



Competition and Consumer Legislation Amendment Bill 2010

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Law and Bills Digest Section

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Competition and Consumer Legislation Amendment Bill 2010

Date introduced: 27 May 2010

House: House of Representatives

Portfolio: Treasury

Commencement: Section 1 to 3 commence on Royal Assent. Schedule 1, dealing with mergers and acquisitions, commences no later than 2 months after Royal Assent, or earlier by Proclamation. Schedule 2, dealing with unconscionable conduct, commences immediately after commencement of Schedules 1 to 5 of the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*.¹

Links: The [links](#) to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bills page, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Purpose

The Bill is intended to commence after the enactment of the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 which will, amongst other things, change the name of the *Trade Practices Act 1974* (TPA) to the *Competition and Consumer Act 2010* and move the existing provisions of Part IVA of the TPA into the Australian Consumer Law. This Bill proposes to:

- amend the TPA to clarify the operation of the mergers and acquisitions provisions, and
- include a statement of interpretative principles in the unconscionable conduct provisions in the Australian Consumer Law² and the *Australian Securities and Investment Commission Act 2001* (ASIC Act) and unify the consumer and business related provisions prohibiting unconscionable conduct in these Acts.

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1. The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010 is currently before the House of Representatives. These Schedules are likely to commence on 1 January 2011.
 2. These provisions are set out in the Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, now before the Parliament. See p. 14 of this Digest for further explanation of the Australian Consumer Law.

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Comment

Whilst the two schedules to the Bill both amend the TPA, the areas that they cover are disparate. That being the case, this Digest will deal with each of the measures separately.

Committee consideration

The Bill was referred to the Senate Economics Committee (the Senate Committee) for inquiry and report by 15 June 2010.³ The Senate Committee, in its report, recommended that the Bill be passed.⁴ A minority report by Senator Xenophon concluded that while broadly supporting the legislation and its clarification of creeping acquisitions and unconscionable conduct, the Senator does not believe it addresses the issues effectively and that more needs to be done to truly ensure fair competition in the market.⁵

This Digest draws on submissions to the Senate Committee inquiry, and the contents of the Senate Committee report.

Financial implications

The Explanatory Memorandum states that the Bill has no significant financial impact on Commonwealth expenditure or revenue.⁶

Mergers and acquisitions⁷

Background

Section 50 of the TPA prohibits acquisitions of shares or assets, other than in the ordinary course of business, where that acquisition is likely to have the effect of substantially lessening competition in a market.

Mergers fall into three generally recognised categories:

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3. Details of the inquiry are at:
http://www.aph.gov.au/Senate/committee/economics_ctte/competition_consumer_10/index.htm
 4. Senate Economics Legislation Committee, *Competition and Consumer Legislation Amendment Bill 2010 [Provisions]* Canberra, June 2010, viewed 21 June 2010,
http://www.aph.gov.au/Senate/committee/economics_ctte/competition_consumer_10/report/report.pdf
 5. *Ibid.*, p. 26.
 6. Explanatory Memorandum, Competition and Consumer Legislation Amendment Bill 2010, p. 4.
 7. The terms ‘mergers’ and ‘acquisitions’ are used interchangeably in this Digest.

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- a horizontal merger of firms operating at the same functional level. The competitive concern with a horizontal merger is that it necessarily result in their being one less actual or potential competitor in a market because products that previously competed against each other are brought under the same ownership and control.⁸
- a vertical merger of firms which operate at different functional levels. The competitive concern with a vertical merger is the linking of previously separate functions under the same ownership and control thereby restricting access to essential raw materials or key bottleneck facilities.⁹
- a conglomerate merger between firms which are active in different but related areas such as suppliers of complementary products or services. Conglomerate mergers may lessen competition if the merged entity has a degree of market power in relation to one product which it can exploit by tying or bundling another complementary product.¹⁰

Although there is no legislative requirement for merging parties to notify proposed mergers, the Australian Competition and Consumer Commissioner (ACCC) has the power to challenge or block a merger which contravenes section 50 of the TPA. As a result, a practice has evolved whereby merging parties voluntarily notify the ACCC about, and seek ‘clearance’ of, proposed mergers. The ACCC has developed *Merger Guidelines* which outline the analytical and evaluative framework applied by the ACCC when reviewing mergers.¹¹ The Chairman of the ACCC recently told a Senate Estimates Committee hearing that this merger clearance regime is ‘working very well’, citing statistics for the financial year up to 1 June 2010 of 274 merger assessments— 256 that were not opposed, four that were cleared with undertakings, and 14 that were opposed or had concerns that were expressed confidentially.¹²

What are ‘creeping acquisitions’¹³

‘Creeping acquisitions’ are generally defined to be a series of small-scale acquisitions by a corporation that individually may not substantially lessen competition in a market in

