EXPLANATORY STATEMENT

Issued by authority of the Assistant Minister for Productivity, Competition, Charities and Treasury

Competition and Consumer Act 2010

Competition and Consumer (Notification of Acquisitions) Determination 2025

The *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the Determination) is a legislative instrument made under the *Competition and Consumer Act 2010* (the CCA).

Section 51ABP of the CCA provides that the Minister may determine the circumstances in which acquisitions are required to be notified to the Australian Competition and Consumer Commission (the Commission).

Section 51ABQ of the CCA provides that the Minister may determine a class of acquisitions which are required to be notified to the Commission.

Subsection 51ABS(6) of the CCA provides that the Minister may determine a class of acquisitions of shares in the capital of a body corporate which are required to be notified to the Commission.

Subsection 51ABY(5) of the CCA provides that the Minister may determine a form in relation to a notification. It also provides that the Minister may determine information or documents to be included in or accompanied by a notification.

Subsection 51ABZQ(5) of the CCA provides that the Minister may determine a form in relation to a public benefit application. It also provides that the Minister may determine information or documents to be included in or accompanied by such an application.

Subsection 51ABZZI(6) of the CCA provides that the Minister may determine the details of a notification and any other information or documents that must be included on the acquisitions register, and the associated timeframes.

Subsections 100A(3), 100C(2) and 100D(2) of the CCA provide that the Minister may determine requirements in relation to applications to the Australian Competition Tribunal (the Tribunal) for the review of decisions and determinations.

Subsections 51ABU(3), 51ABX(2), 51ABZP(3) and 51ABZJ(4) of the CCA provide that the Minister may determine a fee for certain purposes.

The *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* (the Mergers Act) introduced a new merger control system in the CCA. This new system requires certain acquisitions of shares or assets to be notified to the Commission for assessment prior to completion.

The purpose of the Determination is to support the new system by:

- determining the circumstances where acquisitions require notification;

- determining exceptions to the general circumstances;
- determining the classes of acquisitions requiring notification;
- determining certain aspects of the contents of the acquisitions register;
- determining the notification and public benefit application forms and the information and documents required to accompany such forms;
- determining the requirements for applications to the Tribunal; and
- determining certain fees payable under the new system.

Part 1 of the Determination contains definitions and introduces key concepts such as connected entity, major supermarket, Australian revenue, and connected with Australia, as well setting out the tests that apply to determining whether a circumstance that requires notification is met.

Part 2 of the Determination specifies the general circumstances where acquisitions require notification, and exceptions to those general circumstances. Clear definitions and rules enable businesses to identify whether they are required to notify under the new system.

Part 3 of the Determination identifies acquisitions by Coles and Woolworths and their connected entities required to be notified to the Commission. Part 3 also identifies certain types of land acquisitions as a class of acquisitions that are required to be notified to the Commission.

Part 5 of the Determination specifies certain details the Commission must publish on its acquisitions register.

Part 6 of the Determination sets out the content and format of the notification forms prescribed under section 51ABY of the CCA. It also sets out the content and format of the public benefit application form prescribed under section 51ABZQ of the CCA. Both sections also specify that any determinations made pursuant to the sections are exempt from disallowance, as provided by section 42 of the *Legislation Act 2003*. As such, Part 6 of the Determination is exempt from disallowance.

Part 7 of the Determination contains requirements for applications to the Tribunal, an anti-avoidance provision, how indexation applies to certain provisions in the Determination, foreign currency rules, and certain fees payable under the new system.

Part 10 of the Determination sets out the transitional matters.

Subsection 51ABQ(3) of the CCA requires the Minister to consider the following matters in making a determination that certain classes of acquisitions are required to be notified:

- the likely effect of making the instrument on the interests of consumers, promoting competition, and the public interest;
- the likely regulatory impact of requiring the class of acquisitions to which the Determination relates to be notified; and
- any other matters the Minister considers relevant (for example, any relevant reports).

Part 3 of the Determination is made under section 51ABQ of the CCA. In making an instrument under section 51ABQ of the CCA, the Minister must consider certain matters as outlined in subsection 51ABQ(3).

Subsection 51ABQ(4) of the CCA provides that in making an instrument, the Minister may also consider any reports or advice of the Commission.

In accordance with the requirements outlined above, the Minister has considered the likely effect of making the instrument on the interests of consumers, promoting competition, and the public interest and the likely regulatory impact of requiring the class of acquisitions to which the Determination relates to be notified. The Minister has considered the Commission's findings and recommendations in the Supermarkets Inquiry Final Report in making this instrument.

Subsection 51ABQ(6) of the CCA provides that Part 3 of this Determination sunsets on the fifth anniversary of its registration on the Federal Register of Legislation.

The Determination (other than Part 6) is subject to disallowance by Parliament.

Section 4 of the *Acts Interpretation Act 1901* enables the Determination to be made in anticipation of the commencement of the relevant authorising provisions in the Mergers Act.

Details of the Determination, including commencement, are set out in Attachment A.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Office of Impact Analysis (OIA) has been consulted (OIA23-06015) and agreed that an impact analysis is not required.

ATTACHMENT A

Details of the Competition and Consumer (Notification of Acquisitions) Determination 2025

Part 1 – Preliminary

Section 1-1 – Name

This section provides that the name of the instrument is the *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the Determination).

Section 1-2 – Commencement

Part 1 of the Determination commences on 1 July 2025 or the day after the instrument is registered on the Federal Register of Legislation, whichever is later.

Parts 2, 6, 7 and 10 of the Determination commence at the same time as Part 1.

Parts 3 and 5 of the Determination commences on 1 January 2026 or the 30th day after the instrument is registered on the Federal Register of Legislation, whichever is later.

Section 1-3 – Authority

The Determination is made under the *Competition and Consumer Act 2010* (the CCA).

Section 1-4 – Definitions

This section provides definitions for various terms used throughout the Determination. Specific definitions for the Determination are sign-posted.

Key definitions specific to the Determination that are not sign-posted are 'contract date' and 'accounting standards'.

- 'Contract date', in relation to the acquisition of a share or asset, is the date on which a contract, arrangement or understanding has been entered into, pursuant to which the acquisition of the share or asset is to take place. The definition is central to the circumstances outlined in sections 2-1, 2-2 and 2-3 of the Determination, which outline when merger parties are required to notify the Commission of an acquisition. 'Arrangement' and 'understanding' are not defined terms in the CCA but have been the subject of judicial consideration over many years. In short, both an arrangement and understanding are less formal than a contract, and may not give rise to legally binding arrangements. An understanding is even less formal than an arrangement, but both require some form of consensus between the parties. An assessment of whether there is an arrangement or understanding is based on the facts and circumstances of the case. Basing the contract date on the date the contract, arrangement or understanding is entered into is intended to facilitate notification at any stage of the merger process prior to the acquisition being put into effect, once there is a contract, arrangement or understanding.

- 'Accounting standards' is tied to the definition of 'Australian revenue' in section 1-8 of the Determination. 'Accounting standards' means:
  - accounting standards within the meaning given by the *Corporations Act 2001* (Corporations Act);
  - international accounting standards made or adopted by the International Accounting Standards Board; and
  - accounting standards made by a responsible body of a foreign country that correspond to, and are equivalent to, the aforementioned accounting standards.

Section 1-5 – Meaning of *connected entity*

This section defines the term 'connected entity'. This is a key concept for acquisitions made by a major supermarket (see Part 3 of the Determination) and for the tests outlined in Part 1 of the Determination that determine whether the circumstances for notification, which are set out in Division 1 of Part 2 of the Determination, are met. The intent is to ensure that relevant parties beyond the parties immediately engaged in the acquisition are included in the relevant tests to provide a more accurate reflection of the competition implications of an acquisition.

There are two tests for determining whether an entity is a connected entity.

The first test, subsection 1-5(1) of the Determination, captures entities that are connected as a consequence of being a subsidiary, holding company, or related body corporate for the purposes of section 4A of the CCA. Section 4A defines when one body corporate is considered a subsidiary, holding company, or related body corporate of another body corporate. This means the test is focused on instances of legal control. To illustrate:

- An entity (Entity A) is a subsidiary of another entity (Entity B) where Entity B can exercise any of the following over Entity A: control of the composition of Entity A's board; the ability to cast or control more than 50 per cent of the votes at a general meeting of Entity A; or holding more than 50 per cent of the allotted share capital in Entity A (excluding non-participating shares).
  - Entity A will also be a subsidiary if Entity B is itself a subsidiary of another entity (Entity C).
- An entity will be a holding company if it fulfils the role of Entity B in the above scenario (or Entity C, in that Entity B is a subsidiary of Entity C).
- An entity will be a related body corporate where one is a subsidiary of the other, both are subsidiaries of the same holding company, or one is the holding company of the other.

The first test does not capture instances where an unincorporated entity is involved in the acquisition.

The second test, subsection 1-5(2) of the Determination, is more expansive than the first. It captures instances where an entity controls, or is controlled by, another entity. It also is capable of capturing instances where an unincorporated entity is involved in the acquisition

– for example, an unincorporated joint venture or special purpose vehicle. Although this will depend on the facts and circumstances of each case.

The second test draws on two concepts from the Corporations Act – ‘control’ as defined by section 50AA of the Corporations Act, and ‘associate’ within the meaning of Chapter 6 of the Corporations Act. This means that it is focused on instances of practical control.

- Section 50AA provides that an entity (first entity) controls another entity (second entity) where the first entity has the capacity to determine the outcome of decisions about the second entity’s financial and operating policies.
- A person is an ‘associate’ (within the meaning of Chapter 6 of the Corporations Act) if they are part of the same corporate group (i.e. one controls the other, or both are controlled by the same holding company); they have an agreement to influence or control the board or operations of an entity; or they are acting together, or planning to act together, to influence an entity’s affairs (see section 12 of the Corporations Act).
  - The reference to ‘associates’ is intended to give effect to paragraph 51ABS(2)(a) of the CCA, which has the effect that if Entity A and its associates together have the power to control Entity B, then Entity A is considered to control Entity B – even if Entity A would not have control alone.

More specifically, under the second test, an entity is a connected entity of another entity in the following scenarios:

- Where an entity (Entity A) controls – either alone, or together with one or more associates – another entity (Entity B).
  - In this scenario, the concept of control is modified insofar as subsection 50AA(4) of the Corporations Act is disregarded to the extent that Entity B is a special purpose vehicle or has a relevant legal obligation because it is a subsidiary of a body corporate.
- Where an entity (Entity A) is controlled – either alone, or together with one or more associates – by another entity (Entity B).
- Where Entity A and Entity B are both controlled by another entity.
  - This is intended to capture instances of sibling entities.

The concept of ‘connected entity’ is necessary for determining the ‘Australian revenue’ (section 1-8, discussed below) of the principal party and target in the tests set out at sections 1-9, 1-10, 1-12, 1-13 and 1-14 (all discussed below). To determine Australian revenue requires calculation of an entity’s gross revenue in accordance with accounting standards (discussed above). In particular, the consolidation rules outlined in AASB 10 (or the relevant permissible equivalent, see discussion of ‘accounting standards’ above) are likely to apply where an entity is a connected entity.

