



Australian
Competition &
Consumer
Commission

Submission to the Minister for Competition Policy and Consumer Affairs

Creeping acquisitions: the way forward

July 2009



© Commonwealth of Australia 2009

This work is copyright. Apart from any use permitted by the *Copyright Act 1968*, no part may be reproduced without permission of the Australian Competition and Consumer Commission. Requests and inquiries concerning reproduction and rights should be addressed to the Director Publishing, Australian Competition and Consumer Commission, GPO Box 3131, Canberra ACT 2601.

Summary

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to provide its views on the second discussion paper to assist the Government in its examination of options to address the issue of creeping acquisitions.

As detailed in the ACCC's submission in response to the first discussion paper, the ACCC supports the introduction of a legislative amendment to address the issue of creeping acquisitions.

For the most part, problematic mergers and acquisitions are adequately addressed under section 50 of the *Trade Practices Act (Cth) 1974* (the Act). However, the ACCC remains of the view that section 50 of the Act would be better served if the issue of creeping acquisitions could also be addressed.

The revised substantial market power model proposed in the second discussion paper further clarifies the application of the substantial market power model articulated in the first discussion paper. The ACCC considers that the revised model would allow it to address the most serious creeping acquisition issues—that is, cases where a firm already in possession of substantial market power seeks to make a further acquisition that enhances its position in the market, but where the impact of the further acquisition falls short of substantially lessening competition.

The ACCC considers that the revised substantial market power model balances the need to investigate serious creeping acquisition issues with the desire to maintain sufficient flexibility to allow small transactions which, on the facts of the case, do not harm competition.

However, the ACCC notes that some stakeholders remain concerned that the revised substantial market power model could still result in the imposition of a market cap on firms with substantial market power making any acquisitions. Accordingly, the ACCC suggests that an additional requirement could be added to the model to expressly provide that the creeping acquisition law would only apply if the enhancement of market power that results or is likely to result from the acquisition is not insignificant. The ACCC considers that the “not insignificant enhancement” requirement would

ensure that the law would not capture trivial matters, but at the same time would not set the threshold so high that it would defeat the objective of the proposed amendment.

The second discussion paper has presented additional options, namely a ‘declaration’ option and a ‘mandatory notification’ option. While the ACCC recognises that these proposals attempt to provide further clarity to the operation of a substantive creeping acquisition law, the ACCC is concerned that such approaches introduce a level of regulatory complexity that goes beyond what is necessary to address creeping acquisition issues, and would jeopardise the effectiveness of the proposed regime. Further, such regimes—particularly a mandatory notification regime—would result in administrative processes that are incompatible with the informal merger review process applied in relation to the existing substantial lessening of competition test, and would seriously jeopardise the operation of that test.

The ACCC supports the introduction of a generally applicable version of the substantial market power model with the additional “not insignificant enhancement” requirement outlined above. The ACCC does not support either of the additional options included in the second discussion paper; namely, the declaration option and the mandatory notification option.

Contents

Summary	iii
Contents	v
Introduction	1
The revised SMP model	3
Scope of the revised SMP model	4
Substantial market power threshold	5
Enhancing market power test	7
An additional “not insignificant enhancement” requirement	8
The likely practical application of the revised SMP model	8
The informal merger review process	8
Impact on the number of merger reviews	9
Summary	10
Further options	11
Declaration	11
Arbitrary application of the law and distorted markets	12
Unresponsive and inflexible application of the law	13
Difficulty in identifying the appropriate scope of declarations	16
Mandatory notification	17
Mandatory notification is unnecessary	17
Potential to compromise the operation of informal merger review process	18
Difficulty in determining an appropriate threshold	19
Other issues	20
Summary	21
Response to Law Council submission	22
LCA’s criticisms of revised SMP model	23
Need for a creeping acquisition law	23
Scope of the revised SMP model	23
Impact on vertical mergers	24
Other jurisdictions	25
Declaration option	25
Alternative models proposed by the LCA	26
A revised aggregation model	26
Material Increase	27
Conclusion – LCA’s submission	29
Conclusions	29
Appendix A: Case studies	31
Taxi industry	31
Grocery industry	32
Liquor industry	33
Publishing industry	35
Health care industry	36
Hardware industry	37

Introduction

1. On 1 September 2008, the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon. Chris Bowen MP (**the Minister**), issued a discussion paper to gauge the best way forward in relation to the issue of creeping acquisitions (**the first discussion paper**). On 6 May 2009, the Minister released a further discussion paper calling for public comment on options to address the issue of creeping acquisitions (**the second discussion paper**).
2. The Australian Competition and Consumer Commission (**ACCC**) welcomes the opportunity to provide its views on the second discussion paper to assist the Government in its examination of options to address the issue of creeping acquisitions.
3. As detailed in the ACCC's submission in response to the first discussion paper,¹ the ACCC supports the introduction of a legislative amendment to address the issue of creeping acquisitions. The ACCC remains of the view that section 50 of the *Trade Practices Act 1974 (Cth)* (**the Act**) would be better served if the issue of creeping acquisitions could also be addressed.
4. The ACCC's submission on the first discussion paper considered that the introduction of a creeping acquisition law along the lines of the 'substantial market power' model (**SMP model**) would be the preferable option to deal with creeping acquisition issues. The SMP model was articulated in the first discussion paper as:

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.²

¹ ACCC (2008), *Submission to the Assistant Treasurer and Minister for Competition Policy and Consumer Affairs regarding creeping acquisitions*, October 2008, available at <http://www.treasury.gov.au>.

² Australian Government (2008), *Creeping acquisitions – discussion paper*, page 6.

5. 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 option canvassed in the first discussion paper (the ‘aggregation’ model).
6. The second discussion paper puts forward an amended version of the SMP model (**revised SMP model**) as one option being considered by the Government. The second discussion paper articulates the revised SMP model as follows:
 - (1) A corporation that has a substantial degree of power in a market must not directly or indirectly:
 - (a) acquire shares in the capital of a body corporate; or
 - (b) acquire any assets of a person;if the acquisition would have the effect, or be likely to have the effect, of enhancing that corporation’s substantial market power in that market.³
7. The second discussion paper notes that the revised SMP model seeks to complement rather than undermine the existing test under section 50 of the Act (**the SLC test**) and puts forward for consideration a number of options that may be used in conjunction with the revised SMP model.
8. These options are:
 - ‘declaration’, whereby the application of a creeping acquisition provision would be triggered in relation to certain corporations or sectors following Ministerial declaration; and/or

³ To ensure clarity, the ACCC is of the view that the revised SMP model should refer to ‘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 enhancing the substantial degree of power of that corporation in that market’ [emphasis added].

- ‘mandatory notification’, whereby the Minister may set appropriate thresholds for the mandatory notification of acquisitions to the ACCC by declared corporations or in declared sectors.
9. This submission first details the ACCC’s consideration of the revised SMP model, its applicability and practical consequences. Secondly, the ACCC considers the need for, and suitability of, the declaration and mandatory notification options proposed in the second discussion paper.

