



**Australian
Competition &
Consumer
Commission**

Australian Competition and Consumer Commission (ACCC) –
submission to the Assistant Treasurer and Minister for
Competition Policy and Consumer Affairs regarding creeping
acquisitions

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Introduction

1. On 5 August 2008, the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon Chris Bowen MP, released the Government's preliminary action plan in response to the *Report of the ACCC Inquiry into the competitiveness of retail prices for standard groceries (Groceries Inquiry)*.¹
2. As part of its preliminary response, the Government issued a Discussion Paper on 1 September 2008² to gauge the best way forward in relation to the issue of creeping acquisitions. The Discussion Paper seeks comments on the issue of creeping acquisitions and possible approaches to addressing these issues. In particular, the Discussion Paper notes two possible options for dealing with creeping acquisitions, the 'aggregation model', and the 'substantial market power model'.
3. The ACCC welcomes the opportunity to provide its views on these issues to assist the Government in its consideration of this matter.
4. As previously stated in the Groceries Inquiry, the ACCC supports the introduction of a general creeping acquisition law. In particular, the ACCC is concerned that section 50 of the *Trade Practices Act 1974 (Cth)* (**the Act**) is unlikely to capture creeping acquisition issues. There is a significant risk that competition in various industries could be substantially damaged as a result of this loophole in the legislation.
5. The ACCC has considered carefully the two options put forward in the Discussion Paper. On balance, the ACCC considers that the introduction of a creeping acquisition law along the lines of the 'substantial market power' model is the preferable option to deal with creeping acquisition issues. This model targets circumstances where creeping acquisitions pose the highest risk for the Australian economy – where the acquiring firm already has substantial market power. The ACCC believes that while in theory the aggregation model appears

¹ Report available from <http://www.accc.gov.au/content/index.phtml/itemId/809228>.

² Federal Government, '*Creeping Acquisitions – Discussion Paper*', 1 September 2008, available at: www.treasury.gov.au

to address creeping acquisition issues, in practice it would not provide a workable approach due to the complexity of the provision and the evidentiary burden associated with it.

6. The following submission outlines the ACCC's views in detail.

The nature of creeping acquisitions and difficulties in dealing with creeping acquisitions under section 50 of the Trade Practices Act

Creeping acquisitions

7. Mergers and acquisitions are important for the efficient functioning of the economy. They allow firms to achieve efficiencies, such as economies of scale or scope. They also provide a mechanism to replace the managers of underperforming firms. However, in some cases mergers have anti-competitive effects. By altering the structure of markets and incentives for firms to behave competitively, some mergers can result in significant consumer detriment.
8. The term 'creeping acquisition' encompasses a range of situations. While it can refer to a series of acquisitions over time that individually do not raise competitive concerns, but when taken together, the acquisitions have a significant competitive impact, the term creeping acquisition also refers to a firm with existing substantial market power enhancing its market power through one (or more) acquisitions which individually do not substantially lessen competition.
9. The ACCC believes that while the concept of creeping acquisitions may encompass a range of scenarios, the latter type of creeping acquisition is the area of greatest concern. In effect, scenarios involving acquisitions by a firm with substantial market power includes situations where a series of acquisitions over time are most likely to raise significant concerns. That is, in situations where there are already competitive concerns in a market, and further acquisitions will enhance a firm's substantial market power, thus stifling remaining competition. In such markets, the ACCC believes it is important to protect Australian consumers from a further lessening of competition through creeping acquisitions.

10. Creeping acquisitions may impact on competition in a number of ways. A common form of creeping acquisition observed by the ACCC involve matters where a firm at one level of the supply chain makes one or more small acquisitions in a number of downstream markets. The competitive implications of the acquisition in the local market appears to be insignificant (it is often the case that the acquiring firm has no competitive presence in the local market at all), but the combined effect is to create or further entrench a position of substantial market power in the broader upstream market, which has a flow on effect in each of the downstream markets.
11. Creeping acquisition issues are more likely to raise concerns where the structure of the relevant market facilitates the exercise of market power, and in particular, where that market is characterised by high barriers to entry or expansion. Not all acquisitions of small firms will have an incremental impact on competition, particularly when new entrants are likely to continue to emerge to maintain competition in a market. However, where barriers to entry are high, and particularly when one or more firms already possess significant market power, there is a significant risk that any loss of competition could be detrimental.

