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10 July 2009

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

By email: creepingacquisitions@treasury.gov.au

Dear Sir/Madam

DISCUSSION PAPER: *CREEPING ACQUISITIONS – THE WAY FORWARD*

The Business Council of Australia (BCA) welcomes the opportunity to make this submission to the government's second discussion paper *'Creeping Acquisitions – The Way Forward'*, released on 6 May 2009. The BCA also appreciates the extension of time that has been provided to parties interested in making a submission on the paper.

The BCA has consistently advocated a rigorous, evidenced-based approach to regulatory reform, recognising the significant costs that excessive regulation can impose on the economy.

The latest discussion paper on creeping acquisitions does not, in the BCA's view, make a compelling case as to why further reform of the Trade Practices Act in this area is warranted. Moreover, the BCA considers that should the changes outlined in the paper be introduced, the likely impact will be to adversely affect the overall business environment in Australia and make our economy less attractive as an investment destination.

The BCA has a longstanding position on regulation that new business laws, or proposed changes to existing laws, should only occur where there is a clearly identifiable problem that needs to be addressed. Any reforms should be clear in achieving the purpose for which they are intended without creating an additional red tape burden and, importantly, regulatory changes should not stifle ordinary and legitimate business behaviour.

The changes that have been proposed in the latest discussion paper on creeping acquisitions are inconsistent with this approach.

In spite of numerous consultations and reviews on the issue of creeping acquisitions, there is no evidence that an economy-wide problem actually exists. In particular no cost-benefit analysis or economic assessment of the impact of the proposed reform has been undertaken.

Also there has been no compelling evidence provided as to why such changes would have any meaningful effects on the level of competition in the economy for the improved welfare of Australians.

Given that an economy-wide 'problem' has not been identified, it may be appropriate for the Productivity Commission to conduct reviews of industry sectors that are of concern to the government. The BCA proposed this course of action in its submission to the first discussion paper. It is disappointing that this non-regulatory alternative was not considered in the second discussion paper.

In terms of the two options contained in the second discussion paper, the BCA is particularly concerned that should they be pursued, the likely consequence would be to impair legitimate and organic growth of businesses in Australia. It is likely that there will be practical competition effects – most likely unintended – if the proposed reforms are pursued.

For example, any legislation which provided for the declaration of particular sectors or corporations will necessarily create uncertainty for potential investors in Australia due to different merger control provisions applying in different circumstances. Considerable uncertainty will attach to an industry (or company) that has been 'declared' – for example in relation to earnings or growth forecasts. This will inevitably have flow on effects for investment. If there is regulatory uncertainty attaching to profitability and future growth, potential new entrants into 'declared' industries (whether from overseas or domestic sources) may be discouraged from entering those industries.

Given the present challenges associated with the global economic environment, it will become increasingly important for Australia to offer a sound and stable business environment. This will be all the more critical if we are to capitalise on Australia's relative economic strength and build on the benefits that past reforms have delivered.

The BCA supports a merger regime that adequately balances the needs and interests of small and large businesses. Moreover the BCA is strongly of the view that the existing law adequately achieves this. Reform proposals which are not based on a competition test but rather involve potential capping of market share will be detrimental to the competitive process and, therefore, to the overall business and investment environment. Proceeding with a reform proposal in the absence of a demonstrated problem is not in Australia's best economic interests.

The attached submission expands on the arguments outlined above and highlights BCA's specific concerns with:

- the two proposals raised in the second discussion paper, and
- the likely economic impact on Australia arising from amendments to competition laws in respect of creeping acquisitions.

While the BCA submits that reform of the Trade Practices Act to deal with creeping acquisitions is not warranted (and the two proposals outlined are not justified), we nevertheless note that the government has sought in its discussion paper alternative approaches to the issue.

In the event that the government decided to proceed with some change that seeks to deal with creeping acquisitions, the BCA accepts that a fallback position could be investigated. This could comprise the inclusion of a specific reference to 'creeping acquisitions' in section 50(3) of the TPA.

This reference would provide the ACCC with added flexibility and scope to consider previous acquisitions by a corporation when assessing a further merger involving that corporation. However, as with all proposals, the BCA considers that this option should be first tested through a further process of detailed public consultation, to ensure it is targeted and workable and does not have detrimental consequences for the economy. Further information on this option is also set out in the attached submission.