The revised SMP model

10. The ACCC considers that, for the most part, problematic mergers and acquisitions are adequately addressed under the existing SLC test. While the majority of matters can be dealt with under the current legislation, there are a material number of cases where competition and consumers would be better served if the issue of creeping acquisitions could also be addressed.
11. 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.
12. This less than substantial effect on competition may be tolerated where the continuing market structure remains workably competitive. However, the ACCC considers that, where a firm already possesses a substantial degree of market power and is able to act largely unfettered by competitive forces, the firm should appropriately be subject to additional constraints. This principle is recognised elsewhere in the Act—for example, in section 46 which prohibits the misuse of substantial market power.
13. As detailed in the ACCC’s previous submission, and for the reasons outlined above, the ACCC considered that the SMP model would be an appropriate and practically workable option for dealing with creeping acquisition issues.

14. The ACCC continues to support this model and, in particular, the revised version of the model outlined in the second discussion paper. The ACCC believes that the revised SMP model would allow the ACCC to address the most serious creeping acquisition issues—that is, cases where a firm already in possession of substantial market power seeks to make a further acquisition that enhances its position in the market, but where the impact falls short of substantially lessening competition.
15. The ACCC believes that while the majority of cases would continue to be considered under the SLC test, a significantly lower, but material, number of cases would be likely to fall for consideration under the revised SMP model. This would apply over a range of industries. In this regard, the ACCC has provided a number of case studies where it believes that the ability to review the matter under the revised SMP model would limit the potential for anti-competitive mergers (see [Appendix A](#)).
16. The ACCC notes that the creeping acquisition issue has usually been discussed in the context of the grocery industry. In the *Report of the ACCC Inquiry into the competitiveness of retail prices for standard groceries (Groceries Inquiry)*⁴, the ACCC found that creeping acquisitions did not appear to be a significant current concern in the supermarket retailing industry. In this regard, the ACCC considers that the revised SMP model provides an appropriate response in that it is unlikely to capture individual acquisitions that are competitively benign or only have a trivial impact on competition, but does provide scope to address transactions that are more than trivial.

Scope of the revised SMP model

17. As outlined in its previous submission, the ACCC believes that creeping acquisitions are an issue that should be addressed within the Act, but at the same time care must be taken to ensure that the approach taken is not overly broad.

⁴ Report available from <http://www.accc.gov.au/content/index.phtml/itemId/809228>.

18. The ACCC considers that the revised SMP model strikes a balance between capturing those acquisitions which are likely to be of most concern, while minimising the risk that acquisitions which are unlikely to cause competitive concern will be captured. The ACCC considers that there are two elements to the revised SMP model that in particular operate together to ensure that this balance is achieved:

- the substantial market power threshold; and
- the enhancing market power test.

For the avoidance of any doubt, the ACCC believes that it would be prudent to add a further requirement to the revised SMP model to expressly state that the creeping acquisition law would only apply if the enhancement of market power that results or is likely to result from the acquisition is not insignificant.

Substantial market power threshold

19. First, like the SMP model, the revised SMP model adopts ‘substantial market power’ as the initial threshold for the application of the proposed legislative amendment. The ACCC is of the view that, in adopting substantial market power as the threshold requirement, the revised SMP model maintains the focus on addressing only those acquisitions that are at most risk of causing competitive harm. The requirement to demonstrate that a firm has a substantial degree of market power is a high threshold and, in many markets, the competitive dynamics are such that no firm would be likely to be in possession of a substantial degree of market power.

20. In this regard, the ACCC notes that the concepts associated with, and interpretation of, the substantial degree of market power requirement in the revised SMP model will likely follow the interpretation of substantial market power in the context of the application of section 46 of the Act.

21. In that context, *substantial* has been said to mean ‘considerable or large’.⁵

⁵ *Dowling v Dalgety Australia Ltd* (1992) 106 ALR 75.

22. As noted in the second discussion paper, *market power* has been said to be present where a firm is able to raise prices above the minimum cost an efficient firm would incur.⁶

23. Alternatively, a firm may be said to have market power when it can act in an unconstrained manner:

A firm possesses market power when it can behave persistently in a manner different from the behaviour that a competitive market would enforce on a firm facing otherwise similar cost and demand conditions.⁷

24. Market power has been similarly expressed as:

...[the] capacity to behave in a certain way (which might include setting prices, granting or refusing supply, arranging systems of distribution), persistently, free from the constraints of competition.⁸

25. With these interpretations in mind, the ACCC notes that the concept of market power requires more than just a consideration of the size of a firm or its market share. It requires careful consideration of the competitive dynamics of the market and, in particular, whether the firm in question faces significant competitive constraints. For example, the existence (or absence) of barriers to entry has been considered to be a key factor in determining the extent of market power enjoyed by a firm.⁹ Other factors which will influence the extent to which a firm is sufficiently constrained include the nature and extent of import competition, countervailing power of buyers and substitution possibilities.

26. Accordingly, the threshold test of showing a substantial degree of market power imposes a high burden of proof on the ACCC. At the same time, it is a test that

⁶ *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* (1989) 83 ALR 577 at 583 (per Mason CJ and Wilson J).

⁷ *ibid.* at 592 (per Dawson J).

⁸ *Melway Publishing v Robert Hicks Pty Ltd* (2001) 205 CLR 1 at 67.

⁹ *ibid.* and *Eastern Express Pty Ltd v General Newspapers Pty Ltd* (1992) 35 FCR 43 at 63.

industry is very familiar with, and has the benefit of judicial interpretation through the courts in the context of section 46 of the Act.

Enhancing market power test

27. The ACCC is of the view that the second element of the revised SMP model—the requirement that an acquisition have the effect of ‘enhancing’ market power—acts to further focus its application on those acquisitions of most concern. Specifically, the revised SMP model will target only those acquisitions which enhance the firm’s market power in the same market in which it holds substantial market power and in a more than trivial fashion.
28. The Macquarie Dictionary defines enhance as to ‘raise to a higher degree; intensify or magnify’.¹⁰ This requirement makes it clear that, to be captured by the prohibition, an acquisition must add to, or magnify, the strength of the substantial market power of the acquiring firm.
29. Transitory changes to market structure are unlikely to enhance the market power of the acquirer. For example, if a firm with substantial market power were to acquire a small firm (relative to the size of the market), there may be a transitory change in the number of competitors but, if that small firm is likely to be replaced easily, the acquirer’s market power is unlikely to be enhanced.
30. Similarly, the revised SMP model would not apply to *all* acquisitions made by a firm with substantial market power: acquisitions are unlikely to enhance market power where they occur in *other* markets and do not result in an adverse effect on competition in the market in which the substantial degree of market power is held.
31. In focussing on an acquisition’s impact on the market power of a firm through the application of the ‘enhancing’ requirement, the ACCC considers the revised SMP model appropriately targets the very source of the potential competitive concern—that is, the substantial market power held by the acquirer. The ACCC is of the view that this change also provides further comfort that acquisitions

¹⁰ See Macquarie Dictionary Online <http://macquariedictionary.com.au>

which have a trivial or transitory effect on competition would be extremely unlikely to contravene the creeping acquisition law.¹¹

An additional “not insignificant enhancement” requirement

32. As outlined above, the ACCC believes that the revised SMP model would not be likely to capture trivial transactions, or result in the defacto imposition of a market cap on firms that possess substantial market power. However, the ACCC considers that for the avoidance of any doubt, it would be prudent to add a further requirement to the revised SMP model to expressly state that the creeping acquisition law would only apply if the enhancement of market power that results or is likely to result from the acquisition is not insignificant. The ACCC considers that the “not insignificant enhancement” requirement would ensure that the law would not capture trivial matters, but at the same time would not set the threshold so high that it would defeat the objective of the proposed amendment. That is, the ACCC believes that a “not insignificant” enhancement of market power signals that the effect on market power must be more than trivial, but can be less than substantial.

