



Law Council
OF AUSTRALIA

Business Law Section

Supplementary Submission: Merger reform legislation and instruments

The Treasury

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Executive Summary

The Committee welcomes this opportunity to provide further input to Treasury on aspects of the new merger regime which raise practical concerns for business and the adviser community.

We note the recent and high-profile focus that has been placed by Government on the role of the private sector in driving productivity and the importance of ensuring regulatory interventions are efficient, proportionate and targeted to allow this to occur. The Committee is concerned that, at present, the merger regime does not achieve these objectives. Instead, it runs the risk of imposing considerable cost, delay and uncertainty on a very wide range of commercial transactions (not limited to mergers or traditional asset deals) that do not, and were never likely to, raise any competition concerns that warrant intervention.

This submission identifies a non-exhaustive list of 18 issues that have arisen already for members in advising clients and seeking to work within the new framework. Where possible, we have sought to explain the practical consequences for our clients and steps that we see might be taken to address the issue.

These issues raised are important and most have the potential to significantly impact commerce from 1 January 2026 and therefore require urgent attention.

In offering this issues list, the Committee recognises the policy objective of Government to implement a stronger, mandatory framework that reduces the degree to which firms and their advisers have discretion over whether to bring transactions to the ACCC. However, a mandatory framework that is too broad, with consequences for non-notification that are too severe (and fees that are substantial), will impose a considerable and unnecessary regulatory burden on Australian business and global firms seeking to invest here.

In terms of improving the workability of the framework, we consider that ameliorating the most severe and urgent of the difficulties could be achieved by targeting the following:

1. Transactions that are not notified should be voidable and not void.

By making the consequence of a failure to notify that the transaction void *ab initio*, the regime exacerbates the other concerns, because the consequence of 'getting it wrong' where there is uncertainty or complexity is incredibly severe.

There are any number of practical consequences:

- What happens in practice when a transaction is found to be void, after completion has occurred? What is the status of employee entitlements? What is the status of other transactions that have been undertaken in reliance on those rights (e.g. where a licencing or distribution agreement)? What happens to consideration that has been paid? This could occur years into the future.
- It means that ACCC guidance is of limited value because ultimately the question of whether a transaction is notifiable is one that can only be determined by the Federal Court. Ironically, this could *increase* merger parties looking to the Court for guidance compared with the former enforcement

model. The Federal Court will also need to get involved (repeatedly) in rectifying transactions that are identified as not being notified—and even that is limited to a 6-year period, beyond which it is not clear how a transaction could be rectified or what would happen to subsequent transactions etc that were based on the originally void one.

- Advisers must take a conservative approach to interpreting the regime—pushing a wider range of transactions through the regime.
- It creates a strategic opportunity for third parties to use the mechanism to try to pull over transactions after the event.

2. The position of leases is repeatedly problematic—the regime should focus only on leases in those sectors where land holding has proven a concern

It is not surprising that the first two registrations of notified transactions both involved leasehold deals. Query whether either of these justified the time and cost of notification.

The challenge of advising clients in relation to land interests is made more difficult because of (a) the removal of these interests from the ‘ordinary course of business’ exemption; and (b) the uncertain rules around the attribution of revenue for the purpose of the revenue thresholds. In this regard, the Explanatory Statement to the *Competition and Consumer (Notification of Acquisitions) Determination 2025* (Cth) (**Instrument**) (see page 9) is internally inconsistent and inconsistent with any commonly used approach to determining market value. The potential application of the 3-year lookback provisions to acquisitions of leasehold interests is also extremely complex.

Moving away from an assumption that all leases need to be notified to the ACCC, and instead focusing on those types of leases or sectors where this is relevant, would significantly improve workability.

3. The extension of the regime to transactions involving all legal or equitable interests (including non-property rights)

The regime significantly ‘over-captures’, with the significant risk that a large number of commercial arrangements across the Australian economy could potentially be challenged as void over coming years. These concerns arise from a combination of:

- the class of acquisitions under s 51ABN(1)(b) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) to which the regime applies being extremely broad;
- the relatively low level of Australian revenue required to trigger the notification thresholds under the Instrument and the approach to ‘attribution’ of Australian revenue to the acquisition of assets creating uncertainty in many situations (which is not something done in other accounting or legislative contexts, except where this the sale of a going concern); and
- the fact that a failure to notify a notifiable transaction will lead to—amongst other consequences—the transaction being void.

Already, we are being required to advise clients on the potential for merger notification to be required for the grant of patents, exclusive distribution agreements, outsourcing arrangements, commercialisation agreements, assignment of royalties and a host of other major contracts (e.g. in construction, resources, including where parties acquire ‘step in’ rights to operate a major asset, or ‘buy out’ rights to own, or take over a project which includes existing IP, licences, approvals and entitlements).

These are not transactions of a kind that have been required to be notified historically or under other international regimes.

4. The definition of ‘associates’ creates a risk that minority interests are caught

Uncertainty caused by the reference to ‘associates’ in paragraph 51ABS(2)(a) creates a likely requirement for even minority stakes under shareholders agreements to be notified. The fact that most parties undertaking these transactions post 1 January 2026 will not do so (and will not even contemplate the need to do so) creates a substantial risk of how to deal with void outcomes.

5. Attribution of asset to revenue thresholds

The operation of the revenue attribution test to such a wide range of assets or other transactions (which do not involve a ‘going concern’) is causing considerable confusion and uncertainty. We invite Treasury to reconsider a more orthodox approach in which revenue (or turnover) is the threshold applied only in the context of business or share sales—i.e. in the case of the sale of a ‘going concern’.

6. Use of the ‘ordinary course of business’ exemption

The regime relies heavily on an expanded role of this exemption, which historically has been viewed very narrowly by the Courts. A widened use of this exemption could work if the ‘void/voidable’ issue was resolved, because it would enable the ACCC to provide more effective guidance.

As it is, parties and their advisers will be forced to take a very conservative and limited view of the likely application of this exemption to deals—increasing the amount of ‘over capture’ within the regime.

There are a range of other practical issues, including in relation to difficulties in the approach adopted to financial services and land exemptions. Some of these issues have serious and unintended consequences, including the interaction of the regime with public market acquisitions under the *Corporations Act 2001* (Cth) (**Corporations Act**). For example, it appears that as drafted, it may no longer be lawful to undertake a conditional takeover on the public market. We discuss these below.

The Committee looks forward to continuing to work constructively with Treasury to seek to ensure that the regime operates in a workable manner.

Issue 1. Notifiable acquisitions which are not notified are void (Section 45AZA of the CCA)

The issue

This issue is the single most significant concern with the regime as implemented. It results in transactions being void, usually without the parties being aware of it. This is especially so because the regime now applies to a host of commercial arrangements that do not raise competition risks and would not previously have been required to be notified (see issue 4 below). However, these will be made void.

Moreover, because transactions are void without any action being taken by the ACCC, there is very little scope for the ACCC to provide any comfort through guidance. Parties will instead need to approach the Federal Court to seek declarations as to whether a transaction is notifiable or falls within an exemption—which is contrary to the policy intent of removing merger-related challenges from the Federal Court.

This will create a host of significant risks and challenges, for example:

- What happens when parties identify during due diligence that a commercial transaction entered into in the past by the target (such as a lease or a customer agreement) was not notified and is void? What does this mean for the sale process?
- What is the position of employees whose employment has been transferred under a transaction several years ago, but which is now found to have been void?
- What happens to consideration or other payments that have been made (perhaps years ago) in these circumstances?
- What is the scope for third parties to try to use this mechanism to challenge the validity of transactions by arguing that they were notifiable and so are void?

While there is scope for the Federal Court to rectify deals on application of the parties, this is costly, time-consuming and uncertain. It is also time-limited because an application to the Federal Court must be brought within six years (after that time, it is not clear what could be done to address the consequences of the transaction having always been void).

Finally, the fact that transactions are void (rather than able to be made void on application of the ACCC) will result in advisers taking a highly conservative approach with clients, given the serious future consequences of getting it wrong.

The Committee submits that the policy objective of ensuring that there are strong consequences for failure to notify can be adequately addressed through enabling the ACCC to obtain orders and penalties—including voiding transactions, as occurs today under s 87(2).

Potential fix

This issue likely requires statutory amendment in that section 45AZA should be repealed.

There is already a contravention created under s 45AW if a party puts into effect a transaction that was required to be notified.

A right should be included in s 87 of the CCA for the Court to order an acquisition to be void in the event of a contravention of s45AW. This should track the approach in s 87(2)(a), which allows for any contract *“to be void and, if the Court thinks fit, to have*

been void ab initio or at all times on and after such date before the date on which the order is made as is specified in the order”.

Issue 2. Reliance on ordinary course of business exemption (Paragraph 4(4)(b) of the CCA)

The issue

The existing ‘ordinary course of business’ exemption operates narrowly

The acquisition of assets will not be notifiable if the acquisition occurs *“in the ordinary course of business”*.¹

The Explanatory Memorandum to the *Competition and Consumer Legislation Amendment Bill 2010* (Cth) in relation to section 4(4)(b) (**EM to the Amending Bill**) and case law on this exception make it clear that ordinary course of business in this sense means the general idea of ordinary and everyday business transactions that would pass each day in the economy without any special interest or arising out of special circumstances.²

For example, the EM to the Amending Bill cites the following authorities:

- Rich J in *Downs Distributing Co Pty Ltd v Associated Blue Star Stores Pty Ltd (in liq)* (1948) 76 CLR 463 at [477], stating:

“that the transaction must fall into place as part of the undistinguished common flow of business done, that it should form part of the ordinary course of business as carried on, calling for no remark and arising out of no special or particular situation”; and

- Dixon CJ in *Re E J Taylor & Son Pty Ltd (in liq)* (1964) 110 CLR 129 at [136], stating that the exception:

“is meant to refer to transactions regularly taking place in a sustained course of activity or some other usual process naturally passing without examination”.

Further, it does not refer to the ordinary course of the acquirer’s, or anyone else’s, particular business—it refers to *“the ordinary course of business”*. *TPC v Gillette Company (No 2)* (1993) 118 ALR 280 gives the example of General Motors purchasing a typewriter from IBM as something *“sold and purchased in the ordinary course of business”*. Burchett J found that a company carrying on the business of acquiring other companies would not be operating in the ordinary course of business.³

Therefore, while a company carrying on the business of acquiring other companies may be operating in its own specific ordinary course, this is not in the ordinary course of business generally.