Difficulties in applying section 50 of the *Trade Practices Act* to creeping acquisitions

12. The primary regulatory regime for mergers and acquisitions is contained in section 50 of the Act. Section 50 prohibits a corporation from acquiring shares or assets if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market³.
13. In assessing the impact of a proposed merger or acquisition on competition, the ACCC compares the likely future state of competition with the merger and the likely future state of competition without the merger to determine whether the competitive impact will be substantial.

³ If the ACCC considers that a transaction is likely to breach section 50, it may apply to the Federal Court for injunctive relief to prevent the acquisition proceeding. In addition, it may seek pecuniary penalties, divestiture orders or a declaration that the transaction is void within 3 years of the contravention (Section 51 of the Act)

14. The Act provides that a non-exclusive range of factors are to be taken into consideration to determine whether an acquisition is likely to substantially lessen competition including the degree of market concentration, barriers to entry, import competition, removal of a vigorous and effective competitor, and the effect on prices and profits.
15. Section 50 of the Act applies to individual acquisitions. Unlike other competition provisions of the Act such as sections 45⁴ and 47⁵ that contain provisions expressly allowing the examination of multiple transactions, section 50 expressly refers to a single acquisition only. Accordingly, the ACCC takes the view that unlike those other competition provisions of the Act, section 50 is not capable of examining multiple transactions in aggregate, but requires the ACCC to consider each transaction in isolation.
16. While prior acquisitions made by a firm form part of the ‘backdrop’ for assessing the competitive implications of a proposed transaction, such transactions are accounted for in both the with/without scenarios, and therefore the impact of prior transactions is neutralised. The relevant issue is the extent to which the current transaction changes competition (irrespective of the actual level of competition in the market). Accordingly, even where a firm has substantial market power, it may continue to acquire smaller firms without triggering section 50 of the Act.
17. If firms are allowed to continue to exploit this loophole in the legislation, this is likely to result in a substantial reduction in competition, innovation and efficiency, and increased prices and decreased choice for consumers. In particular, firms possessing substantial market power could stifle remaining competition, and the prospect of smaller competitors, who do not currently provide substantial competition, from growing into more significant competitors.
18. There appears to be some misconception that because the ACCC takes the view that where a single acquisition has significant competitive implications in a local

⁴ Section 45 prohibits contracts, arrangements and understandings that have the effect, or are likely to have the effect of substantially lessening competition in a market.

⁵ Section 47 prohibits exclusive dealing.

market it can be assessed under section 50, and is very active in investigating such matters, that there is no need to address creeping acquisition issues.

19. While the ACCC does examine acquisitions of what may be considered to be small businesses in local markets, this is limited to cases where the business in question is substantial in competitive terms within the local or regional market. This does not cover situations where a business or series of businesses that are small in competitive terms are acquired by one firm that has substantial market power. As outlined above, one of the key problems associated with creeping acquisitions is that substantial market power may be enhanced in a broader upstream market through an individual acquisition in local or regional downstream markets where there is no substantial competitive impact within the local or regional market itself. Accordingly, examining competitive effects in the local or regional market does not address the creeping acquisition issue.

