



Submission to the Treasury, Competition and Consumer Policy on Creeping Acquisitions October 2008

1. About Master Grocers Australia

Master Grocers Association Australia (MGA) welcomes the opportunity to provide comment on the discussion paper released by the Federal Government in relation to the issue of creeping acquisitions.

MGA is a National Employer Industry Association representing Independent Grocery and Liquor Supermarkets throughout Australia. MGA represents Independent Supermarkets trading under brand names, such as IGA and FoodWorks, and they range in size from small, to medium and large businesses.

Independent Supermarkets play a major role in the retail industry and make a substantial contribution to the communities in which they trade. There are 2100 independently owned Foodworks and IGA branded supermarkets employing over 70,000 full time, part time and casual staff, representing \$11.5 billion in retail sales. Many MGA members are small family businesses, employing 25 or fewer staff.

MGA notes that the issue of creeping acquisitions in the retail sector was raised by the Australian Competition and Consumer Commission (ACCC) during the recent "Report of the ACCC into the competitiveness of retail prices for standard groceries." MGA would like to thank the Assistant Treasurer, Mr. Chris Bowen, for releasing the discussion paper on creeping acquisitions in response to the issue being raised by the ACCC.

2. Summary of this Submission to the Treasury, Competition and Consumer Policy

- A) The current situation with respect to creeping acquisitions and why concerns have been raised.
- B) The reform measures proposed by the Federal Government to address the issue of creeping acquisitions and the position of MGA in relation to the proposed reform measures.

3. Submission by MGA to the Treasury, Competition and Consumer Policy

A).The current situation with respect to creeping acquisitions and why concerns have been raised.

The Trade Practices Act (TPA) contains provisions that prohibit acquisitions that would have the effect, or the likely effect, of substantially lessening competition in the Australian market place. In particular, Section 50 of the TPA addresses proposed mergers and acquisitions that are likely to have such a detrimental effect. In individual circumstances there are measures in place within the TPA to guard breaches of acquisitions rules.

It is noted that the term “creeping acquisitions” generally refers to a situation where a number of acquisitions which, individually, may not breach a mergers test but when addressed collectively they are likely to have that effect. This situation of creeping acquisitions has occurred demonstrably over time in the grocery and liquor supermarket industry. That is, independent grocery and liquor supermarkets and liquor stores have been continually purchased by both Coles and Woolworths (the major chains), subsequently increasing their market dominance and power and therefore lessening competition in those areas.

The issue of creeping acquisitions is not new, the issue is one that has been emerging over a period of time. It has become apparent over the last 2 decades that there is a concentration of market power in specific areas as a result of the major chain stores increasing their market share through the acquisition of smaller independent retailers. If creeping acquisitions are allowed to continue then they are likely to impact heavily on the survival of small business in the future.

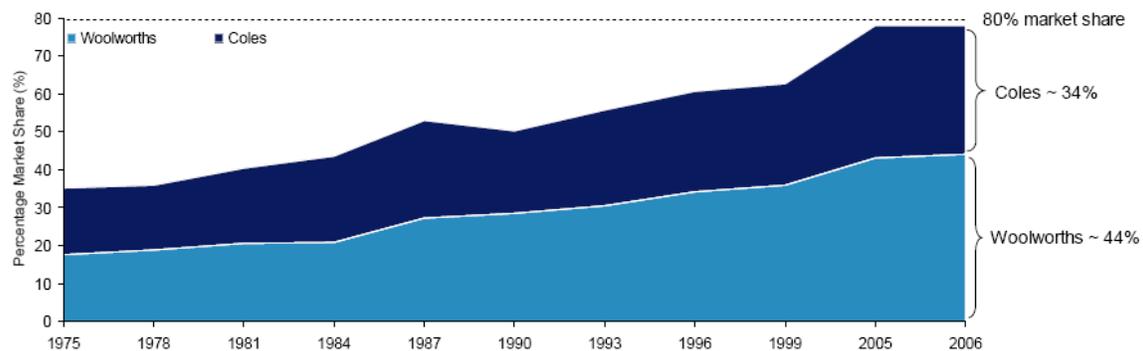
The subject of creeping acquisitions was raised several years ago and was addressed in the Dawson Report in 2004. That Report considered a number of recommendations to address the issue including the introduction of a declarations process, market share caps and an amendment to Section 50(3). The issue of creeping acquisitions was also addressed by the Senate Economics Committee in 2004 which expressed concerns that there may be a lessening of competition over a period of time where there are creeping acquisitions in a concentrated market.

The promotion of vigorous competition in the market place is obviously beneficial to the community but, market situations where a major chain store is able to legitimately gain a substantial amount of market power by degrees and thus gain an advantage must be addressed. The time to address the issue should not be delayed further as small business, in particular independently owned supermarkets and liquor stores, need to be protected **now** from any adverse effects that may emerge as a result of increases in market

concentration. The overall anti competitive effects of creeping acquisitions is highly undesirable in a competitive market.