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8. S G Corones, *Competition Law in Australia*, fifth ed., Lawbook Co., Pyrmont, 2010, p. 380.
 9. Ibid.
 10. Ibid., p. 381.
 11. Australian Competition and Consumer Commission, *Merger Guidelines*, Canberra, 2008, viewed 17 June 2010, <http://www.accc.gov.au/content/index.phtml/itemId/809866>
 12. G Samuel (Chairman, ACCC), Senate Economics Legislation Committee, *Committee Hansard*, proof, 2 June 2010, p. E83, viewed 17 June 2010 http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/13028/toc_pdf/7663-3.pdf;fileType=application/pdf#search=%22samuel%20working%20very%20well%22
 13. The following paragraphs draw on: L Woodward and R Webb, ‘Creeping regulation: an assessment of the proposal for a ‘creeping acquisitions’ prohibition’, *Competition and Consumer Law Journal*, vol. 17, no. 2, November 2009.

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breach of section 50 of the TPA, but collectively may have that effect over time. There are currently no provisions in the TPA that prevent or limit creeping acquisitions. Concerns about creeping acquisitions have been raised primarily in relation to the independent supermarket sector and the liquor sector.¹⁴

Reviews and reports

The ‘creeping acquisitions’ issue has been the subject of numerous inquiries and reports. It has previously been considered by the Parliamentary Joint Select Committee on the Retailing Sector in its 1999 *Fair Market or Market Failure* report; as part of the Dawson Committee review of the competition provisions of the TPA in 2002 (Dawson Committee Review)¹⁵; and later by the Senate Economic Reference Committee in 2004 during its inquiry into the effectiveness of the TPA in protecting small business (the Small Business Review).¹⁶

The ACCC has also considered the issue, first in 2004, in its report titled *Shopper Docket Petrol Discounts and Acquisitions in the Petrol and Grocery Sectors* (Shopper Docket Report)¹⁷; and again in 2008 in the Grocery Price Inquiry.¹⁸

More recently ‘creeping acquisitions’ were considered by the Senate Standing Committee on Economics in its inquiry into the Senator Steve Fielding’s Private Member’s Bill (the Trade Practices Act (Creeping Acquisitions) Amendment Bill 2007)¹⁹; and then again in

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14. Although the ACCC has noted that they have also seen the problem in other industries. In the Shopper Docket Report (see below) the ACCC noted that creeping acquisitions were not confined to the grocery retail sector and also occurred in the taxi, diagnostic health services and optical dispensary industries. Quoted in: L Woodward, op. cit., p. 153.
 15. Dawson Committee, Review of the competition provisions of the Trade Practices Act, Canberra, January 2003.
 16. Senate Economic Reference Committee, The effectiveness of the Trade Practices Act 1974 in protecting small business, Canberra, March 2004.
 17. ACCC, Assessing shopper docket petrol discounts and acquisitions in the petrol and grocery sectors, February 2004.
 18. ACCC, *Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries*, 2008, viewed 15 June 2010, <http://www.accc.gov.au/content/index.phtml/itemId/838251>
 19. The essence of that proposed amendment of section 50 was to allow the Court (and the ACCC), when considering the competitive effects of an acquisition, to aggregate together all other acquisitions made by that corporate group in the previous six years. The Standing Committee on Economics recommended that the Senate defer its consideration until the Government’s legislation on creeping acquisitions is presented. Standing Committee on Economics, *Inquiry into the Trade Practices (Creeping Acquisitions) Amendment Bill 2007 [2008]*, Commonwealth of Australia, Canberra, August 2008, p. 9, viewed 22 June 2010,

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2010 in an inquiry into Senator Nick Xenophon's Private Member's Bill (Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment Bill 2009)).²⁰

The conclusions of these reviews have varied about the extent of the problem presented by creeping acquisitions.²¹ For example, the Dawson Committee Review found there was no basis for the introduction of a 'creeping acquisitions' law.²² In contrast, the Small Business Review argued that as a matter of logic, creeping acquisitions must, if continued indefinitely, at some point result in a very concentrated market. Current merger law does not effectively address this issue and section 50 of the TPA should be strengthened to take account of the cumulative effects of acquisitions which over time may substantially lessen competition.²³

In the Grocery Price Inquiry, the ACCC reviewed and rejected claims that serial acquisitions by the major supermarkets had undermined competition. Notwithstanding that, the ACCC did recommend the adoption of a creeping acquisitions prohibition of general application to address concerns raised in relation to the competitive impact of individual supermarket acquisitions by the major supermarket chains.²⁴

In its response to the ACCC's findings in this Inquiry, the Rudd Government stated that it would take steps to implement a 'creeping acquisitions' law 'as a matter of urgency'.²⁵

http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_creeping_acqs_08/report/report.pdf

