

5 June 2009

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

creepingacquisitions@treasury.gov.au

Dear Sir/Madam

Creeping Acquisitions

The Group of 100 (G100) is an organisation of Chief Financial Officers from Australia's largest business enterprises with the purpose of advancing Australia's financial competitiveness. The G100 is pleased to respond to the second discussion paper relating to proposed creeping acquisitions reforms.

Our principle concern is that the proposed changes would create significant and real uncertainty for businesses contemplating acquisitions and expansion in Australia. In particular, as the reform proposals would apply to the acquisition of assets as well as shares, the G100 considers that normal commercial investment, for example, in new technology and expansion sites, could be seriously inhibited. This would detrimentally affect both jobs and the Australian economy as a whole.

We regard Australia's merger control regime as well administered, sophisticated and efficient. The G100 believes that, if either creeping acquisitions reform proposal is adopted, Australian businesses would face a substantial negative impact in the form of increased regulatory uncertainty, contraction in investment and reduced commercial confidence. Moreover, the G100 considers that the reform would significantly increase the cost of compliance through the imposition of additional regulatory barriers to investment by successful companies. We are of the opinion that no compelling case has been made to support the need for substantial amendment to Australia's merger control legislation in a manner which would undermine efficient investment in the country.

Additionally, the G100 notes that a creeping acquisitions regime would leave Australian merger control laws significantly out of step with international best practice and the merger regimes in other leading jurisdictions, including the United States and European Union. This outcome should be avoided, especially in the current global economic climate.

Principal Concerns with the Proposed Reform

The G100 does not consider that convincing proof has been offered to qualify the flexibility of the existing “substantial lessening of competition” test in the manner of either option contemplated by the Discussion Paper. In the G100’s view, the existing merger legislation is not deficient in the face of creeping acquisitions, such that it requires fundamental amendment to account for small-scale acquisitions by corporations with “substantial market power”.

Additionally, the G100 considers that both the proposed options for reform raise a number of significant legal and practical issues, which will result in potentially damaging unintended consequences. In particular, the proposed reforms raise the following concerns:

- 1 **A larger number of corporations than envisaged may be affected.** Market power has been held by the courts to exist in relation to market shares of approximately 20% (*ACCC v Safeway Stores*). Prohibiting corporations with a “substantial degree of market power in a market” from making acquisitions or expanding existing operations by additional investment would have, or be likely to have, the effect of “enhancing” that market power is likely to create a two stage merger test in many sectors of the economy and a substantial number of corporations operating in those sectors. This would necessarily add to the regulatory burden and costs for all parties, and would be likely to deter vigorous economic activity and acquisitions across the Australian economy.
- 2 **The meaning of the term “enhancing” is unclear.** Arguably, *any* acquisition (of shares or assets) within the relevant market by a corporation with a substantial degree of market power may ‘enhance’ that corporation’s market power. As there is no qualitative element to the competition test proposed, there is considerable risk that “enhancing” may be interpreted to mean a simple increase regardless of the materiality of degree or effect. Such an approach would undermine the ability of corporations to compete actively and effectively in a market, as the possibility of undertaking any investment by way of acquisition may be removed.
- 3 **The reforms are likely to introduce a *de facto* market share cap.** The apparent absence of any qualitative element to the concept of “enhancing” may prevent an acquirer with a substantial degree of market power from making *any* further acquisitions within the relevant market. A *de facto* market share cap would constitute a retrograde step, as affected corporations would be unable to make acquisitions or investments in new assets and, in circumstances where potential investors are scarce (for example in the current financial climate), the G100 is concerned that merger and expansion activity may, in practice, cease in certain industry sectors. Imposing a market share cap runs a significant risk of undermining effective competition.
- 4 **Vertical and unrelated acquisitions and business expansions would be negatively affected.** The Discussion Paper does not address how the proposed reforms would apply to acquisitions or investments by corporations with a substantial degree of market power in one market (Market A), in wholly unrelated markets, or in markets upstream or downstream of Market A.

The G100 is concerned that a corporation may face additional regulatory barriers and be prevented from completing an acquisition, even if the acquisition did not directly impact the corporation's market power in Market A. In particular, because the proposals apply to acquisitions of assets as well as shares, they do not appear to consider the possibility of a corporation with a substantial degree of market power in a market acquiring new plant and equipment, or new investment sites. Such acquisitions, which are normal commercial investments intended to increase a corporation's efficiency, may arguably 'enhance' that corporation's market power in Market A and thereby be blocked.

- 5 **The proposals would inhibit innovation and investment.** Despite the Government's intention that the reforms "should not stop the legitimate and organic growth of businesses", there is a very real risk that innovation and investment will be discouraged. The uncertainty created by the reform, and its application to acquisitions of assets as well as shares, may be expected to hinder investment, including investment in new technology and through acquisitions of expansion sites. As businesses contemplate the impact of these changes, it is likely that investment in marginal and rural sites in particular will be deterred, thereby undermining economic activity in those areas and limiting job creation. Additionally, by inhibiting investment by large corporations, the creeping acquisition reform will likely result in job losses. Moreover, in the case of G100 corporations affected, the reform may lead to potentially damaging fluctuations in share prices as investors react to the regulatory restraints on those corporations' ordinary commercial activities.
- 6 **Option 2 raises serious concerns as to transparency of application and the impact on a declared corporation.** The introduction of a unilateral power for the Minister to declare a corporation or industry sector should be avoided. The G100 is concerned that the Minister's decision may not be transparent, could not be properly challenged and could critically damage the normal commercial operations of a declared entity by preventing *any* acquisitions by a corporate group. Declaring a corporation or corporate group would be a blunt regulatory instrument which would seriously undermine the normal commercial conduct of the entity.

Conclusion

The G100 strongly urges the Government to review its proposals and to acknowledge that Australia's existing merger legislation is sufficient to deal with creeping acquisitions. Introducing creeping acquisitions reforms of the type set out in the Discussion Paper would seriously undermine the competitiveness of the Australian economy and disadvantage Australian consumers.

Yours sincerely



Tony Reeves
National President