¹ CCA s 4(4)(b). However, this exception does not apply to land or an interest in land or patents or an interest in a patent: CCA s 51ABN(2).

² EM to the Amending Bill at [3.50].

³ *Trade Practices Commission v Gillette Co [No 1]* (1993) 45 FCR 366, 382 (Burchett J).

Further, the courts and EM to the Amending Bill have stated that this exemption is meant to operate narrowly.⁴ The EM to the Amending Bill stated from [3.51]:

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

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

- *the development occurs in a built-up area, with limited availability of alternative sites for potential competitors in that local market;*
- *the proposed supermarket operator already has a significant retailing presence in that local market; and*
- *if the proposed supermarket did not open on the site, then an alternative competitive supermarket would be likely to open on that site and operate a supermarket.*

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

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

This means that careful consideration must be given to whether a relevant acquisition can benefit from this exemption. Given the significant consequences of incorrectly relying on the exemption, businesses are more likely to require legal advice in each instance on whether the ordinary course exemption applies. This will involve additional legal cost, creating uncertainty and slowing down business' economic activity and productivity.

⁴ EM to the Amending Bill at [3.51]. *Trade Practices Commission v Gillette Co [No 1]* (1993) 45 FCR 366, 382 (Burchett J).

Further, businesses may fail to undertake that legal assessment because they are unaware or do not (have the resources to) appreciate the risk of their failure to notify. As a result, transactions that should have been notified will be void without the parties' or subsequent acquirers' knowledge.

Potential fix

We suggest that the position on this issue could be improved through the EM and amendment to the Instrument. More generally, we consider that more consideration might be given as to whether use of the exemption in this way is appropriate.

As to general concern re uncertainty:

In the short term, consider more express clarification as to what is meant by the ordinary course of business through the EM.

The Committee considered whether it is possible for an instrument to outline what acquisitions are deemed not in the ordinary course of business for the purpose of s 4(4)(b), but understands this may not be possible, as s 4(4)(b) is not under Part IVA.

A more long-term fix would be to address the 'void' issue discussed at issue 1—which would then enable the ACCC to use guidance to address this concern.

On the specific issues

Give more thought to whether approach to use of this exemption is appropriate.

Consider whether land transactions generally can be brought back within the scope of the exemption, instead carving out specific types of land transactions (e.g. supermarkets, potential foreclosure via land banking, long-term leases over unique parcels of land), especially given that s 50 continues to apply as a safeguard.

Issue 3. Definition of 'associates' under s 50AA of the Corporations Act within the control test (Paragraph 51ABS(2)(a) of the CCA)

The issue

The Committee is concerned that the current definition of control is overly broad and risks resulting in situations where investments by clear minority shareholders and investors with no traditional control rights are deemed to have joint control for the purposes of the acquisitions provisions.

To illustrate the concern, where a consortium of investors acquires a takeover target, the consortium members will invariably enter into a shareholders' agreement that will result in each investor becoming an 'associate' that is deemed to have joint control over the target irrespective of the actual percentage stake acquired in the target or the shareholder rights attached to the stake acquired (or lack thereof).

This concern arises as a result of the following:

- Section 51ABS of the CCA provides that an acquisition by a person of shares in the capital of a body corporate is not required to be notified if the person would not control the body corporate immediately after the acquisition. This test reflects a clear policy intent to avoid capturing acquisitions that do not result in control, and only require notification of acquisitions of control.

- ‘Control’ in this context has the meaning given in section 50AA of the Corporations Act, which looks to the capacity to determine the outcome of decisions about the relevant body corporate’s financial and operating policies.
- Subsection 50AA(3) provides that where two entities jointly have this capacity, neither entity controls the relevant body corporate. However, paragraph 51ABS(2)(a) provides that, despite this subsection 50AA(3), an acquirer is taken to have control if it and one or more ‘associates’ (within the meaning of Chapter 6 of the Corporations Act) jointly have that capacity referred to in subsection 50AA(3) of the Corporation Act in relation to the acquisition target.
- The definition of ‘associate’ that applies for the purposes of Chapter 6 of the Corporations Act is expansive. It captures, among other things, persons who have entered into a relevant agreement for the purposes of controlling or influencing the composition of the relevant body’s board or the conduct of the relevant body’s affairs. It is not uncommon for a minority shareholder to be conferred the right to appoint a director as a way to protect their minority holding. While the director may not have a veto right, and would not have control, the shareholder in this arrangement would be an associate for the purposes of Chapter 6, and therefore be deemed to ‘jointly control’ the target with all other associates for the purposes of paragraph 51ABS(2)(a). It is also customary for other ‘minority shareholder protection rights’ to be conferred under shareholders agreements which would therefore be caught by the latter phrase ‘conduct of the relevant body’s affairs’.⁵ While these rights do not confer ‘control’ as understood under subsection 50AA(2), a shareholder in an arrangement given shareholder protection rights would be an associate for the purposes of Chapter 6, and therefore be deemed to ‘jointly control’ the target with all other associates for the purposes of paragraph 51ABS(2)(a). This is far broader than the definition in the Corporations Act that applies for non-Chapter 6 purposes, which generally covers only entities within a corporate group and their respective directors and secretaries.⁶

The Committee notes that these difficulties appear to arise from the extension of the control test to include instances of joint control (i.e. the modification in subsection 51ABS(2) of the CCA to the control test in section 50AA of the Corporations Act).

In the Committee’s view, the control test in section 50AA of the Corporations Act, without the modification in paragraph 51ABS(2)(a) of the Act, would arguably already cover instances of ‘negative control’ (e.g. where an acquirer is conferred certain veto rights that in practice allow it to determine the outcome of relevant matters by blocking alternatives). On this view, minority interest holders which have sole control through negative veto rights would be captured by the control test, without the need to extend the concept of control to include ‘joint control’.

⁵ ‘Minority shareholder protection rights’ are common or normal protection of the rights of minority shareholders and are related to decisions on the essence of the company’s business, such as changes in the constitution, an increase or decrease in the capital or liquidation. These rights do not confer ‘control’ but are aimed at protecting the value of the investment made by the particular minority investor. This is consistent with the approach taken in the European Union, where minority shareholder protection rights are distinguished from rights which confer control. As the EU Jurisdictional Notice says, “[a] veto right, for example, which prevents the sale or winding-up of the joint venture does not confer joint control on the minority shareholder concerned...” (at 22). The EU Jurisdictional Notice provides the following useful description about ‘control rights’ by saying that “[t]hey must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors in the joint venture. This normal protection of the rights of minority shareholders is related to decisions on the essence of the joint venture, such as changes in the statute, an increase or decrease in the capital or liquidation” (at 22).

⁶ Section 11 of the Corporations Act.

However, if further certainty is needed to ensure that instances of negative control are captured, the Committee considers that a preferable solution to the current mechanism of deeming joint control would be to provide that a person is deemed to have control if they have veto rights in respect of key matters (e.g. the target's financial and operating policies). This approach would also be more closely aligned with the control test in jurisdictions such as the EU.

In other major jurisdictions, such as the EU, the ownership of 50% of non-voting share capital in and of itself is usually insufficient to acquire control and would require additional elements such as strategic veto rights. For example, in the context of the EU merger regulations, 'control' exists if the acquirer directly or indirectly (in summary):

- owns more than a 50% voting interest in the company; or
- has 50% or less than 50% voting interest but has an effective veto over the budget, business plan and/or hiring or firing of senior management (either by virtue of specific governance rights or the ability to block strategic matters via shareholder or board seats); or
- can achieve either of the above by acting 'in concert' with another shareholder, for example, under a side agreement whereby the shareholders agree to always vote in the same way.

This provides for a more straightforward assessment of control that better accurately reflects the degree to which an acquirer can control a target as a matter of commercial reality, which is what the unmodified section 50AA test is equipped to do.

Practical consequences

In the example of an investment consortium scenario described above, the current modified section 50AA control test would have the following implications.

- Where a consortium of investors acquires a target, the consortium members will enter into a shareholders agreement that governs their relationship and behaviour in respect of the target. The shareholders agreement will address, amongst other things, the composition of the board of directors of the target, for example, providing that each investor is entitled to appoint one director for each 15% interest held in the target.
- In these circumstances, a shareholders agreement will constitute a relevant agreement for the purposes of the associate definition, with each party to the agreement being an associate of each other party for the purposes of Chapter 6 of the Corporations Act.⁷
- As a result, each party to the shareholders agreement will be taken to control the target (because it and one or more associates jointly have the capacity referred to in subsection 50AA(3) of the Corporations Act). For example, where an investor acquires a 40% interest, a co-investor acquires a 15% passive interest without the benefit of any traditional control rights and a shareholders agreement exists between the two investors, the 55% total interest would amount to control and the co-investor with 15% would be deemed to have joint control, despite not having any real capacity to control the target.

⁷ Paragraph 12(2)(b) of the Corporations Act provides: "*subject to subsection (2A), the second person is a person with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs*".

- This illustrates that where each investor in a company is a party to the shareholders agreement, all shareholders will invariably be associates, since, as between them, the shareholding is 100%.
- This will be the case even for an investor that has only a small stake and does not enjoy any board appointment or veto rights over strategic matters like the budget or business plan under the shareholders agreement. Such an investor would generally still need to be a party to the agreement for other purposes, e.g. to restrict their ability to dispose of shares in the target other than in accordance with the agreed regime.

In addition, where a consortium member (or shareholder in a similar scenario) is taken to have joint control as an associate, e.g. under a shareholders agreement as described above, it would appear that the shareholder would not need to notify any subsequent acquisition which would have the effect of providing the shareholder with sole control (on the basis that the shareholder already had control, albeit 'joint control'). This outcome does not seem to align well with the policy intent of regulating acquisitions of control, having regard to the practical change of control that would occur only with the subsequent acquisition.

Considering the policy intent of applying the regime to acquisitions of control, the scenarios described above appear to be unintended consequences of the broad scope of the control test.

Potential fix

In the Committee's view, it would be appropriate to amend paragraph 51ABS(2)(a) of the Act. The Committee proposes substituting the concept of 'associate' for a concept that is well established in competition law—entities with which the acquirer is 'acting in concert'.