20. The amendments proposed in this Bill were 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 subsection 50(1) prohibition, replacing a 'substantial' lessening of competition with a 'material' lessening of competition. The Committee report rejected this amendment. Economics Legislation Committee, *Trade Practices Amendment (Material Lessening of Competition—Richmond Amendment) Bill 2009*, Commonwealth of Australia, Canberra, November 2009, p. 26, viewed 22 June 2010, http://www.aph.gov.au/Senate/committee/economics_ctte/richmond_amendment_09/report/report.pdf
21. For a fuller account of these reviews see L Woodward, op. cit., p. 152.
22. Dawson Committee, op. cit., p. 25; and L Woodward, op. cit.
23. L Woodward, op. cit., p. 152.
24. Ibid, p. 156.
25. C Bowen (Minister for Consumer Affairs and Competition Policy), *Rudd Government releases its preliminary action plan in response to the ACCC's Grocery Inquiry*, media release, 5 August 2008, viewed 18 June 2010, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/065.htm&pageID=003&min=ceb&Year=&DocType=0> .

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Treasury discussion papers—models for reform

As part of its response to the Grocery Price Inquiry, the Federal Government published two separate public consultation documents (the discussion papers) seeking comments on proposed options for changes to section 50 of the TPA to account for creeping acquisitions.²⁶ Various models to regulate creeping acquisitions were proposed in the discussion papers. In summary, these models were as follows.

Aggregation model: this would prohibit an acquisition by a corporation which, when combined with previous acquisitions made by the corporation within a ‘specified period’ would be likely to substantially lessen competition in a market.²⁷ This model closely resembles the legislative changes proposed in the Senator Fielding Private Member’s Bill mentioned above.

The ACCC opposed this model on the basis that determining the impact of current and previous acquisitions would be very complicated and likely to raise substantial evidential challenges.²⁸

Substantial market power model: this would prohibit a corporation from making an acquisition if it already has a substantial degree of power in a market and that acquisition would result in ‘any lessening’ of competition in that market.²⁹ This model was opposed in a number of submissions on the basis that it runs contrary to an established principle of competition law, namely, that the merger regime should only be used to block acquisitions which adversely affect consumer welfare by *significantly* lessening competition. The ACCC, on the other hand, supported this model. This model resembles the changes proposed in Senator Nick Xenophon’s Private Member’s Bill mentioned above.

Amended substantial market power model: this was proposed in the second discussion paper.³⁰ It would prevent a corporation that already has a substantial degree of power in a market from making any acquisition that would have, or be likely to have, the effect of

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26. The first discussion paper, released on 1 September 2008, was entitled: *Discussion paper: creeping acquisitions*, viewed 18 June 2010, <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1409> The second paper, released on 6 May 2009, was entitled *Creeping acquisitions – the way forward*, viewed on 18 June 2010, http://www.treasury.gov.au/documents/1530/PDF/Discussion_paper_Creeping_Acquisitions.pdf
 27. Treasury, *Discussion paper: creeping acquisitions*, Commonwealth of Australia, Canberra, 1 September 2010, p. 5.
 28. L Woodward, op. cit., p. 157.
 29. Treasury, *Discussion paper: creeping acquisitions*, op. cit., p. 6.
 30. Treasury, *Creeping acquisitions—the way forward*, Commonwealth of Australia, Canberra, 11 June 2009, p. 3.

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enhancing that power. This would change the competition test to be applied and remove any reference to a ‘lessening of competition’. This model was heavily criticised by business groups and the legal profession.

Declaration of corporations and/or product/service sectors: this option would apply the ‘creeping acquisitions’ law only to corporations and/or product/service sectors which have been ‘declared’ by the Minister.³¹ The amended substantial market power model would be applied to transactions involving ‘declared’ corporations or product/service sectors. The ACCC strongly opposed the declaration model.

Stakeholders opposing the models proposed in the discussion papers included the Business Council of Australia, the National Retailers Association, the Law Council of Australia and the major grocery retailers (Woolworths and Coles). Amongst other things they argued that the Government and the ACCC have failed to establish any factual or policy case for the introduction of a ‘creeping acquisition’ law.³² Those supporting the models of a creeping acquisition law were other business and industry groups, including suppliers to, and representatives of, the small business sector (particularly the independent grocery sector). The principal concern expressed by these parties is the increasing concentration of certain industries and the resultant market power thought to be enjoyed by large firms.³³

The model in the Bill

It is of significance that the amendments proposed by the Bill, do not take up any of the Treasury models—the Government’s stated rationale for abandoning them being that there was no clear consensus of support for any of the models and the costs of implementation would outweigh any benefits.³⁴ The Bill instead proposes to amend section 50 in the following ways:

- the stipulation in subsection 50(6) that merger regulation will only apply in ‘substantial’ markets will be removed; and
- the prohibition on mergers that substantially lessen competition in ‘*a market*’ is replaced with a prohibition on substantially lessening competition in ‘*any market*’.

