Law Council
OF AUSTRALIA

Mr John Hawkins
Committee Secretary
Senate Economics Committee
Department of the Senate
P O Box 6100
Parliament House
Canberra ACT 2600
via email: economics.sen@aph.gov.au

Dear Mr Hawkins,

INQUIRY INTO COMPETITION AND CONSUMER LEGISLATION AMENDMENT BILL 2010

I have the pleasure of enclosing a submission to the Senate Economics Legislation Committee (Senate Committee) in relation to its Inquiry into the Competition and Consumer Legislation Amendment Bill 2010.

The submission has been prepared by the Trade Practices Committee of the Business Law Section of the Law Council of Australia. The submission has been endorsed by the Business Law Section. Given the constraints in responding to the Senate Committee's Inquiry within the short timeframe provided, the submission has not been reviewed by the Directors of the Law Council of Australia Limited.

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

Yours sincerely,

W Grant

Bill Grant
Secretary-General

4 June 2010

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Law Council of Australia (Trade Practices Committee):
Submission to the Senate Economics Legislation Committee
Inquiry into Competition and Consumer Legislation Amendment Bill 2010

1 Introduction

1.1 The Trade Practices Committee of the Business Law Section of the Law Council of Australia (**Committee**) provides this submission to the Senate Economics Legislation Committee (**Senate Committee**) on the *Competition and Consumer Legislation Amendment Bill 2010* (**Bill**), referred to the Senate Committee for inquiry and report by the Senate on 27 May 2010.

1.2 The Committee is grateful for the opportunity to participate in the current consultation process, but notes that it was only asked to provide comments in relation to the Bill on 2 June 2010, with submissions required by 4 June 2010. Such a short timeframe raises concerns with the ability to provide a meaningful written submission which is able to fully assist the Senate Committee in relation to its consideration of the Bill. The short timeframe also makes it very difficult for consultation with the various members of the Trade Practices Committee to occur, and this makes it difficult to ensure that the submission is fully representative of the views of the membership. Accordingly, the Committee requests that the Senate Committee consider any further submissions in relation to the Bill from the Committee made during the course of the Senate Committee's review.

2 Background to the Bill

2.1 The Bill is an important piece of legislation. The provisions relating to amendments to section *50 of the Trade Practices Act 1974* (Cth) (**TPA**) in particular have developed from an ongoing review and consultation process in which the impact of 'creeping acquisitions' on Australian industry has been examined. 'Creeping acquisitions' are generally defined to be a series of small-scale acquisitions that individually may not substantially lessen competition in a market in breach of section 50 of the TPA, but collectively may have that effect over time, or have the effect of entrenching the market power or market share of dominant participants in the market.

2.2 During the course of the last two years in particular, the Federal government has been concerned that 'creeping acquisitions' may not be subject to sufficiently rigorous assessment under section 50 of the TPA resulting in detrimental affects on consumers. 'Creeping acquisitions' concerns have been raised in particular in relation to local retail markets and certain consumer retail industries, including grocery retail. While the Australian Competition and Consumer Commission ("**ACCC**") concluded that 'creeping acquisitions' were not a significant current concern in the supermarket retailing industry, in its 2008 Grocery Inquiry[1], it did express its support for the introduction of a general creeping acquisitions law.

2.3 In 2008 and 2009, the Federal government published two separate public consultation documents seeking comments on proposed options for changes to section 50 of the TPA to account for creeping acquisitions to which the Committee provided extensive responses[2]. The views set out in the Committee's submissions remain relevant.

2.4 During the course of the Federal government's previous consultations, it was evident that there was limited consensus on either:

- the options for amendment put forward in the discussion papers; or

[1] Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries, July 2008.
[2] Responses were submitted to the Treasury on 15 October 2008, 12 June 2009 and 7 August 2009. Electronic versions of these submissions are available on the Law Council website: http://www.lawcouncil.asn.au/sections/business-law/submissions/submissions_home.cfm.

- the need for any amendment to the existing section 50 merger regime

Nevertheless, the government remained committed to specific creeping acquisitions amendments to section 50 of the TPA.

3 The Committee reiterates its view that there is no need to amend Australia's merger legislation to account for 'creeping acquisitions'

3.1 The Committee reiterates the views articulated in its responses to the previous discussion papers[3] that no convincing case or arguments have been put forward to show that it is necessary to deal with so-called 'creeping acquisitions' by amending section 50 of the TPA. The current section 50 requires a "substantial lessening of competition" to be proven in relation to "a market in Australia" and is well understood in its operation.

