# SUBMISSION TO THE COMPETITION AND CONSUMER POLICY DIVISION, THE TREASURY, ON DISCUSSION PAPER: CREEPING ACQUISITIONS

**by**

**JULIE CLARKE**

LLB (Hons) *Deakin*, BA (Politics major) *Deakin*
PhD Candidate, QUT
Lecturer, School of Law, Deakin University

## Introduction

Creeping acquisition laws are needed to deal with the situation where no individual merger in a particular market will substantially lessen competition, but a number of small mergers, over time, may have the same effect.[1] The need for such laws may not be as pressing as some suggest, but there is no logical reason in competition law theory why a series of small mergers by a single entity which, combined, substantially lessen competition, should escape prohibition when a single merger having the same impact on the market does not. Despite some suggestions to the contrary, existing merger law is not equipped to deal with creeping acquisitions. An 'aggregation' model rather than a market power or market share model should be adopted to regulate creeping acquisitions.

## The need for creeping acquisition law

Creeping acquisitions which substantially lessen competition should be subjected to the same prohibition as single acquisitions having the same competitive impact.

[1] The Grocery Inquiry described creeping acquisitions as follows (at 526): 'The term 'creeping acquisition' generally refers to the practice of making a series of acquisitions over time that individually do not raise competitive concerns, usually because the changes in competitive rivalry from any individual acquisition are too small to be considered a substantial lessening of competition. However, when taken together, the acquisitions may have a significant competitive impact. The term creeping acquisition might also refer to a player with existing market power making a small acquisition, even though the small acquisition does not substantially lessen competition in itself'.

### *The retail grocery industry*

The majority of submissions to the Dawson Inquiry on creeping acquisitions[2] and the Senate Economics Reference Committee into the effectiveness of the *Trade Practices Act 1974* in protecting small business (2004) made reference to the retail grocery market as a prime example of creeping acquisitions which may ultimately result in a significant lessening of competition.[3] The recent Grocery Inquiry, however, found little evidence of anti-competitive creeping acquisitions in the grocery market,[4] concluding that growth of the major changes was largely organic rather than a result of acquisitions.

The conclusion in this respect – which has been challenged by many in the industry – may have been influenced by the ACCC's view that it can successfully block single acquisitions in local markets under s 50 of the Act, as it did in repsect of Woolworths' proposed acquisition of the Karabar supermarket in Queanbeyan, NSW in June this year. This, however, is based on the ACCC's view that a very small local market constitutes a 'substantial regional market' for purposes of the market definition provision in s 50(6) of the TPA; although the ACCC effectively blocked this merger, the matter was not pursued in Court (and has never yet been pursued in Court) and it is not clear that the existing provision does in fact extend to such relatively small markets; if it does not, the need for creeping acquisition laws will be even greater.

### *Other industries*

The Grocery Inquiry did conclude that creeping acquisitions were a 'broad issue that can affect many industries'.[5] In this respect, the ACCC has recently begun analysing a

---

2 The following submissions called for the introduction of creeping acquisition laws: Independent Paper Group, p 2; Small Business Development Corporation, p 5 ('… current merger provisions are inadequate to prevent growth by "creeping acquisitions" …'); Association of Consulting Engineers Australia, p 10 ('[a] new specific prohibition against anti-competitive creeping acquisitions is called for … While a large acquisition by a dominant corporation can, be subject to close scrutiny by the ACCC, a series of minor acquisitions that together would substantially lessen competition are less likely to be subject to the same scrutiny. Where in fact scrutinised the ACCC faces considerable limitations on its ability to assess the cumulative effect of the creeping acquisitions on the level of competition. … '); Fair Trading Coalition, p 37; NARGA, p 9 (recommends 'a new prohibition against anti-competitive creeping acquisitions be introduced … [p 29] … although individually these minor or one-off acquisitions may not substantially lessen competition, they may collectively substantially lessen competition to the detriment of consumers. …'); National Association of Retail Grocers of Australia, *Supplementary Submission 2 to the Review of the Competition Provisions of the Trade Practices Act 1974*, Public Submission 206, Trade Practices Act Review 2002, p 7 (recommends insertion of a new s 50(7) into s 50 'providing that where s 50(1) and s50(2) do not prevent the acquisition, yet the cumulative effect of the proposed acquisition and previous acquisitions in any relevant market is to SLC in any relevant market, the proposed acquisition is not to proceed unless authorized or subject to an enforceable undertaking … [p 24] … Creeping acquisitions are an obvious way to avoid scrutiny under the existing s50)'; Victorian Government, p 3 ('current merger law does not cover the gradual acquisition of small participants in an industry by a larger participant').

