Business Council of Australia

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Submission to

Senate Economics Committee

on the

Trade Practices (Creeping Acquisitions) Amendment Bill 2007

25 July 2008

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1. Introduction

The Business Council of Australia (BCA) welcomes the opportunity to make this submission to the Senate Economics Committee's inquiry into the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007* (Bill).

The BCA is an association of Chief Executives of around 100 of Australia's leading companies. The BCA develops and advocates, on behalf of its members, public policy reform that seeks to position Australia as the best place to live, learn, work and do business.

The BCA supports robust and effective competition law, because it is an important element of business regulation in Australia. Effective competition is important to maintain adequate consumer choice and to keep prices low. Any amendments that may stifle ordinary and legitimate commercial conduct or competition should be avoided.

Therefore, consistent with our broader views on regulatory reform, the BCA believes that any new business laws or proposed changes to existing laws should only occur where:

- there is a clear and identifiable problem to be addressed;
- the proposed reforms achieve the purpose for which they are intended without having unintended consequences; and
- the proposed reforms will not stifle ordinary and legitimate business behaviour.

As such, any proposals to amend or reform the *Trade Practices Act 1974 (Cth)* (TPA) require proper economic analysis and consideration of the policy objectives and practical effect of the proposals.

On 20 September 2007, Senator Fielding introduced the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007*. We understand that the amendments proposed by Senator Fielding are intended to address the situation where one acquisition may not of itself substantially lessen competition, but the acquisition nevertheless represents the 'tipping point' at which a series of prior acquisitions has the effect of substantially lessening competition.

However, we believe that there is no evidence of a market failure or competition concerns that section 50 is not already able to address. Accordingly, the BCA does not believe that there is sufficient evidence to amend the TPA, given the potential unintended consequences that may result if amendments stifle legitimate business expansion and investment in Australia.

The BCA strongly supports the operation of open and competitive markets. In an increasingly global business environment, open and competitive markets contribute to the long term growth and prosperity of a comparatively small economy such as Australia, and provide the best outcome for consumers. It would therefore be problematic if the proposals in the Bill make it so costly and time consuming for companies to invest and expand their operations, that Australia's competitiveness suffers.

In summary, the BCA considers that:

- There is no clear evidence that there is a problem which needs to be addressed by amendments to the TPA.

- The law as currently drafted is fully capable of addressing the types of behaviours that the proposed amendments seek to prevent. This is evidenced by the recent decision by the ACCC to oppose the Karabar Supabarn acquisition by Woolworths in Queanbeyan.[1]

- A significant problem with retrospective examination of acquisitions is that such analysis may impose substantial uncertainty for business by introducing a large and unnecessary cost and risk impediment to expansion or investment. For example, the ability for companies to provide information to the ACCC for merger approvals would be extremely difficult and costly, and may delay those approvals. Any discouragement of investment may ultimately have a detrimental effect on the growth and robustness of the Australian economy.

- The proposed '6 year window' is unduly lengthy and arbitrary and not supported by experience in Australia or overseas.

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1 ACCC Media Release MR 178/08 25 June 2008 - ACCC opposes the proposed acquisition of Karabar Supermarket by Woolworths Limited

2. Lack of demonstrated problem which the amendments are intended to address

Regulatory amendments should only be made where there is a clear problem to be addressed, and the regulatory amendment is not a disproportionate response to the problem.

More detailed evidence and analysis of market failure across the entire Australian economy, and the lack of competition that may be occurring in the market as a result of supposed 'creeping acquisitions', is needed before any regulatory response is adopted that will impact all businesses. Indeed, it would be very concerning if new laws were imposed across all markets because of the 'perception' of a problem that has not been clearly demonstrated.

3. The law as currently drafted is capable of dealing with creeping acquisitions

The Bill introduces a number of amendments including deeming an acquisition to have the effect, or be 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 or 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 that effect.*[2]

3.1 Section 50 adequately deals with creeping acquisitions

Section 50 prohibits mergers or acquisitions which have the effect, or are likely to have the effect, of substantially lessening competition in a market in Australia.

There has been little judicial consideration of what constitutes a 'substantial lessening of competition' in a merger context. However, in *Australian Gas Light Company v Australian Competition & Consumer Commission (No. 3)*[3] French J held that 'substantially' means something 'commercially meaningful or relevant to the competitive process'.

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2 Bill, Proposed section 50(7). The Bill introduces a similar amendment which will apply to off-shore acquisitions; section 50A(1B).

3 (2003) 137 FCR, 417

A market can be a national market, or a market in a state, territory or region of Australia and the ACCC has adopted the practice of assessing mergers (including in the retail context), on the basis of multiple geographic market definitions - for example, on a national, State or even a 'local' area basis.

The decision of the Federal Court in *Australian Competition & Consumer Commission v Liquorland (Australia) Pty Ltd and Woolworths Limited*[4] also supports the view that in a retail context a geographic market may be as narrow as local areas constituted by a circle of competition of 2km - 5km around the store in question.

