

**Law Council of Australia (Trade Practices Committees):
Introductory Statement to Senate Economics Legislation Committee
Inquiry into Competition and Consumer Legislation Amendment Bill 2010**

- 1 The Trade Practices Committee of the Business Law Section of the Law Council of Australia (“**Committee**”) would like thank the Senate Economics Legislation Committee (“**Senate Committee**”) for inviting us to attend this hearing to discuss its Inquiry into the *Competition and Consumer Legislation Amendment Bill 2010* (“**Bill**”).
- 2 The Committee has made a submission to the Senate Committee which focuses primarily on the proposed amendments to section 50 of the Trade Practices Act 1974 (“**TPA**”), as set out in the Bill.
- 3 The Committee has consistently argued that no convincing case or arguments have been put forward to show that it is necessary to amend section 50 of the TPA to deal with so called “creeping acquisitions”. The current section requires a “substantial lessening of competition” to be proven in relation to “a market in Australia” and is well understood in relation to its operation. The Committee continues to believe that this is the case, and reiterates the views that it has previously articulated in this regard.
- 4 Notwithstanding the Committee’s view that there is no need to amend section 50 of the TPA to account for so-called creeping acquisitions, the Committee considers that the proposed amendments set out in the Bill are far preferable to previous proposals suggested by Treasury as part of its consultation process to deal specifically with creeping acquisitions.
- 5 In particular, the Committee notes that the proposed amendments are largely pragmatic responses to the government’s desire to implement legislative change to account specifically for the possibility of harmful creeping acquisitions, not caught by the current legislation. As such, and taking into account the governmental commitment to amending section 50 of the TPA, the proposed amendments are viewed by the Committee as being least objectionable because they:
 - largely clarify the existing merger law and practice without making substantial and unnecessary amendments to the operation of section 50 of the TPA;
 - retain the economic rationality of the current merger test and are consistent with the existing architecture of the “substantial lessening of competition” test in section 50 and other provisions in Part IV of the TPA.
- 6 However, this is not to say that the Committee does not have concerns that the practical outcome of the proposed amendments will be to provide the ACCC with too broad a discretion to investigate small and economically insignificant ‘micro-markets’. The Committee has reservations that, by removing the requirement that “a market” under section 50 of the TPA be “substantial”, the proposed amendments would result in the ACCC undertaking greater analysis of very small sub-markets, which are not economically distinct and should not form part of the ACCC’s assessment of whether the relevant acquisition is prohibited by section 50 of the TPA. We believe that it is important to note this reservation as it will be very important that the merger control provisions are administered by the ACCC in a manner that is not overly burdensome and remains appropriate.
- 7 Members of the Committee have extensive experience in advising clients in relation to mergers and dealing with merger inquiries conducted by the ACCC. A number of Committee members have been involved in mergers in which the ACCC has examined very small and discrete geographic or product markets, and has raised competition concerns as to the compatibility of the merger with section 50 of the TPA.

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- 8 As such, it is clear that the ACCC already has the ability under section 50 of the TPA to investigate small markets, provided that those markets are economically distinct. We do not share the concerns expressed by some commentators that the ACCC has been insufficiently thorough on merger analysis and in particular in relation to local markets. There is a view that the Commission's current approach is creating too many initial data requests across the range of mergers. However, we expect the ACCC may disagree with us.
 - 9 The Committee considers that the proposed amendments to section 50 of the TPA are unnecessary and will simply result in the ACCC being encouraged to examine the impact of acquisitions on very small, local and 'micro-markets' which may not be economically distinct markets. We have concerns that this will involve "micro management" of mergers, so to speak, in Australia.
 - 10 Nonetheless, we understand the legislative concern and concern from the community that it be clear that the ACCC has powers to investigate and prohibit mergers in sensitive industry sectors. A lot will ride on continued sound administration in this area by the ACCC.
 - 11 Finally, we note that the Committee considers that the proposed changes to the Australian Consumer Law are appropriate, having regard to the benefit of providing further safeguards for consumers. The Committee considers that it is essential that the courts should be free to make their own findings in relation to cases before them. Accordingly, we prefer the approach adopted in the Bill of including a list of interpretive provisions, rather than specifying examples, which could have limiting effects on the courts' interpretation of the law.