SUBMISSION

ON

CREEPING ACQUISITIONS

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The Assistant Treasurer and Minister for Competition Policy and Consumer Affairs has recently released a discussion paper on "creeping acquisitions law" and has called for public comment on the best way forward.

Speed and Stracey is lodging this submission in response to that invitation.

For the reasons set out in some detail in this submission, Speed and Stracey's key conclusions and recommendations are as follows:

- Amendments should not be made to section 50 of the Trade Practices Act unless a case for change is clearly established.
- In Australia no clear case has been established for change to deal with the said problem of creeping acquisitions - even in the grocery industry.
- If amendments are nevertheless to be made to section 50 then they should be the minimum necessary to avoid excessive compliance and administrative costs.
- The amendments suggested by Senator Fielding in the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007* would result in significant additional costs and time being incurred by parties wishing to acquire assets and shares in Australia - even in relation to acquisitions which will have no impact on competition. These amendments will discourage investment, are arbitrary, and will merely delay rather than prohibit proposed acquisitions. They will also have little, if any, impact on the state of competition in Australian markets.
- The alternative approach suggested in the Discussion Paper is also unsatisfactory as it would prohibit acquisitions by large corporations which involve any lessening of competition with likely public detriment and little, if any, gain.
- The suggestion of increasing the divestiture powers under the Trade Practices Act to deal with creeping acquisitions is wholly inappropriate.
- The only amendment to section 50 which may be appropriate would be an anti-avoidance amendment comparable to article 5.2 of the Council of European Union Regulation No. 139/2004.

Principles of Regulation

In determining whether to enact legislation to address the alleged "problem" of "creeping acquisitions" and if so what legislation to enact, Speed and Stracey believes that particular regard should be had to the key principles of the Regulation Task Force (*Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business,* January 2006). These principles provide that good process for developing and administering regulation requires that:

- "*Governments should not act to address "problems" unless a case for action has been clearly established. This should include evaluating and explaining why existing measures are not sufficient to deal with the issue*";
- "*A range of feasible options need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework*"; and

- "*Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted*."

Further, as the Productivity Commission said in its Inquiry Report into The Market for Retail Tenancy Leases in Australia:

> *"All regulation introduced should be the minimum necessary, to avoid an excessive compliance and administrative cost burden for businesses and governments respectively".*

Finally, regulation should be clear and certain in its expression and operation.

In preparing this submission Speed and Stracey has itself sought to apply and have regard to these principles by:

- Considering whether the alleged problem of creeping acquisitions has indeed been clearly established;
- Evaluating the current laws;
- Identifying the range of suggested alternatives; and
- Assessing this range of alternatives in terms of clarity, certainty and cost implications and within a framework within which mergers and acquisitions are currently assessed and would be assessed.

The "Alleged Problem" of Creeping Acquisition

There is some dispute as to whether section 50, as currently drafted, is adequate to prevent a corporation from acquiring businesses over a period of time, each of which has little impact but which have the cumulative effect of substantially lessening competition in a market - "creeping acquisitions".

For instance Professor Zumbo has stated that "*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 prohibitions against mergers found in section 50*".

To the contrary, the Business Council of Australia has said "*we believe that there is no evidence of a market failure or competition concerns that section 50 is not already able to address"*. In particular the BCA makes reference to subsection 50(3)(g) which refers to "*the dynamic characteristics of the market, including growth, innovation and product differentiation*" and which the BCA suggests is sufficiently broad in scope to permit a Court or the Commission to consider issues such as creeping acquisitions.

This disagreement is not new. In 2003 the Review of the Competition Provisions of the Trade Practices Act (Dawson Review) considered the issue of creeping mergers in detail and concluded that the Act, in its present form, is adequate to consider creeping acquisitions in so far as they raise questions of competition.

In March 2004, however, the Economics References Committee stated:

> *"… as a matter of logic, … creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. Current merger law does not effectively address this issue."*

The Committee then recommended that provisions be introduced into the Act to ensure that the ACCC has powers to prevent creeping acquisitions which substantially lessen competition in a market. The Commonwealth Government of the time, in turn, did not support this recommendation with the Government Senators stating:

> *"In our view, the existing provisions of Part IV, subject to the amendments we have recommended above, adequately deal with such competition issues which 'creeping acquisitions' might raise."*

In Speed and Stracey's view, to properly understand whether the current law is satisfactory, it is first necessary to have regard to the terms of the current section 50 of the *Trade Practices Act 1974* and the experience to date of that provision. It is not satisfactory to rely on simple logic, which may or may not accord with reality, and will not identify what is in fact needed.

