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

Mr John Hawkins
Committee Secretary
Senate Standing Committee on Economics
P O Box 6100
Parliament House
Canberra ACT 2600

Dear Mr Hawkins,

Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2009

I have pleasure in enclosing a submission which has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia.

The submission has been endorsed by the Business Law Section. Owing to time constraints, it has not been considered by the Directors of the Law Council of Australia.

Yours sincerely,

Bill Grant
Secretary-General

14 December 2009

Enc.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone **+61 2 6246 3788**
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Trade Practices Committee of the Business Law Section of the Law Council of Australia

Submission to Senate Economics Committee on Trade Practices Amendment (Material Lessening of Competition -Richmond Amendment) Bill 2009

1 Introduction

1.1 The Trade Practices Committee of the Business Law Section of the Law Council of Australia ("**Committee**") provides this submission to the Senate Economics Committee on the *Trade Practices Amendment (Material Lessening of Competition - Richmond Amendment) Bill 2009* ("**Bill**"), referred to the Senate Economics Committee for inquiry on 30 November 2009. The Committee appreciates the opportunity to participate in the current Senate Economics Committee consultation process.

1.2 The Committee believes that the Bill would create a fundamental change to Australia's existing merger control law and take Australia out of step with comparable jurisdictions, including key trading partners in the European Union, United States, Canada and New Zealand.

1.3 The Committee notes that this Bill was referred to the Senate Economics Committee on 30 November 2009 and submissions are due on this consultation process by 18 December 2009. This is quite a limited period for submissions for such an important area of competition law. Additionally, the Committee is also aware of two Senate or Government competition law reviews with submissions due by that date. The Committee considers that that these areas of competition law are important for the overall economy and that the Treasury consultation process and time period in relation to its creeping acquisitions reforms allowed more extensive and meaningful consultation, which, in turn, facilitates a better law reform process. While the Senate Economics Committee process may be different, the Committee notes the limited time period for a review of a reform which could have important implications for the Australian economy.

2 Executive Summary

2.1 The Bill proposes two fundamental changes to the merger provisions set out in section 50 of the *Trade Practices Act* 1974 (Cth) ("**TPA**"). The Committee's strong submission is that there is no legal or economic justification for the proposed amendment to section 50(1) of the TPA, or the introduction of a new section 50(1A) of the TPA. In the Committee's view, the existing "*substantial lessening of competition*" threshold in section 50(1) of the TPA is consistent with international best practice, and is a well understood test that is reflected in the competition regimes of comparable jurisdictions, including the United States, United Kingdom, European Union, Canada and New Zealand.

2.2 The existing section 50(1) provides the Australian Competition and Consumer Commission ("**ACCC**") with sufficient flexibility to assess and, where necessary, oppose, acquisitions in order to ensure that Australia's economy remains competitive across all sectors. When assessing the impact of a merger, the ACCC has regard to a wide range of factors, including those set out in section 50(3) of the TPA. Where a merger would be likely to result in a "*substantial lessening of competition*" (that is, a lessening of competition that is quantifiable and may be 'considerable', or 'big', to 'not merely nominal' depending on the precise context), the ACCC can oppose it, or seek remedies through the courts in the case of a completed transaction. The existing merger regime therefore 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 test 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.

2.3 Similarly, the Committee strongly submits that the proposed introduction of a specific creeping acquisitions test to account for small scale acquisitions is unnecessary. The existing merger control framework provides sufficient flexibility to enable small scale mergers to be assessed in a thorough fashion and, where they may lead to a substantial lessening of competition, to be opposed by the ACCC. Comparable jurisdictions in which the merger threshold test is "*a substantial lessening of competition*" have also been able to oppose small scale acquisitions by large competitors, including in the grocery sector.

2.4 The proposed reform in this Bill would be based around an uncertain concept that would create considerable uncertainty in the business community. It is not clear what a "*substantial share of a market*" would be, and in certain instances, it may be relatively small, thereby prohibiting dynamic competition from taking place and, indeed, having consequences that were unintended by the drafters of the Bill.

2.5 The reform proposals are also likely to have the effect of introducing a market share cap and discouraging investment in Australia, to the detriment of competition and, ultimately, Australian consumers.

3 Replacement of Existing "Substantial Lessening of Competition" Test

Background

3.1 The Bill proposes to replace the existing language of section 50(1) of the TPA with a test that would prohibit a corporation from directly or indirectly acquiring shares or assets that would have the effect, or be likely to have the effect, "*of **materially** lessening competition in a market*" (emphasis added).

3.2 The existing merger threshold in section 50(1) of the TPA prohibits acquisitions that would have the effect, or be likely to have the effect "*of **substantially** lessening competition*" (emphasis added).

3.3 The Explanatory Memorandum to the Bill states that the current threshold is "*too high*" and that "*as a result a number of controversial mergers have recently been approved*". No evidence is put forward for this statement except reference to 'a number of mergers'. No evidence is put forward that the merger assessments in those matters were incorrect from a competition perspective at the relevant time, or whether the proposed merger test would lead to any different result. Indeed, it is simply stated in the Explanatory Memorandum to the Bill that:

> "*...a 'material' lessening of competition test would lower the threshold for determining whether a merger or acquisition is anti-competitive and would allow the merger or acquisition to be tested by reference to whether it has a pronounced or noticeably adverse affect [sic.] on competition, rather than on whether the merged entity would be able to exercise substantial market power post-merger, as is currently the case.*"

The Committee believes that it is important to consider whether a decrease of the threshold as proposed by this Bill is in fact good for competition and the economy in general. We now put forward many reasons why it is not good for competition in the Committee's view.

The basis of the proposals is flawed

3.4 The Committee does not agree with the contention of the Bill's sponsors that the current "*substantial lessening of competition*" threshold is "*too high*". This threshold is consistent with the merger tests in comparable jurisdictions, including the United States, United Kingdom, European Union, New Zealand and Canada. Accordingly, the threshold has a globally understood meaning which encourages convergence across jurisdictions to the benefit of the Australian economy and consumers in a globalised market.

3.5 The term "*substantial lessening of competition*" is evaluative, and can be used flexibly to address individual mergers in an appropriate manner. For example, French J has stated that

> "*...the phrase sets a standard for judicial intervention... it requires, before intervention can be invoked, that there be a purpose, effect or likely effect of the impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process*"[1].

3.6 Similarly, with regard to the term "*substantial*", its meaning is flexible and can range from 'considerable', or 'big', to 'not merely nominal' depending on the precise context[2].

Existing merger control test and process is appropriate

3.7 The Committee considers that the existing language of section 50(1) of the TPA is sufficiently flexible to permit the ACCC to conduct thorough and correct merger analysis, and to seek to prohibit any acquisition which may substantially lessen competition in a market.

3.8 For example, most recently, the ACCC announced that it would oppose the proposed acquisition of Mobil Australia by Caltex, because of the "*likely effect of the proposed acquisition on local market competition for the supply of petrol, diesel and automotive LPG, as well as broader concerns about the effect of the acquisition on the stability and effectiveness of coordination between the major fuel retailers in determining petrol prices*"[3]. The ACCC assessed the merger in relation to national petroleum and LPG markets, as well as 302 local markets, and determined that the ongoing competition from rival petrol retailers would not overcome any potential substantial lessening of competition. Accordingly, the ACCC is able to undertake a robust and detailed examination of mergers and oppose those transactions that may detrimentally impact competition in a meaningful manner.

3.9 In addition, the ACCC also announced its opposition to the proposed acquisition of ITC Timber Pty Limited by Gunns Limited[4]. Following negotiations with the ACCC, Gunns proposed extensive revisions to the structure of the proposed acquisition, which addressed the concerns raised by the ACCC by enabling a key competitor (SmartFibre) to remain an independent competitor to Gunns in the acquisition of pulpwood, thereby seeking to ensure that Tasmanian farmers and plantation owners continue to receive competitive prices for the pulpwood they supply[5]. This merger review also demonstrates that the ACCC can and will successfully oppose anti-competitive mergers under the existing merger regime, while simultaneously being flexible in allowing what it considers to be the non-problematic elements of mergers to proceed, by ensuring any competition concerns are addressed.

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[1] *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* [2000] FCA 38.

[2] In *Rural Press Ltd v ACCC* [2002] FCAFC 213, the court referred to the proper construction of the term "*substantial*" as being the subject of "*inconclusive debate*".

[3] ACCC media release in relation to Caltex/Mobil, 2 December 2009.

[4] ACCC media release NR 290/09, 25 November 2009.

[5] ACCC media release NR 295/09, 27 November 2009.

3.10 The process under which the ACCC currently reviews mergers is multifaceted and focuses on the impact of the individual acquisition on the competitive landscape in each market in which the parties operate. The Australian approach is consistent with global best practice, including with International Competition Network guidance[6]. As such, the ACCC does not focus solely on *"whether the merged entity would be able to exercise substantial market power post-merger"*[7]. Rather, the ACCC undertakes a complex review of each merger notified to, or investigated by, it with a view to determining whether that particular transaction would, or would be likely to, lead to a substantial lessening of competition. A well functioning competitive market will necessarily result in certain competitors winning market share at the expense of others. The essential role of merger control is to assess whether sufficient competitive constraints will remain post-merger. If sufficient competitive constraints will remain, then the acquisition will, by definition, not be likely to result in a substantial lessening of competition.

3.11 In order to reach a decision, the ACCC will examine those factors set out in section 50(3) of the TPA. These factors reflect merger review criteria and factors which are common throughout comparable jurisdictions. In evaluating these factors, the ACCC will have regard to its 2008 Merger Guidelines[8], which provide further detailed guidance on the matters that must be assessed in order to determine whether or not a merger would result in a substantial lessening of competition. In combination, the relevant merger factors under section 50(3) of the TPA and the 2008 Merger Guidelines, provide a robust analytical framework for the assessment of the competitive impact of mergers.

The proposed new merger test would undermine existing provisions of Part IV of the TPA

3.12 By introducing the proposed new merger test, section 50 of the TPA would no longer be consistent with the language of other key competition provisions in the TPA, such as sections 45 and 47. These sections refer to behaviour that is prohibited if it would result in *"a substantial lessening of competition"*. The contrast between the proposed new merger test and the existing antitrust prohibitions would likely lead to uncertainty in the legal and business community, and may undermine the existing analysis of a number of pro-competitive structures which currently comply with the existing provisions in Part IV of the TPA.

3.13 The proposed new merger test would have unintended consequences for those provisions of Part IV of the TPA which currently refer to *"a substantial lessening of competition"*. The introduction of unnecessary uncertainty to, and possible loss of confidence in, Australia's competition law regime would not be to the benefit of the economy and Australian consumers. The Committee considers, therefore, that the likely consequences of the proposed reform have not been sufficiently thought through.

The proposed Bill would have significant consequences for Australia's economy

3.14 Merger control under section 50 of the TPA is a settled and well administered area of law. Over the past 5 years, the ACCC has developed a relatively efficient process for assessing mergers under section 50 of the TPA, and its new 2008 Merger Guidelines assist that process. Most businesses and advisers have gained confidence in the transparency, consistency and predictability of the existing merger review process, which has, in turn, promoted economic efficiency and enhanced the performance and growth of the Australian economy as a whole by facilitating investment through acquisitions.

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[6] ICN Recommended Practices for Merger Analysis, available online at: http://www.internationalcompetitionnetwork.org/index.php/en/working-groups/mergers.

[7] Explanatory Memorandum.

[8] 2008 Merger Guidelines, November 2008.

3.15 Introducing significant changes to the existing general merger review law, therefore, poses a substantial risk, especially in the current fragile global economic climate. The proposal to introduce a change to the existing well-understood merger control test in order to seek to make prohibition of mergers more likely raises a significant risk of unintended consequences which are both difficult to predict and mitigate. The Committee believes that the proposed changes would greatly undermine the current business confidence in Australian merger control.

Conclusion

3.16 For the reasons outlined above, the Committee does not consider that there is sufficient legal or economic justification to support the proposed replacement of a "*substantial lessening of competition*" test with a "*material lessening of competition*" test.

4 The Bill's Formulation of a 'Creeping Acquisitions' Test

Background

4.1 The second aspect of the Bill is the proposed introduction of a new section 50(1A) of the TPA. This amendment would prohibit an acquisition by a "*corporation that has a substantial share of a market...if the acquisition would have the effect, or be likely to have the effect, of lessening competition in a market*".

4.2 The possibility of amending section 50 of the TPA to account for so called 'creeping acquisitions' has received a high degree of consideration since the publication by the Government on 1 September 2008 of a discussion paper, which set out two options for creeping acquisitions reform ("**First Discussion Paper**")[9]. A second discussion paper published by the Government on 6 May 2009 ("**Second Discussion Paper**") refined the initial proposals, and proposed an option which is very similar to that set out in the Bill[10]. The option set out in the Second Discussion Paper sought to prohibit a corporation with "*a substantial degree of market power*" (rather than "*a substantial market share*") acquiring shares or assets where that acquisition "*would have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market*" (rather than where the acquisition would lead to any "*lessening of competition in a market*").

4.3 While the wording of the proposals set out in the Second Discussion Paper and the Bill vary slightly, the Committee is of the view that the substantive impact of either amendment would be very similar. In particular, the changes would impose a *de facto* market share cap on corporations and prevent successful corporations from increasing their efficiency through acquisitions, because any acquisition of a competitor in a market would, by definition, create a "*lessening of competition*" (at least in the short term), and therefore face prohibition under the terms of the Bill. The proposals set out in the Bill would have the same deficiencies as those identified by the Committee in its submission to Government in relation to the Second Discussion Paper, which would prevent an acquisition if it 'enhanced' a corporation's market power.

4.4 The proposals in the Bill however, suffer from the additional problematic issues that the proceed on the basis of "*market share*", a test that is not, in isolation, a good indicator of competitive dynamics in a market. The Committee therefore considers that it is a much worse approach from a technical legal and economic perspective.

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[9] Commonwealth Treasury Discussion Paper - Creeping Acquisitions, 1 September 2008.
[10] Commonwealth Treasury Discussion Paper - Creeping Acquisitions, the Way Forward, 6 May 2009.

4.5 The Committee has previously made submissions to the Government in response to its Discussion Papers. A number of the points made in those submissions are relevant in relation to the proposals set out in the Bill. Accordingly, the Committee sets out a summary below of its concerns with the proposed creeping acquisitions reform in the Bill, and has attached its previous submissions in relation to the issue of creeping acquisitions reform to this submission as **Attachments 1-3**.

Summary - the Committee does not support the proposed creeping acquisition reform

4.6 The Committee reiterates the views articulated in its response to the Government's First and Second Discussion Papers that no convincing case or arguments have been put forward to show that it is necessary to amend section 50 of the TPA, which currently requires a "*substantial lessening of competition*" to be proven, in the manner of the proposed new section 50(1A) of the TPA outlined in the Bill.

4.7 In particular, the Committee's view is that section 50 is not deficient in the face of creeping acquisitions and does not require fundamental amendment to account for small-scale acquisitions by corporations with "*substantial market power*".

No requirement for any reform

4.8 As noted above, the Committee considers that the current "*substantial lessening of competition*" test in section 50 of the TPA is a highly flexible one which already gives the ACCC (and the courts) the ability to take into account a wide range of factors that are relevant to the likely effect of a particular transaction on competition in a market. This view is reinforced by recent ACCC decisions and investigations which indicate that the ACCC is willing to apply the relevant provisions of the TPA to acquisitions of small assets and undeveloped retail sites, further indicating that the concerns relating to creeping acquisitions which are driving the proposal set out in the Bill are not reflected in the ACCC's current practices. In any event, the ACCC currently has a number of avenues open to it to challenge the type of transaction that the Bill (and accompanying Explanatory Memorandum) suggests cannot adequately be dealt with when administering the relevant merger provisions. To choose to introduce somewhat radical legislative amendments when the ACCC has not been unsuccessful in seeking to prohibit a 'creeping acquisition' is premature and unwarranted, particularly given that overseas regulators in comparable jurisdictions have successfully opposed acquisitions of small grocery stores by larger competitors[11].

Proposed reform would undermine competition

4.9 The proposed reform set out in the Bill is predicated on the basis that a corporation with "*a substantial market share*" could not make acquisitions which lessened competition in any way. The reliance on "*a substantial market share*" would create considerable uncertainty as to the meaning of the phrase. It would likely result in a lack of clarity as to when competitors would have "*a substantial market share*". The term "*substantial market share*" does not have an existing legal meaning. This flexibility may result in corporations with relatively small market shares in a market from being prohibited from making further acquisitions. For example, any participant with a market share of approximately (and, in certain cases, less

[11] For example, in the UK, as well as in Australia, acquisitions of individual supermarkets or development sites have been reviewed by the competition authorities on the basis of a *substantial lessening of competition* test, rather than separate creeping acquisitions provisions, and, in at least three cases, prohibited or opposed (Acquisition of a Co-op store in Slough by Tesco, Competition Commission Enquiry Homepage: http://www.competition-commission.org.uk/inquiries/ref2007/tesco/index.htm. In Australia, see ACCC decision in *Woolworths/Karabah* and the ACCC's Statements of Issues in *Woolworths/Wallaroo* (2008)).

than) 20%[12] may be likely to be considered to have "*a substantial market share*" and thereby be unable to make any efficiency enhancing acquisitions. This approach would run a significant risk of stagnating competition in a number of sectors, by preventing efficiencies from being realised and inefficient competitors from exiting the market. By encouraging stagnation and inefficiency, Australian businesses and consumers would be disadvantaged as compared to their international competitors, to the overall detriment of the economy.

4.10 Indeed, the "*substantial market share*" could, depending on the relevant market and the nature of other competitors, even be as low as approximately 10%. In the grocery industry, for example, the Bill could lead to a result that Aldi, IGA, Franklins, Foodworks and even SupaBarn could be prevented from making acquisitions in some local markets. As such, the Bill may lead to significant unintended consequences if it passes into law.

4.11 Additionally, the reliance on "*a substantial market share*" as an indicator of competitive strength does not take account of the dynamic nature of competition across a range of sectors where market share may not provide a good indicator of relative competitive strength. For example, in bidding markets (e.g. construction of large scale projects), a competitor may have a large market share in January, but be overtaken by one or more competitors in February if those competitors win new tenders.

