

17 October 2008

Mr Scott Rogers
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The Treasury
Langton Crescent
PARKES ACT 2600

By email: scott.rogers@treasury.gov.au

Dear Secretary

Re: Treasury Discussion Paper

Woolworths is pleased to provide the enclosed submission to The Treasury in response to its release of a Discussion Paper on Creeping Acquisitions following the conclusion of the Senate Economics Standing Committee Inquiry on the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008].

While many of our comments are capable of general application we have concentrated on the retail sector and in part the grocery market.

Retail acquisitions in the grocery sector are currently regulated by the *Charter for the Acquisition of Independent Supermarkets*, the *Produce and Grocery Industry Code of Conduct* and the ACCC, which is responsible for enforcing section 50 of the *Trade Practices Act 1974 (TPA)*. Woolworths is committed to complying with the Charter and is a voluntary member of the Code. Together the Charter and the Code operate to ensure there is a competitive bidding process for the acquisition of independent supermarkets and that all potential purchasers are afforded an equal and fair opportunity to acquire independent supermarkets as they come up for sale. They also ensure that the ACCC is notified of, and examines, all relevant proposed acquisitions by Woolworths in this sector. The ACCC's recent decision to oppose Woolworths' proposed acquisition of an independent supermarket in Karabar, near Queanbeyan in NSW, demonstrates the effectiveness of these requirements.

Woolworths submits that there is no factual or policy case for the introduction of any general regulation of so called "creeping acquisitions". Further, Woolworths has significant concerns that the two amendments proposed in the Treasury's Discussion Paper - the Aggregation Model and the Market Power Model - are neither necessary nor appropriate. In this respect, Woolworths notes that:

- the existing provisions of the TPA are adequate to address any competition law issues that might arise from creeping acquisitions that may occur in the retail grocery sector;

- no other Western economy has introduced a law in similar terms to either the Aggregation Model or the Market Power Model, both of which do not appear to be based on sound economic or legal principle;
- both the Aggregation Model and the Substantial Market Power Model will significantly increase transaction and compliance costs, delays and uncertainty for both small and large businesses and introduce another unnecessary layer of regulatory burden;
- the Substantial Market Power Model will, in effect, place a "market cap" on the growth of successful Australian businesses. Any such "market cap" would be a dangerous development in the Australian economy where it would significantly limit the ability of many efficient, innovative and competitive firms in Australia to continue to achieve the efficiencies of scale, scope and risk diversification they require in order to drive Australia's economic growth and development; and
- the burdens of introducing either the Aggregation Model or the Substantial Market Power Model are likely to fall heavily on small business and ultimately consumers.

If you have any questions regarding the matters raised in the submission, please contact Group Manager – Government Relations, Nathalie Samia on 02 8885 3446 or nsamia@woolworths.com.au.

Yours sincerely



Peter Horton
Group General Counsel & Company Secretary

WOOLWORTHS LIMITED

Woolworths Limited

Treasury Discussion Paper on Creeping Acquisitions

17 October 2008

1 Executive Summary

Woolworths Limited (**Woolworths**) welcomes the opportunity to make this submission in response to the Treasury Discussion Paper on Creeping Acquisitions (**Treasury Discussion Paper**).

Woolworths makes this submission as both a significant participant in the retail grocery industry and as a significant contributor to the Australian economy. It further does so as a national retailer of groceries which has, from time to time over the past decade or so, sought to acquire or acquired independent supermarkets, which have been offered for sale. Woolworths undertakes such acquisitions with the prior approval of the Australian Competition and Consumer Commission (**ACCC**).

The two models proposed in the Treasury Discussion Paper have significant problems. Woolworths' submission focuses on those problems in the context of the retail grocery industry. However, the issues identified in this submission equally apply to all other industries in Australia. It is Woolworths submission that any law to address the perceived issue of "creeping acquisitions" should only be introduced if a case for action has been clearly established and the benefits and costs (including compliance costs) of the proposed regulation have been appropriately assessed. Any law that is introduced should be one that will give the greatest net benefit to the community.

Woolworths is aware that the Federal Government has stated its intention to address perceived concerns about creeping acquisitions in a number of sectors in the Australian economy, including the grocery sector. In response, Woolworths notes that the concerns about creeping acquisitions in the grocery sector are a problem very much of perception, rather than reality. Creeping acquisitions are not a problem in the grocery industry; this is a position well supported by the findings of the ACCC's recent thorough investigation of the Australian grocery industry culminating in the *Report of the ACCC Inquiry into the Competitiveness of Retail Prices for Standard Groceries (Grocery Inquiry Final Report)*, where it stated that it:

...does not consider that acquisitions by Coles and Woolworths of smaller competitors over time are a significant current concern in the grocery retail sector. Most of the new growth by Coles and Woolworths in recent years has not come from acquisitions of independent supermarkets. Of all new store openings by Coles and Woolworths in the last two years, only 10 per cent have involved acquiring or leasing a site which was previously operating as an independent supermarket.¹

The ACCC continued:

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 by the MSCs [Coles and Woolworths] has not been a significant contributor to any competition problems in the supermarket sector in recent years.²

¹ ACCC, *Report of the ACCC into the Competitiveness of Retail Prices for Standard Groceries*, July 2008, p. 429.

² ACCC, *Report of the ACCC into the Competitiveness of Retail Prices for Standard Groceries*, July 2008, p. 429.

On this basis, Woolworths submits that there is no factual or policy case for the introduction of any general regulation of so called "creeping acquisitions". There is no evidence of any creeping acquisitions strategy on the part of Woolworths, nor of conduct in the grocery sector that could constitute "creeping acquisitions". The facts show that Woolworths has acquired only 6 independent supermarkets since 2006. In addition, the share of large supermarkets has declined in the period from 1998 to 2007, while in the same period the independent sector has grown strongly.

Woolworths submits that, in its present form, section 50 of the *Trade Practices Act 1974* (Cth) (**TPA**), the *Charter for the Acquisition of Independent Supermarkets* (**Charter**) and the voluntary *Produce and Industry Code of Conduct* (**Code**)³ which are already in place in the grocery industry are adequate to deal with any competition issues that might arise from the perceived issue of creeping acquisitions. This existing regulatory regime has a proven track record of notification of proposed acquisitions to the ACCC for rigorous assessment under section 50. Accordingly, Woolworths submits the two reform proposals included in the Treasury Discussion Paper are neither necessary nor appropriate.

Woolworths also notes that no other Western economy has introduced a law in similar terms to those which are proposed in the Treasury Discussion Paper and urges The Treasury to consider carefully the likely transaction and compliance costs, delays and uncertainty of adding another layer of regulation to what would otherwise be considered small and unexceptional commercial transactions.

