set out above, it is not clear how the Court or the ACCC would apply this lower threshold in way that provides optimal legal, economic or social outcomes.

Section 50 of the current TPA empowers the Courts and the ACCC to consider a range of factors including the contestability of the market through barriers to entry, the concentration of the market and the countervailing power in the market that results from the acquisition and other factors. The basis for such a range of considerations is well grounded in economic theory. Where fundamental change to the competition test in the Act is being proposed, ANRA considers sound policy practice requires a detailed examination of the mischief that the proposed law is remedying. It also required a thorough examination of how the amendments to the Act would resolve this problem. Such analysis would include an overview of how the current s50 test fails in competition policy terms and an overview of what this new s50 test achieves in terms of legal, economic and social policy outcomes. This analysis is currently lacking and major changes to this fundamental element of Australia's competition policy framework should not be supported in its absence.

The likely economic impact

The proposed amendment would have the economic effect of reducing the capacity of firms to make rational investment decisions through introducing uncertainty and increasing the regulatory risk an uncertainty a retailer, or other business, would face when considering or pursuing an acquisition. This regulatory distortion would lead to sub-optimal investment decisions by artificially increasing the risk involved in such decisions. This economic effect would be to reduce capital investment at a time when the recovery of the Australian economy from the GFC is still tenuous risking jobs and economic development.

CREEPING ACQUISITIONS

The Bill also includes a clause to deal with the perceived problem of creeping acquisitions. This occurs by a new clause 50(1A) which involves the concept of the substantial share of a market.

After subsection 50(1)
Insert:
(1A) A corporation that has a substantial share of 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 lessening competition in a market

No evidence of creeping acquisitions have been provided

As ANRA has stated in response to the number of consultations processes the Government has held on this issue, no evidence has been presented 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 retail sector was overwhelmingly due to new sites and the growth of established stores. The ACCC only claimed 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].

The introduction of broad scale legislative change to competition law to deal with a "*potential*" or 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.

As ANRA has consistently stated, missing from the creeping acquisitions 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.

The dangers of the proposed new competition test for creeping acquisitions

Putting aside the absence of any case for creeping acquisition reform, the proposed s 50(1A) is also a cause of concern for ANRA.

If implemented, it once again removes the concept of "substantially lessening competition" and introduces a test that prohibits a corporation from making an acquisition if a corporation has "substantial share of a market" and the acquisition has the effect of "lessening" competition in a market.

An initial concern is that the provision introduced two separate competition tests into the merger and acquisition framework in the TPA. A retailer considering an acquisition will have to assess a proposed acquisition under two separate tests leading to the unnecessary and unjustified regulatory burdens referred to - uncertainty, cost, delay and investment distortion. The definition of a "substantial share of the market" is not defined either by the Bill or is settled language in common law, creating enormous uncertainty.

Of more concern, is the fact that the proposed test appears to be placing an upper level constraint on the share of the market that a corporation may enjoy. It does this through stopping any firm with a "substantial share of the market" from making virtually any acquisition. This is despite the fact that an acquisition has no impact on workable competition in a market once the "substantial lessening" threshold is removed. It is also despite the fact that a firm's 'share' of market is not the test of competition that economic theory prescribes nor the only appropriate measure of a firm's market power. Rather the proper basis for competition policy consideration when assessing an acquisition is whether a market is and remains contestable - market concentration is but one consideration and is, in fact, a consideration already taken into account by the Courts and the ACCC under s50(3).

It goes without saying that the economic effects of imposing any form of market share cap on retailers are significant. It will likely restrict the legitimate activity of a profitable corporation expanding its operation to enjoy economies of scale and scope. The result would be a higher costs structure and less competitive market arrangements than would otherwise be the case.

CONCLUSION

ANRA submits that proposed changes to the competition law would be anti-competition, impose unjustified and unnecessary regulatory burdens through create uncertainty, cost and delay and would like to have adverse economic effects on the Australian economy. The Bill should not be supported.

APPENDIX A: MEMBERS 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
Dymocks

**** 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.***