The likely practical application of the revised SMP model

The informal merger review process

33. The ACCC notes that it is committed to the continuation of the informal merger review process which has developed over many years and has widespread support in the business and legal communities.

34. The informal merger review process has consistently proven to be flexible in how it responds to practical and commercial issues, and an appropriate avenue to deal with competition issues arising from mergers and acquisitions effectively and efficiently.

¹¹ Additionally, as noted previously by the ACCC, the general legal principle of *de minimus non curat les* (the law does not concern itself with trifling matters) would apply. See, for example, *O'Brien Glass v Cool & Sons* (1983) 48 ALR 625.

35. While the ACCC notes that it is inevitable that the introduction of a new legislative prohibition in relation to mergers and acquisitions will have an impact on the resources of the ACCC, it is confident that legislative reform in the form of the revised SMP model would be able to be accommodated under the existing informal merger review process.

Impact on the number of merger reviews

36. While it is difficult to precisely predict the number of merger reviews that would be undertaken under the revised SMP model, the ACCC believes that the number of matters that would fall for consideration would be material, but that the revised SMP model would not impact on the majority of cases.

37. An estimation of the likely number of cases to fall for consideration under the revised SMP model follows.

38. The ACCC has examined all merger reviews completed during the last financial year and identified the proportion of public matters that would be likely to have been investigated under the revised SMP model, if the revised SMP model were incorporated into merger law.

39. It must be stressed that these figures only identify matters where, on the information available, the ACCC considers that they may have warranted consideration under the revised SMP model. It is important to note that this does not necessarily mean that the ACCC would have identified serious concerns in relation to any of these matters—the ACCC is unable to draw such conclusions in the absence of further information and investigation.

40. Of the 175 public mergers reviewed by the ACCC,¹² the ACCC estimates that 16 (or 9 per cent) of public mergers, may have been considered under the revised SMP model, simultaneously to an investigation under the existing SLC test. As outlined above, it is important to note that this does not necessarily

¹² In 2007-08, the ACCC conducted 397 merger reviews. Of these, 212 matters were considered on a confidential basis. Due to information constraints, the ACCC has not considered the applicability of the revised SMP model to the confidential matters it reviewed during the past financial year. A further 10 public matters were withdrawn prior to the ACCC making a final decision—these matters are similarly excluded from the analysis.

- mean that the ACCC would have opposed these mergers under the revised SMP model.
41. Of the acquisitions identified as likely to fall for consideration under the revised SMP model, three presented issues under section 50 of the Act, but were not opposed after competition issues were resolved through divestiture undertakings accepted under section 87B of the Act.
 42. The ACCC also notes that approximately 20 acquisitions—mainly involving single acquisitions of small retail grocery or liquor sites—have not been included in the above estimation of the number of matters likely to fall for consideration under the revised SMP model on the basis that, generally, acquisitions of this nature would be unlikely to have been found to have had more than a trivial effect on the acquirer’s market power (see paragraphs 29 to 30 above).
 43. The ACCC has also undertaken a more detailed assessment of the likely application of the revised SMP model to a number of industries in which potential creeping acquisition issues have been identified. These case studies are at Appendix A to this submission.

Summary

44. In summary, the ACCC supports the amended version of the model and is of the view that the revised SMP model balances the need to investigate serious creeping acquisition issues with the desire to maintain sufficient flexibility to allow small transactions which, on the facts of the case, do not harm competition.
45. Further, for the avoidance of any doubt, the ACCC believes it would be prudent to add a further requirement to the revised SMP model to expressly state that the creeping acquisition law would only apply if the enhancement of market power that results or is likely to result from the acquisition is not insignificant.
46. The ACCC considers that the analysis which would be required to be undertaken by the ACCC to determine whether a contravention of the creeping

acquisition law had occurred could be undertaken within the framework of the existing informal merger review regime.

Further options

47. The second discussion paper notes that a further option that could be considered to address creeping acquisition issues could be to limit the application of the revised SMP model to corporations or product/service sectors that are declared by the Minister. In addition, the Minister could be provided with the power to set mandatory notification thresholds in relation to declared corporations or declared product/service sectors. That is, the Minister could determine that declared corporations, or corporations that produce declared products/services, must notify the ACCC in relation to proposed mergers that meet certain threshold requirements.
48. As outlined above, the ACCC believes that the revised SMP model already incorporates appropriate thresholds and appropriately targets those acquisitions likely to be of most concern. The adoption of a declaration regime (with or without a mandatory notification requirement) is neither necessary nor desirable to deal with the creeping acquisition issue.
49. While these proposals attempt to provide further clarity to the operation of a substantive creeping acquisition law, the ACCC is concerned that such approaches introduce a level of regulatory complexity that goes beyond what is necessary to address creeping acquisition issues, and would seriously jeopardise the effectiveness of the proposed regime. Further, such regimes—particularly a mandatory notification regime—would result in administrative processes that are incompatible with the informal merger review process applied in relation to the SLC test, and would jeopardise the operation of that test.

Declaration

50. The ACCC believes that the introduction of a declaration regime to limit the application of the revised SMP model to declared corporations or declared

product/service sectors would be ineffective, and would seriously undermine the operation of the substantive creeping acquisition law.

51. The ACCC considers that such an approach would not assist in limiting the application of the law to appropriate circumstances; rather, it would result in a piecemeal and arbitrary application of the creeping acquisition law. Additionally, a declaration process would create opportunities to delay the operation of the law, rendering it too slow and inflexible to deal with issues as they arise. These issues are outlined in more detail below.

Arbitrary application of the law and distorted markets

52. As outlined in the second discussion paper, the introduction of a declaration process would be intended to limit the application of the revised SMP model to certain corporations or product/service sectors for a specified period of time.
53. The SLC test is a law of general application, which applies fairly and impartially across and within sectors. General application of merger law is fundamental to providing a level playing field for competition. It would be contradictory to these principles to apply different merger laws to different sectors or to different competitors within a sector. The ACCC considers that the introduction of a declaration regime would create such a contradiction. Further, a declaration regime risks politicising future decisions as to which corporations or sectors would be made subject to the revised SMP model. Governments may be placed under pressure to declare (or not declare) certain corporations or sectors for political rather than competition reasons.
54. As discussed above, the ACCC believes that creeping acquisition issues can arise in a wide variety of industries. Some industries may ‘fly under the radar’ and avoid declaration for a substantial period of time. In contrast, other higher profile industries—where there may in fact be less cause for creeping acquisition concerns—may attract constant scrutiny.
55. These factors would lead to an arbitrary application of the law that would not necessarily capture those industries where creeping acquisition issues are of greatest concern.

56. A declaration regime may also distort markets, as the declaration of one industry may provide less incentive for investment in that industry, thus resulting in an inefficient allocation of resources between industries. As was pointed out in the *Review of the competition provisions of the Trade Practices Act (Dawson Review)*:

Different regulatory treatment of different sectors of the economy will provide different incentives for investment and effort by discouraging participation in particular sectors and will detract from the ability of markets to allocate resources in an efficient manner. Productivity, growth and welfare may then all suffer.¹³

57. Equally, if a particular corporation was to be declared, this may provide its competitors with an advantage over the declared corporation. For example, if there were concerns that one corporation may have substantial market power in a market and that corporation were to be declared, this may increase the opportunities, incentives or motivation for an undeclared competitor to engage in a more aggressive acquisition strategy, creating further concentration within the industry in question.