4.12 Accordingly, the proposed reform is not consistent with the underlying policy principles of the TPA, which are to enhance and encourage competition to the benefit of Australian consumers and to allow a dynamic consideration of mergers. The proposal would fundamentally alter the existing approach to mergers, which treats each acquisition on its merits based upon the impact of **that** acquisition on the level of competition in a particular market, and which does not result in the outright prohibition of acquisitions on the basis of a corporation's existing share in a market.

4.13 The creeping acquisitions proposal may also result in inconsistent application across all industries and corporations and amount to a *de facto* market share cap, to the ultimate detriment of competition and, therefore, Australian consumers.

4.14 An option which prohibits acquisitions of **any** shares or assets, by **any** corporation which possesses a substantial share of a market, is too broad and sweeping a reform and, importantly, does not address the original concern of a 'creeping acquisition' strategy. Moreover, as set out above, it is not clear what a "*substantial share of a market*" would be in each case, which would necessarily lead to substantial uncertainty in the business community, and ultimately undermine confidence in Australia's economy by discouraging new or further investment by successful corporations.

Proposed reform would undermine Australia's existing merger control regime

4.15 The Committee is concerned that the proposal outlined in the Bill would result in Australia's merger control legislation being significantly out of step with international best practice and with merger control regimes in other leading jurisdictions, including the United States and European Union. It would also lead to an additional merger test to that contained in section 50 with a resultant increase in potentially burdensome and uncertain regulation. Caution will be required with such legislation given the fact that, with its relatively small population, Australia tends to have concentrated industries as a result of suppliers seeking necessary economies of scale. Without such economies of scale, suppliers would likely have higher cost structures which would make them less competitive, with the consequent potential for higher

[12] In line with existing case law, it may be possible for a firm to have a substantial degree of market power in a market even where its market share is quite low, as noted in the Committee's first submission, p.15. 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.

prices of goods and/or services. In the Committee's view, it is highly undesirable for Australia to consider diverging so significantly from international best practice in merger control by implementing unique provisions to account for concerns regarding creeping acquisitions.

4.16 The law should not discourage firms from investing, innovating and enhancing the quality and efficiency of their products and services. In order to do so, firms will, in many cases, require the acquisition of assets or shares in order to enable corporations to compete more effectively in a globalised market place and to provide Australian consumers with increased choices and lower prices. By introducing a creeping acquisitions reform as set out in the Bill, Australian businesses would likely be disadvantaged in their ability to compete globally, to the detriment of the Australian economy and consumers.

Conclusion

4.17 The Committee is concerned that the merger provisions of the TPA are proposed to be changed in a fundamental way, notwithstanding an absence of compelling evidence indicating that the existing legislation is in any way deficient. The arguments put forward by advocates of a creeping acquisitions reform[13] in relation to this issue to date are not, in the Committee's view, persuasive.

4.18 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.

4.19 As noted above, the Committee has attached its previous submissions to the Treasury in relation to proposed creeping acquisition reforms. The points raised in those submissions are relevant to the amendment proposed in the Bill. In particular, the Committee would draw the Senate Economics Committee's attention to the following elements of the attachments:

(a) **Attachment 1** - submission in response to First Discussion Paper, dated 15 October 2008:

(i) Section 1 - Summary

(ii) Section 2 - Creeping Acquisitions Identifying the Issue

(iii) Section 4 - The Substantial Market Power Model

(b) **Attachment 2** - submission in response to Second Discussion Paper, dated 12 June 2008:

(i) Section 1 - Introduction

(ii) Section 2 - Executive Summary

(iii) Section 4 - Risks Associated with Substantive Legislative Amendments to Existing Australian Merger Control

(iv) Section 5 - Principal Issues that Arise from the Discussion Paper, particularly paragraphs 5.1 - 5.12

[13] See, for example, submissions made to the Treasury's Discussion Papers by the ACCC.

(c) **Attachment 3** - supplementary submission to Treasury in relation to ACCC submission in response to Second Discussion Paper, dated 7 August 2009:

(i) Section 1 - Introduction

(ii) Section 2 - Executive Summary

(iii) Section 3 - Principal Issues Raised by the ACCC Submission

5 Conclusion

5.1 The Bill proposes two fundamental changes to the merger provisions set out in section 50 of the TPA. The Committee's strong submission is that there is no legal or economic justification for the proposed amendment to section 50(1) of the TPA, or the introduction of a new section 50(1A) of the TPA.

5.2 The existing section 50(1) provides a sufficient test for both small and large acquisitions which may substantially lessen competition to be prohibited. Moreover, it is an internationally recognised standard of merger assessment that provides the ACCC with sufficient flexibility to assess and, where necessary, oppose, acquisitions in order to ensure that Australia's economy remains competitive across all sectors. The introduction of an untried and unclear test in place of the existing "*substantial lessening of competition*" threshold would create uncertainty, undermine existing legal practice and discourage investment in Australian business, including by potentially undermining the operation of existing antitrust provisions in the TPA which rely on the "*substantial lessening of competition*" test.

5.3 Similarly, the proposed introduction of a specific creeping acquisitions test to account for small scale acquisitions is unnecessary. The existing merger control framework provides sufficient flexibility to enable small scale mergers to be assessed in a thorough fashion and, where they may lead to a substantial lessening of competition, to be opposed. The proposed reform would be based around an uncertain concept that would create considerable uncertainty in the business community, and does not adequately indicate the actual operation of competition in any market. It is not clear what a "*substantial share of a market*" would be, and in certain instances, it may be relatively small, thereby prohibiting dynamic competition from taking place. The reform proposals would likely have the effect of introducing a market share cap and discouraging investment in Australia, to the detriment of competition and, ultimately, Australian consumers.

December 2009

Attachment 1: Committee Submission in Response to First Discussion Paper, 15 October 2008

Via email: Scott.Rogers@treasury.gov.au

Mr Scott Rogers
The Treasury
Langton Crescent
Parkes ACT 2600

Dear Mr Rogers,

Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]

I hereby have great pleasure in enclosing a submission to the Treasury in regard to the *Trade Practices **(Creeping Acquisitions)** Amendment Bill* 2007 [2008] and I apologise for its lateness.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Owing to time constraints, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

If you have any questions relating to the submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

Yours sincerely,

W Grant

Bill Grant
Secretary-General

15 October 2008

Law Council of Australia
Trade Practices Committee
Business Law Section

Submission on Commonwealth Government Discussion Paper - Creeping Acquisitions

October 2008

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Law Council of Australia
Trade Practices Committee, Business Law Section

Submission on Commonwealth Government Discussion Paper - Creeping Acquisitions

1. Summary

Introduction

This submission has been prepared by the Trade Practices Committee of the Law Council of Australia, Business Law Section (**TP Committee**) in response to the Discussion Paper on creeping acquisitions that was released for public comment by the Treasury of the Commonwealth of Australia on 1 September 2008.

The TP Committee welcomes the opportunity provided by the Treasury to make a submission in response to the Discussion Paper. The TP Committee also appreciates that the Discussion Paper invites submissions on any matter relating to the issue of creeping acquisitions, not just on specific proposals for legislative change.

The TP Committee is aware that the Government has stated its intention to address concerns about creeping acquisitions. Those concerns have been expressed at various times and in various contexts over the past decade or so.

Context of proposed reforms to the merger test

Whilst the TP Committee appreciates the objectives that the Government is aiming to achieve by means of legislative change in this area, the TP Committee considers that claims that there is a "considerable gap in the Act" that needs to be addressed by such changes are controversial and, in the TP Committee's view, overstated.

Most importantly, the current "substantial lessening of competition" test in section 50 of the Trade Practices Act (**Act**) is a highly flexible one which already gives the Commission (and the Courts) the ability to take into account a very wide range of factors that are relevant to the likely effect of a particular transaction on competition. It is far from clear to the TP Committee that there is any need to qualify this flexibility in the manner contemplated by either the aggregation model or the substantial market power model.

Further, the harm to competition that is said to arise from creeping acquisitions has not been clearly articulated. Unless there is a clear articulation of the competition harm the proposed

amendments are intended to address, there is a significant risk that the amendments will not address that harm and will result in unintended and negative implications for competition.

In this context, it is notable that the competition laws in the United States and of the European Union do not recognise the creeping acquisition theory. The proposed reform will put Australian law at odds with those of most other modern economies that have a competition law.

The available evidence suggests that concerns about creeping acquisitions have been raised in relation to only a few sectors of the economy. Even in those sectors, the degree of risk raised by creeping acquisitions to small business and consumers is uncertain and appears to be based more on potential concerns rather than on any adverse effects identified to date.

Accordingly, some caution is appropriate in proposing any particular remedy in this area. Any changes to an important part of the Act that deals with mergers and acquisitions generally will need to avoid unintended consequences that could have negative implications for legitimate acquisitions that improve the efficiency of the Australian economy.

In substance, many of the arguments in support of legislative change in this area appear not to be concerned with measurable effects on future competition, but rather to arise from concerns about the large size of particular firms and from frustration from some sectors that the ACCC has not intervened at an earlier point.

There are limits to how a merger law such as section 50 can fully address those kinds of concerns. The focus of the Act is on preservation of market conditions which promote competition, rather than the size of firms in a market. To change the focus of the merger provisions in the manner behind the apparent underlying objective of the reform proposals risks creating inconsistencies in the various competition tests in the Act.

The TP Committee therefore proposes (below) an alternative model that avoids many of the regulatory and potentially economic risks that arise from the proposals contained in the Discussion Paper.

The Discussion Paper models

The TP Committee believes that both of the reform proposals canvassed in the Discussion Paper are not well targeted to the stated objectives. In particular, the TP Committee considers that:

(a) the **"aggregation model"** is likely to prove to be very uncertain and arbitrary in its operation, as well as difficult to apply in practice. Any such amendment which

creates business uncertainty and creates lack of regulatory predictability should be viewed cautiously; and

(b) the "**substantial market power model**", as outlined in the Discussion Paper, is even more problematic. Moreover, it is likely to have significant unintended industry-wide consequences due to the breadth of the proposed amendments that would be made under this proposal. This proposed amendment to the Act is inconsistent with the current framework of the Act and the subject of strong criticism by the TP Committee as it introduces new concepts with little economic justification and potential unintended competitive consequences.

Another key risk with each of these models, if not carefully refined, is that they are likely to adversely affect many small business owners who are seeking to sell their businesses and who may be faced with a reduced number of potential acquirers for those businesses (as a result of larger businesses being prevented from bidding, as well as being potentially negative for consumers in leading to inefficiencies and lack of consumer choice).

Thus, it is likely that there will be less competitive tension in the market for the sale of those businesses, which will in turn reduce the value of those businesses to their current small business owners.

Further, small business operators may therefore be faced with reduced incentives to expand and develop their businesses in order to maximise the potential attractiveness of those businesses to potential acquirers (on the basis that any such improvements to the business may not result in a materially increased sale price).

2. Creeping acquisitions - identifying the issue

2.1 Identifying the actual concerns with the current law

The concept of "*creeping acquisitions*" generally refers to the acquisitions of a number of individual assets or businesses over time which, individually, are unlikely to contravene the mergers test in the Act, but which, when taken together, may have such an effect. Neither proponents of the amendments to the Act, nor the proposed models, provide any details as to the necessary size of any acquisition which may constitute a "creeping acquisition". The only identifying characteristic is that the acquisition itself does not substantially lessen competition in any market.

Proponents of change to section 50 have argued that section 50 is a "static" legislative instrument which does not adequately address these circumstances. The key issue, according

to this argument, is that section 50 requires an assessment of whether the acquisition in question is, at a particular point in time, likely to lessen competition substantially. As such, this analysis does not focus on a substantive consideration of any prior acquisitions and on the impact on which those acquisitions have cumulatively had on competition in the relevant market.

The TP Committee recognises that these concerns might potentially be thought to arise in several different circumstances:

(a) where an acquirer embarks on a series of acquisitions which individually account for a small market share (for example, individual acquisitions accounting for market shares of 2%, 3%, 4% and 1% respectively); or

(b) where an acquirer embarks on a series of acquisitions across a number of related markets (such as the markets for supply of a particular good or service in adjacent geographic areas).

In each of these cases, each individual acquisition may be unlikely to substantially lessen competition but there may nevertheless be a concern that, in aggregate, the combined effect of these acquisitions is to strengthen the acquirer's market position to the detriment of competition and consumers in those markets.

In June 2003, the previous Chairman of the ACCC, Professor Allan Fels, defined "creeping acquisitions" in the following terms:

> "*The issue of creeping acquisitions arises when bit by bit a business acquires small units of business. A problem arises when no single acquisition will result in a substantial lessening of competition, particularly as the acquisitions are spread out in time and space. ...*
>
> *The issue of creeping acquisitions raises a problem for the ACCC. At what point can or should the ACCC view such a small and often insignificant event in its wider context.*"[1]

In the September 2008 edition of Asialaw, ACCC Chairman Graeme Samuel stated (at page 19) as follows:

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1 Professor Allan Fels, Chairman, ACCC, 18 June 2003, "A Small Business Friendly Trade Practices Act", Speech to the Council of Small Business Organisations of Australia.

"we are concerned about two sets of circumstances. One is where businesses have gradually increased the concentration in the market and their market power through a series of small acquisitions. Each of these acquisitions would not fall foul of section 50 of the TPA because they wouldn't separately cause a substantial lessening.

The other circumstance is where a business has already got a large degree of power in a market. It might have been through acquisitions and then seek to enhance that power through acquiring something small, which on its own might not substantially lessen competition. Both of these are examples of individual acquisitions which are not by themselves substantially anti-competitive but ought to be prohibited if they lessen competition."

2.2 Is there really a problem?

In the TP Committee's view, there are a number of fundamental weaknesses in the contention that changes need to be made to section 50 of the Act in relation to the alleged "problems" caused by creeping acquisitions.

The current test is sufficiently flexible

Most importantly, the current "substantial lessening of competition" test in section 50 of the Act is a highly flexible one which already gives the Commission (and the Courts) the ability to take into account a very wide range of factors that are relevant to the likely effect of a particular transaction on competition.

Aside from the various mandatory factors identified in section 50(3) of the Act, the "substantial lessening of competition" test already allows thorough attention to be given to the dynamics of the relevant market in a manner which focuses on the underlying structure of that market (rather than merely on the market shares of the existing participants in that market).

It also allows for the degree of substantiality that needs to be shown to be determined by those characteristics, rather than by a "one size fits all" approach. In particular, "substantial" does not simply refer to the size of the relevant market in terms of the number of customers, or total sales volume, or total geographic reach, that the merged firm will have post acquisition. Rather it focuses the relevant inquiry on whether the merged firm will enjoy greater freedom in its price and non-price conduct than was previously the case.

Thus, for example, the question of whether an acquisition, by a company that already has, say, a 45% share of the relevant market, of a company that has a 3% share of that market, will be

likely to result in a substantial lessening of competition will depend, to a significant extent, on whether there will continue to be other vigorous and effective competitors in that market post-acquisition, rather than on the mere aggregation of the market shares of the merging firms.

Moreover, the same analysis also applies regardless of the manner in which the merged firm has acquired its final market share - that is, there should be no material difference, for example, between the case of a firm whose market share has increased from 35% to 45% as a result of organic growth (and which then wishes to move to 48% via an acquisition), and the case of a firm whose market share has increased from 35% to 45% as a result of three small acquisitions (and which then wishes to move to 48% via another acquisition).

In each case, the impact that the 45% to 48% acquisition is likely to have on competition will still depend on whether other vigorous and effective competitors will remain in the market, rather than on the manner in which the previous increases in market share have been achieved.

For these reasons, it is far from clear that there is any need to qualify this flexibility in the manner contemplated by either the aggregation model or the substantial market power model. In particular, even under the current section 50 test, it is likely that any transaction that is likely to result in a noticeable loss of competitive tension in the relevant market is likely to be prohibited, regardless of whether that acquisition is the first in a series of acquisitions, or the third, or the last.

There are no practical examples of the alleged problem and no overseas examples of the proposed solutions

Another argument put forward by some proponents of the need for change is that competition has been undermined by creeping acquisitions to the "detriment of consumers". However, no examples are cited and no evidence is put forward for this claim. The ACCC has not identified any so called "creeping acquisition" with which it had concerns by reason of any adverse impacts on competition but which it could not examine or oppose under the existing provisions of section 50[2]. Thus, the idea that there is a gap in the Act to be addressed by this reform is not supported by the ACCC's reported decisions on section 50.

In this context, it must also be seriously questioned whether support for any such change can be found in any international model competition law. Professor Frank Zumbo has called for a

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2 *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, July 2008,* at 421-430 ("*Grocery Report*").

"world's best competition law" in relation to creeping acquisitions[3]. If there is such a "world's best competition law" it most probably would be found in either the laws of the United States or in those of the European Union. Neither jurisdiction recognises the creeping acquisition theory.

In fact, the proposed reform will put Australian law at odds with those of most other modern economies that have a competition law

In the TP Committee's view, therefore, the support for "creeping acquisition" reform has consistently been put at the theoretical or hypothetical level and without solid examples to back it up. After an extensive review of the grocery industry this year, the ACCC concluded creeping acquisitions "*are not currently an issue in the grocery industry*"[4].

The ACCC found that a cumulative assessment of recent acquisitions within the grocery sector "*has not been a significant contributor to any competition problems in the supermarket sector in recent years*"[5].

The ACCC's support for legislative change in the area of creeping acquisitions is based on *potential* concerns that it sees in the grocery sector.

These relate to the need for small competitors in the future to obtain good sites, the broader barriers to entry and expansion arising from economies of scale in wholesaling, the existence of two major chains, and the existence of many small business units that could be acquired one by one or in small groups[6].

The TP Committee submits that these concerns do not present a convincing case for major legislative change across all industry sectors or indeed in the grocery sector itself. In the grocery sector, the ACCC already has powers to block the acquisition of single stores, and is investigating the acquisition of new sites by the major chains and other practices relevant to barriers to entry in that sector.

In other industries, the specific concerns are difficult to pinpoint, either in terms of past acquisitions or more importantly at the current time in respect of any particular company.

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3 Report by the Senate Standing Committee on Economics enquiry into the Trace Practices (Creeping Acquisitions) Amendment Bill 2007 [2008] at 6.

4 *Grocery Report*, supra, at 421.

5 *Grocery Report*, supra, at 427.

6 *Grocery Report*, supra, at 430.

