SHOPPING CENTRE
COUNCIL OF AUSTRALIA

10 July 2009

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

Dear Sir/Madam,

CREEPING ACQUISITIONS – THE WAY FORWARD

Executive Summary

We believe the provisions proposed in the most recent discussion paper, '*Creeping Acquisitions – The Way Forward*', would be an inappropriate response to a perceived problem which has not been clearly established. We further believe it would have very significant unintended consequences, including adverse consequences for competition, that are potentially far more damaging than those it is intended to address.

We note, however, that according to the Treasury's 'Abstract', "the Government considers reform in relation to creeping acquisitions as an election commitment." This suggests that the Government has already decided to proceed with new laws to address the perceived creeping acquisitions "loophole".

On this basis, the Shopping Centre Council of Australia (SCCA) suggests that any proposed provision should be specifically directed to achieving that end and not directed to putting in a straitjacket some of Australia's most successful businesses. It is our belief that the proposed provision will do this.

Again on the basis that the Government has already decided to proceed with new laws the SCCA supports the recommendation of the American Bar Association that:

> *To the extent that creeping acquisitions require any special treatment, such concerns are best addressed through appropriate premerger notification procedures, rather than through modifications to the substantive standards of legality for mergers.*

Additionally, consistent with the approach adopted in the European Union and to prevent companies in Australia consciously attempting to circumvent the prohibition on acquisitions contained in the existing section 50 of the *Trade Practices Act*, a provision might sensibly be introduced which aggregates, and subjects to the substantial lessening of competition test, consecutive acquisitions by one corporation (or group of companies) of parts of (or individual assets of) another corporation (or group of companies) – i.e. consecutive acquisitions in, say, a five year time frame between the same parties.

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Issues raised in first Discussion Paper

In preparing this paper the SCCA has had the benefit of reading the submissions lodged in response to the first discussion paper, released on 1 September 2008. We note that the majority of those submissions put forward compelling arguments that:

1. Currently "Australia is widely regarded as having a well-developed merger control regime that reflects international best practices in merger enforcement"[1].

2. If Australia were to introduce new laws specifically addressing creeping acquisitions [such as those contemplated by both discussion papers] then Australia would be out of kilter with the rest of the developed world - where there is no relevant international precedent[2].

3. In Australia no clear case has been established for change to deal with the said problem of creeping acquisitions - even in the grocery industry[3] which seems to be the main impetus for the discussion papers.

4. To avoid excessive compliance and administrative costs and so as not to interfere with the operation of the market in unintended ways - such as by discouraging efficiency, discouraging investment and delaying proposed acquisitions - amendments should not be made to section 50 of the *Trade Practices Act 1974 (Cth)* (the Act) unless a case for change is clearly established[4].

In short, these submissions suggest that Australia will be blazing a trail with the proposed amendments, with guaranteed associated costs; unknown unintended consequences; and without any clear need having been established.

Notwithstanding the force of these submissions, the SCCA understands that the Government has decided to proceed with new laws addressing so called "creeping acquisitions" so as to meet its election commitments and because of a perception (supported by the Australian Competition and Consumer Commission) that creeping acquisitions currently constitute a "loop-hole" in the coverage of section 50.

This we take from comments made in the most recent discussion paper which states:

> *"As canvassed in the first discussion paper, the Government considered that creeping acquisitions concerns related to a potential loophole in section 50, which currently prohibits acquisitions that would, or would be likely to, substantially lessen competition in the market. This loophole was understood to relate to a series of small acquisitions that individually would not substantially lessen competition in the market, but collectively may have that effect over time."*

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[1] American Bar Association, Section of Antitrust Law submission p 2

[2] Law Council of Australia Trade Practices Committee Business Law Section submission p 6-7, Speed and Stracey submission p. 5

[3] Law Council of Australia Trade Practices Committee Business Law Section submission p 1-2, Business Council of Australia submission p 2 attachment p 2, Coles and Woolworths submissions

[4] Law Council of Australia Trade Practices Committee Business Law Section submission p 1-2, 13, Speed and Stracey submission p 1-2

On the basis that the Government has already decided to proceed with new laws addressing this "loop-hole", the SCCA proposes to limit our comments in this submission to Question 1, that is:

> *"What are your views on the two regulatory options mentioned [in the discussion paper]? What potential unintended consequences need to be considered? How might these unintended consequences be addressed?"*

What are creeping acquisitions?