Case studies

20. The ACCC has observed a number of industries where creeping acquisitions are raising competitive concerns, or there is a real risk of such concerns arising in the future if acquisitions continue unchecked. Industries where the ACCC has observed significant numbers of acquisitions include taxis, liquor stores, pathology services, waste services, childcare, optical dispensing, packaging and funeral services.
21. The grocery industry is a key area of the Australian economy where the ACCC has identified such risks.
22. In the Groceries Inquiry, the ACCC noted concerns from a number of industry participants that creeping acquisitions were an issue in the retail grocery industry, and in particular that acquisitions of smaller retailers by major supermarket chains (**MSCs**) may have the cumulative effect of eliminating or preventing competition in grocery retailing. Further, concerns were raised that such acquisitions may also affect the grocery wholesaling sector, particularly independent grocery wholesalers, or potential entrants into grocery wholesaling through:

- loss of economies of scale in wholesaling relative to MSCs; and
 - loss of bargaining power in negotiations with suppliers relative to MSCs.
23. The ACCC found that such acquisitions did not appear to be a significant current concern in the supermarket retailing industry. It was found that most of the new growth by MSCs in recent years did not come from acquisitions of independent supermarkets. Nevertheless, it found that the supermarket industry was one where creeping acquisitions could over time become a concern, due to particular structural features of the market, including:
- the need to obtain good sites being a significant barrier to entry, particularly given the financial resources of the MSCs and the leverage they wield over lessors of suitable sites;
 - the existence of broader barriers to entry and expansion created through the need to obtain economies of scale and efficient wholesaling operations;
 - the existence of two major supermarket chains; and
 - a situation where there are many small business units (that is, retail stores or potential retail sites) that could be acquired or leased one by one or in small groups.
24. That is, a significant number of acquisitions (either of existing businesses, sites or leases) could occur in the grocery industry in the future which will not be caught by section 50 of the Act because the acquisition does not have a substantial impact on a local retail market. Nevertheless, such transactions are likely to have a substantial cumulative effect on competition due to the incremental impact on wholesale markets. As barriers to entry and expansion at the retail level are high, the cumulative impact of loss of volumes for existing and potential wholesale operations may weaken existing and potential competition further.
25. The ACCC is concerned that there appears to be some misconception in the market that because section 50 is capable of dealing with some individual

instances of a retailer that is small by industry standards being acquired by a larger firm the law is adequate to deal with any creeping acquisition problem in the grocery sector. Where there are a relatively small number of supermarkets in a retail area, an acquisition of one supermarket may have a substantial impact on competition within that area, and can be assessed accordingly. It was on this basis that the ACCC opposed Woolworth's proposed acquisition of the Karabar supermarket in Queanbeyan, New South Wales⁶. However, this does not address the broader issue of the impact of creeping acquisitions on wholesale markets. Many transactions could continue to occur because the transaction does not have a substantial impact on the local retail market.

26. While the issue of creeping acquisitions has been highlighted in the course of the Grocery Inquiry, it is important to note that the grocery sector is not the only industry where creeping acquisition concerns may arise. The ACCC is aware of a number of other industries where such issues can arise.

Aggregation model

27. As indicated in the Discussion Paper, one model which has been proposed to address the issue of creeping acquisitions is the aggregation model.
28. The aggregation model would add a new provision to section 50 prohibiting acquisitions which, when combined with acquisitions by the firm in question within a specified time period, for example 5-6 years, would be likely to substantially lessen competition. Only the latest acquisition would be prohibited.
29. In theory, the ACCC considers that such a model would appear to capture the competitive harm associated with creeping acquisitions.
30. The ACCC notes however that the analytical framework that would underpin the aggregation model is relatively complex, novel in part and presents significant conceptual difficulties.

⁶ ACCC, *ACCC opposes the proposed acquisition of Karabar supermarket by Woolworths Limited*, media release, 25 June 2008.

31. In applying the aggregation model, the likely impact of the current acquisition on competition in the reasonably foreseeable future (typically, the next 1–2 years) would need to be aggregated with the likely residual impact of each prior acquisition on competition in this 1-2 year period to identify the overall competitive effect. Where a large number of prior acquisitions are involved, and other aspects of the market may have changed significantly over time, identifying the competitive impact of each prior acquisition would be very complicated, and likely to raise substantial evidential challenges.
32. The aggregation model may initially seem like an attractive option to address the issue of creeping acquisitions because it has a superficial similarity to other aggregation provisions in the Act (e.g. sections 45 and 47⁷) and it is consistent with section 50 and other parts of Part IV in that it retains the substantial lessening of competition test. However, the ACCC believes that in practice because of the analytical and evidential issues associated with this option, the disadvantages of introducing of a creeping acquisition law in this form are likely to outweigh the benefits. That is, the ACCC believes there is a real risk that the aggregation model would prove unworkable in practice.

