Via email: creepingacquisitions@treasury.gov.au

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

Dear Sir or Madam,

Creeping Acquisitions – The Way Forward

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

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

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

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

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

Yours faithfully,

Bill Grant
Secretary-General

7 August 2009

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Law Council of Australia
Business Law Section
Trade Practices Committee:

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

1 Introduction

The nature of creeping acquisitions

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

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

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

ACCC Submission

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

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

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

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

Reasons for additional Committee submission

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

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

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

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

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

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

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

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

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

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

2 Executive Summary

Introduction

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

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

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

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

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

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

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

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

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

(a) a substantial lessening of competition; and

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

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

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

The increased regulatory burden on all business sectors

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

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

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

7 See further paragraph 3.3 below.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

3 Principal Issues Raised by the ACCC Submission

ACCC support of amended substantial market power model - background

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

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

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

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

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

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

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

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

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9 ACCC Submission, paragraphs 6, 18 and 32.

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

11 See, in particular, paragraph 5.9 of the Committee's response to the Discussion Paper, 12 June 2009. With regard to the presence of 'market power', the Committee is concerned that considerable numbers of corporations may be caught by a 'double' merger test. This is, in particular, as a result of the low threshold for determining the existence of a substantial degree of market power in *ACCC v Australian Safeway Stores Pty Limited* (2001) 119 FCR 1, *ACCC v Australian Safeway Stores Pty Limited* (2003) FCAFC 149 and *ACCC v Australian Safeway Stores Pty Limited (No 4)* (2006) FCA 21 (see paragraph 5.9 of the Committee's submission in response to the Discussion Paper, 12 June 2009).

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

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

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

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

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

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

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

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12 ACCC Submission, paragraphs 98-134

13 ACCC Submission, paragraphs 11 and 12.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[19] ACCC Submission, paragraph 108.

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

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

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

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

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[20] ACCC Submission, paragraph 112.

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

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

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

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

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22 ACCC Submission, paragraph 113.

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

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

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

Aggregation model

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

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

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

Table: proposed solutions to practical problems of an aggregation model

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

25 ACCC Submission, paragraph 119.

26 ACCC Submission, paragraph 121.

27 ACCC Submission, paragraph 123.

28 ACCC Merger Guidelines 2008, 21 November 2008 (http://www.accc.gov.au/content/index.phtml/itemId/809866).

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

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

"Material increase"

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

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

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

29 See, in particular, paragraphs 6.1-6.9.

30 ACCC Submission, paragraph 126.

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

4 Conclusion

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

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

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

7 August 2009