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Inquiry into the Aspects of Bank Mergers

Submission
by

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The dangers to consumers from high levels of market concentration caused by mergers and creeping acquisitions: The case for effective laws against anti-competitive mergers and creeping acquisitions

There is no doubt that the greater the levels of market concentration, the greater the likelihood that consumers will be price gouged. The reason for this is quite simple. As markets become more concentrated, the opportunities for either collusion or parallel conduct with respect to pricing and related matters grow considerably. Within this context, banking mergers, as with other mergers across the economy, present a real and very serious risk to competition and consumers.

That risk arises because mergers lead to a reduction in competitors and, in turn, a reduction genuine competition that is so essential in ensuring that any “efficiencies” or reduced costs achieved by a merger are passed onto consumers rather than merely pocketed by the merged firm. Yes, mergers are typically justified on the basis of allowing efficiencies or a reduction in costs to be achieved, but such efficiencies, if any, will only be beneficial to consumers if they are passed onto them. Indeed, the danger of mergers is that any efficiencies or reduction in costs that may be realised through a merger will not be passed onto consumers for the simple reason that as mergers remove competitors from the market, there will be fewer competitors left to take an independent stance to drive down prices to consumers.

More dangerously for competition and consumers, as the few remaining firms become even larger through further mergers or, in particular, through creeping acquisitions the market share of the remaining firms itself becomes a considerable, if not insurmountable, barrier to entry. Thus, the mere fact that the market is “locked up” by a few large and powerful firms itself becomes a powerful disincentive to any potential new entrant.

In short, as the number of firms in a market diminishes, so too does the incentive for potential new entrants or for the remaining firms to aggressively attack one another on price or other terms and conditions. It is far easier for the remaining firms to act as a cosy club for their self interested advantage rather than to aggressively attack one another on price or other terms and conditions. Indeed, why enter into a price war when that would only cut profit margins for the “club members,” namely the few remaining firms in a concentrated market? Why should club members sustain cuts in profit margins, when it is much easier for them to build profit margins by simply shadowing one another on price and other terms and conditions?

Of course, the club members will protest loudly that they “compete” with one another, but any such “competition” is conducted in a manner that is beneficial to the club members rather than in manner that produces the maximum benefit to consumers. In relation to banks it is clear that the current highly concentrated marketplace provides ample opportunities for the major banks to shadow one another on price and other terms and conditions.

On price it is clear that the recent falls in official interest rates have not been fully passed onto consumers. Various excuses are provided for withholding some of the cuts, but ultimately it is mutually beneficial for the major banks to refrain from "outdoing" one another and instead simply shadow one another on the level of interest rate cuts actually passed onto consumers. Indeed, why "compete" with one another on the level of interest cuts passed onto consumers when it is far easier to try and grow profit margins at the expense of consumers.

In a less concentrated market, it would only take one independently minded player to pass on the full extent of interest rate cuts for the others to be compelled to follow. In a more concentrated market the players are less likely, if at all, to be "independently minded" as such a mindset only serves to undermine the ability of the few remaining firms to maintain or grow profit margins.

Similarly, as the banking sector has become more concentrated it is clear that recently the major banks have also been able to raise their fees and charges and grow their net interest margins. The growth in fees, and net interest margins is not surprising given the reduction in genuine competition and increase in market concentration arising from (i) the many acquisitions by the major banks in recent years; and (ii) little or no immediate prospect of new entrants given the scarcity of competitively priced sources of finance following the tightening of capital markets around the world.