Substantial Market Power Model

33. To address the issue of creeping acquisitions the ACCC supports the implementation of a substantial market power test along the lines of the ‘substantial market power’ model outlined in the Discussion Paper.
34. The ACCC considers the substantial market power model (**SMP model**) to be a practicably workable provision for dealing with creeping acquisition issues. The SMP model captures the kinds of creeping acquisitions that are most likely to cause concern. Further, the SMP model avoids the analytical and evidentiary issues associated with the aggregation model and would have a less intensive impact on resources.

⁷ Section 45(4) provides, among other things, that a provision of an existing or proposed contract, arrangement or understanding shall be deemed to substantially lessen competition if that provision and the provisions of any other contract, arrangement or understanding together are likely to have that effect. Section 47(10), among other things, allows the impact on competition of separate instances of exclusive dealing conduct by a firm, where these are of ‘the same or a similar kind’, to be aggregated to find a substantial lessening of competition.

35. The SMP model would prohibit a firm with substantial market power from enhancing that power through further acquisitions that lessen competition. This would achieve the objective of a creeping acquisition provision as it would prohibit acquisitions that could form part of a series of creeping acquisitions, particularly where the acquirer is a significant supplier in the relevant market. This model targets circumstances where creeping acquisitions pose the highest risk for the Australian economy – where the acquiring firm already has substantial market power.
36. Such an approach is consistent with the underlying philosophy of the Act, which imposes additional obligations on firms with substantial market power to ensure that while a firm should not be prohibited from competing vigorously to gain an advantage in the market and enjoy the fruits of its labour, checks are placed on its conduct. For example, section 46 of the Act operates to prohibit the misuse of substantial market power.

Practical Application

37. As outlined in the Discussion Paper, the substantial market power model would add a new provision to the Act to supplement the substantial lessening of competition test (**the SLC test**) contained in section 50 of the Act.⁸ The provision would prohibit corporations with a substantial degree of power in a market from making acquisitions which would be likely to result in a lessening of competition in that market.
38. The proposed provision could be drafted as follows:

Section 50AA(1)

A corporation that has a substantial degree of power in a market must not 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 the effect, or be likely to have the effect of, lessening competition in that market.

⁸ Ibid, n 2, pg 6.

39. Consequential amendments would need to be made to ensure that the SMP test would apply in relation to formal merger applications, and merger authorisations.
40. For consistency, the proposed amendment should also incorporate the 2007 amendments to section 46 (s46(3C) and s46(3D), clarifying the interpretation of ‘substantial market power’ as follows:

A corporation may have a substantial degree of power in a market even though:

- (a) the corporation does not substantially control the market; or
- (b) the corporation does not have absolute freedom from constraint by the conduct of:
competitors, or potential competitors, of the corporation in that market;
or
persons to whom or from whom the corporation supplies or acquires goods or services in that market.

To avoid doubt, for the purposes of this section, more than one corporation may have a substantial degree of power in a market.

41. Broadly, a corporation would be considered to have a substantial degree of market power where it has a significant (but not absolute) freedom from competitive constraint, with the ability to raise prices above competitive levels being a critical test of whether such power exists.
42. The degree to which a corporation is free from competitive constraint would be determined by reference to factors such as the height of barriers to entry to the relevant market, the strength of import competition, the number, size and influence of competitors, the countervailing power of suppliers and customers, and other potential competitive constraints; essentially the merger factors in s50(3) of the Act.

Scope of the SMP Model

43. In practice, the ACCC believes that the SMP model would not constitute a significant departure from the scope of the current merger test contained in section 50 – other than to deal with creeping acquisition issues.
44. Most proposed acquisitions which do not contravene the SLC test would also not contravene the SMP test. This is because, for the most part, the factors which determine whether a proposed acquisition would result in a substantial

lessening of competition are essentially the same factors which determine whether an acquirer has a substantial degree of market power. For example, a proposed acquisition would not be likely to substantially lessen competition where there are significant competitive constraints on the merged firm (e.g strong import competition). If a significant constraint exists, the acquirer is also unlikely to have a substantial degree of market power pre-merger. Consequently, the SMP test would also not be contravened.