The Current Law

Section 50(1) of the *Trade Practices Act 1974* provides as follows:

> *"A corporation must not directly or indirectly*
>
> *(a) acquire shares in the capital of a body corporate; or*
>
> *(b) acquire 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."*

In respect of the above provision the Australian Competition and Consumer Commission ("Commission") has stated in its recent Grocery Report:

> "*While section 50 of the Act applies to individual acquisitions, the application to potential "creeping acquisitions" issues is more problematic. The ACCC takes the view that, while it can assess under section 50 the competitive issues associated with an individual acquisition, section 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*."

This, however, is to be contrasted with what the Commission itself said in February 2004 in its report assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sectors in which it stated that:

> *"in order to promote and protect competition in the interests of consumers, the ACCC will enforce the Act in relation to a series of acquisitions which is likely to result in a substantial lessening of competition".*

In Speed and Stracey's view, the accumulation of past "small" acquisitions or likely future "small" acquisitions are very relevant under the existing law to the current and likely "level of concentration in the market" (s.50(3)(c)), the extent "to which substitutions are available in the market or are likely to be in the market" (s.50(3)(t)) and the "likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor" (s.50(e)(h)).

In Speed and Stracey's view therefore, the current section 50 allows the Commission and the Courts to have regard to the cumulative effect of past acquisitions on the market, to assess the acquisition in light of that new market and to have regard to a series of future acquisitions, provided they are

sufficiently likely, when assessing the future with and without the proposed acquisition. Section 50 requires a consideration of the likely future with and without the proposed acquisition.

In these circumstances in our view the issue then becomes whether, by so covering the aggregation of "smaller" acquisitions, past and future, section 50 is currently adequate or is instead "too problematic" and ought to be amended.

In relation to this issue it is relevant that, before the 2004 Economics References Committee, the Commission noted that it had not yet determined whether creeping acquisitions in general (as opposed to specific cases) do substantially lessen competition and so cause economic detriment.

Specifically Mr Brian Cassidy, Chief Executive Officer, ACCC, informed the Committee that the Commission was doing `*a fair bit of work on the economic analysis of creeping acquisitions*' and noted that there is significant debate about whether or not creeping acquisitions do lead to economic detriment, saying:

> *"the economics of it has not been easy, and we have had various bits of work commissioned as well as doing our own internal work, and we are still in the process of working our way through that."*

Whilst Speed and Stracey has not seen the work that the ACCC commissioned, we can readily appreciate why the "economics" of whether or not creeping acquisitions do lead to a detriment is not "easy". For creeping acquisitions to be relevant and a concern in a market there must exist (by definition) a number of "smaller" businesses or assets in the market which are competitive but in respect of each of which their acquisition would not result in a substantial, or in the words of the ACCC - "significant and sustainable", lessening of competition.

In respect of such a market, however, the barriers to entry to establish new similar small businesses and assets will invariably be low– since by definition small businesses and assets can survive and compete in the relevant industry. In those markets, as the Courts have repeatedly stressed, even those which are heavily concentrated, where the barriers to entry are low, the existing competition will be effectively constrained by the potential for new entrants. That is to say, in markets where creeping acquisitions are prone to occur such acquisitions are not likely to result in a substantial lessening of competition.

More recently, in its Grocery Report, the Commission said, in respect of the supermarket industry, the industry which attracts most of the calls for "creeping acquisition" laws, that:

> "*The ACCC does not consider acquisitions by Coles and Woolworths of smaller competitors over time a significant current concern in the grocery retail sector. Most of the new growth by Coles and Woolworths in recent years has not come from acquisitions of independent supermarkets. Of the new store openings by Coles and Woolworths in the last two years, only 10% have involved acquiring or leasing a site which was previously operating as an independent supermarket. However, that figure has been significantly higher for certain periods in the past."*

The Commission also said:

> "*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*."

These are hardly statements upon which it can be said that the need for further regulation is clearly established - and this is in a market in which it is generally acknowledged the competitors are highly concentrated. In accordance with good principles for regulation more is required for a case for action to be established.

