

Chapter 2

Creeping acquisitions and the bill's response

Creeping acquisitions

2.1 The *Trade Practices Act 1974* (TPA) currently has provisions designed to limit the scope for firms to reduce competition in a market through acquiring other firms. Section 50(1) is designed to prevent corporations from acquiring 'shares in the capital of a body corporate' or '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'.¹ Section 50(2) makes the same prohibition against an individual.

2.2 Section 50(3) of the TPA lists a number of non-exhaustive factors to which the Australian Competition and Consumer Commission (ACCC) must have regard in determining whether a merger or acquisition is likely to substantially lessen competition. These factors are principally designed to instruct the courts and the ACCC on the possible effect on competition of a given merger. However, there is some dispute as to whether these factors, as currently drafted, are adequate to prevent a corporation from acquiring businesses over a period of time, each of which has little impact but which has the cumulative effect of substantially lessening competition in a market. This incremental strategy towards market dominance is known as 'creeping acquisitions' or 'acquisition by stealth'.

2.3 Supermarkets, liquor stores and childcare centres are often cited as examples of industries where dominant players have emerged from a series of small acquisitions. There were a number of submissions to the 2004 Senate Economics Committee inquiry into the effectiveness of the TPA which raised concerns about creeping acquisitions. The committee judged that there was sufficient substance to these concerns that it recommended:

The Committee considers that provisions should be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market.²

2.4 After recognising community unease about creeping acquisitions in the supermarket business in a 2004 report, the ACCC introduced the voluntary Charter for the Acquisition of Independent Supermarkets in July 2005. Under the charter, Metcash, Woolworths and Coles are not able to limit the ability of independent

1 Section 50(6) defines a market in terms of a national, state, territory or regional area.

2 Recommendation 12, Senate Economics References Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 64.

supermarket retailers to seek alternative purchasers for their stores. In addition, these chains have to provide independent supermarket owners with written notice of this fact when making an offer to purchase a store. At the time, the ACCC Chairman, Mr Graeme Samuel, argued that the Charter would benefit consumers by promoting competition in the supermarket sector:

...particularly by helping to address concerns about creeping acquisitions. It will ensure that independent supermarket owners are able to achieve the highest possible price for their stores via an open bidding process.³

2.5 The ACCC's recent report on grocery prices noted that concerns about creeping acquisitions persisted. It conceded that its powers to prevent them may be limited:

While s. 50 of the Act applies to individual acquisitions, the application to potential 'creeping acquisition' issues is more problematic. The ACCC takes the view that, while it can assess under s. 50 the competitive issues associated with an individual acquisition, s. 50 is unlikely to allow it to examine the cumulative impact of a series of acquisitions of smaller competitors over time that individually do not raise competition issues.⁴

2.6 Surprisingly to some, the ACCC did not feel this lack of power to deal with creeping acquisitions had been a problem in the supermarket industry, commenting:

The ACCC has not been able to identify any supermarket acquisitions in the last five years where the result would have been different had the ACCC been able to take into account other acquisitions in the same market. This suggests that the cumulative effect of a series of acquisitions of independent supermarkets ... has not been a significant contributor to any competition problems in the supermarket sector in recent years.⁵

2.7 Nonetheless, the ACCC concluded that it:

maintains its support for the introduction of a general creeping acquisition law. The ACCC considers that the supermarket industry is one where creeping acquisitions could potentially become a concern...⁶

2.8 In his preliminary response to the ACCC report, the Minister for Competition Policy and Consumer Affairs announced:

3 'ACCC announces Charter to promote competitive sales of independent supermarkets', *Media Release*, 1 July 2005.

4 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, August 2008, p. 532.

5 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, August 2008, p. 533.

6 ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, August 2008, p. 535.

The Government will implement a creeping acquisition law, releasing a discussion paper by the end of August to gauge the best way forward.⁷

2.9 He had earlier suggested a need to balance competing considerations:

...we want the ACCC to be given the ability to stop the incremental gathering of unhealthy market power, but at the same time we do not want to stop small business people who have built up goodwill in their business over a substantial period of time, from gaining a good price for their business.⁸

The measure proposed in the bill

2.10 The bill's response to the challenge of creeping acquisitions is to permit a court or the ACCC to examine the effect of a merger or acquisition on competition in a market based on acquisitions occurring in the previous 6 years. To this end, it adds a subsection 50(7) relating to corporations and an analogous subsection 50(8) relating to an individual:

For the purposes of the application of subsection (1) in relation to a particular corporation, an acquisition shall be deemed to have the effect, or likely to have the effect, of substantially lessening competition in a market if the acquisition and any one or more other acquisitions by the corporation of a body corporate related to the corporation in the period of 6 years ending on the date of the first mentioned acquisition together have the effect, or are likely to have the effect.

Overall attitudes of submitters

2.11 Unsurprisingly the bill found more support from potential prey than from potential predators.

2.12 The National Association of Retail Grocers of Australia supports the bill. It had proposed amending the TPA to include a reference to the impact of previous acquisitions on the level of competition in its submission to the 2004 Senate inquiry. At this inquiry it commented:

the way that the creeping acquisitions legislation has worked in the past has been inadequate. There is a very great need to strengthen these provisions.⁹

7 The Hon Chris Bowen, 'Rudd Government Releases its Preliminary Action Plan in Response to the ACCC's Grocery Inquiry', Media release 2008/065, 5 August 2008.