- AASB 10 applies to all entities that are required to prepare consolidated financial statements. Consolidated financial statements show the combined financial position of the holding company and the entities it controls for the purposes of AASB 10.

> Control, for the purposes of AASB 10, exists where the holding company has power over the entity (for example, voting rights); has exposures or rights to variable returns from its involvement; and can use its power to affect those returns. Entities underneath the holding company can be incorporated or unincorporated entities.

The above reference to AASB 10 is not intended to be exhaustive of the references to the accounting standards that could apply for the purposes of section 1-8.

Section 1-6 – Meaning of *connected with Australia*

For the new system to apply to an acquisition, the acquisition must be of a share or asset that is 'connected with Australia'. 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 business in Australia (subsection 1-6(a)); or
- in relation to an asset that is an interest in an entity (other than a share in the capital of a body corporate) – the entity carries on business in Australia (subsection 1-6(b)); or
- in all other cases – the asset is used in, or forms part of, a business carried on in Australia (subsection 1-6(c)).

Central to being connected with Australia is whether the entity or body corporate 'carries on business in Australia'. 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).

Subsection 1-6(c) relates to an asset that is not captured by subsections 1-6(a) or (b). It is intended that such an asset is connected with Australia if it is used by the person in carrying on a business in Australia. The distinction between subsection 1-6(c) and subsections 1-6(a) and (b) being that the asset needs to relate to a particular entity that is carrying on business in Australia.

Section 1-7 – Meaning of *major supermarket*

Part 3 of the Determination only applies to a 'major supermarket'. This section defines a 'major supermarket' as Coles and Woolworths and connected entities of Coles and Woolworths. It is appropriate to only apply Part 3 to Coles and Woolworths as supermarket retailing in Australia is an oligopoly, in which Coles and Woolworths each control a significant share of sales. While Coles and Woolworths face competition from other rivals, such as ALDI and Metcash, these rivals are not close competitors. As the Commission notes, 'Coles' and Woolworths' market shares are increasing and they face no rivals of comparable scope and scale'.[1] Coles and Woolworths account for 67 per cent of supermarket retail sales nationally.[2]

Section 1-8 – Meaning of *Australian revenue*

'Australian revenue' is a new concept created for the Determination. It means so much of the entity's gross revenue, determined in accordance with accounting standards, for the entity's most recently ended 12-month financial reporting period, that is attributable to transactions or assets within Australia, or transactions into Australia.

'Accounting standards' is defined in the Determination and is discussed above.

The entity's most recently ended 12-month financial reporting period is the period that is most relevant to the entity. For example, for most Australian-based entities, it would be the Australian financial year from 1 July to 30 June of the following year. For entities based in overseas jurisdictions, it would be the relevant financial reporting period for that entity.

It is not intended that an entity needs audited financial statements to determine its Australian revenue. However, this provision does not preclude reliance on audited financial statements, if those are available.

The intent of limiting an entity's gross revenue to that attributable to transactions or assets within Australia, or transactions into Australia is to limit the revenue calculation to that derived from sales to customers in Australia. Consequently, gross revenue attributable exports from Australia to customers located in overseas jurisdictions is excluded from calculation.

Section 1-9 – Combined acquirer/target revenue test

The 'combined acquirer/target revenue test' is relevant to determining whether the merger parties are required to notify the Commission of an acquisition pursuant to sections 2-1 and 2-3 of the Determination. These sections respectively relate to acquisitions that would result in large or larger corporate groups, or an acquisition is part of a series of creeping or serial acquisitions. These provisions are located in Division 1 of Part 2 of the Determination.

An acquisition will satisfy the combined acquirer/target revenue test at a time if, at that time, the sum of all of the following is $200 million or more (noting that this figure will be indexed over time in accordance with section 7-1 of the Determination, discussed below):

- the Australian revenue of the principal party to the acquisition (paragraph 1-9(1)(a));
- the Australian revenue of each connected entity of the principal party to the acquisition (paragraph 1-9(1)(b));

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[1] ACCC, Supermarkets Inquiry Final Report, 23 March 2025, pp. 1, 10. The Report can be found at: www.accc.gov.au/about-us/publications/serial-publications/supermarkets-inquiry-2024-25-reports/supermarkets-inquiry-feb
ruary-2025-final-report

[2] ACCC, Supermarkets Inquiry Final Report, 23 March 2025, pp. 28–29.

- where the acquisition is in shares in a body corporate – the Australian revenue of the body corporate (paragraph 1-9(1)(c));
- the Australian revenue of each connected entity of the body corporate that is the subject of the acquisition of shares in it (other than an entity not being indirectly acquired as a result of the acquisition) (paragraph 1-9(1)(d)); and
- where the acquisition is of an asset – the Australian revenue of the target to the acquisition to the extent that it is attributable to the asset (paragraph 1-9(1)(e)).

The ‘principal party to the acquisition’ has the same meaning as section 51ABI of the CCA, that being the person who acquires the shares, assets or determined thing. As such, paragraphs 1-9(1)(a) and (b) of the Determination require calculating the Australian revenue (see meaning of ‘Australian revenue’ above) for the acquiring party and its connected entities (see meaning of ‘connected entities’ above).

Paragraphs 1-9(1)(c) to (e) focus on calculating the Australian revenue for the target and its connected entities.

- Paragraph 1-9(c) applies to acquisitions of incorporated entities.
- Paragraph 1-9(1)(d) modifies the operation of connected entity (section 1-5) to ensure the Australian revenue of the seller of the target is not captured – for example, where a parent company is selling a subsidiary.
- Paragraph 1-9(1)(e) applies to acquisitions of assets of incorporated entities as well as unincorporated entities, such as partnerships or unit trusts.

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. It provides that the amount to be included is instead 20 per cent of the market value of the asset(s). It is intended that ‘market value’ takes its ordinary meaning – the price that a willing, but not anxious, purchaser would, as at the date in question, have had to pay to a vendor who was not unwilling, but not anxious, to sell. This is consistent with the High Court reasoning in *Spencer v Commonwealth* (1907) 5 CLR 418. This alternative test is not a choice – it is only available where it is not reasonably practicable to determine the Australian revenue attributable to the acquisition of an asset.

- To illustrate the alternative test (subsection 1-9(3)), where the acquisition is of a lease arrangement only and the principal party would carry on business in the leased premises, it is likely that the alternative means of calculating Australian revenue would apply. In this situation, the market value of the lease arrangement is 20 per cent of the entire lease arrangement – in other words, 20 per cent of the total rent payable under the entire term of the lease, not an individual year of the lease.
- To illustrate the primary asset revenue test (paragraph 1-9(1)(e)), where the asset is not used to generate revenue – for example, because the asset is vacant land – the revenue attributable to the asset is $0.
- Where the acquisition is of a group of assets that together comprise all or a substantial part of a business, it is likely that the Australian revenue attributable to

those assets is the revenue of the business and it is not expected that the alternative test in subsection 1-9(3) would be necessary.

To prevent double counting of Australian revenue, subsection 1-9(2) provides that when calculating whether the threshold is met, the Australian revenue of a relevant entity is not included if the entity's Australian revenue is included in the Australian revenue of another entity involved in the acquisition.

Section 1-10 – Acquired shares or assets revenue tests

The acquired shares or assets revenue tests are relevant to determining whether the merger parties are required to notify the Commission of an acquisition under sections 2-1, 2-2 and 2-3 of the Determination. These sections respectively relate to acquisitions resulting in large or larger corporate groups, acquisitions of smaller targets by very large corporate groups, and creeping or serial acquisitions. These provisions are located in Division 1 of Part 2 of the Determination.

There are two cases, one general and one special, in which this test can apply. In both cases, the purpose of the tests is to capture the revenue of the target of the acquisition.

General case: One corporate group acquires another corporate group (or parts thereof)

There are two separate thresholds for the general case. One is where the Australian revenue is $50 million or more, defined as the 'tier-1 acquired shares or assets revenue test' (tier-1 test), and the other is where the Australian revenue is $10 million or more, defined as the 'tier-2 acquired shares or assets revenue test' (tier-2 test). The figures for the tier-1 and tier-2 tests will be indexed over time in accordance with section 7-1 of the Determination.

For the tier-1 and tier-2 tests, calculating the Australian revenue occurs at a time and comprises the sum of all the following at that time:

- where the acquisition is in shares in a body corporate – the Australian revenue of the body corporate (paragraphs 1-10(1)(a) and 1-10(2)(a));
- the Australian revenue of each connected entity of the body corporate mentioned in paragraph (a) (other than an entity not being indirectly acquired as a result of the acquisition) (paragraphs 1-10(1)(b) and 1-10(2)(b));
- where the acquisition is of an asset – the Australian revenue of the target to the acquisition to the extent that it is attributable to the asset (paragraphs 1-10(1)(c) and 1-10(2)(c)).

As with section 1-9, the concept of 'Australian revenue' in section 1-8 of the Determination is used to calculate whether the tier-1 or tier-2 tests are met. As in section 1-9, a rule is included to prevent double counting of Australian revenue (see subsection 1-10(3) of the Determination).

Also, like section 1-9, when calculating whether tier-1 or tier-2 tests are met, paragraphs 1-10(1)(b) and 1-10(2)(b) exclude the seller of the target.

Also, like section 1-9, an alternative means for calculating Australian revenue where the acquisition is of an asset is provided. The operation of subsection 1-10(4) is the same as subsection 1-9(3).

Special case: More than two parties to the acquisition

The tier-1 and tier-2 tests also apply for the special case. An acquisition will satisfy the tier-1 or tier-2 test for the special case if:

- there are more than two parties to a contract, arrangement or understanding, pursuant to which the acquisition is to take place;
- the contract, arrangement or understanding involves more than one acquisition of shares and assets; and
- any one of the acquisitions under the contract, arrangement or understanding satisfies the tier-1 or tier-2 test for the general case, whichever is relevant to the acquisition.

This special case is intended to address acquisitions where there are more than two parties involved in a contract, arrangement or understanding which would involve at least two acquisitions. Further, this circumstance is captured if at least one acquisition among the acquisitions proposed would satisfy the relevant test for the general case. Put simply, where there are multiple parties involved in multiple acquisitions and one of those acquisitions is caught by the general case test, all other acquisitions are caught, even if they do not meet the tier-1 or tier-2 tests, whichever is relevant.

Section 1-14 of the Determination provides for the small acquisition test (discussed below). This test also has a special case. The special cases for sections 1-10 and 1-14 interact insofar as the section 1-14 special case would not apply where the section 1-10 special case applies because the small acquisition special case provides that if one acquisition does not meet the small acquisition test then the rest of the acquisitions are deemed to not meet the test either, even if they otherwise would.