I have copied this submission to Chris Bowen MP, Lindsay Tanner MP, Dr Craig Emerson MP and Mr Gary Banks (Chairman of the Productivity Commission), for their information.

Please feel free to contact me or Ms Leanne Edwards, Assistant Director – Regulatory Affairs, on (03) 8664 2614 or leanne.edwards@bca.com.au if you wish to discuss the BCA's concerns further.

Yours sincerely

Robert Milliner
Chair – BCA Business Reform Task Force

cc The Hon Chris Bowen MP
The Hon Dr Craig Emerson MP
The Hon Lindsay Tanner MP
Mr Gary Banks

BCA SUBMISSION TO THE GOVERNMENT'S SECOND DISCUSSION PAPER: *CREEPING ACQUISITIONS - THE WAY FORWARD*

This document provides the Business Council of Australia's (BCA) views on the government's second discussion paper *'Creeping Acquisitions – The Way Forward'*, released on 6 May 2009.

This submission follows a number of recent representations prepared by the BCA on this issue including:

- A letter to the Assistant Treasurer dated 23 January 2008 on reforms to the Trade Practices Act;
- A BCA submission dated 25 July 2008 to the Senate Economics Committee relating to the *Trade Practices (Creeping Acquisitions) Amendment Bill 2007*; and
- A BCA submission dated 13 October 2008 to the government's discussion paper '*Creeping Acquisitions'*.

The BCA supports robust and effective competition law as an important element of business regulation in Australia and accepts that effective competition is essential to the maintenance of adequate consumer choice and competitive prices.

Given the significant costs excessive regulation can impose on the economy, any proposal to amend or reform existing competition laws should only occur where there is a clearly identifiable problem that needs to be addressed. Any reforms should be clear in achieving the purpose for which they are intended without creating an additional red tape burden and, importantly, regulatory changes should not stifle ordinary and legitimate business behaviour.

With this in mind, the BCA considers that amendments to the existing merger control regime under the Trade Practices Act to deal with so called 'creeping acquisitions', should not be pursued because:

- No economic case has been demonstrated;
- Genuine consideration of alternatives to further regulation has not been undertaken;
- The two proposals in the discussion paper have the potential to impose significant detrimental consequences for business and the Australian economy as a whole; and
- There is no net benefit to the community from amending the competition laws in respect of so-called creeping acquisitions.

These issues are considered in turn below.

1. A case for action needs to be clearly established

The government has committed to using an 'evidence-based' policy development approach. In an address to senior public servants in April last year, the Prime Minister observed that, "*evidence-based policy making is at the heart of being a reformist government*".[1]

The BCA considers that the creeping acquisitions proposals are based on 'perceived' rather than 'real' problems. Actual evidence of a market-wide problem has yet to be demonstrated by either the government or the ACCC.

As noted in the covering letter to this submission, in the absence of clear evidence that there is a problem of 'creeping acquisitions' across the economy or that the existing merger control regime is flawed, the introduction of creeping acquisitions amendments are not warranted and were they to be introduced could be potentially damaging to some industries and the economy as a whole.

The BCA is concerned that in the absence of a problem being demonstrated, any legislative amendment cannot be targeted at the 'problem'. The likely result is that the amendment once introduced will have unintended, and potentially deleterious, consequences on market behaviour. Unwarranted regulatory responses are necessarily incapable of being targeted or proportionate.

In our 13 October 2008 submission to the government's initial discussion paper on creeping acquisitions, the BCA stressed that proposed changes to existing competition laws should only occur where there is a clearly identifiable problem that needs to be addressed. In this submission it was noted that no economy-wide problem in respect of creeping acquisitions had been demonstrated. The BCA stated:

> *"At the request of the government, the Australian Competition and Consumer Commission (ACCC) conducted an inquiry into the grocery sector and in July 2008 found that there is not a current problem of creeping acquisitions in that sector. The BCA is disappointed that even in the face of the ACCC's findings, there is continued commitment to amending the competition laws in relation to creeping acquisitions.*
>
> *The ACCC's findings in the grocery sector demonstrate that even though there may be a public perception that concentrated markets are being caused by 'creeping acquisitions', independent and thorough investigation can show an entirely different reason for concentrated markets."*