The ACCC Grocery Report also notes that in recent years, both Aldi and the independent supermarkets have matched the growth of the chains[7]. The TP Committee submits that if other competitors in a market demonstrate the ability to continue to grow and expand, it is very difficult to see a case for legislative intervention, or to see how any creeping acquisition strategy could actually generate anti-competitive effects. If smaller competitors continue to expand, any "creeping acquisition" strategy is likely to have only marginal and short term impact.

Parallels with sections 45 and 47?

The ACCC also notes in its Grocery Report that sections 45 and 47 of the Act (but not section 50) allow multiple transactions engaged in by a person to be aggregated when considering the competitive impact of their conduct (s45(4), s47(10)),[8] - that is, one transaction is "deemed" to have an effect of substantially lessening competition if it would have that effect when aggregated with another transaction involving that person.

However, it should also be noted that these deeming provisions only apply to conduct that occurs in a common temporal timeframe and in a market which is common to all the transactions - that is, transactions that occur at different timeframes or in separate markets are not able to be aggregated under these provisions.

The TP Committee therefore submits that there are significant differences of scope between existing aggregation provisions under section 45 and section 47 and the suggested aggregation model for section 50.

3. The proposed "aggregation model" for section 50

3.1 The proposed model

The Discussion Paper describes the "aggregation model" in the following terms:

> *"The "aggregation model" would involve a corporation being prohibited from making an acquisition if, when combined with acquisitions made by the corporation within a specified period, the acquisition would be likely to substantially lessen competition in a market."*

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7 *Grocery Report*, supra, at 428.

8 *Grocery Report*, supra, at 427.

The TP Committee notes that the amendments proposed by Senator Fielding in 2007, which essentially adopt this model, provided for the relevant "specified period" to be six years, and that subsequent amendments proposed by former Senator Andrew Murray, which also adopt this model, propose that the relevant period be five years.

The TP Committee notes that the description of the aggregation model contained in the Discussion Paper appears to contemplate that any amendment based on this model would have the effect of prohibiting only the acquisition that is currently under consideration, and not the prior acquisitions.

Any amendments that may be made to implement the aggregation model should only operate in this way, rather than retrospectively prohibiting other acquisitions that have already occurred.

3.2 The substantial lessening of competition test in section 50.

The phrase "substantial lessening of competition", as used in section 50, also appears in a number of the other provisions of Part IV of the Act and is to be interpreted consistently across all of them.

The "substantial lessening of competition" test focuses on the likely future structure in the relevant market on a "future with" and "future without" basis.

In applying this test, it is necessary to ask what would happen to competitive rivalry in the future "with" the acquisition (the factual), and what is likely to happen to the process of competitive rivalry in the future "without" the acquisition (that is the counter-factual).

In many cases, there are a number of counterfactuals which will need to be considered in order to determine whether proposed conduct will have, or be likely to have, the proscribed effect. However, each of these counterfactuals must have some real commercial basis, rather than be merely a hypothetical possibility.

This is essentially (and necessarily) a forward-looking test.

In the context of the phrase "substantial lessening of competition", the High Court has stated[9] that the concept of a *substantial* lessening of competition is an evaluative one. In particular:

> "*The effect on competition must be meaningful or relevant to the competitive process.*"

What is critical is the impact on the competitive process in the market at hand, rather than the possession of market share as such. This, in turn, requires that the lessening of competition be real, or of substance[10].

3.3 Key difficulties with the aggregation model

Whilst the TP Committee also welcomes the retention of the concept of "substantially lessening competition" in this model, the TP Committee nevertheless considers that there are likely to be a number of considerable difficulties with the implementation of this model in practice.

Difficulty 1: the aggregation model is directed at a specific market

First, one could only aggregate the impact on competition arising from a series of acquisitions if they were all made in the same market or in related or adjacent markets.

Acquisitions of different businesses operating in unrelated markets will not cumulatively add to the market power of the acquirer. This is because market power is a relative concept that must relate to a particular "market".

The ACCC analyses many retail acquisitions by reference to local markets and by analysing the impacts in a wholesale supply market.

In those cases, two or more acquisitions made by one firm are usually in separate retail markets. In those cases, there is usually no cumulative effect on competition in the various retail markets. Furthermore, the impacts of small acquisitions in wholesale markets are usually found to be insignificant because of the large scale of the wholesale market. This is unlikely to change even if a handful of small acquisitions were aggregated.

Difficulty 2: the model requires extensive hypothesising about the past

Secondly, and regardless of the way in which the relevant time period is to be determined, the aggregation model, as proposed in the Discussion Paper, is also likely to be very difficult for the ACCC (or anyone else) to apply to any particular specific proposed transaction.

This is because, conceptually, it is unclear how the counterfactual analysis would operate in such circumstances.

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9 *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53.

10 Explanatory Memorandum to the *Trade Practices Legislation Amendment Act* 1992.

In particular, it appears to the TP Committee that there is an inherent conceptual difficulty in applying the "substantial lessening of competition" test, which (as discussed above) is a forward-looking "future with and without" test to acquisitions that have already occurred - that is, to acquisitions in respect of which the "future without" is necessarily now unable to occur. In effect, this test would require the hypothetical "unwinding" of those earlier acquisitions in order to arrive at a counterfactual that is divorced from the market reality.

Further, such an approach may also necessitate the hypothetical "unwinding" of other developments that have occurred in the relevant market over that period in circumstances where those other market developments may or may not have been affected by the previous acquisition.

In this respect, there is no economic theory or methodology known to the TP Committee which allows for an objective analysis of a hypothetical market situation in which various acquisitions over the past 5-6 years are assumed "not to have occurred".

One would have to make a series of difficult hypothetical assumptions as to what would have been the current and future position of each of the businesses (that were acquired in the prior "look back" period) if they had *not* been acquired.

Further , revisiting prior acquisitions in order to assess whether the current acquisition is likely to substantially lessen competition requires assessing those prior acquisitions:

- *on the basis of a possibly different or evolving market definition,* given that market boundaries and consumer trends may change over time. In some recognised cases, markets that were defined 5 years ago on a localised or state basis are now regarded as national because of changes in technology or distribution[11]. It is both legitimate and open to the ACCC to take a new approach to market definition if circumstances change, compared to the position it adopted with respect to previous acquisitions; and
- *on the basis of different dynamics of competition,* given that the structure and functioning of markets will also change over time.

Moreover, as the aggregation model would also effectively impose a requirement to undertake a counterfactual analysis of each of the relevant previous transactions, it will also carry a

[11] For example, see the ACCC's recent decision on state versus nationally based banking and financial services markets discussed in the *Westpac/St George* proposal (2008).

significant risk that the overall significance of particular events that forms part of those counterfactuals will be greatly overstated.

Thus, it is likely to be very difficult to conclude, under the aggregation model, that the probability of a particular counterfactual occurring, or a particular event occurring, is high enough to support a conclusion that the overall competitive outcome that would result from the occurrence of that event or counterfactual is one which has a "real chance" of occurring and is therefore relevant for the purposes of the substantial lessening of competition test.

For these reasons, the TP Committee submits that the retrospective application of a "substantial lessening of competition" test is not only likely to be extremely difficult and highly uncertain but is also unlikely to product any meaningful analytical outcomes that rise above the level of mere speculation.

This is inappropriate for a law such as section 50 which needs to be capable of effective implementation within the context of a limited timeframe for a relevant acquisition, and which also carries large penalties for breach. In the TP Committee's view, there is a very real risk that any amendments to the Act which undermine certainty will stifle legitimate and, in many cases, pro-competitive investment in Australian industries.

If notwithstanding the issues identified above, it is considered necessary to introduce an aggregation model, the TP Committee suggests that at best the model may only be workable if the "look back" period is relatively short (ie no more than 2 years).

Difficulty 3: the "specified period" contemplated by the model will necessarily be either arbitrary or uncertain

The TP Committee notes that the Discussion Paper simply states that the aggregation model would be applied to a combination of acquisitions made by the relevant firm "within a specified period", but does not include any particular proposals about what the length of that "specified period" should be.

The TP Committee also notes that one possible alternative approach to this issue would be to adopt the approach taken in the European Union's EU Merger Regulation, which provides that a series of transactions in securities which occur "within a reasonably short period of time" are treated as a single transaction.

Whilst the precise meaning of the phrase "reasonably short period of time" remains somewhat unclear, various commentators have noted that this requirement should be interpreted in the

context of the general purpose of the EU Merger Regulation, which is to assess mergers and acquisitions from an economic viewpoint, rather than a formalistic one[12].

Further, it might also be possible to give some more definite content to the phrase "a reasonably short period of time" by specifying the matters to which a court must have regard in determining whether the period of time that the ACCC proposes to adopt for the purposes of this assessment is a reasonable one.

The most important of these matters would be the extent to which the boundaries of the relevant markets, and the structure and functioning of the relevant markets, has changed over time, thereby ensuring that the only relevant previous acquisitions would be those acquisitions that the firm has undertaken under current market conditions, rather than those acquisitions which have occurred in a different competitive environment.

That said, the TP Committee also submits that the adoption of a less well defined test for identifying the appropriate "specified period", rather than a specified number of years, has the potential to create considerable uncertainty in the application of the relevant statutory test.

Accordingly, and if the Government decides to proceed with the aggregation proposal, the TP Committee considers that, on balance:

(a) it would be preferable, in the interests of regulatory certainty, that a particular definite period be specified in the aggregation model; and

(b) as suggested above, the specified period should be of quite a short duration (such as 2 years), in order to ensure that the aggregation model only applies in the context of current and recent market conditions and the current and recent competitive environment.

However, the TP Committee also considers that the arbitrariness that would inevitably be involved in selecting a particular period of years as the specified period, combined with the uncertainty that would inevitably arise from any other possible approach, simply provides yet another compelling reason why the aggregation model should not be adopted.

4. The "substantial market power model"

As an alternative to the aggregation model, the Discussion Paper also presents an alternative model (**substantial market power model**) under which a corporation would be prohibited

[12] "*The EC Law of Competition*", Faull and Nikpay, paragraph 5.78.

from making an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in *any* lessening (as opposed to a substantial lessening) of competition in that market.

This is contrary to the well established test which is used throughout Part IV of the Act, that only conduct which has the effect or likely effect of substantially lessening competition is prohibited.

It is only conduct that is likely to have such an effect that should be prohibited. Conduct which results in an insignificant lessening of competition and is not likely to be relevant or meaningful to competitive processes and should not be prohibited.

4.1 Substantial market power

The concept of "substantial market power" is currently used in Part IV of the Act only in section 46. "Substantial market power" means:

> "*The ability of a firm to raise prices above the supply cost without rivals taking away customers in due time, supply cost being the minimum cost an efficient firm would incur in producing the product*"[13].

and

> "*Pricing may not be the only aspect of market behaviour that manifests power. Other aspects may be the capacity to withhold supply or to decide the terms and conditions, apart from price under which supply will take place*"[14].

Substantial market power may be exercised (for example, by a buyer of goods) by reducing (as well as by raising) the price payable for particular goods or services.

In the context of the phrase "*substantial* degree of market power", it has been held that:

> "*For a corporation to have a substantial degree of market power it must have a considerable or large degree of such power*"[15].

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[13] *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 188.

[14] *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 423 ("***Boral***").

[15] *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 46.

In this context, the word "substantial" therefore retains a degree of relativity. However, it is clear that the word "substantial" is intended to signify something less than the high degree of market power required by the phrase "in a position substantially to control a market" that appeared in section 46 prior to the abolition of the Dominance Test for misuse of market power under section 46 in 1992.

It is possible for a firm to have a substantial degree of power in a market even where its market share in that market is quite low. For example in the *Safeway* case[16], Safeway was found to have a substantial degree of market power in the wholesale market for the acquisition of bread, even though its share of that market was "*something under 20%, around to 16%*", and even though there were also several other large market participants of comparable size in that market.

Further, the *Safeway* case clearly indicates that, in such a situation, other market participants may at the same time, also have a substantial degree of power in that market.

4.2 How is "substantial market power" assessed under section 46?

Under section 46, to determine whether or not a firm has a substantial degree of power requires a detailed review of its *conduct*. This may involve a review of the firm's conduct over a period of time and require an extensive review of the evidence about the firm's position and behaviour towards its customers, suppliers and competitors[17]. That is:

> "*The assessment of the existence of a substantial degree of power in a market is one of fact. It requires a consideration of all the circumstances*"[18].

Importantly, the concept of market power in section 46 is also not concerned with a "one second snap shot of economic activity":

> "*market power can only be determined by examining what a firm is capable of doing over a reasonable time period...such analysis requires an examination of the business structure and practices of the alleged offender and its competitors, their market shares and the barriers to entry if any into the market*"[19].

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16 *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2001) 119 FCR 1.

17 *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* (2008) FCAFC 141 at [93] ("***Baxter***").

18 *Baxter*, supra, at [108].

19 *Boral*, supra, at 470.

4.3 Key difficulties with the substantial market power model

The TP Committee considers that the "substantial market power model" is an even more unsatisfactory response to the "problem" of creeping acquisitions, for several reasons.

As a preliminary matter, the TP Committee notes that from 1977 to 1993, section 50 only prohibited acquisitions which resulted in, or substantially strengthened, the ability of the relevant firm to dominate the relevant market. As a result of the Cooney Inquiry,[20] however, section 50 was then amended, by the adoption of the current "substantial lessening of competition" test, to make it more closely focused on the actual competitive impact of the proposed acquisition on the market as a whole.

The TP Committee is of the view that implementing the substantial market power model would be inconsistent with the outcome of the Cooney Inquiry and, in many cases, would effectively sweep away the current focus of section 50 on actual anti-competitive effects.

Difficulty 1: the model is too restrictive

The TP Committee submits that the substantial market power model, by prohibiting any acquisition by a firm that has substantial market power that would result in any "lessening of competition" in the same market, is likely to have a major chilling effect on future acquisitions, including acquisitions which, on any analysis, are highly unlikely to be of real anti-competitive concern.

To introduce a standard of any "lessening of competition" for some firms may come close to an absolute prohibition on any acquisitions by those firms in the relevant market. As discussed above, the adjective "substantial" has been interpreted by the Courts to require proof of lasting or significant impacts on competition and to not include those impacts which may be short term in nature or of minor significance.

No other country has adopted a test based on a mere "lessening" of competition (in the sense of the test being triggered by any reduction in competition at all). To develop a new set of rules and presumptions around such a concept will take time and experience. It will therefore create significant uncertainty and cost in that period of evaluation.

Moreover, it is likely that many benign acquisitions will be blocked by a test which is too restrictive in nature.

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[20] Senate Committee on Legal and Constitutional Affairs, *Mergers, Monopolies and Acquisitions - The Adequacy of Existing Legislation Controls.*

The "substantial power" threshold

It is possible for a firm to have a substantial degree of power in a market even though its market share in that market is quite low and even though there are also a number of other significant competitors in that market. On any conventional merger analysis, the existence of two or three other significant competitors means, in practice, that other acquisitions that occur in that market will have very little (if any) impact on competition.

Under the "substantial market power model", however, it is likely that such acquisitions would be prohibited. Further, even where any potential adverse impact on competition is expected to be very low, it is still likely to be very difficult for the merging parties to establish that those impacts are unlikely to exist *at all.*

Thus, the "substantial market power model" will therefore prevent particular acquisitions, even where any increase in the acquirer's market power will be insignificant or transitory. In such circumstances, it is clear that the application of this model will not deliver any benefits for consumers or any efficiency improvements in the economy. Accordingly, it is not at all surprising that no other nation that has well-developed competition laws has adopted a law of general application that prohibits all acquisitions which merely "lessen" competition.

Difficulty 2: Yet the model could be too narrow

The proposed second model, by focusing entirely on any lessening of competition, puts into sharp focus the question whether the acquisition would lead to efficiencies which would outweigh any lessening of competition and would therefore in all likelihood be able to be authorised. This would result in an increased regulatory burden for no objective improvement in competition or net welfare.

At the very least, it would therefore be important to ensure that any amendments that are made to the Act in respect of creeping acquisitions also allow a defence or exception for mergers where the resulting efficiencies would outweigh any lessening of competition.

Difficulty 3: the model would impose a cap on market share

Fourthly, the "substantial market power model" would effectively "cap" the market share of any firm which had a substantial degree of power in a market, save for organic growth. Thus, firms which have achieved a position of substantial market power- even if by superior products, better efficiency or other means - will have growth prospects only by organic means. Any acquisitions of small competitors or small suppliers/customers - no matter how trivial - will be either denied to those firms or made the subject of an uncertain and untested regulatory review.

In 2003 the Dawson TP Committee widely consulted on a review of the Act and rejected proposals to cap a firm's market shares because such "caps":

> "*stifle competition and protect the unsustainable position of inefficient competitors. This view is confirmed by the findings of the Baird TP Committee*[21] *and the submissions of the ACCC that a market cap in the retail sector would be unworkable and would effectively regulate the consumer. In a regional market the operation of a cap would deny consumers access to the products or services offered by an efficient producer*" (p67).

These views remain valid today.

Difficulty 4: the model uses the concept of "substantial market power" inappropriately

Finally, the TP Committee considers that the root of many of these problems with the substantial market power model is that, at present, the concept of substantial market power is used in section 46 only as an initial screen, or filter, for determining whether there is any necessity to then examine whether the conduct on the relevant firm is in breach of the "taking advantage" and "purpose" elements of section 46.

That is, the concept of "substantial market power", as used in section 46, does not operate as the behavioural criteria against which the corporation's conduct is to be judged under that section. The TP Committee submits that the manner in which this concept is proposed to be used in the substantial market power model - namely, as a substitute for a realistic assessment of the competitive effects of the proposed transaction - is totally inconsistent with the current focus of each of the existing provisions of Part IV of the Act on the actual proposed conduct of the firm in question and on the likely impact of that conduct on relevant markets.

5. Another option to address concerns about creeping acquisitions

If the Government nevertheless remains minded to make specific legislative changes in respect of creeping acquisitions, the TP committee suggests that, at most, section 50(3) might be amended to require prior acquisitions by the corporation within a specified period be taken into account when assessing whether or not an acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

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[21] Report by the Joint Select TP Committee on the Retailing Sector (1999), *Fair Market or Market Failure? a review of Australia's retailing sector*, Parliament of the Commonwealth of Australia.

