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October 9, 2008

Via E-mail and Express Mail

Mr. Scott Rogers
Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Re: Comments on the Australian Commonwealth Government Treasury's Discussion Paper on Creeping Acquisitions

Dear Mr. Rogers:

On behalf of the American Bar Association Sections of Antitrust Law and International Law, we are pleased to submit the attached comments on the Australian Commonwealth Government Treasury's Discussion Paper on Creeping Acquisitions.

Please note that these views are being presented only on behalf of the Sections of Antitrust Law and International Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the position of the American Bar Association.

If you have any questions after reviewing this report, we would be happy to provide further comments.

Sincerely,

James A. Wilson
Chair, Section of Antitrust Law

Aaron Schildhaus
Chair, Section of International Law

Attachment

JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE AUSTRALIAN COMMONWEALTH GOVERNMENT TREASURY'S DISCUSSION PAPER ON CREEPING ACQUISITIONS[*]

October 2008

The views stated in this submission are presented jointly on behalf of these Sections only. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and therefore may not be construed as representing the policy of the American Bar Association.

The Section of Antitrust Law and the Section of International Law of the American Bar Association (the Sections) appreciate the opportunity to provide comments to the Competition and Consumer Policy Division of the Treasury Department of the Commonwealth Government of Australia (Treasury Department) with respect to its *Discussion Paper on Creeping Acquisitions* (*Discussion Paper*), published in September 2008. The Sections previously provided comments on the Australian Competition and Consumer Commission's (ACCC's) 2008 *Draft Merger Guidelines* (2008 *Guidelines*).[1]

The membership of the Sections has had substantial experience with the various guidelines and merger control practices of U.S. and non-U.S. antitrust authorities on a wide range of issues. That experience informs the Sections' comments on the Treasury Department's efforts to address a relatively undeveloped area of competition law. The Sections' interest in this issue derives in part from the fact that U.S. companies could be parties to transactions implicated by the *Discussion Paper*.

EXECUTIVE SUMMARY

The Sections understand that the *Discussion Paper* does not necessarily reflect a settled position or advance concrete recommendations on how to approach the perceived problem of creeping acquisitions in Australia. Because cross border transactions continue to become ever more important and complex for all nations, the Sections believe that it is in the best interests of competition authorities, as well as parties to transactions and their advisers, to engage in

[*] The members of the working group that drafted these comments are Margaret Ward, Scott Sher, Beau W. Buffier, and John Scribner.

[1] Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law on Australian Consumer and Competition Commission's Draft Merger Guidelines 2008.

constructive dialogue about how merger control regulations and procedures should evolve and consistent with their national interest, seek to harmonize merger review. The Sections therefore commend the Treasury for seeking guidance from interested parties in Australia and globally, especially in light of the fact that such acquisitions may raise important and potentially uniquely local competition issues.

The Sections recognize the particular context in Australia in which concerns have been raised about the potential negative effects of creeping acquisitions and also note that such concerns have been raised in previous reviews of the Trade Practices Act 1974 (Cth) (TPA). The Sections believe that merger control laws of general application should not be modified to address the concerns arising from creeping acquisitions. The ACCC may face significant difficulty in delineating and applying a workable set of rules aimed solely at the anticompetitive risks of creeping acquisitions. The Sections also note that the U.S. and EC competition authorities have not fashioned rules to evaluate different forms of transactions, but have articulated one broadly applicable set of merger guidelines that govern the legality of all combinations. The International Competition Network (ICN) has endorsed such an approach in a paper entitled *The Analytical Framework for Merger Control*.[2]

Moreover, the Sections are wary of attempts to address narrow and potentially unique competition concerns existing in one particular industry (such as retailing) through changes in broadly applicable merger control law.[3] Australia is widely regarded as having a well-developed merger control regime that reflects international best practices in merger enforcement. Accordingly, the Sections believe that before potentially far-reaching changes are introduced, a high burden must be met to demonstrate that (1) under the status quo, the risk of anticompetitive harm from creeping acquisitions is so great that additional prophylactic rules are needed; and (2) the costs of specific rules that address creeping acquisitions would be less than the harms from allowing the current merger control laws to continue to regulate all acquisitions equally.