The Explanatory Memorandum states that the intention of the changes is to remove any uncertainty as to the ability of the ACCC to consider local markets when considering

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31. The Minister would declare a corporation where he/she had concerns about the potential or actual competitive harm rising from the acquisition by that corporation due to the fact that the corporation already has a substantial market power, and/or in the case of a product/service sector, where the Minister had concerns about the potential and/or actual competitive harm arising from creeping acquisitions.
 32. For a fuller account of their arguments see L Woodward, *op. cit.*, p. 164.
 33. *Ibid*, p. 166.
 34. Explanatory Memorandum, *op. cit.*, p. 55.

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acquisitions. Although the current ACCC Merger Guidelines make it clear that the ACCC believes a local market can be a ‘substantial’ market, the Explanatory Memorandum points to the comments made by French J in *Australian Gas Light Company v ACCC (No 3)* (2003) 13 FCA 317 which may cast doubt on this.³⁵

With regard to the change of wording from ‘a market’ to ‘any market’ this is intended to clarify the ability of the ACCC or a court to consider multiple markets when assessing mergers. The Minister’s second reading speech states:

The amendment will clarify that businesses cannot challenge a decision to block a proposed acquisition on the grounds that the substantial lessening of competition identified was in one or more markets other than the primary market in which the acquisition would occur.

The ACCC and the courts will be able to consider the totality of the competitive effects resulting from an acquisition, including impacts in upstream and downstream markets, not just impacts in ‘a market’.³⁶

Position of significant interest groups

Many of the submissions to the Senate Committee inquiry noted the short time-frame for comments on the Bill (2 June to 4 June 2010) raising concerns about the ability to provide a meaningful written submission and to consult with their various members within that time.

The **Business Council of Australia** (BCA) considers that the Government’s final amendments, though unnecessary, are preferable to the options that have been proposed in previous discussion papers, particularly because the ‘substantial lessening of competition’ test is retained.³⁷ The submission further qualifies its support stating:

However, the BCA has concerns that the proposed amendments may have unintended consequences. For example, they may have the effect of causing unnecessary examination of less than economically meaningful markets that are not substantial, creating unnecessary burdens and costs for business and therefore dampening

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35. French J stated there was a risk with the current provisions 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. Explanatory Memorandum, op. cit., p. 13.
 36. C Emerson (Minister for Competition and Consumer Affairs), ‘Second reading speech, Competition and Consumer Legislation Amendment Bill 2010’, House of Representatives, *Debates*, 27 May 2010, p. 2, viewed 18 June 2010, http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/2010-05-27/0005/hansard_frag.pdf;fileType=application%2Fpdf
 37. Business Council of Australia, Submission to Senate Standing Committee on Economics, *Competition and Consumer Legislation Amendment Bill 2010*, June 2010, p. 2.

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economic activity and investment. With this in mind, the BCA considers that the Bill should provide for review of the effect of the proposals after two years.³⁸

[...]

The BCA therefore supports an approach which maintains the ‘substantial lessening of competition’ test and responds only to “*specific problems with specific remedies, rather than responding with general remedies that could have unintended consequences for overall economic activity and employment*”.³⁹

The **Law Council of Australia** puts a ‘strong submission’ that there is no need for any further amendment to the TPA to address creeping acquisitions and that the current ‘substantial lessening of competition in a market’ test in section 50 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 acquisition on competition in a market.⁴⁰ It argues that 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.

The submission concludes:

However, the proposed amendments to section 50 of the TPA are less objectionable than the previous options already considered by Treasury. Nevertheless, the [Law Council] 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 [...] that the ACCC administers the amended section 50 of the TPA in an appropriate and reasonable manner.⁴¹

The **National Association of Retail Grocers of Australia (NARGA)**⁴² supports the proposed ‘creeping acquisition’ amendments, but believes more needs to be done to improve competition in Australia’s highly concentrated markets. Their submission makes further recommendations including that an entity’s local or regional market share could be

38. Ibid, p. 2.

39. Ibid, p. 3.

40. Law Council of Australia, Submission to Senate Standing Committee on Economics, *Competition and Consumer Legislation Amendment Bill 2010, June 2010*, p. 2.

