Law Council of Australia
Trade Practices Committee
Business Law Section

Submission on Commonwealth Government Discussion Paper - Creeping Acquisitions

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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:

[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

[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.

[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."*

[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.

[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].

[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].

[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.

[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.

[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.