

# **FAMILY FIRST - Dissenting Report**

## **Inquiry into the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]**

### **Summary**

After many years of inaction by governments, last year Family First took action to introduce laws to strengthen the powers of the Australian Competition and Consumer Commission (ACCC) to deal with creeping acquisitions.

We all stand and wonder how we have let our grocery market, our petrol market and our other markets become controlled by just a handful of big players. Well, it is because Australia's competition law (the Trade Practices Act) has a huge loophole. The Trade Practices Act (TPA) allows big business to acquire small competitors, one at a time, with each acquisition on its own being too small to be caught by the TPA and thereby falling under the radar of the ACCC.

Family First's Creeping Acquisitions Bill stops this crazy loophole in the TPA by giving the ACCC the power to lump together all the small one-off acquisitions over the past 6 years when they consider the next acquisition – no matter how small the next acquisition may be.

Family First wants the Rudd Government to support Family First's Creeping Acquisitions Bill, to ensure a loophole being exploited by big business is immediately stopped. The bill could easily accommodate government amendments.

University of New South Wales Professor Frank Zumbo concluded that less competition means that families end up paying higher prices:

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.<sup>1</sup>

It is a serious concern that the Trade Practices Act does not give adequate powers to the ACCC to be able to prevent a series of acquisitions by considering the combined effect of those acquisitions on competition. There are always reasons to delay action, but Family First believes legislation to deal with this problem is too important to wait.

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1 Professor Zumbo, Committee Hansard, 5 August 2008, page 4

## **Background**

Family First introduced the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007* to stop big business from acquiring shares or other companies, through smaller buyouts or takeovers, when over time it has the result of substantially reducing competition.

The problem of "creeping acquisitions" is a significant one for small business and the *Trade Practices Act* has to be strengthened to deal with it.

It is a serious concern that the Trade Practices Act does not give adequate powers to the Australian Competition and Consumer Commission (ACCC) to be able to prevent a series of small one-off acquisitions by considering the combined effect of those acquisitions on competition.

Family First supports the passage of the bill because:

- The ACCC acknowledges that the Trade Practices Act does not deal effectively with creeping acquisitions and wants the law changed to fix that problem;
- Four years ago the Senate Economics References Committee recommended action;
- The ACCC acknowledges that the supermarket industry is one where there is a risk of further creeping acquisitions taking place;
- No government has yet introduced legislation to deal with the problem of creeping acquisitions;
- Australian families will continue to pay more unless there are effective laws to protect competition.

## **What are creeping acquisitions?**

Creeping acquisitions refers to where a big company acquires shares, assets or other businesses over a period of time, which results in high levels of market concentration to the detriment of fair competition.

On its own, each acquisition might appear insignificant, but combined over a period of time, they could create significant changes in a market.

University of New South Wales Professor Frank Zumbo explained 'creeping acquisitions' occurs where:

... various large players that have been acquiring individual stores one by one, particularly in retail grocery but in other sectors as well. In some countries they call it 'acquisition by stealth'. Bit by bit, other competition is bought out, to the point where there is a substantial lessening of competition. It creeps up on you. It is by stealth. These acquisitions fly under the radar, and by the time you find out that there is a substantial

lessening in competition it is too late ... there are two dimensions to creeping acquisitions. One is the piecemeal acquisition of individual smallscale competitors. But there is another meaning of creeping acquisitions, and that is creeping acquisitions of market share, whereby, over time and through different practices, you acquire a substantial market share.<sup>2</sup>

Ms Rich from the Consumer Action Law Centre explained:

... in many cases there will be acquisitions where, if you just compare it to the situation immediately prior to that acquisition, there is not going to be a substantial lessening of competition, but if you compare that acquisition to the situation 10 acquisitions ago then you can see that there is a substantial difference.<sup>3</sup>

The combined effect of these so-called creeping acquisitions over time can result in a substantial reduction in competition. Less competition in any market is not good. Fair competition is vital as it keeps prices as low as possible for Australian families.