To properly assess and then comment upon the regulatory options referred to in the most recent discussion paper it is first necessary to identify the particular "loop-hole" the Government has committed itself to closing.

Until recently what constituted "creeping acquisitions" was well settled. In 1999, for example, the Joint Select Committee on the Retailing Sector (the Baird Committee), in its report entitled *"Fair Market or Market Failure? A Review of Australia's Retailing Sector"*, described creeping acquisitions as follows:

> *"5.32 'Creeping acquisitions' refers to the long-term strategy of a major chain increasing its market share through numerous individual acquisitions of other existing supermarkets, rather than by building new stores or expanding existing stores."*

Similarly in January 2003 the Trade Practices Act Review Committee (Dawson Review) described creeping acquisitions as follows:

> *"The term 'creeping acquisitions' generally refers to the acquisition of a number of individual assets or businesses over time that may have a cumulative effect upon the market share of a competitor. However, no individual acquisition by itself would necessarily constitute a substantial lessening of competition in the relevant market so as to fall within the prohibition imposed by section 50."*

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

> *"The issue of creeping acquisitions arises when bit by bit a business acquires small units of business. A problem arises when no single acquisition will result in a substantial lessening of competition, particularly as the acquisitions are spread out in time and space...*
>
> *The issue of creeping acquisitions raises a problem for the ACCC. At what point can or should the ACCC view such a small and often insignificant event in its wider context.[5]"*

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

Consistent with this settled understanding, in the September 2008 discussion paper, the term "creeping acquisitions" was used by Treasury 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 a longer period a series of such transactions may have the cumulative effect of substantially lessening competition in a market.[6]"*

Likewise, in the Law Council of Australia's submission in respect of that discussion paper, creeping acquisitions were described as follows:

> *"The concept of 'creeping acquisitions' generally refers to the acquisitions of a number of individual assets or businesses over time which, individually, are unlikely to contravene the mergers test in the Act, but which, when taken together, may have such an effect."*

In late 2008, however, contrary to the then settled understanding of creeping acquisitions as referred to above, the ACCC in its submission in response to the first discussion paper sought to radically redefine creeping acquisitions as follows:

> *"The term "creeping acquisition" encompasses a range of situations. While it can refer to a series of acquisitions over time that individually do not raise competitive concerns, but when taken together, the acquisitions have a significant competitive impact, the term creeping acquisition also refers to a firm with existing substantial market power enhancing its market power through one (or more) acquisitions which individually do not substantially lessen competition."*
> [Emphasis Added]

Until this intervention there was no suggestion that the concept applied to all acquisitions (including single, one-off acquisitions) by larger corporations which enhanced the market power of those corporations. Not only did the ACCC, in its submission, seek to radically expand the concept of creeping acquisitions, but it proceeded to shift the emphasis by stating:

> *"The ACCC believes that while the concept of creeping acquisitions may encompass a range of scenarios, the latter type of creeping acquisition is the area of greatest concern."*

With respect, the ACCC's attempt to radically redefine and expand the concept of creeping acquisitions should be seen for what it is. True creeping acquisitions, i.e. the perceived "loop-hole" which the Government appears committed to addressing, refer to a series of smaller acquisitions which collectively result in a substantially lessening of competition in a relevant market or markets. Acquisitions (whether singular or more) by entities with substantial power in a market which enhance that substantial market power are something quite separate (as set out below) and should be assessed separately. A provision directed at prohibiting such acquisitions is not a provision directed at closing a perceived "loophole" in Section 50 of the Act. Rather it is a provision directed to achieving an entirely different result (as discussed later).

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

Closing the loophole

Whilst suffering from a large number of deficiencies the 'aggregation model' canvassed in the first discussion paper did at least have the attribute that it was specifically directed to addressing the perceived problem of creeping acquisitions (as properly understood) and was consistent with Part IV of the Act, and in particular section 50, by ultimately requiring proof of a "substantial lessening of competition".