While concerned about the likely effects of both the Aggregation Model and the Substantial Market Power Model, Woolworths is particularly concerned about the Substantial Market Power Model proposed in the Treasury Discussion Paper. Such a model, if enacted, will go well-beyond affecting the grocery industry and will have considerable detrimental effects on the Australian economy as a whole. The Substantial Market Power Model will, in effect, place a "market cap" on the growth of successful Australian businesses in all sectors of the Australian economy. It would significantly limit the ability of many efficient, innovative and competitive firms in Australia to achieve the ongoing efficiencies of scale, scope and risk diversification they require in order to drive Australia's economic growth and development.

Finally, Woolworths notes that the likely practical effect of both the Aggregation Model and the Substantial Market Power Model in the grocery industry may be to prevent Woolworths and Coles from making a small number of small scale ad hoc acquisitions. This would have the effect that the owners of independent supermarkets will have less competitive tension in the sale of their principal business asset. The burdens of either proposed creeping acquisitions law are therefore likely to fall heavily on small business and ultimately consumers.

2 The importance of effective and appropriate regulation in Australia

2.1 The Commonwealth Government has committed to improving regulation in Australia

The Federal Government has made clear its intention to remove inappropriate, ineffective and unnecessary regulation to reduce the "regulatory burden" on businesses.

³ See section 4 to this submission, especially Section 4.2.

In a speech to the Sydney Institute in February 2008, the Minister for Finance and Deregulation stated as such, noting that:

[r]elieving business and consumers of the burden of inappropriate, ineffective or unnecessary regulation will build Australia's productive capacity and create a stronger economy.

Of the potential problems caused or poor or ill-thought out regulation, he stated:

...as well as imposing specific compliance costs, regulation can also have a choking effect on entrepreneurship, risk taking and innovation [where] these costs ultimately affect all of us through higher prices and restricted choice of goods or services.

Finally, the Minister went on to state that:

[r]educing the regulatory burden is critical to improving the efficiency and productivity of the Australian economy⁴.

Reflecting this policy approach, the Federal Government has commenced what it has termed the "Deregulation Agenda", the key elements of which include the establishment of the independent Office of Best Practice Regulation (within the Department of Finance and Deregulation), the strengthening of procedures to ensure new regulation "will only be enacted where necessary and at a minimum cost to business, non-profit organisations and consumers", and the establishment of the COAG Business Regulation Competition Working Group.

2.2 The Commonwealth Government has outlined "best practice" principles for the introduction of regulation

Further to the Government's stated position in relation to the reduction of regulation, the Government has endorsed the 6 principles of good regulatory process as identified by the Report of the Taskforce on Reducing Regulatory Burdens on Business⁵. These 6 "best practice" principles are as follows:

- Governments should not act to address "problems" until a case for action has been clearly established - This should include establishing the nature of the problem and why actions additional to existing measures are needed, recognising that not all "problems" will justify (additional) government action.
- A range of feasible policy options - including self-regulatory and co-regulatory approaches - need to be identified and their benefits and costs, including compliance costs, assessed within an appropriate framework.
- Only the option that generates the greatest net benefit for the community, taking into account all the impacts, should be adopted.

⁴ Minister for Finance and Deregulation, Address to the Sydney Institute: Relieving the burden of business - Labor's deregulation agenda, 26 February 2008. Available at <http://financeminister.gov.au/speeches/2008/index.html> as at 25 September 2008.

⁵ Australian Government Regulation Taskforce, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens of Business*, January 2008. Available at <http://regulationtaskforce.go.au/> as at 25 September 2008.

- Effective guidance should be provided to relevant regulators and regulated parties in order to ensure that the policy intent of the regulation is clear, as well as the expected compliance requirements.
- Mechanisms are needed to ensure that regulation remains relevant and effective over time.
- There needs to be effective consultation with regulated parties at all stages of the regulatory cycle⁶.

The Council of Australian Governments (**COAG**) has agreed that all governments will ensure that regulatory processes in their respective jurisdictions are consistent with similar principles. In addition to the Federal Government principles outlined above, the COAG principles provide a further requirement that “government action should be effective and proportional to the issue being addressed” and, in accordance with the 1995 Competition Principles Agreement, state that legislation should not restrict competition unless it can be demonstrated that:

- the benefits of the restrictions to the community as a whole outweigh the costs, and
- the objectives of the regulation can only be achieved by restricting competition.

A well-designed regulatory framework provides the certainty required for businesses to make investments and grow. For this reason and consistent with the view taken by the Federal Government, Woolworths believes that any new regulation (and the process for regulation - making) must be consistent with the best practice regulatory principles identified by the Taskforce on Reducing Regulatory Burdens on Business. This includes any new regulation to address the perceived issue of "creeping acquisitions".

Therefore, any law to address "creeping acquisitions" should only be introduced if:

- a case for action has been clearly established;
- the benefit and costs (including compliance costs) of proposed regulation has been appropriately assessed; and
- it will give the greatest net benefit to the community.

3 What is a creeping acquisition?

The term "creeping acquisitions" is not defined in any precise way in the Trade Practices (Creeping Acquisitions) Bill 2007 [2008], or by the Senate Standing Economics Committee Inquiry concerning that Bill⁷. In the Treasury Discussion Paper, the term "creeping acquisitions" is used to describe:

...conduct that comprises the accumulated effect of a number of small individual transactions which, when considered in isolation at the time that each transaction occurred, would not breach section 50 [of the TPA]. That is, while each transaction considered at the time it occurred may have a limited impact on competition, and would therefore not fall within the scope of section 50, over

⁶ http://www.finance.gov.au/obpr/proposal/gov-requirements.html#_Principles_of_good.

⁷ See http://www.aph.gov.au/senate/committee/economics_ctte/tpa_creeping_acqs_08/index.htm.

*a longer period a series of such transactions may have the cumulative effect of substantially lessening competition in a market.*⁸

This is consistent with Woolworths' understanding of the term. Woolworths understands the term "creeping acquisitions" to mean a series of individual acquisitions of shares or assets which cumulatively (but not singularly) may have the effect of substantially lessening competition in a market in Australia.⁹ This submission deals with the incremental acquisition of assets (as opposed to shares) in the context of the retail grocery industry.

4 Creeping acquisitions are not a problem in the grocery industry

4.1 Introduction

Woolworths submits that there is no factual or policy case for the introduction of any general regulation of so called "creeping acquisitions". Specifically:

- there is no evidence of any creeping acquisitions strategy on the part of Woolworths, nor of conduct in the grocery sector that could constitute "creeping acquisitions"; and
- in any event, retail acquisitions of independent supermarkets by major supermarket chains are currently regulated by three mechanisms - section 50 of the TPA, the Charter, the Code. In Woolworths' experience, those regulatory requirements are effective to prevent any acquisition, including any so called creeping acquisition, that the ACCC considers is likely to have the effect, or likely effect, of substantially lessening competition in a relevant market.¹⁰

The debate about creeping acquisition reform seems to be based on rhetoric from certain lobbying groups. Fundamentally, it is a debate grounded in social policy rather than competition law, although Woolworths considers the arguments do not hold weight when evaluated from a social policy perspective either.