58. The ACCC believes that there can be circumstances where a specific competition regime may be appropriate for particular industries or corporations (at least for a period of time, perhaps following an industry's deregulation)—as, for example, is provided for by the regulatory regime for telecommunications. Nevertheless, in an area such as creeping acquisitions there is a real risk that applying different laws to particular industries or corporations would result in an arbitrary application of the law that may lead to market distortion.

Unresponsive and inflexible application of the law

59. The second discussion paper outlines a number of possible options for establishing a declaration process similar to the Price Surveillance provisions contained in Part VIIA of the Act. In particular, it identifies two broad options:

¹³ Dawson (2003), *Review of the competition provisions of the Trade Practices Act*, page 36. Available at <http://www.tpareview.treasury.gov.au/content/report/html/Chpt1.asp>

- the Minister would have the power to unilaterally declare a corporation or a product/service sector if the Minister had concerns about potential and/or actual competitive harm from creeping acquisitions, or acquisitions by corporations with substantial degree of market power; or
 - the Minister would have the power to declare a corporation or a product/service sector on application from the ACCC. The ACCC could make such an application if it had concerns about potential and/or actual competitive harm from creeping acquisitions, or acquisitions by corporations with substantial market power.
60. The ACCC is concerned that both of the options put forward in the second discussion paper would be too slow and inflexible to capture creeping acquisition issues as they emerge.
61. As outlined above, some industries may avoid detection for a significant period of time. For example, the ACCC may only identify in the course of an informal merger review pursuant to section 50 of the Act that the matter would be better dealt with under creeping acquisition laws, but at that time it would be too late to commence a declaration process.
62. Even where a potential problem is identified, by the time a declaration decision is made, it may be too late to take effective action. Considerable investigation would need to be undertaken in order for the Minister or the ACCC to be satisfied that the declaration of a particular corporation, or product/service sector is appropriate. In some cases, corporations could ‘fast track’ acquisition programs once they are aware that the ACCC or the Minister is considering declaration.
63. Given the significant impact such a declaration may have on a particular company or industry, any declaration process would arguably need to include merits and/or judicial review mechanisms, including appeal processes. While the ACCC believes that incorporating robust appeal mechanisms would be necessary and appropriate in this context, in certain circumstances parties may

use such processes as a mechanism to delay and frustrate the practical operation of the law.

64. The ACCC has had considerable experience in dealing with declaration processes, particularly in the context of Part XIC of the Act. The ACCC's experience has been that declaration decisions that require consideration of complex competition issues such as the existence of a substantial degree of market power, and the likelihood of competitive harm generally attract considerable legal and economic debate, and are likely to be subject to protracted legal proceedings.
65. In the context of creeping acquisitions, the ACCC is very concerned that declaration decisions are likewise likely to result in the proliferation of complex and protracted legal proceedings and appeals on various issues including:
- whether the Minister had sufficient information to form a concern, or be satisfied, that a corporation has, or corporations in a particular industry have, substantial market power;
 - whether due consideration had been given to setting an appropriate period of time for a declaration to remain in force; and
 - what constitutes sufficient evidence of actual or potential competitive harm.
66. In particular, corporations would have very strong incentives to challenge all aspects of a declaration, particularly if the declaration raises an implication that the firm in question possesses substantial market power, as this may have broader ramifications in relation to the potential application of section 46 of the Act to the corporation.
67. Accordingly, significant resources (both the resources of industry and the government) would be diverted to dealing with legal proceedings arising from declaration decisions. In practice, resources would have to be deployed to assessing whether a corporation holds substantial market power twice; first to

determine whether a corporation needs to be declared, and then again once a corporation is declared as part of the merger review process.

Difficulty in identifying the appropriate scope of declarations

68. As stated in the second discussion paper, for a declaration to be effective and enforceable it would need to clearly specify the relevant corporation or product/service sector that is subject to declaration. The ACCC considers that in practice this would be extremely difficult to achieve.
69. While the declaration of a corporation may appear relatively straightforward, complex issues are likely to arise in determining whether particular transactions undertaken by a corporation would fall within the scope of a declaration. In particular, consideration would need to be given to whether all transactions made by the declared corporation would be covered. Further complex issues that would need to be considered include whether the acquisition of minority interests, management rights and interests in joint ventures should be covered.
70. Identifying the appropriate scope of a declaration in relation to a product/service sector would be similarly complex. Identifying appropriate descriptors for a particular product or range of products will be very difficult to formulate, particularly in industries where products are changing rapidly, or where there is significant product differentiation. Issues are also likely to arise in identifying the necessary connection between the product/service and market participants. For example, if a declaration is drafted to apply to any transactions in relation to a particular product/service, questions will arise as to whether this covers corporations that predominantly operate in other sectors, or operate at different levels of the production chain such as distributors or importers.
71. Further, there is some potential that corporations will find ways to circumvent the scope of a declaration, for example by changing the way that their products or services are described, or changing their product offering to take them outside the scope of a declaration.

72. The ACCC believes there is a real risk that declarations may be drafted so specifically that transactions may be missed or the declaration circumvented, or so broadly that they are ambiguous and uncertain in application.

Mandatory notification

73. In addition to the declaration option, the second discussion paper raises the possibility of an further feature whereby:

...the Minister could also be provided with the power to set appropriate thresholds for the mandatory notification of acquisitions to the ACCC, by declared corporations or by corporations in declared product/service sectors, as part of the declaration process.¹⁴

74. In addition to the concerns the ACCC highlighted above with respect to a declaration regime, the ACCC is of the strong view that any form of mandatory notification regime embedded within a declaration regime is both unnecessary and potentially harmful for the reasons set out below.

Mandatory notification is unnecessary

75. The ACCC is of the view that mandatory notification is unnecessary for a number of reasons.
76. Firstly, in the context of a declaration option, declaration itself would create the incentive or requirement for declared corporations (or those corporations in the declared markets) to notify and to seek clearance by the ACCC of any proposed merger. If the revised SMP model applied generally (that is, without a declaration regime) parties would, rightly, only have the incentive to notify of potentially problematic transactions.
77. Secondly, the informal review process is very effective, efficient and provides appropriate incentives for voluntary notification. The ACCC believes that it receives an acceptable level of notification from the market, which is supplemented by information from government agencies such as the Foreign Investment Review Board and Australian Prudential Regulatory Authority, and

¹⁴ Australian Government (2009), *Creeping acquisitions – the way forward*, paragraph 17.

the merger information sourced by the ACCC's internal capabilities. The ACCC sees no reason why the voluntary notification system utilised currently should not be applied equally to transactions falling for consideration under the revised SMP model.

