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

7 June 2009

Dear Sir,

Creeping Acquisitions. - Second Discussion Paper.

Background.

This is the Second Discussion Paper on an important issue and one where many small businesses have a real concern. In making this submission I represent a number of small business groups.

Small business generally welcomed the SMP option in the First discussion paper as being the best solution to a difficult problem.

Small business hoped for quick action and are very disappointed at the delay that will be caused by a further discussion paper process.

It is assumed that the previous SMP option is still on the table.

The Second discussion paper.

In the Second paper two further options are canvassed, namely,

- An amended version of the SMP model introduced in the first discussion paper. This model would prohibit mergers and acquisitions that enhance a corporation's existing substantial market power.

This amended version of the SMP model would read:

(1) A corporation that has a substantial degree of power in a market 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 enhancing that corporation's substantial market power in that market

- Another approach could be to 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 a 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 apply to acquisitions by declared corporations or acquisitions by corporations in declared product/service sectors would be the same as the test described above.

Questions posed by the 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?

Both have the same underlying test, the method of applying it are different.

The concern with the underlying test is that in many cases the level of market power is such that most further small acquisitions may not "enhance 'that power. This was an issue previously with the dominance test and the issue of 'strengthened" dominance. It is also an issue where the market power is due to statutory power and any acquisition will not make any difference to that power.

One suggestion that may alleviate the issue but not eliminate it altogether is to have a rebuttable presumption that anyone with market power or deemed market power who makes an acquisition in the relevant market will be presumed to enhance its market power unless the proposed acquirer can show otherwise.

Rebuttable presumptions are being used in the Unfair contract terms legislation and the previous reluctance to use that tool appears to have been overcome.

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 same comments as above apply.

In relation to the issue of a Declaration,

- A Declaration should not be an alternative to the above option but in addition. The enhanced market power test would apply generally but where the government felt it appropriate to do so would declare a business or any industry. A little along the lines of what has been done in relation to Telstra in the TPA and issues such as misuse of market power.

That declaration would deem the declared businesses to have market power and would make notification of any acquisition in the relevant market **mandatory**.

- There will be an inherent analytical problem. In that deeming someone to have market power does not necessarily mean that they actually have that power. The ACCC or the Courts will still have to assess whether the acquirer has market power before they can assess if that power will be enhanced.

- As to the alternative of the ACCC advising on a declaration. By all means but not as the sole determinant, it is ultimately a matter for the Minister, not the ACCC. The Minister should be able to decide to declare without an ACCC request.

<u>Other points.</u>

- It is suggested that a definition of 'assets' be added to overcome any confusion and that assets include leases, licences and other beneficial interest.

- As with the First discussion Paper's Options there is the issue of the authorisation process. There will be instances where the new law will prevent an acquisition and where the parties wish to proceed by way of authorisation. After the amendments of 2006 merger authorisations can only go to the Australian Competition Tribunal. It would be inappropriate for small acquisitions as contemplated in these

amendments to go to the ACT. It is suggested either to reverse to 2006 amendments or to provide for the ACCC to consider the issue of authorisation under the creeping acquisitions amendments.

Yours truly,

Hank Spier

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