45. However, as indicated in the Discussion paper, there will be circumstances where a proposed acquisition may pass the SLC test, but contravene the SMP test, including where:
 - the acquirer faces no significant competitive constraint (i.e. it is likely to have substantial market power); and
 - the merged firm would face no significant competitive constraint, but the impact of the proposed acquisition on competition would be less than ‘substantial’.
46. That is, in matters involving creeping acquisitions.
47. It is important to note that the SMP model does not prohibit a firm from enjoying the legitimate fruits of its success. That is, the SMP model would not prevent a firm from achieving a strong market position through innovation and efficiency.
48. Similarly, the SMP model would not prevent a firm with substantial market power making *any* acquisition. Firstly, there would need to be a lessening of competition associated with the proposed acquisition for the test to operate. A lessening of competition would be less than substantial, but not so insignificant so as to have a trivial or minor effect on competition. That is, the intent of the provision would be to capture acquisitions which have a perceptible effect on competition, and not those acquisitions which have such a minor effect on competition so as to be insignificant. To ensure the scope of the provision is confined in this way when interpreted by the courts, it would be useful to

include a description to this effect in the Explanatory Memorandum of the relevant bill. Such words could include:

New clause 50AA uses a ‘lessening of competition’ test. This test is based on the existing ‘substantial lessening of competition’ test used in subsection 50(1) and other provisions of Part IV of the Act. The removal of the word ‘substantial’ recognises the fact that creeping acquisitions do not, usually, trigger the operation of section 50 because they are unlikely to have the effect of substantially lessening competition. ‘Substantial’ has been interpreted as real or of substance, not merely discernible but material in a relative sense and meaningful (see eg, *Rural Press Limited v Australian Competition and Consumer Commission* (2003) 216 CLR 53 at 71 [41]).

It is not the intention that trivial acquisitions, or acquisitions that have such a slight or minor effect on competition, will attract the operation of new clause 50AA. In other words, the effect, or likely effect, on competition must be more than insignificant. This also reflects the common law principle of *de minimus non curat lex* (the law does not concern itself with trifling matters). In determining whether an acquisition would have the effect, or be likely to have the effect, of lessening competition in a market for the purposes of new clause 50AA, regard must be had to the factors contained in subsection 50(3).

49. Secondly, an acquisition would need to have the effect of lessening competition in the market(s) in which the acquirer has substantial market power to be caught by the SMP test. The inclusion of the words ‘*in that market*’ (as outlined in paragraph 38) in the specific wording of the SMP model, as opposed to ‘*in a market*’ which appear in section 50, would ensure the scope of the provision were confined in this way. That is, the SMP test would not apply to *any* acquisition made by an acquirer with substantial market power – only to those acquisitions which ‘*have the effect or would be likely to have the effect of lessening competition in that market*’; the market in which the acquirer has substantial market power.
50. This wording would be broad enough to capture acquisitions:
 - which occur in a related market to the market(s) in which the acquirer has substantial market power, but which have the effect of lessening competition in the market in which the acquirer has substantial market power; and

- which occur in the same market in which the acquirer has substantial market power and would have the effect of lessening competition in that market.
51. With the inclusion of the words ‘in that market’ in the proposed provision, the SMP model would not extend beyond the issue it is seeking to address, it would apply to acquisitions made by an acquirer with substantial market power which further enhance that market power. It would not apply to *all* acquisitions made by an acquirer who happened to have substantial market power in any market. Thus, the SMP model would be confined to addressing the issue of ‘creeping acquisitions’.