Even the 'substantial market power model' canvassed in that paper was directed to a lessening of competition (albeit any lessening).

The test proposed in the most recent discussion paper, however, neither requires there to be a series of acquisitions, "a substantial lessening of competition", nor "any lessening of competition". Rather that test goes much further than its original purpose by seeking to expand existing competition law in a manner that extends well beyond anything currently contemplated or envisaged by the Act.

The test now proposed is open to many of the criticisms made of section 50 as it was prior to amendment in 1993. At that time section 50(1)(b) prohibited acquisitions by corporations in a position to dominate a market for goods or services if the "*acquisition would or be likely to substantially strengthen the power of the corporation to dominate that market*". The 1991 Cooney Report, which led to section 50 changing back to a substantial lessening of competition test, criticised the then existing provision (detailed above) in the following terms which remain pertinent:

> *"3.96 A return to a substantial lessening of competition test for mergers would, it is said, reintroduce a degree of compatibility with the Act, would bring Australia more into line with the approach taken in major Western economies, and would leave the availability of authorisation on public benefit grounds unaffected."*
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> *"3.109 The philosophy underlying Part IV of the Trade Practices Act is the protection and enhancement of competition. Implicit in Part IV is the assumption that acts or occurrences which substantially lessen competition contravene the Act, unless authorised by the Trade Practices Commission on public benefit grounds."*
>
> *"3.110 While most other conduct caught by Part IV of the Act is subject to a competition test, section 50 is subject to a less rigorous test. The existence of a dominance test in the area of merger regulation is difficult to reconcile with the essential thrust of the Act which is directed to preventing anticompetitive conduct."*
>
> *"3.116 The Committee considers that the essential thrust of the Trade Practices Act should be to prohibit acts which substantially injure competition, except where public benefit can be demonstrated. This principle is embraced elsewhere in Part IV of the Act, and should also be incorporated in the merger regulation provisions."*

In the most recent discussion paper Treasury seeks to justify the proposed reliance on a "substantial degree of market power" test rather than a "substantial lessening of competition" test on that basis that:

> *"4. Substantial market power is a concept that is currently used in section 46, but has previously not been used in mergers and acquisitions provisions of the TPA."*
>
> *"5. The concept of market power is well established in competition law..."*
>
> *"13. By amending the SMP model to deal directly with the "enhancement" of market power, this model seeks to complement, rather than undermine, the existing substantial lessening of competition test in section 50. The Government continues to be committed to the existing section 50, and considers that it is functioning well in the majority of mergers and acquisitions cases."*

With respect, the substantial market power model now proposed will not complement section 50 as suggested. It is not specifically drafted to address creeping acquisitions (a series of smaller acquisitions) and will not therefore, as a general rule, close the perceived loophole. Nor does it ultimately require proof of a substantial (or indeed any) lessening of competition. Rather the proposed substantial market power model will add to the ACCC's power over corporations with substantial market power (section 46). If anything, whilst the test now proposed might be said to complement section 46 (not section 50) of the Act, in fact it opens up a new area of business regulation not contemplated in the original discussion on creeping acquisitions. It should be seen in that light.

To the extent that the proposed provision might prohibit some acquisitions which are in truth creeping acquisitions (in the accepted sense) this would result directly from the excessively wide ambit of the proposed provisions as discussed below. If the Government wishes to close the perceived creeping acquisitions loophole the SCCA submits that it would be better served by legislation specifically directed to that perceived loophole (see our **Recommendations** below).

Problems with the proposed test

A large number of the criticisms made of the 'substantial market power' test, canvassed in submissions to the first discussion paper, apply with equal force to the new test and are worth repeating here.

