2008-2009-2010

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

COMPETITION AND CONSUMER LEGISLATION AMENDMENT BILL 2010

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Competition Policy and Consumer Affairs,
Dr Craig Emerson MP)
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<td>ACCC</td>
<td>Australian Competition and Consumer Commission</td>
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<td>ACL</td>
<td>Australian Consumer Law</td>
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<td>ASIC</td>
<td>Australian Securities and Investments Commission</td>
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<td>ASIC Act</td>
<td>Australian Securities and Investments Commission Act 2001</td>
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<td>Baird Committee Report</td>
<td>Joint Select Committee on the Retailing Sector’s 1999 report <em>Fair Market or Market Failure?</em></td>
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<td>Bill</td>
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<td>CPR Act</td>
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<td>Dawson Act</td>
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<td>Dawson Review</td>
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<td>Senate Committee</td>
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<td>Swanson Committee</td>
<td>Trade Practices Act Review Committee (1976)</td>
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<td>TP Act</td>
<td><em>Trade Practices Act 1974</em></td>
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<tr>
<td>Tribunal</td>
<td>Australian Competition Tribunal</td>
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</table>
**General outline and financial impact**

**Mergers and unconscionable conduct**

The Competition and Consumer Legislation Amendment Bill 2010 (‘the Bill’) amends the *Trade Practices Act 1974* (‘the TP Act’) to clarify the operation of various provisions relating to mergers and acquisitions.

The Bill will also insert a statement of interpretative principles into the unconscionable conduct provisions of the Australian Consumer Law (ACL) and the Australian Securities and Investments Act (ASIC Act) and unify sections 21 and 22 of the ACL (formerly sections 51AB and 51AC of the TP Act). The changes to the unconscionable conduct provisions will generally be reflected in the ASIC Act.

**Date of effect:** The provisions relating to mergers and acquisitions will commence on a single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 2 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period. This will ensure that those who may be affected by the new provisions will have time to consider the provisions prior to their commencement.

The provisions related to unconscionable conduct will commence immediately after the commencement of Schedules 1 to 5 of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*.

**Proposal announced:** On 22 January 2010, the Government announced that it would amend the TP Act to ensure the Australian Competition and Consumer Commission (‘the ACCC’) has the power to reject acquisitions that would substantially lessen competition in any local, regional, or national market.

In its announcement, the Government also confirmed its view that site acquisitions – including entry into, or acquisition of, a lease, acquisition of an option to acquire land or acquisition of freehold land – are acquisitions of an asset for the purposes of section 50 of the TP Act.

On 3 March 2010, the Government announced changes to the unconscionable conduct provisions of the Australian Consumer Law. These changes arose from the findings of an expert panel established to consider whether a list of examples of unconscionable or a statement of
principles of what constitutes unconscionable conduct should be incorporated into the legislation.

**Financial impact:** The Bill has no significant financial impact on Commonwealth expenditure or revenue.

**Compliance cost impact:** Low. The provisions of the Bill dealing with unconscionable conduct were assessed by the Office of Best Practice Regulation as not requiring a Regulation Impact Statement.

**Summary of regulation impact statement**

**Regulation impact on business**

**Impact:** Low.

**Main points:**

- The proposed amendments to section 50 would not involve additional costs to businesses or the ACCC as these changes largely confirm the existing administration of that section. Rather, by removing ambiguities around particular elements of section 50, these amendments are likely to have a net positive impact on competition and consumers.

- These amendments are not likely to substantially broaden the scope of operation of section 50 beyond its current administration, but will seek to prevent a situation arising that could potentially narrow the application of merger law in Australia. Consequently, the administrative burdens associated with section 50 will either remain unchanged, or reduce as parties will no longer seek to expend resources pursuing clarity around the matters addressed by these amendments. That is, by clarifying elements of section 50 to remove existing uncertainties regarding its application, these amendments will not change the primary merger test, but will rather enhance certainty for businesses by: avoiding the costs associated with challenging areas of uncertainty in the law; and ensuring that a substantial lessening of competition is prevented, whenever it arises with respect to a particular acquisition. To the extent that these changes have a material impact (given that the changes are directed towards codifying existing practices), it is a materially positive impact.

- These legislative proposals are expected to address concerns regarding markets in which creeping acquisitions have been cited as a potential issue.
• Further, the Government’s policy announcement served to reduce uncertainty surrounding the application of section 50 of the TP Act to leases and acquisitions of greenfield supermarket sites.
Chapter 1
Mergers and acquisitions

Outline of chapter

1.1 Schedule 1 to the Competition and Consumer Legislation Amendment Bill 2010 (‘the Bill’) contains amendments for the reform of the prohibition on anticompetitive mergers and acquisitions within the Trade Practices Act 1974 (the ‘TP Act’).

Context of amendments

1.2 Reviews in the last decade, both by the Government and other parties, have considered the issue of ‘creeping acquisitions’. Creeping acquisitions are generally defined to be series of small-scale acquisitions that individually do not substantially lessen competition in a market in breach of section 50 of the TP Act, but collectively may have that affect over time. Concerns about creeping acquisitions in practice have been raised primarily in relation to the independent supermarket sector in Australia.

1.3 More recently, creeping acquisitions were raised as a concern in the lead-up to, and following the release of, the Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries (‘the Grocery Inquiry’). While the ACCC concluded that creeping acquisitions were not a significant current concern in the supermarket retailing industry, it did express support for the introduction of a general creeping acquisitions law.

1.4 As the TP Act applies to all industries, and creeping acquisitions could affect small and large businesses in a range of sectors, the Government undertook public consultations in 2008 and 2009. Through its public consultations, the Government sought views on the need to give effect to its commitment to implement a ‘general creeping acquisitions law’, and on possible reform options.

1.5 The Government proposed four broad models for reform in its two discussion papers. Submissions made in response to the discussion papers indicated that there was no clear consensus of support for any individual model, and views varied as to whether, in practice, there was a substantive problem to be addressed. However, as a result of this public
consultation, the Government identified two areas in the law where clarification would be helpful and which could assist to address creeping acquisitions concerns. In doing so, the Government is therefore responding to specific problems with specific remedies, rather than responding with general remedies that could have unintended consequences for overall economic activity and employment.

1.6 Through these amendments the Government seeks to ensure that section 50 applies to acquisitions in local markets, and that the impact on competition can be considered in any market, including upstream and downstream markets. These amendments are intended to clarify uncertainties in section 50, and confirm the ACCC’s ability to consider acquisitions in markets where creeping acquisitions have been raised as a concern.

Summary of new law

Amendments in relation to local markets

1.7 This amendment is intended to provide greater certainty regarding the ACCC’s current practice of considering acquisitions in local markets, including those where creeping acquisitions concerns have been raised within the community.

1.8 Subsection 50(6) of the TP Act has the effect of limiting the scope of section 50 to mergers in markets that are ‘substantial’ and in a State, Territory, or region of Australia. The ACCC’s 2008 Merger Guidelines (paragraphs 4.28-4.31) provide that this substantiality criterion can be satisfied in many ways including by reference to the size of the market in terms of the number of customers, total sales or geographic size. However, the ACCC Merger Guidelines do not have the force of law, and the ACCC’s interpretation of the law in this regard has not been tested by the courts.

1.9 In Australian Gas Light Company v Australian Competition and Consumer Commission (No 3) [2003] FCA 1525 (‘AGL v ACCC’), French J of the Federal Court of Australia, while not expressing a conclusive view, left open the possibility that the substantiality of a market under subsection 50(6) may be determined with reference to Australia as a whole. If successfully established in law, this interpretation may preclude the possibility of acquisitions in local markets (for example a three to five kilometre radius around a retail petrol site) from being considered under section 50.
1.10 The key uncertainty therefore appears to be with the word ‘substantial’, not the lack of an explicit reference to a ‘local market’ in subsection 50(6). While it is possible that an amendment explicitly enabling a court to consider acquisitions in substantial local markets may enable the ACCC to consider acquisitions in markets where creeping acquisitions concerns have been raised, there is a risk that it may not. This is particularly the case if, as French J has indicated, the substantiality of ‘a market’ is determined with reference to Australia as a whole.

1.11 Removing the word ‘substantial’ from subsection 50(6) will therefore remove the risk highlighted by French J that a court may in the future adopt the view that the substantiality of a market should be determined with reference to Australia as a whole. The amendment is also intended to remove doubts regarding the ACCC’s or a court’s ability to examine markets, including local markets, which may be relatively small in a geographic sense, where creeping acquisitions concerns may arise in the future.

Amendments in relation to ‘any market’

1.12 The test contained in section 50 refers to a substantial lessening of competition in ‘a market’. Amending section 50 so that references to ‘a market’ are replaced with references to ‘any market’ is intended to clarify the ability of the ACCC or a court to consider multiple markets when assessing mergers.

1.13 Consequently, this amendment is intended to prevent businesses from being able to challenge a decision that their proposed merger or acquisition would, or would be likely to, substantially lessen competition in a market in breach of section 50, on the grounds that the lessening of competition identified was in one or more markets other than the primary market in which the merger or acquisition would occur.

1.14 This amendment will therefore demonstrate more explicitly the importance of ensuring that the ACCC and the courts are able to consider the totality of the competitive effects resulting from the acquisition.
Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th><strong>New law</strong></th>
<th><strong>Current law</strong></th>
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<tbody>
<tr>
<td>Section 50 prohibits mergers or acquisitions that would, or would be likely to substantially lessen competition in any market.</td>
<td>Section 50 prohibits mergers or acquisitions that would, or would be likely to substantially lessen competition in a market.</td>
</tr>
<tr>
<td>Restricts the application of section 50 to markets in Australia, or a State, or Territory, or Region of Australia.</td>
<td>Restricts the application of section 50 to substantial markets in Australia, or a State, or Territory, or Region, of Australia.</td>
</tr>
<tr>
<td>Makes corresponding amendments to those outlined above to the Schedule version of section 50.</td>
<td>Contains provisions corresponding to those outlined above in the Schedule version of section 50.</td>
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Detailed explanation of new law

General overview of the mergers and acquisitions amendments

1.15 Over the past decade, various reviews and inquiries have considered the issue of creeping acquisitions. Creeping acquisitions are broadly considered to be a series of small-scale acquisitions that individually do not substantially lessen competition in a market in breach of current section 50, but collectively may have that effect over time. Concerns about creeping acquisitions in practice have been raised primarily in relation to the independent supermarket sector in Australia.

1.16 More recently, creeping acquisitions were raised as a concern in the lead-up to, and following the release of, the Grocery Inquiry. Following the release of the Grocery Inquiry, the Government sought views from the public via two public consultation papers in 2008 and 2009 on the need to give effect to its commitment to implement a ‘general creeping acquisitions law’, and on possible reform options.

1.17 To stimulate discussion from interested parties, the Government proposed four broad models for reform in its two discussion papers. Responses to both discussion papers were mixed, and there was no clear consensus on the best way forward. As a result of this public consultation, the Government identified two areas in the law where clarification would be helpful, and which could assist to address creeping acquisitions concerns.
1.18 In doing so, the Government is therefore responding to specific problems with specific remedies, rather than responding with general remedies that could have unintended consequences for overall economic activity and employment.

