



Council of **Small Business**  
of Australia

Chair: Richard Brooks  
CEO: Jaye Radisich

[www.cosboa.org.au](http://www.cosboa.org.au)

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General Manager  
Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

By email: [creepingacquisitions@treasury.gov.au](mailto:creepingacquisitions@treasury.gov.au)

20 July 2009

Dear Sir/Madam

The Council of Small Business of Australia (COSBOA) welcomes the opportunity to provide a submission on Creeping Acquisitions – The Way Forward, the second discussion paper released in response to concerns that section 50 of the *Trade Practices Act 1974* (TPA) may not adequately address creeping acquisitions, giving rise to potential competition concerns in concentrated industries.

COSBOA is the peak body in Australia representing small businesses through industry based and geographic business organisations. Our membership ranges from large national professional associations like the Pharmacy Guild of Australia and the National Institute of Accountants, through to State based groups including the Furnishing Industry Association of Australia (Vic/Tas) and the Tasmanian and Northern Territory Small Business Business Council. Through our membership base we connect with around 100 000 small businesses, and are poised to grow exponentially in the latter half of 2009.

Many small businesses associated with COSBOA favour increased regulation/ legislation in the area of creeping acquisitions, as it is felt that s50 of the TPA is inadequate to cover these issues. Hence, we were prompted to respond to your invitation to submit our views.

The Council believes in the need for swift action to change the Act in order to close the legislative loophole allowing a series of small acquisitions to collectively lessen competition in already concentrated markets over time.

### **The First Discussion Paper**

The first discussion paper proposed two possible solutions to address the issue of creeping acquisitions. The first being the 'aggregation model' prohibiting a corporation from making acquisitions in a specified period should the acquisition be likely to substantially lessen competition in a market.

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The second proposed solution involved the addition of a new prohibition to section 50 preventing a corporation from making an acquisition if it already has a substantial degree of power in the market and the acquisition would result in 'any' lessening of competition in the market.

*COSBOA is generally in favour of the Substantial Market Power (SMP) model proposed in the first discussion paper as we consider this proposed response the best available option to address the problematic issue of creeping acquisitions.*

## The Second Discussion Paper

The second discussion paper released by the Government proposed two potential solutions to address concerns relating to creeping acquisitions:

1. An amended version of the SMP model introduced in the first discussion paper prohibiting mergers and acquisitions that 'enhanced' a corporation's existing substantial market power.
2. An approach which could trigger the application of a creeping acquisitions law for a set period of time in certain restricted circumstances only, similar to the Price Surveillance provisions in Part VIIA of the TPA.

Under this proposal, the Minister would have the power to unilaterally, 'declare' a corporation or product/service sector, where the Minister has concerns about potential and/or actual competitive harm from creeping acquisitions, or acquisitions by corporations with substantial market power. Alternatively, this model could be designed so the Minister could only make a declaration after receiving an application from the ACCC. The ACCC would make an application where it has concerns regarding creeping acquisitions by a particular corporation, or in a product/service sector.

The test that would be applicable to each of the above proposed solutions would be the same, however, the test would be applied differently under each proposal.

## Questions posed by Government

### Question 1

*What are your views on the two regulatory options mentioned above? What potential unintended consequences need to be considered? How might these unintended consequences be addressed?*

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COSBOA's prime concern is that the test applicable to each proposed option in the second discussion paper is that in a significant number of instances the level of a corporation's market power would be such that further acquisitions would not have the effect of clearly 'enhancing' that corporation's market power. Where a corporation's market power is relatively high, further individual acquisitions will not have any material effect on that existing power.

Similar concerns exist in instances where a statutory power gives rise to an entity having substantial market power.

As a means of addressing this issue, COSBOA suggests utilising the 'rebuttable presumption' that an entity with market power or deemed market power that makes an acquisition in a relevant market will be presumed to enhance its market power unless the proposed acquirer can demonstrate otherwise.

The 'rebuttable presumption' would operate in a similar fashion to that currently in set out in the unfair contracts legislation.