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[2] ICN Merger Working Group: Analytical Framework Sub-group, THE ANALYTICAL FRAMEWORK FOR MERGER CONTROL REPORT (2002), *available at* http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/afsguk.pdf.

[3] The Section of Antitrust Law has for many years taken the position that "industry-specific antitrust laws are not generally beneficial to consumers or the free enterprise system." Comments of the Section of Antitrust Law of American Bar Association Regarding the Oil and Gas Industry Antitrust Act of 2006, May 4, 2006, *available at* http://www.abanet.org/antitrust/at-comments/2006/05-06/comm-antitrus-law-oil-gas.pdf.

The Sections believe that this burden is unlikely to be met in the case of creeping acquisitions. Unless very narrowly tailored, any change from the well-established "substantial lessening of competition standard" applicable to all mergers likely would impose substantial additional administrative costs and result in significant uncertainty as to how the new rules might be interpreted by the ACCC and the Australian courts. This uncertainty could inhibit larger firms from making efficiency-enhancing acquisitions that would have significant consumer benefits, for fear that such actions might run afoul of special antitrust standards applicable only to large firms. To the extent that creeping acquisitions require any special treatment, such concerns are best addressed through appropriate premerger notification procedures, rather than through modifications to the substantive standards of legality for mergers.

BACKGROUND

The Sections understand that the Treasury Department has drafted the *Discussion Paper* in response to the ACCC's review of competition in the local grocery retail industry. In its report, the ACCC concluded that the substantive provisions applicable to mergers in Australia in Section 50 of the TPA are unlikely to address all concerns produced by creeping acquisitions.[4] Although at present the ACCC concluded that there was no imminent risk that creeping acquisitions would adversely affect competition in the grocery industry, it nonetheless noted that such acquisitions "could potentially become a concern, due to the particular structural features of the market."[5] [6]

To address those concerns, the *Discussion Paper* proposes two alternative models to review such transactions. Under the "*aggregation model*," a corporation would be "prohibited from making an acquisition if, when combined with acquisitions made by the corporation within

[4] Australian Competition and Consumer Commission , REPORT OF THE ACCC INQUIRY INTO THE COMPETITIVENESS OF RETAIL PRICES FOR STANDARD GROCERIES, at 427 (July 2008).
[5] *Id.* at 431.
[6] The U.S. premerger reporting system addresses successive acquisitions of minority interests by setting forth notification thresholds, a series of reporting points deemed to be of competitive significance based on percentage of voting securities held as well as intermediate dollar thresholds of $100 million (as adjusted), $500 million (as adjusted) and 25% if valued in excess of $1 billion (as adjusted). 16 C.F.R. § 801.1(h). These thresholds are adjusted annually for change in the Gross National Product. Absent a challenge within the waiting period, the acquirer may make additional purchases within the percentage and dollar bands for a period of five years without triggering additional reporting. 16 C.F.R. § 802.21. For decades, serial acquisitions have been actionable by prosecutors and other plaintiffs under U.S. law, and have often been alleged or found to substantially lessen competition. *See, e.g.*, TALX Corporation, __ F.T.C. __ (2008), *available at* http://ftc.gov/os/caselist/0610209/index.shtm; MSC.Software Corporation, 134 F.T.C. 580 (2002).

a specified period, the acquisition would be likely to substantially lessen competition in a market." Such a model would prohibit the "latest acquisition in a series of creeping acquisitions" and would retain the "substantial lessening of competition test."[7]

Alternatively, under a "new prohibition to section 50," "[a] corporation would be prohibited from making an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to a substantial lessening) of competition in that market." Thus, an acquisition could be blocked "where the target firm has a small market share. . . . [T]he substantial market power test would [ ] prohibit firms with substantial market power from acquiring small firms when this leads to a lessening of competition," without requiring a showing of a *substantial* lessening of competition.[8]

