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17 December 2009

Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Business Council of Australia

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

Dear Sir/Madam

SUBMISSION TO SENATE ECONOMICS COMMITTEE ON TRADE PRACTICES AMENDMENT (MATERIAL LESSENING OF COMPETITION - RICHMOND AMENDMENT) BILL 2009

The Business Council of Australia (BCA) provides this submission to the Senate Economics Committee on the *Trade Practices Amendment (Material Lessening of Competition - Richmond Amendment) Bill 2009.*

The Bill proposes that amendments are made to section 50(1) of the Trade Practices Act 1974 (Cth) (TPA) such that:

- a *"materially lessening competition"* test is introduced to replace the existing test of *"substantially lessening competition"*; and
- a prohibition is introduced against an acquisition by a corporation that has a *"substantial share of a market"* if the acquisition has the effect of *"lessening competition"*.

The BCA is strongly opposed to the Bill. We consider that the proposed amendments to the existing merger control regime contained in the TPA are not warranted because:

- no economic case has been demonstrated to justify such amendments;
- the proposals have the potential to impose a significant impost on business and to have detrimental consequences for the Australian economy as a whole; and
- there is no net benefit to the community from amending the competition laws in the manner proposed.

Australia already has a well established and internationally recognised mergers regime. A key contributor to the continued success of the Australian economy is its effective competition laws. These laws should support vigorous competition as a means of driving productivity, efficient markets and lower prices for consumers. But productivity growth also requires incentives for businesses to restructure, invest and grow. We are concerned that the Bill significantly undermines those objectives.

The existing section 50(1) of the TPA containing the '*substantial lessening of competition'* test provides business certainty and is in our view underpinned by a strong policy objective.

Introducing such amendments are likely to create additional uncertainty for business activity, and risks forcing all business acquisitions to become subject to scrutiny, even those acquisitions which ultimately have no relevance for competition. As a result, the proposals are likely to require significant additional resources for the ACCC to deal with an increased number of applications for mergers approvals. A 'backlog' of applications with the ACCC will extend the time and cost of acquisitions. Additionally, the BCA endorses the comments of the Law Council in its submission dated 14 December 2009, in which it highlights the risks associated with the proposed changes to the existing regime:

> *The existing merger regime … provides commercial certainty, while permitting the ACCC to oppose any transaction that would detrimentally affect competition, and therefore, Australian consumers. The introduction of an untried and unclear text in place of the existing "substantial lessening of competition" threshold would create uncertainty, undermine existing legal practice and discourage investment in Australian business. Moreover, it would create uncertainty as to the application of the "substantial lessening of competition" test in other provisions in Part IV of the TPA, including sections 45 and 47.*

Changing the *'substantial lessening of competition'* test takes the laws beyond the competition laws of any of Australia's main competitor countries (such as in Europe and the United States) and undermines an internationally recognised regime. These proposals therefore may act as a deterrent to investment from domestic and overseas sources. In this context, the comments provided in the 9 October 2008 submission of the Antitrust Sections of the American Bar Association to the government's September 2008 discussion paper on creeping acquisitions are instructive:

> *Australia is widely regarded as having a well-developed merger control regime that reflects international best practices in merger enforcement…*
>
> *Unless very narrowly tailored, any change from the well-established 'substantial lessening of competition standard' applicable to all mergers likely would impose substantial additional administrative costs and result in significant uncertainty as to how the new rules might be interpreted by the ACCC and Australian courts. This uncertainty could inhibit larger firms from making efficiency-enhancing acquisitions that would have significant consumer benefits….*

The proposed amendment dealing with 'market share' essentially imposes a market share cap on companies and stifles growth. The Explanatory Memorandum to the Bill indicates that the rationale for the changes is because *"a number of controversial mergers have recently been approved"*. However, those mergers were assessed and approved by the ACCC. There is no evidence that the ACCC's decisions were incorrect or detrimental for Australian consumers. Amending the Australian competition laws to deal with perceptions of size of business is contrary to the role of

the competition laws. There is no evidence that concentrated markets are uncompetitive. Indeed, the Dawson Committee in 2002 found that:

> *….while a genuine competitive environment exists, the preservation of the number of competitors in a market is more a matter for industry policy than competition policy. A concentrated market may be highly competitive. Whilst there may be a desire to preserve the number of competitors in a competitive market, it will ordinarily be for policy reasons other than the promotion of competition. Part IV of the Act is concerned with the promotion of competition rather than industry policy.*

In its September 2008 discussion paper *'Creeping Acquisitions'*, the government proposed two options to amend the competition laws. Option 2, which was very similar to the 'market share' proposal in the Bill, proposed to prohibit a corporation from making an acquisition if it already had a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to substantial lessening) of competition in that market. The BCA strongly opposed Option 2 in its October 2008 submission (attached) and those arguments continue to be relevant.

It is therefore disappointing, that having had a public consultation on these issues, new and similar amendments are now being sought in this Bill. The results of these previous reviews are publicly available and should be taken into consideration. The BCA attaches some of the recent submissions in respect of similar proposals to amend the merger thresholds of the competition laws, as those submissions contain relevant information about the importance of the existing mergers regime including the *"substantially lessening of competition"* test:

- A BCA submission dated 25 July 2008 to the Senate Economics Committee relating to the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007*.

- A BCA submission dated 13 October 2008 to the government's discussion paper '*Creeping Acquisitions'*.

- BCA submission dated 10 July 2009 to the government's second discussion paper *'Creeping Acquisitions – The Way Forward'*, released on 6 May 2009.

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I trust you will find this submission of use.

Please contact Leanne Edwards, Assistant Director – Regulatory Affairs on (03) 8664 2614 if you would like to discuss it further.

Yours sincerely

Peter Crone
Director - Policy