The result of this change would be that:

- merely entering into a shareholders agreement with other investors without the enjoyment of traditional control rights would not necessarily result in joint control;
- some degree of either positive or negative 'sole control' (i.e. some degree of the capacity referred to in subsection 50AA(1) of the Corporations Act to determine the outcome of decisions about financial and operating policies, albeit not the capacity to determine those matters individually), such as veto or board appointment rights, would be required; and
- some degree of coordination in respect of how the capacity of control is exercised jointly, or 'in concert', with one or more other entities would be required in relation to decisions about a body corporate's financial and operating policies. This would capture instances where parties have agreed to exercise their control rights in a certain way, and exclude instances where parties are unrelated and do not have any arrangements of this nature.

The Committee further submits that, if greater certainty is required to ensure that negative veto rights constitute control, it would be appropriate to insert a new paragraph 51ABS(2)(d) for this purpose.

An example of the potential amendments that could be made in subsection 51ABS(2) of the CCA is set out below:

(a) despite subsection 50AA(3) of the Corporations Act 2001, the person is taken to control the body corporate if, as a result of the first person and ~~one or more associates (within the meaning of Chapter 6 of that Act)~~ any one or more entities acting in concert, they jointly have the capacity referred to in subsection 50AA(3) of that Act in relation to the body corporate; and

...

(d) if the person is in a position to veto a resolution of the board of an entity in relation to decisions about the entity's financial and operating policies, the person is taken to control the body corporate.

Section 1-5 of the Instrument should be similarly amended and aligned with paragraph 51ABS(2)(a) of the CCA.

Issue 4. The definition of acquisition of assets—and application to contractual rights (Section 51ABN of the CCA)

The issue

General concerns regarding over-capture

The Committee is concerned about the over-capture and uncertainty created by the definition of 'assets' contained in s 51ABN(1) of the CCA in combination with the Instrument and ACCC guidance.

These concerns arise from a combination of:

- the class of acquisitions to which the regime applies being extremely broad, as under s 51ABN(1)(b) of the CCA, it is triggered by the acquisition of any "*legal or equitable right that is not property*";
- the relatively low level of Australian revenue required to trigger the notification thresholds under the Instrument and the approach to attribution of Australian revenue to the acquisition of assets (for the purposes of the notification thresholds) creating uncertainty in many situations; and
- the fact that a failure to notify a notifiable transaction will lead to—amongst other consequences - the transaction being void.

Taken together, these issues create a real risk that the regime will inadvertently have significant impacts on a vast range of transactions in Australia that:

- could never raise any competition risks;
- would never be within scope of an ACCC review under the existing regime; and
- are routine commercial transactions of a kind which are not identified as of concern to the ACCC (unlike e.g. patents or leases), and were therefore never intended to be captured by the new mandatory clearance regime.

Unless changes to the regime are made, the issues noted above will result in a substantially higher volume of routine transactions to be:

- subject to (potentially complex and/or costly) legal analysis and advice not previously required;
- notified to the ACCC (requiring the costs of preparing and paying for notification), either because they meet the thresholds or the uncertainty about the potential application of the regime leaves the parties in the position where notification is made due to the potential risks of not doing so; and
- considered (either under notification or waiver) and determined by the ACCC.

Specific concern regarding extension to general commercial transactions

The Committee is concerned that potential commercial transactions and contracting could be inadvertently caught by the new regime, and proposes pathways to help businesses (and the ACCC) have greater clarity that commercial deals involving assets:

- are not inadvertently subject to the regime where they involve routine commercial transactions; and
- otherwise, can be assessed against the notification thresholds with certainty.

The concern again arises due to the broad definition of s 51ABN(1)(b), which states the acquisition provisions apply to any “*legal or equitable right that is not property*”.

Acquisitions in the s 50 sense have never been intended to capture contractual arrangements as acquisitions of property or an asset (that is what s 45 is for). Contractual rights relating to use of, or rights to assets (e.g. via licences), have been traditionally understood as *separate* from the property or asset itself, although that is not legally conclusive.

The expanded definition of ‘asset’ comes from tax law concepts⁸ and has been imported into an assessment of whether transactions are likely to involve structural changes to markets that adversely impact competition. Importing this concept into a mergers context means that:

- ***Mere creation of contractual rights*** (e.g. grant of licences, sub-licences or other contractual rights) could be a notifiable acquisition. This is a significant departure from the ACCC’s historically consistent approach that the initial grant of licences (e.g. lottery licences) are not ‘acquisitions’ caught by s 50 of the CCA.⁹
- ***Transfer of pre-existing contractual rights could be notifiable***—then requiring legal assessment of whether those rights are acquired “*in the ordinary course of business*” (so as to be exempt under s 4(4)(b)) and of what the Australian revenue attributable to those rights is, which may involve complex analysis.
- ***Significant penalties and major consequences*** (where the transaction is taken to always have been void) attach for failure to notify a new range of contractual rights never intended to be captured under the informal regime or under the new regime,

⁸ Including the definition of CGT Asset in s 108.5 of the *Income Tax Assessment Act 1997* (Cth)

⁹ See ACCC review of a retail liquor licence in Public informal merger reviews register: [‘Woolworths Limited - proposed acquisition of Liquor licence at Glenfield Park t/as South City Liquor’](#) (13 June 2012) and [‘Proposed sale of licence and/or assets relating to NSW Lotteries’](#) (30 September 2009).

where such failure to notify is more likely to be inadvertent as businesses may not appreciate or even identify this issue.

To provide additional detail:

1. There needs to be a relevant 'acquisition' of the asset (the right). Case law indicates that under s 4(4) an acquisition "*must necessarily involve obtaining or gaining ownership of some legal or equitable interest in shares in the capital or assets of a body corporate*" and notes the ordinary meaning of 'acquire' means "*to gain or obtain or get as one's own the ownership of something or to come into possession of something*".¹⁰ For instance:
 - the grant of an option *to purchase shares* was found to be an acquisition of (equitable interest in) the shares for the purposes of s 4(4)(a);¹¹ however
 - the grant of an option to refuse, and grant of a licence to enter, was found to not be an acquisition of *an asset* for purpose of s 4(4)(b)¹². While this indicates a mere right to use an asset, to enter land or to do something conferred under a contract is not a sufficient proprietary interest to be an "*acquisition of an asset*", s 51ABN extends that beyond property to legal or equitable rights that are not property.

As a result, there is a risk that conferring/granting/creating/transferring rights under a contract (whether new rights or transfer of existing rights) could be considered to be an 'acquisition' in the sense that the recipient is obtaining or coming into possession of those rights (which are treated as an 'asset' by virtue of s 51ABN for the purpose of merger laws, but may not have been sufficient to be an 'asset', or legal or equitable interest in an asset, in ordinary case law).

2. The asset must be the asset "*of a person*" or "*of a corporation*": Where the contract involves assignment or transfer of existing contractual rights (which are treated as assets under s 51ABN(1)(b)), this may be more likely to be considered an acquisition of an asset (an existing right) of a person or corporation (the transferring party). Where the contract involves creation or conferring of new rights (also treated as an asset under s 51ABN(1)(b)), there are good arguments that this may not amount to an acquisition of an asset "*of a person*" or "*of a corporation*", as the contractual right (e.g. the option or the licence) did not exist before the contract that created it. However, the counterargument is that the conferrer, by ownership of the underlying asset (e.g. software that is licensed, equipment that is leased or assets over which an option is created) has the inherent ability to grant that right given it is their asset—so granting or conferring a right is still acquiring an asset "*of a person*".

Potential examples of transactions subject to this issue, including the following:

- initial grant of a patent;
- grant or transfer of exclusive licences relating to liquor, gaming, mining or other resources rights or distribution agreements or arrangements;
- business or other outsourcing agreements;

¹⁰ *Trade Practices Commission v Australian Iron & Steel Pty Ltd* (1990) 92 ALR 395.

¹¹ *Trade Practices Commission v Arnotts Ltd* (1990) 93 ALR 657; 16 IPR 417; [1990] ATPR 41-062, [5]-[7].

¹² *SA Brewing Holdings Ltd v Baxt* (1989) 87 ALR 134 [19]-[21].

- exclusive, high-value licences (e.g. plant breeder rights, software and water rights);
- major contracts (e.g. in construction, resources, including where parties acquire ‘step in’ rights to operate a major asset, or ‘buy out’ rights to own or take over a project which includes existing intellectual property (IP), licences, approvals and entitlements);
- assignment of major royalties or revenue streams (e.g. equitable rights in a pre-existing royalty); and
- large acquirers with repeat but major software licensing deals, off-take agreements, power purchase agreements (PPAs), construction or development contracts (even in different geographies) caught under the 3-year lookback.

Practical consequences

Over-capture through ‘asset’ definition

Importing the extended definition of ‘asset’ from the definition of CGT Asset in the *Income Tax Assessment Act 1997* (Cth) and taking a literal view that the acquisition provisions therefore apply to any legal or equitable rights under s 51ABN has materially broadened **the types** and **the volume** of contractual rights that may be caught under the new regime (e.g. everyday commercial contractual rights that a court would enforce, such as all manner of licences, high-value supply agreements, etc.).

For large acquirers, the impacts are even greater, where repeat acquisitions/conferral of contractual rights worth over \$2m involving the same types of goods or services (e.g. software licences, rights associated with major energy or resources projects and licences) would be captured under the 3-year lookback.

The existing ‘ordinary course of business’ exemption operates narrowly, meaning routine commercial negotiations and contracting arrangements may be caught

The acquisition of legal or equitable rights will not be notifiable if the acquisition occurs “*in the ordinary course of business*”.¹³

As noted at issue 2 above, the EM to the Amending Bill and case law on this exception make it clear that ordinary course of business in this sense means the general idea of ordinary and everyday business transactions that would pass each day in the economy without any special interest or arise out of special circumstances.¹⁴ An example may be the acquisition of electricity (which may be viewed as the acquisition of a contractual right to be supplied electricity) for the purposes of powering a business’s manufacturing plant on ordinary commercial terms.

It **does not** refer to the ordinary course of the acquirer’s, or anyone else’s, particular business—it refers to “*the ordinary course of business*”. This means that major one-off commercial deals (e.g. major infrastructure contracts, media rights agreements, partnerships, or major licences awarded) could be said to arise out of special interests or circumstances, and are therefore potentially not in the ordinary course. An example might be the acquisition of contractual rights pursuant to a long-term PPA.

¹³ CCA s 4(4)(b). However, this exception does not apply to land or an interest in land or patents or an interest in a patent: CCA s 51ABN(2).