The BCA remains firmly of the view that there is no clear evidence that the current merger control laws require amendment to take account of so-called creeping acquisitions. The BCA's concerns have been mirrored by a number of other submissions such as that submitted by the Law Council of Australia on 12 June 2009 in response to the government's second discussion paper. In its submission, the Law Council highlights its concern:

[1] Gary Banks, Chairman Productivity Commission, *Evidence-Based Policy-Making: What is it? How do we get it?*, ANZSOG/ANU Public Lecture Series 2009, Canberra, 4 Feb, p 3

> *"… the merger provisions of the TPA are proposed to be changed in ….a fundamental way, in spite of a clear absence of compelling evidence indicating that the existing legislation is in any way deficient. The ACCC's submissions in relation to this issue to date are not, in the Committee's view, persuasive."*

The BCA considers that the move to introduce a creeping acquisitions reform is driven largely by concerns with activity in the grocery sector. Indeed, the majority of submissions received in relation to the initial creeping acquisitions discussion paper were in relation to the grocery sector. These submissions provided little evidence that creeping acquisitions are or may be expected to be a significant problem in the grocery sector, nor that creeping acquisitions may give rise to material issues across other industry sectors in Australia.

The BCA considers that the absence of evidence in support of legislative amendment is not adequately addressed in the government's second consultation paper. Despite the lack of economy-wide evidence to justify an amendment to the competition laws, the second discussion paper states only the following:

> *"The paper was released in response to concerns raised by the Australian Competition and Consumer Commission (ACCC) that section 50 of the Trade Practices Act 1974 (TPA) may not be able to deal with creeping acquisitions that, according to the ACCC, have the potential to cause competition concerns in certain concentrated industries."*

It is the BCA's view, that it is not appropriate to amend the competition laws merely to address 'potential future market behaviour'. That in itself suggests that there is no clearly identifiable problem but rather that a problem may or may not exist at some time in the future.

Proceeding with regulatory changes to address potential future market behaviour, is not, in the BCA's view, consistent with sound evidence-based regulatory process.

2. Genuine consideration of alternatives to regulation

It is recognised that regulatory responses may not always be the best means of achieving the desired outcomes. Accordingly, genuine analysis of all alternatives should be considered.

Whilst the second creeping acquisitions discussion paper states that: '*the Government welcomes alternative approaches to the issue. These may include both regulatory and non-regulatory options',* it is not apparent that any meaningful consideration has been given to non-regulatory alternatives.

Every proposal that has been raised by government through the various consultations on creeping acquisitions has involved amendment of the current merger control regime, with no serious consideration of non-legislative alternatives.

For example, the BCA submission to the first discussion paper provided several proposals for alternative, non-regulatory responses, including a Productivity Commission review of industry sectors of concern. This proposal noted that if the Productivity Commission were to undertake a review of specific sectors of concern any specific 'problems' relevant to that industry could be identified and appropriately targeted.

The BCA is concerned that these (and other) non-regulatory alternatives – despite being raised – were not included in the second discussion paper.

In the BCA's view, the competition laws as they are currently drafted are capable of dealing with so-called 'creeping acquisitions'. When determining whether an acquisition would have the effect of substantially lessening competition, a Court and the ACCC *must have regard to* the list of factors set out in subsection 50(3) of the TPA. The BCA considers that these factors allow sufficient flexibility to examine each proposed acquisition thoroughly. For example:

- section 50(3)(h) requires the consideration of '*the likelihood that the acquisition would result in the removal from the market of a vigorous and effective competitor'*

- section 50(3)(g) which refers to *'the dynamic characteristics of the market, including growth, innovation and product differentiation'*.

The ACCC's 2008[2] Merger Guidelines also state that consideration of the actual conduct of the target firm pre-merger and likely future conduct with and without the merger is needed. The inclusion of this factor as a matter to which the Court and the ACCC *must* have regard, represents a mechanism by which a series of creeping acquisitions may be considered under section 50.

In particular, the ACCC must examine competition prior to the merger, future competition taking account of the merger and future competition without the merger. This ensures that any previous acquisitions by the acquirer will necessarily be taken into account when considering the overall impact on the existing competitive environment in which the merging parties operate.