Evidence of growing dominance of the 4 major banks

The growing dominance of the 4 major banks is readily seen in their ability to grow their fees and commission income. From the most recent APRA Quarterly Bank Performance Statistics issued on 23 June 2009 the 4 major banks were able to grow their fee and commission income in the year ending December 2008.[1] This is illustrated in Table 1 with data taken from that latest APRA Quarterly Bank Performance Statistics in relation to the 4 major banks:

Table 1:

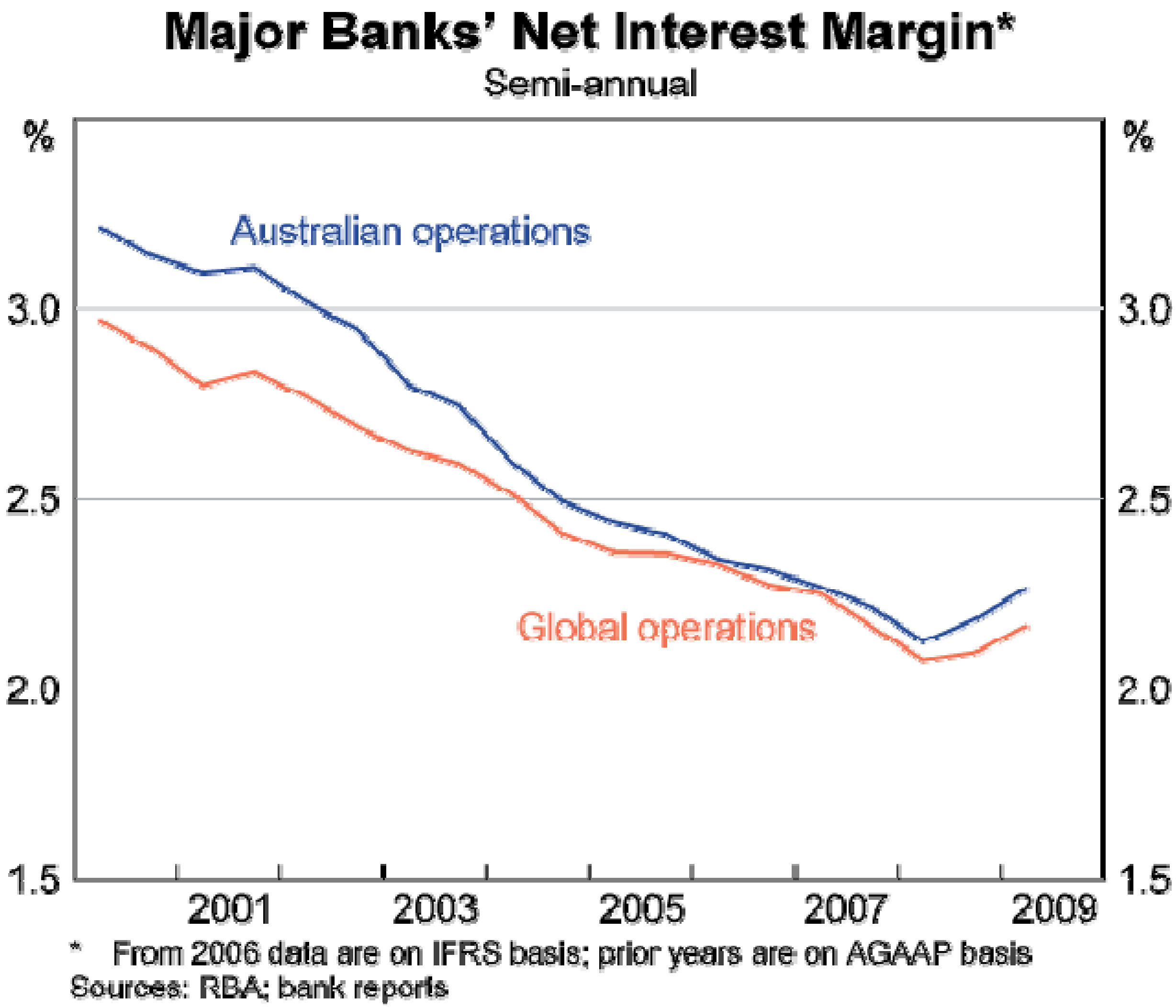
Fee and commission

Year end Dec 2007	Year end Dec 2008
$ million	
12,743	14,819

[1] See http://www.apra.gov.au/Statistics/upload/Bank-Quarterly-publication-Dec-2008.pdf