1.19 The Government has sought to ensure that section 50 applies to acquisitions in local markets, and that the impact on competition can be considered in any market, including upstream and downstream markets. These amendments will clarify uncertainties in section 50, and confirm the ACCC’s ability to consider acquisitions in markets where creeping acquisitions have been raised as a concern.

Amendments in relation to local markets

1.20 The current subsection 50(6) has the effect of limiting the scope of the current section 50 to mergers or acquisitions in markets that are ‘substantial’ and in a State, Territory, or region of Australia.

- The geographical scope of the term ‘region’ is undefined in the legislation, but when its inclusion was recommended by the Joint Select Committee on the Retailing Sector in its 1999 *Fair Market or Market Failure?* report (the ‘Baird Committee Report’), the region provided as an example was ‘South East Queensland’. As it has not been tested by a court, it is unclear whether it extends to the kinds of ‘local markets’ the ACCC has used in considering mergers involving creeping acquisitions concerns.

- It is also unclear the extent to which the word ‘substantial’ in subsection 50(6) limits the scope of section 50. Even if ‘local’ markets are able to be considered under subsection 50(6), it remains unclear the extent to which a market defined in quite narrow geographical terms (such as 3-5 kilometres) may be deemed ‘substantial’, and therefore subject to section 50.

1.21 The ACCC’s 2008 *Merger Guidelines* (at paragraphs 4.28-4.31) provide that the substantiality criteria could be satisfied in many ways, including by reference to the size of the market in terms of the number of customers, total sales or geographic size. A market that is ‘small’ in some sense may still be substantial. Further, substantiality of a market is not necessarily related to geographic size. A market may be small geographically (for example, a local market defined using a 3-5 kilometre radius) but may also be substantial within the region in which it is located. However, the ACCC *Merger Guidelines* do not have the force of law, and in this matter the ACCC’s interpretation of the law has not been considered by the courts.
1.22 Relevantly, in AGL v ACCC, French J stated (at [353]) that:

The competitive process under scrutiny with and without the acquisition is competition in a market. That means a substantial market for goods or services in Australia or a State or a Territory or a region of Australia (s 50(6)). The definition in s 50(6) does not exclude the operation of the definition in s 4E which will pick up, in a product market, goods and services substitutable for or otherwise competitive with each other. However the definition in s 50(6) introduces the qualifying term ‘substantial’ before ‘market’. It is suggested in Heydon, Trade Practices Law (LBC) at [9.570] that the aim of the qualification is to exclude from the Act cases where a merger occurs in a very small market. The learned author there observes:

‘Section 50(6) involves sacrificing the interests of those in small markets to the interests of the parties to the merger. If a small merger in a small market were to be unlawful on the ground that it led to the acquiring corporation obtaining market control, though this result may be harsh for the acquiring corporation, the merger would be likely to cause as much damage to competition in that market as would be caused to competition by like events in a much larger market.’

It does not seem likely that the relativity implied by the term ‘substantial’ in s 50(6) relates to the size of other markets in whichever of the geographical areas mentioned in the definition the market is to be found. For there is no lower bound on the size of ‘a region of Australia’. It may be that having regard to s 4E the substantiality of the market in question, even if it be geographically limited to a State or a Territory or a region, is to be judged by reference to Australia as a whole. I express no concluded view on that difficult constructional issue because the present case does not appear to throw up any dispute between the parties that, whichever of their propounded markets is in issue, it is a ‘substantial market’ for the purposes of s 50(6).

1.23 The key uncertainty is therefore the word ‘substantial’, not the lack of an explicit reference to a ‘local market’ in subsection 50(6). While enabling a court to consider acquisitions in substantial local markets may enable the ACCC to consider acquisitions in markets where creeping acquisitions concerns have been raised, it may not if, as French J has indicated, the substantiality of ‘a market’ is determined with reference to Australia as a whole.

1.24 In addition, while the term ‘market’ is defined in subsection 50(6) for the purposes of section 50, a more general definition of ‘market’ appears in section 4E.
1.25 In section 4E, ‘market’ is defined (for the purposes of the TP Act and unless the contrary intention appears) to mean ‘a market in Australia and, when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are substitutable for, or otherwise competitive with, the first-mentioned goods or services’. The section 4E definition of ‘market’ was included in the TP Act following recommendations of the 1976 Trade Practices Act Review Committee (Swanson Committee), which emphasised the flexibility of product and geographic market boundaries (at paragraph 4.20), and added:

The Committee considered that no advantage would be gained by attempting to define exhaustively the term ‘market’. No definition could produce a formula capable of certainty.

1.26 In light of these views, a legislative change to insert into subsection 50(6) the term ‘local market’ or ‘a part of a region’ (as an alternative to removing the term ‘substantial’) would appear to be undesirable, when neither the term ‘region’ or ‘part’ currently has a substantive legislative definition.

1.27 Further, courts have interpreted the term ‘substantial’ to mean many things, including meaning ‘real or of substance’, ‘not merely discernible but material in a relative sense’ and ‘meaningful’. Arguably, these interpretations of ‘substantial’ suggest that the task of defining the market for the purposes of an analysis of competition within a market is left to section 4E, while the term ‘substantial’ in subsection 50(6) merely operates to limit the scope of section 50, and in fact can add significant uncertainty as per French J’s observations.

1.28 Removing the word ‘substantial’ will therefore remove the risk identified by French J that a court may in the future adopt the view that the substantiality of a market should be determined with reference to Australia as a whole. The amendment will also remove doubts regarding the ACCC’s ability to examine markets where creeping acquisitions concerns may arise in the future.

1.29 As a result, the Bill amends subsection 50(6) contained in Part IV of the TP Act, and in the Schedule version of Part IV to delete the ‘substantiality’ criterion from the definition of a market. [Schedule 1, item 2, subsection 50(6), item 5, subsection 50(6) of the Schedule]
Amendments in relation to ‘any market’

1.30 The test contained in the current section 50 refers to a substantial lessening of competition in ‘a market’. Paragraph 23(b) of the Acts Interpretation Act 1901 provides that, unless the contrary intention appears, words in the legislation in the singular also include the plural; and words in the plural also include the singular.

1.31 The ACCC’s 2008 Merger Guidelines indicate that in assessing whether a merger substantially lessens competition, the ACCC will examine the competitive impact of the transaction in the context of the markets relevant to the merger (see paragraph 4.1); and that ‘It is rarely possible to draw a clear line around fields of rivalry, and indeed, is often possible to determine a merger’s likely impact on competition without precisely defining the boundaries of the relevant market’ (paragraph 4.4). That is, the Merger Guidelines suggest that the ACCC may examine the impact of a transaction in multiple markets.

1.32 Mergers may occur in circumstances involving vertical integration and conglomerates, which can clearly involve multiple markets.

- Vertical mergers involve combining firms that operate at different stages of a single vertical supply chain — that is, a merger between an ‘upstream’ firm and a ‘downstream’ firm (for example, an upstream manufacturer and a downstream distributor) where the upstream firm is an actual or potential supplier of an input into the production process of the downstream firm.

- Conglomerate mergers involve firms that interact across several separate markets and supply products that are typically in some way related to each other — for example, products that are in neighbouring markets or products that are complementary in either demand or supply, such as staples and staplers.
1.33 However, the ACCC’s *Merger Guidelines* do not have the force of law. The relevant provision in the *Acts Interpretation Act* is predicated on the words ‘unless the contrary intention appears’. Amending section 50 such that references to ‘a market’ are replaced with references to ‘any market’ is intended to clarify the ability of the ACCC or a court to consider multiple markets when assessing mergers. Consequently, this amendment is intended to prevent businesses from being able to challenge a decision that a proposed merger or acquisition would, or would be likely to, substantially lessen competition in a market in breach of section 50, on the grounds that the lessening of competition identified was in one or more markets other than the primary market in which the merger or acquisition would occur. *[Schedule 1, item 1, subsections 50(1) and (2), item 4, subsections 50(1) and (2) of the Schedule]*

1.34 This amendment will therefore demonstrate more explicitly the importance of ensuring that the ACCC and the courts are able to consider the totality of the competitive effects resulting from the acquisition.

1.35 The reference to ‘a market’ in subsection 50(3) has intentionally been left unchanged, since that subsection follows the narrative of subsections 50(1) and (2), so that ‘a market’ is to be read as ‘a market’ of those markets referred to in subsections 50(1) or (2).

**Application and transitional provisions**

1.36 The amendments to section 50 apply to acquisitions occurring after the commencement of these provisions. *[Schedule 1, item 3, section 179]*

**Consequential amendments**

1.37 Nil.
Chapter 2
Unconscionable conduct

Outline of chapter

2.1 The Competition and Consumer Legislation Amendment Bill 2010 (the Bill) will insert a statement of interpretative principles into the unconscionable conduct provisions of the ACL (which is set out in the Trade Practices (Australian Consumer Law) Bill (No. 2) 2010 (Bill No. 2), now before the Parliament) and the ASIC Act. It will also unify sections 21 and 22 of the Australian Consumer Law (ACL) (formerly sections 51AB and 51AC of the TP Act), and sections 12CB and 12CC of the Australian Securities and Investments Commissions Act 2001 (ASIC Act).

Context of amendments

2.2 Part 2-2 of the ACL includes provisions prohibiting persons from engaging in unconscionable conduct towards business and consumers. These are explained in the Explanatory Memorandum for Bill No. 2.

2.3 There are three substantive prohibitions currently in the ACL:

- section 20 prohibits a person from engaging in unconscionable conduct within the meaning of the unwritten law, from time to time, in the course of trade or commerce;
- section 21 prohibits a person from engaging in unconscionable conduct towards another person in connection with the supply or possible supply of goods or services to a consumer; and
section 22 prohibits unconscionable conduct in connection with:

- the supply or possible supply of goods or services in trade or commerce to a person being a ‘business consumer’; or
- the acquisition of or possible acquisition of goods or services in trade or commerce from a person being a ‘small business supplier’.

2.4 In accordance with the *Intergovernmental Agreement for the Australian Consumer Law* (IGA), the TP Act’s unconscionable conduct provisions were included in the ACL.

2.5 In December 2008, the Senate Standing Committee on Economics (Senate Committee) released an inquiry report into the need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the TP Act. The Senate Committee recommended:

- a clarifying amendment stating that section 51AC applies to the behaviour of parties under a contract, in addition to their behaviour during the process of agreeing the terms of the contract;
- that the Government engage in an inquiry process to consider the merits of introducing a list of examples or a statement of principles into the law, with particular regard to the retail tenancy leasing and franchising industries; and
- that the Australian Competition and Consumer Commission (ACCC) undertake targeted investigation and funding of unconscionable conduct test cases.