41. Ibid, p. 4.

42. NARGA represents the independent retail grocery sector.

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measured in terms of the share of retail space applicable to the sector in question. NARGA also support a system of compulsory notification of acquisitions by large entities in concentrated markets. Such a notification requirement should apply to acquisitions of sites, leases and stores. NARGA believes that '[w]ithout mandatory notification, the proposed amendments would be difficult to implement.⁴³

Master Grocers Australia (MGA)⁴⁴ states that it is appropriate for the issue of creeping acquisitions to be addressed by the Federal Government and 'welcomes the move towards addressing this serious anti competitive hindrance in the supermarket and packaged liquor market place'. However the submission qualifies this support noting the amendments are a first step and that there are further barriers that need to be addressed in the retail supermarket and packaged liquor sectors to achieve a healthy competitive market. Their submission supports the views expressed by NARGA.⁴⁵

The **Motor Trades Association of Australia (MTAA)** submission states that in general terms MTAA does not oppose the Bill and believes its passage should be supported. However MTAA also believes that the measures outlined in the Bill are unlikely to have a significant effect on behaviour in the market.⁴⁶

In respect of the amendments to the merger provisions MTAA acknowledges that they may help to clarify the operation of section 50 but that 'it is not clear that it will substantially address MTAA's concerns about creeping acquisitions'.⁴⁷

Main provisions—mergers and acquisitions

Section 50 in Part IV of the TPA prohibits mergers or acquisitions that would, or would be likely to substantially lessen competition in a market— market being defined as limited to substantial markets in Australia, or a State, or Territory, or region of Australia (subsection 50(6)).

Item 1 of Schedule 1 of the Bill amends subsection 50(1) and (2) replacing the words 'a market' with 'any market'. **Item 2** amends the definition of 'market' in subsection 50(6) to

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43. National Association of Retail Grocers of Australia, Submission to the Senate Standing Committee on Economics, *Competition and Consumer Legislation Amendment Bill 2010*, June 2010, p. 4-5.
 44. MGA is a National Employer Industry Association representing Independent Grocery and Liquor Supermarkets and packaged liquor stores in all States and Territories.
 45. Master Grocers Australia, Submission to the Senate Standing Committee on Economics, *Competition and Consumer Legislation Amendment Bill 2010*, June 2010, p. 2.
 46. Motor Traders Association of Australia, Submission to the Senate Standing Committee on Economics, *Competition and Consumer Legislation Amendment Bill 2010*, June 2010, p. 1.
 47. Ibid.

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remove the word ‘substantial’ and thus remove the requirement that the market affected by a merger must be ‘substantial’.

The effect of these amendments is that **new section 50** would prohibit mergers or acquisitions that would, or would be likely to, substantially lessen competition in *any* market—market being defined as *markets* (not just substantial markets) in Australia, or a State, or Territory, or region of Australia (**new subsection 50(6)**).

The amendments to section 50 apply to acquisitions occurring after the commencement of these provisions (**item 3**).

Items 4 and 5 of Schedule 1 of the Bill make corresponding amendments to the Schedule version of section 50 in the TPA. These amendments are identical to the amendments in **items 1 and 2** except that they apply to natural persons rather than to corporations.⁴⁸ This is so that the Schedule version of Part IV in the Competition Code is in the same terms as Part IV of the TPA.

Unconscionable conduct

What is ‘unconscionable conduct’⁴⁹

The doctrine of unconscionable conduct developed over several hundred years in the courts of equity. It is a mechanism whereby equity may intervene to undo a state of affairs which it would offend against conscience to permit to continue, irrespective of the legality of the situation at common law. Traditionally, relief on the basis of unconscionable conduct is available where one party to a transaction is at a special disadvantage in dealing with the other party and the other party unconscientiously takes advantage of the opportunity thus placed in his hand.⁵⁰

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48. The origin of the Schedule version of Part IV in the Competition Code dates back to the 1995 Competition Code Agreement—under which the States and Territories of Australia agreed to submit, to their respective legislatures, legislation to implement the version of Part IV of the TPA contained in the Schedule. The intention was to extend the operation of the restrictive trade practices provisions of the TPA to all sectors of the community through the enactment of complementary State and Territory legislation. To this end, section 150C of the TPA provides that the Competition Code consists of, amongst other things, a schedule version of Part IV of the TPA.
49. This section relies on: Treasury, The nature and application of unconscionable conduct regulation: Can statutory unconscionable conduct be further clarified in practice?, Issues paper, Canberra, November 2009, viewed 18 June 2010, http://www.treasury.gov.au/documents/1676/PDF/Unconscionable_Conduct_Issues_Paper.pdf
50. The question of what those factors of ‘special disadvantage’ might be, is discussed in *Blomley v Ryan* (1956) 99 CLR 362 at 415, per Kitto J and also the decision of Justice

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Unconscionable conduct in trade or commerce is also prohibited by statute, both at the Commonwealth level and in the States and Territories. At the Commonwealth level, unconscionable conduct is governed by the provisions of Part IVA of the TPA⁵¹ and, in near identical terms, by Part 2, Division 2, Subdivision C of the ASIC Act. The relevant provisions of the ASIC Act relate to the supply of financial services.