Such an amendment would make it clear that the relevant legal test under which a so-called "creeping acquisition" is to be assessed is no different to the test that applies to other acquisitions, and that each of the other criteria that current apply under section 50(3) will also continue to apply.

Attachment 2: Committee Submission in Response to Second Discussion Paper, 12 June 2009

Law Council
OF AUSTRALIA

Via email: creepingacquistions@treasury.gov.au

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

Dear Sir or Madam,

Creeping Acquisitions – The Way Forward

I have pleasure in enclosing a submission in response to Treasury's discussion paper "Creeping Acquisitions – The Way Forward".

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. The submission has not been reviewed by the Directors of the Law Council of Australia Limited. Please note that the submission was prepared by the Committee prior to receiving information from The Treasury that the new Minister for Competition Policy and Consumer Affairs, Dr Craig Emerson, had extended the period for consultation until 10 July 2009. The Committee will be happy to address any further issues which come to light as a result of this extension.

If you have any questions regarding the submission, in the first instance please contact the Committee Chair, Mr Dave Poddar, on [02] 9296 2281.

Yours faithfully,

Bill Grant
Secretary-General

12 June 2009

Enc.

GPO Box 1989, Canberra, ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

Trade Practices Committee
Business Law Section
Law Council of Australia

Submission to the Commonwealth Treasury in Response to Creeping Acquisitions Discussion Paper

1 Introduction

1.1 The Trade Practices Committee of the Business Law Section of the Law Council of Australia ("**Committee**"), provides this submission to the Commonwealth Government ("**Government**") in response to the second Creeping Acquisitions Discussion Paper, published on 6 May 2009 ("**Discussion Paper**"). The Committee is grateful for the opportunity to participate in the Treasury's consultation process.

1.2 This submission outlines the Committee's views in relation to the Discussion Paper, and addresses concerns that the Committee has in relation to both of the options for reform which have been outlined in the Discussion Paper. Where relevant, the Committee has introduced a series of 'case studies', hypothetical examples which illustrate potential effects of the proposed reforms, and the problematic nature of the reforms.

1.3 Following an examination of issues that each of the options raises, and expressly noting that the Committee's strong belief is that it does not consider that any amendment to the existing merger provisions is necessary to account for creeping acquisitions, this submission proposes two alternative solutions for the Government to consider in the event that it remains resolved to introducing legislative amendments in respect of so called creeping acquisitions.

2 Executive Summary

2.1 The Committee reiterates the views articulated in its response to the Government's first discussion paper of 1 September 2008 (First Discussion Paper)[1] that no convincing case or arguments have been put forward to show that it is necessary to amend section 50 of the *Trade Practices Act 1974 (Cth)* ("**TPA**"), which currently requires a "*substantial lessening of competition*" to be proven, in the manner of either option contemplated by the Discussion Paper.

2.2 In particular, the Committee's view is that section 50 is not deficient in the face of creeping acquisitions and does not require fundamental amendment to account for small-scale acquisitions by corporations with "*substantial market power*". The Committee considers that the current "*substantial lessening of competition*" test in section 50 of the TPA is a highly flexible one which already gives the Australian Competition and Consumer Commission ("**ACCC**") (and

[1] Law Council of Australia Trade Practices Committee, *Submission on Commonwealth Government Discussion Paper - Creeping Acquisitions*, 15 October 2008.

the courts) the ability to take into account a wide range of factors that are relevant to the likely effect of a particular transaction on competition in a market. This view is reinforced by recent ACCC decisions and investigations which indicate that the ACCC is willing to apply the relevant provisions of the TPA to acquisitions of small assets and undeveloped retail sites, further indicating that Government's concerns are not reflected in the ACCC's current practices. In any event, the ACCC currently has a number of avenues open to it to challenge the type of transaction that the Discussion Paper suggests cannot adequately be dealt with when administering the relevant merger provisions. To choose to introduce radical legislative amendments when the ACCC has not been unsuccessful in seeking to prohibit a 'creeping acquisition' is premature and unwarranted, particularly given that overseas regulators in comparable jurisdictions have successfully opposed acquisitions of small grocery stores by larger competitors.

2.3 Neither of the two options raised in the Discussion Paper are *"consistent with the underlying policy principles of the TPA"*. Both options would fundamentally alter the existing approach, which treats each acquisition on its merits based upon the impact of **that** acquisition on the level of competition in a particular market, and which does not result in the outright prohibition of acquisitions on the basis of a corporation's power in a market.

2.4 In contrast, the creeping acquisitions proposal may result in inconsistent application across all industries and corporations and amount to a *de facto* market share cap, to the ultimate detriment of competition and, therefore, consumers.

2.5 An option which prohibits acquisitions of *any* assets (outside of the ordinary course of business[2]), by *any* corporation which possesses substantial market power, is too broad and sweeping a reform and, importantly, does not address the original concern of a "creeping acquisition" strategy.

2.6 Additionally, as noted in the previous submission, the Committee is concerned that the proposals outlined in the Discussion Paper would result in Australia's merger control legislation being significantly out of step with international best practice and with merger control regimes in other leading jurisdictions, including the United States and European Union. It would also lead to an additional merger test to that contained in section 50 with a resultant increase in potentially burdensome and uncertain regulation. Caution will be required with such legislation given the fact that, with its relatively small population, Australia tends to have concentrated industries as a result of suppliers seeking necessary economies of scale. Without such economies of scale, suppliers would likely have higher cost structures which would make them less competitive, with the consequent potential for higher prices of goods and/or services. In the Committee's view, it is highly undesirable for Australia to consider diverging so significantly from international best practice in merger control by implementing unique provisions to account for concerns regarding creeping acquisitions.

[2] See section 4(4)(b) of the TPA.

2.7 The law should encourage firms to invest, innovate and enhance the quality and efficiency of their products and services. To do so will, in many cases, require the 'acquisition of assets' of one kind or another. Such growth, which can be called "organic growth", is not adequately addressed or catered for in the Discussion Paper.

2.8 The Committee is concerned that the merger provisions of the TPA are proposed to be changed in such 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[3]. 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.

2.9 The Committee remains firmly of the view that no amendment to the existing merger provisions is necessary to account for creeping acquisitions. However, should the Government continue to insist on introducing unnecessary reform, the Committee offers two alternative reform models which may be regarded as more appropriate in overcoming the yet untested assertions contained in the Discussion Paper. We only do so noting our strong disagreement with the assertion that any legislative change is necessary.

3 Options Raised by Discussion Paper

3.1 The Discussion Paper sets out two alternative approaches ("**Options**"), both focused on corporations with substantial market power making smaller-scale acquisitions:

(a) **Option 1** - "*A corporation that has a substantial degree of power in a market must not directly or indirectly:*

(i) *acquire shares in the capital of a body corporate; or*

(ii) *acquire any assets of a person;*

if the acquisition would have the effect, or be likely to have the effect, of enhancing that corporation's substantial market power in that market"; OR

(b) **Option 2** - provide the Minister with a unilateral power (either on application by the ACCC or to be exercised at the Minister's discretion) to "declare" a corporation or product/service sector for a period of time, in a situation where the Minister has concerns about actual or potential harm from creeping acquisitions or acquisitions by corporations with substantial market power in the relevant market. The competition test applicable to any acquisitions by declared corporations, or acquisitions

[3] If the ACCC were to provide an additional submission which outlined areas of concern through practical examples, the Committee would appreciate the opportunity to test these examples.

by corporations in declared product/service sectors would be the same as for Option 1 (that is, an 'enhancement of substantial market power' test).

The Discussion Paper also posits that, as part of a declaration under Option 2, the Minister may set appropriate thresholds for the mandatory notification of acquisitions to the ACCC, by declared corporations or by corporations in declared product/service sectors.

4 Risks Associated with Substantive Legislative Amendments to Existing Australian Merger Control

4.1 Before considering the Options proposed in the Discussion Paper, the Committee wishes to make a few general observations about the proposed introduction of the creeping acquisitions reform, which is of importance even if a compelling case had been demonstrated for its introduction (which the Committee considers has not, in fact, been demonstrated).

The ACCC's informal clearance process

4.2 Merger control under section 50 of the TPA is a settled and well administered area of law. Over the past 5 years, the ACCC has developed a relatively efficient process for assessing mergers under section 50 of the TPA, and its new 2008 Merger Guidelines assist that process. Most businesses and advisers have gained confidence in the transparency, consistency and predictability of the existing merger review process, which has, in turn, promoted economic efficiency and enhanced the performance and growth of the Australian economy as a whole by facilitating investment through acquisitions.

Threats to the existing merger process

4.3 Introducing significant changes to the existing general merger review law, therefore, poses a substantial risk, especially in the current fragile economic climate. Irrespective of whether clear and effective creeping acquisition legislation were able to be drafted (notwithstanding that the Committee is of the view that neither Option is sufficiently clear nor effective in its current form), the imposition of material changes to the existing regime raises significant risk of unintended consequences which are both difficult to predict and mitigate. The Committee believes that the proposed changes would greatly undermine the current business confidence in Australian merger control.

Creation of uncertainty

4.4 In particular, any legislative change necessarily increases the regulatory burden on businesses (large or small) and individuals affected by that change, which may in turn have an unintended dampening effect on further investment in certain industries. Creeping acquisitions reform will introduce a considerable degree of uncertainty into an area that currently benefits from reasonable levels of certainty, predictability and transparency in Australia.

Parties intending to merge will be faced with additional regulatory burdens and cost, at least until such time as the practical ramifications of the amendments become clear, which may take many years. In addition to such potentially negative impacts that merging parties may experience, any proposed reform is likely to result in an increase in the administrative and cost burden on the ACCC itself, as mergers which raise few or no competition concerns, or which relate to particular industry sectors, may be notified in order to provide a degree of regulatory comfort to merging parties. This may further prevent the ACCC from allocating its resources in the most efficient manner for carrying out its statutory duties, which may ultimately harm Australian consumers and the economy.

4.5 The Committee believes that the additional regulatory burden and costs imposed on businesses and the ACCC as a result of the proposed reforms outweigh any potential public benefits that the creeping acquisitions proposals may be argued to create. The Committee is not persuaded by ACCC suggestions that the proposed reform is not a radical departure from current merger control, or that, over a period of time, there will not be a departure in the way the current merger test is administered.

Limited role of the courts in section 50 cases

4.6 It is likely that the development of adequate precedent and experience in the application and administration of any new creeping acquisitions test would occur over a considerable period of time, particularly in view of the fact that Australia is a relatively illiquid economy, and given that there is no international jurisprudence in this regard from which to obtain guidance. Further, the Committee notes that whilst clarity of interpretation of the new test may be achieved through the courts, the experience with section 50 has shown how few merger cases are litigated in full on their merits. This is often ascribed to the delays faced by merger parties in litigating a section 50 case, knowing that with appeals, most cases may take 2-3 years to complete. It may, therefore, take many years before a creeping acquisition amendment is similarly tested, particularly given the small scale transactions involved. Until then, merger parties and the ACCC will be required to apply a new law which has no local or foreign antecedents and no particular economic learning behind it.

4.7 Given the difficulty in testing the new provisions, the appropriate regulatory approach should be to proceed with caution in introducing such radical and unwarranted legislative amendments. This is particularly the case with regard to the creeping acquisitions reform proposals, as their introduction will create a groundswell of dissatisfaction, with no mechanism for correction. Clearly this is, from legal, economic and commercial perspectives, highly problematic.

4.8 No economy in the world has adopted a test that prohibits acquisitions which would result in an *"enhancing of that corporation's substantial market power"* or a *"lessening of competition"*. The lack of certainty and understanding as to the full scope of the new provisions will likely inhibit investment and have a negative impact on competition (of which acquisitions play a vital part) across all sectors of the economy.

The Government is not faced with an epidemic of creeping acquisitions

4.9 The number of so-called problematic acquisitions which have "slipped under section 50" has not been identified by the reform proponents, however, it is anticipated that the number over the last 5 years is small. Yet the solutions posed by Government seek heavy handed application "across the board".

4.10 In the Committee's view, utilising concerns, which arose in a limited range of unidentified transactions, to add to the regulatory burden for all businesses across all industry sectors amounts to poor policy. This is particularly so in the current economic climate. Moreover, the introduction of legislative amendments which result in uncertainty as to their application, will likely dampen economic activity until such time as the impact of the changes is understood.

5 Principal Issues that Arise from the Discussion Paper

Introduction

5.1 The Committee considers that one of the principal shortcomings associated with the introduction of creeping acquisitions reform is that no case has been put forward as to why the reform is considered necessary by Government. As noted in the Committee's submission in response to the First Discussion Paper, little argument in favour of introducing changes to the merger control regime to account for creeping acquisitions has been made, let alone satisfactory argument having been made. The Committee reiterates the points made in its first submission, in particular those set out in section 2 of that submission.

5.2 As noted in the Committee's submission in response to the First Discussion Paper, the ACCC has not identified any particular so called "creeping acquisition" with which it had concerns by reason of adverse impacts on competition but which it could not examine or oppose under the existing provisions of section 50 of the TPA. Further, as identified in the Business Council of Australia's submission to the First Discussion Paper, the ACCC conducted an inquiry into the grocery sector and, in July 2008, found that no problem of creeping acquisitions currently exists in that sector[4]. The ACCC's investigations found 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."*[5]

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4 ACCC, Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries, July 2008 (Grocery Inquiry Report)

5 Grocery Inquiry Report, p. 427

5.3 The grocery sector is a highly concentrated sector. However, the ACCC's statement reflects, in the Committee's view, the reality that the current merger control regime adequately addresses any competition concerns with so called creeping acquisitions within that sector, and reflects that there is no need for reform.

5.4 Accordingly, there appear to be highly persuasive arguments in favour of maintaining the current "*substantial lessening of competition*" test for *all* mergers, as it provides sufficient flexibility for the ACCC to prohibit problematic or anti-competitive mergers. The current test allows for rigorous analysis of, and investigation into, the dynamics of competition in a relevant market, with particular focus on the underlying structure of that market, rather than merely focusing on market shares held by existing participants. The ACCC's current 2008 Merger Guidelines[6] outline the range of factors that will be taken into account when conducting a merger review. The breadth of these factors indicates the flexibility provided by the existing *substantial lessening of competition* test under section 50 of the TPA, and that the ACCC has significant flexibility in applying this test to acquisitions of smaller targets, of the type that the creeping acquisitions reform is attempting to target.

5.5 International and domestic evidence supports the view that the existing test is legally sufficient. For example, in the UK, as well as in Australia, acquisitions of individual supermarkets or development sites have been reviewed by the competition authorities on the basis of a *substantial lessening of competition* test, rather than separate creeping acquisitions provisions, and, in at least three cases, prohibited[7] or opposed.

5.6 Accordingly, the Committee submits that the ability of comparable competition regimes to review and, where necessary, prohibit small scale acquisitions on the basis of a *substantial lessening of competition* test, is evidence of the fact that the existing *substantial lessening of competition* test under section 50 of the TPA is in fact sufficient for addressing potential creeping acquisitions, where there may be a genuine threat to competition. In the absence of cases that have been lost by the ACCC in this area, or otherwise publicly explained, it is difficult to demonstrate that the existing law, in its current form, is ineffective.

5.7 In addition to the principal shortcomings discussed above, both of the Options proposed in the Discussion Paper raise a number of specific legal and practical concerns, which are outlined below.

Option 1 - Enhancing Substantial Market Power

5.8 Option 1 would introduce a new element to the existing merger test under section 50 of the TPA by prohibiting acquisitions by corporations with a "*substantial degree of market power in a market*" if the acquisition would have,

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[6] ACCC Merger Guidelines 2008, 21 November 2008, available online at: http://www.accc.gov.au/content/index.phtml/itemId/809866.

[7] Acquisition of a Co-op store in Slough by Tesco, Competition Commission Enquiry Homepage: http://www.competition-commission.org.uk/inquiries/ref2007/tesco/index.htm. In Australia, see ACCC decision in *Woolworths/Karabah* and the ACCC's Statements of Issues in *Woolworths/Wallaroo* (2008).

or be likely to have, the effect of "*enhancing*" that corporation's substantial market power.

5.9 This option will not resolve any perceived concern which lies at the heart of the proposed creeping acquisition amendments ie that a number of smaller acquisitions which occurred over time, and which did not individually substantially lessen competition, may potentially substantially lessen competition when viewed in aggregate. Rather, this Option will effectively create two merger tests for a substantial number of corporations. A number of industry sectors within Australia are fairly concentrated due to our comparatively small population and substantial geographic distances, requiring companies to seek economies of scale. By introducing a secondary test based on "*enhancing*" a corporation's substantial market power in a market, any participant with a market share of approximately (and, in certain cases, less than) 20%[8] may face a dual merger assessment:

- first, section 50 of the TPA would be applied, to determine whether the acquisition would, or would be likely to, result in a substantial lessening of competition in a market; and

- second, the proposed new creeping acquisitions test set out in Option 1 would be applied to determine whether the corporation would, or would be likely to, enhance its substantial market power through the acquisition.

5.10 The two merger tests may result in inconsistency with the underlying policy of the TPA where a merger or acquisition which would not breach the test under section 50, may be found to breach the second test if it increases its market share by a small (almost insignificant) amount. In the Committee's submission in response to the First Discussion Paper, the Committee (when discussing the aggregation model) used the following example:

> *"... the question of whether an acquisition, by a company that already has, say, 45% of the relevant market, of a company that has 3% share of that market, will be likely to result in a substantial lessening of competition will depend, to a significant extent, on whether there will continue to be other vigorous and effective competitors in that market post-acquisition, rather than on the mere aggregation of the market shares of the merging firms.*
>
> *Moreover, the same analysis also applies regardless of the manner in which the merged firm has acquired its final market share – that is, there should be no material difference, for example, between the case of a firm whose market share has increased from 35% to 45% as a result of organic growth (and which then wishes to move to 48% via an acquisition), and the case of a firm whose market share has increased*

[8] In line with existing case law, it may be possible for a firm to have a substantial degree of market power in a market even where its market share is quite low, as noted in the Committee's first submission, p.15. 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.

from 35% to 45% as a result of three small acquisitions (and which wishes to move to 48% via another acquisition).

In each case, the impact that the 45% to 48% acquisition is likely to have on competition will still depend on whether other vigorous and effective competitors will remain in the market, rather than on the manner in which the previous increases in market share have been achieved."