This is particularly so given the findings of the Dawson Review and the ACCC's own recent rejection of a proposed acquisition of a supermarket by Woolworths in Queanbeyan. The Commission's Public Competition Assessment in relation to that proposed acquisition together with the Commission's statements (supported by Allsop J in *ACCC v Liquorland Australia Pty Ltd* [2006] FCA 826) that section 50 applies to local markets, confirms that acquisitions of "smaller" assets can already be caught by the existing section 50 where appropriate.

In an endeavour to ascertain the world's best practices Speed and Stracey has undertaken its own investigation of merger and acquisition laws which are intended to protect competitive marketplaces and prohibit dominant participants attaining or exercising market power. In particular we have looked at over 10 countries throughout the world, including the European Commission, which have laws similar to section 50 of the *Trade Practices Act 1974* in that they prohibit mergers and acquisitions of shares and assets:

- that, or are likely to, "substantially lessens competition" in a market; or
- that result in the acquirer being, or being likely to be, in a position to "dominate a market".

To the best of our knowledge none of these countries have a provision specifically directed to "creeping acquisitions" *generally* but rather, in relevant respects, have laws similar to section 50.

The closest we could find were laws in Argentina and Finland (since revoked due to the administrative burden imposed) which require the aggregation of past acquisitions in the last few years to determine whether those acquisitions collectively passed a set monetary threshold and consequently were required to be notified to the relevant government authority. Such express aggregation did not form part of the ultimate text prohibiting or not prohibiting the proposed acquisition.

A number of countries are governed by or have provisions which mirror, article 5.2 of Council of the European Union Regulation No. 139/2004 which provides:

> *"By way of derogation from paragraph 1, where the concentration consists of the acquisition of parts, whether not constituted as legal entities, of one or more undertakings, only the turnover relating to the parts which are the subject of the concentration shall be taken into account with regards to the seller or sellers.*
>
> *However, two or more transactions within the meaning of the first subparagraph which take place within a two-year period* ***between the same persons or undertakings*** *shall be treated as one and the same concentration arising on the date of the last transaction"*

Pursuant to article 2.3, "*a concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*" and is liable to being prohibited.

Pursuant to article 3, "*a concentration shall be deemed to arise where a change of control on a lasting basis results from … the merger of two or more previously independent undertakings or parts of undertakings…"*

In short, under the European Union Merger Regulation a series of transactions which occur "*within a reasonably short period of time*" or are interdependent are treated as a single transaction - but only where the series of transactions is between the same persons and/or their related entities.

The general approach is said, in the Commission Consolidated Jurisdictional Notice, to reflect, "*on one hand, that under the Merger Regulation transactions which stand or fall together according to the economic objectives pursued by the parties should also be analysed in one procedure … On the other hand, if different transactions are not interdependent and if the parties would proceed with one of the transactions if the other ones would not succeed, it seems appropriate to assess these transactions individually under the Merger Regulation*". The purpose of article 5.2 is said to be "*to ensure that the same persons do not break a transaction down into series of sales of assets over a period of time, with the aim of avoiding the competence conferred on the Commission by the Merger Regulation*."

Properly understood article 5.2 is an anti-avoidance provision intended to stop interdependent sales of businesses and assets between the same parties by small parts where the overall sale would be prohibited. As such article 5.2 addresses the problem of corporations "getting around" the existing prohibitions referred to by Professor Zumbo. It does not apply, and like provisions which we have researched in various countries, do not apply generally to acquisitions where the suppliers are non-related entities.

In Speed and Stracey's view, it is indeed important to distinguish between interdependent acquisitions and acquisitions from the same party (done in a series rather than as an aggregate) from acquisitions made from different parties. In terms of the former, to the extent that such an arrangement is not already caught by section 45, we believe that there is a loophole in section 50, and that a new provision may be incorporated into the Act to specifically address that loophole.

In terms of acquisition from different parties or acquisitions that are not interdependent, ie creeping acquisitions *generally*, we agree with the recommendations against change made by the Dawson Committee, believe that no case for amendment has been clearly established and that the Commonwealth Government should be particularly cautious to act and experiment where there is no satisfactory precedent in the world for doing so.

The Proposed Possible Amendments

According to the Discussion Paper released by the Commonwealth Government one approach to dealing with concerns raised about creeping acquisitions is to adopt an "aggregation model" which involves "*a Corporation being prohibited from making an acquisition if, when combined with acquisitions made by the Corporation within a specified period, the acquisition would be likely to substantially lessen competition in a market*". As stated in the Discussion Paper such a model seeks to prohibit the latest acquisition in a series of creeping acquisitions.