Indeed, the ACCC found in its grocery inquiry that:

> *"The ACCC has not been able to identify any supermarket acquisitions in the last five years where the result would have been different had the ACCC been able to take into account other acquisitions in the same market. This suggests that the cumulative effect of a series of acquisitions of independent supermarkets ... has not been a significant contributor to any competition problems in the supermarket sector in recent years.[3]"*

Accordingly, in the absence of any evidence that the creeping acquisitions reform is required, from either a legal or economic perspective, the BCA considers that it is essential that the existing internationally recognised *'substantial lessening of competition test'* is retained unchanged.

[2] Paragraph 3.16 - 3.19
[3] Grocery Inquiry p 427

The existing merger test is consistent with international best practice, has operated well, protects genuine threats to competition and is proportionate.

In the event that the government decided to proceed with some change that seeks to deal with creeping acquisitions, the BCA accepts that a fallback position could be investigated. The least damaging, and most effective, change could be to introduce an additional factor in section 50(3) that can be taken into account by the ACCC in the assessment of mergers. In particular, section 50(3) may be amended to include a reference along the lines of:

> *"any previous acquisitions by a merger party in the same market that have taken place within the previous two years"*

This approach would provide the ACCC with an express ability to 'deal with' creeping acquisitions, whilst retaining the existing *'substantial lessening of competition'* test in an unchanged form[4].

However, as with all proposals, the BCA considers that this option should be first tested through a further process of detailed public consultation, to ensure it is targeted and workable and does not have detrimental consequences for the economy.

3. Options in the second discussion paper

The second discussion paper raises two options for government intervention in the merger control regime.

Option 1 restricts a corporation with a substantial degree of market power from making an acquisition that would be likely to 'enhance' that corporation's substantial market power.

In the BCA's view, this option poses significant risk to legitimate business activity in Australia, including to a company's ordinary organic growth. The term 'enhancing' is broad and vague in its interpretation. Indeed it is possible that any acquisition by a corporation with 'a substantial degree of market power' would be prohibited by this provision. This would effectively impose a 'market cap' on many companies in Australia, including those which do not have a high market share.[5]

The imposition of an effective 'market cap' has significant economic risks, as reflected in the comments of one BCA Member (see the box below).

[4] This suggestion is made with the overriding qualification that the BCA does not consider that any amendments to the current mergers regime under the TPA is necessary. It is provided as a fall back option only.

[5] It has been held that a 'substantial degree of market power' may exist even where a corporation has a market share of only around 20% (see *ACCC v Australian Safeway Stores Pty Limited* (2001) 119 FCR 1, *ACCC v Australian Safeway Stores Pty Limited* (2003) FCAFC 149 and *ACCC v Australian Safeway Stores Pty Limited (No 4)* (2006) FCA 21).

Substantial Market Power model

The Government's second discussion paper floats the concept of a prohibition on corporations with a substantial degree of market power acquiring businesses that would have the effect or likely effect of "enhancing" that corporation's market power in that market. This is similar to the government's previous proposal which prohibited "any" lessening of competition.

Both proposals are essentially the same and are both inappropriate. Why should the government seek to intervene where there is little or no detrimental effect on competition or consumers, and indeed would otherwise be supported on public policy grounds of economic efficiencies when uneconomic firms are acquired by other firms? The direct implication for our business will be that it will be unable in many markets in which it operates to make relatively small, and in the wider economic and competitive scheme of things, inconsequential acquisitions of smaller firms.

The BCA does not support the option presented in the discussion paper which prohibits mergers and acquisitions that enhance a corporation's existing substantial market power. Any amendment that would effectively prohibit further investment through acquisitions, by certain corporations in certain sectors would seriously undermine the investment climate in Australia and through this the continued growth, development and success of Australia's economy.

Option 2 provides the Minister with the power to 'declare' certain corporations or industries, using a similar test to the one outlined above. 'Declared industries or corporations' would then be required to notify the ACCC of all acquisitions it is considering.

This arrangement is likely to impose significant time and cost burdens on those 'declared' businesses, slowing down the mergers process and creating a strong disincentive for growth and investment.