¹⁴ EM to the Amending Bill, [3.50]

Consequences of the above and associated uncertainty

- **Determining whether the ordinary course of business exemption applies:** businesses will have to place much greater reliance on this exemption. This legal assessment is likely to involve value judgements (where reasonable minds may differ), additional legal costs for routine transactions, and a much larger volume of deals where parties do not feel comfortable relying on the exemption (given the consequences of getting it wrong) and feel they have to notify the ACCC—creating a further volume and triage problem for the ACCC.
- **Determining the Australian revenue attributable to different types of contractual rights** (most of which may not involve acquiring an interest in any underlying property or asset), and also when deciding when it is ‘not reasonably practicable’ to do so, is likely to involve complex legal analysis, and value judgements which may differ from business to business and adviser to adviser. For example, is the legal/equitable right the lease or an interest in the underlying land?
- **Creation and transfer of rights:** While there are good arguments that ‘creation’ of a contractual right does not involve a relevant ‘acquisition’, and also potentially that a ‘transfer’ of pre-existing rights involves a new contract with a different counterparty, and not an acquisition, parties may consider there is too much risk in these value judgments not to notify the ACCC, given the consequences of penalties and void transactions.
- **Routine transactions could be void:** given the automatic deeming provisions, this has huge ramifications if businesses are operating assets or relying on rights which it turns out they have never owned. While businesses will, of course, have to ensure they do their due diligence in typical M&A deals, this level of diligence and the warranties, etc., that will necessarily result, have not typically been part of routine commercial contracting. It creates significant knock-on effects and potentially many court or Tribunal applications to consider the legal ramifications of, and how to rectify, a situation where parties have been operating on the basis of rights they never owned.
- **Problematic precedent:** given the complexity and level of judgment involved at each stage of the assessments outlined above (whether there is a relevant ‘acquisition’, the narrow construction of the ‘ordinary course’ exemption, attribution of Australian revenue)—it is highly likely legal advisers could come to legitimately different and reasonable views about whether the same types of contractual rights are notifiable or not.

Where more conservative businesses/advisers decide to notify, while others may have good arguments not to notify in similar scenarios, there is a real risk the ACCC could consider some parties have not properly notified, which could lead to transactions (arguably validly) completed being deemed void, and the associated court challenges (including by third parties) and potential penalties.

- **ACCC managing volume of notifications:** The ACCC has a material interest in not being notified of large volumes of these types of routine contracts/rights which do not fundamentally alter the structure of the market or raise competition concerns, and the ACCC will not have the resourcing to triage or consider them (even through the waiver process).
- **Significant transactional costs impact/chilling effect:** legal/compliance costs of having to assess the ordinary course of business exemption, and attribution of Australian revenue for large but routine contracts (e.g. bundling IP rights, transfer of licences, energy and resources project developments with no acquisition of underlying

assets) and the payment of notification and application fees will increase dramatically, slowing negotiations and potentially stymying ordinary business conduct. It will be a costly filter for legal advice on whether each commercial deal is in ordinary course, and it could be complex to attribute revenue to the rights created or transferred.

The Committee understands that creating or granting of new contractual rights, high-value supplier/customer contract, and conferral of rights which don't involve acquisitions of underlying assets were never identified as potential competition or markets issues to be addressed via the merger reforms. The operation of s 51ABN, if not tempered in practice by the Instrument, risks creating an *ex ante* review process for commercial contracting.

Finally, s 45 addresses any concerns in these areas: it prohibits contracts, arrangements or understandings that have the purpose, effect or likely effect of substantially lessening competition. It has been and always will be intended for the purpose of ensuring that contractual arrangements do not result in a substantial lessening of competition and remains appropriate for that.

Potential fix

Noting the ACCC can't grant waivers for acquisitions in the ordinary course (as outside Part IVA)

The potential solutions below are intended to be implemented through the Instrument or ACCC's process guidance, however the problem lies in the definition in s 51ABN of the CCA. The Committee strongly urges Treasury to consider amendments to the definition in s 51ABN to deal with these concerns (for example, by linking 'assets' to going concerns or the operation of a business).

In the absence of amending the statutory definition in s 51ABN or the concept of "*acquisition of the asset of a person or corporation*" in the acquisition provisions,¹⁵ it may be possible to implement the following, in combination, to narrow the circumstances in which the 'acquisition' of contractual rights is notifiable.

To address new contractual rights

The Committee submits that an additional exception to the general circumstances under Division 2 of the Instrument for rights conferred under ordinary commercial contracting, with an anti-avoidance protection should be included.

For example, the inclusion of a new 2-27 for:

Certain contractual rights—This Division covers [an acquisition of] legal or equitable rights (as defined in paragraph 51ABN(1)(b) and subparagraph 51ABN(1)(c)(i) resulting from:

- *creation, granting or initial conferral of contractual rights (whether by a regulatory body, corporation or person); or*
- *commercial contracts between suppliers and their customers and without either party obtaining any right to own, buy, or possess any underlying asset of the other (person or corporation).*

¹⁵ CCA ss 4(4) and 51ABB.

To address existing contractual rights

1. Make acquisitions of pre-existing “*legal or equitable rights*” only (where there isn’t otherwise an acquisition of an underlying asset or shares) subject to a specific, higher monetary threshold.

For example, where the value of the rights is \$250 million (similar to the transaction/market value threshold under the general test), with an anti-avoidance provision, and not subject to the 3-year lookback.

2. Define in the Instrument or a new instrument that acquisitions which fall under the new exception outlined above or do not meet a specific monetary threshold for rights are not notifiable.

In addition, specify only those rights that meet the monetary threshold AND are the types of legal or equitable rights that s 51ABN is intending to capture and that the ACCC would be most concerned about must be notified (e.g. major strategic IP licences). This would then create an appropriate three-pronged test for notification:

- not an initial creation of rights;
- the value of the rights meets the higher threshold; and
- the assets are a specific category of rights of concern (in addition to patents and leases).

Alternatively, and similar to the specific supermarkets provisions, if there is a specific type of contractual right that Treasury has reason to be particularly concerned about, the Instrument could specify that those particular rights are notifiable even if they are not the creation of the right or do not meet the higher monetary threshold.

Finally, the Committee also considered whether it is possible for the Instrument to outline what acquisitions are deemed not in the ordinary course of business for the purpose of s 4(4)(b), but understands this may not be possible as s 4(4)(b) is not under Part IVA.

In addition to the above:

The Committee considers it appropriate for there to be detailed ACCC guidance with examples of which types of legal/equitable rights acquisitions are considered to be in the ordinary course of business (or otherwise are intended to be captured by the regime, beyond the examples of leases and interests in patents given in the Explanatory Statement).

Issue 5. Attribution of revenue to asset transactions (Sections 1-9, 1-10 and 1-14 of the Instrument)

The issue

The Committee is concerned that the requirements of the Instrument in respect of the attribution of Australian revenue to certain asset acquisitions gives rise to considerable uncertainty.

The Instrument requires parties to ascertain the amount of 'Australian revenue' for the purposes of determining whether a transaction is notifiable pursuant to sections 2-1 and 2-3 of the Instrument.¹⁶ This is required in situations where the relevant acquisition is one of shares (or equivalent interests) or assets.

By way of illustration, in accordance with section 1-9, for the purposes of calculating whether an acquisition will satisfy the combined acquirer/target revenue test in the context of the acquisition of an asset, paragraph 1-9(1)(e) requires consideration of *"the Australian revenue of the target to the acquisition to the extent that it is attributable to the asset"*.

Further, in instances where it is not reasonably practicable to attribute the Australian revenue of a target to an acquisition of an asset, subsection 1-9(3) provides for an alternative means of calculating Australian revenue by reference to 20% of the 'market value' of the asset.

In respect of this attribution exercise, the Explanatory Statement notes as follows:

*"Where one or a small number of isolated assets are being acquired, it is likely that Australian revenue can be attributed to that asset or those assets. However, if it is not possible, subsection 1-9(3) provides for an alternative means of calculating Australian revenue."*¹⁷

Despite the comments in the Explanatory Statement, the Committee is concerned that the attribution exercise required by the Instrument will require highly complex and novel assessments by merger parties about the attribution of revenue to assets in situations where an asset transaction (as opposed to the acquisition of shares in a body corporate, or equivalent) does not involve the acquisition of a going concern.

The Committee acknowledges, and supports, the Instrument adopting a definition of Australian revenue by reference to the accounting standards that are most applicable to entity for the purposes of assessing whether an acquisition is notifiable.¹⁸ In the Committee's view, this practical definitional approach is a prudent means of reflecting the way in which entities will be recording and reporting their revenues in the ordinary course.

However, the Committee has been unable to identify any accounting standard, or any other example of a legislative requirement, that requires an equivalent exercise for a person to attribute revenue to assets that do not—individually or collectively—form a going concern for which financial statements must be prepared.¹⁹

¹⁶ Sections 1-9 and 1-10 of the Instrument.

¹⁷ Explanatory Statement, page 9.

¹⁸ Section 1-4 of the Instrument.

¹⁹ See by way of contrast, *AASB 101 Presentation of Financial Statements*, [25]-[26].

As a consequence, the Committee considers there are many instances in which the attribution of revenue to assets which do not comprise an entire and separable business will be a highly complex and uncertain exercise.

Further, it is noted that subsection 1-9(3) is intended to operate as a form of ‘fallback’ test which is only to be applied in where the attribution contemplated by paragraph 1-9(1)(e) is not reasonably practicable. Accordingly, a further level of complexity arises as to the circumstances in which merger parties will have complied with the requirements of the Instrument by adopting the ‘fallback’ provisions in subsection 1-9(3).

Under the structure of the Instrument, it appears possible that an entity may make an assessment that a process of revenue attribution for the purposes of paragraph 1-9(1)(e) is not reasonably practicable and instead relies on subsection 1-9(3), only for this to be incorrect on the basis that it is in fact reasonably practicable to attribute Australian revenue to the target assets. Similarly, the reverse appears possible—that is, for an entity to attribute revenue (despite the impracticality), only for this to be incorrect on the basis the attribution was not reasonably practicable. The misapplication of these provisions in the Instrument could lead an acquirer to fail to notify the ACCC of a notifiable acquisition which, as noted elsewhere in this submission, would lead to an automatic deeming of the acquisition as void. This, in effect, requires companies to assess their transactions under both limbs.

In the Committee’s view, such an outcome is a disproportionate and unnecessarily drastic consequence when taking into account the unknown and uncertain requirements of the Instrument.