78. The ACCC also notes that the Dawson Review did not identify the lack of a compulsory notification regime as a shortcoming of the informal process. In fact, it specified that:

[It] is not suggesting that there should be any requirements in the Act that all merger proposals be notified to the ACCC or be formally considered. The benefits of the informal clearance process should be retained so that most merger proposals would continue to be dealt with as expeditiously as they are now.¹⁵

79. Failure to notify has not been a significant issue under the existing SLC test and the ACCC does not expect it to be a significant issue under the revised SMP model.
80. The ACCC does not consider that a mandatory notification threshold would assist in addressing any perceived concern that creeping acquisitions legislation would capture trivial or *de minimis* transactions.
81. Finally, the ACCC does not consider that a mandatory notification threshold would provide greater certainty as to the application of a creeping acquisition amendment. While mandatory notification would require declared corporations to formally inform the ACCC of proposed transactions falling above a legislated threshold, mergers falling below that threshold could still be the subject of investigation.

Potential to compromise the operation of informal merger review process

82. The ACCC's experience is that the informal merger review process—incorporating a voluntary notification regime—has proved to be a highly successful mechanism for assessing the competitive impact of mergers in

¹⁵ Dawson (2003), *Review of the competition provisions of the Trade Practices Act*, page 62.

Australia. It has provided both merging parties and the ACCC with a high degree of flexibility.

83. The introduction of a mandatory notification threshold for declared corporations or corporations in declared product/service sectors would be inconsistent with the current regime for a number of reasons.
84. Firstly, merging firms would be faced with different notification regimes for the SLC test (voluntary) and the revised SMP model (mandatory). This will inevitably create uncertainty in decisions of whether or not to notify the ACCC as a proposed merger may fall under the compulsory notification threshold for the revised SMP model but may be a merger potentially in breach of the SLC test.
85. Secondly, a mandatory notification threshold sends a message to industry that mergers which fall below the threshold do not warrant consideration and may encourage a culture of non-notification of mergers that fall below the mandatory threshold for SMP notification. The ACCC would be particularly concerned at this outcome given that it would undermine the success of the ACCC's existing informal process with a voluntary notification threshold.
86. Overall, the ACCC sees a move away from voluntary notification as being likely to compromise the existing highly successful informal merger process used for the existing SLC test.

Difficulty in determining an appropriate threshold

87. The ACCC is concerned that a mandatory notification regime would involve the subjective and problematic task of determining an appropriate notification threshold.
88. The International Competition Network is rightly critical of regimes which rely on market share based notification thresholds in pre-merger notification regimes. Furthermore, market shares or changes in market shares cannot be used as a predictor of competitive effects, and are frequently not a good indicator of market power. Market shares can provide guidance on when a firm should be *encouraged* to notify (as the ACCC does in its *Merger guidelines*),

but are inappropriate for a determination of when they *must* notify under a mandatory notification regime.

89. The ACCC is of the view that it would not be possible to define an appropriate threshold which is able to ensure that:
- all mergers that are potentially harmful to competition are notified (or appropriate incentives to notify exist where particular mergers fall below the threshold); and
 - businesses are not faced with onerous obligations to notify the ACCC of mergers, particularly where mergers are likely to have only a trivial impact on competition.
90. The ACCC also considers that the issues raised in paragraph 69 above in relation to the treatment of minority interests, management rights, interests in joint ventures and transactions made by the declared corporation in unrelated activities, are equally problematic when it comes to defining appropriate mandatory notification thresholds. For instance, thresholds would also need to be defined in relation to the shareholding that would trigger notification. The ACCC is concerned that this raises the same issues that are identified above in relation to the difficulty in determining an appropriate shareholding threshold that would capture all potentially harmful mergers but which would not place onerous notification obligations on business.

Other issues

91. In addition to the challenges associated with establishing a mandatory notification threshold, such a regime brings with it a range of complex regulatory issues.
92. The ACCC is of the view that a mandatory notification regime jeopardises the timeliness and flexibility of the ACCC decision making process and the quality and integrity of ACCC decisions. In particular, ACCC resources would be diverted to investigating compliance with notification requirements, rather than the competitive effects of problematic mergers, impacting on the flexibility of its approach and its ability to deliver appropriate decisions within commercially

acceptable timeframes. The ACCC is also concerned that the resources of industry would be diverted to calculating and disputing notification thresholds rather than assessing the competitive impact of transactions.

93. Other issues that would need to be considered in designing such a regime include:
- The need to provide substantial additional guidance to assist parties in the interpretation of thresholds.
 - Questions about whether to introduce a suspensive or non-suspensive regime. Suspensive regimes prohibit a firm from proceeding with a notified transaction until the relevant regulator has given clearance. A suspensive regime would need to operate under a legislated merger review process as it would not be compatible with the informal merger review process.
 - How notification is to occur, including determining such issues as forms, fees and strong penalties for non-notification.
 - Determining the appropriate point in time for notification to occur as well as issues of how to deal with various types of transactions, also discussed in paragraphs 69 and 90.
 - How to deal with mergers proposed on a confidential basis (such assessments are currently accommodated under the informal process).

Summary

94. The ACCC has serious concerns with any SMP model which involves the introduction of a declaration regime and/or a mandatory notification regime.
95. The ACCC believes that the introduction of a declaration regime to limit the application of the revised SMP model to declared corporations or declared product/service sectors would be ineffective, and would seriously undermine the operation of the substantive creeping acquisition law.

96. The ACCC considers that such an approach would not assist in limiting the application of the law to appropriate circumstances; but rather, it would result in a piecemeal and arbitrary application of the creeping acquisition law. Additionally, a declaration process would create opportunities to delay the operation of the law, rendering it too slow and inflexible to deal with issues as they arise.
97. The option of including a mandatory notification regime within the declaration option is also, in the view of the ACCC, unnecessary and potentially harmful. It would not be sufficiently flexible to capture all acquisitions likely to be of concern and exclude those which are benign. A mandatory notification regime would not achieve certainty of application of a creeping acquisition law, and is highly likely to place an onerous compliance burden on business. Furthermore, it would not be compatible with the existing informal merger review process, and may very well undermine a system that has proven to be highly successful.

Response to Law Council submission

98. During the consultation period following the release of the second discussion paper, the ACCC has had the benefit of reviewing the submission compiled by the Law Council of Australia (LCA). The ACCC notes that the LCA has raised concerns in relation to the revised SMP model and has raised two further proposed options for dealing with creeping acquisition issues.
99. For the reasons set out elsewhere in this submission, the ACCC believes that creeping acquisition issues should be dealt with, and the revised SMP model is the appropriate approach. While the ACCC notes the LCA's concerns, the ACCC believes that such concerns largely arise from misconceptions about the scope and application of the revised SMP model. Further, the ACCC is strongly of the view that neither of the alternative models proposed by the LCA would provide a satisfactory method for addressing creeping acquisition issues.

LCA's criticisms of revised SMP model

Need for a creeping acquisition law

100. The LCA appears to suggest that there is no need for a creeping acquisition law because there is no 'epidemic of creeping acquisitions'.¹⁶
101. As discussed at paragraphs 10-15, the ACCC considers that most problematic mergers can be dealt with under the existing SLC test, but that a material number of cases where competition and consumers would be better served if creeping acquisitions could be dealt with. Further, Appendix A to this submission includes a number of case studies which provide examples of industries where the ACCC believes that the application of the revised SMP model would benefit competition and consumers.