Impact on resources

52. It is inevitable that the addition of a new prohibition in the Act will impact on the resources of the ACCC, the merger parties and third parties to some extent. The introduction of a supplementary mergers test may increase the number of matters notified to the ACCC, and impact on the scope and duration of enquiries in some matters.
53. However, in comparison to other proposed options, particularly the aggregation model, the impact on resourcing from the SMP model is likely to be significantly less intensive.
54. It is difficult to precisely predict the number of additional merger reviews the ACCC would need to conduct in response to the SMP model. However, even under the current provision, it may be prudent for firms who possess substantial market power to notify the ACCC of even small transactions, given the risks associated with any acquisition having a substantial impact on competition in those circumstances.
55. In terms of the time taken to assess mergers under the SMP model as well as the current test, the ACCC believes this is unlikely to create a significant additional burden to business. As outlined above, the majority of proposed acquisitions which pass the SLC test would also pass the SMP model. Consequently, the instances in which the ACCC would need to apply the SMP model would be limited to genuine creeping acquisition issues and subsequently the instances in

which merger parties and third parties would be required to respond to ACCC inquiries under the SMP model would also be limited to such cases.

56. Further, there would be less uncertainty associated with the introduction of the SMP model than the aggregation model. Industry is already familiar with the concept of substantial market power in the context of section 46 of the Act, and the concept is closely related to the existing section 50 of the Act, which assesses whether a transaction creates or substantially increases a firm's market power.
57. In practice, the ACCC considers the SMP model to be complementary to the SLC test in section 50. In conducting merger reviews the ACCC would first consider all acquisitions under the SLC test, following its usual approach to reviewing acquisitions outlined in the ACCC's merger review process guidelines 2006⁹ and the ACCC's draft merger guidelines 2008¹⁰.
58. Where an acquisition is cleared under the SLC test, but there are reasons which indicate the acquisition may not pass the SMP model, the ACCC would then apply the SMP test. As outlined above, such reasons would most likely include where the acquirer and the merged firm face no significant competitive constraints, and the impact on competition from the proposed acquisition would be less than substantial, but not so insignificant so as to have a trivial or minor effect on competition.
59. In order to limit the impact on businesses and to ensure an efficient review process, the ACCC would seek the information it requires to assess proposed acquisitions under the SMP test at the same time it is seeking information in its review of the acquisition under the SLC test. Given the similarities in the factors determining the elements of the two tests, the ACCC is unlikely to require a great deal more information from businesses than it would otherwise require to

⁹ ACCC, *Merger review process guidelines – July 2006*, available at:

<http://www.accc.gov.au/content/index.phtml/itemId/740765>

¹⁰ ACCC, *Merger guidelines – draft 2008*, available at:

<http://www.accc.gov.au/content/index.phtml/itemId/809866>

assess the proposed acquisition under the SLC test. The information required by the ACCC will differ on a case by case basis.

60. To ensure clear guidance for businesses, the ACCC would amend its merger guidelines outlining the steps it would take in reviewing proposed acquisitions under the SMP test.

Impact on small business

61. As outlined above, the ACCC considers that the SMP model would primarily capture situations where a substantial competitor seeks to eliminate small businesses through a series of acquisitions over time. Accordingly, if this model were adopted, it would provide significant benefits for small businesses by protecting them from such strategic behaviour.
62. However, at the same time, the ACCC notes that this may have a negative impact on some small business owners actively seeking to exit a market because it may eliminate one or more significant prospective bidders for their business and consequently reduce the sale price. Nevertheless, the ACCC considers that any negative impact on a portion of individual sellers would be far outweighed by the wider benefits to consumers and small businesses generally associated with prohibiting firms with substantial market power from engaging in creeping acquisition strategies with the attendant anti-competitive consequences.

Market power or market share test

63. The ACCC notes there may be some debate as to whether the SMP model should be based on a substantial market power test, or a substantial market share test. The ACCC would not support a creeping acquisition test based on market share rather than market power.
64. The ACCC believes that a test based on market share misses the fundamental principle that underwrites the merger provisions in the Act; that it is market power, not market share, which facilitates practices aimed at damaging competitors and competition.

