



**fair trading**  
coalition

The Secretary  
Senate Economics Committee  
The Senate  
Parliament House  
CANBERRA ACT 2600

Dear Sir

The Fair Trading Coalition (FTC) welcomes this opportunity to comment on the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008].

The FTC is an informal coalition of small business organisations committed to reform of the Trade Practices Act. The Members of the Fair Trading Coalition believe that a vibrant small business sector is important if Australia is to sustain a competitive market.

The FTC has always been of the view that the Trade Practices Act should cover the issue of “creeping acquisitions”. 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. At that time, the FTC recommended to the Review that the Trade Practices Act be amended to state that where market concentration had passed a nominated threshold, for example, CR4<sup>1</sup>, the ACCC should take into consideration previous mergers and acquisitions by an acquirer and to aggregate the effect of previous mergers and assess the resultant state of competition in any relevant market.

The Members of the FTC appreciate that section 50 of the Trade Practices Act applies only where the acquisition substantially lessens competition in a market and that it does not pick up aggregate size. In the FTC’s view, many small acquisitions will not lead to a substantial lessening of competition in any one market; but many markets will become highly concentrated because of numbers of individual acquisitions occurring over a period of time. However the FTC believes that the law should be concerned about aggregate size and further increases in that size.

members of the Fair Trading Coalition:

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|---|--|--|---|---|
| 1 Apple & Pear Growers Association of SA Inc    | 7 Australian Petroleum Agents and Distributors Association     | 13 Drycleaning Institute of Australia    | 20 The Motor Trades Association of the Australian Capital Territory | 26 The Pharmacy Guild of Australia                        |
| 2 Australian Automotive Aftermarket Association | 8 Australian Private Hospitals Association                     | 14 Growcom                               | 21 The Motor Traders' Association of New South Wales                | 27 Service Station Association Limited                    |
| 3 Australian Automobile Dealers Association     | 9 Australian Service Station and Convenience Store Association | 15 The Horticulture Council              | 22 The Motor Trades Association of the Northern Territory           | 28 Victorian Automobile Chamber of Commerce               |
| 4 Australian Hotels Association                 | 10 Chamber of Women in Business                                | 16 Independent Liquor Group NSW          | 23 The Motor Trade Association of South Australia                   | 29 Western Australian Dental Implant Society AOS (WA) Inc |
| 5 Australian Motor Body Repairers Association   | 11 Civil Contractors Federation                                | 17 Independent Liquor Stores Association | 24 The Motor Trade Association of Western Australia                 |   |
| 6 Australian Newsagents' Federation             | 12 Council of Small Business Organisations of Australia        | 18 Liquor Stores Association of Victoria | 25 National Institute of Accountants                                |   |
|   |  | 19 Motor Trades Association of Australia |   |   |

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The FTC submitted the following to the 2007 Senate Standing Committee on Economics Inquiry into the Provisions of the Trade Practices Legislation Amendment Bill (No 1) 2007 and the Trade Practices Amendment (Predatory Pricing Bill) 2007.

*"[t]he one perhaps important additional measure which is not addressed in either of the Bills under consideration is the issue of 'creeping acquisitions'. The FTC understands that the issue of 'creeping acquisitions' is a complex one. However, given that large sectors of the Australian economy are now highly concentrated, the FTC believes that the Parliament must now consider enacting measures which will give the ACCC greater powers to consider acquisitions on a case by case basis; albeit that the merger thresholds set out in section 50 of the Act may not be in question".*

In general terms the FTC supports the Bill under consideration, but has some concerns about the details and in particular the fact that it is not limited to highly concentrated markets. The Bill as currently drafted may mean that a small company which buys say two liquor stores over a six year period is subject to the proposed law. That will lead to uncertainties in more than just highly concentrated industries where there are good reasons for controls on further acquisitions.

For many small business operators it is the business which provides their superannuation and any 'blanket' restriction on them selling that business is likely to be opposed by small business groups. Yet creeping acquisitions is a matter which causes quite some concern for small businesses and their representative organisations.

Creeping acquisitions are a difficult issue to deal with in the Trade Practices Act. However the FTC does suggest some options to accommodate the issue. The FTC also appreciates that any law to address concerns about creeping acquisitions may prevent or limit some small businesses from selling their asset to the highest bidder. The Trade Practices Act however, in some circumstances, currently does that; where it catches anti-competitive acquisitions under section 50 (the merger provision). For example, see the recent ACCC decision in relation to the proposed acquisition by Woolworths of an independent supermarket in Queanbeyan, New South Wales.

The Fair Trading Coalition therefore proposes that the Committee consider the following two options:

### ***Option 1 – the CR4 Model***

Where concentration in a market in Australia has passed the CR4 market concentration test, any corporation falling within that threshold must notify any further acquisitions in that market to the Commission.

The Commission must review each such notification on the basis of whether or not the acquisition will or is likely to result in an overall public detriment.

If the Commission decides that there is a public detriment then the acquisition will not be allowed to proceed.



The formal merger clearance processes will apply to such acquisition, as if a formal clearance application has been lodged.

***Option 2- The European Union model***

Under the European Union Merger Regulation, a series of transactions in securities which occur “within a reasonably short period of time”<sup>iii</sup> are treated as a single transaction.

In summary, the FTC supports the introduction of measures to address small business concerns about creeping acquisitions. Notwithstanding some concerns about the detail of the operation of the proposed amendments set out in this Bill (particularly in relation to it potentially capturing small business to small business transactions) and on the basis that those concerns could be addressed, the FTC could support the Bill.

Should the concerns about aspects of the Bill’s operations be addressed, the FTC could support the introduction of measures to address creeping acquisitions at the earliest opportunity.

Please do not hesitate to contact me if you require any further information.

Yours faithfully

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**Executive Director of the Motor Trades Association of Australia**  
**Chair and Convenor of the Fair Trading Coalition**

21 July 2008

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- <sup>i</sup> Defined as being where the combined market share of the four largest companies is greater than 75 per cent.
  - <sup>ii</sup> The FTC understands that the European Union does not define ‘within a reasonably short period of time’ – that is assessed on a case by case basis.