5.11 In this example, the acquisition by the corporation with a 45% market share, of a company with a 3% market share, would presumably "enhance" the corporation's substantial market share. While the resulting merger may not substantially lessen competition due to the presence of vigorous and effective competitors, it would most likely breach the "substantial market power" test. This is further illustrated in section 5.12(a) below.

5.12 Option 1 gives rise to a number of legal and practical concerns, set out below:

(a) ***Meaning of "enhancing" is unclear***

The concept of "*enhancing*" the market power of a corporation is not defined in the Discussion Paper or in the TPA. Indeed, the Committee notes that the term "*enhance*" appears in only two provisions of the TPA: section 2 (the object of the TPA is "*to enhance the welfare of Australians*") and section 152CP(2)(e) (requiring a party to "*extend or enhance*" the capability with which a declared telecommunications facility is supplied). Due to the sparse use of the concept throughout the TPA, the meaning of "*enhancing*" substantial market power is unclear.

Views may differ in regard to whether "*enhance*" implies a materiality criterion. The courts are likely to resort to a literal meaning as contained in a dictionary if there is a need to define the term. The Macquarie Dictionary definition of "enhance" is "*to raise to a higher degree; intensify or to magnify*".

Therefore, a key failing of the use of the term "*enhancing*" is that it is not clear whether there is a qualitative or materiality element to it, such that it would require more than a simple acquisition of *any* assets to 'enhance' a corporation's substantial market power. The concept of 'enhancement' may be interpreted as being qualitative to a degree, requiring an acquisition to heighten, intensify or exaggerate a corporation's substantial market power, which would suggest something more than a simple increase in market share or asset base.

However, there is a considerable risk that "*enhancing*" may be interpreted to mean a simple increase, which treats the level, degree or effect of that enhancement as immaterial. Such an interpretation would promote serious concerns as to the ability for corporations to compete actively and effectively in a market, as the possibility of making any asset acquisitions would appear to be prohibited.

(b) ***Determining whether a "substantial degree of market power" exists***

Furthermore, prior to consideration of an acquisition in question, determining whether an acquirer has a "substantial degree of market power" is not a straightforward task and may prove to be far more difficult than is acknowledged in the Discussion Paper.

Unlike in a section 46 case, in a section 50 context, there is no **conduct** by the acquirer which is subject to review or which could be tested for the suggestion that it demonstrates the existence of substantial market power by such standards as are used in section 46 cases. The existence of market power will have to be identified and proven by other means. It is difficult to expect that this can be done without some fairly arbitrary market share tests being introduced.

It is noted, for example, that the ACCC has published no current guidelines on how the concept of "substantial market power" is to be determined under section 46. Application of the case law criteria to prove the possession of a substantial degree of market power is difficult enough, even where there is a specific conduct which is under challenge, because it is said to involve an *exercise* of substantial market power.

It is unclear to the Committee whether it is intended that the factors in sub-section 46(2) to (3D), which assist to determine the extent of power held by a corporation under section 46, will also apply to the new provision. This would require clarification in any further draft legislation.

Under the suggested new model, the ACCC and the parties will be required to devise new criteria to measure whether the firm in question possesses that elusive concept of "*substantial market power*", in the absence of any specific conduct. The acquirer may have in fact behaved perfectly legitimately for years but its degree of market power, which is not market share, will need to be devised and applied in a merger clearance context which is required to take no longer than 4-6 weeks.

Substantial market power is a difficult concept and is not well suited to application in this type of review. We note that almost every section 46 case on that question has gone through multiple appeals on the issue, with Judges of the Federal Court and High Courts commonly in disagreement on the question of presence or absence of that degree of market power.

It will likely require the interpretation of the courts to provide sufficiently clear guidance to advisers and businesses. The gap between the introduction of creeping acquisitions reforms and the development of adequate judicial guidance is likely to be material, thereby increasing uncertainty for businesses during that period.

(c) ***Equating market power with anti-competitive impact is a flawed approach and will result in a potential market share cap***

Of particular concern is that the theoretical approach which underpins Option 1, appears to equate market power with anti-competitive impact and consumer detriment. However, the mere existence or accrual of market power is not, in and of itself, indicative that anti-competitive behaviour will result and is not sufficient to warrant regulatory intervention. Importantly, the misuse of market power regime under section 46 of the TPA does not *prohibit* the possession of market power, merely taking advantage of that power.

If "*enhancing*" is interpreted in a restrictive and narrow manner, such that it effectively is seen to mean that *any* acquisition by a corporation with a substantial degree of market power would enhance its market power in that market, the result would be a *de facto* market share cap for corporations that were held to have a "*substantial degree of market power*" in a market. As noted in paragraph 5.9 above, this may prohibit acquisitions by firms with relatively small market shares.

A *de facto* market share cap would constitute a retrograde step, as affected corporations would be unable to make acquisitions and, in circumstances where potential buyers are scarce (for example in the current financial climate), acquisitions may effectively cease within certain sectors. This could create a potential moribund corporate sector.

Any additional test which would effectively operate as a prohibition on *any* further acquisitions by certain corporations within certain markets would be unique, and would risk undermining the principles of section 50 of the TPA, which require a qualitative analysis of competition in a market to be conducted, and which do not seek to prohibit acquisitions outright. Moreover, acquisitions that 'enhance' the market power of one corporation may also enhance the welfare of Australians (consistent with the objects of the TPA, as set out in section 2) by way of increased savings arising from economies of scale, increased efficiency and innovation, and a greater ability to compete domestically and globally.

Additionally, the test envisaged by Option 1 raises the same issues identified in relation to the previous substantial market power option in the First Discussion Paper, which proposed the prohibition of any acquisition by a corporation with substantial market power where it resulted in any "*lessening of competition*". By introducing a prohibition on acquisitions which 'enhance' a corporation's substantial market power (depending on how "*enhancing*" is interpreted), there may be an absolute prohibition on acquisitions by corporations with substantial market power within the relevant markets.

(d) ***Effect on vertical or unrelated mergers***

The Discussion Paper does not provide any guidance as to how the proposed creeping acquisitions test would be applied in relation to vertical acquisitions which do not directly increase a corporation's market share position in a *particular* market. Additionally, the Discussion Paper does not address the question of whether an acquisition of assets or interests which raises no vertical or horizontal competition issues, as a result of there being no competitive overlap, and which takes place at a level in the supply chain outside a corporation's current sphere of operations, would face prohibition under Option 1.

In most jurisdictions with well established and entrenched competition laws, vertical mergers are recognised as generally not raising competition issues and generally being efficiency enhancing.

The ACCC currently provides for the examination of the vertical effects of mergers (see 2008 Merger Guidelines). However, the introduction of a creeping acquisitions test may in practice prevent a corporation with a substantial degree of market power in one market from making upstream or downstream acquisitions, as any such acquisition may potentially 'enhance' its substantial market power, even if the acquisition is of a complementary, and not of a competitively overlapping, asset.

This is a significant departure from the existing test under section 50 of the TPA and may have the effect of prohibiting non-horizontal growth in certain markets. Moreover, the possibility of stifling such vertical acquisitions arguably contravenes the primary purpose of the creeping acquisitions reform, which is to prevent horizontal acquisitions that individually may not raise competition issues, but collectively may potentially give rise to concerns. For example, consider Case Study 1 and 2 below:

<u>Case study 1 (vertical acquisitions)</u>

An energy retailer (gas and electricity) with substantial market shares in each of Melbourne, Sydney and Adelaide residential and commercial markets seeks to acquire part interest in a large-scale coal burning power station in Victoria. The rationale for the acquisition is to create a natural hedge against extreme movements in the electricity pool price by combining generation and retail under the same ownership structure. This type of combination is commonplace in other jurisdictions and has been recognised as welfare-enhancing.

The test embodied in Option 1 would likely preclude this acquisition from proceeding because the energy retailer would likely be found to have substantial market power, and the acquisition would probably be construed as enhancing that market power by giving the energy retailer an advantage over its rivals in accessing hedge cover.

It is noted that, under the current TPA, the Federal Court made a positive determination that such a transaction would not in fact lead to a substantial lessening of competition (AGL v ACCC (No 3) [2003] FCA 1525, Melbourne.

Case study 2 (complementary acquisitions)

A market leading Australian freight forwarder with substantial rail freight interests seeks to acquire one of the two major Australian stevedoring firms. The two firms have relatively minor overlaps in rail freight and services ancillary to stevedoring. The rationale for the acquisition is to improve logistics chain coordination from dockside to customer premises by placing the entire chain under unified ownership. The economic literature recognises the superior efficiency of unified ownership over contractual coordination among unrelated parties.

The test embodied in Option 1 would likely preclude this acquisition from proceeding because the freight forwarder would likely be found to have substantial market power, and the improved supply chain efficiency would probably be construed as enhancing that market power by improving its relative cost structure.

It is noted that under the current TPA, the overlaps in the Toll-Patrick merger were successfully dealt with through divestiture commitments. Conditional on those commitments, the ACCC ultimately did not oppose it. However, the undertakings may not adequately deal with the enhancement of that market power.

Similarly, the Discussion Paper does not consider the issue of acquisitions of new plant and equipment or intellectual property assets by corporations with a substantial degree of market power. Section 46(5) of the TPA states that "*a corporation shall not be taken to contravene [the prohibition against misuse of market power] by reason only that it acquires plant or equipment*". There is no equivalent exception set out in the Discussion Paper. Without an equivalent exception, the acquisition of a new factory, or new machinery to use within its factory, which will increase efficiency for a manufacturer with substantial market power in a particular market, may arguably 'enhance' that corporation's market power, and thereby be prohibited under Option 1.

Case study 3

One of the main capital city airports in Australia wishes to acquire a parcel of adjacent land for the purpose of expanding its on-airport air freight handling facility, which is currently operating at an inefficiently small scale due to space limitations. To some extent this on-airport facility competes with other off-airport freight handling facilities which are able to compete in part because of their less-stringent space constraints, despite the additional transport cost. Permitting the on-airport facility to operate at efficient scale would be welfare enhancing.

The test embodied in Option 1 would likely preclude this acquisition because the airport would be found to have substantial market power in several markets, apart from airside services. The acquisition would improve the competitive position of the on-airport freight facility at the expense of the off-airport facilities and could, therefore, be construed as enhancing the airport's market power.

Thus the Option 1 test would likely prevent the airport from making a logical and desirable investment in improving the efficiency of air-freight handling services.

This example highlights how the proposed creeping acquisitions reform has moved away from examining competition in a market and taking account of efficiencies as a means of facilitating increased competition, to focus merely on the acquisition of additional assets or shares. As such, the proposed new test is flawed.

(e) ***Impact on innovation and investment***

In paragraph 20 of the Discussion Paper, the Government states that "*intervention in this area...should not stop the legitimate and organic growth of businesses*". There is, however, no consideration given in regard to what is meant by "*organic growth*" and no definition has been proposed. This raises practical difficulties, as "*organic growth*" is not something that necessarily has a clear meaning.

For example, should the acquisition of a greenfield site from a land owner by a retailer for new store development be considered to be organic or inorganic growth? In addition, where a corporation with 30% market share in the fertiliser industry acquires a large site to build a new plant and acquires a licence to use patents to adopt an innovative new production technology, which lowers its costs and which will likely render most of its competitors uncompetitive on cost. As the cost of this investment is approximately $500 million, and the corporation has not previously made an investment of this kind, it is hard to say that it is made "in the ordinary course of business" under section 4(4)(b). There is no exception for the acquisition of such assets in section 50. The acquisition will most definitely enhance or materially increase the firm's market power. Should the acquisition be prohibited?

Such uncertainty would be likely to inhibit innovation and investment and, again, appears to be inconsistent with the initial comments about the new provision being intended to deal with a series of small acquisitions of competitors over time.

For example, consider Case Study 4 and 5 below:

<u>Case study 4 (innovation-related acquisition)</u>

The market leading provider of subscription television services in Australia wishes to acquire shares in a small technology company that

designs and manufactures smart cards that are used in digital set-top boxes. The motivation for the acquisition is that the smart cards necessarily embody proprietary information concerning customer access and system information functions of the broadcaster. Ownership is seen as necessary to protect that IP. In fact it is a necessary precondition to the roll-out of a range of new services to customers, which embody substantial IP.

The test embodied in Option 1 would likely preclude this acquisition because the ACCC in the past has held that subscription television service providers have substantial market power, and the acquisition could be construed as enhancing that power by giving the firm a competitive advantage over rivals through its new product offering.

Thus the Option 1 test could discourage, impede or prevent product innovations that would otherwise have benefitted consumers.

Case study 5 (innovation-related acquisition)

One of the four major Australian banks wishes to acquire a small data security/encryption firm that has a 'best of breed' data encryption method that can be used on credit cards and debit cards. The reason for the acquisition is that it would permit the bank to offer more secure transaction services to its customers and reduce costs associated with fraudulent transactions. Ownership of the technology is seen as necessary for security reasons, as the bank would need to work closely with the encryption firm and share the bank's own proprietary information to fully develop the application.

The test embodied in Option 1 would likely preclude this acquisition because the bank would be found to have substantial market power in a cluster of banking-related markets. The acquisition could be construed as enhancing that power by giving the bank a competitive edge through the ability to offer consumers a more secure transaction service and reducing the bank's costs.

Thus the Option 1 test could act to impede or prevent the introduction of superior data security measures by the bank.

Additionally, the Committee notes that continued inorganic growth (ie through acquisitions) is specifically something which the Discussion Paper appears not to support, which is quite contrary to most accepted economic view points. Efficient and successful economies typically require acquisitions in order to function properly. Acquisitions allow inefficient firms to exit the market and for effective and vigorous competition to take place, thereby benefitting consumers and the broader economy. It would be extremely disappointing if a reform were implemented which had the effect of inhibiting mergers *per se*. In particular, pro-competitive mergers could be limited, become less timely from a commercial perspective, or be blocked in certain

circumstances, to the detriment of all consumers. For example, see Case Study 6 below:

Case study 6 (efficiency-enhancing investment acquisition)

The two largest supermarket chains in Australia each seek to acquire (different) providers of EFTPOS technology in order to improve their service delivery at the checkout counter - faster and more accurate scanning, more reliable fraud detection and credit authorisation, etc. One dimension of the competition between these supermarket chains is the technology 'arms race'.

The test embodied in Option 1 appears to be squarely aimed at preventing firms such as supermarkets from acquiring smaller rivals, but the way it is framed, it would almost certainly also prevent supermarkets from acquiring complementary service providers who may play an integral role in the process of competition between the largest and most vigorous rivals.

One may say that it is not necessary to acquire a technology firm in order to benefit from the technology. However, in many cases, an ownership stake in such a technology firm may be the only viable means of utilising the technology because of the need to share and protect IP, the need to protect data encryption methodologies from wider dissemination, or the need to ensure that complementary investments between the two firms are made in a timely and effective manner.

(f) ***No international equivalent***

The Committee noted in its previous submission on this topic that the introduction of a creeping acquisitions law would put Australia out of step with international best practice and comparable regimes in the United States and European Union. In particular, the creeping acquisitions regime would in practice be substantially different from the closest equivalent merger framework, being that of the European Union.

The European Community Merger Regulation[9] requires that "*concentrations which would significantly impede effective competition in the common market, or substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market*"[10].

It is clear that the creation or strengthening of a dominant position is a determinant of whether an acquisition may "*significantly impede effective competition*". It is not the sole, or even the key determinant,

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9 European Community Merger Regulation, Council Regulation No. 139/2004, available online at: http://ec.europa.eu/competition/mergers/legislation/legislation.html.

10 ECMR, Article 3.

however. Importantly, the creation or strengthening of a dominant position is not a reason to prohibit an acquisition ***per se***.

In contrast, the introduction of a creeping acquisitions test of the type proposed in Option 1 would prohibit all transactions that 'enhance' a corporation's substantial market power and would effectively make the existence of market power the key or sole determinant of whether or not an acquisition may be permitted. As indicated, such an approach would be substantially different to the approach adopted in other leading jurisdictions, and would create considerable uncertainty for merging parties and their advisers.

The introduction of an additional regulatory hurdle for a significant number of corporations active in various sectors in Australia would not only add to the regulatory burden and cost for merging parties and the ACCC, as discussed above, but may also deter vigorous economic activity and acquisitions which may be necessary and/or beneficial in certain industry sectors. Such an outcome would not, in the Committee's view, promote the economic well-being of the country.

Option 2 - Ministerial direction of sensitive sectors

5.13 Option 2 would provide the Minister with a broad discretion to 'declare' a corporation or product/service sector of the economy for a period of time in a situation where the Minister has concerns about actual or potential harm from creeping acquisitions. The consequence of this would be that declared corporations, or corporations active in the declared product or service sector, would be required to notify all proposed acquisitions to the ACCC for assessment, regardless of size or impact.

5.14 This would unnecessarily increase the regulatory burden and cost for corporations who would not otherwise notify the ACCC and would also significantly increase the caseload of the ACCC in having to investigate these mergers.

5.15 The Committee notes that there has been little expansion in the Discussion Paper as to how either of these elements of Option 2 would work in practice. However, the lack of explanation and detail in relation to Option 2 is potentially more problematic, as the proposal would provide significant discretion to the Minister to make a declaration. Clarity as to how a declaration may be made (for example, whether there would be parameters within which the decision would have to be made, what defined factors would have to be considered prior to a declaration, what the period of declaration would be, whether all acquisitions would be required to be notified or whether a notification threshold would be introduced) is required to enable respondents to provide substantive comment on the Option.

5.16 Notwithstanding the absence of detail in the Discussion Paper, the Committee is, in principle, opposed to the introduction of a creeping acquisitions provision of the type set out in Option 2 for the reasons set out below:

(a) ***Same limitations as for Option 1***

Option 2 raises the same issues highlighted above in respect of Option 1 (such as the potential introduction of a practical market share cap, lack of certainty, negative impact on innovation and investment etc), as the substantive competition test to be applied would be identical.

(b) ***Contrary to principle of applying merger control consistently across all sectors***

In principle, legislation of general rather than specific application is preferable because it creates greater certainty, transparency and confidence. In particular, the declaration process would undermine the general application of section 50 of the TPA across all industries on an equal basis. The possibility of the Minister unilaterally declaring a corporation or product/service sector is contrary to the principle of general application and risks introducing considerable uncertainty both within declared corporations/sectors, and the wider economy.

