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Legislation Committee

Competition and Consumer Legislation Amendment Bill 2010 [Provisions]

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Chapter 1

Introduction

1.1 The Competition and Consumer Legislation (Amendment) Bill 2010 revisits two areas of recent inquiry for the Senate Economics Legislation Committee. The first relates to 'creeping acquisitions' and the definition of a 'market' for purposes of merger approvals in section 50 of the *Trade Practices Act 1974* (TPA). The second issue is the definition of 'unconscionable conduct' in subsection 51AC of the TPA. The bill will amend sections 50 and 51AC of the TPA, which will form sections 21 and 22 of the proposed *Competition and Consumer Act 2010*.

1.2 In his Second Reading Speech, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson, told parliament that the bill will give effect to two important reforms to strengthen and clarify Australia's competition and consumer laws. It will clarify that:

- the Australian Competition and Consumer Commission and the courts can assess the totality of the competitive effects associated with acquisitions which occur in a geographically confined, local market; and
- the unconscionable conduct provisions of the TPA extend beyond the equitable and common law doctrines of unconscionability and the bargaining practices leading to the formation of a contract.[1]

Conduct of the inquiry

1.3 On 27 May 2010, the bill was introduced into the House of Representatives. It was automatically referred to the Senate Economics Legislation Committee under the terms of a resolution passed by the Senate on 13 May 2010.

1.4 The committee advertised the inquiry in *The Australian* newspaper and on the committee's website. It also wrote to stakeholders, inviting written submissions by 4 June 2010. The committee received nine submissions, which are listed in Appendix 1.

1.5 The committee held a public hearing in Canberra on 9 June 2010 where it took evidence from Treasury officials, the Law Council of Australia and the National Association of Retail Grocers of Australia.

1.6 The committee thanks all who participated in this inquiry, particularly given the tight timeframe for making submissions.

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1 The Hon. Dr Criag Emerson, Second Reading Speech, *House of Representatives Hansard*, 27 May 2010, p. 4.

Structure of the report

1.7 This report has three chapters. Chapter 2 looks at the bill's amendments to section 50 of the TPA while chapter 3 examines the amendments to the unconscionable conduct provisions. Both these chapters discuss the background to the bill in the context of inquiries by this committee and the government.

Chapter 2

The section 50 provisions

2.1 This chapter examines the bill's provisions in relation to its amendments to section 50 of the *Trade Practices Act 1974* (TPA). Currently, section 50(1) of the TPA states that:

> A corporation must not directly or indirectly:
>
> a) acquire shares in the capital of a body corporate; or
>
> b) acquire any asset of a person;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

2.2 Section 50(6) of the Act clarifies the meaning of 'a market':

> In this section:
>
> market means a substantial market for goods and services in:
>
> (a) Australia; or
>
> (b) a State; or
>
> (c) a Territory; or
>
> (d) a region of Australia.

2.3 Section 50 is the key provision relating to mergers and acquisitions. Creeping acquisitions are a series of small-scale acquisitions that, individually, do not substantially lessen competition in a market, but collectively may do so over time.[1] Each of these small acquisitions is not in breach of section 50, and the series of acquisitions are therefore permissible by law.

2.4 There are currently no provisions in the TPA to prevent or limit 'creeping acquisitions'. This has been an area of recurring concern for this committee. It recommended in a 2004 inquiry that 'provisions should be introduced into the Act to ensure that the Australian Competition and Consumer Commission (ACCC) has powers to prevent creeping acquisitions which substantially lessen competition in a market'.[2]

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1 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 27 May 2010, p. 1.

2 Senate Economics References Committee, *The effectiveness of the Trade Practices Act in protecting small business*, March 2004, p. xviii and p. 64. Government (Coalition) Senators did not support this recommendation. p. 89.

The bill's provisions on section 50

2.5 The bill deletes the word 'substantial' from section 50(6). The Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, explained that this would remove the risk that a court could adopt the view that acquisitions in geographically confined markets may not be considered substantial and therefore not fall within the scope of section 50.[3] It is important to note, however, that this amendment does not oblige the ACCC to examine the competitive impact of an acquisition on small markets. It is simply a clarification that it can, and that it is a relevant factor where there are issues.[4]

2.6 The bill also amends section 50 to replace references to 'a market' with references to 'any market'. The amendment will clarify the ability of the ACCC or a court to consider multiple markets when assessing mergers. In other words, a business cannot challenge a decision to block a proposed acquisition on the grounds that the substantial lessening of competition would be in a market other than the primary market in which the acquisition would occur.[5] The ACCC will be able to examine the effects of a proposed merger in both upstream and downstream markets.

2.7 The Minister explained that together, these amendments will clarify the operation of section 50 as it is currently interpreted by the ACCC, as set out in its November 2008 publication, *Merger Guidelines*.[6]

Acquisition of greenfield sites

2.8 In addition, the government proposes to ensure that the ACCC can examine the acquisition of greenfield sites and not just existing businesses. There have been some queries as to whether the ACCC has the power to review acquisitions of greenfield sites. In particular, the government's intent is to ensure that the ACCC can review acquisitions by the major supermarket chains of interests in new sites to investigate whether such acquisitions could substantially lessen competition.[7]

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3 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 27 May 2010, p. 2.

4 See Mr Dave Poddar, Law Council of Australia, *Proof Committee Hansard*, 9 June 2010, p. 13.

5 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 27 May 2010, p. 2.

6 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 27 May 2010, p. 1.

7 The Hon. Craig Emerson, 'Government to secure powers to deal with creeping acquisitions', *Media Release*, 22 January 2010.