<u>Section 1-11 – Accumulated acquired shares or assets revenue tests</u>

The accumulated acquired shares or assets revenue tests are relevant to determining whether the merger parties are required to notify the Commission of an acquisition under section 2-3 of the Determination, which relates to the circumstance where there are creeping or serial acquisitions. This section is located in Division 1 of Part 2 of the Determination.

There are two tests.

The first test is where the acquisition satisfies the tier-1 accumulated acquired shares or assets revenue test (subsection 1-11(1)). This is relevant where the combined acquirer/target revenue test (section 1-9, discussed above) has been satisfied for the purposes of notifying creeping or serial acquisitions under section 2-3.

The second test is where the acquisition satisfies the tier-2 accumulated acquired shares or assets revenue test (subsection 1-11(2)). This is relevant where the very large corporate group revenue test (section 1-13, discussed below) has been satisfied for the purposes of notifying creeping or serial acquisitions under section 2-3.

For both tests, an acquisition satisfies the relevant test at a time if, at that time:

- the acquisition is of shares or assets (the current shares or assets) (paragraphs 1-11(1)(a) and 1-11(2)(a));
- the principal party to the acquisition, or a connected entity of the principal party, acquired other shares or assets (the previous shares or assets) in the 3-year period ending at the time of the revenue test (paragraphs 1-11(1)(b) and 1-11(2)(b));
- both the current shares or assets and the previous shares and assets relate, directly or indirectly, to the carrying on of a business that predominantly involves the supply or acquisition of the same goods or services, or goods and services that are substitutable for, or otherwise competitive with, each other (disregarding any geographic factors or limitations) (paragraphs 1-11(1)(c) and 1-11(2)(c)); and
- the acquisition of the previous shares or assets and the current shares or assets which, if treated as a single acquisition, would satisfy the tier-1 test (subsection 1-10(1), discussed above) or the tier-2 test (subsection 1-10(2), discussed above) – whichever is relevant (paragraphs 1-11(1)(d) and 1-11(2)(d)).

For an acquisition to be captured by one of these tests, the current acquisition must be of a target that, directly or indirectly, is predominantly involved in the supply of goods or services that are the same as, substitutable for, or otherwise competitive with the goods or services supplied by the previously acquired targets. The intent is to capture a series of acquisitions by a principal party that would increase market concentration in a sector.

- 'Predominantly' is intended to take its ordinary meaning. The Macquarie Dictionary defines the word to mean 'chiefly; principally; for the most part'.
- For example, fuel outlets' predominant supply is considered to be selling fuel to consumers, not the incidental sale of snacks and drinks. Thus, to enliven the accumulated acquired shares or assets revenue tests, the acquisitions would need to be of fuel outlets and not fuel outlets followed by, for example, a convenience store. Ultimately, the facts and circumstances of each acquisition will need to be considered.

However, for both tests, there are certain acquisitions that are to be disregarded (see subsection 1-11(3) of the Determination). These are the acquisition of a previous share or asset (see paragraphs 1-11(1)(b) and 1-11(2)(b)) where:

- the acquisition of that previous share or asset was a notified acquisition (other than because of, in combination with other provisions of the CCA and the Determination, a previous operation of this section and section 2-3); or
- the acquisition of that previous share or asset satisfied the small acquisition test at the time it was put into effect (see section 1-14 for 'small acquisition test', discussed below); or
- the acquisition of the previous share or asset was not connected with Australia (see section 1-6 for 'connected with Australia' test, discussed above).

The effect of subsection 1-11(3) is that acquisitions notified under sections 2-1, 2-2, Part 3 or otherwise voluntarily notified are to be disregarded for the purposes of the accumulated acquired shares or assets revenue test. However, section 7-30 of the Determination, the anti-avoidance provision, is intended to regulate any efforts to circumvent notification under section 2-3 through strategic prior notifications.

The disregarding of previously notified acquisitions, other than those notified under section 2-3 which deals with creeping or serial acquisitions, is intended to balance appropriate oversight of creeping or serial acquisitions with administrative burden on the merger parties.

Also, for both tests, the Australian revenue of acquisitions of previous shares or assets are to be ascertained as at their respective historical contract dates. This means that the Australian revenue for these past acquisitions is the same as at the time of the past acquisition – and is not adjusted to reflect the current Australian revenue of the relevant entity.

As in section 1-9 (discussed above), ‘principal party to the acquisition’ has the same meaning as section 51ABI of the CCA. It means the person who acquires the shares, assets or any other thing determined by the Minister pursuant to subsection 51ABB(2) of the CCA.

<u>Section 1-12 – Transaction value test</u>

The concept of ‘transaction value test’ is relevant to determining whether the general notification thresholds in Division 1 of Part 2 of the Determination are met. Namely, it looks at acquisitions resulting in large or larger corporate groups in section 2-1.

An acquisition will meet the transaction value test at a time if the greater of the following is $250 million or more:

- the sum of the market values of all the shares and assets being acquired as part of the contract, arrangement or understanding, pursuant to which the acquisition is to take place;
- the consideration received or receivable for all of the shares and assets being acquired as part of the contract, arrangement or understanding, pursuant to which the acquisition is to take place.

The first test looks at the acquisition in terms of its ‘market value’. As mentioned above, the concept of market value is to take its ordinary meaning.

The alternative test looks at the consideration received or receivable for the acquisition. ‘Consideration’ is also to take its ordinary meaning, namely the amount paid for the target, and includes cash and non-cash consideration.

Satisfying either of these tests will mean the transaction value test is met.

The reason for having two tests is that a principal party may pay a premium for an acquisition in anticipation of a target’s potential earnings or to remove a competitor from the market.

Section 1-13 – Very large corporate group revenue test

The 'very large corporate group revenue test' is relevant to determining whether the general notification thresholds in Division 1 of Part 2 of the Determination are met. It is used in sections 2-2 and 2-3, which relate to acquisitions by very large corporate groups, and creeping or serial acquisitions.

An acquisition will satisfy this test if, at a time, the sum of all of the following at that time is $500 million or more:

- the Australian revenue of the principal party to the acquisition;
- the Australian revenue of each connected entity of the principal party to the acquisition.

If there is more than one principal party to the acquisition, the test is only satisfied if at least one of the principal parties to the acquisition has Australian revenue of $500 million or more. In other words, Australian revenue is not aggregated between the principal parties to the acquisition. This is to ensure that the test only captures very large corporate groups.

The concepts of 'Australian revenue', 'principal party to the acquisition' and 'connected entity' should be interpreted consistently with sections 1-9, 1-10 and 1-11 of the Determination. These are discussed above.

As in sections 1-9 and 1-10, a rule is included at subsection 1-13(2) to prevent double counting of Australian revenue.

Section 1-14 – Small acquisition test

This test is relevant to determining whether the general notification thresholds in Division 1 of Part 2 of the Determination are met. It is used in section 2-3 which relates to circumstances of creeping or serial acquisitions.

An acquisition will satisfy the small acquisition test, at a time, if the sum of all of the following, at that time, is less than $2 million:

- where the acquisition is in shares in a body corporate – the Australian revenue of the body corporate;
- the Australian revenue of each connected entity of the body corporate that is the subject of the acquisition of shares in it (other than an entity not being indirectly acquired as a result of the acquisition); and
- where the acquisition is of an asset – the Australian revenue of the target to the acquisition to the extent that it is attributable to the asset.

The concepts of 'Australian revenue' and 'connected entity' should be interpreted consistently with sections 1-9, 1-10 and 1-11 of the Determination. These are discussed above. As in sections 1-9, 1-10 and 1-13, a rule is included at subsection 1-14(3) to prevent double counting of Australian revenue.

Also consistent with sections 1-9 and 1-10, an alternative means is provided for calculating Australian revenue where the acquisition is of an asset. The operation of subsection 1-14(3) is the same as subsections 1-9(3) and 1-10(4).

Special case: More than two parties to the acquisition

Subsection 1-14(4) is intended to address a situation where there are more than two parties proposing to complete more than one acquisition. In this situation, if one of the acquisitions does not meet the small acquisitions test (subsections 1-14(1) to (3)), then the other acquisitions that the parties seek to complete are deemed to also not meet the test, even if they otherwise would.

The special case for the small acquisitions test ensures that if the special case for the acquired shares or assets revenue tests (subsections 1-10(5) and (6), discussed above) is met, there is not a conflict between the small acquisitions test and the special case for the acquired shares or assets revenue tests. In this situation, the acquisition that would otherwise be disregarded is captured by the special case for the acquired shares or assets revenue tests.

Part 2 – Circumstances where acquisitions require notification

This Part contains two divisions. Division 1 sets out the circumstances where an acquisition needs to be notified to the Commission. Division 2 sets out exceptions to these circumstances.

Division 1 – General circumstances

<u>Section 2-1 – Circumstance – acquisitions resulting in large or larger corporate groups</u>

One circumstance requiring notification to the Commission is where an acquisition results in a large or larger corporate group.

Requiring notification where the merger parties, combined, have $200 million or more in Australian revenue and the target has $50 million or more in Australian revenue will mean that the Commission is apprised of those mergers most likely to impact Australian consumers if they are anti-competitive, while reducing the overall compliance burden on businesses.

The merger parties must notify the Commission if:

- the acquisition is of shares or assets that are connected with Australia (see section 1-6, discussed above);
- the principal party and the target have, combined, $200 million or more in Australian revenue (see section 1-8, discussed above) on the date on which the contract, arrangement or understanding pursuant to which the acquisition is to take place is entered (see ‘contract date’ discussed above), thus satisfying the combined acquirer/target revenue test (see section 1-9 – discussed above); and

- either:
  - – the target has $50 million or more in Australian revenue (the tier-1 test – see subsection 1-10(1), discussed above) on the contract date; or
  - – the transaction value of the acquisition is $250 million or more (the transaction value test – see section 1-12, discussed above) on the contract date.

The acquisition is not notifiable if exempted by Part 2, Division 2 of the Determination. These exemptions are discussed below.

<u>Section 2-2 – Circumstance – acquisitions by very large corporate groups</u>

Another circumstance requiring notification to the Commission is where a very large corporate group acquires a target with at least $10 million in Australian revenue.

The merger parties must notify the Commission if:

- the acquisition is of shares or assets that are connected with Australia;
- the principal party's Australian revenue is $500 million or more on the contract date; and
- the target's Australian revenue is $10 million or more on the contract date (the tier-2 test – see subsection 1-10(2), discussed above).

By setting the principal party's Australian revenue at $500 million or more and the target's Australian revenue at $10 million or more, the intent is to capture acquisitions by businesses that are of substantial size in the context of the Australian economy acquiring smaller businesses.

The very large corporate group revenue test is set out in section 1-13 of the Determination and discussed above. The tier-2 test is set out in subsection 1-10(2) of the Determination and discussed above. The meaning of 'connected with Australia' is set out in section 1-6 of the Determination and the meaning of 'contract date' is set out in section 1-4. Both are discussed above.

The acquisition is not notifiable if exempted by Part 2, Division 2 of the Determination. These exemptions are discussed below.