3.2 In particular, the Committee's view is that section 50 is not deficient in the face of creeping acquisitions and does not require amendment to account for small-scale acquisitions. The Committee considers that the current "substantial lessening of competition in a market" test in section 50 of the TPA is a highly flexible one which already gives the ACCC (and the courts) the ability to take into account a wide range of factors that are relevant to the likely effect of a particular transaction on competition in a market. This view is reinforced by recent ACCC decisions and investigations which indicate that the ACCC is willing to apply the relevant provisions of the TPA to acquisitions of small assets and undeveloped retail sites, further indicating that concerns in relation to 'creeping acquisitions' are not reflected in the ACCC's current practices.

3.3 In any event, the ACCC has not been unsuccessful in seeking to prohibit a 'creeping acquisition', including in relation to the grocery sector, the sector which the Explanatory Memorandum to the Bill (**EM**) notes has previously caused concerns about the impact of such acquisitions. This suggests that legislative amendment of a merger test that is well understood and generally well administered, is actually unwarranted, particularly given that overseas regulators in comparable jurisdictions have successfully opposed acquisitions of small grocery stores by larger competitors. It is noteworthy that there is no specific prohibition concerning creeping acquisitions in the competition laws of either the USA or Europe.

4 The proposed merger amendments are less objectionable than previous formulations

4.1 The Bill proposes to amend the merger control provisions of the TPA so that they apply to any merger that affects any market, or markets, in Australia (including a state, territory or region of Australia), regardless of whether the market(s) is substantial. Specifically, the Bill proposes to:

- amend the definition of "market" in s 50(6) of the TPA to remove the requirement that the market affected by a merger must be "substantial" (**First Amendment**); and
- amend s 50(1) and (2) of the TPA to replace the words "a market" with "any market" (**Second Amendment**).

4.2 The First Amendment is intended to remove the "substantiality" requirement which currently exists in section 50 of the TPA, to make clear that the ACCC may assess the impact of a merger on ***any*** market, and specifically, small local markets including, presumably, local markets for petrol or groceries, or regional markets.

[3] Law Council of Australia Trade Practices Committee, responses submitted to the Treasury on 15 October 2008, 12 June 2009 and 7 August 2009.

4.3 The Second Amendment is designed to clarify that the ACCC (or a court) may consider multiple markets when considering the impact of a merger under s 50 of the TPA, including markets other than the primary market in which the merger would occur. The EM notes that although the ACCC can and does consider multiple markets when reviewing a merger, some doubts have apparently been expressed by some about whether the current wording of s 50(1) and (2) allows consideration of more than one market.

4.4 Both the First and Second Amendments are largely pragmatic responses to the impetus to reform section 50 of the TPA to deal specifically with 'creeping acquisitions', in the form of acquisitions of small companies in local areas whether as part of a chain or individually. The Committee considers that, in comparison to the previous options for amendment to Australia's merger laws, the proposed amendments viewed by the Committee as being 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 TPA;
- retain the economic rationality of the current merger test and is consistent with the existing architecture of the "substantial lessening of competition" test in section 50 of the TPA and other provisions in Part IV of the TPA.

5 The proposed amendments raise further concerns as to their practical application

5.1 The intention behind the proposed amendments is to clarify the existing merger law, to make clear that the ACCC can examine the impact of acquisitions on small markets and multiple markets.

5.2 However, this is not to say that the Committee does not have concerns that the practical outcome of the proposed amendments will be to provide the ACCC with too much discretion to investigate small and economically insignificant 'micro-markets'. By removing the requirement that "a market" under section 50 of the TPA be "substantial", the Committee has reservations that the proposed amendments would result in the ACCC undertaking an unnecessary greater analysis of very small sub-markets, which are not economically distinct and should not form part of the ACCC's assessment of whether the relevant acquisition is prohibited by section 50 of the TPA. This in turn will give rise to the risk that merging parties will be faced with an administrative process that demands burdensome levels of disclosure and information provision which will delay acquisitions, and may result in reduced incentives for businesses to invest in acquisitions in Australia.

5.3 Members of the Committee have represented clients in merger cases in which the ACCC has undertaken extensive analysis of the impact of proposed acquisitions on very small geographic and product markets. A number of Committee members have been involved in mergers in which the ACCC has examined very small and discrete geographic or product markets, and has raised competition concerns as to the compatibility of the merger with section 50 of the TPA on the basis of these small markets. These cases include retail acquisitions, which relate to local area markets defined by a small radius from the relevant target, as well as non-retail acquisitions which relate to small and distinct product markets.

5.4 Accordingly, the ACCC already has the ability under section 50 of the TPA to investigate small and local markets, provided that those markets are economically distinct. As such, the proposed amendments are viewed by the Committee as unnecessary.

5.5 We note by way of comparison that there is a real risk that the proposed amendments would take Australia's merger control regime out of step with its international equivalents. For example, the European Community Merger Regulation[4] requires that

> "concentrations which would significantly impede effective competition in the common market, or substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market"[5].