The two proposals in the Treasury Discussion Paper would result in more regulation and unnecessary review of small business transactions. It would create more uncertainty as to the extent of ACCC power under section 50, and lead to consequent delay, which will inevitably drive up costs for business. Relative to revenue, small business is likely to be most affected. Consumers are very unlikely to receive any corresponding benefit from a reform such as this, and may in fact receive exactly the opposite in the form of an inferior price / product / service offer if certain potential acquirers are effectively excluded from acquiring an independent supermarket. The net effect of this reform therefore is likely to be detrimental to the Australian economy and Australian consumers.

4.2 The Code and Charter

Small business concerns in the supermarket sector about fairness and receiving a competitive price for the sale of their business are already protected. In July 2005,

⁸ The Treasury, *Discussion Paper on Creeping Acquisitions*, p. 3 (para 17).

⁹ Dawson Review Committee, p. 66. Available at <http://tpareview.treasury.gov.au/content/report.asp>.

¹⁰ See Executive Summary to this submission.

Woolworths, Coles Myer Limited and Metcash Trading Limited (**Metcash**) voluntarily signed a charter called *Charter for the Acquisition of Independent Supermarkets (Charter)*.¹¹

Paragraph 1.1 of the Charter states:

1.1 The purpose of the Charter is to ensure that any acquisition of a Supermarket owned or operated by an Independent Supermarket Retailer takes place under a competitive bidding process (para 1).

Evidently, the purpose of the Charter is to ensure that the bidding process for independent supermarket acquisitions is open and transparent, and that all interested purchasers (including independent operators) have an equal opportunity to purchase the independent supermarket for sale.

This occurs through a notification process. Paragraph 4.1 of the Charter requires that where a party to the Charter proposes to make a formal offer to acquire a supermarket the party must first provide the seller with written notice that it is entitled to negotiate with alternative buyers to secure the best price for the supermarket on the most advantageous selling terms. This form of this notice is prescribed by the Charter.

The Charter operates in conjunction with the Code (as amended), which Woolworths signed as a founding signatory in 2000. The Coles Group Limited and Aldi Stores are also signatories to the Code, as are a number of grocery industry bodies. Metcash is not a signatory to the Code. The Code requires its signatories to notify the ACCC of any acquisition of an independent supermarket. Since that time, Woolworths has notified the ACCC of proposed supermarket acquisitions in accordance with the Code and as part of its standing arrangement with the ACCC.¹² When the ACCC receives notice of such an acquisition, it reviews that acquisition in accordance with its informal merger review process¹³.

As a result, the ACCC has had the opportunity to review each supermarket acquisition proposed by Woolworths, to conduct market inquiries, request further information from Woolworths and use its powers to investigate whether each proposed acquisition would be likely to substantially lessen competition in a relevant market.

In Woolworths' submission, the Charter is effective in ensuring that there is a competitive bidding process for the acquisition of independent supermarkets and that all potential purchasers (including Woolworths) are afforded a fair opportunity to acquire independent supermarkets as they come up for sale. The notification process under the Code ensures that the ACCC has an adequate opportunity to review the competitive effect of an acquisition before completion.

In Woolworths' submission, there is no factual or policy basis for the introduction of any additional regulation of so-called creeping acquisitions. Woolworths does not have, and has never had, a "creeping acquisitions" strategy. There is no evidence that any major supermarket operator has such a strategy. In the period from 2006 to the present, Woolworths acquired a total of 6 independent supermarkets nationally. This is not a

¹¹ <http://www.accc.gov.au/content/index.phtml/itemId/694509/fromItemId/2332>. Franklins also signed the Charter in August 2006.

¹² See, in particular, the clause 8 of the Code in its present form. Available at http://www.produceandgrocerycode.com.au/documents/pgi_code.pdf.

¹³ *ACCC Merger Review Process Guidelines July 2006*. Available at <http://www.accc.gov.au/content/index.phtml/itemId/740765>.

large number. These supermarkets were located in 6 geographically diverse areas. Of these 6 areas, 4 had no local existing Woolworths stores, while 2 had existing Woolworths stores within different shopping centres.

The very limited number of independent supermarkets acquired by Woolworths represent *ad hoc*, opportunistic acquisitions. Collectively these acquisitions (only 6 in total since 2006) are dwarfed in number by the growth of a variety of new independent supermarket operators, which have entered the retail grocery industry. Importantly, increases in Woolworths' store numbers have not been at the expense of the independent sector. The share of total food and grocery sales held by "Large Supermarkets" (as defined by the ABS¹⁴) has declined from 66% to 63% in the period from 1998 to 2007. In that same period, the share of total food and grocery sales held by independent supermarkets and convenience stores grew from 13% to 16%.¹⁵ In addition, 48% of the increase in total outlet numbers was attributed to "Fresh Food Specialities", while 45% of the net gain in store numbers was attributable to supermarkets and stores other than the major supermarket chains.¹⁶

Prior to each of its proposed acquisitions of independent supermarkets since 2006, Woolworths notified the seller of its rights under the Charter and notified the ACCC in accordance with the Code. The ACCC reviewed each acquisition under section 50. In 6 of 7 cases, after carefully considering the competitive effects of the proposed acquisition on the relevant retail and wholesale markets in question, the ACCC ultimately approved the acquisition.

4.3 Section 50 as currently drafted is adequate

The ACCC already has the powers and a track record of thoroughly investigating acquisitions of individual independent supermarkets.¹⁷ Recent experience such as the recent Karabar matter where, for the first time, the ACCC opposed a single store acquisition, also demonstrates that section 50 in its present form and the ACCC's informal merger review processes are effective in regulating single store acquisitions.

¹⁴ "Large Supermarkets" is defined by ABS to include Woolworths, Coles/Bi-Lo, ALDI, Franklins as well as larger IGA and Foodworks supermarkets. See [http://www.accc.gov.au/content/item.phtml?itemId=813406&nodeId=5c04bee316d5fd461bdc798a7cb07a50&fn=134%20\(late%2014%20Mar\)%20-%20Woolworths%20Limited%20\(part%20of%20\)%20\(37%20pages\).pdf](http://www.accc.gov.au/content/item.phtml?itemId=813406&nodeId=5c04bee316d5fd461bdc798a7cb07a50&fn=134%20(late%2014%20Mar)%20-%20Woolworths%20Limited%20(part%20of%20)%20(37%20pages).pdf) at page 3 to Appendix C.