Scope of the revised SMP model

102. The LCA has raised concerns that the revised SMP model would be too broad in application, and would result in a de facto market cap on many corporations, with unintended consequences for growth and efficiency of firms. In this regard, the LCA has provided a number of hypothetical case studies to illustrate its concerns. The ACCC believes that many of the case studies overstate the potential application of the revised SMP test for a number of reasons.
103. Firstly, the LCA's case studies appear to be largely based on the assumption that the threshold test for whether a corporation possesses substantial market power will in fact be a market share test. As indicated above, the ACCC considers existing legal interpretation of the term 'substantial market power', developed in relation to section 46 of the TPA, has made it very clear that the concept is influenced by a range of factors, not just a firm's market share.
104. Second, the LCA takes the view that the test of 'enhancing' market power will be interpreted in a restrictive manner such that any acquisition by a corporation with a substantial degree of market power would enhance that market power. As outlined above, the ACCC considers that a normal reading of the words,

¹⁶ LCA submission, 12 June 2009, p.6

combined with safeguards of statutory interpretation, make it extremely unlikely that trivial matters would be caught by the TPA. This issue is discussed in more detail at paragraphs 28-29.

105. Nevertheless, as outlined above, for the avoidance of any doubt, the ACCC believes a further requirement could be added to the revised SMP model to expressly state that the creeping acquisition law would only apply if the enhancement of market power that results or is likely to result from the acquisition is not insignificant.
106. Finally, the LCA appears to assume that any efficient or innovative acquisition will be prohibited. The ACCC does not agree that this will be the case. Furthermore, the ACCC notes that in the event that an acquisition would result in benefits outweighing the costs of any loss of competition, the acquirer would have the option of authorisation available to it.

Impact on vertical mergers

107. The LCA's submission makes the claim that the revised SMP model:
- ...may in practice prevent a corporation with a substantial degree of market power in one market from making upstream or downstream acquisitions, as any such acquisitions may potentially 'enhance' its substantial market power, even if the acquisition is of a complementary, and not of a competitively overlapping, asset.¹⁷
108. The ACCC does not consider that a corporation with market power will always be prevented from making upstream or downstream acquisitions. The ACCC considers that the wording of the revised SMP model makes it clear that such acquisitions will only be prohibited if the corporation's market power would be enhanced in the market in which it holds substantial market power.
109. As with the SLC test, the relevant consideration will not be whether or not the acquired asset is complementary or competitively overlapping, but rather what the impact of the acquisition will be in competition. The ACCC considers that

¹⁷ LCA submission, 12 June 2009, p12

this approach is appropriate and consistent with examining of mergers under the existing SLC test.

110. Further guidance on how the ACCC considers vertical mergers may be dealt with under the revised SMP model is included in the discussion of case studies at Appendix A of this submission.

Other jurisdictions

111. The LCA's previous and current submissions argue that the proposed changes to the legislation would be 'significantly out of step with international best practice', and that the amendments would be unique to the rest of the world.
112. The ACCC acknowledges that specific creeping acquisition laws are not generally a feature of merger laws in other key jurisdictions. However, as indicated in the ACCC's response to the first discussion paper, the nature and structure of markets in other jurisdictions can be quite different to conditions in Australia. In many cases, the jurisdictions Australia is compared with (such as the United States, United Kingdom and Europe) are typically larger jurisdictions with larger numbers of competitors and, therefore, it may not be necessary to scrutinise smaller acquisitions to a great extent.
113. Furthermore, as set out in the ACCC's response to the first discussion paper, jurisdictions such as the United Kingdom and the European Union do have the ability to deal with creeping acquisitions to some extent, although they do not have specific creeping acquisition legislation.

Declaration option

114. The LCA's submission raised concerns with the option that would provide the Minister with discretion over which corporations or products/service sectors of the economy would be subject to an SMP test.
115. The ACCC broadly agrees with the concerns raised by the LCA, and reiterates the points raised from paragraph 50 of this submission which highlight the problematic nature of this option.

Alternative models proposed by the LCA

A revised aggregation model

116. The LCA's submission states:

...an aggregation model of the type raised in the Government's first discussion paper may be a preferable alternative **provided** the 'look back' or aggregation period is limited, possibly to a period not exceeding 2 years.¹⁸

117. The submission also notes the LCA's preference that a model of this type only apply to 'specific declared markets or industries'.

118. The ACCC raised serious concerns in its response to the 'aggregation model'¹⁹ option in the first discussion paper. The ACCC maintains these strong concerns.

119. In particular, the ACCC continues to be concerned with the practical difficulties involved in assessing the likely impact of a current acquisition on competition in the reasonably foreseeable future (typically the next 1-2 years) combined with the likely residual impact of each prior acquisition on competition in the reasonably foreseeable future to identify the overall competitive effect.

120. In a scenario where aspects of the market have changed significantly, combined with numerous aggregated acquisitions, identifying the competitive impact of each would be very complicated. The ACCC expects that this would result in substantial analytical and evidential challenges when pursuing an alleged breach under this model.

121. The ACCC notes the revised aggregation model put forward by the LCA attempts to limit these issues by restricting the relevant time period for aggregating the competitive effects of mergers to two years. Nevertheless, the ACCC believes that this approach will not remove the inherent complexity associated with the aggregation model, and presents further difficulties.

¹⁸ LCA Submission, 12 June 2009, p21

¹⁹ The aggregation model was described in the first discussion paper as a test where a corporation would be 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.

122. Firstly, ACCC does not consider that the two year time limit overcomes the fundamental analytical and evidential issues that would be encountered in reviewing transactions under the aggregation model. The effect of multiple acquisitions occurring within a two year period would still need to be considered in aggregate and this would result in the same issues being encountered as described above and in the ACCC's previous submissions on this issue.
123. Secondly, a two year time period appears to be arbitrary and would be insufficient to allow for consideration of the impact of acquisitions which had an important role in a lessening of competition over time, but which occurred longer than two years prior to the current acquisition.
124. Finally, the two year limit could increase the likelihood of corporations making transactions in a strategic manner such that particular acquisitions would fall just outside the two year window and would thus be rendered incapable of being assessed under the creeping acquisitions law.

Material Increase

125. The ACCC notes the Law Council's submission suggests replacing the descriptor 'enhancing' with 'material increase' in the wording of the revised SMP model (described in paragraph 6 of this submission). The LCA submits that this would provide a greater level of certainty to the application of the SMP model, and ensure that the SMP model would not apply to any acquisition made by a corporation that possesses market power.
126. The ACCC is of the view that the term 'material increase', and specifically 'material' is unnecessary for the reasons outlined above. Further, it would not necessarily increase certainty of application, but rather, create greater uncertainty – not only of the application of the SMP test, but of the existing SLC test.
127. The ACCC notes that the SMP model contained in the first discussion paper contained the phrase 'any lessening of competition' but has been replaced with the term 'enhancing' in the second discussion paper.

128. The ACCC is of the view that the use of ‘material’ in the revised SMP model would create the potential for conflict with the SLC test, which contains ‘substantial’ – a descriptor with a similar meaning. The Macquarie Dictionary defines ‘material’ as ‘of substantial import or much consequence’. The meaning of ‘substantial’ was considered in the 2nd reading speeches on the Trade Practices Legislation Amendment Bill 1992. Senator Tate noted:

In signifying its intention that that word as now proposed to be used in section 50 should bear the meaning ‘real or of substance’, the Government intends that the test should apply to effects upon competition which are not merely discernible but which are **material** in a relative sense in the impact that they may have upon effective competition in the marketplace. [emphasis added]

129. The ACCC considers that the use of material would create uncertainty around what the difference between this test and the SLC test should be. The ACCC considers that it is important to use language in the SMP test which differentiates itself from ‘substantial’ but is something which is more than ‘trivial’. For this reason, as outlined above, the ACCC believes that if a further qualifier on “enhancement” is introduced to the revised SMP model, it should be along the lines of a “not insignificantly enhancement” test.