The Dawson Committee examined a number of proposals for dealing with creeping acquisitions, including the declaration of highly concentrated industries by the government and compulsory notification of acquisitions in declared industries. It determined that compulsory notifications may not be workable because:[6]

> *"Compulsory notification might result in larger participants establishing new facilities rather than acquiring existing businesses, possibly to the detriment of those wanting to sell their businesses."*

[6] Dawson Committee report, Chapter 2, Mergers

The BCA is aware of the Law Council's submission to the second discussion paper, and its proposal for a scheme of 'declaration'. The BCA acknowledges that the Law Council's proposals are made with the firm caveat that '*no amendment to the existing merger provisions is necessary to account for creeping acquisitions'* and that the alternatives suggested by the Law Council are made only where *'the government continue(s) to insist on introducing unnecessary reform'.*

However, the BCA does not agree with the possible approaches to dealing with creeping acquisitions provided in the Law Council's submission, on the basis that any legislation providing for declaration of particular sectors or corporations necessarily creates uncertainty for potential investors in Australia due to different merger control provisions applying in different circumstances.

Moreover, the 'declaration' approach as described in the second discussion paper is entirely lacking in sufficient detail. For example, there is no discussion of what checks and balances might apply or whether there would be an appeal mechanism in place.

The BCA has significant concerns with any proposal that allows for unilateral decision making by government in relation to competition decisions. Significant checks and balances must, of necessity, be imposed in order to ensure that any 'declarations' are made independently of political pressure and circumstances.

In any event, the BCA's concerns with the proposal do not rest solely on the administrative processes, but on the detrimental economic consequences that such an arrangement would impose more broadly.

It is likely that there will be practical competition effects – most likely unintended – if the proposed declaration approach is pursued. Considerable uncertainty will attach to an industry (or company) that has been 'declared' – for example in relation to earnings or growth forecasts. This will inevitably have flow on effects for investment.

If there is regulatory uncertainty attaching to profitability and future growth, potential new entrants into 'declared' industries (whether from overseas or domestic sources) may be discouraged from entering those industries. Given the present challenges associated with the global economic environment, it will become increasingly important for Australia to offer a sound and stable business environment. This will be all the more critical if we are to capitalise on Australia's relative economic strength and build on the benefits that past reforms have delivered.

The BCA is also concerned about the effect that a 'declaration' arrangement will have on the interpretation of the competition laws under other sections of the TPA. For example, if specific corporations have been 'declared' to have 'market power', will that also affect the interpretation about 'market power' under other TPA provisions (such as section 46)?

Furthermore, whether a corporation has 'market power' is usually something that is strongly contested in court, with significant evidence about markets and the individual circumstances and actions of specific companies required to determine the existence - or otherwise - of 'market power'. These issues need to continue to be treated with the same degree of evidence-based analysis by courts. Courts are experienced in making evidentiary assessments and importantly are capable of

making politically independent and detailed assessments on the basis of specific evidence and circumstances of individual cases.

The BCA's concerns outlined on the 'declaration' option, take into account the Dawson Committee's consideration of a 'declaration' scheme in 2002. The Dawson Committee determined that problems may be associated with applying competition laws differently by industry sector. The Dawson Committee found:[7]

> *"Differing regulatory treatment of different sectors of the economy will provide differing incentives for investment and effort by discouraging participation in particular sectors and will detract from the ability of markets to allocate resources in an efficient manner.* ***Productivity, growth and welfare may then all suffer****."* (Our emphasis)

Both options deal with acquisitions by corporations with 'market power'. In the BCA's view, this reflects an inherent desire to deal in some manner with concentrated markets, and effectively impose a 'market cap' on businesses. Concentrated markets themselves are not necessarily inherently anti-competitive, especially in a concentrated economy like Australia's. Rather, it is the misuse of any market power that should be prohibited, and indeed is already prohibited under section 46 of the TPA. The mere existence of market power should not lead to a conclusion that anti-competitive behaviour will arise.

This view again reflects the independent review of the competition provisions of the TPA and their administration by the Dawson Committee in 2002, which found that:[8]

> *"….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".* (Our emphasis added)

The introduction of creeping acquisitions provisions in Australia's competition laws is likely to increase burdens for business and the merger control process (including regulators and courts). Both options involve a lowering of the threshold of the type of mergers which could be captured by the new provisions. Lower thresholds would mean that businesses would feel compelled to lodge an increased number of clearance notifications which could result in an administrative problem.