Application to accumulated or ‘serial’ acquisitions before 2026

The position is—in the Committee’s view - even more complicated in the case of the ‘accumulated’ acquired shares or assets test in accordance with section 1-11 of the Instrument. Under this provision (either the tier 1 test in subsection 1-11(1) or the tier 2 test in subsection 1-11(2)), the acquirer is required to examine the revenue attributed to previous assets that it acquired in a prior three-year period (ending at the ‘test time’).

For acquisitions entered into by parties until approximately July 2028, the relevant three-year period before the ‘test time’ will include transactions involving the acquisition of assets that completed before the registration of the Instrument, and accordingly, before parties were aware that any asset attribution test would need to be considered.²⁰

For these transactions, the Committee expects many parties will not have the records or information necessary to properly ascertain the application of the tests in section 1-11 of the Instrument.

Potential fix

Sale of a going concern vs other asset acquisitions

In the Committee’s view, an appropriate resolution to the issues outlined above that would not disturb:

- the underlying policy objectives, or
- the substantive effect of the legislation and Instrument

²⁰ As per the timing rules in subsection 1-11(4) of the Instrument.

would be to bifurcate the application of the notification thresholds in respect of the acquisition of assets as between those that involve the acquisition of a 'going concern' and those that do not.

In the Committee's view, the concept of a 'going concern' is a well-understood term in the context of business transactions, owing to the established rules for the treatment of any sale of a going concern as GST-free in accordance with the GST laws,²¹ and there is a substantial body of interpretative material and judicial consideration to assist in understanding when a transaction involves the sale of a going concern.²²

Accordingly, introducing this concept into the Instrument—by reference to the GST laws if needed—would not introduce any matter or consideration that does not already need to be made by parties to any form of asset transaction.²³

In the case of a transaction that involves the sale and purchase of a going concern, the Committee considers that the existing Australian revenue tests can be applied in the manner currently contemplated under the Instrument.

The Committee notes that each of the existing examples provided in the Instrument for the application of paragraph 1-9(e) are likely to be acquisitions of a business that is a going concern, rather than merely assets (for example, a lease, a licence or other form of contract, a single piece of infrastructure or other form of asset).

Alternative - transaction or market value thresholds

For transactions involving the acquisition of assets that do not meet the requirements to be the sale of a going concern, the Committee considers an alternative approach to the attribution concepts in section 1-9 of the Instrument would be to instead rely on thresholds set by reference to the transaction or market value of the assets—being a concept already relied upon in the Instrument in accordance with section 1-12.

More specifically, the Committee considers that thresholds could be set for asset acquisitions leading to a situation where the applicable notification triggers are satisfied where the transaction (or market) values for the assets are in accordance with the following:

- For the ***tier 1 acquired assets test*** under subsection 1-10(1) of the Instrument, where the acquisition is of a target that is ***not*** a going concern, the transaction value of the target (applying the same principles in section 1-12) is **at least \$200m**; and
- For the ***tier 2 acquired assets test*** under subsection 1-10(2) of the Instrument, where the acquisition is of a target that is ***not*** a going concern, the transaction value of the target (applying the same principles in section 1-12) is **at least \$50m**.

The above asset value tests are proportionate to the existing thresholds in the Instrument (if not slightly lower in the case of the tier 1 test); and would not involve the omission of any transactions that should—in the Committee's view—be notifiable under the new clearance regime.

²¹ In accordance with Subdivision 38-J of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and subsection 38-325(1) in particular.

²² See, e.g., *Goods and Services Tax Ruling GSTR 2002/5: when is a 'supply of a going concern' GST-free?*, *Aurora Developments Pty Ltd v. Commissioner of Taxation* (2011) 192 FCR 519 and *Debonne Holdings Pty Ltd v Commissioner of Taxation* (2006) 64 ATR 1154.

²³ The Committee also notes the reference to a 'going concern' in the Explanatory Statement to the Instrument, in respect of the application of paragraph 2-22(2)(d), subsection 2-23(7) (relating to derivatives) and subsection 2-24(1) (relating to debt instruments, money lending and security interests) of the Instrument.

For completeness, the Committee also notes that these changes would also not disrupt or undermine the application (or scope) of the carve-out in paragraph 2-22(d) of the Instrument to the exception for certain acquisitions in section 2-22.

Application to the accumulation tests in s 1-11

In relation to the requirements for the accumulated acquired shares or assets revenue tests in section 1-11 of the Instrument, the Committee considers that at least for the first 3 years from 1 January 2026 until 1 December 2028, each of the tier 1 and tier 2 accumulated tests should be limited to only accumulating prior acquisitions that involved the acquisition of shares, or assets that amounted to the acquisition of a going concern.

The Committee considers this approach addresses the uncertainty for parties who acquired assets (other than those involving the acquisition of a going concern) prior to the mandatory application of the Instrument on 1 January 2026 by removing the need to review those acquisitions and attempt to attribute any revenue for the purposes of the Instrument. In the Committee's view, this change would not interfere with the policy objectives of the accumulated acquisitions tests, as it would still capture acquisitions of businesses that supplied or acquired predominantly the same goods or services as the target (or goods and services that are substitutable for, or otherwise competitive with) the target.

If, in contrast to the proposal above, it is considered necessary to retain the consideration of asset acquisitions other than going concerns for the purposes of section 1-11, this could be achieved by replicating the applicable tier 1 and tier 2 tests into section 1-11. However, the Committee would recommend in this context a change to the small acquisition test for asset acquisitions other than going concerns to exclude any acquisition that did not meet a \$5m asset value test.

Issue 6. Lack of class waivers (Sections 51ABU and 51ABV of the CCA)

The issue

Under ss 51ABU-51ABV, the ACCC is only able to waive notification requirements for individual acquisitions.

It is likely that there will be large volumes of similar types of transactions that clearly will not give rise to competition issues which are not currently set out in the Instrument. Requiring parties to seek waivers for such transactions on an individual basis and the ACCC to consider each separately is highly inefficient and would impose an undue administrative burden.

While there is scope to add new exemptions to the Instrument, this is subject to time and process limitations, making it harder and slower.

Giving the ACCC the power to make class waivers would provide for a more flexible solution to dealing with categories of acquisitions.

Potential fix

If the desire is to largely retain the existing statutory provisions, this could potentially be achieved by amending s 51ABV to allow for the ACCC to use an acquisition that is notified as the basis for waiving a class, of which the acquisition forms part.

Some specific suggested amendments are as follows.

- (1) *If a notification waiver application in relation to an acquisition is made, the Commission may, in writing, determine:*
 - (a) *that:*
 - (i) *the acquisition is not required to be notified; or*
 - (ii) *a class of acquisitions which includes the acquisition (including specifying criteria for inclusion in the class) is not required to be notified; or*
 - (b) *not to make the determination applied for.*
- ...
- (6) *If the Commission makes a determination under subparagraph (1)(a)(i) in respect of the application, the acquisition is not required to be notified.*
- (7) *If the Commission makes a determination under subparagraph 1(a)(ii) in respect of the application, any acquisition within that class of acquisitions is not required to be notified.*

Issue 7. Non-controlling interests and divested interests captured under lookback period (Section 1-11 of the Instrument)

The issue

The Committee is concerned that the serial acquisitions threshold is likely to result in significant and unintended over-capture that is inconsistent with the policy intent of both regulating acquisitions of control *and* finding an appropriate balance between oversight of creeping acquisitions and the administrative burden on merger parties.²⁴

To illustrate the Committee's concerns in this respect, suppose that a party has previously acquired a 1% interest in an entity, and has since disposed of that 1% interest. If the party looks to acquire a subsequent interest in the same sector, the accumulated acquired shares or assets revenue tests in section 1-11 of the Instrument would require the party to:

1. Include the revenue of the previous acquisition target, despite not having a relationship of control over the target that would allow it to access this information.

In circumstances where, for example, an investor acquires a minority interest in a company, it will often be difficult or impossible, and potentially inappropriate, for the investor to access the precise revenue information of the target. This information may be confidential and potentially sensitive information of the target, or even if it is not, the target may simply be unwilling to provide the information.

For the purposes of determining whether an acquisition of this nature is required to be notified, the fact that the acquisition would not result in control is sufficient to avoid having to access the revenue information of the target. While this is an appropriate outcome having regard to the policy intention of only regulating acquisitions of control, the serial acquisitions revenue tests reinstate this practical requirement for acquirers to assess the revenue of a previous acquisition target even where the acquisition did not result in control.

2. Aggregate 100% of the Australian revenue of the previous acquisition target, despite only having acquired a 1% interest.

The accumulated acquired shares or assets revenue tests in section 1-11 of the Instrument set out which previous acquisitions are to be aggregated for the purposes of the monetary thresholds. In particular, subsections 1-11(1) and (2) provide that where a principal party to the acquisition, or a connected entity of a principal party, "*acquired other shares or assets*" in the previous three years, those acquisitions of shares or assets are to be aggregated with the current acquisition (subject to the requirement that, in general terms, those shares or assets are in a similar market as the current acquisition target).

Subsection 1-11(3) sets out the previous acquisitions that are to be disregarded for the purposes of this calculation. This is limited to acquisitions that were previously notified (other than as a result of the serial acquisitions monetary threshold), acquisitions that satisfied the small acquisition test and acquisitions of targets not connected with Australia.

²⁴ Explanatory Statement, page 13.

However, subsection 1-11(3) does not provide for the disregarding of previous acquisitions that did not result in control.

3. Aggregate 100% of the Australian revenue of the previous acquisition target, despite having since disposed of the relevant 1% interest.

Similarly, subsection 1-11(3) of the Instrument does not provide for the disregarding of previous acquisitions where the previously acquired interest has since been divested in whole or part.

Practical consequences

These results appear to be inconsistent with the policy intent of regulating acquisitions of control only and balancing appropriate oversight over creeping acquisitions with the administrative burden on merger parties. As currently formulated, the serial acquisitions threshold carries a high risk of over-capture resulting in a disproportionate burden on merger parties.

In addition, the serial acquisitions revenue tests are likely to result in significant practical difficulties for parties to comply with the requirements and properly assess previous acquisitions, which is likely to result in an even greater degree of administrative burden due to acquirers notifying out of an abundance of caution. Where it is impractical or impossible to include the revenue of a previous acquisition target, parties will naturally seek to avoid the significant consequences of failing to notify an acquisition that is required to be notified by assuming the revenue attributable to the previous acquisition is at or above the highest estimates.