130. Crucially, if the threshold for the SMP test is too close to ‘substantial’ it will not be able to capture any creeping acquisitions, as the test will effectively replicate the existing SLC test, albeit with the inclusion of the additional evidentiary threshold of having to prove substantial market power. Consequently, the use of ‘material’ or a similar descriptor in the SMP test would defeat the objective of the creeping acquisition legislation.

131. As with the LCA’s suggestion of the aggregation model, the ACCC considers that the proposal to include the words ‘material increase’ would not enable the ACCC to deal with creeping acquisitions issues and would therefore be less preferable than having no law amendment at all.

Conclusion – LCA’s submission

132. The ACCC does not agree with the concerns the LCA has with the revised SMP model, for the reasons set out above.
133. In relation to the alternative options that the LCA has put forward in its submission, the ACCC is of the view that these are not satisfactory solutions to the creeping acquisitions issue.
134. Furthermore, the ACCC considers that it would preferable to have no law introduced to address creeping acquisitions than it would to have an aggregation model or a ‘material increase’ threshold.

Conclusions

135. In conclusion, the ACCC considers that, while the majority of matters can be dealt with under the current legislation, there are a material number of cases where competition and consumers would be better served if the issue of creeping acquisitions could also be addressed.
136. The ACCC considers that the revised SMP model, which further clarifies the application of the original SMP model, would allow the ACCC to address the most serious creeping acquisition issues—that is, cases where a firm already in possession of substantial market power seeks to make a further acquisition that enhances its position in the market, but where the impact falls short of substantially lessening competition. A “not insignificant enhancement” requirement could also be added to the model to ensure that acquisitions that only have a trivial impact on a firm’s market power are not prohibited.
137. The ACCC has serious concerns with any SMP model which involves the introduction of a declaration regime and/or a mandatory notification regime. The ACCC is of the view that such a regime would seriously undermine the operation of the substantive creeping acquisition law and the existing informal merger review process.

138. The ACCC supports the introduction of a generally applicable version of the SMP model with the additional “not insignificant enhancement” requirement outlined above. The ACCC is not supportive of the other options included in the second discussion paper; namely the declaration option and the mandatory notification option.

Appendix A: Case studies

The following case studies provide examples of industries where the ACCC believes that the application of the revised SMP model would benefit competition and consumers. These case studies also demonstrate that the revised SMP model does not apply to all acquisitions made by an acquirer that possesses substantial market power, and will not prohibit transactions that are competitively benign.

Significantly, the case studies below reveal that, on the basis of the information available to the ACCC, it is highly unlikely that in most circumstances acquisitions of individual retail stores, leasehold interests or ‘greenfield’ sites would be prohibited if the revised SMP model were adopted.

In providing these case studies, the ACCC does not purport to offer any conclusive views as to whether any future acquisition is likely to be opposed under either section 50 of the Act, or the revised SMP model. Such views can only be provided after a comprehensive public review has been carried out in relation to a specific acquisition. Further, it is important to note that no comment is made in relation to acquisitions that have not proceeded, as the ACCC was not in a position to finalise its views on these acquisitions.

These case studies do not provide an exhaustive list of industries where creeping acquisitions arise. Potentially, there may be other industries or matters where similar issues arise.

Taxi industry

The ACCC has been notified of and investigated the acquisition of a number of taxi networks by Cabcharge. Of matters that have involved a full public investigation and where the ACCC has been in a position to form a final view, it has found that generally, such acquisitions were unlikely to substantially lessen competition in a market. In these matters, the ACCC has identified concerns that enhancing the degree of vertical integration between Cabcharge and taxi networks could have a detrimental impact on the competitiveness of non-cash payment services. That is, as the degree of vertical integration between Cabcharge and taxi networks increases, new entry into non-cash

payment services becomes more difficult as it, for example, may reduce the proportion of independent taxi fleets with which a new entrant could negotiate for the supply of a competing non-cash payment services. As well as owning taxi networks, Cabcharge is currently the predominant supplier of non-cash payment systems in Australia, for which it faces very limited, if any, competition.

The ACCC believes that the revised SMP model would provide a useful mechanism for assessing these transactions, in addition to section 50 of the Act. In particular, the revised SMP model would be able to capture acquisitions involving smaller taxi networks, where it is found that these are likely to enhance any market power the acquirer may have, but are unlikely to be considered to substantially lessen competition.

Grocery industry

The ACCC has assessed numerous acquisitions in the grocery sector. In the *Report of the ACCC Inquiry into the competitiveness of retail prices for standard groceries (Groceries Inquiry)*, the ACCC found that creeping acquisitions did not appear to be a significant current concern in the supermarket retailing industry, primarily because there was not strong evidence of significant levels of acquisitive activity in the sector. Nevertheless, the ACCC recognised that creeping acquisitions have raised concerns in the past and may again become a concern in the future.

The sale of Foodland Associated Ltd (**FAL**) assets (including Action-branded retail sites) to Woolworths and Metcash in 2005 provides one example of the issues associated with creeping acquisitions.

In that matter, the ACCC found that Woolworth's single acquisition of 19 Action stores was not likely to substantially lessen competition in any local retail market. It also found that although the acquisitions may have diminished competition in procurement markets and/or wholesale markets by increasing Woolworths' volumes of sales, there was insufficient evidence to show that any lessening of competition would be substantial. At the same time, while Metcash's acquisition of FAL's wholesale operations left Metcash as the only remaining wholesaler to independent supermarkets in Australia, it was found that this was not likely to substantially lessen competition.

The ACCC believes that if the revised SMP model had applied to this transaction it would have enabled the ACCC to better take into account the broader competitive effects of the transaction on wholesale and acquisition markets. In particular, the ACCC would have been in a position to assess whether either Woolworths or Metcash had a substantial degree of power in wholesale and/or acquisition markets, and if market power would be enhanced as a result of the transaction. This is particularly important, as this transaction represented a key structural change in the grocery industry, with the exit of FAL as a separate competing entity, particularly in Western Australia.

While the ACCC believes that this situation shows the benefits of the introduction of the revised SMP model, it is important to note that the revised SMP model would not operate to prevent all acquisitions of individual retail stores, leasehold interests or 'greenfield' sites, but would focus on broader transactions that have a lasting impact on the structure of the market. That is, the revised SMP model is only concerned with acquisitions that enhance market power. Acquisitions that have no effect, or at most a trivial impact on market power will not be caught.

For example, in 2008, the ACCC publicly reviewed the separate acquisitions of 8 retail grocery stores, leasehold sites or 'greenfield' sites by Coles or Woolworths. Of those, it opposed one transaction pursuant to section 50 of the Act, and one was withdrawn. The ACCC considers it is unlikely that the remaining transactions would have been found to have had more than a trivial, if any, effect on any market power of the acquirer. Accordingly, cases of this nature are unlikely to fall within the scope of the revised SMP model.