- "To introduce a standard of "enhancing" a corporation's substantial market power for some firms may come close to an absolute prohibition on any acquisitions by those firms in the relevant market."[7]
- "...the "substantial market power model" will therefore prevent particular acquisitions, even where any increase in the acquirer's market power will be insignificant or transitory".[8]

[7] *Law Council of Australia Trade Practices Committee Business Law Section submission p 16*
[8] *Law Council of Australia Trade Practices Committee Business Law Section submission p 17*

- "...the "substantial market power model" would effectively "cap" the market share of any firm which had a substantial degree of power in a market, save for organic growth. Thus, firms which have achieved a position of substantial market power – even if by superior products, better efficiency or other means – will have growth prospects only by organic means. Any acquisitions of small competitors or small suppliers/customers – no matter how trivial – will be either denied to those firms or made the subject of an uncertain and untested regulatory review."[9]

- "This uncertainty could inhibit larger firms from making efficiency-enhancing acquisitions that would have significant consumer benefits for fear that such actions might run foul of special antitrust standards applicable only to large firms."[10]

- "There is a very real risk that the proposed "substantial market power model" will prevent businesses right across the Australian economy that might be viewed as having market power from considering or proceeding with any acquisitions, as it may, in many cases, be impossible for them to be certain that the proposed acquisition may not have some effect on competition (albeit not substantial, material or more than transitory). As a result, it may have the undesirable effect of preventing businesses from entering geographic locations to offer more choice and lower prices, and instead protect less efficient and higher price competitors. In this sense, the "substantial market power model" may operate as a de facto market share cap and limit larger companies to organic growth."[11]

- "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."[12]

- "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;

[9] *Law Council of Australia Trade Practices Committee Business Law Section submission p 17*
[10] *American Bar Association, Section of Antitrust Law submission p 3*
[11] *Coles submission p 3*
[12] *Woolworths Limited submission p 20*

- undermine business efficacy and Australia's international competitiveness; and
- ultimately reduces overall consumer welfare in Australia."[13]

The SCCA notes that the imposition of a market cap on larger corporations was expressly rejected by the Dawson Committee, and the Baird Committee before it[14], on the basis that it would inefficiently restrict competition by preventing more efficient operators from expanding through the acquisition of less efficient operators.[15]

To the extent that the proposed provision will lead to results such as those detailed above then the proposed provision would clearly be inconsistent with the assurances given in the most recent discussion paper that:

> *"The Government is acutely aware that any intervention in this area, while preventing harm and detriment, should not stop the legitimate or organic growth of the businesses that is designed to increase production efficiencies to enhance the welfare of Australians. This is particularly important in the current economic environment."*

The SCCA submits that the submissions referred to above actually understate the problems with the proposed provision by suggesting that Australia's biggest and brightest corporations may still effectively grow under such a law organically. This is because the proposed provision applies to the acquisition of "any assets of a person" and not just the acquisition of the businesses or assets of competitors.

Assets are not defined in the discussion paper, nor in the Act. In the Macquarie Dictionary, "assets" are relevantly defined as:

> "*1. Commerce* resources available to a business or an individual for future economic benefit or service potential, and consisting of such items as the real property, machinery, inventory, cash and securities etc (tangible assets) and of patents, trademarks and goodwill (intangible assets) *2.* property or effects (opposed to *liabilities*) *3. Accounting* the detailed listing of property owned by a firm and money owing to it...."

Subsection 4(4)(b) of the Act which follows provides only one relevant limit to the ambit of section 50:

> *"a reference to the acquisition of assets of a person shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such assets but does not include a reference to an acquisition by way of charge only or an acquisition in the ordinary course of business."*

Accordingly an acquisition by a corporation with substantial market power of stock or inventory in the ordinary course of business would be unlikely to be prohibited by the new provision even if that acquisition was of such a scale or on such advantageous terms as could be said to "*have the effect, or be likely to have the effect, of enhancing the corporation's substantial market power in that market*".