2.6 On 5 November 2009, the Australian Government released its response to the Senate Committee. The Government agreed to all the Senate Committee’s recommendations, and included the clarifying amendment in Bill No. 2. The Government also established an expert panel to consider:

- whether a list of examples of unconscionable conduct, or a statement of principles concerning unconscionable conduct, should be incorporated into the TP Act; and
- the case for amendments to strengthen the *Franchising Code of Conduct*. 

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2.7 The expert panel reported to the Government in February 2010. On 3 March 2010, the Government released the expert panel’s report and announced its response. The changes to the statutory unconscionable conduct provisions announced by the Government are reflected in the amendments made by this Bill. Changes relating to the regulation of franchising are being progressed through amendments to the *Trade Practices (Industry Codes — Franchising) Regulations 1998*.

### Summary of new law

2.8 The Bill amends the unconscionable conduct provisions of the ACL and the ASIC Act to include a list of interpretative principles and to unify the consumer and business-related provisions prohibiting unconscionable conduct.

2.9 The inclusion of a statement of interpretative principles in the unconscionable conduct provisions of the ACL and the ASIC Act will assist the Courts in applying the prohibition of statutory unconscionable conduct, as well as improve stakeholder understanding of the meaning and scope of the provisions.

2.10 The Bill also unifies what were sections 51AB and 51AC of the TP Act and sections 12CB and 12CC of the ASIC Act. Sections 51AB and 51AC of the TP Act were drafted in almost identical terms, as were sections 12CB and 12CC of the ASIC Act, and the meaning of unconscionable conduct under each provision was intended to be the same. The new provisions are sections 21 and 22 of the ACL and sections 12CB and 12CC of the ASIC Act. The unification will avoid the risk that courts will accord different meanings to the two sets of provisions.
Comparison of key features of new law and current law

<table>
<thead>
<tr>
<th>New law</th>
<th>Current law</th>
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<tr>
<td>It is the intention of the Parliament that: (a) this section is not limited by the unwritten law relating to unconscionable conduct; and (b) this section is capable of applying to a system of conduct or pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour; and (c) in considering whether conduct to which a contract relates is unconscionable, a court’s consideration of the contract may include consideration of: (i) the terms of the contract and (ii) the manner in which and the extent to which the contract is carried out; and is not limited to consideration of the circumstances relating to formation of the contract.</td>
<td>There are currently no interpretative principles in the unconscionable conduct provisions of the ACL, or the ASIC Act.</td>
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### Unconscionable conduct

**New law**

<table>
<thead>
<tr>
<th>A person must not, in trade or commerce, in connection with:</th>
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<tr>
<td>(a) the supply or possible supply of goods or services to a person (other than a listed company); or</td>
</tr>
<tr>
<td>(b) the acquisition or possible acquisition of goods or services from a person (other than a listed company);</td>
</tr>
<tr>
<td>engage in conduct that is, in all the circumstances, unconscionable.</td>
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**Current law**

| Subsection 21(1) of the ACL and subsection 12CB(1) of the ASIC Act provide that a person must not, in trade or commerce, in connection with the supply or possible of goods or services to another person, engage in conduct which is in all the circumstances unconscionable. |
| Paragraph 22(1)(a) of the ACL and subsection 12CC(1)(a) of the ASIC Act provide that a person must not, in trade or commerce, in connection with the supply or possible supply of goods or services to another person, engage in conduct that is in all the circumstances unconscionable. |
| Section 22(1)(b) of the ACL and subsection 12CC(1)(b) of the ASIC Act provide that a person must not, in trade or commerce, in connection with the acquisition or possible acquisition of goods or services from another person, other than a listed public company, engage in conduct that is, in all the circumstances, unconscionable. |

Without limiting the matters to which a court may have regard, the Bill provides two non-exhaustive lists of types of conduct that may be unconscionable in the context of a person’s dealings with another person, either as a customer of or a supplier to those persons.

This list of factors replicates the longer list of factors which previously applied to the business-related provisions of the ACL and the ASIC Act.

**New law**

| Without limiting the matters to which a court may have regard, the Bill provides two non-exhaustive lists of types of conduct that may be unconscionable in the context of a person’s dealings with another person, either as a customer of or a supplier to those persons. |
| This list of factors replicates the longer list of factors which previously applied to the business-related provisions of the ACL and the ASIC Act. |

**Current law**

| Subsection 21(2) of the ACL and subsection 12CB(2) of the ASIC Act provide a non-exhaustive list of conduct which may be unconscionable. |
| Subsections 22(2) and (3) of the ACL and subsections 12CC(2) and (3) of the ASIC Act provide non-exhaustive lists of types of conduct that may be unconscionable in the context of a business’s dealings with other businesses, either as a customer or a supplier to those businesses. |
| Currently, subsection 22(2) and (3) of the ACL and subsections 12CC(2) and (3) are longer lists of factors that the court may consider. It is this longer list of factors which will be replicated in the new law. |
Detailed explanation of new law

Unconscionable conduct in connection with goods or services

2.11 Section 21 of the ACL prohibits a person from engaging in unconscionable towards another person in connection with:

- the supply or possible supply of goods or services to a person (other than a listed public company); or

- the acquisition or possible acquisition of goods or services from a person (other than a listed public company).

[Schedule 2, item 4: section 21]

2.12 This section does not define ‘unconscionable conduct’, but it also does not limit it to the concept as understood under the ‘unwritten law, from time to time’.

2.13 The ‘unwritten law, from time to time’ is the array of common law and equitable principles that have developed in the Australian courts over many years as they apply and relate to the concept of unconscionable conduct. Previous jurisprudence developed in the courts of England and Wales prior to the independence of the Australian judicial system, which occurred with the reception of the laws and statutes of England and Wales and the establishment of the colonial Supreme Courts in the nineteenth century, is also relevant, as are the decisions of the Privy Council exercising its now ended appellate jurisdiction over State courts.

2.14 Section 21 does not apply to conduct relating to the supply or possible supply of goods or services to or from a listed public company. [Schedule 2, item 4: paragraphs 21(1)(a) and 21(1)(b)] A listed public company is defined in section 2 of the ACL. Such companies do not require the protection of the unconscionable conduct provisions of the ACL.

2.15 Section 21 does not apply to conduct that is engaged in only because the person engaging in conduct institutes legal proceedings in relation to the supply or possible supply, or in relation to the acquisition or possible acquisition. It also does not apply if a person engages in conduct by referring a dispute or claim to arbitration. This ensures that it is not possible to assert that the action of instituting formal dispute resolution processes amounts to unconscionable conduct. [Schedule 2, item 4: paragraphs 21(2)(a) and 21(2)(b)]
2.16 When determining whether a person has engaged in conduct that is unconscionable, the court must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention. This ensures that persons engaging in conduct are not held to an absolute standard if circumstances that they could not have reasonably foreseen occur which, had they been foreseen, would suggest that the conduct could not in good conscience have been engaged in. [Schedule 2, item 4: paragraph 21(3)(a)]

2.17 When determining whether a person has engaged in conduct that is unconscionable, the court may have regard to conduct engaged in, or circumstances existing, before the commencement of the section. The unconscionable conduct provisions of the TP Act have been in place since 1986 (section 51AB) and 1988 (section 51AC). Paragraph 21(3)(b), whilst providing for retrospective effect of the ACL provisions, ensures that a gap does not occur whereby conduct that would have been unconscionable under the TP Act escapes consideration upon commencement of the ACL provisions. [Schedule 2, item 4, paragraph 21(3)(b)]

Interpretative principles

2.18 Subsection 21(4) of the ACL sets out the intention of Parliament in relation to the interpretation of section 21 of the ACL. Each of the principles has been drawn from existing case law. The principles clarify, rather than alter, the effect of the statutory prohibition of unconscionable conduct.  

Unconscionable conduct is not limited by the unwritten law

2.19 Paragraph 21(4)(a) of the ACL provides that it is the intention of Parliament that the section is not limited by the unwritten law of the States and Territories relating to unconscionable conduct. Section 21 is otherwise silent on the relationship between the equitable and common law doctrines of unconscionable conduct and the statutory prohibition, and existing case law on the statutory prohibition continues to be instructive about this relationship. Paragraph 21(4)(a) of the ACL makes it clear, on the face of the statute, that statutory unconscionable conduct may, where appropriate, continue to develop independently from the equitable and common law doctrines. [Schedule 2, item 4, paragraph 21(4)(a)]
The section may apply to systems of conduct or patterns of behaviour

2.20 Paragraph 21(4)(b) of the ACL provides that it is the intention of Parliament that the section is capable of applying to a system of conduct or a pattern of behaviour, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour. The unconscionable conduct provisions of the ACL are not limited to individual transactions. Rather, the focus of the provisions is on conduct that may be said to offend against good conscience; it is not specifically on the characteristics of any possible ‘victim’ of the conduct (though these may be relevant to the assessment of the conduct).

2.21 It follows, then, and it is established in recent case law, that conduct may be unconscionable even where there is no ‘victim’ identified. In ASIC v National Exchange, the Full Federal Court held that the statutory unconscionable conduct provisions of the TP Act and the ASIC Act are not confined by ‘… limitations from unwritten law, such as the need to identify a specific or particular person.’ ¹

2.22 The concept of unconscionable conduct as encapsulated by the High Court’s decision in Commercial Bank of Australia v Amadio draws on the concept of a person who is ‘… by reason of some condition [or] circumstance is placed at a special disadvantage vis a vis another’.² Whether the notion of a ‘special disadvantage’ is relevant to a finding of unconscionable conduct — either under the unwritten law or under the statutory prohibitions — remains a matter for the court to decide having regard to the particular matter before it. However, it follows from the principle that a specific person need not be identified that a special disadvantage is not a necessary component of the prohibition.

2.23 To emphasise this point, paragraph 21(4)(b) of the ACL indicates Parliament’s intention that the provision may apply whether or not there is an identified person disadvantaged by the conduct or behaviour. This ensures that focus is on the conduct in question, as opposed to the characteristics of a particular person, or the effect of the impugned conduct on that person. [Schedule 2, item 4, paragraph 21(4)(b)]

¹ Australian Securities & Investments Commission v National Exchange Pty Ltd (2005) 148 FCR 132 at 140, per Tamberlin, Finn and Conti JJ.
² Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 at 462, per Mason J.
**The court may consider the terms and progress of a contract**

2.24 Paragraph 21(4)(c) of the ACL provides that it is the intention of the Parliament that the Court may consider the terms of the contract and the manner in which and the extent to which the contract is carried out in considering whether conduct to which the contract relates is unconscionable. The prohibition of unconscionable conduct is not restricted to situations where there is a contract between two or more parties. However, where there is a contract, this provision clarifies that unconscionable conduct can extend beyond the formation of the contract to both its terms and the way in which it is carried out.  

*Schedule 2, item 4, paragraph 21(4)(c)*

**ASIC Act changes**

2.25 Section 12CB of the ASIC Act is amended to reflect section 21 of the ACL.  

*Schedule 2, item 1, section 12CB*

**Matters to which the courts may have regard**

2.26 A court must consider allegations of unconscionable conduct in the context of all of the circumstances surrounding the relevant parties’ conduct towards each other.  