3 The Senate Committee also made reference to retail liquor sector in this respect.

4 *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, July 2008 ('Grocery Inquiry'). The Inquiry concluded that major supermarket chain growth has been largely a product of 'organic growth rather than growth through acquisitions' and that 'creeping acquisitions are not currently an issue in the grocery industry' (at 525).

5 Grocery Inquiry, p 525.

series of acquisitions of Mitre 10 stores by Bunnings and has indicated it is also monitoring acquisitions in the taxi and childcare industries.[6]

Thus, although anti-competitive creeping acquisitions might be less pervasive than some suggest, it is clear that there is potential for a series of small mergers to substantially lessen competition in a market and, in Australia's relatively small economy, the market is not in a position to readily correct for the resulting anti-competitive structural change.

## Existing merger laws

Section 50 of the TPA is ill-equipped to deal with creeping acquisitions. The Dawson Committee concluded that the current s 50, combined with the ACCC's merger guidelines adequately dealt with creeping acquisitions. The 2004 Senate Committee reached the opposite conclusion; this view is to be preferred.

First, the current prohibition requires analysis only of 'the' acquisition in question with no scope for regard to be paid to the cumulative effect of previous acquisitions; by definition creeping acquisitions do not factor in existing s 50 analysis. In this respect, Professor Henry Ergas recently likened creeping acquisitions to hair loss – no one lost hair will make you bald, but if it keeps happening you're in trouble.[7] Similarly, while no one merger in a particular industry may substantially lessen competition, several may do so without breaching the current provisions which analyse only the current merger.

Second, while the ACCC is guided by its merger guidelines when undertaking its clearance analysis, these guidelines have no legislative force; thus, if the ACCC 'blocks'[8] a merger as a result of cumulative anti-competitive effects on competition rather than the isolated effect of the merger being considered, their decision would not survive a legal challenge.

## Aggregation Model

Introduction of creeping acquisition laws should be based on the 'aggregation model' mentioned in the discussion paper. This is the most logical and accords with the underlying goal of competition policy in Australia. This model has also been adopted in other jurisdictions, such as the European Union[9] and the UK which have the power to assess cumulative effects of mergers over a period of two years.

---

6 See, for example, Blair Speedy, 'Wesfarmers might sell five Mitre 10 stores' *The Australian – Business*, 26 September 2008 (http://www.theaustralian.news.com.au/story/0,25197,24403094-20142,00.html)

7 H Ergas, 'Doubts about Dawson', NECG, June 2003, <http://www.necg.com.au/pappub_PSRSAP.shtml>. See also H Ergas, 'Good Report, Pity About All the Flaws', *Australian Financial Review*, 18 June 2003, p 63.

8 This term is used loosely as the ACCC has no power to block a merger; it can simply indicate it will or will not challenge a merger – to successfully prevent a merger it is required to bring action in the Federal Court seeking an injunction and making its case by reference to s 50 and not its own Guidelines.

9 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) article 5(2) provides that: 'two or more transactions within the meaning of the first subparagraph which take place within a two-year period between the same persons

Although this model has been criticised by some commentators, the practical difficulties associated with implementing creeping acquisitions are outweighed by the benefits of ensuring retention of competitive markets. For example, Anthony Haly of Mallesons suggests the following flaws with the aggregation model (most criticism is along these lines):

> Acquisitions are currently assessed under section 50 using a forward-looking test which compares the likely state of competition *with* the acquisition to the likely state of competition *without* the acquisition. It is unclear how this 'with-and-without' test would function if the ACCC or a court could also 'look backwards' and aggregate previous acquisitions.
>
> There are also temporal issues in terms of how far back the ACCC or a court would be able to go in assessing the effect of a series of acquisitions (for context, Family First's proposed legislation permits the ACCC or a court to consider acquisitions over the previous six years). It is unclear how changes in market boundaries or dynamics will be addressed (such as industry consolidation or disaggregation). An aggregation model is also likely to impose significant uncertainty and onerous compliance costs upon businesses seeking to assess the impacts of their merger activity over time.
>
> An aggregation model is also likely to lead to an increase in the time taken by the ACCC to consider acquisitions under its popular informal clearance process, given the increased scope of the issues to be considered.[10]

There is some legitimate concern about the practical implementation of the aggregation model, but the suggestion that this would lead to 'significant uncertainty and onerous compliance costs' is overstated.[11] The creeping acquisition laws would have practical application to a relatively small proportion of mergers investigated by the ACCC – clearly they would apply only where there had been earlier acquisitions in the same market. For those mergers that do fall within the creeping acquisition laws, the increased compliance costs (which are still relatively small by comparison with most of the world's merger regimes which impose *mandatory* pre-merger notification obligations) are outweighed by the benefits of ensuring our markets remain competitive. We exist in a relatively small economy which is not able to readily correct for anti-competitive structural change (unlike, for example, the US or even the EU) and it is, therefore, important that we are vigilant about ensuring companies don't thwart the competition laws by acquiring dominance 'under the radar' of existing laws through multiple small acquisitions.