COMMENTS REGARDING THE *DISCUSSION PAPER*

Under existing Australian competition law and pursuant to precedents articulated by the ACCC, Section 50's substantial lessening of competition standard should be adequate to address the concerns hypothesized by the *Discussion Paper*; namely, creeping acquisitions where the resultant change in concentration in any given market is by itself insignificant, but when aggregated with prior acquisitions, raises competitive concerns. Thus, Section 50 would prohibit a horizontal merger that resulted in undue concentration in any properly defined local market, even if the acquisition and the relevant market were considered to be "small." The Sections understand that the ACCC has challenged such transactions and required divestitures in such cases.[9] Moreover, the Sections note that the ACCC in its *Inquiry into the Competitiveness of Retail Prices for Standard Groceries* (*Grocery Inquiry Report*) concluded that there had been no historical enforcement "gap" of the kind the *Discussion Paper* raises. As the *Grocery Inquiry Report* specifically notes:

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[7] Discussion Paper at 6.
[8] *Ibid.*
[9] *See, e.g.*, Australian Competition and Consumer Comm'n. v Liquorland (Australia) Pty Ltd & Anor [2006] FCA 826. The Sections also understand that the ACCC recently challenged Woolworths Limited's proposed acquisition of Karabar Superbarn in the Australian Capital Territory. The ACCC's Public Competition Assessment of this transaction is available at http://www.accc.gov.au/content/trimFile.phtml?trimFileName=D08+67047.pdf&trimFileTitle=D08+67047.pdf&trimFileFromVersionId=835878.

> 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 by the MSCs [Coles and Woolworths] has not been a significant contributor to any competition problems in the supermarket sector in recent years.[10]

It is a widely accepted tenet of competition law that "'trends toward greater concentration should be regarded as irrelevant except insofar as they might suggest that more severe antimerger rules be applied once an industry has reached a particular degree of concentration."[11] Thus, the Sections believe that to the extent that the ACCC is concerned with the effect of undue concentration resulting from the latest in a series of transactions, then Section 50, as currently drafted, appears to address such concerns, by examining the structure of the market as it exists at the time of the transaction, regardless of the past-history of prior acquisitions. If the result of the latest acquisition may be a substantial lessening of competition, then Section 50 would presumably prohibit that transaction, regardless of its size. The Sections note that the statutory language of Section 50 largely corresponds to the substantive standard applied in U.S. merger control under Section 7 of the Clayton Act, which prohibits acquisitions where "the effect of such acquisition may be to substantially lessen competition."

If the *Discussion Paper* seeks to address concerns raised by the failure of the ACCC to learn about such creeping acquisitions until after they are consummated, making it difficult to fashion appropriate post-consummation relief, then the Sections believe that prior notification provisions should suffice. Such procedural mechanisms, limited to those industries where creeping acquisitions pose particular problems (e.g., the grocery sector), are preferable to novel and potentially sweeping changes to substantive competition law. The Sections note that the United Kingdom Competition Commission (CC) adopted such an approach, following its exhaustive inquiry into competition in the grocery sector in the United Kingdom.[12] In some limited instances (usually in cases involving a merger consent decree), the U.S. antitrust authorities have required similar premerger notification provisions, even where a particular transaction does not trigger the Hart-Scott-Rodino notification provisions because the value of

[10] ACCC, *supra* note 3, at 427.
[11] IV Phillip E. Areeda and Herbert Hovenkamp, ANTITRUST LAW ¶ 932e (2d ed. 2004).
[12] U.K. Competition Commission, GROCERIES MARKET INVESTIGATION, ¶ 11.123 (2008) (requiring that acquisition by any large grocery retailer of any store with groceries sales are above 1,000 square meters to be notified to the Office of Fair Trading by the acquiring party).

the transaction, or the size of one or both of the parties, is insufficient to trigger the premerger notification regime.[13]

The Sections also are concerned that the proposed changes also could unintentionally broaden enforcement against a wide range of non-horizontal mergers. The *Discussion Paper*'s proposed changes are not limited to those transactions that would result in additional concentration within a well-defined product or geographic market or, if there is no overlap, confine its application to accepted theories of anticompetitive harm under the actual potential competition or perceived potential competition doctrines or under accepted vertical theories. The proposals could be construed to increase scrutiny of any acquisitions by large firms even if there is no actual or potential competition between the acquiring firm and the target in any relevant market. Accordingly, they could serve to impede transactions that increase the size of an acquiring party, without increasing its market share.