In addition to being able to grow their fee and commission income, the 4 major banks have been able to grow their net interest margin[2] since the half year ending September 2008. This is demonstrated in Table 2 which is taken from an article in the Reserve Bank Bulletin – June 2009 entitled *The Impact of the Capital Market Turbulence on Banks' Funding Costs*.[3]

Table 2:



Significantly the downward direction of net interest margins since 2000 coincided with the growth of non-bank mortgage providers and the strong competition that they injected into the Australian banking sector. Dangerously, however, for consumers and competition, the up turn in net interest margins coincides with the rapid succession of acquisitions by the Commonwealth Bank and Westpac of BankWest and St George respectively as well as

[2] The Net Interest Margin is the difference between the average interest rate paid on a bank's assets (mostly loans, but also other debt securities) and the interest paid on its liabilities (deposits, debt and equity), expressed as a percentage of its interest-earning assets.
[3] The article can be accessed at:
http://www.rba.gov.au/PublicationsAndResearch/Bulletin/bu_jun09/impact-cap-mkt-turb.html

acquisitions by the 2 major banks in relation to those non-bank mortgage providers.

In short, with the Commonwealth Bank having acquired BankWest and stakes in Aussie Home Loans and Wizard in quick succession, and with Westpac having acquired St George and RAMS Home Loans also in quick succession, it not surprising to find an up turn in net interest margins following these acquisitions by the Commonwealth Bank and Westpac. This is detrimental to consumers and is further compelling evidence of the ever growing dominance of the 4 major banks.

Within this context, the submission will make a number of recommendations aimed at promoting consumer welfare by protecting and facilitating competition in the Australian banking sector. These recommendations are listed below and will be individually discussed in the submission.

List of recommendations

(1) Amend the *Banking Act* to provide for an outright prohibition against any merger between the four major banks so as to ensure that the four pillar policy is given the force of law and can only be altered by Parliament;

(2) That the ACCC consider applying for a divestiture order pursuant to s 81 of the Trade Practices Act in relation to both the Commonwealth Bank's acquisition of BankWest and Westpac's acquisition of St George;

(3) The Senate Economics Committee request within 3 months of the date of the request a report pursuant to s 29(3) of the Trade Practices Act as to circumstances under which the ACCC would apply for a divestiture order pursuant to s 81 of the Trade Practices Act;

(4) Amend s 50 of the *Trade Practices Act* to prohibit any merger or acquisition that "materially" lessens competition;

(5) Amend the *Trade Practices Act* to deal with creeping acquisitions by prohibiting a firm with substantial market share from making an acquisition that would lessen competition in a market;

(6) Amend the *Trade Practices Act* to provide for a general divestiture power whereby a Court can, on the application of the ACCC, order the break up of companies (i) having substantial market share; and (ii) where either the characteristics of the market prevent, restrict or distort competition; or the companies have engaged in patterns of conduct that are detrimental to competition and consumers.

Amend the *Banking Act* to provide for an outright prohibition against any merger between the four major banks so as to give the four pillar policy the force of law

As with any Government policy, the four pillar policy can be varied or discarded at the whim of Government of the day. Unfortunately, this brings with it the very real risk that decisions regarding the four pillar policy may become politicised or be left to be dealt with under s 50(1) of the *Trade Practices Act* in circumstances where s 50(1) as currently drafted is failing to prevent anti-competitive mergers or acquisitions on the basis that the “substantial lessening of competition” test is far too high a threshold.

In short, s 50(1) of the *Trade Practices Act* as currently drafted would be grossly inadequate for dealing with any possible mergers between the 4 major banks. Given the increasing market share and power of the 4 major banks and how that market failure it is leading to higher fees and net interest margins, there are overwhelming national interest and competition grounds for ruling out through legislative means any merger between the 4 major banks unless approved by a further Act of Parliament. As Parliament is the ultimate guardian of the national interest it is more than appropriate that the *Banking Act* be amended to provide for the outright prohibition of any merger between the four major banks thereby giving the four pillar policy the force of law.