Additionally, there is a considerable risk that the introduction of a Ministerial declaration process in relation to particular corporations and/or product or service sectors may result in distinct approaches to mergers within the declared corporations or sectors. In turn, this may result in serious inconsistency of merger control practice across different sectors of the economy, leading to further legal and practical uncertainty.

That said, while the adoption of disparate approaches to merger control in different industry sectors would increase commercial uncertainty and risk (which may in turn stifle investment), to the detriment of the Australian economy as a whole, it does appear that such an approach may, comparatively, be less harmful than a reform of general application.

(c) ***Lack of transparency***

Some degree of risk arises in relation to the grant of a blanket power to 'declare' corporations or industry sectors, especially where there is little or no transparency in the processes and procedures resulting in a declaration. As noted above, there is currently a lack of detail as to the circumstances in which a declaration may be made, or the factors that the Minister would be required to take into account before declaring a particular corporation or product/service sector. As a result, the administrative procedures and safeguards around the declaration process would be opaque, creating substantial uncertainty, especially within those sectors which may be at risk of being declared. In its response to the First Discussion Paper, the ACCC merely asserted that certain industry sectors have suffered from creeping acquisitions in the

past, without providing evidence in support or further details[11]. For example, the reference to funeral services was an issue that was not otherwise known to competition law practitioners. Similarly, in the case of optical industries, barriers to entry have not previously been found to be high and it is not clear that any participant possesses, in practice, a "*substantial degree of market power*". If the Minister's decision was based on ACCC recommendation, it raises concerns as to the ability to test that recommendation through normal legal avenues.

Similarly, the Committee considers that the introduction of Option 2 may result in a perception (whether warranted or not) that:

- the Minister is seeking to exercise his or her discretion in an arbitrary manner, perhaps with a view from some industry sectors to introduce a degree of 'social engineering' in respect of mergers within specific sectors, or to provide regulatory support for new entrants within particular markets based on some form of perception of "workable" competition;
- those sectors which are declared are subject to extra scrutiny as a result of political pressure or even misinformed debate in relation to particular companies, rather than due to any failures of competition within those sectors; and
- significantly, the ACCC may take a 'no smoke without fire' view that, as the Minister has declared a particular sector, there must be a problem which militates in favour of blocking rather than approving acquisitions within that industry sector.

(d) ***Extent of impact on declared firm and appeals***

The Discussion Paper does not provide any details in relation to the impact that a declaration would have on an individual corporation. There is no discussion of whether a declaration could be made in relation to a single corporate entity, or a group of companies as a whole, within a single economic entity.

In particular, there is no consideration as to how a declaration (if made in relation to a whole corporate group rather than a specific part or standalone corporation within a group) would impact support functions, or business divisions which are unrelated to the specific product or service sector in which the declaration is seeking to control acquisitions.

Case study 7

[11] See *ACCC Submission to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs regarding creeping acquisitions*, October 2008.

A conglomerate comprised of various business divisions has interests in retail stores, travel services, mineral exploration and car manufacturing. The travel services division has a large share of the travel industry, approximately 45% to 50%, and there have been a number of acquisitions within that sector in the past five years. The Minister declares the entire corporation, thereby preventing, in effect, additional acquisitions by the corporation as a whole, even though the principal concern arises in relation to the influence by one of the division's of the corporation in the travel sector. The car manufacturing division wishes to purchase some additional sites on which to build more efficient factories. The existence of a declaration of the corporation gives rise to problems, however, as it is not clear whether the efficiency enhancing acquisition by the car division would be subject to regulatory scrutiny, and may even be prohibited given that those cars could potentially be used for the conglomerate's car hire business.

Additionally, there is no visibility as to whether a corporation subject to a declaration would be permitted to appeal decisions made in relation to the declaration. If appeals were allowed, the grounds and manner pursuant to which that appeal would be permissible have yet to be defined. In summary, the lack of certainty undermines the degree to which a full and sensible assessment of Option 2 is possible.

It appears that the application of a declaration to an ultimate holding company in Australia (or indeed overseas) would, in effect, be a blunt regulatory instrument and would have significant impact across the corporate group as a whole. It would also impose a considerable additional regulatory burden to parts of the business that operate in highly competitive markets. Further, by singling out some market players, application to a corporation or corporate group would effectively result in the choosing of "winners and losers" by the Minister. In that sense, application to industry sectors is preferable to application to individual corporations so that every market participant is treated equally and the regulatory impact does not discriminate against individual corporations or corporate groups.

Accordingly, while in many ways the Committee is sympathetic to this approach based on a more upfront reflection of political concerns with particular sectors of the economy, it is a process that could rapidly expand across industry sectors with limited checks and balances and regulatory impacts that outweigh the benefits; and

(e) ***Third party declaration procedures***

The Discussion Paper does not address the position of third parties in a litigation process under Option 2, particularly whether:

- third parties would be able to seek declarations from a court of a contravention of the new provisions where an acquisition proceeded without prior merger clearance; and

- third parties could bring actions against the merger parties for declaration of a contravention of the new provision by the declared corporation or sector participants.

As noted above, the lack of certainty undermines the degree to which a meaningful assessment of Option 2 is possible.

6 Proposed Options for the Creeping Acquisitions Reform

6.1 The Committee does not believe that the various permutations of creeping acquisition reforms are necessary and does not believe that a compelling case for their introduction has been made.

6.2 Nevertheless, if the Government is intent on making specific legislative changes in respect of creeping acquisitions, the Committee suggests that the following proposals be considered. The Committee's preference is for the Government to adopt Proposal A, being an aggregation model, to be applied to specific declared markets or industries. In the alternative, and if Proposal A is not acceptable to the Government, we put forward Proposal B as the basis for a creeping acquisition reform which mitigates the worst effects of the current Options by introducing a clear qualitative element to the test surrounding a corporation's "*substantial degree of market power*". In particular, Proposal B would require that an acquirer's substantial market power were "*materially increased*". This approach is the most consistent with the underlying nature of the creeping acquisitions reform, in that it is intended to prevent piecemeal aggregation.

Proposal A: Aggregation Model

6.3 Although the Committee, in its previous submission expressed a number of reservations on this issue, an aggregation model of the type raised in the Government's first discussion paper may be a preferable alternative **provided** the 'look back' or aggregation period is limited, possibly to a period not exceeding 2 years.

6.4 The primary advantage of an aggregation model is that, compared to the alternatives under consideration, it is the most appropriate method to achieve the policy objectives which underpin the creeping acquisitions reform debate; that is, to provide greater regulatory oversight of small acquisitions over time which, individually are unlikely to contravene the existing merger test in section 50 of the TPA, but which, when taken together, may have such an effect, i.e. of substantially lessening competition. An aggregation model permits previous acquisitions (precisely the types of acquisitions that the Government is concerned with) to be aggregated with the current acquisition, thereby helping to determine whether or not the current acquisition would, or would be likely to, lead to a substantial lessening of competition.

6.5 Consequently, the Committee reiterates the recommendation in its previous submission of 15 October. In this regard, section 50(3) of the TPA might be amended to require prior acquisitions by the corporation within a reasonable specified period (of up to two years) to be taken into account when assessing,

in aggregate, whether or not an acquisition, combined with those prior acquisitions, would have the effect, or be likely to have the effect, of substantially lessening competition in an industry. A period of two years appears workable in most industries where competition is unlikely to have changed significantly within this period and it would, therefore, be easier to identify the counterfactual and apply a "future with and without" test.

6.6 Such an amendment would make clear that the relevant legal test to be applied in relation to the latest acquisition (the creeping acquisition) is the same as that under the existing section 50 of the TPA, and that all of the criteria which apply under section 50(3) will also continue to apply.

6.7 Because of the unusual nature of this test, and its cost and uncertainty of application, we believe it should be confined to notified or declared sectors only and should not have blanket application across all sectors of the economy. We accept that an aggregation model may still require the ACCC to clear a reasonable hurdle and demonstrate that the latest acquisition, when aggregated with past acquisitions over a reasonable period, would lessen competition substantially. The proposed test would also suffer from the issue of being a backward looking test in aggregating past acquisitions with a forward looking test of the current acquisition. Nonetheless, from a competition perspective it is a test much more "true" to tackling the stated harm of a series of "creeping" acquisitions. The combination of a declared corporation, or product/services sector, together with the aggregation test would limit the fundamental difficulties associated with having two merger tests, as addressed above, and would be much more workable than the enhancement test. A corporation would only have to consider the aggregation model if it was in a declared industry. While still not ideal, this would reduce the burden on a number of corporations outside the declared industries.

6.8 The proposed aggregation test should not be viewed as a panacea and there would still be a number of practical problems to be managed. However, the Committee considers that, in the event that the Government proceeds with amendments to the merger provisions of the TPA to take account of creeping acquisitions, the proposed aggregation model is the best solution.

6.9 Details in relation to the proposed aggregation model and industry declaration are set out in the Attachment.

Proposal B: "Material Increase"

6.10 The Options proposed in the Discussion Paper raise a number of legal and practical concerns. One of these concerns is that the meaning of 'enhancement' is unclear and may result in the prohibition of transactions which are not harmful and which are beyond the intended scope of the amendments. The term 'enhance' is not presently defined in the TPA and has not been the subject of any substantial consideration in commercial jurisprudence.

6.11 In order to provide a greater level of certainty, this submission proposes that the word "*enhancing*" be replaced with the words "*materially increasing*" in

order to introduce a more practical and proportionate element to the test being proposed.

6.12 The words "*material increase*" can currently be found in Part IIIA of the TPA, where it is specified that a service cannot be declared unless access to the service would promote a "*material increase*" in competition. This submission considers the meaning of the words "*material increase*" and "*material*" as it appears in other provisions of Commonwealth legislation, and how this concept may be applied in the context of the Options proposed in the Discussion Paper. The Committee recognises that such a change may still be viewed as difficult by the ACCC, but it is, in the Committee's view, a much better test than "*enhancing*", which suffers from the substantial drawbacks described in this submission.

Meaning of "material increase"

Amendment to Part IIIA

6.13 The term "*material increase*" was introduced into criterion (a) of sections 44G(2)(a) and 44H(4)(a) of the TPA by items 16 and 23 of Schedule 1 of the *Trade Practices Amendment (National Access Regime) Act 2006* (Cth) ("**TPA Amendment Act**").

6.14 The Explanatory Memorandum for the TPA Amendment Act states that the inclusion of "*material increase*" in section 44G(2)(a) was intended to ensure that "*access declarations are only sought where increases in competition are not trivial*".[12] The Explanatory Memorandum further states that criterion (a), as previously drafted, did not adequately address the situation where declaration would result "*only in a marginal increase in competition*". The Explanatory Memorandum makes equivalent comments in relation to section 44H(4)(a).

6.15 The Explanatory Memorandum referenced the Government's response to the Productivity Commission's report, *Review of the National Access Regime* in which recommendation 7.1 was that criterion (a) be amended to require that access (or increased access) to the service would promote a substantial increase in competition. The Government's response was that the term "*substantial*" "*may exclude situations where a small supplier is prevented from gaining access to nationally significant infrastructure*".[13] On this basis, the Government instead chose the wording "*material increase*", in order to include circumstances in which increases in competition would be "*not trivial*".

NCC Recommendations

6.16 The National Competition Council ("**NCC**") has considered the meaning of "*material increase*" in the context of making recommendations as to whether infrastructure should be declared under Part IIIA of the TPA.

[12] Explanatory Memorandum to the Trade Practices Amendment (National Access Regime) Bill 2005 at p 21.
[13] http://www.treasurer.gov.au/DisplayDocs.aspx?pageID=&doc=publications/FinalReport_NationalAccessRegime.htm&min=phc.

6.17 In the NCC's final recommendation regarding an Application for declaration of a Service provided by the Tasmanian Railway Network, it noted that the introduction of the term "*material increase*" 'confirms' the approach of the NCC and the Tribunal to interpreting criterion (a), which "*has always been that the promotion of competition in the dependent market has to be non-trivial*".[14] The NCC further stated that:

> "*The additional words now contained in criterion (a), "a material increase", indicate that the level of competition promoted must be more than trivial, being at a level that could reasonably be expected to have a tangible impact on competition in the dependent market. (emphasis added)*"[15].

6.18 The NCC also noted that whether Part IIIA declaration would promote a "*material increase*" would need to be measured against the state of the current market:

> "*if a dependent market is already effectively competitive, access would be unlikely to promote a material increase in competition. Similarly access may not materially promote competition where high barriers to entry or other conditions, that are unrelated to the existence of the bottleneck facility, preclude additional competition in a dependent market*"[16].

6.19 In the NCC's final recommendations regarding Applications for declaration of services provided by the Goldsworthy, Hamersley and Robe Railways further emphasises that the words "*material increase*" indicate that "*the change in competition promoted by access must be more than trivial*" as opposed to "*marginal*". The Committee therefore believes that such a test would be preferable to a test based on the concept of 'enhancement'.

7 Conclusion

The Committee's strong submission is that there is no need for any further amendment to the TPA to address 'creeping acquisitions'. However, if the Government is minded to proceed with a creeping acquisitions test, the Committee favours its Proposal A, being the aggregation model to be applied to particular industry. This is more clearly directed at the perceived harm to be addressed. In the alternative, if the Government rejects the aggregation model (acknowledging that there are some difficulties with such a model, having regard to assessment of substantial market power and market delineation), the Committee submits that a test involving a "material increase" in a substantial market power is a preferable test, and puts forward Proposal B. In particular, introducing a test based on the concept of "material increase" is preferable to one reliant on "*material enhancement*", as such an alternative

[14] NCC, *Application for declaration of a Service provided by the Tasmanian Railway Network*, Final Recommendation (14 August 2007) at [5.15] http://www.ncc.gov.au/pdf/DeRaTRFR-001.pdf.
[15] NCC, *Application for declaration of a Service provided by the Tasmanian Railway Network*, Final Recommendation (14 August 2007) at [5.16] http://www.ncc.gov.au/pdf/DeRaTRFR-001.pdf.
[16] NCC, *Application for declaration of a Service provided by the Tasmanian Railway Network*, Final Recommendation (14 August 2007) at [5.8] http://www.ncc.gov.au/pdf/DeRaTRFR-001.pdf.

would not address the shortcomings enunciated above with a test based on "*enhancement*".

Any questions regarding the submission should, in the first instance, be directed to the Committee Chair, Mr Dave Poddar, on [02] 9296 2281.

12 June 2009

Attachment: Proposed Aggregation and Industry Declaration Model

THE PROCESS TO DECLARE A SENSITIVE INDUSTRY

[1](1) If the ACCC determines, after due inquiry, that both of the following criteria are satisfied in respect of a substantial industry:

(a) one or more corporations may possess a substantial degree of market power in that industry; and

(b) there have been a number of acquisitions within the industry in the preceding 2 years, by those corporations referred to in subsection (1)(a), of assets or shares of a person in that industry (other than by an acquisition in the ordinary course of business);

the ACCC may recommend to the Minister that the relevant industry be designated as a sensitive industry for the purposes of section **[2]**[17].

(2) The Minister may accept or reject the ACCC's recommendation. If the Minister does not accept the recommendation within 90 days, the Minister is deemed to have rejected the recommendation.

(3) The Minister may only accept the ACCC's recommendation if the Minister is satisfied that designation of the industry as a sensitive industry would be in the public interest, having regard to:

(a) the objectives of promoting competition, innovation and efficiency in Australian markets;

(b) the objectives of not discouraging organic growth nor firms increasing their efficiency by means other than by acquiring assets or shares of a competitor, customer or supplier;

(c) the objectives of promoting the international competitiveness of Australian businesses;

(d) the costs of designation likely to be incurred by persons carrying on business in the substantial industry weighed against the likely benefits of designation for consumers; and

(e) any other matter which the Minister considers relevant.

(4) The Minister must publish his or her decision and reasons for his or her decision.

(5) A designation made by the Minister under subsection (2) expires after 2 years from the date of publication.

(6) If a designation made by the Minister under subsection (2) is in force, section **[2]** applies in respect of that industry.

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[17] The Committee expressly notes the difficulties with market delineation and assessment of substantial market power that such a test creates.

(7) A recommendation by the ACCC under subsection (1) or a designation by the Minister under subsection (2) is not admissible as evidence of whether a corporation referred to in the designation has a substantial degree of market power in any proceedings.

THE SUBSTANTIVE PROHIBITION-ALTERNATIVE ONE- ENHANCE MARKET POWER

[2] (1). A corporation which possess a substantial degree of market power in a sensitive industry designated under section **[1]** must not, while the designation remains in force, directly or indirectly:

(a) acquire shares in the capital of a body corporate; or

(b) acquire any assets of a person,

if the acquisition would have, or be likely to have the effect, of **materially increasing /enhancing**, that corporation's degree of market power in that industry.

(2) Without limiting the matters that may be taken into account for the purpose of subsection (1) in determining whether the acquisition would have the effect, or be likely to have the effect, of materially strengthening/enhancing, the corporation's substantial degree of power in that industry, the matters set out in section 50(3) must be taken into account.

OR ALTERNATIVE 2- AGGREGATION AND SLC TEST

A corporation in a sensitive industry designated under section **[1]** must not, while the designation remains in force, directly or indirectly:

(a) acquire shares in the capital of a body corporate; or

(b) acquire any assets of a person,

if the acquisition (**New Acquisition**), when aggregated with the effect or likely effect of any other acquisition of shares or assets of a person made by that corporation in the period of 2 years prior to the New Acquisition, would have, or be likely to have the effect, of **substantially lessening competition** in that industry.

REVIEW OF DESIGNATIONS

[3] (1) A person whose interests are affected by a decision of the Minister under section **[1]** may apply in writing to the Tribunal for review of the Minister's decision.

(2) The person must apply for review within **[21]** days after the Minister publishes his or her decision.

(3) The review by the Tribunal will constitute a reconsideration of the matter.

(4) For the purpose of the review, the Tribunal has the same powers as the Minister.

(4) If an application for review of a designation decision is made, the designation remains in operation until the Tribunal makes its decision on the review.

(5) If the Minister made a decision to designate an industry, the Tribunal may affirm, set aside or vary the designation.

(6) If the Minister made a decision not to designate an industry, the Tribunal may affirm, set aside or vary the decision not to designate the industry.