65. Market share, while an important consideration, does not always provide an accurate indication of the power that a corporation has in a market. For example, a firm with a high market share, (e.g 40% or over) may not have substantial market power due to other factors such as low barriers to entry, or import competition. In these circumstances, restricting the ability of such a firm to acquire another firm could stifle potential efficiencies and distort competition, going well beyond what is necessary to address creeping acquisition issues.

Other Jurisdictions

66. The ACCC notes that specific creeping acquisition laws are not generally a feature of merger laws in other key jurisdictions. However, the nature and structure of markets in other jurisdictions can be quite different to conditions in Australia. Also, in a jurisdiction such as the European Union, which focuses on larger, community-wide mergers, issues such as creeping acquisitions are less relevant. Accordingly, the ACCC does not believe that strict comparisons with other jurisdictions are necessarily helpful in this matter.
67. Nevertheless, it is notable that in some jurisdictions such as the United Kingdom, and to some extent, the European Union, do have the capacity to deal with creeping acquisition issues.

United Kingdom

68. In the United Kingdom, on receipt of a market investigation reference from the Office of Fair Trading, the UK Competition Commission will investigate whether any features or combination of features of each relevant market prevents, restricts or distorts competition in connection with the acquisition or supply of goods or service in the United Kingdom or in part of the United Kingdom. That is, whether the features or combination of features have any adverse effect on competition or potential competition. The UK Competition Commission may impose a range of remedies to address features of a market which it finds adversely effect competition, including divestiture of a business or assets to another person.

69. The broad scope of the market investigations power would enable the UK Competition Commission to consider various features of a market, including, potentially the competitive effects of a series of creeping acquisitions.
70. While the ACCC considers this approach may be suitable for the United Kingdom, the ACCC does not believe it would necessarily be suitable for Australia. The UK approach involves a case-by-case examination, rather than a law of general application in relation to creeping acquisitions. Also, the UK approach goes well beyond issues of creeping acquisitions, and accordingly, the ACCC believes that such an approach should only be taken in Australia if it considered that there is a broad need for a general market investigation power.

The European Union

71. The European Commission Merger Regulation (the ECMR) prohibits mergers which would significantly impede effective competition in the common market, or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.
72. The ECMR only applies in relation to mergers between firms with very large turnovers. Generally, the ECMR applies in relation to parties with a combined worldwide turnover of over EUR 5 000 million, and at least two of the parties having an aggregate turnover in the European Union of over EUR 250 million. Accordingly, as merger control at the European Union level is focussed on large transactions with a community-wide dimension, creeping acquisition issues are less of an issue for the Union as a whole.
73. Nevertheless, the ECMR recognises the concept of a creeping acquisition in the context of a firm acquiring control over one undertaking through a series of transactions taking place “within a reasonable period of time”¹¹. Also, article 5(2) of the ECMR allows the European Commission to consider successive transactions by one firm to acquire another firm through a succession of incremental acquisitions over a 2 year period as a single transaction for the purposes of calculating turnover. This provision is designed to avoid the

¹¹ European Commission, *Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*, para 48.

creeping acquisition of one firm by another through small transactions that fall below turnover thresholds.

Conclusion

76. In conclusion, the ACCC considers that creeping acquisitions are an important issue for the Australian economy. Significant numbers of small acquisitions are occurring in various markets that may have a detrimental effect on competition. These transactions cannot be addressed under the existing provisions of the Act. At the same time, care must be taken in developing an approach to creeping acquisitions to ensure that the approach taken is not overly broad, merely protecting particular smaller competitors rather than the competitive process. Equally, the approach taken must be workable in practice and minimise the burden on regulators and industry in order to deliver benefits to consumers.
77. For these reasons, the ACCC believes that the SMP test is the most appropriate model for dealing with creeping acquisitions. The test targets situations where creeping acquisitions raise the greatest risks, preventing firms that already have substantial market power from pursuing a series of small acquisitions. Further, it draws on concepts and analytical tools that are already familiar to Australian industries and utilised in merger analysis, thus minimising the resource burden associated with the introduction of a creeping acquisition law.