8 The Hon. Chris Bowen, 'Reviewing the federal government's amendments to the Trade Practices Act 1974', *Keynote address to the 4th Annual Trade Practices and Corporate Compliance Summit*, The Grace Hotel, Sydney, 28 April 2008.

9 Mr Ken Henrick, NARGA, *Proof Committee Hansard*, 5 August 2008, p. 40.

2.13 Metcash was also broadly supportive of the bill. Its submission to the 2004 inquiry had argued that creeping acquisitions were anticompetitive, as they crowded out independent retailers and also threatened the competitive ability of wholesalers supplying these independent retailers.¹⁰

2.14 On the other hand, the Australian National Retailers Association, representing the large retail chains, argued that existing controls in the TPA are adequate to deal with creeping acquisitions and that the ACCC already considers the effect of past acquisitions. They contend that the bill would not require the ACCC to assess any new factors. As to the threat that the major retailers pose by creeping acquisitions:

...in a market with literally thousands of supermarkets, the sale of a handful of sites each year has virtually no impact on the level of competition in the market.¹¹

2.15 Similarly, the Business Council of Australia contends that the list of factors that the ACCC and the court must have regard to in section 50(3) are adequate to consider creeping acquisitions.

2.16 The Fair Trading Coalition echoed the Minister's concern that any reform to section 50 must be mindful of the effect on families selling their business to the highest bidder.

2.17 Professor Zumbo felt the bill was addressing a lacuna in section 50:

Dealing effectively with the issue of creeping acquisitions is essential to having a world's best competition law. Failure to deal effectively with creeping acquisitions undermines competition to the 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 section 50.¹²

2.18 Consumer representatives also see creeping acquisitions as an important issue:

It simply seems to us to be unsatisfactory in the extreme that you can do it [build market share] by little bites and get to the same result, and yet that does not throw up the flags that would be thrown up if that were done in toto as a bundle.¹³

10 Senate Economics Reference Committee, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, March 2004, p. 60.

11 Australian National Retailers Association, *Submission 4*, p. 1.

12 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 4.

13 Ms Catriona Lowe, Consumer Action Law Centre, *Proof Committee Hansard*, 5 August 2008, p. 47.

The 'six years' provision

2.19 There were mixed views about the six year period in the bill which the ACCC and courts are required to look back in assessing the cumulative impact on competition. The Business Council of Australia criticised it as 'arbitrary'.¹⁴

2.20 The Council also claimed that it would be burdensome for firms to provide information going back that far, especially as market boundaries may have changed over time. It argued the provision may impose 'substantial uncertainty' and high costs for businesses by requiring them to provide information to the ACCC for merger proposals. Investment may potentially be discouraged and the ACCC's resources will be strained from investigating previous acquisitions.¹⁵

2.21 The Council also opined that it is 'unclear how a forward looking test should also be applied to "look back"'.¹⁶ Although the Council did not elaborate, this presumably means that it is difficult to assess the likely future impact of a merger based on previous acquisitions.

2.22 Metcash doubted whether six years was adequate in the context of the supermarket industry given the major acquisitions made by the major chains in the period 2001 to 2003 would soon fall outside the six-year window.

Applicability of the bill

2.23 The Fair Trading Coalition broadly supports the bill but argues that it should refer only to highly concentrated markets. Professor Zumbo rejects this view:

Because they happen through stealth, they could turn up in any industry at any time. Ideally, you would like the expert regulator, the ACCC, to have the ability to make a judgement call on whether there is a danger that some stealth activity is occurring in an industry and to enforce that law across the economy where it is relevant and appropriate.¹⁷

2.24 NARGA also rejected this argument with respect to the grocery market:

The independents cannot defend any further erosion of their market share and therefore it is important to stop creeping acquisitions wherever it occurs, not just in locally concentrated markets.¹⁸

14 Business Council of Australia, *Submission 6*, p. 7.

15 Business Council of Australia, *Submission 6*, p. 7.

16 Business Council of Australia, *Submission 6*, p. 7.

17 Associate Professor Frank Zumbo, *Proof Committee Hansard*, 5 August 2008, p. 9.

18 National Association of Retail Grocers of Australia, *Proof Committee Hansard*, 5 August 2008, p. 39.

The charter as an alternative in the grocery market

2.25 As noted above, the ACCC has a specific charter aimed at limiting creeping acquisitions in the grocery sector. NARGA are sceptical of the charter:

It does not help much at all. I should say at the beginning that it is a voluntary code. In relation to the purchase of the store in Jindabyne, the ACCC were unaware of it until I rang them and told them that it was happening. Woolworths had not bothered to notify the ACCC that they were in any sort of negotiation with that independent. The idea of that charter was that the independent should be able to get the best price available for his business if he wished to sell, but that the independent sector as a whole ought to be able to have an opportunity to match that best price and retain that store and that business within the independent sector to avoid the creeping acquisitions.¹⁹

19 National Association of Retail Grocers of Australia, *Proof Committee Hansard*, 5 August 2008, p. 40.