The *Trade Practices (Creeping Acquisitions) Amendment Bill 2007* is an example of the aggregation model, which suggests the addition of a subsection 50(7) relating to corporations and an analogous subsection 50(8) relating to an individual in the following terms:

> *"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 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."*

An alternate approach suggested by the Discussion Paper is to add a new prohibition to section 50 pursuant to which:

> *"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."*

Broadly it is said "*the phrase substantial market power would mean a significant, but not absolute, freedom from competitive constraint, the extent of which would be considered in light of the factors set out in subsection 50 (3), and the ability to raise prices above competitive levels*." This second approach it is said "*would provide a mechanism for prohibiting acquisitions that* ***could form*** *part of a series of creeping acquisitions, where the acquirer is a significant supplier in the market where competition would be lessened*."

This second approach is similar to, although less blunt than, the "competition test" recommended by the Competition Commission as part of its recent investigation into the supply of groceries in the United Kingdom (Volume One: Summary and Report, April 2008 Page 17). That competition test would prohibit the acquisition of existing stores or development of new stores by a market operator when the overall presence of the operator in a defined local market exceeded a certain threshold.

This second approach is also very similar to the Australian section 50(1)(b), prior to amendments made in 1993, which provided that:

> *50(1) A corporation shall not acquire, directly or indirectly, any shares in the capital, or any assets, of a body corporate if:…*
>
> > *(b) In a case where the corporation is in a position to dominate a market for goods or services:*
> >
> > > *(i) The body corporate or another body corporate that is related to, or associated with, that body corporate is, or is likely to be, a competitor of the corporation or of a body corporate that is related to, or associated with, the corporation; and*
> > >
> > > *(ii) the acquisition would, or would be likely to, substantially strengthen the power of the corporation to dominate that market.*

A third approach suggested as worthy of consideration in the Dissenting Report of Coalition Senators on the Standing Committee on Economics inquiring into the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007* was the enactment of a divestiture power under the *Trade Practices Act.*

Speed and Stracey seeks to assess each of the above three alternatives.

Alternative 1 - Assessment of the "Aggregation Model"

We see significant difficulties arising if the proposed amendments (being the addition of subsections (7) and (8)) were made to section 50.

Taking the subsections at their word we assume that the proposed amended section will require the Court and Commission to consider the impact of each of the series of acquisitions over the last six years in each of the markets in respect of which those acquisitions relate (as if those acquisitions all took place at the time of the most recent acquisition).

The analysis thus then switches from the analysis of the acquisition of a single asset in potentially a single market to an analysis of multiple assets in potentially multiple markets.

In terms of delineating and assessing the relevant market/s this is significant. As the ACCC stated in its 1999 Merger Guidelines:

> *"The merged firm is the starting point for delineating the relevant market… A different market may be relevant for the analysis of a different merger or different conduct."*
>
> *"The process of establishing the market boundaries starts with the product, geographic and functional areas of supply covered by the merged firm. These are then extended in product, geographic and functional space to include all those sources, and potential sources, of close substitutes which would otherwise make it non profit-maximising for the hypothetical monopolist to impose a [significant and non-transitory increase in price] SNIPP or otherwise exercise a significant degree of market power."*

The change of approach foreshadowed by the proposed amendments, which is proposed to apply to all acquisitions made by parties who have acquired assets in the last six years and irrespective of whether in the relevant market/s creeping acquisitions are considered a problem or not, is likely to lead the parties and the Commission to incur substantially increased costs and to experience substantially increased delays in the approval process. The approval, however, is only to be of the most recent acquisition as this approach only seeks to prohibit the latest acquisition in a series of creeping acquisitions.

The waste of a party's and the Commission's time and effort will be most acute where it is a past acquisition, made some time in the last six years (whether approved then or not by the Commission), which is the more significant acquisition that raises the competition concerns. The more recent acquisition may be de minimis and yet nevertheless require the parties to undertake an exhaustive process.

The new proposed approach is therefore likely to greatly deter corporations and persons who have made substantial acquisitions in the past, within the last six years, from making smaller future acquisitions even where they rightly consider those acquisitions alone raise no competition issues.

This is likely to be directly contrary to the public interest given that what is detailed below in relation to the second approach suggested in the Discussion Paper -concerning options on exit for small businesses.