In implementing an aggregation model creeping acquisition law a time-frame of two-five years would be appropriate for assessing cumulative market effects.

---

or undertakings shall be treated as one and the same concentration arising on the date of the last transaction'.

10 'Government releases discussion paper on creeping acquisitions', 1 September 2008 (http://www.mallesons.com/publications/2008/Sep/9596886w.htm). See also David Ball (of Clayton Utz) 'New Creeping Acquisitions Proposals Raise Real Concerns', 8 October 2008 (http://www.mondaq.com/article.asp?article_id=67286&lk=1&print=1).

11 See also David Ball (of Clayton Utz) 'New Creeping Acquisitions Proposals Raise Real Concerns', 8 October 2008 (http://www.mondaq.com/article.asp?article_id=67286&lk=1&print=1) who claims 'commercial parties are unlikely to welcome a clearance process which is more protracted or complex than the current timeframes'

## Substantial Market Power Model

The 'substantial market power model' (SMP) would prohibit mergers by a firm having substantial market power where it would result in *any* lessening of competition. This is not sound either in economic or competition policy and should be rejected.

Implementation of this model would ultimately prove anti-competitive and harm small businesses in the following ways:

- Small business would be deprived of the opportunity to take advantage of their business goodwill through asset sales to larger businesses – this would deny small business access to its largest prospective buyer and thereby reduce competition for the purchase of the small business.[12]
- It would effectively prevent a firm with substantial market power (however that was defined) merging at all. By definition a horizontal merger reduces the number of competitors in the market[13] and thus has some (even if only slight) impact on competition in that market. Where a merger enhances efficiencies in the market without significantly limiting competition, on any theory of competition law policy the merger should be permitted to proceed.

This model is similar to one suggested in a number of submissions to the Dawson Review, that a 'cap' should be placed on the market share of companies, beyond which acquisitions should not be permitted (or at least not permitted without approval).[14] This suggestion was criticised by the Dawson Committee in its report, which considered that a cap would 'stifle competition and protect the unsustainable position of inefficient competitors'.[15] They also accepted that a cap would prove 'unworkable' and could deny consumers access 'to the products or services offered by an efficient producer'.[16]

12 See, for example, Stephen Bartholomeusz, 'Creeping Towards Absurdity', Business Spectator, 1 September 2008: 'It is … difficult to see how anyone would think it would help small business to devalue what might well be their lives' work by denying them access to the biggest and best-resourced prospective buyers of their business. …'

13 The only exception may be where the corporation to be acquired was a failing firm and there were no other potential buyers; although even then there is an argument that the increase in market share acquired by the firm having pre-existing substantial market power might have a slight impact on competition sufficient to trigger a contravention of this proposed test.

14 Association of Consulting Engineers Australia, p 11; Fair Trading Coalition, pp iv & 37; NARGA, p 81 (propose that a 'concentrated market notice' be issued when markets are identified as highly concentrated); Pharmacy Guild of Australia, p 2; Spier Consulting, p 22; WA Independent Grocers Association (Inc), *Submission to the Review of the Competition Provisions of the Trade Practices Act 1974*, 'Restoring Competitive Equality in an Increasingly Anti-Competitive Environment', Public Submission 158, Trade Practices Act Review 2002, p 13.

15 Dawson Report, p 67.

16 The Committee claim that the Baird Committee and ACCC both agree this would be unworkable (Dawson Report, p 67). The Baird Committee reported in 1999: Report by the Joint Select Committee on the Retailing Sector (the Baird Committee), *Fair Market or Market Failure? A Review of Australia's retailing sector,* Parliament of the Commonwealth of Australia, Canberra, 1999 ('Baird Report'). This report (at p viii and pp 47-53) states that the Committee heard compelling evidence that a market cap (of the nature suggested to that Committee – which would have required divestiture of existing assets) would prove unworkable. The ACCC's submission to the Dawson Report does not contain any suggestion that a cap as proposed in

## Summary

Legislation should be introduced to prohibit creeping acquisitions which substantially lessen competition:

- the existing law is not equipped to deal with creeping acquisitions because it focuses only on ‘the’ individual merger under consideration;
- the law should take the form of an aggregation of the competitive effects of mergers over a period of time (two-five years);
- the substantial market power model should be rejected – it represents bad policy and would ultimately harm both competition and small business.

Julie Clarke
Lecturer, School of Law
Deakin University

10 October 2008

Dawson Review submissions would be unworkable. The Baird Committee Report does, however, indicate that the then Chairman of the ACCC, Professor Allan Fels, provided evidence to the Baird Committee that there would be ‘significant mechanical problems associated with a market cap’ (Baird Report, p viii; see also p 51).