Senate Economics Committee's inquiries

2.9 This committee has examined the issue of creeping acquisitions in the context of section 50 on two previous occasions during this parliamentary term. In August 2008, the committee reported on the provisions of the Trade Practices (Creeping Acquisitions) Amendment Bill 2007.[8] The bill was introduced into the parliament by Family First Senator Steve Fielding in September 2007. In May 2010, the committee reported on the provisions of the Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009. This bill was introduced into the parliament by independent Senator Nick Xenophon on 26 November 2009.[9]

2.10 Senator Fielding's bill advocated a timeframe within which the courts and the ACCC would be directed to determine whether an acquisition had the effect of substantially lessening competition. It proposed that an acquisition could be prohibited if it and any one or more other acquisitions by the company in the previous six years together have the effect, or are likely to have the effect, of substantially lessening competition.

2.11 The committee report on Senator Fielding's bill recommended that the Senate defer its consideration until the Government's legislation on creeping acquisitions is presented.[10]

2.12 Senator Xenophon's bill proposed that a corporation that already has a substantial share of a market would be prohibited from acquiring shares or an asset which would have the effect of lessening competition in a market. The bill also proposed a lower threshold for the section 50(1) prohibition, replacing a 'substantial' lessening of competition with a 'material' lessening of competition.

2.13 The Committee's report rejected the 'Richmond Amendment'. It argued that setting a percentage market share threshold would be both arbitrary and contentious. If the threshold is set too low, it may prevent relatively small firms with a sizeable share of a local market from merging to increase efficiency and competitiveness.[11]

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8 Standing Committee on Economics, *Trade Practices (Creeping Acquisitions) Amendment Bill 2007*, August 2008.

9 Senate Economics Legislation Committee, *Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009*.

10 Standing Committee on Economics, *Trade Practices (Creeping Acquisitions) Amendment Bill 2007*, August 2008, p. 9.

11 Senate Economics Legislation Committee, *Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009*, p. 26.

The government's inquiry process

2.14 The Australian Labor Party pledged prior to the 2007 federal election that in office, it would enact laws to deal with creeping acquisitions by amending section 50 of the TPA.

2.15 In July 2008, the ACCC released its report into the competitiveness of retail prices for standard groceries. Although it noted that creeping acquisitions do not appear to be a significant current concern in the supermarket retail sector, the ACCC supported the introduction of a general creeping acquisition law. It noted that given 'particular structural features' of the retail supermarket industry, 'creeping acquisitions are a potential area of concern'.[12]

2.16 The Second Reading Speech to this bill notes that following the ACCC's report, the government subsequently undertook 'extensive public consultations in 2008 and 2009 to seek the community's view on possible reform options'.[13] These consultations were initiated through two government discussion papers. The first, released in September 2008, noted two possible approaches to addressing concerns about creeping acquisitions:

- to prohibit a corporation from making an acquisition if, when combined with acquisitions made by the corporation within a specified period, the acquisition would be likely to substantially lessen competition in a market; or
- to add a new prohibition to section 50 whereby a corporation must not make an acquisition if it already has a substantial degree of power in a market, and the acquisition would result in any lessening (as opposed to substantial lessening) of competition in the market.[14]

2.17 The committee notes the strong similarities between these proposals and Senators Fielding and Xenophon's private members bills (see above).

2.18 The government released a second discussion paper in May 2009. This paper invited comment on two further options to implement a creeping acquisitions law:

- to prohibit mergers and acquisitions that enhance a corporation's existing substantial market power where a direct or indirect acquisition of shares or assets 'would have the effect, or be likely to have the effect, of enhancing that corporation's substantial power in that market' (thereby avoiding the phrase 'substantial lessening of competition'); or

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12 ACCC, 'Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries', July 2008, p. xxi.

13 The Hon. Dr Craig Emerson, Second Reading Speech, *House of Representatives Hansard*, 27 May 2010, p. 1.

14 Treasury, First Discussion Paper—Creeping Acquisitions, http://www.treasury.gov.au/documents/1409/PDF/Discussion%20Paper%20-20Creeping%20Acquisitions.pdf (accessed 9 June 2010).

- to give the Minister the power to unilaterally 'declare' a corporation where s/he has concerns about potential and/or actual competitive harm from creeping acquisitions.[15]

2.19 On 22 January 2010, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, announced that the government will move to ensure that the ACCC has the power to reject acquisitions that would substantially lessen competition in any local regional or national market. As chapter 1 noted, the bill was introduced into the parliament on 27 May 2010.

Views on the 'creeping acquisitions' provisions

2.20 This section canvasses the comment the committee received on the creeping acquisitions provisions in the bill. The majority of this comment related to the amendment to section 50(6) and the implications of removing the word 'substantial' for the ACCC's analysis of mergers and acquisitions.

A minor clarification

2.21 Several submitters to both this inquiry and the committee's inquiry into the Richmond Amendment in April this year expressed the view that the section 50 amendments are merely a clarification of existing understanding and practice.

2.22 The ACCC have stated they already consider the competitive effects of an acquisition on a local market when assessing section 50(1) cases. Mr Tim Grimwade told the committee:

> We act on the basis, and have acted on the basis, that we have jurisdiction to deal with local markets. In fact, it is an incredibly important part of merger review, because there are so many retail acquisitions of import that occur in local markets, and we have blocked transactions where mergers occur in local markets on the basis of local markets. There has been some legal doubt expressed to us whether a substantial market encompasses a local market. The government's announcement to ensure that it is clear that a local market can be a substantial market does shore up our ability to deal with mergers in local markets.[16]

2.23 The Law Council argued that of all the options raised over the past few years to reform section 50, this bill's proposals are 'least objectionable' because they largely clarify existing merger law and practice.[17] Mr Dave Poddar, the Chair of the Law Council's Trade Practices Committee, elaborated:

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15 Treasury, Second Discussion Paper—Creeping Acquisitions, http://www.treasury.gov.au/documents/1530/PDF/Discussion_paper_Creeping_Acquisitions.pdf (accessed 9 June 2010).