To the extent that the *Discussion Paper* seeks to increase scrutiny of transactions that result in larger enterprises, without at the same time raising specific horizontal or vertical antitrust concerns, the Sections believe that the *Discussion Paper* needs to expressly explain the potential harm to competition that would result from such a transaction. To the extent that the *Discussion Paper* promotes rules to protect smaller and potentially less efficient competitors from larger firms, the Sections note their past opposition to such enforcement regimes. Indeed, the Sections are on record as opposing competition policies designed to protect *competitors*, rather than protecting *competition* itself.[14]

More specifically, the Sections are concerned that, as set forth in the *Discussion Paper*, both the *aggregation model* and substantial market power tests raise significant concerns about their applicability and effect in practice.

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[13] *See, e.g.*, United States v. Allied Waste Industries, Inc. and Browning-Ferris Industries, Inc., No. 1:99 CV 01962 (D.D.C. 1999), *available at* http://www.usdoj.gov/atr/cases/f5000/5072.htm; In the Matter of DaVita, Inc. 140 F.T.C. 609 (2005). However, in 1995 the Federal Trade Commission announced that it would not routinely seek prior approval or prior notice requirements in cease and desist orders implicating alleged violations of Section of the Clayton Act. Notice and Request for Comment Regarding Statement of Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39745 (Aug. 3, 1995).

[14] *See, e.g.*, American Bar Association Section of Antitrust Law, REPORT ON ANTITRUST POLICY OBJECTIVES (2003), *available at* http://www.abanet.org/antitrust/at-comments/2003/reports/policyobjectives.pdf.

A. Aggregation Model

The statement of this test may be too vague to allow for successful application. The *Discussion Paper* does not set forth the factors used for analyzing a particular transaction under the *aggregation model*. Specifically:

- An *aggregation model* may introduce a great deal of uncertainty into the merger review process, such that it may not be possible for acquirers to determine whether the test would be breached in any particular case.

- The *Discussion Paper* does not indicate how far back in time the ACCC will examine past transactions to determine whether any particular acquisition led to a substantial lessening of competition. Nor does such an approach appear to take into account the possibility that exogenous variables led to changes in market structure or performance. For example, it appears exceedingly difficult to require an acquirer and, necessarily, the ACCC, to assess the effect of a number of creeping acquisitions over several years in dynamic, constantly changing markets within which acquisitions may have occurred. Other participants may have entered and exited for a range of reasons, and innovation and technological advances may have occurred.

- The *Discussion Paper* does not set forth whether there is a particular market share that would afford a firm with a "safe harbor" from enforcement for engaging in a series of small acquisitions. If special legislation targeting creeping acquisitions is necessary, the ACCC should adopt appropriate safe harbors, and also explain whether a particular "increase in market share" that would lead to a presumption of legality or illegality.

- The *aggregation model* does not indicate whether the acquisition must result in a horizontal overlap in a given geographic market. As discussed above, the Sections would have concern with a policy that sought to enjoin mergers that provided a competitor greater scale or scope and did not result in horizontal overlap or present vertical concerns.

- If the *aggregation model* applies to vertical or conglomerate acquisitions as well as horizontal overlaps, how will the ACCC or the courts take into account the very different and varied effects of these different types of transactions?

- The *aggregation model* does not specifically balance the effect of a creeping acquisition with the potential efficiencies generated by that transaction. To the extent that the ACCC considers the efficiencies of a transaction to be a factor in such an analysis, the Sections believe that the *Discussion Paper* should expressly provide that such countervailing efficiencies are a factor in the competition analysis.