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[13] *Woolworths Limited submission p 21*
[14] *Parliament of the Commonwealth of Australia, Report by the Joint Select Committee on the Retailing Sector, Fair Market or Market Failure? A Review of Australia's Retailing Sector, 1999.*
[15] *Dawson Review Committee, p. 67. Available at http://tpareview.treasury.gov.au/content/report.asp.*

However, there can be a vast array of assets (which might, for instance, be recorded in the accounts as abnormal items) which from time to time are acquired by Australian businesses so as to enhance efficiency, to grow and to better compete. Such acquisitions, which when made by corporations with substantial market power, are inevitably made to enhance the business of those corporations and can credibly therefore be said to "enhance", at least in the short term, those corporation's "substantial market power" in the market (even if not made from competitors). These acquisitions cannot be said to be in the ordinary course of business. They would be caught by the proposed provision since there is no requirement in that prohibition that the acquisition of the asset "substantially" enhances the Corporation's substantial market power. In the merger context in *Australian Gas Light Company v Australian Competition & Consumer Commission (No. 3)*[16] French J held that "substantially" means something "*commercially meaningful or relevant to the competitive process*". More generally "substantial" has been interpreted by the Courts to require proof of lasting or significant impacts and to not include those impacts which may be short term in nature or of minor significance. The absence of a similar adjective before the word "enhancing" in the proposed prohibition suggests that acquisitions which have an insignificant, or transitory, "enhancing" of the relevant corporation's market power will now be caught by the prohibition.

Arguably a corporation's substantial market power may be enhanced without actually altering "*the ability of the firm to raise prices above the supply cost without rivals taking away customers in due time, supply costs being the minimum cost an efficient firm would incur in producing the product*"[17]. That market power might be enhanced for example by ensuring that the corporation maintains its current advantage over its competitors for longer – perhaps by an acquisition which for instance increases its financial position.

As the High Court said in *Boral Besser Masonry Ltd v ACCC* (2003) 215 CLR 274, whilst the exercise of financial power is not an exercise of market power the ability of a participant to act without constraint because of its access to capital or the extent of its own financial resources, will be relevant in determining whether a corporation has market power and the degree of that power. Hence an acquisition that enhances a corporation's financial position, its efficiency, its productivity etc may well be an acquisition that enhances that corporation's market power.

In summary, by reason of the fact that the proposed provision will apply to the acquisition of all assets (except those that are acquired in the ordinary course of business), it is incorrect to assert without qualification, as the ACCC submitted in September 2009, that:

> *"It is important to note that the SMP model does not prohibit a firm from enjoying the legitimate fruits of its success. That is, the SMP model would not prevent a firm from achieving a strong market position through innovation and efficiency."*

Rather, with the introduction of the proposed provision into Part IV of the Act, the future growth of a significant number of Australia's most successful corporations will be constrained even though there is no suggestion that that growth has been occasioned by an abuse of market power. These corporations may in fact whither away because in business standing still is not an option.

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[16] *(2003) 137 FCR, p 417.*

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

If the proposed prohibition were introduced the Chairman of the ACCC, Mr Samuel, could no longer be able to say:

> *"... there is nothing in the TPA that prevents businesses from gaining market power organically, ie growing their own businesses. If a firm is able to expand and gain large market share by being better, by being more efficient, by offering better products to consumers at lower prices and better quality, then the law is not intended to stop businesses doing that. That is what competition is all about"*

Examples of unintended consequences

The SCCA believes the problems with the proposed provision may be best illustrated by examples of acquisitions which arguably would be caught by the proposed prohibition, whether or not they lessen or increase competition, with unintended and undesirable consequences.

Example 1 - The entry into a new lease by Coles (or Woolworths) of retail space in a proposed new shopping centre (i.e. on a greenfield site) in an area already serviced at least in part by Coles (or Woolworths).

Example 2 – The entry into a new lease by Coles (or Woolworths) of retail space in an existing shopping centre, which is adjacent to an existing Coles or Woolworths supermarket, for the purpose of that store expanding to satisfy demand (where that space was either vacant or not occupied by a competitor).

Example 3 – The acquisition by Coles (or Woolworths) of a marketing/advertising business which enables Coles (or Woolworths) to market groceries more effectively and at less cost – thereby enhancing Coles' (or Woolworths') business and arguably market power.

Example 4 – The acquisition by Coles (or Woolworths) of a milk processing plant so as to process its own milk more efficiently and to on-sell that milk to consumers at lower prices – thereby increasing competition but simultaneously enhancing Coles' (or Woolworths') business and arguably market power.