### **The need for law reform**

The need for legislation to strengthen section 50 of the *Trade Practices Act* to deal with creeping acquisitions has been acknowledged for many years, but to date no government has introduced legislation to fix the problem. That is why last year Family First introduced draft laws to the Senate to stop acquisition by stealth.

The Australian Competition and Consumer Commission (ACCC) acknowledged the problem of creeping acquisitions most recently in its grocery report earlier this year:

... the ACCC considers that s. 50 is unlikely to be able to deal with the cumulative impact of acquisitions of smaller independent supermarkets that individually do not raise competition issues.<sup>4</sup>

Independent supermarket supplier Metcash says "The ACCC Chairman has noted that 'the Trade Practices Act...does not permit us to stop parties that are engaging in acquisitions of assets by small increments'."<sup>5</sup>

ACCC Chairman Graeme Samuel told the Australian Institute of Company Directors in June that "the law only prohibits an acquisition that is likely to lead to a substantial lessening of competition. Those creeping acquisitions - be it in supermarkets or other

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2 Professor Zumbo, Committee Hansard, 5 August 2008, page 5

3 Ms Rich, Committee Hansard, 5 August 2008, page 46-47

4 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, page 535

5 Metcash, submission 2, page 1

industries - can lead ultimately to significant dominance and potential monopolisation."<sup>6</sup>

The ACCC also stated "... the ACCC maintains its support for a general creeping acquisitions law that would better allow it to address creeping acquisitions more generally."<sup>7</sup>

Small business and consumer groups have also been active calling for the problem of creeping acquisitions to be addressed.

The National Association of Retail Grocers of Australia (NARGA) has been a longstanding advocate for reform,<sup>8</sup> while the Fair Trading Coalition (FTC) stated that:

The FTC has long had real concerns about conduct where larger players in the economy gradually acquire smaller ones and incrementally increase aggregate market share. In fact the FTC raised the issue of the Trade Practices Act and creeping acquisitions in its submission to the Dawson Review of the Trade Practices Act in 2002.<sup>9</sup>

The Consumer Action Law Centre said:

Creeping acquisitions pose a long-term threat to competition and consumer welfare, and amendments that allow the court to take a longer term view of the effect of combined acquisitions in deciding whether an acquisition is anticompetitive are appropriate.<sup>10</sup>

The Senate Economics References Committee's 2004 report "*Effectiveness of the Trade Practices Act 1974 in protecting small business*" recommended 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", but still nothing has been done.

The recent ACCC decision to block Woolworths buying a supermarket in Karabar NSW was cited in some submissions as evidence that no change in the law was necessary.<sup>11</sup>

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6 Creeping acquisitions under spotlight as ACCC flag changes to competition laws, Australian Food News, 20 June 2008. See <http://www.ausfoodnews.com.au/2008/06/20/creeping-acquisitions-under-spotlight-as-acc-cc-flag-changes-to-competition-laws.html> (accessed 18 August 2008)

7 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, page 552

8 NARGA, submission 1.

9 Fair Trading Coalition, submission 3, page 1.

10 Consumer Action Law Centre, submission 5, page 4.

11 Business Council of Australia, submission 6, pages 2,5; Australia National Retailers Association, submission 4, pages 9-10

In contrast, Metcash argued that the Karabar case was a very specific one that did not answer concerns over creeping acquisitions:

The ACCC recently elected to block the purchase of the Karabar Supabarn supermarket by Woolworths because the acquisition would “substantially lessen competition in the local retail supermarket market surrounding the area”. However the current Act would not be able to block acquisitions in situations where the major chains are seeking to acquire an independent retailer in an area where they do not already have a presence. Such acquisitions reduce the competitiveness of the independent sector of the grocery industry, as they result in:

- o a loss of sales volumes (and associated scale economies) for the independent sector as a whole; and
- o increases the bargaining power of the major chains against suppliers (including both grocery product suppliers and landlords).<sup>12</sup>

Trade practices expert Professor Frank Zumbo stated in hearings on the bill that "those that say there is no problem with [creeping] acquisitions, I would respectfully submit, have a vested interest in allowing those creeping acquisitions to occur."<sup>13</sup>

### **Creeping acquisitions and supermarkets**

Concern over creeping acquisitions applies to a range of markets including child care centres,<sup>14</sup> but the supermarket industry is the one most frequently pointed to as an example of creeping acquisitions affecting competition.