¹⁵ These estimates are based on Pitney Bowes MapInfo data using the date from the ABS retail turnover series. See Woolworths Limited Submission to the Grocery Price Inquiry, Creeping Acquisitions, 18 June 2008. Available at [http://www.accc.gov.au/content/item.phtml?itemId=832478&nodeId=a619e9c80d02a31b107bfe0fc59db39f&fn=232%20\(late%2018%20June\)%20Woolworths%20-%20creeping%20acquisitions.pdf](http://www.accc.gov.au/content/item.phtml?itemId=832478&nodeId=a619e9c80d02a31b107bfe0fc59db39f&fn=232%20(late%2018%20June)%20Woolworths%20-%20creeping%20acquisitions.pdf); cf. Woolworths Limited Submission to the Grocery Price Inquiry, Market Definition and Market Concentration, 18 June 2008 for a discussion of the market concentration for take home food and grocery retailers, based on Pitney Bowes MapInfo data, and the limitations of using AC Nielsen Scan. Available at [http://www.accc.gov.au/content/item.phtml?itemId=832479&nodeId=24af9ee5e11a2565beef1c37e21b9554&fn=233%20\(late%2018%20June\)%20Woolworths-%20market%20definition%20and%20market%20concentration%20\(7%20pages\).pdf](http://www.accc.gov.au/content/item.phtml?itemId=832479&nodeId=24af9ee5e11a2565beef1c37e21b9554&fn=233%20(late%2018%20June)%20Woolworths-%20market%20definition%20and%20market%20concentration%20(7%20pages).pdf).

¹⁶ Pitney Bowes MapInfo, Company Annual Reports and ABS data.

¹⁷ Two recent examples of where the ACCC has conducted a thorough investigation of a proposed acquisition are Woolworths' proposed acquisitions at Jindabyne in 2007 (approved) and at Karabar in 2008 (opposed), both in New South Wales.

In June 2008, the ACCC decided to oppose Woolworths' proposed acquisition of Karabar Supabarn at Karabar near Queanbeyan in NSW (**Karabar Acquisition**). This occurred after Woolworths notified the ACCC of the proposed acquisition in accordance with the Code and the ACCC conducted an extensive investigation under its Informal Merger Review Process lasting more than 2 and half months.

The ACCC also has a track record of investigating acquisitions of single businesses or assets in other industries. For example, it has reviewed acquisitions of day surgeries¹⁸, child care centres¹⁹ and assets such as quarries²⁰.

5 The facts do not support a need for reform

There is not evidence that there is any real problem which requires alleviation through creeping acquisitions reform to the TPA.

Since 2006, Woolworths has in fact only acquired 6 stores by acquisition. The facts therefore do not support the notion of Woolworths pursuing a creeping acquisitions strategy. In this context, it is also noteworthy that the independent grocery sector has overall grown at a much faster rate than the major supermarket chains in the past five years. For example, over the past five years, the increase in store numbers for Metcash/IGA (118) and ALDI (95 stores) has been more rapid than the overall store growth for either Woolworths (73 stores) or Coles (59 stores).²¹

Further, there is no evidence that competition has been undermined in the grocery sector by any creeping acquisitions to the detriment of consumers. The presence of a Woolworths supermarket actually improves the price, range and service offered to consumers by other competing supermarkets in the immediate area surrounding the store. This is to the benefit (not the detriment) of consumers, as other supermarkets must improve their overall offer in order to remain competitive.

Finally, and more generally there is no evidence of any identifiable economic harm caused by supposed creeping acquisitions and the economic case for regulatory intervention and legislative change is unproven.²² Woolworths notes the previous debate about whether creeping acquisitions do even actually lead to any economic detriment.²³

¹⁸ See ACCC Informal Merger Clearance Register: Ramsay Health Care Limited - completed acquisition of Cairns Day Surgery 1 November 2007; Ramsay Health Care Limited - proposed acquisition of Boral Day Surgery 29 February 2008. Ramsay Health Care Limited - proposed acquisition of the Coolenberg Clinic day surgery (currently closed) at Port Macquarie, NSW - 22 August 2008.

¹⁹ See ACCC Informal Merger Clearance Register: ABC Learning Centres Limited - acquisition of Just Little People child care centres (Macedon Ranges Victoria) 15 February 2007.

²⁰ See ACCC Informal Merger Clearance Register: Adelaide Brighton Limited acquisition of quarry assets of Loogana Lime Limited June 2006.

²¹ See

[http://www.accc.gov.au/content/item.phtml?itemId=813406&nodeId=5c04bee316d5fd461bdc798a7cb07a50&fn=134%20\(late%2014%20Mar\)%20-%20Woolworths%20Limited%20\(part%20of%20\)%20\(37%20pages\).pdf](http://www.accc.gov.au/content/item.phtml?itemId=813406&nodeId=5c04bee316d5fd461bdc798a7cb07a50&fn=134%20(late%2014%20Mar)%20-%20Woolworths%20Limited%20(part%20of%20)%20(37%20pages).pdf) at Table 2 (page 6) to Appendix C.

²² Warren Pengilly, *Thirty Years of the Trade Practices Act - Some Thematic Conclusions* (2004) 23 CCLJ 1 at 39.

²³ Senate Economics Reference Committee, *The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*, para 4.65. See

In this respect, no other Western economy has adopted creeping acquisition provisions in its competition laws. Neither the competition law of the United States nor the European Commission recognises the creeping acquisition theory.

In the Grocery Inquiry Final Report, the ACCC noted that the grocery sector is one where creeping acquisitions could *potentially* become a concern some time in the future due to particular structural features of the market.²⁴ Woolworths also notes the ACCC's view that, in its present form, section 50 is unlikely to address all future possible concerns in relation to creeping acquisitions, and its support for the introduction of a general creeping acquisitions law to address those concerns.²⁵

The ACCC's support for legislative change in the area of creeping acquisitions is based on *potential* concerns that it sees possibly arising in the future in the grocery sector. It is noteworthy that these concerns are not based on any present concerns about the state of competition in the grocery sector, which the Grocery Inquiry found was "workably competitive."²⁶

The ACCC's concerns relate to the need for smaller competitors to in the future obtain access to suitable sites for their businesses, the broader barriers to entry and expansion arising from economies of scale in wholesaling, the existence of two major supermarket chains, and the existence of many small business units that could be acquired one by one or in small groups.²⁷

In Woolworths' submission, these concerns do not present a convincing case for major legislative change to section 50. In particular, there are limits to how a competition law such as section 50 can fully address the kinds of concerns which have been raised about the market share of the major supermarket chains. In this regard, Woolworths urges the Treasury to be mindful that the focus of the TPA is on preservation of market conditions which promote competition, rather than the preservation of particular competitors or the size of firms in a market.

6 Competition policy should not be used to achieve industry or other social policy objectives

Woolworths is concerned that the introduction of a creeping acquisitions law, through either the Aggregation Model or the Substantial Market Power Model, is an attempt to address a concern from certain special interest lobby groups about the national retail concentration of the major supermarket chains through the mechanism of competition law and policy. Woolworths submits that this is not a proper end or use of competition law and policy. In this respect, Woolworths notes the Dawson Review Committee's view that:

http://www.aph.gov.au/senate/committee/economics_ctte/completed_inquiries/2002-04/trade_practices_1974/report/report.pdf.