RECOMMENDATION

Amend the *Banking Act* to provide for an outright prohibition against any merger between the four major banks so as to ensure that the four pillar policy is given the force of law and can only be altered by Parliament.

That the ACCC consider applying for a divestiture order pursuant to s 81 of the Trade Practices Act in relation to both the Commonwealth Bank's acquisition of BankWest and Westpac's acquisition of St George

In view of concerns recently expressed by the ACCC and its Chairman regarding the increased dominance of the Commonwealth Bank and Westpac following their recent acquisitions of Bankwest and St George respectively,[4] it is clear that these acquisitions by those 2 major banks, along with their previous acquisitions of non-bank mortgage providers, have had a significantly detrimental impact on competition in the Australian bank sector.

It is particularly noteworthy that the ACCC Chairman has reportedly expressed concerns, as well as "regret," about having allowed the Commonwealth Bank's acquisition of BankWest as that has allowed the Commonwealth Bank to significantly increase its dominance in the banking sector.[5]

While the ACCC Chairman has suggested that his hands were "tied" by BankWest parent's precarious financial position, it is clear that the ACCC had major concerns about allowing that acquisition given that BankWest had been a vigorous competitor in the market. So from a competition point of view there has been clear recognition by the ACCC that there would have been strong competition grounds for seeking to stop the Commonwealth Bank's acquisition of BankWest. Within this context, it also needs to be remembered that before acquiring BankWest, the Commonwealth Bank's dominance of the market had already been increased as a result of its previous acquisitions of stakes in Aussie Home Loans and Wizard.

In view of the ACCC's concern with the growing dominance of the 4 major banks, it is equally important to note that the dominance of Westpac has similarly increased as a result of its acquisition of St George, another acquisition that the ACCC failed to prevent despite St George also having been a vigorous competitor. Again, it needs to be remembered that before acquiring St George, Westpac's dominance of the market had already been increased as a result of its previous acquisition of Rams Home Loans.

ACCC can act immediately on its concerns regarding the dominance of the 4 major banks

In view of the concerns that the ACCC and its Chairman have expressed, it is appropriate to reconsider the Commonwealth Bank's acquisition of BankWest and Westpac's acquisition of St George. Under s 50(1) of the *Trade Practices Act* as currently drafted, it is clear that an acquisition is prohibited if it "would have the effect, or be likely to have the effect, of substantially lessening

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[4] See for example, Alex Tilbury, "Big Four flex loan market muscle," The Courier-Mail, July 11, 2009 which can be accessed at:
http://www.news.com.au/couriermail/story/0,23739,25762486-3122,00.html

[5] Ibid

competition in a market.” Thus, if it can be shown that the effect of the acquisition is to allow the merged entity to have the ability to exercise substantial market power, namely, the ability to raise prices without losing business to rivals, then the acquisition is in breach of s 50(1) as currently drafted.

Given that the Commonwealth Bank has been able to substantially increase its market power following its acquisition of BankWest, there is a compelling case that its acquisition of BankWest may have been in breach of s 50(1) as currently drafted.

Similarly, given that Westpac has been able to substantially increase its market power following its acquisition of St George, there is a compelling case that its acquisition of St George may have been in breach of s 50(1) as currently drafted.

ACCC can apply for a divestiture order under s 81 regarding anti-competitive acquisitions

In circumstances where there is compelling case that the Commonwealth Bank and Westpac may have breached s 50(1), the ACCC is empowered under s 81 to apply to the Federal Court for a divestiture order in relation to the Commonwealth Bank’s acquisition of BankWest and in relation to Westpac’s acquisition of St George.

In view of its serious concerns regarding the dominance of the 4 major banks, the ACCC should urgently consider applying for a divestiture order against both the Commonwealth Bank and Westpac. This can be done immediately as under s 81 of the *Trade Practices Act*, the ACCC has 3 years in which to apply to the Federal Court for the divestiture of shares or assets acquired in breach of s 50 of the *Trade Practices Act* prohibiting mergers that substantially lessen competition. A copy of s 81 of the Trade Practices Act is included in Appendix 1 of this submission.