- Finally, the ACCC could be placed in the difficult position of structuring a remedy to address an acquisition deemed illegal, if that acquisition already had been consummated and the target firm integrated into the acquiring company's operations. As the Sections have noted in several other Comments, post-closing relief is often difficult to structure, and many times demands a reorganization that could significantly harm the firm subject to the divestiture, as well as existing competition in the market.

B. Substantial Market Power Test

Principally, the Sections are concerned that the substantial market power test supplants the substantial lessening of competition test. Introduction of a new test raises a number of issues. First, it introduces substantial uncertainty into the merger review process. In particular, for multijurisdictional mergers, businesses will be faced with the dilemma that transactions will be reviewed by jurisdictions employing different analytical frameworks. This increases transaction costs, and may disrupt or prevent procompetitive mergers.

Since the *Discussion Paper* does not propose to limit the application of a new creeping acquisition test to only national grocery store mergers it is unclear which industries will be subjected to this proposed framework and when such a test will apply. Although the Sections firmly believe that the ACCC need not adopt a new test for competition review, they urge the ACCC to set forth bright-line rules for when such a test would apply, to what industries, and at what degree of concentration in a particular market.

The *Discussion Paper* notes that the primary use of the significant market share test would be to "prohibit firms with substantial market power from acquiring small firms when this leads to a lessening of competition," but not a "substantial lessening of competition." The Sections note that the effect of every horizontal merger is *some diminution* of competition, but that loss of competition is generally not prohibited unless it adversely affects consumer welfare. Thus, a substantial lessening of competition test applies to ensure that transactions having no effect on consumer welfare are allowed, because they are either procompetitive or neutral in their effects on competition.

In addition, the Sections believe that the threshold definition of substantial market power, as currently drafted in paragraph 30 is too vague, and introduces substantial uncertainty for firms with strong positions in many sectors in the Australian economy. Paragraph 30 provides that a firm would have substantial market power where it has significant, but not absolute, freedom from competitive constraint. It is unclear whether this explanation indicates that the test of substantial market power would in practice differ from, or would mirror the threshold test for Section 46 of the TPA (misuse of market power/abuse of dominance), which applies to corporations that have a substantial degree of power in a market.

As drafted in the *Discussion Paper*, the significant market power test effectively prohibits all mergers and acquisitions by firms with "significant market power." The Sections believe that such a policy could impede the development of markets significantly, without a corresponding improvement in consumer welfare.

If the ACCC proceeds with a significant market power test in the context of creeping acquisitions, it should clarify several issues, including:

- "Substantial market power." The *Discussion Paper* does not define what constitutes substantial market power. Does such a term equate with the interpretation under Section 46 of the TPA or does it mean a "dominant position" as defined in some merger control regimes, such as the European Union's Article 81 of the Treaty of Rome? Is there a particular market share that the ACCC considers to provide a firm with "substantial market power," or other market characteristics that would likely lead to such a finding?

- When would the test apply? The *Discussion Paper* notes that the test would apply when the acquiring party has substantial market power and the "target firm has a small market share," but does not indicate what share would constitute a "small market share."

- Finally, the *Discussion Paper* does not indicate whether the substantial market power test would be applied *instead of*, or *in connection with*, the traditional substantial lessening of competition test. The Sections believe that any legislation or guidelines would need to clearly set forth whether the test are mutually exclusive, and when one or the other would apply.

CONCLUSION

The changes proposed in the *Discussion Paper* present significant and concerning issues for merger enforcement. While creeping acquisitions may present important policy issues in Australia, enacting the proposals in the *Discussion Paper* would introduce unneeded uncertainty into the merger review process. Those raise significant concerns for a wide range of firms (both domestic and multinational) that are potentially subject to the merger control regime in Australia. The nearly universally accepted "substantial lessening of competition" test is sufficient to review the effect of all mergers on consumer welfare, even mergers that are small in value or occur in small local markets. To the extent that special regulations are needed to ensure proper scrutiny of creeping acquisitions, the Sections submit that such regulations should be limited to appropriate premerger notification procedures in order to ensure that the competitive effects of creeping acquisitions can be thoroughly investigated by the ACCC.