<u>Section 2-3 – Circumstance – Creeping or serial acquisitions</u>

Another circumstance requiring notification to the Commission is where a principal party makes a series of acquisitions within a 3-year period that were not otherwise notified under sections 2-1, 2-2 and Part 3 of the Determination, or voluntarily notified, and are of targets with at least $2 million in Australian revenue.

The merger parties will need to notify the Commission if:

- the acquisition does not meet the 'small acquisitions test' on the contract date, meaning the acquisition must be of a target with at least $2 million in Australian revenue (see section 1-14 for small acquisitions test, discussed above);

- the acquisition is not exempted by Part 2, Division 2 of the Determination;
- either the combined acquirer/target revenue test or the very large corporate group revenue test is satisfied on the contract date (see sections 1-9 and 1-13, discussed above); and
- where the combined acquirer/target revenue test is satisfied – the acquisition satisfies the tier-1 accumulated acquired shares or assets revenue test on the contract date (see subsection 1-11(1) for the test, discussed above); or
- where the very large corporate group revenue test is satisfied – the acquisition satisfies the tier-2 accumulated acquired shares or assets revenue test on the contract date (see subsection 1-11(2) for the test, discussed above).

The threshold is intended to capture the combined effect of the acquisition and all previous acquisitions that relate, directly or indirectly, to the carrying on of a business that predominantly involves the supply of goods or services in the past 3 years by the principal party (including its connected entities) where those goods or services are the same, substitutable or otherwise competitive with each other (disregarding any geographic factors or limitations). In practice, this means that all acquisitions, which were not otherwise notified, made in a 3-year period are aggregated with the acquisition when determining if this threshold is met.

- The following scenario illustrates when notification is required:
  - The principal party, ScanCo, is a business supplying pathology and diagnostic imaging services. To simplify how revenue is accumulated, ScanCo and the targets are treated as having the same Australian revenue at all times – i.e. ScanCo's Australian revenue is $190M, ACo's is $10M et cetera. Therefore, ScanCo's Australian revenue increases by the Australian revenue of each target that it acquires – for example, ScanCo's Australian revenue increases from $190 million to $200 million once it acquires ACo and to $210 million once it acquires BCo (because ACo and BCo each have revenue of $10 million).
  - Notification is required under section 2-3 on three occasions, when ScanCo acquires ECo, FCo and HCo (see rows 5, 6 and 8 of Table 1 below).

Table 1 – Example of creeping or serial acquisitions

Acqui-sition	Year	Target	Goods or services supplied by the target	Australian revenue of the target	Aggregated or notifiable?	Accumulated revenue
1	2024	ACo	Pathology and Diagnostic Imaging Services	$10M	Aggregated for Pathology and Diagnostic Imaging Services but not notifiable	$10M
2	2024	BCo	Pathology and Diagnostic Imaging Services	$10M	Aggregated for Pathology and Diagnostic Imaging Services but not notifiable	$20M

Acqui-sition	Year	Target	Goods or services supplied by the target	Australian revenue of the target	Aggregated or notifiable?	Accumulated revenue
3	2024	CCo	Pathology and Diagnostic Imaging Services	$10M	Aggregated for Pathology and Diagnostic Imaging Services but not notifiable	$30M
4	2025	DCo	Pathology and Diagnostic Imaging Services	$10M	Aggregated for Pathology and Diagnostic Imaging Services but not notifiable	$40M
5	2026	ECo	Pathology and Diagnostic Imaging Services	$10M	Aggregated and notifiable because combined revenue of ScanCo and ECo is $240M (ScanCo now includes ACo to ECo revenue) thus satisfying the combined acquirer/target revenue test (see section 1-9) and the tier-1 accumulated acquired shares or assets revenue test is satisfied (see subsection 1-11(1)) because aggregated revenue of ACo to ECo is $50M and these businesses predominantly supply goods or services that are same/substitutable/competitive.	$50M
6	2026	FCo	Pathology and Diagnostic Imaging Services	$4M	Aggregated and notifiable because the combined revenue is $244M comprising FCo's $4M revenue and ScanCo's $240M revenue (because Scan Co's revenue now includes the revenue of ACo, BCo, CCo, DCo and ECo) thus satisfying the test at 1-9. The tier-1 accumulated acquired shares or assets revenue test is satisfied because the aggregated revenue of acquisitions 1 to 6 is $54M.	$54M
7	2026	GCo	Pathology and Diagnostic Imaging Services	$1.5M	Not aggregated or notifiable because revenue of the target is less than $2M (excluded by the small acquisitions test, section 1-14). However, GCo's revenue will count towards	$54M

Acqui-sition	Year	Target	Goods or services supplied by the target	Australian revenue of the target	Aggregated or notifiable?	Accumulated revenue
					ScanCo's revenue for any future acquisitions.	
8	2028	HCo	Pathology and Diagnostic Imaging Services	$27M	Aggregated and notifiable because combined revenue of ScanCo and HCo is $272.5M, comprising HCo's $27M revenue and ScanCo's $245.5M revenue (ScanCo's revenue includes ACo to GCo's revenues), thus satisfying the test at 1-9. The tier-1 accumulated acquired shares or assets revenue test is satisfied because aggregated revenue of acquisitions 4, 5, 6 and 8 is $51M. Acquisitions 1 to 3 are disregarded because more than 3 years ago.	$51M

Division 2 – Exceptions to general circumstances

This Division sets out the circumstances in which an acquisition is exempt from notification.

<u>Section 2-20 – Certain land acquisitions</u>

Subsection 2-20(1) – Developing residential premises or operating a land development or management business

This subsection exempts two categories of land acquisitions from notification:

- residential property developments – acquisitions made for the purpose of developing residential premises; and
- certain commercial property acquisitions – acquisitions by businesses primarily engaged in buying, selling, leasing or developing land, where the acquisition is for a purpose other than operating a commercial business on the land. This permitted purpose includes activities that are ancillary or incidental to the primary purpose.

The exemption applies where the effect of the acquisition is that the acquirer obtains a legal or equitable interest in land regardless of whether the land is currently vacant or already developed.

The relief from notification requirements recognises that property developers and entities that lease land acquire land as their stock-in-trade or for land leasing or development purposes. This differs from acquisitions where land serves as a platform or location for operating other commercial activities, which the exemption does not extend to.

Developing residential premises

Paragraph 2-20(1)(a) provides an exemption for acquisitions of land for the purpose of developing residential premises. The term 'residential premises' has the meaning given by section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*, being land or a building that:

- is occupied as a residence or for residential accommodation; or
- is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation.

The exemption covers acquisitions for developing various forms of residential premises, including houses, apartments, townhouses, retirement villages, student accommodation, and other premises intended for residential purposes.

Buying, selling, leasing or developing land

Paragraph 2-20(1)(b) exempts acquisitions where the person acquiring the interest is carrying on a business primarily engaged in buying, selling or leasing land and the acquisition is for any purpose of that person in carrying on that business.

The following conditions must be met for the exemption to apply:

- first, the acquirer must be a person carrying on a business primarily engaged in buying, selling or leasing land; and
- second, the purpose of the land acquisition cannot be to operate a commercial business on the land (unless it is ancillary to the primary purpose of buying, selling, leasing or developing land).

The exemption covers property development activity, for example, property developers who are acquiring land for the purpose of carrying on their business. Where land is acquired as a platform for operating a commercial business, such as a manufacturing company acquiring land to operate a factory, the acquisition falls outside the exemption because the primary purpose relates to operating the commercial business on the land rather than trading or development in the land itself.

Activities that are ancillary or incidental to the primary purpose of buying, selling or leasing the land do not disqualify a person from the exemption. This means that where a person in the land trading business acquires land for that business, supporting commercial activities do not remove the exemption, provided such activities are ancillary or incidental to the primary land trading purpose. Examples of these activities include property management services, concierge services, facility management in office buildings and other similar activities.

Subsection 2-20(2) – Land entities

This subsection extends the land exemption to acquisitions of interests in entities that only hold land assets. This includes acquisitions of shares, as well as units in unit trusts, which under subsection 51ABC(1) of the CCA, are treated as if they were acquisitions of shares.

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

The exemption applies where the following conditions are met:

- the entity's only non-cash asset is a legal or equitable interest in land; and
- the land is held for one or more of the purposes covered by subsection 2-20(1) (such as residential development or land trading).

For example, if a developer acquires all the units in a trust that holds only vacant land for residential development (as covered by subsection 2-20(1)), the acquisition would be exempt under this subsection.

The condition that the entity's only asset is land refers to its substantive holdings. Incidental assets (such as a nominal bank account or receivables) would not disqualify the exemption, provided the entity does not hold any other significant or standalone business assets.

Subsection 2-20(3) – Lease extensions and renewals

This subsection exempts acquisitions that arise from the extension or renewal of an existing lease over land. The exemption covers lease transactions where there is continued occupation of the same land by the same party. This is to ensure the consistent and proportionate treatment of lease-related transactions under the mergers control system.

The renewal of a lease means the grant of a new lease for a further period and includes situations where the previous lease is terminated and a new lease is granted over the same land. The exemption does not apply where the renewal or extension involves a new or expanded parcel of land.

For example, where a tenant continues to occupy the same parcel of land (whether by entering into a new lease or by exercising an option to renew under an existing lease), the acquisition is exempt. Similar examples also include:

- entering into a new lease over the same land following expiry of the original term;
- exercising a contractual option to renew a lease;
- arrangements effected through a renewal deed or similar instrument;
- other common leasing practices where continuation is achieved through surrender and regrant.

Subsection 2-20(4) – Subsequent acquisitions of the same interests in land

This subsection exempts acquisitions of legal or equitable interests in land where the same acquirer has previously notified the Commission of an acquisition of an equitable interest in the same land. 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.

The exemption applies where:

- the acquirer previously acquired an equitable interest in the land and that acquisition was a notified acquisition;
- the same acquirer then acquired a subsequent legal or equitable interest that relates to that same parcel of land (such as obtaining legal title or acquiring an additional equitable interest over it);
- the size of the land to which the previous interest and the subsequent interest relate, are materially the same; and
- the proportion of the ownership interest in the land to which the previous interest and the subsequent interest relate, is the same.

For example, if an entity enters into an agreement for lease and notifies the Commission of that acquisition (being the equitable interest in land), the later acquisition of a legal interest upon entering into the lease does not require a separate notification provided the land remains unchanged.

Paragraphs 2-20(4)(d) and (e) ensure that this exemption is confined to subsequent acquisitions that are of the same land. For example, where an entity acquires an equitable interest of 20 per cent in a block of land at exchange, and then at settlement acquires legal interest of 50 per cent, the exemption is not applicable. Paragraph 2-20(4)(d) deliberately uses the word ‘materially’ to allow for minor adjustments in land size that may be outside the notifier’s control (for example, a minor increase in the size of land in a lease as a result of a store redevelopment in a shopping centre).

Subsection 2-20(5) – Land development rights

This subsection exempts acquisitions of land development rights where the substance of the transaction is equivalent to a land acquisition that would otherwise be covered by another provision in section 2-20. This ensures that acquisitions of legal or contractual rights to develop land are treated consistently with acquisitions of legal or equitable interests in land for the same purpose.