To date the major chains already have approximately, 80% market share¹ in supermarket groceries and approximately 46% in packaged liquor². Further concentration of the major chains market power, by allowing them to further purchase small businesses over a period of time, will have a serious affect on the survival of independently owned grocery and liquor businesses in Australia. The graph below shows the growth relativity over time for the major chains. A large portion of this growth was acquired through creeping acquisitions between 1980 and early 2000.

Figure 2.10: Growth in market share of Woolworths and Coles, 1975-2006



Source: Retail World, ACNielsen

(1)

It has been argued that the current TPA provisions are capable of addressing any competition concerns that may exist in Australia and that therefore the TPA does not require any amendments to deal with the concerns that have been raised in the past and currently. It could however be argued that because there is such a strong and increasingly powerful duopoly in Australia, the introduction of new TPA laws are needed to protect small businesses from being too easily subject to acquisition, which would ultimately be anti competitive.

There is no reason why law makers cannot be proactive and enact legislation which will prevent an unacceptable situation from arising or worsening. Although the ACCC did disallow the acquisition of the Karabar Superbarn by Woolworths in 2007 because it would substantially lessen competition in the area, the TPA in its current form does not prevent a major supermarket chain store from successively acquiring smaller independent supermarkets or liquor stores in areas where they do not already exist.

There is no doubt that a progressive aggregation of a number of smaller independently owned supermarkets and liquor stores over a period of time is going to result in the

¹ Figure2.10 AC Nielsen Retail World

² AC Nielsen presentation to the Australian Liquor Stores Association Conference July 2008

expansion of dominance by the acquirer. There are currently no provisions in the TPA that prevent a party from acquiring smaller businesses incrementally.

There is sufficient evidence to demonstrate that smaller independent supermarkets and liquor stores do not have the ability to withstand any continued concentration of dominance in the marketplace. If creeping acquisitions are allowed to continue to emerge over a sustained period of time it is inevitable that there will be a reduction in competition in the market place

The issue of creeping acquisitions in Australia can no longer be ignored. If the larger chains continue to dominate the market to the same extent in the future as they have in the past then there should be new laws to provide for the protection of smaller independent supermarkets and liquor stores in order to provide for their survival.

B) The reform measures proposed by the Federal Government to address the issue of creeping acquisition.

The Federal Government is proposing two models to address the concerns of creeping acquisitions. The first one is the “aggregation model” and the second is the “substantial power model.”

The aggregation model proposes that the TPA be amended to provide that a Company not be allowed to make a further business acquisition if, together with previous acquisitions, the total number of acquisitions within a specific period, would substantially lessen competition within the market.

The proposed period for the total number of acquisitions has been suggested as 6 years.

If the aggregation model was implemented it may have the effect of substantially lessening competition for a period of time in the event of an acquisition taking place but it raises a number of problems. There is insufficient detail to establish whether the length of time and the number of acquisitions within the six year period would necessarily have the effect of protecting small businesses overall.

It is suggested that when assessing whether a number of subsequent acquisitions might lessen competition if the businesses were using this model it would be appropriate for the ACCC to be notified each time a subsequent purchase is proposed. This may assist in determining whether the acquisition would substantially lessen competition in a particular area. However, the procedure might be lengthy and complex.

The aggregation model may offer some benefit against creeping acquisitions but in its current form it may not actually prevent progressive acquisitions taking place.

The substantial power model proposes that the TPA be amended to provide a new prohibition which would disallow an acquisition where the acquiring Company already has a substantial degree of power in the market place and the acquisition was likely to lessen competition in the market. It is noted that the proposed section would not refer to a “substantial” lessening of competition.

The substantial power model is likely to inhibit any large corporation that has market power, from acquiring a number of smaller businesses. The ACCC would not have to prove that a substantial competitive difference would result from the acquisition. The introduction of this test would introduce a major change to the current system of assessing the impact of acquisitions as currently, acquisitions are refused only where there is likely to be a substantial effect on competition in the market place.

This is the model most likely to affect the acquisition of small businesses where the larger acquirer is a significant major supplier in the market place.

Earlier this year the ACCC approved the acquisition of the Food-Rite Emerald Supermarket, Victoria by Woolworths despite the fact that the acquirer already had two Safeway supermarkets in close proximity to the Food-Rite Emerald store. It was pointed out at the time that the proposed acquisition would substantially lessen competition in the relevant market and it would significantly increase Woolworth’s market concentration and result in one competitor having more than 80% of the market. It was vigorously argued that the acquisition should be opposed by the ACCC. However, the acquisition was successful.

An acquisition in similar circumstances may be avoided if the substantial power model becomes law. Although the detail of how the proposed law would be implemented has not been provided, in its current form it would only need to be demonstrated that the acquiring Company held substantial market power, to prevent it acquiring the smaller business. It would not have to be shown that it would substantially lessen competition.

Conclusion

It is evident that Independent supermarkets and small liquor outlets have real concerns in respect of their vulnerability to the power of larger supermarket chains. MGA supports the introduction of the expansion of Section 50 of the TPA to protect small business and supports the adoption of the substantial power model. It is understood that there would need to be some expansion of the proposed law and a need to provide some modifications to the ACCC merger guidelines in order to make the amendment workable.



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Master Grocers Australia.
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