Example 5 – The acquisition by Coles (or Woolworths) of the intellectual property in logistics software which enables Coles (or Woolworths) to better deliver groceries to their stores as and when required and in the quantities required – thereby enhancing Coles' (or Woolworths') business and arguably market power.

Why is this an issue for the Shopping Centre Council of Australia?

The Shopping Centre Council of Australia represents investors in and managers of shopping centres. As such we also represent the interests of around nine million Australians who have an interest in retail property through their superannuation, life insurance, managed funds, property trusts, syndicates and shareholdings.

Our members, who are listed later in this submission, range across the spectrum from owners and managers with larger market shares in the industry to their most vigorous smaller competitors.

Our members all directly deal with the major grocery chains and are directly affected by any further concentration of those chains. A number of our members have publicly stated their desire for more quality grocery operators with whom they might deal and they have actively encouraged the growth of Aldi in Australia by leasing deals in their shopping centres.

Nevertheless the SCCA, representing the interests of all of its members, opposes the proposed provisions. This is because, firstly, those provisions potentially might directly apply to future asset acquisitions by many of our members. Secondly, those proposed provisions, by applying directly to Coles and Woolworths, may significantly and adversely impact upon our members and their tenants as innocent third parties - as detailed below.

SCCA members could be potential legitimate offenders

In *Australian Competition & Consumer Commission v Liquorland (Australia) Pty Ltd and Woolworths Limited*[18] Allsop J of the Federal Court found that in a retail context (the sale of liquor) a geographic market can be as narrow as the local area constituted by a circle of competition of 2km - 5km around the store in question, being an area commensurate with the particular store's trade area.

In a similar vein, the ACCC in its Public Competition Assessment of a recent acquisition of two centres by one of our members[19] said:

> *28. The purpose of defining the relevant market(s) is to determine the approximate boundary within which to assess the effects on competition of the acquisition, which in this case requires us to determine the types of shopping areas (and their geographic scope) that compete with Penrith Plaza and Woden Plaza for tenants. The relevant markets can be delineated by determining which, if any, other shopping areas would be likely to constrain a rent rise at either plaza – that is, to which other shopping areas (if any) could retailers move, while retaining a significant proportion of their existing customer base, if either Woden Plaza or Penrith Plaza raised their rents?*
>
> *29. The qualification that retailers must be able to retain a significant proportion of their existing customer base is important. It might be argued that any shopping area that provided an equivalent customer base is a substitute for the retailers' existing premises.*
>
> *However, the concept of a substitute does not extend to products that a business or consumer could choose to purchase in addition to the product in question – that is, products are not substitutes where businesses or consumers could realistically consume them both concurrently. In this case, where different shopping areas serve different customer bases, it would be possible for retailers to service both customer bases at the same time (by having more than one store). Consequently, these shopping areas are not substitutes. ...*

Applying these statements of principle the ACCC proceeded to note that there may be separate retail space markets for different types of retailer and to assess the proposed acquisitions by reference to a market of 8-10 km, being "the trade area for smaller retailers relying particularly on comparison shopping", and smaller markets for retailers relying on the multipurpose non-comparison shopping.

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[18] *[2006] FCA 826.*

[19] ACCC Public Competition Assessment of Westfield's proposed acquisition of 50% of Woden and Penrith Plazas dated 8 July 2005

The Commission concluded its assessment by stating in respect of the acquisition of Penrith Plaza:

> *66. Given the discussion of market definition above, it appears that the landlord of Penrith Plaza effectively exercises considerable market power over most of the smaller retailers in the centre. In particular:*
>
> - *as noted at paragraph 56, for at least 35-40 per cent of retailers, there are few if any substitutes for retail space inside Penrith Plaza; and*
>
> - *as noted at paragraphs 48 and 53, for at least 45 per cent of retailers, while other RSCs and sub-RSCs might potentially be substitutes, no actual substitutes appear to exist in this case.*
>
> *67. The proposed acquisition of Penrith Plaza by Westfield [from AMP, however,] would not change this position [as Westfield did not have any other centres within those markets as defined], and therefore would not substantially lessen competition as regards these retailers. [Comments in square brackets added]*

Given the Commission's and Court's approach of looking at the impact of acquisitions on "local markets" with a relatively small area (as detailed above), the SCCA and its members well appreciate that the proposed laws, by applying to corporations with a "substantial degree of power in the market", might well be said to apply to all (or substantially all) the SCCA's members (both big and small within the industry) and the majority of shopping centres that they own and/or manage. This is because inevitably our members' shopping centres will have a mathematically significant share of a market - if that market is sufficiently narrowly defined around their centre such as by reference to the centre's own trade area.