Potential fix

The Committee considers that it would be appropriate to insert additional carve-outs in subsection 1-11(3) of the Instrument such that non-controlling and divested interests are to be disregarded in calculating the accumulated acquired shares or assets revenue tests.

An example of the potential carve-outs is set out below, noting the Committee's concerns regarding the extension of the control test to 'associates' within the meaning of Chapter 6 of the Corporations Act, as discussed at issue 3 above:

(d) where the acquisition was in shares in a body corporate—at the test time, the body corporate is not controlled (within the meaning of section 50AA of the Corporations Act 2001), either alone, or together with one or more associates (within the meaning of Chapter 6 of the Corporations Act 2001) by a principal party to the acquisition or a connected entity of a principal party to the acquisition; or

(e) where the acquisition was of an asset—at the test time, the principal party to the acquisition or a connected entity of a principal party to the acquisition no longer has an interest in the asset.

Issue 8. ACCC file not being available to merger parties ahead of Tribunal review

The issue

Under the existing statutory framework, the ACCC is not required to provide access to its file or third-party submissions either on the register or to merger parties.

This gives rise to significant prejudice for merger parties, who will not be in a position to effectively and efficiently address the ACCC's concerns without access to those documents. It also prevents merger parties from making fully informed decisions about whether to proceed to Phase 2 (which would involve incurring substantial costs) or to seek Tribunal review.

This is also inconsistent with the ACCC's current practice of publishing non-confidential submissions on its merger authorisation register.

Paragraph 3.3(g) of Practice Direction No 3 published by the Australian Competition Tribunal provides that at the first directions hearing (which it will seek to conduct within 7 days of the filing of the application for review), the parties will be required to address the provision by the ACCC to the participants of information referred to in its reasons and any other information furnished, documents produced or evidence given to the Commission in connection with the making of its decision.

Paragraphs 10-12 of the model directions for the first directions hearing in the Appendix to that Practice Direction provide for the ACCC to:

- file and serve an index (including any confidentiality claims), and serve an electronic bundle of non-confidential documents within 5 business days; and
- serve an electronic bundle of confidential documents that are not the subject of an application for further directions within 11 business days.

The Committee considers that relying on the Tribunal discovery process to provide for access to the ACCC file raises a number of practical and fairness issues:

- It means that parties do not know the full nature of the evidence before the ACCC prior to being required to bring an application—significantly increasing the likelihood that changes need to be made to any application after the process has commenced.
- The process for the ACCC to clear third party confidentiality usually takes some time. There is a significant risk that this will mean that parties do not receive the file until several weeks into the review process—which is already subject to very tight and strict timeframes.

The Committee is concerned that having to wait until well into the Tribunal review process to get access to relevant information and documents will be prejudicial to merger parties and will adversely impact the Tribunal process.

Potential fix

At the very least, there should be a clear statutory obligation on the ACCC to produce its file, ideally at the same time, or within 7 days of, its publication of reasons—allowing time for parties to have regard to it in deciding whether to seek Tribunal review and in framing their application.

Issue 9. Exemptions for certain financial transactions

The issue

The Committee welcomes the addition of the exemption in section 2-24 of the Instrument, which reflects that the relevant financial transactions and arrangements to which the exemption relates generally involve the provision of capital, managing financial risk or facilitating financial activities, rather than acquiring business operations.²⁵

However, in the Committee's view:

- paragraphs 2-24(1)(a)-(e) are not sufficiently broad to cover routine transactions in the financial services industry, particularly asset financing arrangements.
- paragraphs 2-24(1)(f), (g) and (h) create significant difficulties and uncertainty in applying the exemption, and are unnecessary from a competition policy perspective.

Paragraphs 2-24(1)(a)-(e) list types of interests which, subject to certain caveats, are exempt from notification. Paragraphs 2-24(1)(f), (g) and (h) provide that:

- an acquisition that is directly connected with an instrument, interest, arrangement or transaction mentioned in paragraphs 2-24(1)(a)-(e) will also be exempt;
- where an acquisition of a share or equity interest listed in paragraphs 2-24(1)(a)-(e) has the effect that a person “*will begin, or can begin, to control*” an entity, the exemptions in paragraphs 2-24(1)(a)-(e) will not apply.
- where an acquisition of an asset has the effect that a person will, or can, acquire all, or substantially all, of the assets of a business, the exemptions in paragraphs 2-24(1)(a)-(e) will not apply.

Paragraphs 2-24(1)(a)-(e)—asset financing

The Committee is concerned that the list of instruments and interests covered in paragraphs 2-24(1)(a)-(e) is unlikely to capture all routine financing arrangements. For example, the current drafting does not appear to exempt from notification acquisitions by financing providers in the course of providing asset financing.

Pursuant to an asset financing arrangement, for example, the financing provider may acquire an asset in the course of enabling a business to lease the asset. Businesses often enter into these arrangements with financing providers to avoid bearing the upfront cost of the asset and spread the cost over time. The financing provider in this instance does not acquire the asset with the ability or intent to influence competition, as the asset will be used for the operations of the business that is leasing the asset.

Paragraph 2-24(1)(f)—‘directly connected’

The Committee is concerned that paragraph 2-24(1)(f) is insufficiently clear in scope to enable financial services providers to confidently rely on the exemption, having regard to the consequences of failing to notify an acquisition that is required to be notified. The Instrument and the Explanatory Statement do not expand on the meaning of ‘directly connected’ in this context.

²⁵ Explanatory Statement, page 28.

Paragraphs 2-24(1)(g) and (h)—convertible instruments

The implications of paragraph 2-24(1)(g) are clarified in an example in the Instrument, which states:

A person ‘can begin to control an entity’ where the person acquires the power to exercise an enforceable right in relation to the securities of the entity, or a connected entity of the entity. The enforceable right need not be presently enforceable, it includes a right only enforceable in the future, or only enforceable on the satisfaction of a condition.

The Explanatory Statement expands on this example within the context of subsection 2-24(1):²⁶

The example in this subsection clarifies when a person can begin to control an entity. In this context, it includes instances where a person acquires a convertible note or bond that provides an enforceable right to convert the instrument into voting shares of the entity or a connected entity.

For example, where an investor acquires convertible bonds that, upon conversion, would give the holder majority control of the issuing company, the effect of this is that the acquisition of the convertible bonds are not exempt from notification (regardless of whether the bonds are converted).

The application, therefore, of paragraph 2-24(1)(g) appears to be:

- where a convertible instrument is acquired; and
- if that instrument were to be converted (e.g. to shares) the acquirer would acquire control over an entity (eg, the body corporate that the shares are in); then
- the acquisition of the convertible instrument is not exempt from notification.

In relation to paragraph 2-22(2)(d), which provides a similar carve-out from the exemptions in the context of close out and set-off rights as paragraph 2-24(1)(h), the Explanatory Statement states:

Paragraph 2-22(2)(d) excludes from the exemption acquisitions where the effect is that a person will acquire all, or substantially all, of the assets of a business. This includes acquisitions where such an outcome is given effect to through the exercise of rights granted under the arrangement, whether immediately or on the fulfilment of a condition.

The ‘all or substantially all’ test is applied in other jurisdictions, including Canada and the United States. For the purposes of this Determination, the focus is on whether the acquisition results in the transfer of all, or substantially all, of the assets of the business or of an internal unit or division of the business.

As a result of the application of either paragraph 2-24(1)(g) or (h) to an acquisition, a party to a routine financial transaction involving convertible notes, for example, may be required to notify both the acquisition of the convertible notes as well as the conversion of the notes to shares if and when that occurs (as a result of the shares conferring control on the acquirer).

²⁶ Explanatory Statement, page 28.

The Committee is concerned that this construction will result in acquisitions being required to be notified that:

- do not have any implications for competition whatsoever (having regard to the fact that the convertible instrument itself does not confer rights that would enable the acquirer to control the target in a way that could impact competition);
- may not ultimately ever result in control by the acquirer (having regard to the fact that convertible instruments are often ultimately never converted, with the possibility of conversion acting as a protective measure); and
- would in any event be required to be notified (again) if and when control is ultimately acquired through conversion of the convertible instrument to shares.

The Committee also notes that the current position of requiring notification of acquisitions of convertible notes is not consistent with the approach taken in jurisdictions overseas, for example, the European Union, where notification is only required when control is in fact acquired, which is on conversion of the debt instrument to equity.²⁷

Potential fix

Paragraphs 2-24(1)(a)-(e)—asset financing

The Committee considers that it is important to ensure the exemptions intended to cover routine transactions in the financial markets are sufficiently broad and clear so as to avoid significant disruptions to the industry and flow-on impacts to businesses which rely on financing arrangements. The Committee recommends expanding the exemptions in paragraphs 2-24(1)(a)-(e) of the Instrument to cover all routine financing arrangements which are highly unlikely to result in any meaningful impact to competition. In relation to asset financing arrangements in particular, the Committee submits that an appropriate solution would be to insert a new paragraph 2-24(1)(aa) to exempt from notification acquisitions by financing providers in the course of facilitating an asset financing arrangement.

An example of the potential drafting is below:

(aa) which is part of an asset financing arrangement; or

Paragraph 2-24(1)(f)—‘directly connected’

The Committee considers that it would be helpful for the scope of paragraph 2-24(1)(f) to be further clarified to provide businesses with sufficient confidence to determine the circumstances in which they may rely on the exemption.

Paragraphs 2-24(1)(g) and (h)—convertible instruments

Having regard to the difficulties and duplication created by paragraphs 2-24(1)(g) and (h) of the Instrument, as outlined above, in the Committee’s view, it would be appropriate to repeal paragraphs 2-24(1)(g) and (h).

²⁷ See for example, [Case No COMP/M.6600 - AAEC / ENTERO / BMC INVESTMENTS](#), European Commission decision of 3 August 2012, pursuant to Article 6(1)(b) of Council Regulation No 139/2004, which related to a debt to equity swap (by means of conversion of part of the loans into equity). Notification is in relation to conversion, not the acquisition of the original debt which provided for the possible later conversion into equity.

Issue 10. Enforcement of security interests and temporary holdings (Subsections 2-21 and 2-24(2) of the Instrument)

The issue

The Committee is concerned that the overly narrow framing of certain exemptions in the Instrument carries a high risk of causing significant and undue disruptions to the financial services industry. For example, the Instrument exempts from notification:

- acquisitions by administrators, receivers, receiver-manager and liquidators under section 2-21; and
- acquisitions of security interests in the ordinary course and on ordinary commercial terms under subsection 2-24(2).

