



10 July 2009

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

By email: creepingacquisitions@treasury.gov.au

Dear Madam/Sir

CREEPING ACQUISITIONS – THE WAY FORWARD

CHOICE is a social enterprise established 49 years ago to unlock the power of consumers with an ambition for Australians to be the most savvy and active consumers in the world. CHOICE is pleased to respond to the Treasury's second consultation paper on proposals to address anti-competitive creeping acquisitions. We trust these comments will assist in the development and implementation of the Government's creeping acquisition laws.

The consultation paper puts forward two proposals for creeping acquisitions law reform: one based on the general applicability of the substantial market power test, the other targeting 'declared' corporations or markets. We respond below to each of these proposals.

1. Substantial Market Power (SMP) test

This approach would limit the capacity for firms who exercise substantial market power to buy out their competitor where the acquisition would increase the dominance of the acquirer. Because concentration in a market does not by itself mean an industry is anti-competitive, the law would only apply to situations where the dominant firm uses their position to extract monopoly rents. We believe that this approach would discipline the market without posing an excessive regulatory burden on market participants. The SMP test will provide an incentive for dominant corporations to limit their exercise of market power because the creeping acquisition laws will only apply to dominant firms who actively use their position to the detriment of consumers. CHOICE supports the general applicability of the SMP test to creeping acquisitions.

We propose a number of complementary measures to the SMP test;

- **Mandatory reporting:** In addition to all corporations being subject to creeping acquisition laws, we recommend that industries of concern should be subject to mandatory reporting of acquisitions. As an initial step we suggest that the produce and groceries industries be subject to mandatory reporting of acquisitions. Additional industries could become subject to similar mandatory obligations as competition concerns arise. This proposal for mandatory reporting is not intended to limit the scope

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of the law but rather it would assist the ACCC in reviewing acquisitions in industries of concern.

- **Exemptions:** Unique situation may arise where it is, in fact, in the best interests of consumers to allow a restriction of competition by a corporation with substantial market power through smaller acquisitions. Provision could therefore be made to exempt declared corporations or product/service markets from the creeping acquisition laws, subject to the application of a public interest test. Exemptions should be issued by the Australian Competition and Consumer Commission (ACCC) following a public consultation process. The provision of exemptions should dispel industry concerns about the reasonable applicability of this form of creeping acquisition law.
- **Burden of Proof:** For corporations seeking informal approval of a creeping acquisition, we believe that the burden of proof must rest with the corporation in a process that maximises transparency. The law should be framed in such a way that an acquisition is presumed to increase the dominance of the firm, unless the firm can demonstrate otherwise.

2. Targeting 'declared' firms and markets

This approach would see the Minister (acting on ACCC advice) declare specific corporations or product/service markets subject to creeping acquisition laws. CHOICE does not support this approach. We believe it risks establishing an ex-post regulatory environment and fails to promote competitive markets across the economy. The approach creates an unnecessary regulatory burden on the ACCC and will limit the effectiveness of competition law in the marketplace. Creeping acquisition laws are needed to provide a legal solution to the loopholes or failings of Australia's current merger and acquisition laws. Part IV of the *Trade Practices Act* are not limited to declared corporations and/or market segments and neither should creeping acquisition laws be so limited. While we do not endorse this approach, should the government adopt this measure, we believe it is essential that any decisions about which industries/corporations to declare should be at arms length from the political process. We therefore prefer a model that sees any declarations made transparently and independently by the ACCC.

Thank you for the opportunity to contribute to this important process. If you would like to discuss further this submission please contact me at grenouf@choice.com.au or Elissa Freeman, Senior policy officer at efreeman@choice.com.au.

Yours sincerely

A handwritten signature in black ink, appearing to read "G Renouf".

Gordon Renouf
Director Policy and Campaigns