A land development right includes a right to develop or redevelop land, including rights to construct, refurbish, expand or subdivide existing land or buildings. These rights may arise under planning or rezoning schemes, development agreements or similar instruments and are commonly used by developers or landowners to facilitate improvements without transferring freehold title.

An acquisition of land development rights will be exempt where the right relates to land already used or held for a purpose (e.g. covered by subsection 2-20(1)). The exemption applies if the following test is satisfied:

- first, assume that the acquirer of the development rights had instead acquired an equitable interest in the same land for the relevant purpose;
- then, consider whether that acquisition would itself be exempt under another provision in section 2-20.

If both conditions are met, then the exemption applies. For example, suppose a property developer acquires development rights under a planning scheme to construct residential apartments on land owned by a third party and that these rights allow the developer to begin construction without acquiring legal title to the land:

- the first condition is met if the land is used or will be used for a purpose covered by section 2-20, such as land development or trading;
- the second condition is met if, instead of acquiring the development rights, the developer had acquired an equitable interest in that same land for the same purpose and that acquisition would be exempt under another provision in section 2-20 (for example, under subsections 2-20(1) or 2-20(4)).

Subsection 2-20(6) – Sale and leaseback arrangements

This subsection exempts sale and leaseback arrangements relating to the land. These arrangements are typically used for financing or capital management purposes where the economic control remains unchanged despite the transfer of legal title.

The effect is that where a party sells land but immediately leases it back for the same use (such as a retailer selling their store but continuing to operate from the same premises), the leaseback component is exempt.

Section 2-21 – Liquidation, administration, receivership etc

This section exempts acquisitions by an administrator, receiver, receiver and manager, or liquidator. This is because such acquisitions occur by operation of the law, as a result of legal processes related to insolvency.

- ‘Administrator’, ‘receiver’, ‘receiver and manager’ and ‘liquidator’ are all within the meaning of section 9 of the Corporations Act.

However, this exemption does not cover instances where an entity is acquiring shares or assets *from* the administrator, receiver, receiver and manager, or liquidator. Such transactions are still subject to the notification requirements if the thresholds are met.

Section 2-22 – Financial market infrastructure

Clearing and settlement facilities

Subsection 2-22(1) exempts certain acquisitions that occur in the course of clearing and settlement activity:

- acquisitions made by an operator of a clearing and settlement facility (within the meaning of section 9 of the Corporations Act), where the acquisition is made in that capacity; and
- acquisitions made by a participant in such a facility (within the meaning of section 9 of the Corporations Act), where the participant is acting in that capacity, and for or on behalf of another person who is a party to the acquisition.

These exemptions apply to transactions that arise in the ordinary course of clearing and settlement activities, such as acquiring legal title to financial instruments to facilitate the transfer of ownership or settlement of trades.

However, the exemption does not apply where the acquisition falls outside that clearing or settlement role. For example, the following will not be covered by the exemption:

- an acquisition arising from a merger between two clearing and settlement operators;
- an acquisition by a participant for purposes unrelated to clearing and settlement activities. For instance, if a major bank that participates in a clearing facility (e.g., ASX Clear or Austraclear) acquires another bank, this acquisition would not be covered by the exemption. This is because the acquisition is unrelated to the bank's clearing and settlement activities.

Acquisitions under close out, set off, or account combination rights

Subsection 2-22(2) exempts acquisitions of shares or assets that occur under a contract as a result of:

- the exercise of a contractual right to close out a transaction; or
- the exercise of a right of set off or combination of accounts under the contract.

These rights are common in lending, collateral or other similar arrangements and are integral to routine financial risk management practices.

A 'close out' right refers to the discharge of obligations under a futures contract by entering into an equal and opposite position in a futures contract of the same kind. This includes, for example, acquisitions made under a close-out netting contract (within the meaning of the *Payment Systems and Netting Act 1998*), which allow obligations between parties to be terminated and settled through a single net amount following a specified event.

A 'right of set off' refers to the reduction of a creditor's claim by the amount the creditor owes to the debtor.

A 'right of combination' refers to the entitlement of a bank to combine or set-off accounts kept by a customer (even if they are kept at different branches) and to treat the balance as a single amount either due to the customer or owing to the bank.

In general, acquisitions that result from the exercise of these rights are exempt from the notification requirements, unless:

- the acquisition is of a share or an asset that is an equity interest, where that acquisition has the effect that a person will begin, or can begin, to control an entity that it did not control before the acquisition (within the meaning of section 50AA of the Corporations Act after applying the modifications set out in subsection 51ABS(2) of the Mergers Act) (the control test); or

- the acquisition is of an asset, where the acquisition has the effect that a person will acquire all, or substantially all, of the assets of a business (the ‘all or substantially all’ test).

Control test

This test excludes from the exemption acquisitions of shares or equity interests where the acquisition has the effect that a person will begin, or can begin, to control an entity that it did not control before the acquisition.

This test is also relevant to subsection 2-23(7) (relating to derivatives) and subsection 2-24(1) (relating to debt instruments, money lending and security interests). The control test ensures that instruments such as derivatives, convertible debt, structured securities or interests with conversion features, exercise rights, or other mechanisms remain subject to notification requirements if an acquisition involving them could result in obtaining control.

- An equity interest has the meaning provided under the *Income Tax Assessment Act 1997* (ITAA 1997). An interest in an asset is an equity interest if it satisfies the equity test in Division 974 of the ITAA 1997.
- ‘Control’ is within the meaning of section 50AA of the Corporations Act after applying the modifications set out in subsection 51ABS(2) of the Mergers Act.

The example in subsection 2-22(2) clarifies that a person ‘can begin to control an entity’ where they acquire the power to exercise an enforceable right, even if that right is only enforceable in the future or contingent on a condition. For instance, this may occur where a lender party exercises a contractual close-out right under a lending agreement and as a result, acquires shares that result in control.

Similar examples apply to subsection 2-23(7) (derivatives) and subsection 2-24(1) (debt instruments, money lending and security interests).

All or substantially all assets of a business test

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.

This test is also relevant to subsections 2-23(7) (relating to derivatives) and subsection 2-24(1) (relating to debt instruments, money lending and security interests) and the note in these subsections clarifies that the test applies regardless of how a target has chosen to structure its business.

- A business means a commercial enterprise carried on as a going concern, or activities conducted for the purpose of profit on a continuous and repetitive basis. General characteristics of a business include profit-making, repetition, regularity, organisation, and the use of a system.

- This can include, for example, internal units or divisions that form part of the larger commercial enterprise, such as a particular product line or operational segment. For example, a dairy business may be comprised of a fresh milk division and a cheese division. Each of these divisions can constitute a 'business' for these purposes.

The test has no fixed threshold and requires a fact-intensive analysis based on specific circumstances. The assessment can involve both quantitative factors (such as percentage of revenue, assets, book value or earnings before interest, taxes, depreciation, and amortisation) and qualitative factors (whether the transaction fundamentally changes the nature of the business or 'strikes at the heart of the corporate existence and purpose').

<u>Section 2-23 – Financial securities</u>

This section exempts acquisitions related to certain fundraising activities from the notification requirement to avoid undue disruption to capital markets.

Acquisitions relating to the capital-raising process can include transactions where an underwriter acquires shares under an underwriting arrangement, or a shareholder increases their percentage holding due to a shortfall in a rights issue.

The Corporations Act facilitates capital raising by providing exceptions to the general takeover prohibitions under section 606 of that Act. Consistent with this approach, acquisitions that result from and satisfy the conditions of the relevant items in section 611 of the Corporations Act are also exempt from merger notification requirements.

This section applies to acquisitions resulting from:

- rights issues (including accelerated rights issues);
- dividend reinvestment or share bonus plans;
- underwriting of fundraising;
- buy-backs; and
- derivatives.

Rights issues

Subsection 2-23(2) applies the notification exemption to acquisitions resulting from rights issues that satisfy the conditions in item 10 of section 611 of the Corporations Act. The nature of rights issues justifies their exemption because:

- each holder has an equal opportunity to avoid dilution of their existing holding by participating in the offer; and
- compared to other issues of securities, it is less likely that any one holder's percentage holding will increase substantially.

Subsection 2-23(3) extends the exemption to accelerated rights issues satisfying the conditions in notional item 10A of section 611 of the Corporations Act, inserted by the *ASIC Corporations (Takeovers—Accelerated Rights Issues) Instrument 2015/1069*. Both the standard rights issue and the accelerated rights issue exemptions cover acquisitions by an underwriter or sub-underwriter (under subsection 2-23(4)).

Dividend reinvestment etc and underwriting of fundraising

Subsection 2-23(5) exempts acquisitions resulting from dividend reinvestment plans or bonus share plans that satisfy the conditions in item 11 of the table in section 611 of the Corporations Act. These common corporate actions allow shareholders to acquire additional shares instead of receiving a cash dividend or distribution.

This subsection also applies to acquisitions by an underwriter or sub-underwriter of fundraising satisfying the conditions in item 13 of the table in section 611 of the Corporations Act.

Item 13 applies to acquisitions that involve the following two circumstances:

- the acquisition results from an issue of securities to a person as underwriter or sub-underwriter when the issue is made under a disclosure document; and
- the effect of the acquisition on the person's voting power is disclosed in the disclosure document.

Buy-backs

Subsection 2-23(6) exempts acquisitions resulting from a share buy-back as authorised by section 257A of the Corporations Act, as provided by item 19 of the table in section 611 of the same Act. A share buy-back involves a company acquiring its own shares from shareholders, generally to return capital to shareholders and increase share value. Buy-backs are unlikely to raise competition concerns as they do not alter market structure.

Derivatives

Derivative transactions are generally entered into for financial risk management or investment purposes rather than to acquire business operations. Subsection 2-23(7) applies to acquisitions of derivatives (within the meaning of section 9 of the Corporations Act) or acquisitions that result from derivatives.

However, derivatives can also be structured or used in ways that allow a person to gain control of an entity or acquire substantial business assets. To address this, the exemption in subsection 2-23(7) does not apply where the control test or the 'all or substantially all' test applies.

The example in this subsection clarifies that a person can begin to control an entity where they acquire a derivative that confers a right to obtain control, even if that right is not immediately enforceable. This includes rights that become enforceable in the future or only upon satisfaction of a condition. Common examples include call options and other derivatives that provide a right to control at a later time.

Section 2-24 – Debt instruments, money lending, financial accommodation and security interests

Subsection 2-24(1) exempts acquisitions involving debt instruments, debt interests, asset securitisation arrangements, securities financing transactions, security interests and directly connected arrangements. The exemption reflects that such financial transactions and arrangements generally involve providing capital, managing financial risk or facilitating financial activities rather than acquiring business operations.

The exemption covers:

- debt instruments;
- debt interests in entities;
- asset securitisation arrangements;
- securities financing transactions such as repurchase agreements and securities lending;
- security interests (within the meaning of the Corporations Act); and
- arrangements directly connected with these financial structures.

