

The Senate

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Standing Committee on Economics

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Trade Practices (Creeping Acquisitions)  
Amendment Bill 2007 [2008]

August 2008

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ISBN 978-0-642-71955-3

Printed by the Senate Printing Unit, Parliament House, Canberra.

# Senate Standing Committee on Economics

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# Chapter 1

## Introduction

1.1 The Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] aims to regulate 'creeping acquisitions' to promote fair competition. It would amend the *Trade Practices Act 1974* so that an acquisition would be deemed to lessen competition substantially if it and other acquisitions over the previous six years would have that effect.

1.2 The bill was introduced into the Parliament in September 2007 by Family First Senator Steve Fielding. The bill was restored to the Notice Paper in February 2008.

1.3 On 26 June 2008, the Senate referred the bill to the Senate Standing Committee on Economics for report by 27 August 2008.

### Conduct of the inquiry

1.4 The committee advertised the inquiry in the national press and invited written submissions by 21 July 2008. The committee received 6 submissions to its inquiry which are listed at Appendix 1. They are available on the Committee's website; [http://www.aph.gov.au/Senate/committee/economics\\_ctte/tpa\\_creeping\\_acqs\\_08/index.htm](http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_creeping_acqs_08/index.htm).

1.5 The committee held a public hearing on the bill in Melbourne on 5 August, in conjunction with its hearing on the Trade Practices Legislation Amendment Bill 2008. The witnesses are listed in Appendix 2.

1.6 The Committee thanks those who participated in the inquiry.





# 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'.<sup>1</sup> 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.<sup>2</sup>

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

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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.<sup>3</sup>

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.<sup>4</sup>

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.<sup>5</sup>

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...<sup>6</sup>

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

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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.

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

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.<sup>8</sup>

### **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.<sup>9</sup>

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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 4<sup>th</sup> 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.<sup>10</sup>

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.<sup>11</sup>

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.<sup>12</sup>

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.<sup>13</sup>

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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.

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## 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'.<sup>14</sup>

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.<sup>15</sup>

2.21 The Council also opined that it is 'unclear how a forward looking test should also be applied to "look back"'.<sup>16</sup> 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.<sup>17</sup>

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.<sup>18</sup>

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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.<sup>19</sup>

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

# Chapter 3

## Conclusions

3.1 The committee believes concerns about the impact of 'creeping acquisitions' on competition are valid. It agrees that the current provisions of section 50 of the *Trade Practices Act* are insufficient to address the problem adequately.

3.2 The committee notes that the Government has foreshadowed that it will be introducing legislation regarding creeping acquisitions within weeks. It would be prudent to see what this legislation contains before deciding whether or not the bill currently under consideration is preferable.

### **Recommendation 1**

**3.3 The committee recommends that the Senate defer consideration of the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] until the Government's legislation regarding this topic is presented.**

**Senator Annette Hurley**

**Chair**





# **Dissenting Report from Coalition Senators**

**Senators Alan Eggleston (Deputy Chair),  
Barnaby Joyce and David Bushby**

As the *Trade Practices Act* now stands, there is no specific power to stop creeping acquisitions. There is also no specific power to undo acquisitions that have been allowed to occur individually over a period of time, but which collectively substantially lessen competition to the detriment of consumers.

With Australia having the highest levels of market concentration representing a lack of real competition, it is clear that fundamental reform of the *Trade Practices Act* needs to occur to restore competition into the market place. We need to enact a divestiture power which allows the Court to break up corporations that dominate markets by acquiring a substantial market share to the detriment of small businesses and consumers.

The proposal contained in the Inquiry into the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] represents one way to deal with creeping acquisitions problem. There are other, superior, ways of effectively dealing with creeping acquisitions to restore competition in key Australian Markets for the benefit of small businesses and consumers. Consideration should be given to enacting a divestiture power under the *Trade Practices Act*.

## **Recommendation**

**Dealing with Creeping acquisitions in the manner proposed by the Family First Bill is meritorious but strong consideration should be given to exploring superior alternatives in preventing creeping acquisitions and restoring competition through the enactment of a divestiture power under the *Trade Practices Act*.**

**Senator Alan Eggleston**  
**Deputy Chair**  
**LP**

**Senator Barnaby Joyce**  
**LNP**

**Senator David Bushby**  
**LP**

# **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**



# APPENDIX 1

## Submissions Received

<b>Submission Number</b>	<b>Submitter</b>
1	National Association of Retail Grocers of Australia (NARGA)
2	Metcash Ltd
3	Fair Trading Coalition (FTC)
4	Australia National Retailers Association (ANRA)
5	Consumer Action Law Centre (CALC)
6	Business Council of Australia (BCA)



# **APPENDIX 2**

## **Public Hearings and Witnesses**

**MELBOURNE, TUESDAY, 5 AUGUST 2008**

- BOWD, Mr Matthew, Analyst,  
Competition Policy Framework Unit, Competition and Consumer Policy  
Division, Treasury
- HENRICK, Mr Kenneth Michael, Chief Executive Officer,  
National Association of Retail Grocers of Australia
- LOWE, Ms Catriona, Co-Chief Executive Officer,  
Consumer Action Law Centre
- MAHER, Mr Graham, Partner,  
Addisons Lawyers
- RICH, Ms Nicole, Director, Policy and Campaigns,  
Consumer Action Law Centre
- ROGERS, Mr Scott, Senior Advisor,  
Competition Policy Framework Unit, Competition and Consumer Policy  
Division, Treasury
- STEWART, Mr Ian Barton, Member,  
Trade Practices Committee, Law Council of Australia
- van RIJSWIJK, Mr Gerard Anthony, Senior Policy Officer,  
National Association of Retail Grocers of Australia
- ZUMBO, Associate Professor Frank