A 'backlog' of merger approvals was experienced in 1977 in the context of mergers being assessed against a market dominance test, rather than the test of substantial lessening of competition. When the substantial lessening of competition test was introduced, the 'backlog' was also reduced.[9] By introducing a creeping acquisitions

[7] Dawson Committee report, Chapter 2, Mergers
[8] Dawson Committee report, Chapter 2, Mergers
[9] Dawson Committee report, Chapter 2, Mergers

test of the type outlined in either option one or two, the BCA considers that a similar 'backlog' would be likely to occur, with market participants notifying transactions which do not raise competition issues, in order to obtain regulatory certainty. This would have the consequent effect of effecting delays on transactions and imposing unnecessary additional burdens on ACCC resources.

4. The proposals must have a net benefit for the community

A key feature of good regulatory process is to determine whether new regulations have, overall, a net benefit for the community. In its submission to the first creeping acquisitions discussion paper, the BCA suggested that an economic assessment and cost benefit analysis be undertaken of the impact of the proposed changes.

It does not appear that such an assessment of the reform proposals has been conducted. Indeed, the only assessment of costs contained in the second creeping acquisitions paper was a single paragraph as follows:

> *"While the mandatory notification of acquisitions by declared corporations or by corporations in declared product/service sectors may increase regulatory burdens on business and the ACCC, it may serve to resolve information asymmetries and increase transparency regarding the practical impact of creeping acquisitions, through the use of a public process by the ACCC."*

The BCA agrees with the statements of Law Council in its submission to this second discussion paper:

> *"We believe that the reform proposals will do substantially more harm than good, both legally and economically. In particular, the proposed changes will effectively create inefficient and anti-competitive market share caps, to the detriment of businesses (whether large or small), consumers and the Australian economy."*[10]

Economic burdens on business and the economy

It is likely that amendments to the TPA to deal with creeping acquisitions by effectively imposing a 'market cap' on business will have significant, unintended negative consequences for the business climate in Australia.

For example, one BCA member explains below how such proposals can have a detrimental effect on the economy and consumers.

[10] Paragraph 2.8 on page 3 of the Law Council submission, 12 June 2009

Economic burdens from creeping acquisitions proposals

….common pro-competitive benefits of acquisitions, include productive, allocative and dynamic efficiencies such as economies of scale or scope, improved resource allocation, better management, and innovation.

Recent circumstances in our sector provide examples of how such benefits can arise:

1. *Consumers benefit from companies having scale given the increasing global nature of our sector. Scale impacts on our credit rating and therefore ability to access global funding markets and the premium paid for those funds. Restricting inorganic growth could potentially lead to downgraded ratings and increased funding costs, which in turn impacts consumers' pricing …..*
2. *The ability for large businesses to acquire small businesses is important in times of financial turmoil. The acquisition of financially stressed smaller players by larger entities assists in maintaining the stability of the industry, limits the potential need for public intervention, and lessens the impact on consumers.*

There is a substantial risk that the proposed models would create a disincentive, or an outright prohibition in some circumstances, for entities to undertake acquisitions and therefore hinder the achievement of these pro-competitive benefits.

International competitiveness

Creeping acquisitions proposals such as those outlined in the second discussion paper will result in Australia's merger control laws being significantly out of step with the competition laws of other countries.

Currently, 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 amend competition laws to address issues in specific sectors can have economy-wide implications for Australia. The proposal to eliminate an internationally recognised 'substantial lessening of competition' test has the potential to have major implications for our competitiveness and attractiveness as a place for investment and growth. The association states the following:[11]

> *"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 ACCC may face significant difficulty in delineating and applying a workable set of rules aimed solely at the anticompetitive risks of creeping acquisitions. The Sections also note that the U.S. and EC competition authorities have not fashioned rules to evaluate different forms of*

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

transactions, but have articulated one broadly applicable set of merger guidelines that govern the legality of all combinations.

Moreover, 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 a signal of the extent to which regulatory changes may impact on the overall business environment and on how Australia is perceived as an investment destination. The comments highlight the importance of taking a considered, cautious approach to any regulatory change in the area of creeping acquisitions.