(7) A designation by the Tribunal is taken to be a designation by the Minister for all purposes (except this section).

Attachment 3: Committee Supplementary Submission in Relation to ACCC Submission in Response to Second Discussion Paper, 7 August 2009

Law Council
OF AUSTRALIA

Via email: creepingacquisitions@treasury.gov.au

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

Dear Sir or Madam,

Creeping Acquisitions – The Way Forward

Following the submission made in response to the Treasury's Discussion Paper "Creeping Acquisitions – The Way Forward" by the Australian Competition and Consumer Commission ('ACCC') in July, the Trade Practices Committee of the Business Law Section of the Law Council of Australia ('the Committee') wishes to provide the Treasury with a further submission in relation to the proposed creeping acquisitions reform.

This supplementary submission has been prepared by the Committee and endorsed by the Business Law Section. Owing to time constraints, it has not been reviewed by the Directors of the Law Council of Australia Limited.

The supplementary submission is both a summary document which reiterates the previous arguments made in the Committee's submission of 12 June, and a document which addresses in detail the key issues raised by the ACCC in its submission. In particular, the Committee has taken this opportunity to outline its views on the ACCC's proposed amendment to 'substantial market power' creeping acquisitions model, which would require that any accretion of substantial market power as a result of an acquisition be 'not significant'.

Given the important and effect of any proposed creeping acquisitions reform, the impact of the ACCC proposal is, in the Committee's view, sufficiently material that a supplementary submission is justified.

GPO Box 1989, Canberra
ACT 2601, DX 5719 Canberra
19 Torrens St Braddon ACT 2612

Telephone +61 2 6246 3788
Facsimile +61 2 6248 0639

Law Council of Australia Limited
ABN 85 005 260 622
www.lawcouncil.asn.au

If you have any questions regarding this submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

Yours faithfully,

Bill Grant
Secretary-General

7 August 2009

Enc.

Law Council of Australia
Business Law Section
Trade Practices Committee:

Submission to Treasury in Response to Submission by the Australian Competition & Consumer Commission on Creeping Acquisitions of July 2009

1 Introduction

The nature of creeping acquisitions

1.1 The Trade Practices Committee of the Business Law Section of the Law Council of Australia ("**Committee**"), provides this submission to the Treasury in connection with the second Creeping Acquisitions Discussion Paper, published on 6 May 2009 ("**Discussion Paper**"). The Government, in the accompanying media release to the Discussion Paper, stated that:

> *"Creeping acquisitions refer to the acquisition of a number of individual assets or businesses over time that may collectively raise competition concerns, but when considered in isolation, are unlikely to be captured by the existing mergers and acquisitions test under section 50 of the Trade Practices Act."*

1.2 The Committee wishes to focus upon the nature of creeping acquisitions and the revised proposals that have been put forward to address the perceived issues in this area.

ACCC Submission

1.3 In response to the Discussion Paper, the Australian Competition & Consumer Commission ("**ACCC**") made a submission dated July 2009, which reiterated its position that specific legislative amendment is required to account for creeping acquisitions ("**ACCC Submission**")[1]. However, the ACCC Submission also put forward a further, new variation of the creeping acquisitions test. The latest proposal from the ACCC appears intended to find a compromise on the continuum of differing impacts on competition, somewhere between 'any lessening of competition' and a 'substantial lessening of competition'. The ACCC ultimately settled on the somewhat inelegant terminology of "*not insignificant*". While acknowledging the well meaning intention behind such a further revision, the Committee has serious reservations as to the use of such a double negative, given the uncertainty it will create in interpretation by businesses and their advisers and, ultimately, judges.

1.4 The Committee also has serious concerns with the substantial enhancing and redefining of the concept of creeping acquisitions that has occurred and the resultant cost to business from such a major proposed change to the law.

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[1] ACCC Submission, July 2009 (http://www.treasury.gov.au/contentitem.asp?ContentID=1583&NavID=037)

1.5 The Committee believes that the ACCC under new processes has administered the mergers test comparatively well. However, even that history provides no comfort for the wide discretion and business uncertainty created by the ACCC's revised reform proposal. This is perhaps not surprising given that no other country has a creeping acquisitions law so far as the Committee is aware. Creeping acquisitions may be a vexed issue, but they are not a problem of such a scale that creates any ascertainable competitive harm in Australia. The law reform proposals risk creating more harm and economic disruption than good to the regulatory and market process.

Reasons for additional Committee submission

1.6 In a speech dated 10 October 2008, the Prime Minister of Australia stated:

> "... *over the last decade, the deregulation programme of the Hawke and Keating Governments that opened up Australia's markets has been reversed by what the Business Council of Australia has described as the 'creeping re-regulation of Australian business'. We want to turn that around, and ease the regulatory burden on Australian business*"[2].

The Committee believes there is a clear danger that the ACCC's proposed new creeping acquisitions test will involve a significant and unwarranted increase in the regulatory burden for all parties involved in mergers across all Australian industry sectors, thereby creating unnecessary costs for the Australian economy, and disadvantaging Australian business and consumers.

1.7 In addition, in the Committee's view, there is a serious risk that such a revised merger control test may discourage international capital investment in Australia. The Committee notes that the current global financial crisis has had a substantial impact on the availability of investment capital to be invested. This has constrained the ability of investors to finance investments and has made differences between investment regimes across countries important factors in deciding whether or not to invest. The importance of competition between countries for a share of finite global investment resources has been recognised by the Federal Treasurer in a speech in which the Treasurer outlined proposed changes to Australia's Foreign Investment Review legislation in order to "...*ensure Australia's regulatory framework promotes our competitiveness and attractiveness as a destination for international capital. Our mission is to compete globally more effectively – to take a larger slice of a currently smaller pie*"[3].

1.8 The submissions to the Treasury in the last round of consultation focused essentially on two areas - grocery and childcare - the latter raising, in our view, issues of licensing and governance primarily, rather than competition. If the Government is minded to press ahead with creeping acquisitions reform, the Committee remains of the view that merger control tests should be:

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[2] Address to the Telstra Business Awards, 10 October 2008 (http://www.pm.gov.au/node/5534).

[3] *Foreign Investment and the Long Road to Recovery*, speech to the Thomson Reuters Newsmaker Series, 4 August 2009, Sydney.

- specific to the actual competition issues arising in Australian industry based upon a demonstrated economic need;
- properly targeted to any harmful creeping acquisitions (rather than simply creating an additional test for all acquirers, or seeking to prevent any one-off acquisitions by large competitors); and
- be expressed to allow Australian companies to compete against the background of a transparent and objective merger test, which is subject to judicial scrutiny in the Courts in a timely manner, rather than a test which creates business uncertainty by giving such great discretion to the ACCC.

To do otherwise would actually increase the regulatory burden on business with limited, if any, benefit to consumers. For the reasons set out in Parts 2 and 3 below, in the event that the Government proceeds with amendments to the merger provisions of the TPA to take account of creeping acquisitions, the Committee's view is that the most legally and economically appropriate solution is the modified aggregation model previously put forward by the Government, with certain modifications as suggested by the Committee.

1.9 This submission outlines the Committee's views in relation to the ACCC Submission and, in particular, the ACCC's proposed amended 'substantial market power' test. The Committee believes that it is important to make a further submission and wishes to draw out the substantial changes to the Australian merger test that the ACCC Submission involves, particularly as it goes beyond what industry may have expected if the focus was simply on 'creeping acquisitions' (i.e. a series of small acquisitions, rather than one-off acquisitions by larger competitors)[4].

2 Executive Summary

Introduction

2.1 The Committee remains of the view articulated in its response to both the Government's discussion papers of 1 September 2008 and 6 May 2009, that no convincing evidence or arguments have been put forward to show that it is necessary to amend section 50 of the Trade Practices Act 1974 (Cth) ("**TPA**"), which currently requires a "*substantial lessening of competition*" to be proven, in the manner of either option contemplated by the Discussion Paper.

[4] The Committee further notes that, given the ACCC Submission was only made available in mid-July, if the Government wishes to proceed on the basis of the ACCC's latest proposal, there will not have been any meaningful opportunity for the broader business community to comment on the latest variation of the creeping acquisitions reform proposal. The Committee has been critical of some regulatory reform processes in recent times as in the Committee's view the resultant laws have numerous problematic issues of application as they have been pressed through. For example in the criminal cartel amendments the final position as to joint ventures and lack of enforcement guidance that was expected in respect of them has been disappointing.

The nature of the ACCC's latest iteration of a creeping acquisitions test

2.2 In the ACCC Submission, the ACCC has redefined the concept of creeping acquisition from a series of small acquisitions that together substantially lessen competition to be one-off acquisitions by a corporation with a substantial degree of market power which enhance that market power, even though they may not substantially lessen competition. At paragraph 11 it states that:

> *"The ACCC sees the issue of creeping acquisitions as follows. An individual acquisition has a 'creeping' effect where it enables the acquirer to enhance its competitive position in a market, but where the impact on competition is less than substantial. As the effect on competition is less than substantial, the ACCC is of the view that it is not captured by the existing SLC test."*

2.3 A one-off acquisition by a corporation with a substantial degree of market power can already be appropriately assessed by the current substantial lessening of competition test under section 50 of the TPA. Where a one-off acquisition does not substantially lessen competition, it should not be prohibited (see further Part 3 below).

2.4 In addition to expanding the definition of creeping acquisitions, the ACCC Submission (paragraph 11) appears to imply that there is something intrinsically wrong with corporations seeking to enhance their competitive position through acquisitions. In practice, corporations will often see acquisitions as a means of enhancing their market position through inorganic growth. The nature of competition as "*deliberate and ruthless*" has been recognised by the courts[5]. A well functioning competitive market will necessarily result in certain competitors winning market share at the expense of others. The essential role of merger control is to assess whether sufficient competitive constraints will remain post-merger. If sufficient competitive constraints will remain, then the acquisition will, by definition, not be likely to result in a substantial lessening of competition. This assessment is true regardless of the pre-merger position of the entities involved (i.e. irrespective of whether or not one or more parties has market power). It should not be the role of effective merger control to seek to introduce a presumption that mergers involving large corporations are inherently anti-competitive, as the proposed creeping acquisitions reform now appears intended to do.

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[5] *Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd* (1989) 167 CLR 177.

2.5 While the ACCC's latest proposal, which would require that any enhancement of a corporation's substantial market power in a market must be "*not insignificant*"[6], seeks to decrease the likelihood of capturing acquisitions with minimal market impact, the introduction of a fluid materiality threshold does not, in the Committee's view, overcome the issues arising from the introduction of the proposed new merger control test. In particular, the Committee considers that the effect of such an amendment would be to add to the existing merger test, by requiring the ACCC to determine whether there is both:

(a) a substantial lessening of competition; and

(b) a not insignificant enhancement of a corporation's market power in the relevant market.

2.6 Moreover, the ACCC's proposed test does not immediately or clearly relate back to the impact on the level of competition. In particular, the proposed new test does not operate as clearly as the current substantial lessening of competition test in relation to the overall level of competition within a market. While the proposed new test may assist if the Government wishes to proceed down the path (with all of the attendant dangers) of being involved directly in industry structuring, it is unclear as to what benefits it brings to the overall level of competition within a market, and therefore what benefit it brings to consumers.

2.7 In addition, the proposed test would fail in its aim of introducing a clear materiality threshold. The result of the introduction of a "*not insignificant*" requirement would not provide a clear and objective standard which could be applied to individual merger cases.

The increased regulatory burden on all business sectors

2.8 The Committee does not believe that the estimated 9% of mergers the ACCC considers would be subject to the new test, would in fact be an accurate representation of the impact of the proposed reform. In the Committee's analysis, there are many mergers in which the parties will be compelled to address the new 'substantial market power' test. The Committee believes, from its members' involvement in merger filings, that the estimates provided by the ACCC seriously underestimate the likely real impact of such a new mergers test[7].

2.9 The Committee is concerned that the relatively concentrated nature of many sectors of Australia's economy would result in merger parties being compelled to address the 'substantial market power' test in any merger notification. Accordingly, a wholly unnecessary two-stage merger test would be applied to a substantial number of transactions across all Australian industry sectors, when no evidence has been provided of any significant failings of the current test.

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6 See ACCC Submission, paragraphs 18, 32 and 45 for discussion of this option.

7 See further paragraph 3.3 below.

2.10 In the Committee's view, the ACCC's proposed new and additional test would also:

(a) add to the regulatory burden on all parties;

(b) require extensive focus on the analytical issue of whether the corporation has market power; and

(c) in particular, introduce a test lacking clarity to such a degree that it may fail to provide an objective standard as required in a merger test.

2.11 The Committee also notes that the proposed test appears rather out of date with regard to its ability to address any current economic harm. The ACCC has in fact recently informally cleared the sale of 45 supermarkets and 8 liquor stores by Coles supermarkets to the small business operator Foodworks[8]. A creeping acquisitions law aimed at perceived concerns in the grocery industry seems both somewhat incongruous against this background and a particularly blunt policy given its added cost to all of industry.

The proposed new test provides levels of regulatory discretion that do not offer regulatory certainty for the business community

2.12 In the ACCC Submission, the ACCC states at paragraph 5 that:

> *"In considering the appropriateness of the SMP Model, the ACCC formed the view that it would capture those acquisitions that are most likely to cause concern, while avoiding the analytical and evidentiary issues associated with the alternative options canvassed in the first discussion paper ('the aggregation model')."*

The Committee believes that, just because the aggregation model that was proposed by the Government at one stage may be difficult for the ACCC to prove and may require detailed analysis and evidence by the regulator, it is not, by definition, an inappropriate test or burden for a regulator to satisfy. It is internationally accepted that only a small proportion (approximately 5-10%) of mergers are problematic from a competition perspective. As such, it should be anticipated that in this small proportion of cases it will be difficult to demonstrate an anticompetitive impact. This is not a bad thing, it merely demonstrates that the economic effects of mergers may be difficult to determine, and that care should be taken so as not to unreasonably interfere in mergers. The Committee believes that, instead, to make the test so discretionary in favour of the ACCC is more burdensome for businesses and the community. Additionally, the Committee notes that overregulation carries costs, including through decreased efficiency and investment, for the Australian economy as a whole. Accordingly, Australian consumers will ultimately be harmed by the proposed reform.

2.13 The Committee also notes that the ACCC's proposed new test would continue to apply both horizontally and vertically, potentially beyond a series of 'creeping' acquisitions. This is not consistent with the common perception of

[8] ACCC merger reference 36983, 21 July 2009.

'creeping acquisitions, which relate to horizontal acquisitions of a competitor active in the same market.

The Committee supports the introduction of an aggregation model to account for creeping acquisitions if the Government is committed to unwarranted reform

2.14 In its submission of 12 June 2009 in response to the Discussion Paper ("**June Submission**"), the Committee proposed that, in the event that the Government is committed to introducing regulatory amendments to take account of creeping acquisitions - even in the face of strong opposition (including from the Committee) - an aggregation model (which aggregates acquisitions by a purchaser over a set period of two years) be introduced.

2.15 The Committee remains of the view that such a model is the most legally and economically sensible solution to the perceived problem of creeping acquisitions, for the reasons articulated in Part 6 of its June Submission. In particular, the ACCC's proposed introduction of a "*not insignificant*" requirement creates substantial uncertainty of application. Additionally, the real possibility that the creeping acquisitions test will expand to cover *any* acquisition by a company which has or may have a substantial degree of market power, rather than applying to a series of small acquisitions, and so act as an effective market share cap, remains. Accordingly, in the Committee's view, the only practical as well as legally and economically justifiable model for a creeping acquisitions reform is the aggregation model.

2.16 The Committee would also not object to the alternative model suggested by the Business Council of Australia in relation to creeping acquisitions - again over a period of 2 years in section 50(3). However, the Committee notes that arguably those acquisitions should already be able to be taken into consideration by the ACCC in any relevant acquisition, consistent with the Committee's view that the existing section 50 test is sufficient.

3 Principal Issues Raised by the ACCC Submission

ACCC support of amended substantial market power model - background

3.1 In its Submission, the ACCC restates its support for a 'substantial market power' model, which would prohibit a corporation with a substantial degree of market power in a market from acquiring shares or assets, if that acquisition would have, or be likely to have, the effect of enhancing that corporation's substantial market power. The ACCC submits that having a creeping acquisitions test would permit the (in its estimation) small number of potentially problematic transactions to be addressed. However, in order to provide clarity to the test, and to address some of the concerns raised by stakeholders, the ACCC has suggested an amended test which would read something like:

> *"A corporation that has a substantial degree of power in a market must not...[make an acquisition]...if the acquisition would have the effect, or*

be likely to have the effect, of not insignificantly enhancing the substantial degree of market power of that corporation in that market"[9].

3.2 The ACCC Submission concludes that, by focusing on an acquisition's impact on the market power of a corporation through the application of the 'enhancing' requirement, the source of the potential competitive concern (the substantial market power held by the corporation), would be targeted. The ACCC estimates that, of the 175 public mergers examined in 2007-08, 16 (or 9%) "*may have been considered under the revised substantial market power model*"[10].

Amended substantial market power model would apply in many cases and raises considerable practical concerns

3.3 The Committee has significant reservations that the ACCC's estimate of the number of mergers that would require consideration under a substantial market power test is correct, having regard to how many industries in Australia have corporations which may, on closer analysis, be deemed to possess a 'substantial degree of power in a market'[11]. Accordingly, it seems highly likely that, in practice, a much higher percentage of mergers will be assessed under this new test, in addition to being examined to determine whether a substantial lessening of competition will result. This would impose an additional burden upon all businesses, would significantly increase the costs of regulation and would detrimentally affect the strong reputation of Australia's merger control regime as being flexible and appropriately balanced. In particular, we are not aware of any other jurisdiction which has a "*not insignificant*" merger control test or other variant which creates such an obvious lack of clarity in its application. As such, if the proposed creeping acquisitions test is adopted, Australia would move seriously out of step with its major trading partners, such as the United States.

3.4 The Committee also has serious reservations about how the new test would operate in practice. It is not clear whether this test is effectively a requirement that the enhancement must be "*significant*" (rather than the double negative of "*not insignificant*"), or if the ACCC believes the threshold is, in fact, lower.