However, the exemption does not apply where the control test or the 'all or substantially all' test applies.

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).

By contrast, a cash-settled total return swap that provides economic exposure to share price movements (without any right to acquire shares or voting rights) would be exempt from the notification requirements.

Debt instruments and debt interest in an entity

Paragraph 2-24(1)(a) provides an exemption for debt instruments such as bonds, notes, and debentures.

Paragraph 2-24(1)(b) provides an exemption for debt interests in an entity (including hybrid instruments). For the purposes of this exemption, an interest in an entity is a 'debt interest' if it is a debt interest for tax purposes.

This is determined according to Div 974 of the ITAA 1997. Under section 974-15 of that Act, a scheme gives rise to a debt interest in an entity if, at the time the scheme comes into existence, the scheme satisfies the ‘debt test’, set out in section 974-20 of that Act. More detailed rules are set out in Div 974 of that Act.

Acquisitions that are part of asset securitisation arrangements

Paragraph 2-24(1)(c) provides an exemption for acquisitions that are part of an asset securitisation arrangement. This aligns with the securitisation framework (see for example, APRA Prudential Standard APS 120) and includes financial arrangements in which:

- income-generating assets (such as loans, leases, or receivables) are pooled; and
- those assets are repackaged into securities that are sold to investors, for example, through a special purpose vehicle.

Acquisitions that are part of securities financing transactions

Paragraph 2-24(1)(d) provides an exemption for acquisitions that are part of a securities financing transaction. A securities financing transaction includes arrangements where securities are provided as collateral to facilitate funding or liquidity, such as repurchase agreements and securities or margin lending transactions. These transactions generally involve the temporary transfer of securities with an agreement to reverse the transaction at a later date and are commonly used for liquidity management, collateralised borrowing, and market-making activities.

Security interests

Paragraph 2-24(1)(e) covers the acquisition of a security interest within the meaning of section 9 of the Corporations Act. This includes any charge, lien or pledge as well as a security interest within the meaning of the *Personal Property Securities Act 2009* (and to which that Act applies). This ensures that interests acquired or granted over shares or assets as part of routine financing, collateralisation or risk management are covered (subject to the conditions explained below).

Paragraph 2-24(1)(f) extends the exemption to acquisitions directly connected with a qualifying debt, securitisation, or financing arrangement.

Security interests in the ordinary course of financial accommodation

Subsection 2-24(2) provides a further exemption for acquisitions of security interests made in the context of commercial lending. The subsection provides that an acquisition is exempt where the security interest is taken in the ordinary course of a person’s business of providing financial accommodation on standard commercial terms.

While subsection 4(4) of the CCA excludes acquisitions of assets by way of charge, no equivalent exclusion exists for shares. The requirements for this exemption are modelled on subsection 609(1) of the Corporations Act. That section excludes security interests taken in the ordinary course of a financial accommodation business from giving rise to a ‘relevant interest’ under the takeover rules.

The exemption applies whether the lender takes the security interest directly or it is taken by another person for the lender’s benefit. However, the exemption is only available if the person whose property is subject to the security interest is not an associate of the lender or any other person benefiting from the security. This limitation manages the risk of control transactions being structured as financial accommodation arrangements to avoid notification.

- 'Security interest' and 'property' have the meaning given by section 9 of the Corporations Act.
- Sections 11 to 17 of the Corporations Act are relevant to define 'associate'.
- A reference to a security interest includes a reference to a negative pledge.

The exemption recognises that secured lending is a routine feature of financial markets and is not generally used as a means of acquiring control or substantial business assets.

In contrast with subsection 2-24(1), which provides a general exemption for security interests subject to the control and 'all or substantially all' asset tests, this subsection applies specifically to acquisitions made in the ordinary course of providing financial accommodation and is therefore, not subject to those tests.

Section 2-25 – Nominees and other trustees

Bare trustee

Subsection 2-25(1) applies to an acquisition of interests in securities. The acquisition must be by a person acting as bare trustee for a beneficiary. Additionally, the beneficiary must have a 'relevant interest' in the securities arising from a presently enforceable and unconditional right to acquire them. It exempts the acquisition of such interests from the notification requirement.

Applying the takeovers concept of 'relevant interest', the exemption recognises that it is the beneficiary (not the bare trustee) who is the true owner of the interest in these circumstances. As the trustee does not obtain any real interest that could shift control or raise other competition issues, requiring notification would serve no proper purpose.

The exemption is modelled on the equivalent nominee exemption in subsection 609(2) of the Corporations Act. The note to this section clarifies that the exemption can apply to a person holding securities as a nominee for the beneficial owner. This subsection only exempts the acquisition of the legal interest by the trustee; it does not exempt the acquisition of the beneficial interest by the beneficiary.

- 'Securities' has the meaning given by subsection 92(3) of the Corporations Act.
- 'Relevant interest' has the meaning given by section 9 of the Corporations Act.

Custodial or depository service

Subsection 2-25(2) exempts acquisitions made by a provider of custodial or depository services in the ordinary course of providing that service. These services involve the provider acquiring a financial product or beneficial interest, which is held in trust for a client or a person nominated by the client.

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The meaning of a custodial or depository service is set out in section 766E of the Corporations Act and can include licensed custodians, nominee service platforms and administrative service providers that act under client instruction and do not exercise discretion over the use or disposition of the assets.

This exemption does not apply to activities excluded from the statutory definition of custodial or depository service in subsection 766E(3) of the Corporations Act, such as regulated superannuation funds. Acquisitions made in the course of those excluded activities remain within scope of the merger control system where relevant thresholds are met.

Section 2-26 – Acquisitions that occur by operation of law

This section exempts acquisitions that occur by operation of a law of the Commonwealth, or of a State or Territory. The exemption covers circumstances where the law itself effects the transfer upon the occurrence of a specified event and the parties have no discretion in whether or how the acquisition occurs (for example, transfers that happen automatically under legal rules, without any commercial negotiation or agreement by the parties).

The note to this section clarifies that an acquisition by operation of law is distinguished from other legal transactions by its automatic nature and only applies to acquisitions by operation of law.

For example, this includes the vesting of a deceased person's property in the executor of their estate under succession law, or a testamentary disposition under a will both of which occur without requiring any deliberate act of transfer by the parties involved.

Part 3 – Classes of acquisitions requiring notification

Division 1 - Supermarkets

Section 3-1 – Class of acquisitions – supermarket business

Part 2 of the Determination sets general notification thresholds that apply across all sectors of the economy. Part 3 specifies certain transactions within the supermarket sector that must be notified, regardless of whether those transactions meet the general notification thresholds. Section 3-1 specifies an acquisition is in a class that must be notified if:

- the acquisition is of shares or assets; and
- the effect of the acquisition is that a major supermarket acquires, in whole or in part, a supermarket business.

A major supermarket is defined as Coles Group Limited and Woolworths Group Limited, and their connected entities.

A supermarket business is defined by reference to section 5 of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulations 2024*. That is, a supermarket business means a business if:

- the main purpose of the business is the retail sale of grocery products to consumers; and
- a substantial proportion of those grocery products is food that is not for in-store consumption.

It is appropriate to have a consistent definition of supermarket business throughout Commonwealth legislation, regulations and legislative instruments.

As explained in note 1 to the section, the effect is that transactions by Coles or Woolworths (or their connected entities) that result in them acquiring a supermarket business are notifiable acquisitions. Notifiable acquisitions must be notified to the Commission under the new system.

Note 2 of the section clarifies that this section covers acquisitions of units in a unit trust, or an interest in a managed investment scheme, by directing the reader to section 51ABC of the CCA. Section 51ABC provides that those types of acquisitions are treated the same as if the units or interests were shares in the capital of a body corporate.

<u>Section 3-2 – Class of acquisitions – land for supermarket business</u>

Paragraphs 3-2(1)(a), (b) and (c) specify an acquisition is in a class that must be notified if:

- the acquisition is of shares or assets;
- the acquisition will have the effect that a major supermarket acquires a legal or equitable interest in land (in whole or in part). This includes acquisitions of an entity which only holds land. Note 3 to section 1-4 provides that the expression 'land' is defined in section 2B of the *Acts Interpretation Act 1901*; and
- the land meets the size requirements outlined below.

However, paragraphs 3-2(1)(d), (e) and (f) provide exemptions for certain types of acquisitions. The effect of this is that any acquisition that meets paragraphs 3-2(1)(a), (b) and (c) does not have to notify if it meets one of the exemptions in paragraphs 3-2(1)(d), (e) and (f). The types of acquisitions that are exempt are:

- The acquisition is a lease extension or renewal for land that has a currently operating commercial business.
- An acquisition of a legal or equitable interest in land where a previous interest in that land has previously been notified.
- An acquisition of a legal or equitable interest in land where it only relates to a sale or leaseback arrangement.
- An acquisition relating to land upon which only a business that is not a supermarket business is operating or will operate.

Certain extensions or renewals of leases are exempt from the notification requirements. This is important to avoid a supermarket that has been operating on a site with an existing lease having to notify because its lease is being renewed. This exemption has been limited to circumstances where a commercial business is currently being operated, to avoid extending it to vacant sites that are being held for future development of a store.

The term ‘renewal’ has been interpreted broadly by the courts. Existing case law notes that to ‘renew a lease’ means to grant a new lease for a further period, whether or not for the same period and on the same terms as the original lease (*Trade Practices Commission v Tooth & Co* (1979) 142 CLR 397), and ‘renewal’ includes termination of the earlier lease and granting of a new lease (*J & M O'Brien Enterprises Pty Ltd v Shell Co of Australia* (1982) 45 ALR 81).

This exemption applies to lease renewals or extensions that maintain the continuity of an existing business operation at the same site. It does not apply where the acquisition involves a new or materially expanded site. In such cases, the acquisition may be notifiable if it otherwise meets the relevant criteria.

Exemptions are provided for interests in land where a previous interest in the land has already been notified, and for sale and leaseback arrangements, for the same reasons as discussed in section 2-20 above.

Exemptions are also provided for land on which businesses that are not supermarket businesses operate or will operate. This is to ensure land acquisitions of the non-supermarket businesses of the major supermarkets’ connected entities (for example, Big W for Woolworths) do not fall within a class of acquisitions required to be notified.

Note 1 to the section clarifies that acquisitions by Coles or Woolworths (or their connected entities) resulting in them acquiring land within the size requirements must be notified to the Commission.

Note 2 to the section clarifies that this section covers acquisitions of units in a unit trust, or an interest in a managed investment scheme, by directing the reader to section 51ABC of the CCA.

Note 3 to the section clarifies that, to avoid duplication of notification requirement, where a major supermarket enters into an agreement to purchase land and notifies the Commission when acquiring an equitable interest in that land, it is not required to notify the Commission when the purchase is subsequently finalised and a legal interest in the same land is acquired.