ACCC accountability regarding use of s 81 of the Trade Practices Act

Given that the ACCC has the ability to immediately act to apply for a divestiture order for acquisitions in breach of the current s 50(1), it is imperative that the ACCC take the opportunity in view of their publicly expressed concerns regarding growing dominance of the 4 major banks. While it may be one thing to have concerns or regrets and not be able to do anything about it, it is entirely a different matter where you have concerns or regrets but can **do** something about it.

If the ACCC fails to seek a divestiture order under s 81 for divestiture order against both the Commonwealth Bank and Westpac, then it is in public interest that the ACCC issue a statement of reasons for its failure, along with a statement outlining the circumstances in which it would apply for a divestiture order under s 81 of the *Trade Practices Act*.

In the event that the ACCC considers that it is unable to seek a divestiture order against the Commonwealth Bank and Westpac under s 81 on the basis that the very onerous “substantial lessening of competition” test under the current s 50(1) would prevent the ACCC from doing so, then that in itself would provide compelling evidence of failure of the current s 50(1) to prevent mergers that result in dominance or the increased dominance of the major players in the particular market.

Indeed, the clearest evidence of the failure of the current s 50(1) can be found in its hitherto failure to prevent the most recent acquisitions by the Commonwealth Bank and Westpac, which from a competition and consumer point of view have been the most destructive of competition given that they have allowed those 2 major banks to substantially increase their dominance in Australian banking sector. Even the ACCC has publicly expressed its concerns regarding the increased dominance of the 4 major banks, a state of affairs that has occurred as a direct result of the recent series of acquisitions by the Commonwealth Bank and Westpac.

RECOMMENDATION

That the ACCC consider applying for a divestiture order pursuant to s 81 of the Trade Practices Act in relation to both the Commonwealth Bank’s acquisition of BankWest and Westpac’s acquisition of St George.

The Senate Economics Committee request within 3 months of the date of the request a report pursuant to s 29(3) of the Trade Practices Act as to circumstances under which the ACCC would apply for a divestiture order pursuant to s 81 of the Trade Practices Act

Pursuant to s 29(3) of the *Trade Practices Act* either House of Federal Parliament, as well as a Committee of either House of Parliament, can ask the ACCC to furnish to that House or Committee any information concerning the performance of a function of the ACCC under the *Trade Practices Act*:

> **TRADE PRACTICES ACT 1974 - SECT 29**
> …
> (3) If either House of the Parliament or a Committee of either House, or of both Houses, of the Parliament requires the Commission to furnish to that House or Committee any information concerning the performance of the functions of the Commission under this Act, the Commission shall comply with the requirement.

Accordingly, under s 29(3) of the *Trade Practices Act* the Senate Economics Committee is expressly empowered to ask the ACCC to provide information regarding the ACCC's approach to applying for a divestiture order under s 81 of the *Trade Practices Act*.

The importance of knowing the ACCC's approach to applying for a divestiture order under s 81 of the *Trade Practices Act*

Given that s 81 of the *Trade Practices Act* gives the ACCC an important, but very limited, window of opportunity to undo the destructive effects on competition flowing from a merger or acquisition that substantially lessens competition, it is essential that businesses and consumers have a clear understanding as to the circumstances under which the ACCC would apply for a divestiture order under s 81 of the *Trade Practices Act*.

RECOMMENDATION

The Senate Economics Committee request within 3 months of the date of the request a report pursuant to s 29(3) of the Trade Practices Act as to circumstances under which the ACCC would apply for a divestiture order pursuant to s 81 of the Trade Practices Act.

Amend s 50 of the *Trade Practices Act* to prohibit any merger or acquisition that "materially" lessens competition

Currently, s 50 of the *Trade Practices Act* only prohibits a merger or acquisition if it substantially lessens competition:

> (1) A corporation 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 substantially lessening competition in a market.