Part IVA of the TPA contains three substantive provisions prohibiting unconscionable conduct. Briefly, the three provisions operate as follows:

- **Section 51AA** prohibits conduct that is unconscionable within the meaning of the unwritten law of the States and Territories. This section was introduced in 1992.
- **Section 51AB** prohibits engaging in conduct, in connection with the supply of goods or services to a person, that is, in all the circumstances, unconscionable. This section was originally introduced, as section 52A, in 1986.
- **Section 51AC** prohibits conduct that is, in all the circumstances, unconscionable, in connection with the supply or acquisition of goods or services, to or from a corporation. This section was introduced in 1998.

The TPA does not define unconscionable conduct.⁵² Rather, it requires the courts to apply the doctrines associated with unconscionable conduct, either as it exists in equity (section 51AA), or coloured by the circumstances described by the statute. Sections 51AB and 51AC contain a list of factors which the courts may consider in making a determination of unconscionable conduct.

For section 51AB the factors include: the relative strengths of the parties' bargaining positions; whether the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the other party; whether the consumer was able to understand any documents relating to the supply of the goods or services; whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer, and the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services elsewhere.

Mason in *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, particularly at 461-2. Extracted from Treasury, *The nature and application of unconscionable conduct regulation*, op. cit.

51. Although this regime is soon to be transferred to the Australian Consumer Law. See below at p. 14.
52. The question of a statutory definition of unconscionable conduct is addressed in some detail in: Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, Department of the Senate, Canberra, December 2008, viewed 11 May 2010, http://www.aph.gov.au/Senate/committee/economics_ctte/tpa_unconscionable_08/index.htm

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For section 51AC the factors include those matters listed above (though framed in terms of conduct towards ‘business consumers’ and ‘small business suppliers’ rather than towards ‘consumers’), and additionally: the extent to which the conduct of one party towards another was consistent with the first party’s conduct in similar transactions; the requirements of any applicable prescribed industry code; the requirements of any other industry code, if the one party acted on the reasonable belief that another would comply with that code; the extent to which the stronger party unreasonably failed to disclose any intended conduct that might affect the weaker party’s interests, or any risks to the weaker party arising out of any intended conduct; the extent to which the stronger party was willing to negotiate the terms and conditions of any contract with the weaker party; whether the stronger party has a contractual right to vary unilaterally a term of a contract with the weaker party, and the extent to which the parties acted in good faith.⁵³

Effect of the Australian Consumer Law

The Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010, currently before the Parliament, proposes, amongst other things, to transfer, the TPA Part IVA unconscionable conduct provisions to the Australian Consumer Law so that:

- section 51AA of the TPA would become section 20 of the Australian Consumer Law;
- section 51AB, with some amendments, would become section 21; and
- section 51AC, with some amendments, would become section 22.⁵⁴

It is these new unconscionable conduct provisions (sections 21 and 22) of the Australian Consumer Law that this Bill would repeal and replace.

Reviews and reports

The Federal Government has been under pressure for some time to strengthen the prohibitions on unconscionable conduct in the TPA. Discontent in the franchising sector has been the primary catalyst for change and that discontent was aired in a number of enquiries and subsequent reports.⁵⁵ In particular the Senate Standing Committee on

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53. The courts are not required to consider any or all of these factors in making a finding of unconscionable conduct. Rather, the factors are those the Parliament considers the courts should have regard to, depending on the circumstances.
54. The amendments include new paragraphs 22(2)(j) and 22(3)(j). There are also new pecuniary penalties and enforcement powers in relation to unconscionable conduct offences. For further information, the reader is referred to: P Pyburne, *Trade Practices Amendment (Australian Consumer Law) Bill (No. 2) 2010*, Bills digest, no. 187, 2009-2010, Parliamentary Library, Canberra, viewed 21 June 2010.
55. For background information see P Pyburne, *Current Legal Issues in Franchising in Australia*, Background note, Parliamentary Library, Canberra, 17 November 2008, viewed 12 May 2010, <http://www.aph.gov.au/library/pubs/BN/2008-09/Franchising.htm>

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Economics published a report on its inquiry into the statutory definition of ‘unconscionable conduct’ in December 2008.⁵⁶ The Committee did not recommend the introduction of a statutory definition, but made three recommendations directed at improving the clarity of the unconscionable conduct provisions in the TPA. In particular it recommended:

- an amendment to section 51AC of the TPA which states that the prohibited conduct in the supply and acquisition of goods or services relates to the terms or progress of a contract
- there be further inquiry to consider the option of producing a list of examples and/or statement of principles for insertion into the TPA, and
- the ACCC pursue targeted investigation and funding of test cases.⁵⁷