Land size requirements

Where the land has a commercial building on it (except a building that is reasonably intended or expected to be demolished), the size requirement in paragraph 3-2(2)(a) applies. This type of land meets the size requirements if the gross lettable area of the building is greater than 1,000 square metres.

Subsection 3-2(3) provides how to work out the gross lettable area of a building. Industry practice is to rely on the Property Council of Australia’s (PCA) definition and calculations, outlined in their document ‘Method of Measurement for Lettable Area’. It is inappropriate to incorporate the PCA document by reference into the Determination as the PCA document requires payment to access. It is also inappropriate to repeat the PCA document’s contents in the Determination. As such, the Determination provides that in working out the gross lettable area, the building must be measured by someone qualified and in accordance with generally accepted industry practice.

Where the land does *not* have a commercial building on it (or has a building upon it that is reasonably intended or expected to be demolished), the size requirement in paragraph 3-2(2)(b) applies. This type of land meets the size requirements if the land is greater than 2,000 square metres.

Adjacent acquisitions

Subsection 3-2(4) ensures that major supermarkets cannot subvert the land size requirements by acquiring land acquisitions below the land size requirements but adjacent to existing land, to be aggregated. The subsection provides that where a party makes an acquisition of land directly adjacent to a piece of land they have an existing interest in, both pieces of land are treated as if they were a single parcel of land. The pieces of land are also considered together when working out if the land meets the size requirements.

The note to the subsection clarifies that where multiple lots of land adjacent to existing land are acquired, this subsection applies to the acquisition of each separate lot of land.

Section 3-3 – Class of acquisitions not resulting in control that are required to be notified

This section specifies a class of acquisitions of shares in the capital of bodies corporate for the purposes of this Determination and section 51ABS of the CCA.

The note to the section clarifies that any acquisition of shares in a supermarket business or land for a supermarket business by a major supermarket must be notified to the Commission, regardless of whether control is acquired.

Section 3-4 – Sunsetting of this Division

This section specifies that this Division is repealed on the fifth anniversary of the registration of this Determination (as originally made).

Part 5 – Acquisitions Register

Division 1 – Contents of the register

The acquisitions register must include certain details, information or documents for each notified acquisition. This transparency requirement sets a baseline for disclosure of information and documents by the Commission as part of the merger review process, and allows relevant stakeholders to be aware of intended acquisitions so they can engage in the Commission's review. It will also facilitate transparency and predictability in relation to decisions that the Commission may make and provide the public with an insight into the economic and legal reasoning that has been applied by the Commission when assessing notified acquisitions.

Section 51ABZZI of the CCA provides that certain things must be included on the register. These include a copy of each acquisition determination made in respect of notifications, a statement of the Commission's reasons for making the determination, and a copy of the notice (given under subparagraph 51ABZJ(2)(b)(i) of the CCA) of the decision that a notification is to be subject to Phase 2 review.

Section 5-1 and subsection 5-2(1) of the Determination prescribe details of each notification of the acquisition, and other information or documents that are also to be included on the register.

Section 5-1 – Details of notifications

Section 5-1 determines the details of a notification that must be included on the acquisitions register. The details are as follows:

- the name of each notifying party of, and the target to, the acquisition.
- if a notifying party has an ABN—the ABN of the party.
- if the target has an ABN—the ABN of the target.
- if a notifying party, or the target, does not have an ABN, but does have an ACN, or equivalent or unique identifier—the ACN, or identifier, of the party or target.
- a summary of the details of the acquisition.
- the class code and title for each notifying party and the target, by reference to ANZSIC.
- the effective notification date for the notification.
- the end of the determination period for the notification.

Section 5-2 – Information and documents relating to the acquisitions register

Subsection 5-2(1) determines information or documents, relating to the operation of the acquisitions provisions, that must also be included on the acquisitions register. The information and documents are as follows:

- if a person has applied for a notification waiver in relation to an acquisition—a statement to that effect, a summary of the details of the acquisition and a summary of any decision of the Commission in relation to the application.
- any extension of a determination period in respect of a notification of an acquisition and the reasons for the extension. For example, an extension of the Phase 2 determination period.
- the current stage of each notification of an acquisition. For example, Phase 1 determination period, Phase 2 determination period, or public benefit assessment.
- if the Commission consults with persons under paragraph 51ABZZD(2)(d) of the CCA for the purposes of making the acquisition determination in respect of a notification—a statement that consultation is occurring and the nature of the consultation.
- if a notice of competition concerns has been given to a notifying party of an acquisition—a summary of the notice.

- if a public benefit assessment has been given to a notifying party of an acquisition—a summary of the public benefit assessment.

Subsection 5-2(2) determines a time by which the above information or documents must be included on the acquisitions register.

Generally, the information or documents must be included on the register within one business day from when the relevant action has occurred or, if that is not practicable, as soon as practicable after that one business day. Table 2, below, provides a summary of when information or documents must be published.

Table 2: Summary of when certain information or documents must be published on the register

Information or documents	Time by which they must be published
any extension of a determination period in respect of a notification of an acquisition and the reasons for the extension	within 1 business day of the extension notice being given to the notifying party or, if that is not practicable, as soon as practicable after that day
the current stage of each notification of an acquisition	within 1 business day of any change in the stage of the notification or, if that is not practicable, as soon as practicable after that day
a statement that consultation is occurring and the nature of the consultation	within 1 business day of the consultation starting and of any change in the status of the consultation or, if that is not practicable, as soon as practicable after that day
a copy of the notice of competition concerns	within 1 business day after the notice is given or, if that is not practicable, as soon as practicable after that day
a summary of the public benefit assessment	within 1 business day after the public benefit assessment is given to the notifying party or, if that is not practicable, as soon as practicable after that day

<u>Section 5-3 – Redaction of certain information</u>

Section 5-3 relates to circumstances in which the Commission may withhold or remove details, information or documents.

The Commission may redact certain information in each of the following circumstances:

- the Commission is reasonably satisfied the information or document is commercially sensitive and has the potential to cause detriment to a party to the acquisition or a third party. For example, the Commission may consider whether releasing the information would disadvantage the party commercially.

- the Commission is reasonably satisfied the information or document contains personal information within the meaning of the Privacy Act 1988.
- the Commission is reasonably satisfied the information or document is inaccurate, likely to cause confusion, or likely to mislead, users of the acquisitions register. To ensure the reliability of the register, the Commission may decline to include information if it is considered inaccurate or likely to be confusing or misleading.
- the Commission is reasonably satisfied the information or document is likely to offend a reasonable individual or cause unreasonable harm to an individual. To ensure the integrity of the register, the Commission may decline to include information if it may be offensive to a reasonable individual or cause unreasonable harm to an individual.
- the Commission is reasonably satisfied the information or document could endanger public safety.

- This provides a safeguard mechanism to ensure that inappropriate information would not be published on the register.

If redactions have been made, the Commission needs to publish a statement to the effect that information or a document has been withheld or removed. This is intended to be general in order to give effect to the balance between protection of information and disclosure for the purposes of transparency. This must be included on the register at the same time as the information or document to which the statement relates is included on the acquisitions register.

Part 6 – Forms

Division 1 – Determination of forms, information and documents

Section 6-1 – Notification of proposed acquisition

Under section 51ABY of the CCA, the Minister may determine a form in relation to a notification. The Minister may also determine information or documents to be included in or accompany said notification (see paragraphs 51ABY(5)(a) and (b) of the CCA). The extent to which the notification is in that form, or includes or is accompanied by such information, are matters to which the Commission may have regard. The Commission is to have regard to those matters in considering whether the notification is materially incomplete, materially misleading, or contains information that is false in a material particular (see subsection 51ABY(2) and paragraphs 51ABY(4)(a) and (b) of the CCA).

This section determines the forms to be used by the notifying party, and determines the information and documents required to accompany the forms. There is a short form and a long form (at Divisions 2 and 3 to Part 6 of the Determination). These ensure that an applicant provides relevant information to facilitate the Commission in carrying out an efficient and effective review of an acquisition.

Merger parties will be able to submit a 'simple' shorter notification form for acquisitions that are less likely to raise competition concerns, and a more detailed longer notification form for others.

Section 6-2 – Public benefit application

Under paragraph 51ABZQ(5)(a) of the CCA, the Minister may determine a form in relation to a public benefit application. The Minister may also determine information or documents to be included in or accompany the application (see paragraph 51ABZQ(5)(b) of the CCA). The extent to which the application is in that form, or includes or is accompanied by such information, are matters to which the Commission may have regard (see paragraphs 51ABZQ(4)(a) and (b) of the CCA). The Commission is to have regard to those matters in considering whether the application is materially incomplete, materially misleading, or contains information that is false in a material particular (see subsections 51ABZQ(2) and (4) of the CCA).

This section determines the form to be used by the party making a public benefit application, and determines the information and documents required to accompany the form. There is only one form, at Division 4 of Part 6 of the Determination. The form ensures that an applicant provides relevant information to facilitate the Commission in carrying out an efficient and effective review of whether an acquisition is of public benefit.

Division 2 – Notification of proposed acquisition: short form

Division 2 sets out the requirements for the short notification form.

Explanatory notes are included to remind the notifying party that they must give the Commission enough information to determine whether the acquisition may be put into effect or must not be put into effect. A notifying party should consider consulting with the Commission before making a notification. This is to discuss the scope and range of information and documents needed in the context of the particular proposed acquisition to which the notification relates. Guidance material about whether the short form or long form is likely to be appropriate for the notification of the acquisition is also available on the Commission website.

All references to a 'party to the acquisition' in this Division are references to each notifying party of the acquisition, the target of the acquisition, and each connected entity of the notifying party and target unless the contrary intention is stated.

Item 1 – Parties to the acquisition

Item 1 of Division 2 requires that information about each party to the acquisition, such as party name, identifying number if applicable (for example, ABN, ACN or equivalent or unique identifier) and contact details, be provided.

ABN has the meaning given by the *A New Tax System (Australian Business Number) Act 1999*.

ACN has the meaning given by the *Corporations Act 2001*.

Items 2 to 4 – Details of acquisition

Item 2 of Division 2 requires the notifying party to provide a non-confidential summary of the acquisition, which may be published on the acquisitions register.

Item 2(b) should be answered by providing relevant ANZSIC codes. Notifying parties may also answer item 2(d) by providing relevant ANZSIC codes.

ANZSIC is the *Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006* (1292.0) published by the Australian Statistician. It is a standard classification developed for use in Australia and New Zealand. At the time the Determination was registered, this document was freely available on the Australian Bureau of Statistics' website (http://www.abs.gov.au).

ANZSIC is used as a standard means of classifying business units into industry sectors. The notifying party can search the ANZSIC by keyword on the ABS website to find ANZSIC codes and their activity descriptions. General classification principles, methods and issues are outlined in the above document.

The basic method for classifying units to categories in the ANZSIC is to classify each unit according to its predominant activity. The notifying party should classify units to the lowest level of detail of the classification in addressing item 2(b) and may provide all relevant ANZSIC codes of the main industries in the which the parties to the acquisition supply the goods and services in addressing item 2(d).

