SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Submission to the Senate Economics Committee on the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2009

1. Executive Summary

There is no evidence of a market failure or regulatory failure which would justify changing the merger provisions of section 50 of the *Trade Practices Act*. Nor is there a need to make changes to section 50 specifically to address creeping acquisitions.

The first principle of the Government's *Principles of Good Regulatory Process* requires that the Government "should not act to address 'problems' until a case for action has been clearly established". No such case for action has been established.

Australia's existing merger control regime provides sufficient flexibility for the Australian Competition and Consumer Commission to thoroughly examine, against transparent criteria, all mergers and, where necessary, to oppose anti-competitive mergers, including in those markets (such as petrol retailing and groceries) to which this Bill is obviously mainly addressed.

This Bill would introduce fundamental and unnecessary changes to section 50 which would be detrimental to Australia's economic interests. The Bill would create substantial uncertainty across a number of sectors of the economy, including commercial property and, in our case, the shopping centre industry. Shopping centre owners would face uncertainty when considering new investments. Shopping centre retailers and customers would be potentially disadvantaged by a more limited choice of retail stores (particularly supermarkets) in shopping centres throughout metropolitan and regional Australia.

The proposed changes would not enhance competition in Australia. Instead the Bill would make it more difficult for successful and efficient corporations (and not only large corporations) to make acquisitions which enhance efficiency and to realise economies of scale and thus provide greater levels of service to consumers. The result will inevitably be a less productive economy and higher prices for goods and services.

The existing merger threshold in section 50(1) (i.e. a "substantial lessening of competition") is not "too high" (as asserted in the Explanatory Memorandum) and is consistent with the merger control regimes in leading jurisdictions, including the United States, the United Kingdom and the European Union. It therefore provides a high degree of certainty and confidence for corporations operating in Australia. The introduction of a new threshold - one that is untested, unfamiliar and vague - would undermine business confidence and jeopardise job-creating investments.

The proposed changes would also make section 50(1) of the *Trade Practices Act* inconsistent with other provisions in Part IV of the Act which also prohibit anti-competitive actions and which currently also refer to a "substantial lessening of competition". Such inconsistency would result in legal confusion. The proposed amendment to section 50 should therefore not be considered in isolation.

ABN 41 116 804 310
Shopping Centre Council of Australia Limited
Property Council of Australia House, Level 1, 11 Barrack Street, Sydney NSW 2000
Telephone: 02 9033 1902 Facsimile: 02 9033 1976 www.scca.org.au

2. The existing merger test is effective

The present merger test in section 50, in combination with the Merger Guidelines[1], provides the Australian Competition and Consumer Commission (ACCC) with sufficient flexibility to examine mergers in a thorough manner. The test and the guidelines also provide guidance to corporations on how the ACCC will examine mergers.

The current merger review process ensures that each merger is examined on its merits, focusing on the impact of the proposed or completed acquisition on the relevant market. The ACCC's approach is generally well understood by the business community and is based on a detailed analysis of the facts of the merger in question. Those factors are set out in section 50(3) of the Act, and combined with the matters set out in the Merger Guidelines, are the principal points that any merger review takes into account. Accordingly, the ACCC already has the benefit of a wide range of factors with which to measure and assess the competitive impact of the merger, thereby ensuring that individual acquisitions and mergers are subject to detailed analysis. This high degree of analysis ensures that those transactions which are genuinely anti-competitive may be opposed by the ACCC.

Most recently, the ACCC announced that it would oppose the proposed acquisition of Mobil Australia by Caltex, because of the *"likely effect of the proposed acquisition on local market competition for the supply of petrol, diesel and automotive LPG, as well as broader concerns about the effect of the acquisition on the stability and effectiveness of coordination between the major fuel retailers in determining petrol prices"*[2]. We note that Senator Xenophon observed that this case was still under review when he introduced his Bill. In this case, the ACCC examined the impact of the merger on 302 local markets, in addition to the national markets for petrol and LPG. Although the parties would face continued competition from other petrol retailers, the ACCC did not consider that the constraints would be sufficiently strong to overcome any potential substantial lessening of competition. This shows clearly that the ACCC has the ability to assess mergers in detail and to oppose transactions that may detrimentally impact on competition.