Therefore, if a 'substantial lessening of competition' can be found, when:

- an acquisition has a 'commercially meaningful' effect on the relevant market, and
- a market can be as narrow as a area of approximately 2km - 5km,

then there is no clear reason why section 50 could not be used to assess the acquisition of a single store or individual asset. Accordingly, section 50 already provides a substantial degree of flexibility for the Courts and the ACCC to focus on the circumstances of, and market dynamics surrounding, an individual acquisition.

In addition, the ACCC's Merger Guidelines 1999 and Draft Merger Guidelines 2008 provide scope for the ACCC to consider creeping acquisitions. The Merger Guidelines allow the ACCC to assess creeping acquisitions[5] and the Draft Merger Guidelines allow the ACCC to consider *any unilateral or coordinated effects that may arise as a result of the acquisition*.[6]

3.2 Section 50(3) factors

When determining whether an acquisition would have the effect of substantially lessening competition, a Court and the ACCC *must have regard to* the list of factors set out in subsection 50(3) of the TPA. These factors allow sufficient flexibility to examine each proposed acquisition thoroughly.

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4 [2006] FCA 826

5 See for example the Merger Guidelines 1999 paragraphs 3.31 and 5.99

6 See pages 20-30 of the ACCC Draft Merger Guidelines 2008

For example, section 50(3)(h) requires the consideration of:

> *the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor.*

Accordingly, if a corporation were to seek to acquire a firm with a relatively small market share, subsection 50(3)(h) means that the ACCC, or a Court, must consider whether the target is a vigorous competitor and the merger would result in the removal of such a competitor. The ACCC's Merger Guidelines 1999[7] also state that consideration of the actual conduct of the target firm pre-merger and likely future conduct with and without the merger is needed. The inclusion of this factor as a matter to which the Court and the ACCC *must* have regard, represents a mechanism by which section 50 may consider a series of creeping acquisitions.

Similarly, subsection 50(3)(g) which refers to *'the dynamic characteristics of the market, including growth, innovation and product differentiation'* is sufficiently broad in scope to permit a Court or the ACCC to consider issues such as creeping acquisitions.

3.3 ACCC's recent decisions

The ACCC recently opposed the acquisition of the Karabar Supabarn by Woolworths. This decision demonstrates that the ACCC was (and is) able to rely on section 50 in its current form to prohibit small acquisitions of individual shares or assets where it considers that such acquisitions will substantially lessen competition. In the Statement of Issues for that acquisition the ACCC stated that:

> *the proposed acquisition is likely to constitute a substantial lessening of competition in the relevant local supermarket market when compared with the likely situation without the acquisition.*[8]

Further, it is not apparent that the ACCC has previously had difficulty in undertaking analysis on a local store basis. The ACCC's Public Competition Assessment on 19 October 2005 in relation to Woolworths' Proposed Acquisition of 22 Action Stores and

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7 Paragraph 5.138 - 5.147

8 ACCC Statement of Issues- Woolworths Limited- proposed acquisition of the Karabar Supabarn supermarket, 4 June 2008

Development sites, provides significant detail as to the process the ACCC undertook to assess the proposed acquisition and demonstrates that the ACCC does consider small markets in making its assessments on these issues.

4. Retrospectivity

The proposed amendment by Senator Fielding would permit a Court, or the ACCC, to 'look back' to any or all acquisitions occurring in the previous 6 years and to determine if any or all of the previous acquisitions would together substantially lessen competition.

Firstly, this raises a number of conceptual difficulties. It is unclear how a forward looking test should also be applied to 'look back'. Additionally, an assessment of prior acquisitions to determine whether the current acquisition substantially lessens competition, may require looking at prior acquisitions:

- on the basis of a different market definition (given that market boundaries may change over time); and

- on the basis of different dynamics of competition (given that the structure and functioning of markets may also change over time).

Secondly, this has the potential to impose a considerable uncertainty and a cost burden on business, which could adversely impact investment in Australia. For example:

- Business will have to factor into each acquisition, the 'risk' possibility of retrospective assessment of each acquisition over a six year time period. This will raise the cost of investment because this 'risk' will be factored into transactions.

- The cost to business of providing the ACCC with information on the impact of a proposed acquisition, as well as transactions that have occurred in the previous 6 years, will increase.

- The time spent investigating previous acquisitions over the past 5 or 6 years is likely to increase the pressure on businesses and the ACCC's resources. This may also delay transactions (even those which previously would have been uncontentious) and this has the potential to adversely impact commercial time frames (for example, in the context of public takeover bids).

- The suggested amendment may also create considerable regulatory uncertainty, particularly if the remedy is applicable not just to any proposed new acquisition, but also to past acquisitions.

5. Time frame

The '6 year window' proposed in the Bill appears arbitrary and is not supported by overseas experience. For example, under the European Union Merger Regulation,[9] a series of transactions in securities which occur 'within a reasonably short period of time'[10] are treated as a single transaction. Should a real need for reform to address 'creeping acquisitions' arise, any reform package should focus on economic realities and the impact on business and risk, rather than imposing an arbitrary criteria or time frame.

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9 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings Recital 20

10 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings Recital 20