3.5 The Committee is primarily concerned that, given the likely application of a creeping acquisitions test to a considerable number of corporations for the reasons outlined above, a considerable number of the substantive merger notifications made to the ACCC will effectively be compelled to address the 'creeping acquisitions' test, in addition to the existing substantial lessening of

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[9] ACCC Submission, paragraphs 6, 18 and 32.

[10] ACCC Submission, paragraph 40. The Committee notes that the ACCC's Annual Report 2007-2008 stated that 397 merger reviews were undertaken (p.6). The discrepancy in figures may be due to the ACCC only including those acquisitions which it reviewed on a public basis.

[11] See, in particular, paragraph 5.9 of the Committee's response to the Discussion Paper, 12 June 2009. With regard to the presence of 'market power', the Committee is concerned that considerable numbers of corporations may be caught by a 'double' merger test. This is, in particular, as a result of the low threshold for determining the existence of a substantial degree of market power in *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 (see paragraph 5.9 of the Committee's submission in response to the Discussion Paper, 12 June 2009).

competition test. Accordingly, two very different and separate tests will be applied in a large number of cases, with considerable resources being utilised in focusing on the substantial market power element of the merger control test, even in industry sectors which have not warranted any concern.

The ACCC has not addressed the key concerns raised by the Committee's submission of 12 June

3.6 The ACCC Submission seeks to address issues raised by the Committee in its June Submission and the Committee welcomes the ACCC's feedback. In the Committee's view, however, the ACCC Submission does not provide any compelling reasons for the Committee to change its views on the proposed introduction of a substantial market power merger test to account for creeping acquisitions. As such, the Committee remains of the views set out in its June Submission.

3.7 The ACCC addresses five specific areas of the Committee's June submission. The Committee considers that the ACCC's arguments are not compelling for the reasons set out below. For convenient cross reference, the Committee has adopted the structure of the ACCC Submission[12]:

(a) **need for a creeping acquisitions law** - the ACCC Submission does not put forward a compelling or positive case as to why the existing substantial lessening of competition test is not adequate to take account of creeping acquisitions. The ACCC Submission suggests that the existing substantial lessening of competition test is defective because it may permit small acquisitions by corporations with a substantial degree of market power that may have a less than substantial impact on competition, where the "*continuing market structure remains workably competitive*"[13]. However, the Committee notes that:

(i) the substantial market power test, if applied properly, effectively replicates the existing substantial lessening of competition test. The ACCC has acknowledged that, in assessing market power, it is not sufficient to rely solely on market shares. Rather, an assessment of the competitive dynamics of the market is required. Consequently, assessing market power necessarily requires an assessment of the likely effects on competition in a market arising from the acquisition. Accordingly, the perceived need for a substantial market power test does not take into account the flexibility of the existing substantial lessening of competition test, or the lack of need for the proposed new test;

(ii) the ACCC argument in favour of a creeping acquisitions reform relies heavily on the case studies of acquisitions, set out in Appendix A of the ACCC Submission. The case studies are intended to show that the introduction of a creeping acquisitions

[12] ACCC Submission, paragraphs 98-134
[13] ACCC Submission, paragraphs 11 and 12.

test of the sort advocated would enable the ACCC to review potentially anti-competitive mergers more closely and prevent such transactions where appropriate. However, in the Committee's view, the case studies are not convincing and fail to support the ACCC's view that specific creeping acquisitions reforms are required. Instead, the case studies are examples of situations where application of the existing substantial lessening of competition test would be adequate to prevent potentially anti-competitive acquisitions from taking place; and

(iii) the United Kingdom competition authorities administer a substantial lessening of competition test and do not appear to have had issues with applying it in the case of small acquisitions[14].

In the Committee's view, acquisitions should not be prohibited unless they result in a substantial lessening of competition in a market. Consequently, in circumstances where an acquisition takes place and the "*continuing market structure remains workably competitive*", such an acquisition should not be prohibited by the ACCC, because, by definition, it is unlikely to lead to a substantial lessening of competition.

The existing test is sufficient to enable the ACCC to challenge and (where necessary) prohibit acquisitions that would substantially lessen competition in a market, and is applicable to *all* acquisitions, including those that would be classified as 'creeping'. For the reasons set out above, and discussed in the Committee's June Submission, the Committee does not consider that the ACCC has presented a strong, positive or compelling case for the introduction of a specific regulatory regime to account for creeping acquisitions.

In particular, one-off acquisitions by corporations with a substantial degree of market power can be appropriately assessed under the existing substantial lessening of competition test under section 50 of the TPA. If a one-off acquisition does not substantially lessen competition, it should not be prohibited. For example:

- Firm A has a market share of 50%
- Firms B and C each have market shares of 20%
- Firm D has a market share of 5%
- Firms E has a market share of 3%
- Firm F has a market share of 2%

If Firm A (50% share) acquires Firm F (2% market share), the post-acquisition level of concentration in the market would be 3538, with an

[14] See further paragraph 3.7(d) below.

increase in concentration of 200 (using an HHI calculation). This is well in excess of the ACCC's suggested notification thresholds set out in the 2008 Merger Guidelines[15]. Accordingly, the transaction would be expected to be subject to scrutiny by the ACCC under the existing substantial lessening of competition test, with the ACCC being in a position to prohibit the merger, if it leads to a substantial lessening of competition.

(b) **scope of the revised substantial market power model** - the ACCC appears to take the view that the substantial market power model would not act as an effective market share cap because the concept of substantial market power "*is influenced by a range of factors, not just a firm's market share*"[16]. Naturally, the Committee is aware that substantial market power is not solely determined by reference to market share figures. The ACCC's comment does not address the substantive and realistic concerns raised by the Committee in its June Submission that the *practical* effect of the reform would be to introduce an effective market share cap on large corporations. Importantly, there has been no consideration of whether the proposed new test would restrict Australian corporations from seeking legitimate economies of scale and scope. Additionally, the Committee notes that the reference to seeking authorisations is somewhat cynical, given the time and logistical issues involved in authorisation applications.

Similarly, the Committee takes little comfort from the ACCC's claim that "*the test of 'enhancing' market power will be interpreted in a restrictive manner*"[17]. Notwithstanding an overall positive view of this ACCC administration's handling of the critical area of merger control, the Committee believes that it is not appropriate to advance a law which relies wholly on the discretion of the regulator in applying the relevant test in question in either a restrictive or expansive fashion. In the Committee's view, the test should enable businesses and their advisers to understand clearly how it will apply to them. The ACCC's position and the proposed new test does not, in the Committee's view, promote certainty in application, and is unlikely to encourage business confidence in making investments when the regulatory test is so discretionary.

Indeed, the introduction of the "*not insignificant*" proposal does not address the fundamental problem inherent in the substantial market power model. In particular, the substantial market power test presumes that *any* increase in the market share of a corporation which has a substantial degree of market power pre-merger necessarily gives rise to a substantial or unacceptable lessening of competition, regardless of the market position of the target. There is no economic

[15] ACCC Merger Guidelines 2008, 21 November 2008.
[16] ACCC Submission, paragraph 103.
[17] ACCC Submission, paragraph 104.

support for such a position, irrespective of the proposed inclusion of a qualitative element (in the form of "*not insignificant*")[18].

The Committee notes a great danger in the tendency to seek to regulate Australian companies that have achieved a strong market position by strong brands, products and service. These companies should not be targeted in the absence of misuse of market power to facilitate new entry or expansion by large overseas entities. Playing fields should be level and should not be tilted, whether in favour of domestic or overseas corporations, as such intervention discourages long term investment and innovation and ultimately detracts from competition to the detriment of consumers.

Accordingly, the Committee's concerns are not allayed by the ACCC's response. The ACCC would retain substantial discretion to apply the 'enhancing' test in a restrictive manner at any time. Notwithstanding the proposed inclusion of a materiality threshold in the form of a requirement that the enhancement is "*not insignificant*", the Committee remains concerned that the effect of a restrictive interpretation of this test could be to prevent *any* acquisitions by a corporation with a substantial degree of market power - irrespective of whether such a market position may have been attained by customer service and innovation. Such a law is contrary to normal economic incentives for investment and penalises successful Australian and international companies operating in Australia.

(c) **impact on vertical mergers** - the ACCC Submission indicates that the effect of the substantial market power model would not be to prevent a corporation from making vertical acquisitions *per se*. The ACCC submits that, only where that acquisition actually enhanced the market power of the corporation in the market in which it holds that market power would the acquisition be prohibited. Again, naturally that should be the case. The issue that the Committee was highlighting is that the creeping acquisitions test has now expanded beyond an acquisition of a competitor, to any acquisition. The Committee also notes that the ACCC states that it "*...does not consider that a corporation with market power will **always** be prevented from making upstream or downstream acquisitions*" [emphasis added][19].

The ACCC's analysis in relation to vertical acquisitions indicates that the effect of a creeping acquisitions reform based on a substantial market power model would exceed the current scope and operations of the existing merger control test under section 50 of the TPA. Moreover, in the Committee's view, the ACCC's position goes beyond the traditional definition of creeping acquisitions, which would ordinarily be understood as relating to horizontal mergers only. Accordingly, the

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[18] The Committee also reiterates a serious concern that it has as to the issue of section 155 notices by the ACCC in merger clearance matters. The significant lowering of the merger threshold will give the ACCC greater scope for the use of such notices against corporations and individuals, even in the context of a voluntary notification process.

[19] ACCC Submission, paragraph 108.

Committee remains concerned that the proposed reform would negatively affect efficiency enhancing vertical mergers (which are internationally viewed as seldom being troublesome), and may undermine business confidence and investment for the reasons set out in the Committee's June Submission.

(d) **other jurisdictions** - the ACCC recognises in its Submission that "*specific creeping acquisitions laws are not generally a feature of merger laws in other key jurisdictions*"[20]. Nevertheless, in the ACCC's view, Australia's small and relatively concentrated economy is sufficiently different to the jurisdictions that it is typically compared with to require particular creeping acquisitions legislation. The Committee is not aware of such a proposition in merger regulation from the ACCC being put before. Australia is a small, open economy, but our competition issues are relatively similar to those faced by many economies and we see no reasons to change that perspective now. Indeed, such a proposition is quite inconsistent with the ACCC's and Government's previous views as to OECD consistency and best practice.

The Committee does not agree with the proposition that Australia has inherently different merger issues for the reasons set out in its June Submission[21]. In the Committee's view, the existing provisions of section 50 of the TPA provide sufficient leeway for small acquisitions which may substantially lessen competition to be prohibited. This view is supported by the ability of a comparable jurisdiction (the United Kingdom) to prevent the acquisition of single supermarkets by large competitors, as discussed in paragraphs 5.5 and 5.6 of the Committee's earlier submission. Moreover, the Committee notes that other jurisdictions with relatively small markets and a small population (for example, New Zealand, Canada and the Scandinavian countries) do not have specific creeping acquisitions legislation. There is no reason for Australia to be different.

Additionally, the Committee does not accept the ACCC's argument that Australia's economy is somehow unique, such that it requires specific creeping acquisitions legislation. Australia competes in a globalised economy, and must do all that it can to remain competitive in terms of outcomes for consumers, as well as objectively certain regulation to promote investment and employment. The introduction of a creeping acquisitions reform which would take Australia's merger control significantly out of step with that of other leading jurisdictions may have serious detrimental effects on our economy. Such an outcome is particularly of concern in the current global economic climate, given the investment that is required to stimulate growth. While the Government's stimulus packages are recognised as having contributed to lessening the downturn, it is important to allow business to invest with certainty. Moreover, the Committee believes that the proposed

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[20] ACCC Submission, paragraph 112.

[21] See, in particular, paragraphs 5.5, 5.6 and 5.12(f).

test will in fact, if it were to be implemented, cause greater concern to small business as they see opportunities to exit their businesses on retirement or changed circumstances curtailed by the practical impact of this new law.

Finally, the Committee agrees with the ACCC's analysis that "*the United Kingdom and the European Union do have the ability to deal with creeping acquisitions to some extent*"[22]. However, the reasons behind the ACCC's argument and that of the Committee are different. The Committee maintains its view that the existing merger control test in the United Kingdom and European Union (which is very similar to Australia's substantial lessening of competition test) permits treatment of small ('creeping') acquisitions, as the regulator can take account of any acquisition that falls within the relevant thresholds. The Committee notes that the submission to the Discussion Paper by RBB Economics, a United Kingdom based economics consultancy firm with offices in Australia, reaches the same conclusion[23]. The Committee has seen no evidence to the contrary and is unconvinced by the ACCC's stated position.

By contrast, the ACCC is likely to consider that the European Union and United Kingdom are able to deal with creeping acquisitions as a result of their ability to aggregate the turnover of certain acquisitions between the same parties within a two year period[24]. This provision under European merger law is not, however, similar or equivalent to the proposed creeping acquisition reform in any way. Accordingly, it is not that case that the European Union or United Kingdom has any form of specific legislative recognition of creeping acquisitions, as implied in the ACCC Submission.

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22 ACCC Submission, paragraph 113.

23 RBB Economics Comments on the Proposed Creeping Acquisitions Law in Australia, 10 July 2009.

24 See Article 5(2) of the European Community Merger Regulation, European Council Regulation No. 139/2004 of 20 January 2004, OJ L 24, 29.1.2004 (http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004R0139:EN:NOT).

(e) **alternative models proposed by the Committee**

Aggregation model

The ACCC Submission reiterates the ACCC's objections to the aggregation model, which the Committee proposed as an option in its June Submission. In particular, the ACCC appears to be particularly concerned with the "*practical difficulties involved*"[25] in applying an aggregation model. The ACCC concludes that , even if the Committee's proposed aggregation time limit of two years were adopted, "*this approach will not remove the inherent complexity associated with the aggregation model*"[26]. The ACCC sets out concerns around the analytical and evidential issues that would be encountered in reviewing transactions under the aggregation model, and considers that the two year time period proposed "*appears to be arbitrary*"[27]. The two year period reflects the ACCC's own period applied when examining the future state of competition in a market, as set out in its Merger Guidelines 2008[28]. In the Committee's view, the period is therefore appropriate.

The Committee recognises the complexity involved in applying an aggregation model of the type suggested. However, in spite of these acknowledged difficulties, the Committee does not consider that the ACCC's objections to the introduction of an aggregation model (as a least worst option for addressing creeping acquisitions) are compelling. In the Committee's view, because a test is complicated and more difficult for the regulator to prove does not mean that it is inappropriate. Rather, it may in fact be the correct and most specific legal instrument to deal with the policy issue in question of genuinely creeping acquisitions, as opposed to a rather blunt, and possibly more widely impacting, reform. If that is the case, then consideration should be given to its introduction.

While the aggregation test requires more consideration as to its practical application, it should be possible to apply such a test to assess the effect on competition of a series of aggregated transactions at the time of the last acquisition. The Committee has identified three primary issues around the practical application of the aggregation model which could be ameliorated in the manner set out in the table below:

Table: proposed solutions to practical problems of an aggregation model

Issue	Solution
Difficult to unwind acquisitions	ACCC should not have the ability to

[25] ACCC Submission, paragraph 119.
[26] ACCC Submission, paragraph 121.
[27] ACCC Submission, paragraph 123.
[28] ACCC Merger Guidelines 2008, 21 November 2008 (http://www.accc.gov.au/content/index.phtml/itemId/809866).

which had already previously been approved	unwind previous acquisitions - should be limited to prohibiting current acquisition
Period of aggregation difficult to agree on	Two year period as suggested by the Committee is appropriate for the reasons set out paragraph 3.7(e) above
Over the period of aggregation, the market dynamics may have changed such that the previous mergers may be assessed against a counterfactual that did not apply at the time they were entered into	ACCC should not have the ability to unwind previous acquisitions - should be limited to prohibiting current acquisition

Accordingly, for the reasons set out above and in the Committee's June Submission[29], the Committee considers that, in the event that the Government proceeds with amendments to the merger provisions of the TPA to take account of creeping acquisitions, the proposed aggregation model is the most appropriate solution. In particular, it is a more true and surgically accurate test for the perceived issue of what are genuinely 'creeping acquisitions' and does not create the distortions or regulatory burden of the ACCC's proposed variation to the latest attempt at formulating a creeping acquisitions law.

"Material increase"

Finally, with regard to the Committee's alternative proposal of replacing the word "*enhancing*" with "*material increase*" to refer to a corporation's substantial market power, the ACCC concluded that this would be unnecessary. In the ACCC's view, such an approach would "*not necessarily increase certainty of application, but rather create greater uncertainty*", as it may conflict with the existing substantial lessening of competition test[30].

The Committee does not agree with the ACCC's criticisms. The Committee considers that the replacement of "*enhancing*" with "*material increase*" would ensure that the real possibility of *all* acquisitions by corporations with substantial market power being prohibited under this new law would not in fact come to pass. There would be a clear and commercially sensible materiality threshold that would reduce the risk of the ACCC exercising too much discretion in its interpretation of "*enhancing*", to the detriment of the Australian economy.

The introduction of "*material increase*" would provide significantly greater clarity in application than the Commission's proposed "*not insignificant*" qualifier, which may have the effect of undermining any

[29] See, in particular, paragraphs 6.1-6.9.
[30] ACCC Submission, paragraph 126.

objective standard in a creeping acquisitions test. Accordingly, the Committee continues to support its proposal for the replacement of "*enhancing*" with "*material increase*" in the event that the Government is committed to unwarranted reform.

4 Conclusion

4.1 The Committee reiterates its view that there is no need for any further amendment to the TPA to address 'creeping acquisitions'. In the Committee's view, the existing provisions of section 50 provide a sufficient test for small acquisitions which may substantially lessen competition to be prohibited. This view is supported by the ability of a comparable jurisdiction (the United Kingdom) to prevent the acquisition of single supermarkets by large competitors. The Committee believes that the ACCC's proposed further variation to the creeping acquisitions test would create more costs and unnecessary regulatory burden than benefits to competition.

4.2 Having sought to provide workable and pragmatic alternatives to the uncertain test provided by the ACCC, the Committee remains firmly opposed to the current proposal and the ACCC's revised proposal. The Committee, which is comprised of Australian lawyers and economists with international experience, feels strongly as to the inadequacies of this law reform proposal and would be prepared to work with the Government and ACCC for a constructive position that does not impair the competitive process and most importantly, ultimately benefits consumers.

If you have any questions regarding this submission, in the first instance please contact the Committee Chair, Dave Poddar, on [02] 9296 2281.

7 August 2009