16 Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009; Mr Tim Grimwade, *Committee Hansard*, 9 April 2010, p. 32.

17 Law Council of Australia, *Submission 1*, p. 2.

> …our committee notes that the proposed amendments are largely pragmatic responses to the government's desire to implement legislative change to account specifically for the possibility of harmful creeping acquisitions not caught by the current legislation. As such, and taking into account the governmental commitment to amending section 50 of the TPA, our committee believes the proposed amendments are the least objectionable because they largely clarify the existing merger law and practice without making substantial and unnecessary amendments to the operation of section 50 of the act, retain the economic rationality of the current merger test and are consistent with the existing architecture of the substantial lessening of competition test in section 50 and other provisions in part IV of the TPA.[18]

2.24 The Law Council argued that in its opinion, that ACCC already considers the effects on a local market when considering the provisions of section 50(1). In evidence during the committee's hearing into the Richmond Amendment in April this year, the Law Council noted that:

> The ACCC, when looking at the Woolworths acquisition of those FAL stores in Perth, undoubtedly looked at each individual local area as a separate market and considered the acquisition in each separate local market. I was advising the ACCC.[19]

2.25 Mr Milton Cockburn, Executive Director of the Shopping Centre Council of Australia was asked his opinion of the government's proposed change to section 50. He responded:

> …my understanding of Minister Emerson's media statement in January was that it was a clarification. I think, if you look at a lot of the mergers and acquisitions that have been examined by the ACCC, they have got down to the nitty-gritty of local markets. I think someone has referred to the Woolworths acquisition of FAL and its acquisition of some of the old Franklin sites, the recent Caltex-Mobil examination and the Westfield acquisition of the AMP Shopping Centre Trust. In all of these cases, my understanding is that the ACCC looked at the impact upon local markets. My understanding is that a legal opinion was floating around that said, by examining the impact on the local markets, the ACCC was possibly in contravention of the Trade Practices Act simply because the word 'local' is not mentioned; it refers to…national or state regional markets but not local markets.[20]

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18 Mr Dave Poddar, *Proof Committee Hansard,* 9 June 2010, p. 9.

19 Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009; Dr Phillip Williams, *Committee Hansard*, 9 April 2010, p. 17.

20 Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009; Mr Milton Cockburn, *Committee Hansard*, 9 April 2010, p. 34.

The need for more action

2.26 Other witnesses and commentators have argued that the amendments to section 50 are indeed minor and they needed to go further. For example, the Motor Trades Association of Australia (MTAA) expressed doubt as to whether the bill addresses its concerns about creeping acquisitions. It noted in its submission that throughout the inquiry process, the MTAA has supported a more significant change to the Act. Its preference is for a provision prohibiting 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 (see paragraph 2.16).[21]

2.27 *Choice* was quoted in the *Australian Financial Review* as saying that the bill simply reinforces the powers the ACCC already has. Mr David Howarth, *Choice*'s senior policy officer said that the bill therefore does not address the issue of creeping acquisitions.[22] In the same article, Minter Ellison partner Mr Richard Murphy was quoted as saying:

> It doesn't matter if it's a geographically large market or a geographically small market, at the end of the day it has to be recognisable as an economic concept as a separate market.[23]

2.28 Mr Ken Henrick, Chief Executive Officer of National Association of Retail Grocers of Australia (NARGA), told the committee that the effectiveness of the legislation will depend on the ACCC's response.[24] On this score, however, he argued that the ACCC had failed in the past:

> They have had laws like this. For example, the Baird committee recommended including the word 'regional' so that a smaller market could be looked at. They were trying to do in the context of 1999 what this bill is trying to do now. It has had no effect on the way the ACCC has operated.[25]

Micromarkets

2.29 The committee asked Treasury why it was necessary to remove the word 'substantial' from section 50(6). Treasury noted the comments of Justice French in the Federal Court case of *AGL v ACCC*.[26] Justice French observed that there were

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21 Motor Trades Association of Australia, *Submission 7*, p. 2.

22 Sam McKeith, 'TPA reform wins few supporters', *Australian Financial Review*, 28 May 2010, p. 3.

23 Sam McKeith, 'TPA reform wins few supporters', *Australian Financial Review*, 28 May 2010, p. 3.

24 Sam McKeith, 'TPA reform wins few supporters', *Australian Financial Review*, 28 May 2010, p. 3.

25 Mr Ken Henrick, *Proof Committee Hansard*, 9 June 2010, p. 19.

26 *Australian Gas Light Company v ACCC* [2003] FCA 1525

circumstances in which a substantial lessening of competition (section 50(1)) could arise in a particular market, but because it was not held to be substantial (section 50(6)) it might fall outside of the ACCC's ability to block that acquisition.[27]

2.30 However, the Law Council expressed concern that the proposed amendments will result in the ACCC undertaking greater analysis of 'very small submarkets which are not economically distinct' and should not form part of the ACCC's section 50 assessment.[28] Mr Poddar was asked his opinion on how to define the smallest market for which section 50 concerns might arise. He responded:

> It has to be something meaningful to the level of competition. We do not have something which creates thresholds of turnover, as some countries do. The commission has the ability to come in and look at markets which may involve very small amounts of commerce if the products which are in those markets are critical and relevant to products or sales of different products. It is not possible to give you a definitive answer as to how small that number could be. I am aware that the commission has looked into mergers which are in a numeric matter of $4 million, over the years that I have been a practitioner on the other side of the commission. I have been in transactions where the commission has looked into mergers involving $250,000. Hence some of our comments about the fact that we need to be very mindful about just how far regulators move down into commerce and what actually is a significant degree of commerce.[29]

2.31 The Business Council of Australia (BCA) has also expressed concern that the amendment to section 50(6) of the Act will have the effect of 'unnecessary examination of less than economically meaningful markets that are not substantial'. It argued that this would create unnecessary burdens and costs for business which would in turn dampen economic activity and investment. The BCA recommended that the bill should provide for a review of its effect after two years.[30]

Spillover effects

2.32 The Law Council also expressed concern at the effect of the bill's amendments on industry sectors other than supermarkets. Mr Poddar told the committee that the amendments will apply across all industry sectors, including to those sectors about which no concerns have been raised. He argued that while the intention of the bill is a general amendment, there is a need for the ACCC to minimise

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27 *Australian Gas Light Company v ACCC* [2003] FCA 1525, paragraph 353. Justice French noted that the 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 section 50(6).