Also in December 2008, the Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee) tabled its report *Opportunity not opportunism: improving conduct in Australian franchising*. The Joint Committee made 11 recommendations including that the TPA be amended to provide for pecuniary penalties in relation to breaches of the unconscionable conduct provisions.⁵⁸

Additionally, both Western Australia and South Australia have also held their own inquiries considering allegations of unconscionability in the franchising sector.⁵⁹

In November 2009, the Federal Government responded to both the Senate Economics Committee inquiry and the Joint Committee inquiry by commissioning an expert panel to consider a range of suggested changes to the Franchising Code of Conduct and the unconscionable conduct provisions of the TPA. An issues paper was circulated as part of this process.⁶⁰

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56. Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974*, op. cit.
57. *Ibid*, pp. 36, 38 and 39.
58. Parliamentary Joint Committee on Corporations and Financial Services, *Opportunity not opportunism: improving conduct in Australian Franchising*, Department of the Senate, Canberra, 1 December 2008, paragraph 9.37, viewed 11 May 2010, http://www.aph.gov.au/Senate/committee/corporations_ctte/franchising/report/index.htm
59. Economic and Finance Committee, *Final Report: Franchises*, Parliament of South Australia, Adelaide, 6 May 2008; and Small Business Development Corporation, *Inquiry into the operation of franchise businesses in Western Australia: Report to the Western Australian Minister for Small Business*, Perth, April 2008.
60. Treasury, *The nature and application of unconscionable conduct regulation*, op. cit.

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The expert panel reported in February 2010 and recommended against the proposal of inserting a list of statutory examples of unconscionable conduct into the TPA to guide courts, concluding that this would not achieve certainty and may create false expectations. The panel considered, however, that a list of interpretative principles may assist the courts in applying the unconscionable conduct prohibition.⁶¹ These recommendations were subsequently endorsed by the Government in March 2010.⁶²

Proposed changes

Schedule 2 of the Bill implements these recommendations of the expert panel. It proposes to amend the unconscionable conduct provisions of the Australian Consumer Law to:

- 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 or behaviour over time, whether or not a particular individual is identified as having been disadvantaged by the conduct or behaviour.

The Bill also takes up a further recommendation of the expert panel by consolidating sections 21 and 22 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).⁶³ The rationale for

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61. Treasury, *Strengthening statutory unconscionable conduct and the Franchising Code of Conduct*, February 2010, viewed 19 June 2010, http://www.treasury.gov.au/documents/1744/PDF/unconscionable_conduct_report.pdf. The panel also recommended against the proposal of banning certain franchisor behaviours, but advocated greater up-front disclosure to franchisees. The Government has tabled amendments to the Franchising Code of Conduct in response to these recommendations (Trade Practices (Industry Codes – Franchising) Amendment Regulations 2010 (No.1)). The issue of franchising and Code amendments is beyond the scope of this Digest.
62. C Emerson (Minister for Small Business), *Rudd Government strengthens unconscionable conduct laws*, media release, 3 March 2010, viewed 19 June 2010, http://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/JE2W6/upload_binary/je2w60.pdf;fileType=application/pdf#search=%22expert%20panel%20unconscionable%202010%22
63. The list is set out at pp 13–14 above.

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this merging of these two provisions is to eliminate the risk that the courts could ascribe different meanings to concepts contained in both sections.⁶⁴

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

Position of significant interest groups

As already stated, many of the submissions to the Senate inquiry noted the short time-frame for comments on the Bill (2 June to 4 June 2010) raising concerns about the ability to provide a meaningful written submission and to consult with their various members within that time.

The **Law Council of Australia** considers that the proposed changes 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’.⁶⁵ The submission notes in particular 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.

[...] 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.⁶⁶

The **Shopping Centre Council of Australia** accepts the proposed changes to the unconscionable conduct provisions but with some reservations. The reservation is that the change may encourage unintended judicial activism, leading to ‘findings that statutory unconscionable conduct exists in commercial settings commonly accepted as unobjectionable. Such a development would be regrettable and would take the law beyond what was envisaged when the present section 51AC was introduced in 1998 and thus add to, rather than reduce commercial uncertainty.’⁶⁷

64. Treasury, Strengthening statutory unconscionable conduct and the Franchising Code of Conduct, op. cit., p. 37.

65. Law Council of Australia, op. cit., p. 5.

66. Ibid.

67. Shopping Centre Council of Australia, Submission to Senate Standing Committee on Economics, *Competition and Consumer Legislation Amendment Bill 2010*, 7 June 2010, p. 1.

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The **Motor Trades Association of Australia** (MTAA) has no objection to the unconscionable conduct amendments, but does not believe that they will address many of its concerns about the operation of the unconscionable conduct provisions.