The approach proposed by Senator Fielding will also work very unsatisfactorily if the current drafting is retained and the section can operate to prohibit a more recent de minimis acquisition solely on the basis that a past acquisition, in the last six years, led to a substantially lessening of competition in a market in respect of which the most recent de minimis acquisition does not even relate – ie the acquisitions are in different markets.

The proposed approach is further likely to run into difficulties when the Commission or the Court seeks to ascertain whether the aggregate of the acquisitions made in the last 6 years is likely to substantially lessen competition.

A lot can happen in six years. If it is proposed that the Court and the Commission are to look at the state of the earlier asset that was acquired as at the date of its assessment, rather as at the date that acquisition was made, then the proposed provision is likely to have the unintended consequence of punishing corporations who have developed those assets post acquisition over the last 6 years. Section 50 was deliberately crafted not to catch such organic growth. As Mr Samuel recently said:

> *"Let me make it clear there is nothing in the TPA that prevents businesses from gaining market power organically, ie growing their own businesses. If a firm is able to expand and gain large market share by being better, by being more efficient, by offering better products to consumers at lower prices and better quality, then the law is not intended to stop businesses doing that. That is what competition is all about."*

If the provision is indeed to catch organic growth then the provision will have the effect of discouraging investment and development at least until after a corporation has made any acquisitions it might otherwise intend making. It may also be the organic growth, or other unrelated changes in the market, rather than the acquisitions itself that has substantially lessened competition - this is particularly the case where the asset as at the date of acquisition was very small and has been very substantially developed post acquisition.

If to the contrary under the proposed provision the Court and the Commission are to look at the state of the earlier asset as at the date that it was acquired then the analysis to be undertaken will be very artificial, of little current or future value and will be expensive because it will involve the Courts and Commission going back in history.

Further the proposed approach, as stated by the Business Council of Australia, provides for an arbitrary 6 year period. Under the proposed provision Corporations are merely likely to be delayed in, and not prohibited from, making acquisitions.

No reason is given why an acquisition should be prohibited today on the basis of another acquisition having been made 5 years 11 months ago whilst it would not be prohibited had that same other acquisition taken place 6 years and one month ago.

The proposed provisions will also have the unusual result of allowing established dominant competitors making acquisitions in markets in which they have not made acquisitions in the last six years whilst preventing other similar competitors, who have made such acquisitions.

For example, Coles has not been very active as an acquirer in the retail grocery market (compared to Woolworths) over the recent past. The Bill may not prevent acquisitions of independent retailers by Coles (compared to if the acquirer was Woolworths), although such acquisitions would arguably result in the same level of negative impact on competition in the grocery industry.

The proposed provisions may in fact prohibit a new and growing competitor (small, but vigorous in the wider market) from acquiring assets in a particular local market where it first would otherwise be establishing a base from which to launch its competitive attack on, increase competition, in the wider market.

Further, in light of the Commission's recent revelation that:

> "*The ACCC considers that leases of sites, acquisitions of leases currently held by other parties, and acquisitions of sites that are currently empty or used for other purposes, can all be considered acquisitions of assets under section 50 or be assessed under other provisions in Part IV of the Act."*

- it is likely that the Commission technically under the proposed provision could look at all the lease renewals in a particular market by say a particular grocery retailer in the last six years and ascertain whether they have resulted in a substantial lessening of competition. If the Commission gauges those lease renewals have collectively resulting in such a lessening of competition it may prohibit the relevant participant from renewing its most recent lease. This the Commission could do as each

lease comes up for renewal until it is satisfied with the state of competition in the market. The result of such approach would be similar to giving the Commission additional divestiture powers which for the reasons detailed later should not be entertained.

In summary, the "Aggregation Model" approach suggested by Senator Field for dealing with the issue of creeping acquisitions has a number of considerable problems and yet is intended merely to apply to prevent, in terms of analogy often cited in favour of laws to introduce creeping acquisitions, an otherwise bald man losing that last hair that would make him bald. This proposed approach will cause a lot of cost to be incurred and difficulties to be experienced just to preserve that one hair – with little if any benefit to the competitive state of the market.

Alternative 2 - Assessment

As stated above the second suggested alternative approach is very similar to how section 50 was until 1993.

For the reasons that were given in 1993 for changing from a dominance test to a substantially lessening competition test Speed and Stracey does not consider that this proposed amendment should be made.