28 Law Council of Australia, *Submission 1*, p. 3.

29 Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, p. 13.

30 Business Council of Australia, *Submission 5*, p. 2.

extra cost to industry by being mindful of how it administers across sectors where there have not been concerns.[31]

2.33 Mr Gerard van Rijswijk, Senior Policy Advisor at NARGA, dismissed these 'spillover' concerns as largely irrelevant. He told the committee that:

> …if other industries were not as concentrated, they would not be as affected. The problem is concentration. Section 50 deals with the competitive issues that result from overconcentration in relation to acquisitions and mergers. If the other industries do not have that problem then they will have nothing to worry about.[32]

Market size or market power?

2.34 In its evidence to the committee, the Law Council distinguished between the use of the word 'substantial' in section 50(1) and in section 50(6). In section 50(1), the word is used in the context of the effect of the acquisition on competition. In section 50(6), 'a substantial market' relates to the scale of the market in which the competition takes place. Mr Poddar expressed the Law Council's concerns at the bill's amendment to section 50(6) through a sporting analogy:

> Our concern that the football field, or the field in which the dynamics of competition are assessed, does not become tiny—that it does not in fact become the square in which the ball is bounced. The appropriate market is the football field so you can see all the dynamics of competition.[33]

2.35 It was put to Mr Poddar that the key issue is not the size of the field (market size) but the unequal number of players on the teams (market share). He responded:

> It is not the market share that it is important; it is the conditions of competition. It is the entry barriers, the ability for people to enter into that football field and compete vigorously. We think it is wrong to look and focus too narrowly on concentration figures because concentration figures do not show the real dynamics of competition. They do not show a vigorous new entrant who comes in and competes vigorously whether it is a tall ruckman or a fantastic rover. What you should be looking at is how that competition actually occurs on the football field, not the shares of those football fields because competition changes every day.[34]

2.36 Other submitters disagreed with this analysis and emphasised the importance of market share in the context of assessing mergers. NARGA, notably, told the committee that:

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31 Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, p. 12.

32 Mr Gerard van Rijswijk, *Proof Committee Hansard*, 9 June 2010, p. 20.

33 Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, p. 10.

34 Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, p. 10.

> …the real nub of competition is having many competitors, each having a small share of the market, competing with each other and improving the market as a whole. That is competition, and nobody seems to think of that as the model of competition on which the Trade Practices Act should be based or should regulate. In fact, the act has no definition of competition. It just assumes everybody knows what it is.[35]

The Herfindahl-Hirschman Index

2.37 NARGA referred in its submission to the Herfindahl-Hirschman Index (HHI). The Index is a measure of the size of firms in relation to the industry and an indicator of the amount of competition among them. It is defined as the sum of the squares of the percentage market shares of each individual firm.[36]

2.38 The HHI can range from 0 to 10 000 moving from a very large amount of very small firms to a single monopolistic producer. Where there are only two firms of equal size, the HHI will be 5000. Where there are many firms of different size and the HHI is around 1000, for example, the degree of concentration is equivalent to ten firms of equal size.

2.39 NARGA noted that in other jurisdictions, notably the United States, the quantification of market share is an important part in the merger approval process. It observed that:

> In the USA a post merger market with a HHI of less than 1000 is defined as 'unconcentrated', between 1000 and 1800 as 'moderately concentrated' and above 1800 as 'highly concentrated'. A merger potentially raises 'significantly competitive concerns' if it produces an increase in the HHI of more than 100 points in a moderately concentrated market or more than 50 points in a highly concentrated market. A merger is presumed 'likely to create or enhance market power or facilitate its exercise' of it produces an increase in the HHI of more than 100 in a highly concentrated market.[37]

2.40 Mr van Rijswijk contrasted the approaches of the Australian and American regulators in their use of the HHI:

> The US regulators look at a market of 1,000 or higher post merger as being of concern. The ACCC, where our markets are much more concentrated already, do not bother looking at the market until it is over 2,000. That is a much higher level of concentration. In fact 2,000 in terms of the regulator in the USA is above their 1,800 threshold which they regard as highly concentrated. That is significant in the USA context because at that level of concentration antitrust laws kick in where they can actually require the market to be split up. We do not have those provisions in the act. The US regulators are quite active on the concentration issue. They see

35 Mr Gerard van Rijswijk, *Proof Committee Hansard*, 9 June 2010, p. 17.

36 National Association of Retail Grocers of Australia, *Submission 4*, p. 2.

37 National Association of Retail Grocers of Australia, *Submission 4*, p. 4.

> concentration as being the major problem in the lack of competition within the market.[38]

2.41 Treasury was asked why the HHI was not a greater determinant in the merger and acquisition approval process in Australia, as it is in the United States. Mr Andrew Deitz responded:

> One of the things I would point out is that the HHI is one of many indicators used by the commission when considering the state of competition in a particular market, as it is with the US. Market shares are always a factor that everyone does consider, but I would not place it any higher than it is—something which is a factor considered in a broader competition analysis. So the reference to the USA merger guidelines and the extent to which they talk about HHIs, yes, they do have a view about what the numbers mean; but it is a rebuttable presumption.[39]

2.42 Treasury also noted that the merger guidelines published in the United States this year diminished the importance of market shares as determinative in looking at whether a merger is likely to substantially lessen competition.[40] The committee notes the following observation in the guidelines:

> The purpose of these thresholds is not to provide a rigid screen to separate acceptable mergers from anticompetitive transactions, although high levels of concentration do raise concerns. Rather, they provide one way to identify those mergers for which it is particularly important to examine whether other competitive factors confirm, reinforce, or would counteract the potentially harmful effects of increased concentration. The higher the post-merger HHI and the increase in the HHI, the greater is the likelihood that the Agencies will request additional information to conduct their analysis.[41]

'Any market'—the section 50(1) amendment

2.43 The committee received some comment on the bill's amendment to section 50(1), changing 'a market' to 'any market'. The MTAA welcomed the amendment stating it should allow the ACCC to consider all markets in which the acquirer is active in relation to any merger matter.[42]

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38 Mr Gerard van Rijswijk, *Proof Committee Hansard*, 9 June 2010, p. 18.

39 Mr Andrew Deitz, *Proof Committee Hansard*, 9 June 2010, p. 5.

40 Mr Andrew Deitz, *Proof Committee Hansard*, 9 June 2010, p. 5. The proposed US Guidelines have been released for public comment: http://www.ftc.gov/os/2010/04/100420hmg.pdf (accessed 10 June 2010).

41 *Horizontal Merger Guidelines: For public comment*, Released 20 April 2010, p. 18; http://www.ftc.gov/os/2010/04/100420hmg.pdf (accessed 10 June 2010).

42 Motor Trades Association of Australia, *Submission 7*, p. 2.

2.44 While supporting the change, NARGA argued that the phrase 'any market' needs to be clarified. It noted that the grocery market is composed of a number of subsets from the full range of grocery products supplied through a large supermarket, to packaged groceries, fruit and vegetables, meat, delicatessen goods, milk and bread. Each of these markets could be differentially affected by an acquisition in a local market. NARGA urged for guidelines to explain how the ACCC will interpret the 'any market' definition.[43]

2.45 Master Grocers Australia and Liquor Retailers Australia supported NARGA's proposal. They argued in their submission that:

> The inclusion of the word "any" should enable the ACCC to embrace the impact on all markets that are likely to be affected by an acquisition rather than being limited to a single market. There is no doubt that in order to ensure that the amendments are effective, they need to be tested and MGA supports the views expressed by National Association of Retail Grocers Australia (NARGA) in its submission, in particular, the call for Guidelines which would provide a clear interpretation of the amended clauses.[44]

Committee view

2.46 The committee supports the government's proposed amendments to section 50 of the TPA. While the amendments may seem fairly minor points of clarification, it is important that the regulator, the courts and the public at large understand that the ACCC can consider a local market in their assessment of section 50.

43 NARGA, *Submission 4*, p. 5.

44 Master Grocers Australia, *Submission 6*, p. 2.

Chapter 3

The unconscionable conduct provisions

3.1 This chapter examines the bill's provisions on 'unconscionable conduct' relating to section 51AC of the *Trade Practices Act (1974)* (TPA). As with the amendments to section 50, these provisions have also been derived from inquiries by this committee and a government process.

Senate Economics Committee inquiry

3.2 In December 2008, this committee tabled its report into the need for a statutory definition of 'unconscionable conduct' in section 51AC of the TPA. The inquiry was established by independent Senator Nick Xenophon.

3.3 The committee recommended in its report that the federal government engage industry participants in an inquiry process to consider whether a clear list of examples and a statement of principles would enhance the 'unconscionable conduct' provisions of the TPA.[1] The committee argued that:

> Properly drafted, through the consultative process recommended,…a list of these principles would provide another useful option to clarify section 51AC for the courts and the parties involved…A list of principles would also act as a deterrent to larger businesses in a way that section 51(3) does not.[2]

The expert panel

3.4 In response, the Minister for Competition Policy and Consumer Affairs, the Hon. Dr Craig Emerson MP, convened an expert panel to consider the issues raised in this committee's inquiry.[3] On 27 November 2009, the Minister appointed Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall to the expert panel. He asked the panel to consider whether a list of examples that all parties agree constitute unconscionable conduct, or a statement of principles concerning unconscionable conduct, should be incorporated into the TPA.

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1 Senate Economics Legislation Committee, 'The need , scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, p. 39.

2 Senate Economics Legislation Committee, 'The need , scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, p. 38.

3 The Hon. Dr Craig Emerson, 'Expert panel on Franchising', *Media Release*, http://www.franchise.org.au/lib/pdf/media/articles/2009/november/expert_panel_on_franchising.p Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall have been appointed to the expert panel.df (accessed 10 June 2010).

3.5 The same day, the government released an issues paper prepared by Treasury to canvass stakeholder views of the proposals on unconscionable conduct discussed in this committee's report. The paper was drawn to the attention of key stakeholders in the franchising, retail tenancy, business and academic sectors and was circulated to Commonwealth, state and territory governmental agencies dealing with consumer protection, small business and retail tenancy issues.[4]

3.6 The panel provided the Minister with their report in February 2010. These experts were assisted in their inquiry by Treasury officials and officers from the Department of Innovation, Industry, Science and Research.