²⁴ Treasury Discussion Paper, September 2008, p. 5 (para 25).

²⁵ ACCC, *Report of the ACCC into the Competitiveness of Retail Prices for Standard Groceries*, July 2008, p. 427.

²⁶ ACCC, *Report of the ACCC into the Competitiveness of Retail Prices for Standard Groceries*, July 2008, p xvi.

²⁷ ACCC, *Report of the ACCC into the Competitiveness of Retail Prices for Standard Groceries*, July 2008, p. 430.

...the purpose of the competition provisions of the Act is to promote and protect the competitive process rather than to protect individual competitors. The competition provisions should not be seen as a device to achieve social outcomes unrelated to the encouragement of competition. As a matter of policy those outcomes may be regarded as desirable, but the policy will not be competition policy. Nor should the competition provisions seek the preservation of particular businesses or of a particular class of business that is unable to withstand competitive forces or may fail for other reasons. Those are matters which may legitimately be the subject of an industry policy, but that is not a policy which is to be found in the competition provisions in Part IV of the Act.²⁸

7 Proposals for reform - Aggregation Model and Substantial Market Power Model

As discussed above, Woolworths does not consider that there is a sound factual or policy basis for the introduction of a creeping acquisition law.

The Treasury Discussion Paper makes two proposals for reform to section 50 to address the issue of creeping acquisitions - the Aggregation Model and the Substantial Market Power Model. There are significant problems with both proposals. Neither proposal provides a solution to the perceived problem of creeping acquisitions. Both proposals create more problems than they solve. In particular, the introduction of the Substantial Market Power Model is of particular concern where it will have significant detrimental effects, both in terms of its impact on the grocery sector but also the full spectrum of other industries in the Australian economy.

8 The Aggregation Model

8.1 What is the Aggregation Model

The Aggregation Model essentially responds to the concern held by the certain small business lobby groups within the independent retail grocery sector that the TPA in its existing form does not currently adequately regulate creeping acquisitions by the major supermarket chains.²⁹

This proposal is broadly in the terms suggested by Federal Senator Fielding in 2007 and proposed by the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]. It has already been the subject of review by the Senate Standing Economics Committee earlier this year.³⁰ Like it did in 2004³¹, that Committee came to the view that the current provisions of section 50 are not sufficient to adequately address the issue of creeping acquisitions, however was unable to recommend any solution to the perceived problem or a preferred approach. Woolworths submits that this is because the issue is fundamentally one of social policy. It is not an issue of competition policy, as the retail grocery sector is competitive.

²⁸ Dawson Review Committee at p. 36. Available at <http://tpareview.treasury.gov.au/content/report.asp>.

²⁹ http://www.stevefielding.com.au/html/media/SF333_Jun262008.pdf.

³⁰ http://www.aph.gov.au/senate/committee/economics_ctte/tpa_creeping_acqs_08/index.htm.

³¹ Recommendation 12, Senate Economics Reference Committee, *The Effectiveness of the Trade Practices Act in Protecting Small Business*, March 2004, p. 64.

The Treasury 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.³²

This appears to require the ACCC (and the Court) to look at previous acquisitions by a corporation over a non-specified period of years when assessing whether the acquisition in question (the last in a series of acquisitions) is likely to substantially lessen competition in a market.

8.2 What are the key difficulties with the Aggregation Model?

The amendments to section 50 which are proposed in the Aggregation Model create a number of key conceptual and practical difficulties for Australian businesses.

(a) **If the Aggregation Model becomes law, it will materially increase the uncertainty of the scope of section 50 and its likely application**

For business, the Aggregation Model would increase the transaction costs, delay and uncertainty and these overall cost increases will invariably flow through to consumers. In particular:

- there is no evidence of any creeping acquisitions strategy on the part of Woolworths, nor of conduct in the grocery sector that could constitute "creeping acquisitions"; and
- the costs, delay and uncertainty already created by the informal merger clearance process and s 50 generally will be exacerbated, as companies (as well as their advisors and financiers) will need to undertake detailed competition analysis of both the proposed and any relevant previous acquisition; and
- the competitive process is likely to be skewed to unjustifiably favour businesses which have not made acquisitions in the past. This is despite the fact that such acquisitions are likely to be irrelevant for the purposes of assessing whether the particular acquisition under consideration will have the effect of substantially lessening competition.

This is inconsistent with the Government's stated objective of reducing regulatory burden to deregulate the economy and improve efficient business practices.³³

(b) **There are concerns about the analytical assumptions on which the Creeping Acquisition model is based**

The Aggregation Model is based on the flawed assumption that there is some magical point where an increase in a corporation's aggregate market share beyond a certain level necessarily means that a given acquisition will be

³² Treasury Discussion Paper, p. 5 (para 27).

³³ See http://www.financeminister.gov.au/speeches/2008/sp_20080226.html.

anti-competitive.³⁴ This is contrary to the ACCC's view that "*aggregate market share may not fully indicate the state of competition in the market*".³⁵ It is also inconsistent with the ACCC's *Draft Merger Guidelines 2008*.³⁶

While the analysis of market concentration figures provides a snapshot of a market which can be a helpful starting point for a competition analysis, it is a static measure and does not give any meaningful insight into a market's competitive dynamics. In and of themselves, market concentration figures are not definitive. This is expressly recognised by the ACCC in its *Draft Merger Guidelines 2008*:

*...market concentration is not determinative in itself. For example, firms can gain a high market share by adopting a more efficient technology, lowering costs and reducing prices. In such cases, high levels of market concentration do not necessarily reflect the existence of market power.*³⁷

It is competitive efficiencies that shape conduct within markets and the structure of those markets. This is manifested in innovation, quality of production, competition for location, amenities and price competition. Accordingly, the focus of any competition analysis should be on establishing whether competition is present, and if so, the form that it takes (not on market share). Within the market for the retail sale of standard groceries, there is overwhelming evidence that the market is in fact competitive. One need look only to the ongoing innovation within the grocery industry (e.g. Metcash's investment in its "IGA D>Fresh" division)³⁸, the successful entry and growth of new competitors (e.g. ALDI) and strong price competition among retailers for evidence of this. There are also a continually growing number of speciality retailers which compete with the major supermarket chains (e.g. fresh fruit and vegetable retailers, bakers, butchers and delicatessens, florists and convenience stores).

(c) **The Aggregation Model is likely to unfairly protect inefficient operators**

The Aggregation Model has the potential to unfairly protect inefficient operators by preventing more efficient operators from acquiring independent supermarkets if their aggregate market share in a relevant market exceeds a certain level. Focusing on market share in this way does not reward those market participants which are more efficient and, through that efficiency, are able to offer their customers a superior price, range and service offering to their competitors. Such an outcome is to the detriment of consumers. It is also contrary to well-established High Court authority to the effect that competition

³⁴ http://www.stevefielding.com.au/html/media/SF333_Jun262008.pdf.