The day before Senator Xenophon took this initiative the ACCC announced its opposition to the proposed acquisition of ITC Timber Pty Ltd by Gunns Limited, as the acquisition would be likely to result in a substantial lessening of competition in the relevant markets[3]. In response to the ACCC's position, Gunns Limited proposed extensive revisions to the structure of the proposed acquisition which addressed the ACCC's competition concerns. These revisions enabled a key competitor (SmartFibre) to remain an independent competitor to Gunns Limited in the acquisition of pulpwood, thereby ensuring that Tasmanian farmers and plantation owners will continue to receive competitive prices for the pulpwood they supply[4]. Again, this case demonstrates clearly that the ACCC will oppose anti-competitive mergers and that the existing merger regime prohibits such transactions.

The ACCC also has the ability to examine the effects of mergers on a highly localised basis[5].Accordingly, competitive impacts only need to arise at a local level in order for a transaction to potentially substantially lessen competition, thereby providing the ACCC with a high degree of flexibility to examine acquisitions, including small scale acquisitions, and oppose those that it considers would detrimentally impact on competition.

[1] *ACCC 2008 Merger Guidelines, November 2008.*
[2] *ACCC media release 2 December 2009.*
[3] *ACCC media release 25 November 2009.*
[4] *ACCC media release 27 November 2009.*
[5] *See, for example, ACCC Public Competition Assessment of Westfield's proposed acquisition of 50% of Woden and Penrith Plazas, 8 July 2008.*

3. Proposed "material lessening of competition" test is flawed

Section 50(1) of the *Trade Practices Act* ("the Act") prohibits any acquisition that would have the effect, or would be likely to have the effect, of "*substantially* lessening competition in a market". The Bill proposes to replace this test with a test that would prohibit an acquisition that would have the effect, or be likely to have the effect, of "*materially* lessening competition in a market".

The purpose of this section of the Bill is to lower the present merger threshold. The justification in the Explanatory Memorandum is simply that the current threshold is "*too high*" and that "*as a result a number of controversial mergers have recently been approved*". This is a very slender justification for a potentially radical change in the law. In his second reading speech the Bill's author, Senator Xenophon, justifies the proposed change (and gives it a popular name) on the basis of an event that has not yet occurred.

No attempt has been made to examine whether or not the approvals of the "controversial mergers" were in fact correct under the existing merger test. Nor is it clear from the Explanatory Memorandum whether these "*controversial mergers*" would have satisfied the proposed new merger test. The proposal is aimed solely at making it more difficult for successful corporations to invest in acquisitions in the future.

We believe there is no evidence that the current "*substantial lessening of competition*" threshold is "*too high*". This threshold is internationally recognised, and mirrors the merger control thresholds that operate in other leading jurisdictions, such as the United States, the European Union and the United Kingdom.

Unlike the proposed threshold of a "*material lessening of competition*", the "*substantial lessening of competition*" threshold has a globally understood meaning which encourages business confidence and investment, thereby greatly benefiting both the overall Australian economy and Australian consumers. It also has the benefit of many years of judicial interpretation.

The Bill would create substantial uncertainty across a number of sectors of the economy. Business uncertainty should not be lightly dismissed. Decisions to commit hundreds of millions of dollars to major job-creating investment projects are not taken lightly and factors which increase the risk of such investments can be the reason for such projects not proceeding.

4. Creeping acquisitions proposals are unnecessary.

In addition to the proposed amendment to section 50(1) of the Act, the Bill also introduces a new section 50(1A) which would prohibit an acquisition by a "corporation that has a substantial share of a market . . . if the acquisition would have the effect, or be likely to have the effect, of lessening competition in a market." This is designed to address the issue of creeping acquisitions or, in the words of the Explanatory Memorandum, is designed "to prevent creeping acquisitions taking place."