Examples and test cases

3.7 The expert panel found that a list of examples will not improve the understanding or implementation of the unconscionable conduct provisions in section 51AC. It gave three reasons. First, examples may create 'a false sense of expectation' in those who read them:

> It is easy to imagine small business owners who feel hard done by in their transactions with larger businesses, reading the examples of unconscionable conduct and adopting the view that their specific circumstances match one of them. This could lead many to invest significant resources in terms of time, effort and money in pursuing a case, only to discover that a court, in considering the particular circumstances, finds that the conduct is not unconscionable.[5]

3.8 Second, the panel argued that a list of examples is unlikely to remain current as community expectations change and with them change thereby the understanding and meaning of unconscionability. The panel considered it too legislatively and administratively burdensome for a list of statutory examples to be updated over time.[6]

3.9 The panel's third objection to statutory examples relates to the need to develop interpretation of the provisions. It argued that the mere presence of examples may serve as an indication that parliament has set the general bounds of the provision. The panel observed in its report that:

> …many submissions point to a judicial tendency to reading examples as though they limit the scope of the provisions they exemplify. This may be

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4 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, Appendix A. http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FCCFinal100302.pdf (accessed 10 June 2010).

5 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 23.

6 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 26.

> particularly the case in lower courts or tribunals, where decision-makers may be reluctant to step outside the bounds of the examples.[7]

Test cases

3.10 This committee recommended in its December 2008 report that the ACCC pursue targeted investigation and funding of test cases into the unconscionable conduct provisions.[8] While not supporting a list of statutory examples, the expert panel did note the importance of bringing further test cases to develop national guidance on the unconscionable conduct provisions. It considered that these test cases are examples of unconscionable conduct and that 'publicising these cases will bring greater community understanding of the provisions'. The panel also noted that the new provisions arising out of its report would benefit from 'appropriate test cases being brought, and reported through guidance material'.[9]

Interpretive principles

3.11 The expert panel did argue that interpretative principles 'would assist the courts in interpreting the provisions, stakeholders in understanding them and regulators in enforcing them'. In particular, it noted that the principles should recognise that section 51AC is intended to go beyond the scope of the equitable and common law doctrines of unconscionability in section 51AA.[10]

3.12 The expert panel explained in its report the nature and purpose of the proposed 'interpretative' principles. It noted that some of the submissions to its inquiry suggested inserting principles that indicate what appropriate behaviour from a business might be, and where there may or may not be strict legal consequences should a business not comply with that behaviour.[11] Other submissions noted that principles could serve as a guide to interpretation of the provisions, and may or may not be mandatory considerations.[12] The panel's preference for 'interpretive' principles was based on the objective of:

> …assisting the courts and other stakeholders in interpreting the provisions. Principles of business conduct are closer to examples, which the panel has already examined. Guiding principles of interpretation provide an

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7 Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 26.

8 Senate Economics Legislation Committee, 'The need , scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, p. 39.

9 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 36.

10 Treasury, Department of Innovation, Industry Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. ix.

11 Submission by the RTAWA, pp. 2–3.

12 Submission by the Motor Traders Association of Australia, pp. 3–4.

indication of the law's effect without unduly confining the law's development.[13]

3.13 The panel recommended that the following three interpretive principles:

- that the prohibition against unconscionable conduct in the TPA is not limited to the equitable or common law doctrines of unconscionable conduct;
- unconscionable conduct is not limited to the bargaining practices leading to the formation of a contract but can also be apparent in the way a party exercises its rights under a contract or the way in which a party behaves once a contract is made; and
- unconscionable conduct applies to systemic conduct or patterns of behaviour and there is no need to identify a person at a disadvantage in order to attract the prohibition.[14]

Provisions of the bill

3.14 The bill adopts all the panel's recommendations concerning unconscionable conduct, including the interpretative provisions. The bill proposes to insert the following words into the Act, which will form section 21(4) of the *Competition and Consumer Act 2010*:

> 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.

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13 Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 29.

14 Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. ix. http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FCCFinal100302.pdf (accessed 10 June 2010).

3.15 The bill also consolidates the previous sections 51AB and 51AC of the TPA in order to remove the distinction between business and consumer transactions with regard to unconscionable conduct.[15]

Views on the 'unconscionable conduct' provisions

3.16 Treasury acknowledged in its evidence that 'there is obviously some controversy around the scope and nature of unconscionable conduct'. Indeed, this is partly what has prompted the recommendation of the panel to insert interpretative principles and the government's acceptance of this recommendation.[16]

3.17 The bill has not resolved this controversy, however. The Shopping Centre Council of Australia, notably, argued in its submission that the bill's provisions create potential for the scope of statutory unconscionability to be expanded beyond the sensible limits that were intended by the parliament in 1998. The Council reiterated its position that:

> …there is no evidence that the unconscionable conduct provisions in the present Part IV of the Act are confusing to the courts, or to relevant tribunals; nor to the body given primary responsibility for enforcing these provisions, the Australian Competition and Consumer Commission.[17]

3.18 The Australian Chamber of Commerce and Industry also argued that the interpretive principles 'will greatly widen' the ability of courts to interpret those sections relating to unconscionable conduct beyond the original intention of the parliament.[18]

3.19 The Motor Trades Association of Australia (MTAA), on the other hand, argued that the principles will not provide the necessary guidance for the courts to identify cases of unconscionable conduct. It noted in its submission that:

> For small business operators one of the major difficulties is that 'unconscionable' conduct is a difficult concept to prove. The factors to be listed in the new section 22 of the Competition and Consumer Act are not of themselves determinative of a breach of the unconscionable conduct provision and the courts have found that there must be something more than 'hard bargaining' on the part of the stronger party to sustain a case of

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15 This was also recommended by the expert panel. Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 17. http://www.innovation.gov.au/Section/SmallBusiness/Documents/ExpertPanelReportUCC_FCCFinal100302.pdf (accessed 10 June 2010).

16 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 7.