*Schedule 2, item 4, section 22*

2.27 In considering whether there has been unconscionable conduct in connection with the supply or possible supply of goods and services to a person, the court may have regard to a list of matters specified in subsection 22(1) of the ACL, but may also consider any other matter that it thinks relevant. Similarly, in considering whether there has been unconscionable conduct in connection with the acquisition or possible acquisition of goods and services from a person, the court may have regard to a list of matters specified in subsection 22(2) of the ACL, but may also consider any other matter that it thinks relevant.  

*Schedule 2, item 4, subsections 22(1) and 22(2).*

2.28 The lists of matters in section 22 of the ACL are drawn from the lists in the current statutory prohibitions of unconscionable conduct towards businesses. The lists apply equally to business and consumer transactions. The matters may or may not be relevant to a finding of unconscionable conduct, depending on the specific circumstances in which the conduct takes place.

**ASIC Act changes**

2.29 Section 12CC of the ASIC Act is amended to reflect the drafting of section 22 of the ACL.  

*Schedule 2, item 1, section 12CC*
Misleading representations with respect to future matters

2.30 Section 4 of the ACL, concerning the treatment of misleading representations as to future matters, applies in the same way to sections 21 and 22 of the ACL as it does to Chapter 3, Part 3-1, Division 1 of the ACL. [Schedule 2, item 4, section 22A]

Application and transitional provisions

2.31 The amendments made by Schedule 2 of the Bill commence immediately upon commencement of Schedules 1 to 5 of the Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010.

Consequential amendments

2.32 Items 2 and 3 of Schedule 2 of the Bill make minor consequential amendments to the ACL to substitute a reference to section 22 with a reference to section 21 in paragraph 131(2)(a) of the TP Act and to omit a reference from subsection 20(2) from Schedule 2 of the ACL, respectively. [Schedule 2, items 2 and 3, paragraph 131(2)(a) and subsection 20(2)]
Chapter 3
Regulation impact statement — Creeping acquisitions

Background

3.1 Over the last decade, concerns have been raised in a number of forums within the community that section 50 of the TP Act may not be able to address creeping acquisitions. The term ‘creeping acquisitions’ is commonly used to refer to a series of small acquisitions that individually do not substantially lessen competition in a market so as to breach section 50, but collectively may have that effect. Such activity may lead to competitive harm and consumer detriment in certain circumstances.

3.2 Recognising this concern, the Government committed in 2007 to introduce a law in relation to creeping acquisitions.

3.3 Creeping acquisitions were most recently raised as a concern in the lead-up to, and following the release of, the Grocery Inquiry in July 2008. On 5 August 2008, the Government announced its preliminary action plan in response to the Grocery Inquiry. As part of this plan, the Government released a discussion paper on 1 September 2008, seeking views on a range of options aimed at formulating the best way forward in relation to creeping acquisitions. A second discussion paper was released on 6 May 2009, continuing the consultation process. The Government’s current proposal to address creeping acquisitions reflects the extensive community consultation it has undertaken and fulfils its commitment to address community concerns in relation to this issue.

Promoting competition and fair trading

3.4 The object of the TP Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

3.5 Competitive markets are an important mechanism for achieving the advances in efficiency and productivity that enhance economic welfare. Maximising the competitiveness of a market will usually maximise efficiency and lead to the greatest enhancement in economic welfare.
3.6 Effective competition can be reduced through changes to market structure or by firms behaving, either independently or with other firms, in ways that reduce rivalry in the market, or prevent or deter the entry of new firms. The competition provisions in Part IV of the TP Act promote competition by prohibiting anticompetitive conduct.

Mergers and acquisitions

3.7 Mergers and acquisitions (‘acquisitions’) are important for the efficient functioning of the Australian economy. They can allow firms to achieve efficiencies, such as economies of scale or scope and diversify risk across a range of activities. Acquisitions can promote the efficient allocation of resources where the control of a company’s assets is transferred, the resources of two companies are integrated, or new management facilitates dynamic efficiencies, allowing the assets to be put to a more productive use. The threat of being acquired can also be important in fostering competition and facilitating efficiencies.

3.8 Acquisitions can also be driven by a firm’s desire to increase its market power. This is perfectly legitimate: it is not a contravention of the TP Act to hold market power or to seek to gain market power through superior economic performance. However, while there is nothing inherently anticompetitive about possessing market power, a firm with substantial market power has a greater ability to act in a manner unconstrained by competitive tension — for example, by raising prices. Certain market conditions can also exacerbate anticompetitive behaviour, particularly by firms that have substantial market power. For example, if a market is characterised by high barriers to entry or expansion, and a firm possesses significant market power, the likelihood of rival firms entering the market is reduced. This lack of competitive tension increases the risk that the merged firm could raise prices, to the detriment of consumers.

3.9 In many markets, sufficient competitive tension remains after an acquisition to ensure that consumers and suppliers are no worse off. In many cases, consumers or suppliers benefit from acquisitions. However, in some cases acquisitions can have anticompetitive effects. By altering the structure of markets and the incentives for firms to behave competitively, some mergers can result in significant consumer detriment. This gives rise to the key purpose of section 50 of the TP Act — to ensure that acquisitions do not significantly reduce competitive tension in the market. If there are loopholes that allow acquisitions that reduce competition to proceed, it is important to assess whether those gaps should be addressed to retain the integrity of section 50.
**Section 50 of the Act**

3.10 Section 50 of the TP Act contains provisions designed to limit the scope for firms to reduce competition in a market through acquiring other firms. In particular, section 50 prohibits acquisitions that would or would be likely to have the effect of substantially lessening competition in a market. This test focuses on the state of competition in a market and whether a merger or acquisition is likely to substantially reduce that competition. The provision applies to economy-wide activity. Courts have determined, through a process of statutory construction, that section 50 is a provision of broad application.

3.11 When applying the test in section 50, the ACCC must also bear in mind the overarching object of the TP Act, which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

3.12 When assessing an acquisition, a court or the ACCC has broad discretion in deciding whether a substantial lessening of competition is likely to occur. The ACCC defines the market in question, identifies the level of existing competition and assesses the likely impact of the acquisition on that competition.

3.13 Consideration of whether or not a merger or proposed merger would breach section 50 is not the sole domain of the ACCC and courts. Acquiring firms closely consider the application of section 50 to a possible merger, because this determines the strategy employed to gain some certainty about a proposed merger. Generally, there are four options open to a firm.

3.14 First, acquiring firms may seek informal clearance of the merger from the ACCC, under which parties approach the ACCC, providing details of the proposed merger, and obtain written advice from the ACCC as to whether or not it intends to oppose the merger in court if it proceeds.

3.15 Second, a party to the merger may apply to the ACCC for a binding formal clearance on the basis that the proposed merger does not breach section 50. The ACCC may grant a clearance, but if it does not do so (or does so on conditions), then this decision may be reviewed by the Australian Competition Tribunal at the request of the person who applied for the clearance.

3.16 Third, an acquirer may seek authorisation of a merger from the Australian Competition Tribunal, on the basis that the merger or acquisition would be likely to result in such a benefit to the public that it ought to proceed.
3.17 Finally, a party may seek to proceed with a merger on the basis that they do not consider that it would breach section 50. This runs the risk that the ACCC could investigate and may decide to intervene, which could result in the application of penalties or a divestiture order by a court if it finds that the merger has breached section 50.

3.18 As a result, a limited number of merger proposals are considered by the Federal Court (and consequently the jurisprudence in this area is similarly limited). However, both private sector lawyers and the ACCC have developed significant expertise over time in this area. Their expertise, developed through interactions between the ACCC and the private sector, frames the environment in which merger and acquisition activity currently takes place in Australia.

Previous consideration of creeping acquisitions

3.19 Creeping acquisitions have been considered in a number of forums over the last ten years, resulting in the introduction of various regulatory responses over time. The details of a number of these consultations, inquiries and regulatory responses are considered below.

Baird Committee

3.20 The Baird Committee considered creeping acquisitions in its 1999 Fair Market or Market Failure report. While noting a ‘degree of equivocation’ amongst those giving evidence as to whether legislative amendments were required in relation to creeping acquisitions, it also noted its concerns that section 50 was unlikely to be breached by small but repeated acquisitions of independent grocery retailers. Concerns were also raised that in some instances the ACCC is unaware until after the fact that an acquisition has even taken place due to the lack of notification requirements.

3.21 The Committee recommended a code of conduct be established requiring the mandatory notification of supermarket acquisitions by publicly listed corporations. This recommendation was not implemented.

3.22 The Baird Committee also recommended that subsection 50(6) be amended to specifically allow consideration of a ‘regional’ market (a term which is not defined), in order to address creeping acquisitions concerns at the regional/rural level (see Recommendation 2). The Report cited as an example the heavily concentrated regional markets in South East Queensland. Previously, subsection 50(6) had only referred to a market in Australia, a State or Territory. However, the ACCC’s Merger Guidelines had noted that while a market may be small relative to the national economy, it may be substantial in the context of a State or
regional economy. The previous government supported the Committee’s recommendation, noting that the Merger Guidelines already explicitly stated that the relevant substantial market could be a regional market and that amending subsection 50(6) ‘will clarify the Government’s policy intent and confirm current practice’. Subsection 50(6) was subsequently amended in 2001. At the time of those amendments, the explanatory material noted that these amendments did not change the substantive legal rights and obligations of any person.

Produce and Grocery Industry Code of Conduct

3.23 In 2000, in response to the Baird Committee’s Fair Market or Market Failure report, the Government established an industry committee to develop a voluntary industry code of conduct, the Produce and Grocery Industry Code of Conduct. The code requires signatories to notify the ACCC of acquisitions of a controlling interest in a grocery retailer. Despite broad compliance with the code, the ACCC noted in its 2008 Grocery Inquiry that it is aware of a small number of acquisitions where it was not notified.

Dawson Review

3.24 The Review of the Competition Provisions of the Trade Practices Act (the Dawson Review) reported to Government in January 2003. The Dawson Review examined a range of measures to deal with creeping acquisitions:

- **market share caps** — these were rejected on the basis that caps would restrict competition, would be unworkable in the retail sector and would adversely affect rural consumers in particular;

- **a declaration process**, whereby industries declared by the Government to be highly concentrated would have to notify the ACCC of intended acquisitions. This was rejected as it was thought to lead to large market participants establishing new facilities rather than buying existing stores from smaller rivals willing to sell;

- **amendments to section 50** to include a reference to creeping acquisitions as a relevant concern in assessments of mergers and acquisitions under section 50. This recommendation was rejected.
3.25 The Dawson Review concluded that concentrated markets can be highly competitive and that there was no need to amend section 50 of the TP Act to address creeping acquisitions. It further noted that in a competitive environment, the number of players in a market is a matter for industry policy, not competition policy.