However, in the Committee's view, these exemptions do not clearly apply to acquisitions that constitute the *enforcement* of a security interest (e.g. the acquisition of property that is the subject of a security interest in the event of a default), as opposed to the taking of a security interest, which is covered by subsection 2-24(2). This issue exists even where the property would be acquired and held on a temporary basis, which would routinely occur, for example, in cases of acquisitions by mortgagees in possession in order to resell the property to recover the loan money.

This appears to be inconsistent with both:

- the treatment of acquisitions by formal insolvency appointees (i.e. the entities listed in section 2-21); and
- the treatment of similar acquisitions in other major jurisdictions. For example, the EU Merger Regulation provides an exception for temporary holdings (i.e. the merger regime does not apply where an interest is held on a temporary basis of up to 12 months, or another period as agreed with the European Commission due to the impracticality of disposing of an interest within 12 months).²⁸

In the Committee's view, an acquisition arising from the enforcement of a security interest by any creditor should generally not be subject to the merger regime unless it would result in material impacts to competition on the basis that the acquirer intends to retain the acquired shares or assets beyond a temporary period (i.e. a reasonable period in which the acquirer could dispose of the shares or assets).

Practical consequences

The lack of a clear exemption for the enforcement of a security interest, even on a temporary basis, creates significant risks for financial services providers, particularly in enforcement and recovery scenarios such as a restructuring or refinancing (e.g. a debt-for-equity swap).

²⁸ EC Merger Regulation 139/2004, Article 3(5)(a).

Potential fix

The Committee submits that an exemption for temporary holdings acquired as a result of the enforcement of a security interest would be an appropriate solution.

While various drafting approaches could be adopted, the Committee considers that the approach taken in the EU is likely to provide a suitable model, and that this could be implemented through inserting new subsections (3) and (4) in section 2-24 of the Instrument.

An example of the potential drafting for such an exemption is set out below. The drafting is intended to have the effect that an acquisition of an interest arising due to the enforcement of a security interest would not be required to be notified in the first instance, and the acquirer would have at least 12 months (extendable by agreement with the ACCC) to dispose of the interest, so as to recover the loan money.

- (3) *This Division also covers an acquisition of a share or asset where:*
- (a) *the acquisition occurs as a direct result of the acquirer enforcing a security interest; and*
 - (b) *the purpose of the acquisition is to preserve the value, or dispose of, the share or asset.*
- (4) *If an acquisition is not required to be notified solely by reason of the application of subsection (3), and the acquired share or asset is not disposed of within 12 months from the date the acquisition is put into effect, or such longer period that the Commission has agreed to in writing on the basis it is not reasonably practicable for the acquirer to dispose of the share or asset within 12 months, then the acquisition is void by force of this subsection.*

Issue 11. Security interests acquired ‘on ordinary commercial terms’ (Subsection 2-24(2) of the Instrument)

The issue

The Committee is also concerned that the exemption for the taking of security interests in subsection 2-24(2) of the Instrument is framed in unduly narrow terms and would present difficulties for financial services providers in interpreting and applying the exemption.

In particular, in addition to not clearly extending to the acquisition of shares or assets as a result of the enforcement of a security interest (as discussed in relation to issue 10 above), the qualifier that the taking of the security interest must be ‘on ordinary commercial terms’ would exclude situations where there is some degree of deviation from standard pricing or terms, which may arise due to factors such as (amongst others):

- changing market conditions or practice;
- a borrower’s risk profile; and
- restructuring imperatives.

Practical consequences

There are significant practical difficulties associated with determining what ‘on ordinary commercial terms’ means. This is particularly the case in financial services markets, which are highly innovative, involve many unique and dynamic business models, and where what is ordinary for a particular product in one customer segment or business line may be extraordinary in another.

Given this ambiguity, the Committee considers that the qualification unduly narrows the application of the exemption, particularly given that relying on the exemption would require sufficient evidence of what is ‘ordinary’, which in practice would require detailed assessment and market research to form a view.

Potential fix

The Committee submits that it would be appropriate to remove the qualifier in subparagraphs 2-24(2)(a)(i) and (ii) that require the acquisition to be “*on ordinary commercial terms*”.

Issue 12. Multiple acquisitions in respect of the same land where the initial acquisition is not a notified acquisition (Subsection 2-20(4) of the Instrument)

The issue

The Committee welcomes the addition of the exemption in subsection 2-20(4) of the Instrument. This exemption operates to exempt from notification the acquisition of a subsequent interest in land where the acquisition of a previous interest has been notified.

However, subsection 2-20(4) does not apply where the acquisition of the previous interest was not notified, even in circumstances where:

- the ACCC has reviewed the previous acquisition and advised that it does not intend to take action under section 50 in relation to the acquisition, in accordance with section 189 of the CCA; or
- the ACCC has considered a notification waiver application in relation to the previous acquisition and determined that it is not required to be notified, in accordance with section 51ABV of the CCA.

Practical consequences

The results outlined above appear to be unintended and inconsistent with the policy intent of the exemption. The Explanatory Statement notes that:

The purpose of the exemption is to avoid duplication of notification requirements for what is, in substance, a single land acquisition that takes place in multiple stages.

Potential fix

Having regard to the fact that the other criteria in subsection 2-20(4) will continue to apply (i.e. that the land remains materially the same and the ownership portions remain the same), the Committee submits that it would be appropriate to extend the exemption in subsection 2-20(4) to cover subsequent acquisitions in land where the previous acquisition was not notified as a result of a notification waiver or in relation to which the ACCC has provided a section 189 letter.

An example of the potential amendments to paragraph 2-20(4)(b) of the Instrument that would achieve this outcome is below:

(b) the acquisition of the previous interest was a notified acquisition, an acquisition to which subsection 189(2) of the Act applies, or an acquisition in relation to which the Commission made a determination in accordance with paragraph 51ABV(1)(a) of the Act; and

Issue 13. Acquisitions of interests in entities that hold land entities (Subsections 2-20(1)-(2) of the Instrument)

The issue

The Committee similarly welcomes the addition of the exemption in subsection 2-20(2) of the Instrument. This exemption extends the exemptions in subsection 2-20(1) for acquisitions relating to residential developments and property businesses to acquisitions of interests in 'land entities'. In this context, a land entity is an entity that only holds cash or interests in land. The Explanatory Statement states that:

The exemption ensures that acquisitions of land through entity structures are treated consistent with direct land acquisitions, applying the exemption based on economic substance rather than legal form.

The Committee agrees with the intent of regulating economic substance rather than form. However, in practice the exemption does not appear to cover entity structures where there are multiple layers of holding entities. For example, it appears that the exemption would exclude notification of an acquisition in a land entity, however, it is not clear that the exemption would apply to an acquisition of an interest in an entity where the entity's only non-cash asset is an interest in a land entity.

Practical consequences

In the Committee's view, the same rationale that applies to the land entities exemption would apply equally to an acquisition of an interest in an entity that holds a land entity, where the same legal criteria apply (i.e. the entity's only non-cash asset is an interest in land, and the land is held for a purpose mentioned in subsection 2-20(1)).

The current construction of subsection 2-20(2) risks requiring notification of substantively the same acquisitions that are different only in legal form.

Potential fix

The Committee submits that it would be appropriate to extend the definition of land entity in subsection 2-20(2) to include entities that only hold cash, an interest in land, or another land entity.

An example of the drafting changes in paragraph 2-20(2)(a) that would achieve this is below:

(a) the entity's only non-cash asset is a legal or equitable interest in land or an interest in an entity that meets both of the criteria in this subsection (2); and

Issue 14. Acquisitions arising due to court-ordered divestiture (Section 2-26 of the Instrument)

The issue

The Committee is concerned that acquisitions arising due to court-ordered divestitures are notifiable.

While section 2-26 of the Instrument provides an exemption for acquisitions occurring due to the automatic operation of the law, this does not appear to extend to acquisitions required as a result of a court-ordered divestiture.

Practical consequences

Where a court orders the divestiture of an interest, such that a business must dispose of an asset, the disposal would be subject to notification. This may result in practical inability to comply with the court order in terms of both the timing of the divestiture and potentially the identity of the acquirer.

Potential fix

The Committee submits that a new exemption should be inserted into the Instrument to clearly exempt notification of acquisitions occurring as a result of a court order.

An example of the potential drafting for the exemption is below:

2-27 Acquisitions that occur as a result of court-ordered divestiture

This division covers an acquisition that occurs by reason of an order by a court to dispose of shares or assets.

Issue 15. Inability to notify a proposed acquisition of shares in a company under a takeover bid under Chapter 6 of the Corporations Act (other than in certain limited circumstances) (Section 51ABX of the CCA)

The issue

There is a serious issue with the drafting of section 51ABX of the CCA, as it does not permit notification of a proposed acquisition of shares in a company under a takeover bid under Chapter 6 of the Corporations Act (other than in certain limited circumstances). Chapter 6 of the Corporations Act regulates the acquisition of shares in publicly listed companies and other companies having more than 50 members. The issue here is as follows:

- A bidder which has announced a takeover bid for a company will not be able to notify under subparagraph 51ABX(1)(d)(i), because at the time the bid is made, the contract to acquire the relevant shares from the target shareholders will not have been entered into.
- The proposed bidder will also not be able to satisfy subparagraph 51ABX(1)(d)(ii), because at the time the bid is made, it will not be possible to say that all of the proposed parties to the contract intend to enter into it, as the target shareholders may be aware of the offer but will not have decided whether or not to accept it.
- Subparagraph 51ABX(1)(d)(iii) does not fix this problem. That subparagraph requires not only that the acquisition is a takeover acquisition in relation to a takeover bid, but that subsection (4) must apply. The problem is that subsection (4) is limited to takeover bids for all of the voting shares in the bid class where the takeover bid is either unconditional or subject only to a 'prescribed occurrence' condition, and where the bidder intends to make a request under the 'surprise hostile takeover' provisions in paragraph 51ABZZL(1)(d).
- This means that it is not possible for a bidder to notify a proposed acquisition under a conditional takeover bid. The vast majority of takeover bids will be, on announcement, be subject to one or more conditions. For example, almost all takeover bids are at the outset subject to conditions such as a minimum acceptance condition; a material adverse change condition; or a condition that there are no material acquisitions or disposals during the bid period. None of these takeover bids will be able to be notified under subparagraph 51ABX(1)(d)(iii). There is also the problem that the proposed bid will not be a 'surprise hostile takeover', as the proposed takeover bid will already have been announced. Subsection (4) also only applies to takeover bids for all of the shares in the bid class and therefore does not allow for proportional takeover bids.
- It is obviously not an answer to this problem to say that the bidder can wait until the target shareholders have accepted the offer, as control may already have passed on acceptance, without a notification having been made.