³⁵ Graeme Samuel, Speech to the Food and Grocery Council of Australia - Competition and the Nation's Supermarket Trolley, 16 September 2003, p. 8. Available at <http://www.accc.gov.au/content/index.phtml/itemId/365801>.

³⁶ ACCC Draft Merger Guidelines 2008, para 6.7. Available at <http://www.accc.gov.au/content/index.phtml/itemId/809866>.

³⁷ ACCC, Draft Merger Guidelines 2008, para 6.7.

³⁸ See, for eg, *Metcash – Company Results, Financial Year Ending 30 April 2008*, 3 June 2008, p. 21. Available online at http://www.metcash.com/site_files/s1001/files/June_0308_ASX_Ltr_re_CEO_Presentation.pdf.

is a dynamic process³⁹ and that the purpose of competition law is to protect that process, not to protect individual competitors.⁴⁰

(d) **The Aggregation Model will potentially undermine the effectiveness of the ACCC's information clearance process**

If the Aggregation Model is adopted, it will be difficult for the ACCC to give comfort to parties in relation to a proposed acquisition under the current informal merger clearance process. Specifically, with repeated small acquisitions, it will be difficult for the ACCC, or the Court, to decide when one small acquisition among a number of consecutive acquisitions over a given period "crosses the line" and results in a substantial lessening of competition in a relevant market.

In addition to the above, a number of uncertainties arise in interpreting and applying the Aggregation Model using conventional well established principles. These uncertainties will pose problems for the ACCC and the Court in enforcing the proposed law, and for businesses seeking to comply with the new provision.

For example, to breach section 50 in its existing form, what is required is a "substantial lessening of competition" in a market. In a merger context, "substantial" means that the effect on competition is not merely transitory but "commercially meaningful or relevant to the competitive process"⁴¹. This requires that the lessening of competition is real or of substance.⁴²

Undertaking the assessment of whether an acquisition is likely to substantially lessen competition in a market requires the ACCC (and the Court) to consider the likely state of competition in the future with the proposed acquisition (the **factual**) versus the likely state of future competition without the proposed acquisition (the **counterfactual**). This is a forward looking comparative analysis.

The Aggregation Model conflicts with this well established approach. If enacted, the Aggregation Model would require the ACCC (and the Court) to assess the competitive effect of past acquisitions, individually and cumulatively, as well as the effect of the acquisition in question in the future. This appears to require a retrospective rather than forward looking analysis. This is contrary to settled law.⁴³

As a practical matter, it will be extremely hard to undertake an objective and realistic analysis of a hypothetical market situation in which various acquisitions over the past few years are assumed "not to have occurred". In particular, the Aggregation Model will

³⁹ *Re QCMA* (1976) 8 ALR 481 at 516 per Woodward J, President, Shipton and Brunt, Members (Trade Practices Tribunal).

⁴⁰ *Boral Besser Masonry Limited v ACCC* (2003) 215 CLR 374 at para 87 per Gleeson CJ and Callinan J; at para 160 per Gummow, Gaudron and Hayne JJ; cf Graeme Samuel, Meeting the Competitive Challenges of the Grocery Sector, 17 February 2004. Available at <http://www.accc.gov.au/content/item.html?itemId=497673&nodeId=23062e1a24a1ed8f09fea1b15f53f2a5&fn=20040219%20MasterGrocers.pdf>.

⁴¹ *Australian Gas Company v ACCC (No 3)* (2003) 137 FCR 317 at para 348 per French J; cf. *Rural Press Limited v ACCC* (2003) 203 ALR 217 at para 41 (including footnote) per Gleeson CJ and Callinan J.

⁴² Explanatory Memorandum to the *Trade Practices Legislation Amendment Act 1992*.

⁴³ *Stirling Harbour v Port of Bunbury Authority* (2000) ATPR 41-752 at para 12 per Hely and Burchett J, at para 86 per Carr J; cf. ACCC Draft Merger Guidelines 2008, paras 2.12 to 2.17. Available at <http://www.accc.gov.au/content/index.phtml/itemId/809866>.

serve to punish those operators who have grown through acquisition over a given time frame rather than by improving an existing business.

The Aggregation Model appears to require the ACCC (and the Court) to assess the competitive effect of an acquisition on numerous occasions. The first assessment would occur at the time of the acquisition. That acquisition would then be considered each time the same acquirer proposes to make another acquisition in the same industry for the purpose of assessing the competitive effects of that later acquisition. Each time it is reconsidered, that acquisition will be assessed according to a different dynamic of competition. This will significantly increase uncertainty and therefore cost for all parties involved in a sale and purchase of a small business which is likely to be scrutinised under this reform.

Revisiting past acquisitions which have been previously approved for the purpose of assessing whether a *current* acquisition should be deemed to substantially lessen competition raises the following risks and uncertainties:

- (a) as currently proposed, the “aggregation” proposal does not necessarily confine the competition analysis to the market in which the proposed current acquisition occurs. Therefore the Court or the ACCC, in considering a proposed acquisition, may be able to take into account the competitive effect of all of the company’s other acquisitions over the specified period, regardless of whether or not they are in the same market as the proposed acquisition;
- (b) consideration of the acquisition on the basis of a different market definition, as market boundaries change over time. As both the ACCC and the Court take a forward-looking purposive approach to market definition⁴⁴, it would be open to the ACCC and the Court to take a different approach to market definition if circumstances change (e.g. in relation to the geographic, product and functional dimensions of the relevant market(s));
- (c) identification of precisely which prior acquisitions will be relevant to the assessment of the competitive effect of the proposed acquisition (e.g. acquisitions in different geographic, functional or product markets);
- (d) a retrospective review of past acquisitions over an unspecified period that could be as long as several years does not take into account the fact that the boundaries and structure of markets constantly evolve and quickly change. This is in contrast with the ACCC’s current approach in retail mergers, which is to assess the likely competition effects of the proposed acquisition within a 1-2 year timeframe⁴⁵;
- (e) consideration of the acquisition on the basis of changed competitive dynamics and market structures, as the functioning and structure of markets change over time. For example, over time the size (and the number) of other competing retailers in a given market is likely to have changed such that the structure of the relevant market is materially different to that which existed years earlier. A range of other changes to the state of competition may also occur which will make the

⁴⁴ Public Competition Assessment: Woolworths Limited - Proposed Acquisition of Karabar Supermarket, 11 July 2008, para 25. The Court takes the same approach: see *ACCC v Liquorland (Australia) Pty Ltd and Woolworths Limited* [2006] FCA 826 at paras 429-430 and paras 436-445 per Allsop J.