Unfortunately for consumers and competition the "substantial lessening of competition" test is far too high a threshold to meet and, accordingly, explains why the ACCC approves around 97% of mergers that it considers. The "substantial lessening of competition" test requires that in order for the merger or acquisition to be considered in breach of the test, the merged entity must have the ability to raise prices without losing business to rivals. In this way, the "substantial lessening of competition" test has come to be equated with the "substantial market power" test which also requires that it be established that the company have the ability to raise prices without losing business to rivals.

With the near perfect record of mergers being approved or escaping scrutiny under the current s 50(1) resulting in Australia having some of the most highly concentrated markets in the world, there is compelling evidence to point to the failure of s 50(1) as currently drafted to protect competition and consumers from the adverse effects of mergers or acquisitions, particularly as a reduction in genuine competition between the fewer companies remaining post merger which is increasingly likely to lead to them acting as a cosy club to the detriment of consumers.

This failure of the current s 50(1) to prevent mergers and acquisitions having a detrimental effect on consumers and competition can be directly attributed to the view that the present "substantial lessening of competition" test is simply too high a test to act as an appropriate filter to protect competition. In short, because the "substantial lessening of competition" test is set too high, s 50(1) as currently drafted is failing to prevent anti-competitive mergers and acquisitions.

Proposed amendment to s 50(1) of the *Trade Practices Act*

Within this context, it would be submitted that the "substantial lessening of competition" test under the current s 50(1) is in urgent need of change to a more balanced test of a "material lessening of competition." A "material lessening of competition" test would operate to lower the threshold for determining whether a merger or acquisition is anti-competitive in a manner that 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 post merger be able to exercise substantial market power as is currently the case.

The following draft illustrates how an amended s 50(1) would incorporate a new “material lessening of competition” test:

> *(1) A corporation 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 materially lessening competition in a market.*

RECOMMENDATION

Amend s 50(1) of the *Trade Practices Act* to prohibit any merger or acquisition that “materially” lessens competition

Dealing with creeping acquisitions: The importance of preventing the destruction of competition by stealth

Dealing effectively with the issue of creeping acquisitions is essential to having a world's best competition law framework. Failure to deal effectively with creeping acquisitions undermines competition to the clear and longstanding detriment of consumers. Unless the *Trade Practices Act* effectively prevents creeping acquisitions there will be a considerable gap in the Act allowing large businesses to acquire competitors in a piecemeal manner that gets around the existing prohibition against mergers found in s 50(1) of the *Trade Practices Act*.

The issue of creeping acquisitions arises because of the current drafting of s 50 of the *Trade Practices Act*. First, as discussed above s 50(1) is far too permissive in allowing around 97% of mergers to be approved by the ACCC. Second, s 50(1) as currently drafted refers to an "acquisition" in the singular making it clear that it is each individual acquisition that needs to be assessed under s 50. Unless the particular acquisition, in itself, substantially lessens competition, it will not be in breach of s 50. As a result, the individual acquisition will be allowed under s 50(1) as currently drafted as the "substantial lessening of competition" test is too high a threshold to deal with mergers or acquisitions.

It is clear that s 50 can be easily circumvented by undertaking piecemeal or small scale acquisitions which individually don't substantially lessen competition, but which over time lead to the increased dominance of the merged entities. As noted above, this is clearly evident in the Australian banking sector where the series of acquisitions by the Commonwealth Bank and Westpac in recent years has led to the increased dominance of these 2 major banks in circumstances where s 50(1) as currently drafted has hitherto failed to prevent those piecemeal acquisitions.

Thus, while over time individual piecemeal acquisitions may, when taken together with previous acquisitions by the same entity, have the effect of collectively destroying competition, the current s 50(1) is powerless to stop the piecemeal acquisitions as can be so clearly seen in the Australian banking sector.

So under s 50(1) as currently drafted the creeping acquisitions of individual competitors will not be prevented because their small scale will not be considered to substantially lessen competition and accordingly not breach s 50(1) of the *Trade Practices Act*. In this way creeping acquisitions lead to the destruction of competition over time in a manner that is not prevented by the current s 50(1) of the *Trade Practices Act*.