## Question 2

*Are there alternative regulatory or non-regulatory options that might be appropriate responses to creeping acquisitions concerns? How might these work in practice? What are the costs and benefits?*

The comments in respect of question one also applies.

COSBOA submits that the use of an approach involving a Declaration should not be an alternative but rather used in conjunction with the SMP model. Further, the Council considers that any new arrangement to address creeping acquisitions should be applied broadly across the economy.

Inherent analytical issues arise where mandatory acquisition notifications occur as a result of a declaration of a corporation being deemed to have substantial market power.

It does not necessarily follow that in all instances where a declaration is made and an acquirer is deemed to have market power, that they will in fact have market power.

An assessment by the ACCC or the Courts will still be required before the application of the test to assess whether any such market power will be enhanced.

In respect of the alternative arrangement proposed where the ACCC would advise on a possible declaration, COSBOA believes that the matter of a declaration is ultimately a matter for the Minister. Accordingly, the Minister should be at liberty to make a declaration without having first received an ACCC request.

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## **Additional Comments**

A definition of 'assets' should be incorporated into draft legislation to provide greater clarification in relation to this term and should include leases, licences and other beneficial interests.

COSBOA considers that each of the options proposed in the second discussion paper do not adequately address the authorisation process and believes instances will occur where the new law will prevent acquisitions from proceeding via an authorisation.

The Council submits that it would be inappropriate for small acquisitions to be heard before the Australian Competition Tribunal (Tribunal), as is currently required under the TPA for merger authorisations.

Currently, the Tribunal is not readily accessible or a practicable avenue of recourse for small businesses. This is due in part to the costs associated with bringing matters before the Tribunal.

COSBOA recommends that the current process be changed, or that a provision allowing the ACCC to consider the issue of authorisation in respect of creeping acquisitions be included in any such amendment.

We do not believe concerns regarding the occurrence of creeping acquisitions will be resolved if issues relating to small business accessibility of the authorisation process are not first adequately addressed.

COSBOA understands that the proposed creeping acquisition law will consider market power only in the context of the broader market not in a local market context.

COSBOA believes that the application of all relevant SMP tests should include each of the relevant markets appropriate to the size and nature of the acquisition, specifically, the test ought to be applied to the national, state or territory, and relevant regional markets for each acquisition.

The Council considers that creeping acquisitions have aggravated competition concerns in a number of industries at risk including, but not limited to: shopping centres, supermarkets, liquor stores and petrol retailing.

A physical and intellectual concentration over recent years in the listed property market, and more specifically among shopping centre owners has seen, technical leasing expertise, collectively disclosed retail sales figures and shopping centre floorspace concentrate under the control a small group of large market players.

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The effect on independent small businesses owners, particularly small specialty retailers has been significant.

These impacts have been exacerbated by planning laws which have restricted shopping centre floorspace and market concentration within the supermarket industry allowing the major supermarket chains to capture large amounts of floorspace in shopping centres.

These factors have combined to create barriers to entry and information asymmetries in the shopping centre retail leasing markets, contributing to the substantial market power of the major operators in each of these industries.

The Council notes with concern that a potential unintended consequence of CA legislation is that small business who do want to sell their going concerns to large businesses, who may well have market power, may either be precluded by doing so if they amendments are not drafted and applied correctly, and/or that the value of the going concern would be significantly diminished if 'powerful' buyers are excluded from the market to purchase.

## Conclusions

COSBOA emphasises its strong support for action on creeping acquisition at the earliest possible opportunity.

We believe that the benefits arising from a viable creeping acquisition law will outweigh any overall potential detriment small business owners may experience in relation to the sale perceived potential sale price that may be achieved for their businesses.

COSBOA prefers the 'substantial market power' (SMP) model outlined in the first discussion paper. Notwithstanding our comments regarding the revised SMP model, COSBOA is comfortable with the SMP model proposed in the second discussion paper.

Should you wish to discuss this matter further with me please contact me on 03 8665 3167.

Yours sincerely

**Jaye Radisich**  
Chief Executive Officer

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