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 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.

MTAA believes, as it has previously proposed to the Committee, that business-to-business contracts should in fact be covered by unfair contracts legislation.

The Association acknowledges that the amendments are proposed to expressly clarify that the unconscionable conduct provisions apply not only to conduct during the negotiation of an agreement but also to conduct during the course of the agreement. While this is a welcome amendment to the Act, the comments above in relation to the hurdle of proving ‘unconscionability’ remain, in the Association’s view, relevant.⁶⁸

Main provisions—unconscionable conduct

Item 4 of Schedule 2 to the Bill repeals and replaces the unconscionable conduct provisions (sections 21 and 22)⁶⁹ as they will appear in the *Competition and Consumer Act 2010*.⁷⁰

Proposed section 21(1) 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 person (other than a listed public company)
- the acquisition or possible acquisition of goods or services from a person (other than a listed public company).⁷¹

Proposed subsections 21(2) and (3) provide further explanation of the extent of the prohibition on unconscionable conduct, namely:

68. Motor Traders Association of Australia, op. cit., p. 2.

69. These provisions are the renumbered sections 51AB and 51AC of the TPA.

70. The TPA is to be renamed the *Competition and Consumer Act 2010*.

71. The unconscionable conduct provisions have never applied to listed public companies. A listed public company is defined in section 2 of the Australian Consumer Law.

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- it is not possible to assert that the action of instituting legal proceedings or instituting formal dispute resolution processes amounts to unconscionable conduct (**paragraphs 21(2)(a) and 21(2)(b)**)
- 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 (**proposed paragraph 21(3)(a)**), but
 - *may* have regard to conduct engaged in, or circumstances existing, before the commencement of the section (**paragraph 21(3)(b)**).

Proposed subsection 21(4) is the major change. It sets out a list of interpretative principles to be followed in relation to section 21 stating that it is the intention of the Parliament that:

- the prohibition against unconscionable conduct in this section is not limited by the unwritten law relating to unconscionable conduct (in other words, while common law and equitable doctrines on unconscionable conduct may be instructive, courts are free to develop the statutory prohibition independently from these doctrines, as the need arises)
- the prohibition against unconscionable conduct in 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
- in considering whether conduct to which a contract relates is unconscionable, a court's consideration of the contract may include consideration of:
 - the terms of the contract
 - 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.

The Explanatory Memorandum states that these principles has been drawn from existing case law and clarify, rather than alter, the effect of the statutory prohibition of unconscionable conduct.

Proposed section 22 lists the matters the court may have regard to for the purpose of determining whether a person has contravened the unconscionable conduct provisions. The list is not new but rather is drawn from the current statutory prohibitions of unconscionable conduct toward businesses which have been discussed above.

Item 1 of Schedule 2 to the Bill makes amendments to the ASIC Act that essentially mirror the amendments in **item 4** just described. Since 1988, the TPA unconscionable conduct provisions have been mirrored in Part 2, Division 2, Subdivision C of the ASIC which apply in respect of financial services. The effect of **item 1** is that **new sections**

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12CB and **12CC** of the ASIC Act will continue to mirror the unconscionable conduct provisions as set out in the Australian Consumer Law.

Concluding comments

Given the history of reviews and the Rudd Government's commitment to implement a 'creeping acquisitions' law 'as a matter of urgency', it might seem that the amendments to the merger provisions proposed by the Bill are an anti-climax. Descriptions of the amendments as 'window dressing'⁷² or 'pragmatic'⁷³ would also appear to be apt. These minor amendments largely reflect the ACCC's current interpretation of the existing law and are unlikely to have any substantial effect on merger analysis in the future.

Similarly with the unconscionable conduct provisions. The Federal Government has been under pressure for some time to strengthen the prohibitions on unconscionable conduct in the TPA and the Bill purports to finally address these calls. The changes are, in fact, relatively minor. Their real effect seems likely to be minimal and they are not expected to have a substantial impact in practice. However there are other reforms happening at this time including the recent amendments to the Franchising Code of Conduct announced on 4 June 2010⁷⁴ and the new enforcement powers and civil pecuniary penalties in relation to unconscionable conduct. It may be that the combined effect of these changes could alleviate some of the concerns of small business and the franchising industry.

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72. F Zumbo, *Emerson fails small businesses and consumers*, media release, 27 May 2010, viewed 16 June 2010, http://www.businesses.com.au/index.php?option=com_content&view=article&id=167:emerson-fails-small-businesses-and-consumers-frank-zumbo&catid=38:business-news&Itemid=71
73. Law Council of Australia, op. cit.
74. C Emerson (Minister for Small Business), *Greater certainty and better protection for franchisees*, media release, 4 June 2010.

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