⁴⁵ Public Competition Assessment, A&R Whitcoulls Group Holdings Pty Limited Acquisition of Borders Australia Pty Limited, paragraph 60, including footnote 4 (1-2 years); Draft Merger Guidelines 2008, paragraph 2.4 (1-2 years).

required counterfactual analysis a hypothetical exercise about the past and an exercise in speculation as to what would have been the current and future position of each of the businesses if they had *not* been acquired:

- (i) If those business had continued under their previous ownership, how long would that have been the case?
- (ii) Who else might have acquired them?
- (iii) What were the risks of some contraction, expansion or failure of each of the businesses in question?
- (iv) Would they have been sold to other buyers?
- (v) Who would those buyers have been?
- (vi) Would the businesses have ceased trading?

This is not a static analysis, and in a dynamic industry such as the retail grocery sector, there would need to be a complex and costly inquiry into the independent owner's business fortunes over some unspecified period under this alternative world. It is unclear from a conceptual or practical perspective how the counterfactual analysis would operate in such circumstances. The likely result is considerable uncertainty as well as increased compliance costs for business, especially the small business owner trying to sell their business. The costs of regulatory intervention and investigation of proposed acquisitions of independent grocery stores by the major supermarket chains is likely to outweigh the benefits, and will "hurt" small business owners to a far greater extent than it will the acquirers of those businesses.

A further problem of interpretation and application is that the Aggregation Model refers to a series of acquisitions made by a firm "within a specified period" without specifying or providing any guidance as to what the length of that specified period should be. This is undesirable.

9 The Substantial Market Power Model

9.1 What is the Substantial Market Power Model?

The Substantial Market Power Model would involve the addition of a new provision to section 50 which would prohibit a corporation with a substantial degree of market power from making an acquisition that would result in any lessening of competition (whether substantial or not). This provision would supplement, and operate alongside, the existing section 50.

The Treasury Discussion Paper describes the Substantial Market Power Model in the following terms:

A corporation would be prohibited 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.⁴⁶

⁴⁶ Treasury Discussion Paper, September 2008, p. 6 (para 29).

This proposal is anathema to any previous approach which seeks to deal with the issue of creeping acquisitions. In Woolworths' submission, it is highly controversial as a matter of both policy and practice. As a matter of policy, it controversially imports the concept of existing market power to the statutory language of section 50. The traditional approach under section 50 is to assess whether a corporation would acquire substantial market power or increased market share as a result of the proposed transaction (i.e. be able to increase prices above the competitive level without losing customers as a result of the proposed transaction).⁴⁷ This depends on a number of factors including the behavioural and the structural features of the market in question - market share is but one determinant of market power.

9.2 What is "Substantial Market Power"?

The concept of market power is an economic concept.⁴⁸

Section 46 of Part IV of the TPA contains the concept of substantial market power. It is understood that "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*⁴⁹.

In addition:

*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.*⁵⁰

Substantial market power may be exercised 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.*⁵¹

Woolworths notes that 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 (e.g. 16-20%) and there are also several other large market participants of comparable size in that particular market.⁵² Further, other market participants may at the same time also have a

⁴⁷ *Australian Gas Light (ACN 052167 405) v Australian Competition & Consumer Commission (No 3)* (2003) 25 ATPR 41-966 at 47,723 - 47,757 at [427]-[428] per French J. In *Queensland Wire Industries Pty Ltd v Broken Hill Co Ltd* (1988) 167 CLR 177 at 189 Mason CJ and Wilson J speak of "*the ability of a firm to increase prices above supply cost without rivals taking away customers in due time*" (emphasis added) and at 200 Dawson J speaks of the "*power to raise prices in a sustainable way*".

⁴⁸ *Boral Besser Masonry Limited v ACCC* (2003) 195 ALR 609 at [247]; cf. *Melway Publishing Pty Limited v Robert Hicks Pty Limited* (2001) 205 CLR 1 at [52] - [53].

⁴⁹ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 167 CLR 177 at 188.

⁵⁰ *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Consumer Commission* (2003) 215 CLR 374 at 423.

⁵¹ *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 46.

⁵² *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2001) 119 FCR 1.

substantial degree of power in that market. This is significant because it shows that a firm with the most substantial degree of power in a given market is not the only firm that may possess market power in that market.

9.3 Assessing "substantial market power" under section 46

To determine whether a firm has a substantial degree of power under section 46, a detailed analysis of its *conduct* in the period prior to the impugned conduct must be conducted - the review period could be anything up to the previous 2 or more years in duration and require an extensive review of the evidence about the firm's position and behaviour towards its customers, suppliers and competitors⁵³. 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.*⁵⁴

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.*⁵⁵

9.4 What are the key difficulties with the Substantial Market Power Model?

Woolworths submits that the Substantial Market Power Model does not in any way "cure" the deficiencies of the Aggregation Model outlined above. In fact, Woolworths is particularly concerned about the Substantial Market Power Model proposed in the Treasury Discussion Paper.

Such a model, if enacted, will go well-beyond affecting the grocery industry and will have considerable detrimental effects on the Australian economy as a whole. The Substantial Market power model will, in effect, place a "market cap" on the growth of successful Australian businesses in all sectors of the Australian economy. It would significantly limit the ability of many efficient, innovative and competitive firms in Australia to achieve the efficiencies of scale, scope and risk diversification they require in order to drive Australia's economic growth and development. The side-effects of this include, but are not limited to, reductions in research, development and efficient capital investment, the undermining of Australia's international competitiveness and an overall loss in the consumer welfare of Australians.

⁵³ *Australian Competition and Consumer Commission v Baxter Healthcare Pty Limited* (2008) FCAFC 141, at [93].

⁵⁴ *Baxter*, supra, at [108].

⁵⁵ *Boral*, supra, at 470.

This is for several reasons:

(a) **The Substantial Market Power Model will, in effect, place a "market cap" on some firms in a market**

The Substantial Market Power Model would effectively impose a cap on market share, as it would cap the market share of any firm which already possesses a substantial degree of market power in a market. Firms with this degree of power would only be able to grow organically rather than by acquisition. Woolworths notes that the imposition of such a cap was expressly rejected by the Dawson Committee, and the Baird Committee before it⁵⁶, on the basis that it would inefficiently restrict competition by regulating the consumer and preventing more efficient operators from expanding through the acquisition of less efficient operators.⁵⁷

In blocking their ability to acquire less efficient firms, the Substantial Market Power Model would significantly limit the ability of many efficient firms in Australia to achieve further efficiencies of scale, scope and risk diversification that they require to drive Australia's economic growth and development. More specifically, in preventing efficient and successful firms from acquiring their less-efficient competitors, the Substantial Market Power Model would put a ceiling on the growth of Australian companies and:

- limit opportunities and resources for research, development and efficient capital investment;
- hinder industrial rationalisation that results in efficient allocation of resources and lower unit production costs;
- undermine business efficacy and Australia's international competitiveness; and
- ultimately reduces overall consumer welfare in Australia.