Practical consequences

This issue will have significant practical consequences, as it would effectively make it impossible for most takeover bids to be made, which will have a material adverse effect on the market for corporate control in Australia, and is obviously wholly inconsistent with the intent of Chapter 6 of the Corporations Act.

Potential fix

The Committee submits that subparagraph 51ABX(1)(d)(iii) needs to be amended to remove the need for the takeover acquisition to also have to comply with subsection 51ABX(4).

The proposed drafting would be to:

- delete the words “*and subsection (4) applies*” from subparagraph 51ABX(1)(d)(iii); and
- delete subsection 51ABX(4) itself.

Subsection 51ABX(4) is not necessary, as section 51ABZZL, dealing with confidential notification ahead of a surprise potential takeover, is already limited to bids for all of the voting shares in the bid class which are either unconditional or subject only to a ‘prescribed occurrence’ condition (see subsection 51ABZZL(2)).

Issue 16. Inability to notify a proposed acquisition of shares in a publicly listed company under the 3% creeping acquisition exception in item 9 of section 611 of the Corporations Act (Section 51ABX of the CCA)

The issue

There is a similar serious issue with the drafting of section 51ABX of the CCA, as it does not permit notification of a proposed on-market acquisition of shares in a publicly listed company under the 3% creeping acquisition exception in item 9 of section 611 of the Corporations Act.

The issue is as follows:

- A person may be able to acquire control of a publicly listed company by way of a 3% creeping acquisition under item 9 of section 611 of the Corporations Act. For example, assuming that a person would acquire control of a publicly listed company once they hold 50% of the shares in the company (noting that control may pass at below 50% because not all shareholders will vote at a general meeting of the company to determine the composition of the board of the company), then a shareholder with 48% may wish to acquire an additional 3% under the creeping acquisition exception, to move to 51%.
- However, that person will not be able to notify the proposed 3% acquisition under subparagraph 51ABX(1)(d)(i), because at the time, the contract to acquire the relevant shares from the target shareholders will not have been entered into.

- The person will also not be able to notify the proposed 3% acquisition under subparagraph 51ABX(1)(d)(ii), because at the time of the proposed acquisition, it will not be possible to say that all of the proposed parties to the contract intend to enter into it, as the acquisitions will occur on-market, and the selling shareholders will not even have been identified, let alone intend to enter into the contract.
- Subparagraph 51ABX(1)(d)(iii) will not assist, as there is no takeover bid.

This means that it is not possible for a person to utilise the 3% creeping exception under item 9 of section 611 of the Corporations Act to acquire control.

Potential fix

The Committee submits that paragraph 51ABX(1)(d) needs to be amended to add a provision allowing for notification of proposed creeping acquisitions under item 9 of section 611 of the Corporations Act. The proposed drafting would be to add the following as a new subparagraph 51ABX(1)(d)(v):

(v) the acquisition is an acquisition under item 9 of section 611 of the Corporations Act.

Issue 17. Definition of connected with Australia (Section 1-6 of the Instrument)

The issue

Each of the notification thresholds under the Instrument requires the acquisition to be of a share or asset that is 'connected with Australia'.²⁹

Under the Instrument, a share or asset is connected with Australia if:

- in relation to a share—the share is in the capital of a body corporate that carries on a business in Australia;
- in relation to an asset that is an interest in an entity (other than a share in the capital of a body corporate)—the interest is in an entity that carries on business in Australia; and
- in all other cases—the asset is used in, or forms part of, a business carried on in Australia.³⁰

The Explanatory Statement notes as follows:

*In competition law cases, the courts have looked at all of the circumstances surrounding the entity and its activities when determining whether it is carrying on business in Australia. This is what applies in relation to subsections 1-6(a) and (b).*³¹

Whether a company is carrying on a business in Australia is a question of fact.³² Despite the comments in the Explanatory Statement, the Committee considers that the bulk of the case law in relation to the scope of what is required for carrying on business in Australia is

²⁹ Instrument, paragraphs 2-1(b), 2-2(b) and 2-3(b)

³⁰ Instrument, section 1-6

³¹ Explanatory Statement, page 7. No specific cases are cited.

³² *Luckins v Highway Motel (Carnarvon) Pty Ltd* (1975) 133 CLR 164, 186.

drawn from other considerations—and principally taxation law—which are not directly relevant or appropriate for the purposes of incorporating a jurisdictional nexus to the notification requirements under the Instrument.

In particular, the judicial consideration of carrying on business is directed at identifying the indicia or factors which delineate activities that are of a commercial nature from those that are not. Accordingly, the leading case provides that carrying on a business requires “*repetition of acts rather than a single isolated act*” and refers to “*activities undertaken as a commercial enterprise in the nature of a going concern, that is, activities engaged in for the purpose of profit on a continuous and repetitive basis*”.³³

Further, there is judicial authority for the fact that a place of business in Australia is not required.³⁴ A corporation can be found to be carrying on business in Australia even if most of its activities are conducted outside Australia.³⁵ This nexus test appears to be satisfied, if there are acts within Australia “*that amount to, or are ancillary to, transactions that make up or support the business*”.³⁶

In the Committee’s view, these cases support a jurisdictional nexus test which is too easily satisfied and will lead to over-capture of international transactions that are not connected with Australia to an extent that would warrant notification. This is particularly the case where an acquirer and seller might be global corporations with Australian businesses which enter into a transaction that has nothing to do with their Australian operations.

However, if the target has derived revenue from an Australian customer even though there are no assets, employees or other Australian-based aspects of the target’s business, this fact alone could be enough to warrant notification because the thresholds will be otherwise satisfied by virtue of—for example—the acquirer’s unrelated Australian revenue and the transaction value.

Potential fix

In the Committee’s view, this issue could be resolved relatively simply by amending the Instrument to require a minimum amount of annual Australian revenue or asset value for the target for an acquisition to be notifiable, such as \$50m. This would be a more specific and empirical jurisdictional nexus that would be easier for merger parties to assess the requirements, without undermining the policy objectives of the Instrument or meaning any transactions that should be subject to the regime are no longer notifiable.

In the absence of any changes to the thresholds, the Committee considers an alternative approach would be for the test in section 1-6 of the Instrument to be supported by additional guidance in the Explanatory Statement or a further instrument to more clearly set out the parameters or indicia that will mean an acquisition qualifies for notification on the basis that it is connected with Australia.

³³ *Hope v Bathurst City Council* (1980) 144 CLR 1, 8-9. It is noted that, in the context of the CCA, the term also includes businesses that are not carried on for profit.

³⁴ *Bray v F Hoffmann-La Roche Ltd* (2002) 118 FCR 1.

³⁵ *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514, 538.

³⁶ *Gebo Investments (Labuan) Ltd v Signatory Investments Pty Ltd* (2005) 190 FLR 209, 220 [31]; *Valve Corporation v Australian Competition and Consumer Commission* (2017) 258 FCR 190, 235 [149].

Issue 18. Limited application of grandfathering

The issue

The Committee understands that Treasury intends to provide for the grandfathering of notification requirements that would apply to major supermarkets, so as to not require notifications relating to transactions that will already be in flight on 1 January 2026.

The Committee welcomes this approach and considers that it should be adopted on an economy-wide basis to address the same issues that are faced in other sectors. For example, mining developments and other large infrastructure projects involve similar transaction structures whereby initial interests would already have been acquired, but additional interests will be acquired after 1 January 2026 as the project progresses.

Practical consequences

As with the major supermarkets, many businesses will face significant and costly disruptions to their current projects as a result of the application of the mandatory notification requirements to transactions that have been in flight, in many cases, for years prior to 1 January 2026.

Potential fix

The Committee submits that it would be appropriate to extend the same grandfathering arrangements that would apply to major supermarkets to other businesses in other sectors.

Annexure: About the Business Law Section of the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its Constituent Bodies on federal, national, and international issues; and promotes the administration of justice, access to justice, and general improvement of the law.

The Business Law Section of the Law Council furthers the objects of the Law Council on matters pertaining to business law.

The Section provides a forum through which lawyers and others interested in law affecting business can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Law Society of the Australian Capital Territory
- New South Wales Bar Association
- Law Society of New South Wales
- Northern Territory Bar Association
- Law Society Northern Territory
- Bar Association of Queensland
- Queensland Law Society
- South Australian Bar Association
- Law Society of South Australia
- Tasmanian Bar
- Law Society of Tasmania
- The Victorian Bar Incorporated
- Law Institute of Victoria
- Western Australian Bar Association
- Law Society of Western Australia
- Law Firms Australia

The Business Law Section has approximately 1000 members. It currently has 14 specialist committees and working groups:

- Competition & Consumer Law Committee
- Construction & Infrastructure Law Committee
- Corporations Law Committee
- Customs & International Transactions Committee
- Digital Commerce Committee
- Financial Services Committee
- Foreign Corrupt Practices Working Group
- Foreign Investment Committee
- Insolvency & Reconstruction Law Committee
- Intellectual Property Committee
- Media & Communications Committee
- Privacy Law Committee
- SME Business Law Committee

- Taxation Law Committee

The Section has an Executive Committee of 12 members drawn from different states and territories and fields of practice. The Executive Committees meet quarterly to set objectives, policy and priorities for the Section.

The members of the Section Executive are:

- Dr Pamela Hanrahan, Chair
- Mr Adrian Varrasso, Deputy Chair
- Dr Elizabeth Boros, Treasurer
- Mr Philip Argy
- Mr Greg Rodgers
- Mr John Keeves
- Ms Rachel Webber
- Ms Shannon Finch
- Mr Clint Harding
- Mr Peter Leech
- Mr Chris Pearce
- Ms Lisa Huett

The Section's administration team serves the Section nationally and is part of the Law Council's Secretariat in Canberra.

The Law Council's website is www.lawcouncil.au.

The Section's website is www.lawcouncil.au/business-law.