17 Shopping Centre Council of Australia, *Submission 3*, p. 1. See also Treasury, Department of Innovation, Industry, Science and Research, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, p. 20.

18 Australian Chamber of Commerce and Industry, *Submission 3*, p. 1.

> unconscionable conduct. Many businesses that operate under contractual arrangements (such as franchise agreements) are in a 'captive' situation and MTAA does not believe that the current law deals effectively with inappropriate behaviour by larger business in such circumstances.[19]

3.20 The committee asked Treasury officials whether the interpretive principles will assist the courts to identify 'unconscionable conduct'. Mr Simon Writer responded:

> The interpretive principles are designed to give greater clarity about where the courts can go with the provision so that it is clear to the court that it is not bound by the equitable principles around unconscionable conduct that have traditionally been understood to apply. The other principles make it clear that the courts can go to matters that perhaps have been considered previously to be beyond the sorts of things that courts can look at so that it can go beyond procedural unconscionability into issues of substantive unconscionability and can look at cases that involve patterns of behaviour and do not require the ACCC or another regulator—or whoever is bringing the action—to point to particular persons, which has obviously been a big concern in this area, but to these patterns of conduct.[20]

3.21 The Law Council told the committee that it is important that one of the interpretive principles is to remove the connection from the legal concept of a special disadvantage to the person who is the victim of the unconscionable conduct.[21] This is consistent with the widely held view that section 51AC of the TPA extends beyond procedural disadvantage to substantive disadvantage.[22]

Principles, not examples

3.22 The Law Council commented that the changes to section 51AC are 'appropriate' to provide further safeguards for consumers.[23] Mr Stephen Ridgeway, Deputy Chair of the Law Council, commended the expert panel for their work. In particular, he argued that the panel was correct to focus on principles rather than examples of unconscionable conduct:

> …it is far preferable to make the changes that have been made rather than trying to cement examples of particular types of conduct. The concept of unconscionability has been around for a long time in our law, but it has perhaps become fixed in certain principles. What these amendments attempt to do is break some of those connections, which is an appropriate change,

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19 Motor Trades Association, *Submission 7*, p. 2.

20 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 2.

21 Mr Stephen Ridgeway, *Proof Committee Hansard*, 9 June 2010, p. 14.

22 Senate Economics Legislation Committee, 'The need , scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the *Trade Practices Act 1974*', December 2008, pp. 3–8.

23 Law Council of Australia, *Submission 1*, p. 5.

> rather than trying to pick specific examples of conduct that may mislead people about the extent of unconscionability. The principle of equity in our law was designed to be flexible—there is the old saying that the law is that categories of equity are not closed…Some things which are unconscionable in one circumstance may not be in another, and you are really going to limit the application of the concept.[24]

3.23 Mr Dave Poddar, Chair of the Law Council's Trade Practices Committee, also argued that the panel's approach is sound. He told the committee that while examples are necessarily fact based, principles are preferable 'because they are less likely to tie the law down to particular fact based situations'.[25]

Wider enforcement

3.24 Treasury also noted in its evidence that the provisions on unconscionable conduct will form part of the new Australian Consumer Law and as such will apply nationally to corporations and to the laws of each of the states and territories. They will be enforceable in Commonwealth and in state and territory courts. Treasury anticipated that regulators and individual claimants would thereby be able to bring actions much more cheaply than they could through the Federal Court.[26] It noted that these broader avenues for public enforcement are consistent with the government's in principle acceptance of the expert panel's favour for more test cases on the unconscionable conduct provisions (see paragraph 3.10, above).[27]

Committee view

3.25 The committee is pleased that the government—acting on the recommendation of the expert panel—is legislating for the inclusion of a list of statutory principles to clarify the unconscionable conduct provisions of the TPA. It believes it is important that the Act state explicitly that these provisions extend beyond the equitable and common law doctrines of unconscionability. To this end, the committee urges the government and the ACCC to heed the advice of the expert panel and pursue test cases to develop national guidance on the new provisions.

Recommendation 1

The committee recommends that the Senate pass the bill.

Senator Annette Hurley

Chair

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24 Mr Stephen Ridgeway, *Proof Committee Hansard*, 9 June 2010, p. 14.

25 Mr Dave Poddar, *Proof Committee Hansard*, 9 June 2010, pp. 14–15.

26 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 2.

27 Mr Simon Writer, *Proof Committee Hansard*, 9 June 2010, p. 7.

Minority Report by Senator Xenophon

1.1 The *Competition and Consumer Legislation Bill 2010* addresses the issues of creeping acquisitions and unconscionable conduct currently defined under Section 50 and 51 of the Trade Practices Act.

Creeping Acquisitions

1.2 Under the Trade Practices Act, creeping acquisitions are a series of small-scale acquisitions that, individually, do not substantially lessen competition in a market, but collectively may do so over time[1].

1.3 Section 50(1) of the Trade Practices Act states:

> A corporation must not directly or indirectly:
>
> a) acquire shares in the capital of a body corporate; or
>
> b) acquire any asset of a person;
>
> if the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in a market.

The market is then defined under Section 50(6) as being "a substantial market for goods or services in Australia, a State, a Territory or a region of Australia".

1.4 Under the Competition and Consumer Legislation Bill 2010, the word 'substantial' will be deleted and the term 'any market' will replace references to 'a market'.

This will address the inclusion of local markets, as is currently the interpretation used by the ACCC, and also will remove the risk that a court could adopt the view that acquisitions in geographically confined markets may not be considered 'substantial' and therefore not be considered under Section 50 of the Trade Practices Act.

1.5 Some of the comments to the Competition and Consumer Legislation Bill 2010 include that the Bill puts into legislation what is the current interpretation by the ACCC, and in that regard is ineffective.