A report commissioned by NARGA found that:

since the early 1990s, the supermarket industry has undergone significant restructuring. Australia’s grocery market has become one of the most concentrated in the world. Current ACNielsen estimates indicate that the two major supermarket chains, Woolworths and Coles, have approximately 78-79% of the market. The Australian market share growth of these two key MGRs [major grocery retailers] over the past three decades has been significant – growing from approximately 35% to around 79% ...<sup>15</sup>

Metcash makes the comment that:

In the past, the ACCC has not been able to prevent the vast majority of acquisitions of independent supermarkets by the major chains. In their

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12 Metcash, submission 2, page 1-2

13 Professor Zumbo, Committee Hansard, 5 August 2008, page 8

14 Professor Zumbo, Senate Committee Hansard, 5 August 2008, page 5.

15 *The Economic Contribution of Small to Medium-Sized Grocery Retailers to the Australian Economy, with a Particular Focus on Western Australia*. A report prepared by PriceWaterhouse Coopers for the National Association of Retail Grocers of Australia, June 2007. Page 14.

public submission to the ACCC on creeping acquisitions, Woolworths recognises the fact that the ACCC has cleared the acquisition of 21 Action stores and 6 independent supermarkets since 2005. A number of supermarket acquisitions have also proceeded without notification to the ACCC. Despite the denial of a creeping acquisitions “strategy”, the combined market share of the major chains (Coles and Woolworths) in the packaged groceries market is now approximately 78%.<sup>16</sup>

Professor Zumbo argues that in cases such as supermarkets where market concentration has already taken place, divestiture powers are also needed:

Section 50 has been circumvented by various large players that have been acquiring individual stores one by one, particularly in retail grocery but in other sectors as well. In some countries they call it ‘acquisition by stealth’. Bit by bit, other competition is bought out, to the point where there is a substantial lessening of competition. It creeps up on you. It is by stealth. These acquisitions fly under the radar, and by the time you find out that there is a substantial lessening in competition it is too late. The acquisitions have occurred and there is no mechanism in the Trade Practices Act, such as a divestiture power, to break up these players when they get too big and misbehave.<sup>17</sup>

But despite the supermarket sector already being highly concentrated and dominated by a duopoly, the ACCC is still concerned that creeping acquisitions is an ongoing issue:

The ACCC considers that the supermarket industry is one where creeping acquisitions could potentially become a concern, due to particular structural features of the market, including:

the need to obtain good sites being a significant barrier to entry, particularly given the financial resources of the MSCs and the leverage they wield over lessors of suitable sites

the existence of broader barriers to entry and expansion created through the need to obtain economies of scale and efficient wholesaling operations

the existence of two major supermarket chains

a situation where there are many small business units (that is, retail stores or potential retail sites) that could be acquired or leased one by one or in small groups.<sup>18</sup>

The supermarket industry is already highly concentrated, but laws against creeping acquisitions are still needed to prevent yet more market share falling into the hands of the dominant duopoly, Coles and Woolworths.

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16 Metcash, submission 2, page 1

17 Professor Zumbo, Committee Hansard, 5 August 2008, page 5

18 Australian Competition and Consumer Commission, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008, page 535

## **Conclusion**

After many years of inaction by governments, last year Family First took action to introduce laws to strengthen the powers of the ACCC to deal with creeping acquisitions.

Family First's *Trade Practices (Creeping Acquisitions) Amendment Bill 2007* is to stop big business from acquiring shares or other companies, through buyouts or takeovers, when it has the result of substantially reducing competition.

Professor Zumbo concluded that less competition means that families end up paying higher prices:

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.<sup>19</sup>

It is a serious concern that the Trade Practices Act does not give adequate powers to the Australian Competition and Consumer Commission (ACCC) to be able to prevent a series of acquisitions by considering the combined effect of those acquisitions on competition. There are always reasons to delay action, but Family First believes legislation to deal with this problem is too important to wait.

**Senator Steve Fielding**  
**Leader of Family First**