**Senate Inquiry into the Effectiveness of the Trade Practices Act 1974 in Protecting Small Business**

3.26 Submissions to the 2004 Senate Inquiry (*The Effectiveness of the Trade Practices Act 1974 in Protecting Small Business*) highlighted particular concerns about creeping acquisitions in the retail grocery and the retail liquor sectors. In its report, the Committee considered that creeping acquisitions must at some point result in a very concentrated market and that section 50 does not effectively address this issue. It recommended that provisions be introduced into the TP Act to ensure the ACCC has the powers to prevent creeping acquisitions that substantially lessen competition in a market.

3.27 In its comments to the Inquiry, the ACCC noted that it had not yet determined whether creeping acquisitions substantially lessen competition and cause economic detriment, but expressed uncertainty about whether section 50 would be adequate to deal with the issue.

3.28 The then government did not support the Committee’s recommended amendments, noting the Dawson Review’s findings that the TP Act is adequate to address creeping acquisitions. It also noted uncertainty around whether creeping acquisitions actually substantially lessen competition and cause economic harm in practice.

**ACCC inquiry into shopper docket**

3.29 In February 2004, the ACCC conducted an inquiry into petrol discounting schemes run by the major supermarket chains, releasing a report entitled ‘Assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sectors’. The inquiry noted that there is potential for creeping acquisitions to become a problem in the supermarket sector in the future. It also noted that while it is in the retail grocery (including liquor) sector that this issue is most commonly raised, the issue is not limited to this sector, with participants in the taxi, diagnostic health services and optical dispensary industries all having referred to the issue in their discussions with the ACCC.
Charter for the Acquisition of Independent Supermarkets

3.30 The ACCC introduced a voluntary Charter for the Acquisition of Independent Supermarkets in July 2005, in response to community unease about creeping acquisitions in the supermarket industry. Under the charter, Metcash, Woolworths and Coles are not able to limit the ability of independent supermarket retailers to seek alternative purchasers for their stores. In addition, these chains must provide independent supermarket owners with written notice of this fact when making an offer to buy a store.

3.31 The ACCC Chairman, Graeme Samuel, noted that the Charter will benefit consumers by promoting competition in the supermarket sector, particularly by helping to address concerns about creeping acquisitions.

Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]

3.32 In September 2007, Senator Fielding introduced a Bill into the Parliament to regulate creeping acquisitions. The Bill proposed to amend the TP Act so that an acquisition would be deemed to substantially lessen competition if it and other acquisitions over the previous six years would have that effect. A Senate Inquiry into the Bill found that concerns about creeping acquisitions are valid and the provisions in section 50 are insufficient to address the problem adequately. However, the Senate Economics Committee recommended in August 2008 that the Senate defer consideration of the Bill until the Government introduced its creeping acquisitions legislation (which at the time was expected to be within weeks).

Government’s 2007 election commitment

3.33 In the context of ongoing community concerns about creeping acquisitions, reflecting that the regulatory responses to date had not adequately addressed the problem, the then-Opposition committed in the lead-up to the 2007 election, to introduce a law in relation to creeping acquisitions.

ACCC Grocery Inquiry

3.34 In its Grocery Inquiry, released in July 2008, the ACCC found that because much of the growth of the major chains is through organic expansion of their businesses, it did not consider creeping acquisitions to be a major concern at that time. However, the ACCC stated that section 50 is unlikely to address all concerns in relation to creeping acquisitions and it maintained its support for the introduction of a general creeping acquisitions law to address potential shortcomings of section 50.
3.35 While noting that creeping acquisitions are not a current concern in the grocery retailing industry, the Grocery Inquiry cited the supermarket industry as one where creeping acquisitions could potentially become a concern, due to particular structural features of the market.

**Government consultation**

3.36 As part of its preliminary response to the Grocery Inquiry and in line with its 2007 election commitment, the Government committed to respond appropriately and carefully to concerns about creeping acquisitions. In September 2008, the Government released a discussion paper seeking views from interested parties in relation to the best way to address creeping acquisitions. Twenty-three submissions were received. The Government released a second discussion paper in May 2009 which proposed amended approaches to the issue, taking into account concerns raised in submissions to the first paper. To ensure more fulsome consultation, the Government extended the deadline for submissions by four weeks and actively approached a range of business and consumer organisations to encourage them to make a submission. The second discussion paper received 32 submissions.

**Trade Practices Amendment (Material Lessening of Competition — Richmond Amendment) Bill 2009**

3.37 On 26 November 2009, Senator Xenophon introduced a Bill into the Parliament which was intended to `strengthen Australia’s anti-merger laws and to address the issue of creeping acquisitions’ (see the explanatory memorandum). This Bill repeals current subsection 50(1) and replaces it with a requirement that a corporation must not directly or indirectly acquire shares in the capital of a body corporate or assets which would have the effect or be likely to have the effect of materially lessening competition in a market. It also requires that a corporation that already has a substantial share of a market must not directly or indirectly merge with or acquire assets which would have the effect or likely effect of lessening competition in a market. On 30 November 2009, the Senate referred the Bill to the Senate Economics Committee for inquiry and reported on 13 May 2010.

**Scope of the Regulation Impact Statement**

3.38 This Regulation Impact Statement (RIS) relates to proposed amendments to the provisions of the TP Act that prohibit acquisitions that would have the effect or likely effect of substantially lessening competition in a market (section 50).
During the course of examining the issues giving rise to this RIS, concerns emerged regarding the appropriate scope of an exemption from section 50 for acquisitions made ‘in the ordinary course of business’ (as provided by paragraph 4(4)(b) of the TP Act). The Government is satisfied that its examination of this matter, and relevant case law, has confirmed that the broad existing policy settings are appropriate and unambiguous in their application. However, the Government is also aware that parties may seek to test these settings in future and has expressed a clear intention to legislate if required in future to remove this possibility for the reasons set out in this RIS. If legislation is required in the future, a further RIS will be prepared on the options for amendment at the time at which a decision on implementation must be made.

Problem

There is broad agreement in the community that section 50 of the TP Act operates appropriately for the majority of mergers and acquisitions. Section 50 is viewed as being able to adequately address the likely impacts on competition of individual mergers. However, there is a perception amongst some businesses, consumers and the ACCC that section 50 may not be able to effectively target a series of small acquisitions (‘creeping acquisitions’) in certain circumstances. Specifically, concerns relate to a potential loophole in section 50 whereby a series of small acquisitions that individually are not considered to substantially lessen competition in a market, may collectively have that effect. These concerns have been raised in numerous industries, including: supermarkets, liquor, taxis, diagnostic health services and optical dispensary industries.

Divergent views have been held over time as to whether creeping acquisitions are a problem. Opinions both in favour of, and against, the case for government action have been variously articulated in a range of forums over the years, including Parliamentary Committees, Government-initiated independent reviews and ACCC inquiries. Numerous recommendations have flowed from these reviews and inquiries, some of which have been accepted by governments and others not. However, the current prevailing view in the community, as borne out by the balance of opinions in response to the Government’s consultation process and by the recent introduction in the Senate of two private member’s Bills, is that creeping acquisitions concerns should be addressed. In particular, reviews have suggested that:

- to the extent that creeping acquisitions change the structure of a particular market, they could further concentrate market
power, and where this occurs, it can result in reduced incentives for organisations to compete in that market; and

- such reduced competitive tension affects consumers by limiting consumer choice and quality and putting upward pressure on prices.

3.42 In addition to these specific concerns raised about creeping acquisition behaviour, it has been suggested that certain elements of section 50 currently lack clarity and are creating uncertainty for the business community and the ACCC with regard to the interpretation of section 50. These concerns are relevant to the debate about creeping acquisitions, because while the issues do not directly suggest prohibiting creeping acquisitions, possible solutions could address those concerns.

3.43 On that basis, and reflecting both its 2007 pre election commitment and its response to concerns raised in the Grocery Inquiry, the Government is now seeking to put in place mechanisms to ensure that there is no further weakening of competition in either the supermarket sector or other concentrated industries.

Ambiguity in the interpretation of section 50

3.44 Some businesses — particularly in the supermarket sector — have indicated to the ACCC that they will seek to challenge its interpretation of certain elements of section 50 due to potentially ambiguous wording in the TP Act. The ACCC applies a rigorous economic test to determine whether an acquisition substantially lessens competition. In enforcing the TP Act, the ACCC must act in accordance with the object of the TP Act, which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. In challenging the ACCC’s interpretation of section 50, certain businesses may seek to adopt a novel approach to merger and acquisition activity that appears inconsistent with the ACCC’s enforcement approach, the limited jurisprudence in this area, and with the object of the TP Act. Given the lack of jurisprudence in this area (there have been only a handful of section 50 cases litigated in the last decade, the most recent being in 2003), it is important that the ambiguities are clarified and the ACCC can continue to enforce section 50 consistent with its prior practice (generally, that section 50 should have a broad application) and the TP Act’s broader object. This will also increase certainty for businesses.

3.45 Further detail on the particular elements is outlined below.
Subsection 50(1) refers to ‘a market’, while in practice the ACCC may consider multiple markets

3.46 Subsection 50(1) is designed to prohibit corporations from acquiring ‘shares in the capital of a body corporate’ or ‘any assets of a person’ if the acquisition would have the effect, or likely effect, of substantially lessening competition in a market. Although subsection 50(1) refers to ‘a market’, nothing precludes the ACCC from considering multiple markets when considering an acquisition and it is not uncommon for more than one market to be identified in a merger review. Nonetheless, some doubts have been expressed about the scope for considering more than one market under section 50.

Subsection 50(6) does not refer to sub-regional markets, but the ACCC may consider such markets providing they are ‘substantial’ markets

3.47 Subsection 50(6) defines a market as a ‘substantial market for goods or services in Australia, a State, Territory or region of Australia’. Nothing in the wording of subsection 50(6) precludes the courts or the ACCC from considering markets at the sub-regional level, providing they are ‘substantial’ markets. Indeed, in practice the ACCC typically reviews acquisitions on the basis of local markets in a number of sectors (including grocery and liquor sites, hardware stores, childcare facilities, book selling and retail petrol sites) and considers that some local markets can be substantial. Its 2008 Merger Guidelines provide that substantiality of a market is not necessarily related to geographic size and that this criteria can be demonstrated in many ways.

3.48 However, there have been doubts expressed to the ACCC about the application of section 50 to markets in local areas due to potentially ambiguous wording in the TP Act. Furthermore, comments by French J in the case of AGL v ACCC demonstrate the real risk that a court may in the future adopt the view that the substantiality of a market should be determined by reference to Australia as a whole, making it difficult to argue that a local market would be found to be substantial:

‘It does not seem likely that the relativity implied by the term ‘substantial’ in s50(6) relates to the size of other markets in whichever of the geographical areas mentioned in the definition the market is to be found. For there is no lower bound on the size of ‘a region of Australia’. It may be that having regard to section 4E the substantiality of the market in question, even if it be geographically limited to a State or a Territory or a region, is to be judged by reference to Australia as a whole. I express no concluded view on that difficult constructional issue …’

3.49 In light of this discussion around uncertainties in the interpretation of this provision, there appears to be a case to examine
clarifying its application to ensure that local markets are considered appropriately under section 50. In addition to potentially impacting on transactions that may raise creeping acquisitions concerns, this issue has relevance for transactions involving very large firms that compete against each other in a large number of local geographic markets.