While, of course, those engaging in creeping acquisitions will justify the creeping acquisitions on efficiency grounds as possibly leading to greater economies of scale, it is essential to note that the removal of individual efficient competitors over time means that there is a reduction in the very competition required to ensure that any savings from any economies of scale gained from acquisitions are passed onto consumers.

Thus, unless there is sufficient competition to force the merged entities to pass efficiency savings onto consumers, the benefits of any economies from mergers or acquisitions will simply be a windfall for the merged entity and not be passed onto consumers. More dangerously for consumer, the weakening of competition through merger activity, along with the increased dominance of the merged entities, allows the merged entities to raise prices to detriment of consumers. As noted above, we are now seeing a clear example of this in the Australian banking sector as direct a result of the acquisitions by the Commonwealth Bank and Westpac.

Current Federal Government proposals fail to deal with creeping acquisitions

In a discussion paper issued by the then Minister for Competition Policy and Consumer Affairs on 6 May 2009 and entitled *Creeping Acquisitions - The Way Forward*, the Federal Government outlined the following proposal for dealing with creeping acquisitions:[6]

> *(1) A corporation that has a substantial degree of power in 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 enhancing that corporation's substantial market power in that market.*

This proposal requires that the company would have to have substantial market power in the first place before the proposal would stop any of its subsequent acquisitions. So if the company does not have market power, then it would not be covered by this proposal at all. As discussed above, the market power threshold is a very high threshold as there is a need to prove that company has "the ability to raise prices without losing business to its rivals." Very few companies, if any, have substantial market power. In fact, only monopolists, or near monopolists, can raise prices without losing business.

Since a company needs to be a monopolist or near monopolist before it will have a substantial degree of market power, the Federal Government's creeping acquisitions proposal will, with all due respect, be ineffective in preventing the destruction of competition by stealth. Indeed, under the Federal Government's creeping proposal, few, if any, companies will have substantial

[6] The discussion paper can be accessed at: http://www.treasury.gov.au/documents/1530/PDF/Discussion_paper_Creeping_Acquisitions.pdf

market power on the basis that few, if any, companies have the ability to raise prices without losing business to rivals.

In addition to the real problem that under the Federal Government's proposal very few, if any, companies would have a substantial degree of market power, the Federal Government's proposals will also fail to prevent creeping acquisitions on the basis that the need to show an "enhancement" of market power under the proposals will be a further insurmountable hurdle to the application of the Federal Government's creeping acquisition proposals. Given that a company having substantial market power already has the ability to raise prices without losing business, it is especially questionable for the proposals to refer to an "enhancement" on the basis that there is real uncertainty as to what that would mean in practice.

Does an "enhancement" mean that under the Federal Government's creeping acquisition proposals it would need to be shown that a company already possessing substantial market power can raise prices even higher after the acquisition? How much higher? Given that the company already has the ability to raise prices in order to have substantial market power, it would be extremely unlikely, if ever, possible for a creeping acquisition, given its small scale, to "enhance" the pricing power of a company already having substantial market power.

In short, the Federal Government's proposals will fail, with all due respect, to prevent creeping acquisitions that can be so destructive of competition to the clear and longstanding detriment of consumers.

Proposed amendment to s 50 of the *Trade Practices Act*

In view of the considerable concerns with the Federal Government proposals for dealing with creeping acquisitions, it would be submitted that an alternative approach to effectively dealing with creeping acquisitions is needed.

Given that creeping acquisitions become a very real concern where they are being engaged in by companies already having a substantial market share it would be submitted that the focus of a prohibition on creeping acquisitions should be on those companies having a substantial share of the market. It is these companies with substantial market share that can engage in a destructive, but well organised, pattern of creeping acquisitions in order to increase their strength in the market through piecemeal acquisitions in circumstances where individually those acquisitions are not prevented by the current s 50(1).

The following new subsection of s 50 would be proposed to deal effectively with creeping acquisitions:

> *(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.