The introduction of a specific creeping acquisitions test to account for small scale acquisitions is unnecessary, as no evidence has been presented that the current merger test is not able to be enforced in relation to such mergers. The current "substantial lessening of competition" test in section 50 of the Act provides sufficient flexibility to the ACCC to enable it to thoroughly assess small scale mergers and, where it finds they may lead to a substantial lessening of competition, to oppose the merger.

The ACCC has not been faced with a significant number of creeping acquisitions or an increase in such acquisitions. The Federal Government has pointed out[6], for example, that contrary to popular perception Woolworths has only acquired 21 independent retail stores since 2001 out of a total expansion in that time of 270 stores. Because there is no evidence of a compelling need to address creeping acquisitions as a separate type of acquisition under section 50, it is unnecessary to introduce radical legislative reform such as the proposed section 50(1A).

5. Proposed creeping acquisitions test is flawed

The proposed section 50(1A) of the Bill is extraordinarily broad in its application by seeking to prohibit a corporation with "a substantial market share" from making any acquisitions which lessen competition in any way. It is worth stressing this point: it seeks to prohibit acquisitions of **any** shares or assets, by **any** corporation which possesses a substantial share of a market which would lessen competition in a market.

Taking into account the operation of section 4(4)(b) of the Act (which defines an acquisition as any acquisition of any legal or equitable interest of assets, other than those acquisitions in the ordinary course of business), the effect of the proposed reform would be to limit a corporation's ability to invest in certain assets. While normal stock acquisitions would be unlikely to be prohibited under the proposed section 50(1A), a number of asset acquisitions may be prohibited, or at least subject to merger review. This could occur even where the assets acquired are items acquired by Australian businesses to enhance efficiency, to grow and to compete more effectively, all to the benefit of consumers. Accordingly the increase in competition that the Bill is presumably intended to support would actually be stifled by the Bill.

The phrase "*a substantial market share*" is undefined. It lacks clarity and will result in considerable uncertainty as to its precise meaning and impact on any one transaction. Accordingly, this threshold could result in corporations with relatively small market shares in a market being prohibited from making further acquisitions. For example, any participant with a market share of approximately (and, in certain cases, less than) 20%[7] may be considered to have "*a substantial market share*" and therefore be unable to make any acquisitions, even where those acquisitions would enhance efficiency in the market and lead to tangible competitive benefits to consumers. The Bill's proposals, by preventing efficiencies from being realised and inefficient competitors from exiting the market, would promote stagnation and inefficiency to the ultimate detriment of competition and consumers.

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[6] The Hon Dr Craig Emerson 'Introducing more competition and empowering consumers in grocery retailing' 18 September 2009.

[7] In line with existing case law, it may be possible for a firm to have a substantial degree of market power in a market even where its market share is quite low, as noted in the Committee's first submission, p.15. See ACCC v Australian Safeway Stores Pty Limited (2001) 119 FCR 1, ACCC v Australian Safeway Stores Pty Limited (2003) FCAFC 149 and ACCC v Australian Safeway Stores Pty Limited (No 4) (2006) FCA 21.

Arguably any acquisition which reduces the number of competitors, even if it removes only the least effective competitor in the market, may "lessen" competition to a degree, however small. Accordingly the proposed change will primarily result in larger competitors being effectively barred from being able to make acquisitions within the markets in which they operate. In other words, the changes would impose a *de facto* market share cap. We note that the imposition of a market share cap on larger corporations was expressly rejected by the Dawson Committee and, before it, by the Baird Committee, on the basis that it would inefficiently restrict competition by preventing more efficient operators from expanding through the acquisition of less efficient operators. It would also have the perverse effect of shielding inefficient businesses from healthy competition.

6. Unintended consequences for shopping centre owners

We are particularly concerned that the proposed changes would have a detrimental effect on a number of leading retail tenants which form the core of the majority of shopping centres around Australia. The Shopping Centre Council of Australia (SCCA) represents investors in, and managers of, shopping centres. Our members deal directly with major supermarket chains and are directly affected by any further concentration in those chains.

