

7 June 2010

The Secretary
Senate Economics Legislation Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: economics.sen@aph.gov.au

Business
Council of
Australia



Dear Sir/Madam

**SENATE ECONOMICS LEGISLATION COMMITTEE INQUIRY INTO THE
COMPETITION AND CONSUMER LEGISLATION AMENDMENT BILL 2010**

The Business Council of Australia (BCA) makes this submission to the 'creeping acquisitions' aspects of the Senate Economics Legislation Committee's inquiry into the *Competition and Consumer Legislation Amendment Bill 2010*.

The BCA notes that we have not been able to meet the deadline for lodging submissions to this inquiry because the committee has only given two working days for lodgement. In the BCA's view, important regulatory amendments to the competition laws which are the subject of a Senate committee inquiry, should allow stakeholders sufficient time to submit their views. It is difficult for stakeholder groups such as the BCA to seek information from, and the views of, its members in such a short period of time.

There has been considerable analysis of so-called 'creeping acquisitions' over "*the last decade, by both Government and other parties*"¹ including through a significant inquiry into the grocery sector by the ACCC. Throughout this process there has been no evidence identified of a systemic 'creeping acquisitions' problem in the Australian economy. The BCA does not therefore consider that any amendments are required to the merger provisions of the competition laws.

The BCA has consistently advocated a rigorous, evidence-based approach to regulatory reform, recognising the significant costs that excessive regulation can impose on the economy. The government's approach on this matter has included the release of two consultation papers during 2008 and 2009. To the government's credit, these papers did explore whether there is a 'creeping acquisitions' problem and examined various options to deal with the issues. The BCA made submissions to those inquiries and our previous positions remain relevant.²

¹ Explanatory Memorandum, para 1.2

² The BCA made submissions on 25 July 2008 to the Senate Economics Legislation Committee inquiry relating to the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007*, on 13 October 2008 to the government's first discussion paper and on 10 July 2009 to the government's second discussion paper: they can all be found on the BCA website www.bca.com.au

Overall, the public submissions to the government's discussion papers on creeping acquisitions "*indicated that there was no clear consensus of support for any individual model, and views varied as to whether, in practice, there was a substantive problem to be addressed.*"³ The submissions did however identify specific areas of concern with the application of the merger provisions of the competition laws. Government has sought to target those specific regulatory concerns through proposed amendments to the competition laws contained in the Bill.

The BCA considers that the government's final amendments, though unnecessary, are preferable to the options that have been proposed in previous discussion papers, particularly because the 'substantial lessening of competition' test is retained.

However, the BCA has concerns that the proposed amendments may have unintended consequences. For example, they may have the effect of causing unnecessary examination of less than economically meaningful markets that are not substantial, creating unnecessary burdens and costs for business and therefore dampening economic activity and investment. With this in mind, the BCA considers that the Bill should provide for review of the effect of the proposals after two years.

Australia's merger laws are recognised internationally as working well. The American Bar Association, in its submission to the first government discussion paper on creeping acquisitions, explained that the proposal to change the internationally recognised 'substantial lessening of competition' test has the potential to have major implications for Australia's competitiveness and attractiveness as a place for investment and growth. The association noted:⁴

"The Sections' interest in this issue derives in part from the fact that U.S. companies could be parties to transactions implicated by the Discussion Paper...The Sections believe that merger control laws of general application should not be modified to address the concerns arising from creeping acquisitions...

...the Sections are wary of attempts to address narrow and potentially unique competition concerns existing in one particular industry (such as retailing) through changes in broadly applicable merger control law. Australia is widely regarded as having a well-developed merger control regime that reflects international best practices in merger enforcement. Accordingly, the Sections believe that before potentially far-reaching changes are introduced, a high burden must be met to demonstrate that (1) under the status quo, the risk of anticompetitive harm from creeping acquisitions is so great that additional prophylactic rules are needed; and (2) the costs of specific rules that address creeping acquisitions would be less than the harms from allowing the current merger control laws to continue to regulate all acquisitions equally."

Comments such as these from the American Bar Association provide an indication of the extent to which regulatory changes may impact on the overall business environment and on how Australia is perceived as an investment destination.

³ Explanatory Memorandum to the Bill, para 1.5

⁴ American Bar Association submission in response to the government's first discussion paper, 10 October 2008

The comments highlight the importance of taking a considered, cautious approach to any regulatory change in the area of mergers.

The BCA therefore supports an approach which maintains the 'substantial lessening of competition' test and responds only to *"specific problems with specific remedies, rather than responding with general remedies that could have unintended consequences for overall economic activity and employment."*⁵

Please direct any inquiries in respect of this submission to Leanne Edwards, Assistant Director – Regulatory Affairs, on (03) 8664 2614 or leanne.edwards@bca.com.au.

Yours sincerely



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⁵ Explanatory Memorandum to the Bill, para 1.5