RECOMMENDATION:

Amend the *Trade Practices Act* to deal with creeping acquisitions by prohibiting a firm with substantial market share from making an acquisition that would lessen competition in a market.

Amend the *Trade Practices Act* to provide for a general divestiture power whereby a Court can, on the application of the ACCC, order the break up of companies (i) having substantial market share; and (ii) where either the characteristics of the market prevent, restrict or distort competition; or the companies have engaged in patterns of conduct that are detrimental to competition and consumers.

Unlike the United Kingdom or the United States, Australia does not provide for a general divestiture power to deal with highly concentrated markets having characteristics that prevent, restrict or distort competition in those markets. In the United Kingdom a very sophisticated framework has been enacted to allow for highly concentrated markets to be reviewed with the purpose of assessing the level of competition in a market and for taking steps to remedy market distortions having a detrimental impact on competition and consumers.

RECOMMENDATION

Amend the *Trade Practices Act* to provide for a general divestiture power whereby a Court can, on the application of the ACCC, order the break up of companies (i) having substantial market share; and (ii) where either the characteristics of the market prevent, restrict or distort competition; or the companies have engaged in patterns of conduct that are detrimental to competition and consumers.

APPENDIX 1:

TRADE PRACTICES ACT 1974 - SECT 81

Divestiture where merger contravenes section 50 or 50A

(1) The Court may, on the application of the Commission or any other person, if it finds, or has in another proceeding instituted under this Part found, that a person has contravened section 50, by order, give directions for the purpose of securing the disposal by the person of all or any of the shares or assets acquired in contravention of that section.

(1A) Where:

(a) the Court finds, in a proceeding instituted under this Part, that a person (in this subsection referred to as the ***acquirer***) has acquired shares in the capital of a body corporate or any assets of a person in contravention of section 50;

(b) the Court finds, whether in that proceeding or any other proceeding instituted under this Part, that the person (in this section referred to as the ***vendor***) from whom the acquirer acquired those shares or those assets, as the case may be, was involved in the contravention; and

(c) at the time when the finding referred to in paragraph (b) is made, any of those shares or those assets, as the case may be, are vested in the acquirer or, if the acquirer is a body corporate, in any body corporate that is related to the acquirer;

the Court may, on the application of the Commission, declare that the acquisition, in so far as it relates to the shares or assets referred to in paragraph (c), is void as from the day on which it took place and, where the Court makes such a declaration:

(d) the shares or the assets to which the declaration relates shall be deemed not to have been disposed of by the vendor; and

(e) the vendor shall refund to the acquirer any amount paid to the vendor in respect of the acquisition of the shares or assets to which the declaration relates.

(1B) Where a declaration has been made under subsection 50A(1) in relation to the obtaining of a controlling interest in a corporation, or in each of 2 or more corporations, the Court may, on the application of the Minister or the Commission, if it finds, or has in a proceeding instituted under section 80 found, that that corporation, or any of those corporations, as the case may be (in this subsection referred to as the ***relevant corporation***), has contravened subsection 50A(6), by order, for the purpose of ensuring that the obtaining of that controlling interest ceases to have the result referred to in paragraph

50A(1)(a), direct the relevant corporation to dispose of such of its assets as are specified in the order within such period as is so specified.

(1C) Where an application is made to the Court for an order under subsection (1) or a declaration under subsection (1A), the Court may, instead of making an order under subsection (1) for the purpose of securing the disposal by a person of shares or assets or an order under subsection (1A) that the acquisition by a person of shares or assets is void, accept, upon such conditions (if any) as the Court thinks fit, an undertaking by the person to dispose of other shares or assets owned by the person.

(2) An application under subsection (1), (1A) or (1B) may be made at any time within 3 years after the date on which the contravention occurred.

(3) Where an application for directions under subsection (1) or for a declaration under subsection (1A) has been made, whether before or after the commencement of this subsection, the Court may, if the Court determines it to be appropriate, give directions or make a declaration by consent of all the parties to the proceedings, whether or not the Court has made the findings referred to in subsections (1) and (1A).