1.6 Associate Professor Frank Zumbo from the University of New South Wales says:

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1 Law Council of Australia, *Submission 1*, p. 5.

> "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."[2]

1.7 In comparison, the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) sought to strengthen sections 50 (1) and 50 (2) of the *Trade Practices Act 1974* by tightening the test for proposed mergers or acquisitions, and to prevent 'creeping acquisitions'.

1.8 The Private Senator's Bill was referred to the Senate Economics Committee for inquiry and the majority report recommended that the Senate not pass the Bill.

1.9 The Bill was introduced in part in response to the case of small business owners, William and Samira Fares, who have owned and operated an independent United service station in the Adelaide suburb of West Richmond for the last twenty years.

1.10 In late 2009 the Fares were notified that supermarket giant, Woolworths, who currently shares 44 percent of the petrol market and 80 of the dry packaged goods market with its direct competitor, Coles, applied to lease the land adjacent to the Fares on Marion Road, and submitted plans for a service station to be built on this site.

1.11 The impact of this aggressive tactic, the Fares' believe, will result in them being priced out of business and forced to close.

> "If a Woolworths site ends up being next door to us then I am pretty sure that within no time, three months, six months or whatever it might be, that our doors will close. That is what I believe because they can afford to go as low as they can."

1.12 The Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill sought to address instances such as these, where corporations who already hold a substantial share of a market would be prevented from acquiring shares or an asset (in this case, leasing land) that would have the effect of lessening competition in the market.

1.13 Meanwhile, this Bill will not address the concerns highlighted by the Richmond Amendment, rather will only put into legislation what is currently in practice.

Recommendation 1

That the bill be amended to incorporate the provisions as contained within the Trade Practices Amendment (Material Lessening of Competition – Richmond Amendment) Bill 2010.

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2 Associate Professor Frank Zumbo, University of NSW – Media Release, 27 May 2010.

Unconscionable conduct

1.14 The Trade Practices Act does not currently include a statutory definition and it was not recommended that a definition be inserted under the Competition and Consumer Legislation Bill 2010.

1.15 However this Bill will insert interpretative principles within the Act, stating that:

- the prohibition against unconscionable conduct in the TPA is not limited to the equitable or common law doctrines of unconscionable conduct;
- unconscionable conduct is not limited to the bargaining practices leading to the formation of a contract but can also be apparent in the way a party exercises its rights under a contract or the way in which a party behaves once a contract is made; and
- unconscionable conduct applies to systemic conduct or patterns of behaviour and there is no need to identify a person at a disadvantage in order to attract the prohibition and is not limited to consideration of the circumstances relating to formation of the contract.

The Government argues that a list of examples would not improve the understanding or implementation of the unconscionable conduct provisions, but that interpretive principles "would assist the courts in interpreting the provisions, stakeholders in understanding them and regulator in enforcing them."[3]

1.16 Again, this Bill will not address the concerns surrounding unconscionable conduct and behaviours.

1.17 The 2008 Senate Economics Committee inquiry into "The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974" explored the proposal by Associate Professor Frank Zumbo that the definition of unconscionable conduct rely on "nine term to guide the courts: unfair, unreasonable, harsh, oppressive, (or contrary to the concepts of) fair dealing, fair-trading, fair play, good faith and good conscience."

1.18 As stated in the Additional Comments to the 2008 Inquiry, submitted by Coalition Senators and myself, such a definition would make it clear to the courts that the term "unconscionable conduct" under Section 51 AC is to be interpreted in a manner that prohibits unethical conduct in general.

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3 Treasury, Department of Innovation, Industry Science and Research, Strengthening statutory unconscionable conduct and the Franchising Code of Conduct, February 2010, p. ix.

Recommendation 2

That a statutory definition of unconscionable conduct be included within the Bill.

Conclusion

1.19 While I broadly support this legislation and it's clarification of creeping acquisitions and unconscionable conduct, I do not believe it addresses the issues effectively, rather only clarifies what is already in practice.

1.20 Given this, I believe more needs to be done to truly ensure fair competition in the market.

Nick Xenophon
Independent Senator for South Australia

APPENDIX 1

Submissions Received

Submission Number	Submitter
1	Law Council of Australia
2	Shopping Centre Council of Australia
3	Australian Chamber of Commerce and Industry
4	National Association of Retail Grocers of Australia
5	Business Council of Australia
6	Master Grocers Australia
7	Motor Trades Association of Australia
8	Australian National Retailers' Association
9	Pharmacy Guild of Australia

Additional Information Received

TABLED DOCUMENTS

1. **Document tabled by the Law Council of Australia at a public hearing in Canberra on 9 June 2010: "Introductory Statement to Senate Economics Legislation Committee Inquiry into Competition and Consumer Legislation Amendment Bill 2010"**

APPENDIX 2

Public Hearing and Witnesses

CANBERRA, WEDNESDAY 9 JUNE 2010

DEITZ, Mr Andrew, Manager,
Infrastructure, Competition and Consumer Division, Markets Group, Treasury

HENRICK, Mr Kenneth Michael, Chief Executive Officer,
National Association of Retail Grocers of Australia

JONES, Mr David,
Senior Adviser, Competition and Law Policy, Treasury

PAINE, Mr Bruce, Principal Adviser,
Competition, Infrastructure, Competition and Consumer Division, Markets Group, Treasury

PODDAR, Mr Dave, Chair,
Trade Practices Committee, Business Law Section, Law Council of Australia

RIDGEWAY, Mr Stephen, Deputy Chairman,
Trade Practices Committee, Business Law Section, Law Council of Australia

VAN RIJSWIK, Mr Gerard, Senior Policy Advisor,
National Association of Retail Grocers of Australia

WRITER, Mr Simon, Manager,
Infrastructure, Competition and Consumer Division, Markets Group, Treasury