Liquor industry

The ACCC has been notified of a large number of acquisitions of liquor outlets by major grocery chains in recent years. Generally, the ACCC has found that absent issues of local market competition those acquisitions were unlikely to fall within the scope of section 50 of the Act. At the same time, the ACCC notes that there are generally a small number of liquor wholesalers in Australia, and acquisitions of retail sites have the potential to strengthen the position of wholesalers. Accordingly, the ACCC believes that this is an area where creeping acquisition issues could arise.

Coles' acquisition of the Hedley Liquor Group (**Hedley**) in 2006 provides one example of the types of issues that may arise. The acquisition involved the acquisition of 103 packaged liquor outlets in various parts of Queensland.

In that matter, the ACCC considered the impact of the acquisition primarily in the markets for retail packaged liquor for off premises consumption in local areas of Queensland. It found that the acquisition was unlikely to have a substantial impact on competition in those markets due to the fact that there was very little overlap in the physical location of Coles and Hedley's retail sites and, where there was overlap, other competitors were likely to act as a competitive constraint. The ACCC also considered whether the proposed acquisition could substantially weaken the viability of the independent wholesale liquor sector through the removal of an independent retail customer, and increase Coles' bargaining power in relation to suppliers. The ACCC found that the volumes involved were not sufficient to have a substantial impact on independent buying groups, wholesalers, or supply arrangements and therefore was unlikely to substantially lessen competition.

While this matter did not fall within the scope of section 50 of the Act, the ACCC is concerned that such transactions are incrementally enhancing the strength of vertically integrated national liquor chains. Such acquisitions may have the result of undermining the effectiveness of independent packaged liquor retailers who would find it increasingly difficult to provide effective competition because they do not have access to sufficient retail outlets that would provide them the necessary wholesale scale to compete effectively.

The ACCC believes that if the revised SMP model were applied, it would provide a useful mechanism to constrain further consolidation of this nature if investigations reveal that an acquirer has achieved the requisite degree of market power. At the same time, the revised SMP model would provide a balanced approach. It would not prevent acquisitions unless it was already shown that the acquirer has substantial market power, and would not prevent very small individual acquisitions, even if the acquirer did have substantial market power if the acquisition is competitively benign or would have a trivial impact on competition. Rather, the revised SMP model would focus on cases

similar to the above matter, where the transaction involves a range of sites and therefore justifies careful scrutiny to ensure competition is protected or maintained.

In the financial year ended 30 June 2008, the ACCC assessed approximately 20 acquisitions of liquor businesses or licences. Further to the discussion at paragraphs 29 to 30 above, the ACCC considers that it is unlikely that these acquisitions would have been found to have had a more than trivial effect on any market power of the acquirer. Accordingly, cases of this nature would be unlikely to fall within the scope of the revised SMP model.

Publishing industry

In the case of the A&R Whitcoulls Group (**ARW**) acquisition of Borders the ACCC identified a number of concerns in relation to the transaction, but was unable to oppose the acquisition as there was insufficient evidence that the effects on competition would be substantial.

In the course of its enquiries, the ACCC identified that the merged entity was likely to increase its bargaining power against publishers as a result of the acquisition. Notably, the combined market shares of ARW and Borders in terms of national retail sales was approximately 27-31%, which would make it, by far, the single largest buyer of books in Australia. In particular, concerns were raised that publishers may have to increase discounts provided to the merged entity, and raise prices to other retailers, or increase recommended retail prices across the board in order to recoup losses. Concerns were also raised that the merged entity would be in a position to ‘make or break’ a title, and the result may be a reduction in the range of titles available to customers. Another concern was that the merger could have a direct impact on retail competition by reducing the level of discounting, particularly on back-list and mid-list titles.

Despite these concerns, the ACCC did not find sufficient evidence that the effects of the transaction on competition, while present, were likely to be substantial.

Nevertheless, the impact of the merger was to remove an important developing competitor in the retail book industry. The ACCC believes that the revised SMP model would have been useful in this case, in that, if it was found that ARW already had substantial market power, then this reduction in competition could have been

prevented. If it was found that ARW did not have substantial market power then, rightly, any reduction in competition would not have been sufficient to justify objecting to the transaction.

Health care industry

The ACCC is aware of the growing level of consolidation at various levels of the health care industry, including acquisitions of health funds, private hospitals, and various medical services including pathology services. In some instances, creeping acquisition issues may arise in these areas.

One example recently considered by the ACCC was the acquisition by Ramsay Health Care (**Ramsay**) of the Cairns Day Surgery. That matter involved the consolidation of the only two private facilities offering day surgery services in Cairns and the surrounding region. The ACCC considered the competitive implications of this matter in relation to the supply of surgery services to health funds and the Department of Veterans Affairs, in particular whether Ramsay's bargaining power would be significantly enhanced as a result of the acquisition, and in relation to the supply of private day surgery services to patients in Cairns and the surrounding region.

Notably, while the ACCC had concerns about the competitive implications of Ramsay acquiring its only existing competitor in the Cairns region, it was not able to take action under section 50 of the Act, primarily because the Cairns Day Surgery was a relatively small supplier, so its loss was unlikely to have a substantial impact. Under the revised SMP model, the ACCC would have had the ability to assess whether Ramsay already possessed substantial market power and if so, prevent the enhancement of its market power through the acquisition of a weaker competitor.

The potential incremental impact of acquisitions of this nature cannot be underestimated. This matter demonstrates the potential for larger hospital groups to incrementally acquire competitors, even if this results in the removal of the only existing competitor in a region where the acquirer already has substantial market power. Further, it demonstrates the potential incremental increase in bargaining power of private hospital groups against health funds, potentially leading to higher priced premiums for consumers.

Hardware industry

In February 2009, the ACCC decided not to oppose Bunnings' completed acquisition of five Mitre 10 stores.

The ACCC identified the following relevant markets:

- The national market for the acquisition of home-improvement products (by wholesale bodies from suppliers); and
- Local markets in a number of regional areas for the retail supply of home improvement products.

The ACCC found that the acquisitions were not likely to substantially lessen competition in local markets due to competition from a range of other firms across a number of product categories and other factors. In relation to the national acquisition market, the ACCC found that the acquisitions may, by increasing Bunnings' volumes, potentially increase its bargaining power with suppliers. However, it was found that each individual acquisition was unlikely to have a substantial impact. Accordingly, the ACCC reached the view that these acquisitions were unlikely to substantially lessen competition in a market.

The ACCC considers that this case demonstrates the ability of a large, national retail chain to enhance its bargaining power with suppliers through acquisitions of competitors, and that such transactions are unlikely to be caught under section 50 of the Act unless the individual impact of the acquisition in question is substantial. Although increased bargaining power may lead to reduced prices and better deals for the acquiring firm, the merged firm would be unlikely to face sufficient pressure to pass on these benefits to consumers.

Under the revised SMP model, the ACCC would be able to assess whether a particular firm has reached a point where it has substantial market power in acquisition markets, and to prevent acquisitions that would enhance its market power, even though the impact of that single transaction is less than substantial.

Whether any particular acquisition would be caught under the revised SMP model would depend on the circumstances of the case. For example, acquisitions of single

sites would be unlikely to enhance any market power of the acquirer, particularly where the sales volumes associated with the site are not sufficient to impact on the bargaining power of the acquirer. Where sites are found to have no effect or a trivial effect on market power, these acquisitions would not fall within the scope of the revised SMP model.