More specifically in relation to the grocery industry, serious questions arise as to whether the imposition of such a cap, and the inevitable favouring of smaller businesses under such a model, would serve to promote more efficient grocery markets.

(b) **The Substantial Market Power Model will unintentionally prevent a wide range of acquisitions**

The threshold of "substantial market power" sets a low benchmark for the prohibition, as firms with relatively small market shares, and more than one firm within the same market, may hold market power depending on the functioning and structure of the market in question. These other firms with substantial market power must be considered strong, significant, even vigorous, competitors. On any conventional merger analysis, the existence of two or three such competitors means that, in practice, small scale acquisitions that occur in that market will have very little, if any, real impact on competition.

⁵⁶ Parliament of the Commonwealth of Australia, Report by the Joint Select TP Committee on the Retailing Sector, *Fair Market or Market Failure? A Review of Australia's Retailing Sector*, 1999.

⁵⁷ Dawson Review Committee, p. 67. Available at <http://tpareview.treasury.gov.au/content/report.asp>.

Under the Substantial Market Power Model, it is likely that such mergers would be prohibited on the basis that any lessening of competition, however small, brought about by the merger is prohibited. In most if not all cases it will be near impossible for the merging parties to establish that the merger will not result in any impact on competition at all.

In addition, it may also deter acquisitions which, over the long term, are actually pro-competitive.

(c) **The Substantial Market Power Model will introduce added complexity and uncertainty for firms**

Woolworths submits that the use of a "substantial degree of market power" test as the key threshold for the operation of the Substantial Market Power Model is likely to require a much more complex and wide-ranging analysis of relevant market conditions than is currently required for the purposes of section 50. It is an economic concept and the analysis is likely to require detailed economic evidence which will be time consuming to prepare. This is undesirable in a merger context where the policy objective of merger regulation must be to analyse and assess a proposed transaction within a relatively short timeframe in keeping with commercial realities (i.e. a matter of weeks or a couple of months), rather than the many months, or years, that are often required in order to complete an investigation into a potential breach of section 46.

(d) **The Substantial Market Power Model will likely result in increased litigation between parties and the ACCC and undermine the effectiveness of the informal merger clearance regime**

The Substantial Market Power Model is likely to lead to increased tension between the ACCC and clearance applicants. A finding of substantial market power by the ACCC or the Court will be of such significance for any firm that it will be in its interests to contest such a finding. This is on the basis that the finding will expose the firm to an increased risk of rejection of subsequent acquisitions as well as a greater risk of complaint about its competitive conduct under other provisions in the TPA, both in the market in question and other markets in which the firm conducts business. Woolworths submits that there is a risk that a finding of substantial market power in one market will have ripple effects on other markets.

10 The impact of either the Aggregation Model or Substantial Market Power model on independents

Woolworths submits that the effect of the Aggregation Model and the Substantial Market Power, if either were enacted, would be to reduce the competitive tension currently available to independent supermarket operators when they sell their principal business asset. Legislative reform which leads to a reduction in the range of potential buyers of independent supermarkets by reducing the ability of other potential acquirers to bid for such businesses will detrimentally affect the competitive process which currently exists

under the Charter. This has been acknowledged by the ACCC.⁵⁸ In particular, two outcomes are likely to result:

- (a) Metcash may become a monopsonist in the market for the acquisition of existing and future IGAs and other independents, an outcome which will not likely increase the welfare of independent grocery retailers or their customers; and
- (b) the value that independent grocery retailers could obtain upon exiting the business would diminish (because of the smaller number of potential bidders). This will ultimately discourage entry into independent grocery retailing because of a perceived inability to adequately execute a financially viable "exit strategy" should the retailer choose to cease trading. Ensuring that there is such an "exit strategy" is key to ensuring the maintenance of a competitive market.

In addition, there is also a real likelihood that removing or hindering Woolworths and other major supermarket chains as potential acquirers of independents supermarkets will effectively "tie" independent supermarket operators to Metcash to an even greater degree than is presently the case. Assuming Metcash does not itself seek to acquire an independent supermarket offered for sale, Metcash will still benefit because the independent operator that eventually acquires the independent supermarket for sale is likely to continue to have to purchase stock from Metcash. This outcome is undesirable and was specifically drawn to the attention of the Grocery Price Inquiry by the National Association of Retail Grocers of Australia, which represents independent grocery retailers in each State and Territory.⁵⁹

11 Conclusion

For the reasons set out in this paper, Woolworths submits that there is no need to introduce a creeping acquisitions law where section 50 is adequate to deal with the perceived issue of creeping acquisitions.. Together with the Charter, the Code ensures that the ACCC is aware of all proposed acquisitions of independent supermarkets before completion and that the bidding process for such supermarkets is competitive.

In the absence of a factual or policy basis for the introduction of this law, Woolworths is therefore significantly concerned about the introduction of either the Aggregation Model or the Substantial Market Power Model. In summary:

- both the Aggregation Model and the Substantial Market Power Model suffer from significant deficiencies which are likely to prevent their successful implementation in practice. They are therefore both likely to increase the transactions costs, delay and uncertainty and these overall cost increases will invariably flow through to consumers;
- the Aggregation Model is likely to prove to be very uncertain and arbitrary in its operation, as well as difficult to apply in practice. It is also likely to unfairly protect inefficient operators and undermine the effectiveness of the ACCC's information clearance process;

⁵⁸ Graeme Samuel, Speech to the Food and Grocery Council of Australia - Competition and the Nation's Supermarket Trolley, 16 September 2003, p. 7. Available at <http://www.accc.gov.au/content/index.phtml/itemId/365801>.

⁵⁹ See Grocery Price Inquiry Hearing Transcript, 9 April 2008, p. 7 line 38; p. 29 line 30 onwards; p. 30 line 41 onwards; p. 33 line 24 onwards; p 35 line 10 onwards). Available at <http://www.accc.gov.au/content/index.phtml/itemId/814372>.

- the Substantial Market Power Model is likely to have significant unintended consequences due to the breadth of the proposed amendments. In addition to the cost, delay and uncertainty it will cause, it will likely result in increased litigation between parties and the ACCC and undermine the effectiveness of the informal merger clearance regime. Of most concern, however, is the fact that it is likely to impose a "market cap" on certain firms within markets, which will limit the ability of many efficient, innovative and competitive firms in Australia to achieve the efficiencies of scale, scope and risk diversification they require in order to drive Australia's economic growth and development; and
- the risk with each of these models is likely to be particularly adverse to many small business owners seeking to sell their businesses and who may be faced with a reduced number of potential acquirers for those businesses (as a result of certain potential acquirers being prevented from bidding for the business). Thus, it is likely that there will be less competitive tension in the market for the sale of those businesses. This will reduce the value of those businesses to the detriment of their current owners.