The 'ordinary course of business’ exemption from section 50, contained in paragraph 4(4)(b), is intended to have a narrow interpretation, but parties may test its scope

3.50 Paragraph 4(4)(b) provides that acquisitions made in 'the ordinary course of business' are exempted from section 50. The TP Act does not clarify the meaning of this phrase, but case law has found that it:

- means 'that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation' (see Rich J in Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq) (1948) 76 CLR 463 at 477); and

- 'is meant to refer to transactions regularly taking place in a sustained course of activity or some other usual process naturally passing without examination' (see Dixon CJ in Re E J Taylor & Son Pty Ltd (in liq) (1964) 110 CLR 129 and 136m [1964] ALR 595 at 598).

3.51 The courts have also found that the wording of section 50 indicates that the legislature intended it to apply broadly, and that the 'ordinary course of business' exemption would operate narrowly.

3.52 The ACCC has advised that at least one corporation in the grocery retailing sector has claimed that acquisitions of vacant land for development as a supermarket are within the scope of the ordinary course of business exemption, and unable to be examined under section 50. The ACCC has taken a contrary view regarding the application of section 50 to new site developments, where those developments exhibit three characteristics:

- the development occurs in a built-up area, with limited availability of alternative sites for potential competitors in that local market;

- the proposed supermarket operator already has a significant retailing presence in that local market; and
• if the proposed supermarket did not open on the site, then an alternative competitive supermarket would be likely to open on that site and operate a supermarket.

3.53 It is appropriate for section 50 to apply in these circumstances because: it applies to acquisitions of legal or equitable interests in real property, which are 'assets' within the scope of section 50; and because such an acquisition has the potential to substantially lessen competition in the market.

3.54 Some have contended that acquisitions of new sites should fall within the scope of the exemption as 'organic growth' on the basis that organic growth results in the introduction of a new competitor. However, it is difficult to see that organic growth is suitable for exemption from section 50 since it would be unlikely to provide a new source of competition in a market because any new ‘competitor’ would be unlikely to compete against its own existing presence in that market. Taking the converse view, that the 'ordinary course of business' exemption is broad, could allow the systematic aggressive acquisition of independent supermarkets to occur as acquisitions 'within the ordinary course of business' and hence exempt from consideration under section 50 altogether. It is therefore inappropriate to give a wide reading to the exemption for such acquisitions (that are already examinable under section 50) based on the fallacy that organic growth automatically results in a positive outcome for consumers. The counterfactual is more persuasive, that consumers should not face the consequences of anti-competitive effects simply because the asset being acquired is considered exempt from the prohibition.

Evidence of harm

Impacts on competition

3.55 Creeping acquisitions may impact on competition in a number of ways. Commonly, a creeping acquisition could occur when a firm at one level of the supply chain makes one or more small acquisitions in a number of downstream markets. The competitive implications of the acquisition in the local market may appear insignificant. However, if that market is characterised by high barriers to entry or expansion, and if one or more firms already possesses significant market power, the likelihood of rival firms entering the market is reduced. This lack of competitive tension increases the risk that the merged firm could raise prices, to the detriment of consumers.

3.56 More generally, the ACCC is concerned about certain ambiguities in section 50 (outlined above). These have recently become
known as businesses have indicated they will seek to challenge the ACCC’s interpretation of section 50, including to challenge the ‘ordinary course of business’ exemption. Such ambiguities make it difficult for businesses to have confidence in the ACCC’s ability to effectively enforce section 50. Consequently, businesses may either be refraining from undertaking acquisitions that could enhance competition, or anticompetitive acquisitions may be proceeding unchecked.

**Impacts on consumers**

3.57 Over the past decade, creeping acquisitions have been raised in relation to a number of industries, including supermarkets, liquor stores and childcare. Other industries about which the ACCC has noted potential creeping acquisitions concerns include taxis, funerals and the healthcare industry.

3.58 The key concern is the potential effect of small incremental acquisitions on consumers through the impact they have on competition, consumer choice, prices and quality. The impact on wholesale markets of creeping acquisitions in retail markets in certain industries is also a concern for similar reasons. The associated consumer detriment has the potential to be felt across a range of products in all markets — local, regional, state and national.

3.59 While evidence that creeping acquisitions have caused actual consumer detriment to date is limited, the issue has been flagged by numerous Senate Committees and inquiries, and most recently in the Grocery Inquiry, as a real potential risk in the future, and concerns have been raised about the ability of section 50 to prevent such detriment. In these circumstances it is not appropriate to wait until clear evidence of actual harm emerges, when taking preventative policy action now could limit the prospect of harm eventuating at all.

**Example: the grocery industry**

3.60 Concerns relate to the potential for creeping acquisitions to inhibit competition in the retail grocery industry. Concerns have also been raised about detrimental effects on the grocery wholesaling sector, particularly independent grocery wholesalers, or potential entrants into grocery wholesaling. These effects include loss of economies of scale in wholesaling relative to the major chains and reduced bargaining power in negotiations with suppliers relative to the major chains. Importantly, effects in both the retail and wholesale sectors can have flow-on effects for the prices that consumers pay and the quality and choice of products they face.
3.61 The ACCC noted in its Grocery Inquiry that while creeping acquisitions did not currently appear to be a significant concern and that grocery retailing is ‘workably competitive’, price competition between the major chains is limited and creeping acquisitions could over time become a concern due to particular structural features of the market, including:

- the need to obtain good sites being a significant barrier to entry, particularly given the financial resources of the major supermarket chains and the leverage they wield over lessors of suitable sites;
- the existence of broader barriers to entry and expansion created through the need to obtain economies of scale and efficient wholesaling operations;
- the existence of two major supermarket chains; and
- a situation where there are many small business units (that is, retail stores or potential retail sites) that could be acquired or leased one by one or in small groups.

3.62 The ACCC noted that section 50 may be capable of addressing some (but not all) acquisitions that have a substantial impact on a local retail market, but not necessarily those that have anticompetitive effects in wholesale markets. One of the key problems associated with creeping acquisitions is that substantial market power may be enhanced in a broader upstream market (for example, a wholesale market) through an individual acquisition in local or regional downstream market even though there is no substantial competitive impact within the local or regional market itself.

**Need to address the problem**

3.63 Section 50 applies to the full range of mergers and acquisitions in the Australian economy. If the concerns relating to the ability of section 50 to effectively address creeping acquisitions remain unresolved, competition could be adversely affected across a range of markets (local, state and national), with the potential for serious detriment to consumer welfare.

3.64 Furthermore, clarifying the ambiguities in section 50 will ensure that businesses have confidence in the ACCC’s ability to effectively enforce the merger provisions. This will maximise the ability of section 50 to ensure that acquisitions do not threaten a competitive market environment.
Objective

3.65 Prior to the 2007 election, the Government committed to introduce a law in relation to creeping acquisitions. This reflected a persistent community view that, despite the implementation of various regulatory responses over the past decade aimed at addressing creeping acquisitions, the issue remains a concern. Subsequent to the Government’s election commitment, the ACCC’s Grocery Inquiry report provided further support for the case to address creeping acquisitions. It found that although such acquisitions do not appear to be a significant current concern in the supermarket retail sector, particular structural features of the supermarket industry mean that creeping acquisitions are a potential concern. In its report, the ACCC noted that grocery retailing is ‘workably competitive’, but that there are a number of factors currently limiting the level of price competition, including the limited competitive constraint imposed by the independent sector on the pricing power of the major supermarket chains. The Government is concerned to ensure that there are appropriate mechanisms in place to preserve adequate competition in this and other sectors where creeping acquisitions might be a problem.

3.66 The objective of the proposed options is to enhance the protections against anticompetitive acquisitions, to limit or prevent potential harm to competition and, consequently, consumer welfare.

Options

3.67 The Government made its 2007 pre-election commitment in response to a groundswell of community concern that previous regulatory responses to address creeping acquisitions had been insufficient in addressing the problem. The findings of the Grocery Inquiry — that creeping acquisitions are a potential concern in the supermarket sector — further lent support to the case for reform.

3.68 In considering possible creeping acquisitions reforms, the Government has engaged in a consultation process in 2008 and 2009 to confirm the community’s views that reform should indeed be undertaken, and explore possible options for what shape such reforms should take. As part of its consultation process, the Government issued two discussion papers seeking the views of business and the community on a range of options. The discussion papers canvassed Options 2, 3, 4 and 5 (described below), but none received a consensus of support, primarily because while it was broadly accepted that some degree of reform is needed, all four options were considered to be overly interventionist responses to the problem. Given this, a further option (Option 6) was developed,
presenting a more proportionate response to the problem. The Government undertook targeted consultation on this option with the major supermarket chains and the Business Council of Australia and reflecting those discussions, the proposals were further refined.

3.69 The Options that are considered in this RIS include:

- Option 1: Status quo.

- Option 2: Amending section 50 so that it permits the courts or the ACCC to treat a series of acquisitions as a single acquisition for the purposes of establishing whether a substantial lessening of competition has occurred (‘aggregation model’).

- Option 3: Amending section 50 to add an additional prohibition, so that section 50 also prohibits a corporation from making an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in any lessening of competition in that market.

- Option 4: Amending section 50 to add an additional prohibition, so that section 50 also prohibits a corporation with existing substantial market power from making an acquisition if the acquisition would result in an enhancement of its market power in that market.

- Option 5: As per option 4, but to apply only to ‘declared’ corporations or sectors for a set period of time, with mandatory notification to the ACCC of acquisitions by relevant corporations or in relevant sectors above a set threshold.

- Option 6: Amending section 50 to clarify that any market can be examined, and that markets can be defined in accordance with economic principles, including local markets where appropriate; and introducing a quasi regulatory approach to address concerns regarding the scope of an exemption from section 50 for certain acquisitions made ‘in the ordinary course of business’.
Impact analysis

3.70 As has been the case with various competition policy reforms over recent decades, the degree of support for particular options is influenced by the interests of respective parties in their position under the various options. Parties for whom the current arrangements are comparatively more favourable than the proposed changes will support little or no change. Equally, parties for whom current arrangements are considered to be unfavourable will seek substantial change. Submissions from stakeholders are therefore useful and informative and relied upon where possible, but it is important that parties’ views are considered in the context in which they are provided.

3.71 Treasury has critically examined all submissions, carefully weighed alternatives and undertaken its own analysis to inform its final conclusions as reflected in this RIS.

Analysis of Option 1

3.72 Option 1 proposes no change to the law.

3.73 The benefits of retaining the status quo are that it would avoid introducing uncertainties and costs that were raised as a concern in relation to a number of the other options. In other words, business and the community would retain the existing understanding about the operation of section 50, backed by a body of prior ACCC decisions and the (limited) case law to date.

3.74 Most of the submissions that did not support any change to the current merger regime under section 50, argued that evidence had not been provided to suggest that creeping acquisitions are currently a problem. Organisations not in support of a change included: the Business Council of Australia, the Group of 100, Coles, the Australian National Retailers Association, the Law Council of Australia, the National Farmers Federation and the Shopping Centre Council of Australia.