The SCCA would welcome Australia having a greater number of quality supermarket operators and our members have actively encouraged the growth of Aldi in Australia by leasing space to Aldi in their shopping centres. Despite our desire for greater competition in the retail grocery sector, however, we do not support the proposed new section 50(1A) because the provisions would apply directly to new investments by Coles and Woolworths, and would have significant detrimental effects on SCCA members. Both Coles and Woolworths may have "a substantial market share" in relation to the vast majority of their geographic markets. Accordingly, any acquisitions of new assets by them, possibly including the potential acquisition of a new retail lease in a shopping centre, would be likely to be subject to the proposed new section 50(1A) provisions. The threshold of any "lessening" of competition is, as we have noted, a low one with the likelihood that any acquisition of a retail lease or any competing grocery retailer would be determined to "lessen" competition in a market. As a result, SCCA members are concerned that Coles and Woolworths may be prohibited under the proposed reform from leasing new space or renewing leases of space in a number of shopping centres, where they have other supermarkets nearby.

This would create a significant concern for SCCA members, given that having these two supermarket chains as anchor tenants is often critical to the viability of their existing and proposed shopping centres throughout Australia which directly benefits small tenants, including through increased foot traffic. This was recognised by the ACCC in last year's Grocery Inquiry: "*Anchor tenants, such as supermarkets, generate sales and foot traffic, which benefit all tenants and drive the success or otherwise of the centre. Woolworths and Coles have a proven track record of driving sales and are considered by many developers to be the only supermarkets that can successfully anchor a shopping centre development*".[8]

The proposed new section 50(1A) is also unnecessary as it relates the grocery industry for the reasons addressed in the following section.

[8] *ACCC Grocery Inquiry Report, July 2008, p.183.*

7. Notification of grocery acquisitions to the ACCC

There is no doubt that recent publicity about the alleged dominance of Coles and Woolworths in the grocery industry in Australia is one of the reasons for this Bill. Senator Xenophon refers to both companies in his second reading speech. Senator Xenophon is possibly unaware that the ACCC, in the wake of the 2008 Grocery Inquiry, has already placed supermarket operators and shopping centre owners on notice that it would investigate certain proposed acquisitions of supermarket sites to establish whether or not these raise concerns about a substantial lessening of competition under section 50.

In a letter to shopping centre owners in August 2008 the ACCC advised that, in its opinion, section 50 applied to more than just the acquisitions of existing supermarket businesses. The ACCC said that it regarded acquisition of an "asset" for the purposes of section 50 also applied to entry into and acquisition of a lease (including renewals and assignments); acquisition of an option to acquire land; and acquisition of freehold land. The ACCC has advised shopping centre owners and supermarket operators to notify it of proposed "acquisitions" which may raise competition concerns which include circumstances where the acquirer already operates one or more supermarkets in the local area (which is generally regarded as an area within a 5km radius of the acquisition in question.)

This notification process is already in operation. The ACCC has just announced that it is conducting a review of an acquisition by Woolworths of three pieces of land at Newport, in Sydney, on which it intends to develop a new supermarket. This process obviously addresses the issue of creeping acquisitions in the grocery industry and should be given an opportunity to play out before making radical changes to section 50, which would have adverse implications far beyond this industry.

8. The Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents investors in and managers of shopping centres. As such we represent the interests of around nine million Australians with an interest in retail property through their superannuation, life insurance, managed funds, real estate investment trusts, syndicates and shareholdings.

Our members are AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Colonial First State Property, Dexus Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and Westfield Group.

9. Contact

The Shopping Centre Council would be happy to discuss any aspect of this submission. Please do not hesitate to contact:

Milton Cockburn
Executive Director
Shopping Centre Council of Australia
Level 1, 11 Barrack Street
SYDNEY NSW 2000
Phone: 02 9033 1912 or 0419 750299
Fax: 02 9033 1976
Email: mcockburn@scca.org.au