The only real difference between the law as it was until 1993 and what is now proposed is that the requirement that "the acquisition would, or would be likely to, **substantially** strengthen the power of the Corporation to dominate a market" has been replaced by a requirement that the acquisition will simply lessen (as opposed to substantially lessen) competition in the market.

The problem with a simple "lessening test" is that it would apply to practically every acquisition a large corporation might make - prohibiting such acquisitions even where there are no valid competition reasons for doing so.

Such an approach is likely to create significant difficulties for smaller businesses wishing to exit the market and to receive fair value for their business. As stated by the Minister for Competition Policy and Consumer Affairs, any provision proposed to deal with creeping acquisitions should give the ACCC "*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."*

The problem was acknowledged by the Master Grocers Association in its submission to the Grocery Inquiry:

> " *It should be noted that increased regulation of creeping acquisitions may sometimes have a negative effect, albeit limited, on independent supermarkets. Restricting the ways in which the major chains can appropriate individual independent stores could decrease the potential exit pathways for independent supermarket owners wishing to sell their businesses.*"

In its submission to the Grocery Inquiry Woolworths also submitted that, in the event of onerous creeping acquisition laws:

> *" the value that independent grocery retailers could obtain upon exiting the business would diminish (because of the smaller number of potential bidders), which would ultimately discourage entry into independent grocery retailing because of a perceived inability to*

adequately execute and financially viable "exit strategy" should the retailer choose to cease trading".

The fact is the requirement that there be a **substantially** lessening competition (or alternatively **substantially** strengthening of the power of a Corporation to dominate a market) is not particularly onerous. As the Commission has said:

> *"The terms 'substantial' has been variously interpreted as real or of substance, not merely discernible but material in a relative sense and meaningful. The precise threshold between a lessening of competition and a substantial lessening of competition is a matter of judgment and will always depend on the particular facts of the merger under investigation. Generally, the ACCC takes the view that a lessening of competition is substantial if it confers an increase in market power on the merged firm that is significant and sustainable."*

Given the Commission's approach of looking at the impact of mergers and acquisitions over the range of markets that exist in Australia, including local markets (an approach which has recent judicial support in the context of the liquor industry), an acquisition of even a small business in Australia can substantially lessen competition in a market and the current law will prohibit such an acquisition where appropriate. This is particularly the case where the market is already highly concentrated and that small business is one of the last few independent businesses left participating in a market including a local market.

It is Speed and Stracey's submission that there needs to be something more than a mere lessening of competition in the market to trigger the prohibition under section 50 and that the correct approach, consistent with the rest of the Act, is that a substantial lessening of competition should be required.

If a substantial lessening of competition is required, as we submit it should be, then section 50 should merely remain as it currently is. To amend the provision and in addition require that the acquirer already has a substantial degree of power in the market would simply make a breach of the provision more difficult to prove.

Alternative 3 - Assessment of Divestiture

Speed and Stracey disagrees with the third approach suggested of dealing with creeping acquisitions by increasing the scope of the divestiture power under the Trade Practices Act.

The divestiture power (section 81) was specifically intended to cover recent acquisitions which are not brought to the attention of the Commission, which the Commission has subsequently found out about and which the Commission believes are in breach of section 50 of the Trade Practices Act.

The divestiture power was never intended to catch nor apply to situations where a corporation has attained a position of market power through organic growth or otherwise (other than through the acquisitions of shares and assets in breach of section 50).

We note in this regard that the suggestion of increasing the divestiture powers under the Act was raised and dealt with by the Dawson Committee. In its detailed report that Committee recommended against extending those powers. It also provided detailed reasons supporting that recommendation including that there is a logistical difficulty of unscrambling a merged entity particularly where that merger took place some time ago and that divestiture powers would create an uncertain business environment. We refer the Government to the report of the Dawson Review.

We also refer the Government to the submission of the Business Law Committee of the Law Council of Australia which sets out in considerable detail at pages 30-33 why divestiture is an inappropriate remedy where the relevant acquisitions took place some considerable time ago and where the relevant Corporation has also attained market power through organic growth and over time. These include:

- That such a power would deter corporations from increasing their market presence or competitive advantage by product innovation, price competition or improved customer service (whilst ever the potential of a divestiture order may be hanging over their heads);
- The Act should not urge a competitor to compete, to apply superior skill, foresight and industry, and then deprive that competitor of his winnings. Such an approach would deter competition which is the Act's prime object to foster.