3.75 However, without addressing the problems identified above it is likely that industries where creeping acquisitions have been noted as a concern may become increasingly concentrated. While noting that there is no direct causal link between industry concentration and a substantial lessening of competition (as such matters would need to be determined under the test in section 50), creeping acquisitions may arise in particular industries that the ACCC has flagged, such as taxis, liquor, health care and hardware. It is noted that increases in industry concentration do not necessarily lead to a substantial lessening of competition.
If businesses lack confidence in the ability of section 50 to address creeping acquisitions, this could deter the entry of new businesses into industries where such acquisitions are a concern, reducing the level of competition in those markets and potentially also in related markets.

The broader economic impact of reduced competition is likely to include higher prices and/or reduced quality or choice for consumers and, to some degree, a reduction in Australia’s export competitiveness. It may also lead to fewer gains in efficiency and productivity, reduced innovation and fewer employment opportunities. This may result in reduced enhancements to economic welfare which, in turn, may flow through to lower taxation revenue for government. On balance, Option 1 would leave the problem unaddressed, and therefore is not an appropriate option.

Analysis of Options 2, 3, 4 and 5

There was no clear consensus of support for any of the models proposed in the discussion papers (Options 2, 3, 4 and 5 refer). While these options presented a range of benefits, respectively, the costs associated with each were considered to be relatively high.

Option 2

Option 2 (canvassed in the Government’s first discussion paper) proposes to amend section 50 to allow a series of acquisitions to be treated as a single acquisition in determining whether an acquisition is likely to lead to a substantial lessening of competition. This could be done by specifically listing this aggregation element as one of the factors to be considered in section 50(3).

This would address the core of the problem of creeping acquisitions and allow section 50 to operate independently of the acquisition strategy adopted by a firm. It would also retain the existing substantial lessening of competition test. It would require minimal upfront compliance costs for businesses in terms of familiarising themselves with the new legislation.

However, it would be conceptually and practically difficult for the courts or the ACCC to implement because it would require the application of the forward-looking test in section 50 (that is, assessing the state of the market if the acquisition proceeds) to assess the impact on competition of past acquisitions. The ACCC has noted that this would be particularly difficult if the activity occurred in a related market. The question of the logistics of the ACCC establishing a ‘watchlist’ of firms on an ‘aggregation trail’ could also be problematic, in determining the point at which a ‘series of acquisitions’ had commenced. A further
complication would be that markets (in terms of their geographic boundaries, structure and functioning) and consumer preferences change over time.

3.82 Examining the effects of prior acquisitions could also increase legal costs and resourcing requirements for businesses and the ACCC, and firms may also have to provide substantially more information to the ACCC as part of its informal clearance process to enable it to determine whether there has been a substantial lessening of competition. Businesses may also face higher costs if they need to notify the ACCC of acquisitions that previously would have been considered too minor to notify. This may deter otherwise efficient mergers from proceeding.

3.83 To be workable, the period over which a series of acquisitions is to be considered would need to be relatively short, which would necessarily diminish this option’s effectiveness as a solution to the problem, as firms could choose to delay acquisitions to avoid the statutory time limit for consideration by the ACCC. However, this could be costly to firms, as timing is often crucial to the success of acquisitions.

3.84 Firms would also need to consider how best to sequence acquisitions over time. For example, proceeding with a merger now could preclude a merger in the future or make it more costly in terms of undertakings required by the ACCC. This could introduce an element of complexity into business planning that currently does not exist.

3.85 This option could also have the perverse outcome of leading firms to expand through greenfields development rather than potentially more efficient acquisition of existing firms. This ‘organic growth’ could increase firms’ costs, pushing up prices for consumers. Conversely, firms could be deterred from growing organically due to uncertainty over whether the acquisition of assets through organic growth would be considered to be one in a series of acquisitions. This could prevent efficiency enhancing acquisitions, limiting the consequent benefits to consumers.

3.86 Option 2 was supported by a number of peak industry bodies representing the independent retail sector (the National Association of Retail Grocers of Australia, The Retailers Association) and small business representatives (the WA Small Business Development Corporation). However, this option was widely opposed by other organisations that made submissions to the Government’s first discussion paper on the basis that it would introduce uncertainty into the working of section 50 and would be practically difficult to implement.
Option 3

3.87 Option 3 (canvassed in the Government’s first discussion paper) would supplement the existing substantial lessening of competition test in section 50 with a provision that would prohibit a firm with substantial market power from making an acquisition that would result in any lessening of competition in that market.

3.88 However, this would be inconsistent with the underlying policy principle of the TP Act, which focuses on the state of competition in a market, rather than market structure per se. Furthermore, it would introduce a new merger regime, taking Australia out of step with its international counterparts. No other comparable jurisdiction has a merger law based on substantial market power.

3.89 It is possible for legitimate pro-competitive acquisitions to result in some lessening of competition while still yielding net benefits to consumers, and where a firm was declared to have substantial market power, this model would prohibit those. For example, firms with substantial market power would be prohibited from acquiring small firms in unrelated markets, or expanding organically through acquisition of assets, where this results in a lessening of competition, even if the acquisition would be efficiency enhancing and result in a net benefit to consumers. In the extreme, this model could create a de facto market share cap, leading to a perverse outcome in which firms with substantial market power are prevented from innovating or achieving economies of scale, or in some cases, merging at all. However, the ACCC’s authorisation process would still be available to allow pro-competitive acquisitions, that would otherwise contravene this prohibition, to proceed.

3.90 If firms with substantial market power were effectively prevented from acquiring small firms, this would affect the ability of smaller businesses to realise a reasonable price for their business when seeking to exit the industry. This could inhibit small firms from entering an industry in the first place.

3.91 A serious risk of adopting Option 3 is the uncertainty it would create for businesses, as outlined above. This option also has the potential to increase legal costs for firms in establishing whether they possess substantial market power, as in the ordinary commercial environment it may not be immediately obvious to a firm whether it has such power in the first place, nor whether a proposed acquisition would move that firm into such a position. It is likely that notifications to the ACCC through its informal clearance process would increase.

3.92 By introducing the term ‘any lessening of competition’, this option has the potential to undermine the existing ‘substantial lessening of
competition’ descriptor in section 50. The difficulty of defining a lessening of competition that is lower than ‘substantial’ but more than trivial could increase uncertainty for businesses, potentially inhibiting efficiency-enhancing acquisitions.

3.93 This option was generally supported by smaller retailers (such as the Fair Trading Coalition, the Australian Food and Grocery Council, Master Grocers Australia, Metcash) but opposed by large businesses (such as Coles). IGA supported this option, but with a number of modifications such as limiting its application to concentrated industries and broadening the test to capture a lessening of competition in any market. The Trade Practices Committee of the Law Council of Australia was strongly opposed to this option on the basis that it would have significant unintended industry-wide consequences.

Option 4

3.94 Option 4 (canvassed in the Government’s second discussion paper) would amend Option 3 to prohibit acquisitions that enhance a firm’s existing substantial market power. As with Option 3, this model would supplement the existing substantial lessening of competition test in section 50.

3.95 One advantage of this model over Option 3 is that it would address the potential ambiguity about the distinction between a ‘lessening’ of competition and a ‘substantial lessening’ of competition.

3.96 However, this model has all the other drawbacks of Option 3, including increased uncertainty and costs for business and a departure from international best practice in merger law.

3.97 This option was received in similar terms to Option 3. In addition, many submissions (including from the Law Council of Australia) also criticised this model for the lack of clarity around the term ‘enhancing’. If any enhancement of a firm’s substantial market power would trigger a breach, then this model could have a serious chilling effect on acquisitions. If the threshold was set at a ‘material’ enhancement, this may be more appropriate, but there was no consensus on what an appropriate qualifier might be. As such, the proposed wording was broadly viewed as being particularly damaging in terms of creating uncertainty for businesses and opening the ACCC’s decisions up to challenge.
Option 5

3.98 Option 5 (canvassed in the Government’s second discussion paper) would adapt Option 4, only applying for a set period of time to corporations or product/service sectors that are ‘declared’ by the Minister, where the Minister has concerns about potential and/or actual competitive harm from creeping acquisitions, or acquisitions by corporations with substantial market power. The Minister could unilaterally declare a corporation or sector, or do so on application from the ACCC. As with Options 3 and 4, the existing substantial lessening of competition test in section 50 would continue to apply to all other acquisitions.

3.99 As part of the declaration, the Minister would clearly specify the relevant corporation or product/service sector and could set appropriate thresholds for the mandatory notification of acquisitions to the ACCC, by declared corporations or by corporations in declared sectors, as part of the declaration process. Thresholds would be carefully established to ensure the law is applied with minimal burden while still maximising transparency and accountability.

3.100 While mandatory notification of acquisitions by declared corporations or by corporations in declared sectors may help to resolve information asymmetries and increase transparency regarding the practical impact of creeping acquisitions through the use of a public process by the ACCC, it would significantly increase regulatory burdens and resourcing costs for businesses and the ACCC. The extent of this additional burden and cost would depend on whether the firm would have notified the ACCC of the acquisition anyway (under its informal clearance process). Businesses have expressed broad support for the ACCC’s existing informal clearance process, which involves voluntary notification of acquisitions, and any departure from this successful model would not be welcomed by businesses.

3.101 Option 5 was broadly supported by small business peak bodies (such as the Council of Small Business of Australia, the Australian Hotels Association, the Motor Trades Association of Australia and small grocery retailers (such as IGA, Supabarn and NARGA)).

Option 6

3.102 Based on the lack of a clear consensus of support in the submissions, and taking into consideration the majority view of submissions that a less interventionist solution may be more appropriate, an alternative option (Option 6) was considered. The Government undertook targeted consultation in the process of further refining elements of this option. Treasury is of the view that Option 6 therefore achieves an
appropriate balance between addressing the concerns raised in submissions and the views expressed in the subsequent targeted consultations.

3.103 Recognising the views presented in submissions that section 50 is generally operating effectively; and that Options 2, 3, 4 and 5 would be likely to generate costs that exceed the expected benefits, the Government has sought to develop a more proportionate response to the problem. Option 6 is expected to have a predominantly positive impact on competition and consumers, while imposing minimal costs on the businesses concerned.

3.104 Option 6 proposes two amendments to section 50, and one quasi-regulatory proposal (outlined below), to provide greater clarity around the application of section 50. By clarifying elements of section 50 to remove existing uncertainties regarding its application, Option 6 will not change the way the mergers test in section 50 is applied in practice, but rather will enhance certainty for businesses, as they will be able to avoid the costs of challenging areas of uncertainty in the law. Further, it will ensure that a substantial lessening of competition is prevented, whenever it arises with respect to a particular acquisition. Therefore, to the extent that these changes have a material impact (given that the changes are directed towards codifying existing practice), it is a materially positive impact. In particular, the amendments will provide additional clarity around current merger practices, without imposing intrusive mechanisms for regulating creeping acquisitions that conflict with the existing well established merger test in section 50. Given that these amendments do not alter the mergers test established under section 50 or change the approach the ACCC takes to enforcing section 50, it is not expected that they will significantly alter firms’ current behaviour with respect to acquisitions, other than to prevent challenges to the appropriate application of section 50 to individual acquisitions.