This is particularly the case given that it has been found that a firm may 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.[20]

SCCA members, in terms of the acquisition they might wish to make (for a whole host of legitimate commercial reasons), under the proposed laws, might then be limited to acquisitions outside local markets in which they already have a presence - being acquisitions which will not "enhance" their said market power in those local markets.

Such a law has the disturbing potential to prohibit (or at least substantially delay until an authorisation is obtained) the expansion and development of existing centres onto adjoining land where for instance that expansion requires the acquisition of adjoining land (being an asset). This is regardless of whether that adjoining land is operated as a shopping centre, is used for a retail use, for residential or other purposes, or is merely a greenfields site. This is also irrespective of the fact that such expansions and development may very well increase competition in the retail market. This is because inevitably such expansions and development increase the owner/manager's market share in the local market (at least over the short-term) and arguably "enhance" any market power that owner or manager might then have.

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

Following on from the examples given above, such a law may also have the potential to prohibit members of the SCCA refurbishing and refitting existing centres (if not regarded as expenditures incurred "in the ordinary course of business") because it could credibly be said that such refurbishment and refitting enhances our member's shopping centres and hence enhances our member's "market power" in the surrounding, and geographically limited, local market. Shopping centres, however, constantly need to be upgraded if they are to remain relevant and attractive to their surrounding customer base.

SCCA members and their tenants could be innocent third party victims

The SCCA is also wary of comments made by Commissioners of the ACCC in their report of the ACCC's *Inquiry into the competitiveness of retail prices for standard groceries* (the "Grocery Inquiry") that:

> *As with the acquisition of land or a business, the ACCC is able to consider the acquisition of leases, by supermarkets or any other business, under the substantial lessening of competition test in s. 50 of the Act and other sections of Part IV of the Act. The ACCC will actively investigate lease arrangements or other acquisitions where there is evidence put before it that indicates that there is a likely breach of the substantially lessening of competition test.*

Following that report the ACCC notified shopping centre owners that it intended to investigate future proposed acquisitions of supermarket 'sites' (including acquisition of leases – whether by way of direct grant, renewal, assignment or exercise of an option – acquisition of freehold land and options to acquire land.) We **attach** a copy of the letter sent by the ACCC, and advice sent to members by the SCCA, following discussions with the ACCC on this matter.

If the proposed provision is enacted then the SCCA assumes that the ACCC will likewise be actively investigating lease arrangements where there is evidence that indicates a likely breach of the "enhancing" substantial market power test.

In that event, and on the basis as discussed above that "enhancing" is such a low threshold, the SCCA and its members are very concerned that Coles and/or Woolworths may be prohibited under the proposed provision from leasing new space or renewing leases of space in a number of shopping centres owned by them, where they have other supermarkets somewhere nearby.

This would create a significant problem for the members of the SCCA given that having these two supermarket chains as anchor tenants is critical to the viability of their existing and proposed shopping centres throughout Australia. Such was the evidence before the Grocery Inquiry (which was ultimately accepted by the Commissioners):

> *Colonial First State (CFS) and Westfield expressed the view that anchor tenants are very important to shopping centres because the strength of the anchor tenant is crucial to the viability of the centre. They stated that they choose anchor tenants based on research and knowledge regarding which anchor tenant would be likely to generate the largest sales, and typically that is Woolworths and Coles. CFS and Westfield further stated that if other proven operators capable of driving sales existed, they would also be considered as anchor tenants but that typically this is not the case...*[21]

[21] ACCC Grocery Inquiry report dated July 2008 p 181