There is therefore a clear requirement in European competition law that the market in question be "substantial".

5.6 In the event that the ACCC routinely conducts a detailed examination of mergers which relate to local or smaller markets (most commonly, for example, in the case of retail mergers), parties are likely to face additional regulatory uncertainty and costs as a result of the proposed amendments. This in turn may have the effect of deterring Australian businesses from conducting acquisitions which may raise local or small market competition issues on the basis that there is sufficient regulatory uncertainty to undermine or offset any efficiencies achieved as a result of the acquisition.

5.7 Merger control under section 50 of the TPA is a settled and well administered area of law. Over the past 5 years, the ACCC has developed a relatively efficient process for assessing mergers under section 50 of the TPA, and its comparatively new 2008 Merger Guidelines assist that process. Most businesses and advisers have gained confidence in the transparency, consistency and predictability of the existing merger review process, which has, in turn, promoted economic efficiency and enhanced the performance and growth of the Australian economy as a whole by facilitating investment through acquisitions.

5.8 Should the proposed amendments have such a deterrent effect, the economic benefits of acquisitions may be lost in certain instances, and Australia's merger control regime will permit excessive discretion for the regulator to examine, and potentially oppose, mergers on the basis of 'micro-markets' which are not economically distinct and should not form part of a merger assessment under section 50 of the TPA.

6 Conclusion

6.1 The Committee's strong submission is that there is no need for any further amendment to the TPA to address 'creeping acquisitions'. However, the proposed amendments to section 50 of the TPA are less objectionable than the previous options already considered by Treasury. Nevertheless, the Committee is concerned that the practical outcome of the proposed amendments may be to provide the ACCC with an enhanced ability to examine the impact of acquisitions on very small, local and 'micro-markets' which may not be economically distinct markets. This in turn is likely to increase regulatory uncertainty and has the potential to increase costs, to the detriment of Australian business and consumers. It will be important in the Committee's view that the ACCC administers the amended section 50 of the TPA in an appropriate and reasonable manner.

7 Consumer law amendments

7.1 The Bill proposes to amend the unconscionable conduct provisions of the Australian Consumer Law to:

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4 European Community Merger Regulation, Council Regulation No. 139/2004, available online at: http://ec.europa.eu/competition/mergers/legislation/legislation.html.

5 ECMR, Article 3.

(a) include a statement of interpretative principles to provide that:

- the statutory prohibition against unconscionable conduct is not limited by the equitable or common law doctrines of unconscionable conduct;
- in considering whether conduct to which a contract relates is unconscionable, a court should not limit its consideration to the formation of the contract alone, but may also consider the terms of the contract and the manner in which the contract is carried out; and
- the statutory prohibition against unconscionable conduct can apply to a system or pattern of conduct over time, and need not be limited to an individual transaction or event; and

(b) Consolidate the previous ss 51AB and 51AC of the TPA (or *Competition and Consumer Act*, as it may soon be renamed) in order to remove the distinction between business and consumer transactions with respect to unconscionable conduct. As a result, the factors to which a court may have regard when considering whether conduct is unconscionable in the circumstances will be the same for both business and consumer transactions (adopting the longer list of factors which presently apply to business transactions).

7.2 The Bill will also amend the unconscionable conduct provisions in the ASIC Act in the same way.

7.3 As with the proposed amendments to the merger control provisions of the TPA, the proposed amendments to the consumer law are a result of long and detailed investigations into the unconscionable conduct provisions in the TPA, dating back to December 2008 when the Senate Standing Committee on Economics released an inquiry report into the need, scope and content of developing a definition of unconscionable conduct. Since then, the Senate Standing Committee's recommendations have been further considered by a Federal government appointed expert panel, whose recommendations were subsequently endorsed by the government in March 2010.

8 The Committee considers the proposed changes to the Australian Consumer Law are appropriate

8.1 The Committee considers that the proposed changes to the Australian Consumer Law are appropriate to "assist the Courts in applying the prohibition of unconscionable conduct, as well as improve stakeholder understanding of the meaning and scope of the provisions"[6].

8.2 In particular, the Committee considers that it is appropriate to provide further safeguards for consumers by encouraging corporations to be aware of the totality of their actions and contracts with consumers.

8.3 In the Committee's view, as a matter of principle, the courts should be free to make their own findings in relation to each individual case brought before them, and should not have their discretion fettered unreasonably by legislation. Accordingly, the Committee prefers the approach adopted in the Bill of including a list of interpretive principles rather than the use of examples which could have had the effect of being interpreted as limiting the application of the unconscionable conduct provisions.

[6] EM, p.19.