3.105 The amendments and quasi-regulatory proposal have been grouped together under a single option as they are not intended to operate in isolation, but rather would work jointly to address creeping acquisitions concerns. The amendments are outlined below.

a. Ability to consider multiple markets

3.106 The test contained in section 50 refers to a substantial lessening of competition in a market. Section 50 would be amended so that references to ‘a market’ in subsections 50(1) and (2) are replaced by reference to ‘any market’. This would clarify the ACCC’s ability to consider multiple markets when assessing mergers under section 50, which the ACCC acknowledges as common practice in its 2008 Merger Guidelines (which is a public document that has been developed
and refined in consultation with the community and stakeholders over time). Amendments to refer to ‘any market’, while reflecting current practice, would also reflect amendments made to section 46 in 2007, which extended the application of that provision (which applies to a misuse of market power) to the specific market in question ‘or any other market’.

3.107 The ACCC has indicated that as this is a clarifying amendment that would not alter existing policy, it does not consider that it will change the scope of section 50. However, the effect should be to clarify to the business community that section 50 can apply to multiple markets. Consequently, this amendment will prevent businesses from seeking to proceed with acquisitions that may be deemed to breach section 50 on the grounds that they lessen competition in markets other than the primary market in which the acquisition would occur. Although the ACCC would have opposed such acquisitions anyway, this clarification will save businesses the costs associated with applying to the ACCC through the voluntary clearance process or otherwise proceeding with the merger without seeking clearance and subsequently having it blocked by the ACCC.

3.108 Relevant examples include industries where an acquisition in a local retail market may not have a substantial competitive impact in the local market, but may substantially lessen competition in a related upstream market (for example, a wholesale market). In these circumstances, it is important to enable the ACCC to consider the totality of effects resulting from the acquisition. Indeed, to take the alternative view, that use of the term ‘a market’ means one market only would probably seriously weaken the merger framework that operates in Australia.

b. Enable courts or ACCC to consider ‘local’ markets when assessing acquisitions under section 50

3.109 Under Option 6, subsection 50(6) would also be amended to specify that the courts or the ACCC can consider more confined geographic markets than what may be considered ‘regional’ markets when assessing acquisitions. Again, this is current practice by the ACCC in its administration of section 50, as evidenced by the ACCC’s opposition to Woolworths’ acquisition of an independent supermarket in Queanbeyan in a local retail market in 2008. However, the potential ambiguity in the existing wording, identified but not conclusively determined in recent jurisprudence in this area, has created a risk that parties will seek to challenge the ACCC’s ability to do so. That is, in Australian Gas Light Company v Australian Competition and Consumer Commission (No 3) [2003] FCA 1525, French J of the Federal Court of Australia refused to express a concluded view that the substantiality of a market is to be
judged by reference to Australia as a whole. Should such a view be successfully established, this would diminish the chances of successfully establishing that there was a substantial lessening of competition in markets deemed to be not substantial with respect to Australia as a whole.

3.110 This amendment will provide clarification about the scope of subsection 50(6). Section 50 focuses on preventing acquisitions which have the effect or likely effect of substantially lessening competition. It would be undesirable, therefore, for the ACCC or the courts to be unable to prevent an acquisition which has such an effect but where interpretations of subsection 50(6) would operate to remove their capacity to intervene.

3.111 This amendment will ensure that there will be no undue narrowing of the application of merger law in Australia to the detriment of consumers. Increased clarity would benefit businesses as they will have greater certainty about how the ACCC will seek to enforce section 50. This amendment also ensures that individual small acquisitions that are most appropriately considered in the context of a local market can be captured by section 50, thereby assisting the ACCC’s examination of acquisitions in industries where creeping acquisitions concerns have been raised. Further, in contrast to Options 2 to 5 above, it does not unduly expand the application of the primary test in section 50 to mergers which do not give rise to a substantial lessening of competition.

3.112 This amendment has the additional advantage of reinforcing the approach taken in amendments made to this provision in the Trade Practices Amendment Act (No. 1) 2001 (which amended subsection 50(6) to recognise more geographically confined markets than Australia, a State or Territory).

c. Quasi regulatory proposal

3.113 While legislative amendments to section 50, or to the exemption from section 50, could address concerns regarding reliance on the ‘ordinary course of business’ exemption to avoid examination of an acquisition of vacant land under section 50, to date this issue has been confined to untested contentions in the retail grocery sector.

3.114 It appears premature, therefore, to undertake legislative amendments to the general remedy in section 50 or the exemption in paragraph 4(4)(b), when any such potential issues appear currently confined to specific markets. The policy option chosen by the Government is to clearly state the Government's expectations about how it will view attempts to expand the interpretation of this narrow exemption from section 50.
3.115 Maintenance of the status quo does not impose any additional compliance costs on businesses, although it may remove opportunities for the business community to seek to challenge this view.

3.116 In light of court findings that: section 50 is a provision of broad application; and that the exemption is one of narrow application, stating the Government's expectations about future reliance on the ordinary course of business exemption from section 50 arguably does no more than to retain the status quo. The Government’s intention to legislate if required to address this policy concern, therefore, should result in no or low additional business costs, or other impacts at this point in time.

3.117 While this quasi regulatory proposal will foreclose opportunities for businesses to seek to expand the application of this exemption in future, it will provide greater certainty to businesses on the future legislative framework, and its maintenance consistent with current policy settings.

**Summary of Option 6**

3.118 The amendments to subsection 50(6) would not involve additional costs to businesses or the ACCC as these changes largely confirm the existing administration of section 50 in this respect (that a market that can be considered under section 50 may be more geographically confined than a ‘regional’ market). Rather, by removing ambiguities around particular elements of section 50, these amendments are likely to have a net positive impact on competition and consumers.

3.119 The ACCC has indicated that these amendments are not likely to substantially broaden the scope of operation of section 50 beyond its current administration, but will seek to prevent a situation arising that could potentially narrow the application of merger law in Australia. Consequently, the administrative burdens associated with section 50 will either remain unchanged, or reduce as parties will no longer seek to expend resources pursuing clarity around the matters addressed by these amendments. That is, as noted above, by clarifying elements of section 50 to remove existing uncertainties regarding its application, Option 6 will not change the primary merger test, but will rather enhance certainty for businesses by: avoiding the costs associated with challenging areas of uncertainty in the law; and ensuring that a substantial lessening of competition is prevented, whenever it arises with respect to a particular acquisition. To the extent that these changes have a material impact (given that the changes are directed towards codifying existing practices), it is a materially positive impact.

3.120 Option 6 would clarify that section 50 prohibits acquisitions resulting in a substantial lessening of competition, regardless of the form
and circumstances in which they take place. Consequently, this option will give businesses greater confidence in the efficacy of section 50 (and particularly with respect to its application to smaller acquisitions), thereby facilitating pro-competitive acquisitions that may not otherwise have occurred by decreasing uncertainty.

3.121 Given the sound theoretical argument, that section 50 already applies to acquisitions of interests in real property, there is a strong argument that the Government’s quasi-regulatory approach to address concerns about the scope of the ‘ordinary course of business’ exemption will not impose any additional compliance costs on businesses or other impacts.

3.122 These legislative and quasi-legislative proposals are expected to address concerns regarding market concentration in markets in which creeping acquisitions have been cited as a potential issue.

3.123 Option 6 has been canvassed with the key stakeholders most likely to be affected by the changes and responses were broadly supportive of the policy direction proposed under Option 6.

Consultation

3.124 As the TP Act applies to all industries and creeping acquisitions could affect small and large businesses in a range of sectors, and the community more broadly, the Government sought comments from a wide range of businesses and consumer groups in its consultation process. The Government issued two public discussion papers (in September 2008 and May 2009) which canvassed four possible alternatives for addressing creeping acquisitions (Options 2, 3, 4 and 5 refer) and sought alternative options from businesses and the community.

3.125 The public consultation spanned a period of 10 months. Twenty-three submissions were received to the first discussion paper and 32 submissions to the second discussion paper, from small and large businesses from a range of industries including the retail, supermarket and childcare sectors, as well as peak industry bodies. Submissions were also received from individual consumers, legal practitioners experienced in Trade Practices matters and the ACCC.

3.126 The views expressed throughout the consultation process informed the Government’s further proposal (Option 6), which was then the subject of targeted consultation with key stakeholders most likely to be affected by the policy direction proposed under Option 6.
3.127 Treasury consulted with relevant Commonwealth departments and agencies, as well as with the State and Territory governments to seek their approval on the draft amendments in accordance with the 1995 intergovernmental Conduct Code Agreement prior to introduction of a Bill into the Parliament. Legislation will only be introduced if the Government obtains the required support from State and Territory governments for the proposed amendments.

Conclusion and recommended option

3.128 While there is not a prevailing view that creeping acquisitions are currently causing serious actual harm to competition and consumers, there is a widely-held view that they are a potential problem that could develop into a genuine concern in the future. Ambiguities in relation to certain elements of section 50 are also posing a real risk to the ACCC’s ability to effectively enforce section 50 consistent with the policy objectives referred to elsewhere in this Regulation Impact Statement and to the confidence of businesses in its ability to do so. As such, Option 1 would not be an appropriate course of action as it would leave the problem unaddressed.

3.129 There was no consensus of support for Options 2, 3, 4 and 5 and these options are not a proportionate response to the problem, with the costs or likely costs clearly outweighing the benefits or likely benefits.

3.130 On balance, Option 6 would appear to present a more balanced and targeted option because it:

- addresses the perceived problem regarding creeping acquisitions in respect of specific markets;

- is not overly intrusive in terms of regulatory impact on business;

- addresses stakeholder concerns as expressed in the submissions to the Government’s discussion papers; and

- meets the Government’s 2007 pre-election commitment.
Implementation and review

Changes to the Trade Practices Act

3.131 The changes to the TP Act will need to be implemented by passing amending legislation through the Commonwealth Parliament.

3.132 The quasi regulatory approach would be implemented by way of a media statement.

Changes to the ACCC’s *Merger Guidelines 2008*

3.133 The ACCC would need to update its *Merger Guidelines* to reflect the changes to the relevant parts of the TP Act.

Enforcement

3.134 The ACCC would have responsibility for enforcing the amended Act.

Review

3.135 The effectiveness of the proposed amendments would be informally monitored by the Treasury, and reviewed after a sufficient period of time had elapsed.
### Schedule 1: Mergers and acquisitions

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<td>Item 4, paragraph 21(4)(b)</td>
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<td>Item 4; section 21</td>
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<td>Item 4, section 22</td>
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<td>Item 4, subsections 22(1) and 22(2)</td>
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<td>Item 4; paragraphs 21(2)(a) and 21(2)(b)</td>
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