Item 3 of Division 2 requires the notifying party to provide further details in relation to the acquisition. These include the commercial rationale for the acquisition and, if applicable, the transaction value calculated for the purposes of the transaction value test.

Item 4 of Division 2 requires details of the Australian revenue for each of three 12-month financial reporting periods before the day the notification is made for each party to the acquisition.

Item 5 – Past relevant acquisitions

Item 5 of Division 2 requires each notifying party to list any acquisitions put into effect by the parties during the three 12-month financial reporting periods prior to the notification being made, subject to some exclusions.

It should be noted that acquisitions that are exempt from the notification requirements under Subdivision B of Division 2 of Part IVA of the CCA (provisions relating to particular kinds of acquisitions that do not result in control or involve the acquisition of shares in the capital of Chapter 6 entities) should not be listed. Acquisitions that do not meet the circumstances in Division 1 of Part 2 of the Determination should also not be listed. For example, if the acquisition of the share or asset was not connected with Australia, the acquisition should not be listed. Acquisitions in the ordinary course of business are also not required to be listed under this question as they are not an 'acquisition' under the CCA (specifically, under paragraph 4(4)(b) and section 51ABN of the CCA).

Items 6 and 7 – Competitive effects of acquisition

Item 6 of Division 2 requires certain information in relation to each relevant good or service supplied or potentially supplied by the parties to the acquisition.

Note 1 to the item clarifies when a good or service is a relevant good or service in relation to an acquisition. It is ‘relevant’ if the parties to the acquisition supply, or potentially supply, goods or services that are the same as, or are substitutable for, the good or service in the same or a similar geographical area. It is also ‘relevant’ if the parties supply the good or service at different levels in the supply chain for that good or service. It is also ‘relevant’ if the parties supply other goods or services that are not in the same market or in the same supply chain as the good or service but are related in some other way to that good or service.

Note 2 of the item clarifies that in determining the relevant market definition or definitions, parties should choose the definition or definitions that are most appropriate for the good or service. Parties are to have regard to the definition or definitions where the acquisition is likely to result in the largest market share or largest increment in market share based on certain factors. These factors include the revenue, volume, or capacities of the parties.

Note 3 to the item clarifies that if the acquisition is an acquisition of vacant land – the relevant market definitions should have regard to the acquirer’s potential use of the land.

Item 7 of Division 2 requires, for each of the three 12-month financial reporting periods prior to the date the notification is made, estimated market shares for each of the parties to the acquisition, and other key suppliers.

The intention of these two items is to seek information from the parties to better allow the Commission to assess the competitive effects of the acquisition.

Item 8 – Competitor and customer contacts

Item 8 of Division 2 requires contact details for certain competitors and customers of each party to the acquisition for each relevant good or service supplied.

Item 9 – Additional information

Item 9 of Division 2 requires parties to identify the subparagraph of paragraph 51ABX(1)(d) of the CCA which applies to the notification of the proposed acquisition. It also requires information about goodwill protection provisions in the contract pursuant to which the acquisition would take place, whether the notifying party intends to request confidential review of a surprise hostile takeover, and a copy of the certificate of transfer if the acquisition (or part thereof) is a voluntary transfer of business within the meaning of the *Financial Sector (Transfer and Restructure) Act 1999*.

Items 10 to 12 – Documents required

Item 10 of Division 2 requires final or most recent versions of all transaction documents. Examples include the sale and purchase agreement, heads of agreement, offer documents, and any other agreements between the parties related to the acquisition.

Item 11 of Division 2 requires the most recent audited financial reports and income statements relating to the supply of relevant goods or services be provided for each party to the acquisition.

Item 12 of Division 2 requires an organisation chart or diagram showing the structure of ownership and control of the parties to the acquisition, both before and after the acquisition. This must also show related bodies corporate involved in the supply of the relevant goods or services.

Item 13 – Declaration

Item 13 of Division 2 requires an authorised person of each notifying party to declare that, to the best of their knowledge and belief, the information provided is true, correct and complete. They must all declare that complete copies of documents required by the form have been supplied, that all estimates are the best estimates based on the underlying facts, and that all opinions expressed are genuinely held.

Division 3 – Notification of proposed acquisition: long form

Division 3 sets out the requirements for the long notification form.

Explanatory notes are included to remind the notifying party that they must give the Commission enough information to determine whether the acquisition may be put into effect or must not be put into effect. A notifying party should consider consulting with the Commission before making a notification. This is to discuss the scope and range of information and documents needed in the context of the particular proposed acquisition to which the notification relates. Guidance material about whether the short form or long form is likely to be appropriate for the notification of the acquisition is also available on the Commission website.

All references to a 'party to the acquisition' in this Division are references to each notifying party of the acquisition, the target of the acquisition, and each connected entity of the notifying party and target unless the contrary intention is stated.

Item 1 – Parties to the acquisition

Item 1 of Division 3 requires that information about each party to the acquisition, such as party name, identifying number if applicable (for example, ABN, ACN or equivalent or unique identifier) and contact details, be provided.

Items 2 to 5 – Details of acquisition

Item 2 of Division 3 requires the notifying party to provide a non-confidential summary of the acquisition, which may be published on the acquisitions register.

Item 2(b) should be answered by providing relevant ANZSIC codes. Notifying parties may also answer item 2(d) by providing relevant ANZSIC codes.

ANZSIC is the *Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006* (1292.0) published by the Australian Statistician. It is a standard classification developed for use in Australia and New Zealand. At the time the Determination was registered, this document was freely available on the Australian Bureau of Statistics' website (http://www.abs.gov.au).

ANZSIC is used as a standard means of classifying business units into industry sectors. The notifying party can search the ANZSIC by keyword on the ABS website to find ANZSIC codes and their activity descriptions. General classification principles, methods and issues are outlined in the above document.

The basic method for classifying units to categories in the ANZSIC is to classify each unit according to its predominant activity. The notifying party should classify units to the lowest level of detail of the classification in addressing item 2(b) and may provide all relevant ANZSIC codes of the main industries in the which the parties to the acquisition supply the goods and services in addressing item 2(d).

Item 3 of Division 3 requires the notifying party to provide further details in relation to the acquisition, such as the commercial rationale for the acquisition and, if applicable, the transaction value calculated for the purposes of the transaction value test.

Item 4 of Division 3 requires the notifying party to describe any existing or proposed commercial relationships between the parties to the acquisition that relate to the supply of relevant goods and services.

The note to the item clarifies when a good or service is a relevant good or service in relation to an acquisition. It is 'relevant' if the parties to the acquisition supply, or potentially supply, goods or services that are the same as, or are substitutable for, the good or service in the same or a similar geographical area. It is also 'relevant' if the parties supply the good or service at different levels in the supply chain for that good or service. It is also 'relevant' if the parties supply other goods or services that are not in the same market or in the same supply chain as the good or service but are related in some other way to that good or service.

Item 5 of Division 3 requires details of the Australian revenue for each of three 12-month financial reporting periods before the day the notification is made for each party to the acquisition.

Item 6 – Past relevant acquisitions

Item 6 of Division 3 requires each notifying party to list any acquisitions put into effect by the parties during the three 12-month financial reporting periods prior to the notification being made, subject to some exclusions.

It should be noted that acquisitions that are exempt from the notification requirements under Subdivision B of Division 2 of Part IVA of the CCA (provisions relating to particular kinds of acquisitions that do not result in control or involve the acquisition of shares in the capital of Chapter 6 entities) should not be listed. Acquisitions that do not meet the circumstances in Division 1 of Part 2 of the Determination should also not be listed. For example, if the acquisition of the share or asset was not connected with Australia, the acquisition should not be listed. Acquisitions in the ordinary course of business are also not required to be listed under this question as they are not an 'acquisition' under the CCA (specifically, under paragraph 4(4)(b) and section 51ABN of the CCA).

Items 7 and 8 – Competitive effects of acquisition

Item 7 of Division 3 requires certain information in relation to each relevant good or service supplied or potentially supplied by the parties to the acquisition.

Note 1 to the item clarifies that in determining the relevant market definition or definitions, parties should choose the definition or definitions that are most appropriate for the good or service. In doing this, parties must have regard to the definition or definitions where the acquisition is likely to result in the largest market share or largest increment in market share based on the revenue, volume or capacities of the parties.

Note 2 to the item clarifies that if the acquisition is an acquisition of vacant land – the relevant market definitions should have regard to the acquirer's potential use of the land.

Item 8 of Division 3 requires, for each of the three 12-month financial reporting periods prior to the date the notification is made, estimated market shares for each party to the acquisition and other key suppliers.

Items 9 to 11 – Barriers to entry

Item 9 of Division 3 requires the notifying party to identify suppliers, if and where material, who have started to supply relevant products or services during the three 12-month financial reporting periods prior to the date this notification is made, and any such supplier expected to enter the market in the near future.

The note to the item clarifies that a supplier in a market is material if they hold a material share or role in the relevant market. Typically, this will include suppliers with a market share of 5 per cent or more.

Item 10 of Division 3 requires the notifying party to identify suppliers, if and where material, who have stopped supplying relevant products or services during the three 12-month financial reporting periods prior to the date the notification is made.

Item 11 of Division 3 requires the notifying party to describe factors influencing entry into the market for the supply of the relevant goods or services.

If the notifying party submits that there are low barriers to entry in relation to the relevant products or services, they should provide information and evidence supporting these statements.

Items 12 – Data

Item 12 of Division 3 requires the notifying party to identify any third-party datasets or reports used by the parties to the acquisition to estimate or analyse a party's own and competitors' market shares in the supply of the relevant goods or services. Examples include materials produced by industry bodies, research organisations, government or non-government organisations (public or otherwise).

Item 13 – Competitor and customer contacts

Item 13 of Division 3 requires contact details for certain competitors and customers of each party to the acquisition for each relevant good or service supplied.

Items 14 and 15 – Additional information

Item 14 of Division 3 requires parties to identify the subparagraph of paragraph 51ABX(1)(d) of the CCA which applies to the notification of the proposed acquisition. It also requires information about goodwill protection provisions in the contract pursuant to which the acquisition would take place, whether the notifying party intends to request confidential review of a surprise hostile takeover, and a copy of the certificate of transfer if the acquisition (or part thereof) is a voluntary transfer of business within the meaning of the *Financial Sector (Transfer and Restructure) Act 1999*.

Item 15 of Division 3 requires the notifying party to provide any other information or documents that they consider to be relevant to, or may assist, the Commission's assessment of the acquisition.

Items 16 to 21 – Documents required

Item 16 of Division 3 requires final or most recent versions of all transaction documents. Examples include the sale and purchase agreement, heads of agreement, offer documents, and any other agreements between the parties related to the acquisition.

Item 17 of Division 3 requires the most recent audited financial reports and income statements relating to the supply of relevant goods or services be provided for each party to the acquisition.

Item 18 of Division 3 requires an organisation chart or diagram showing the structure of ownership and control of the parties to the acquisition, both before and after the acquisition. This must also show related bodies corporate involved in the supply of the relevant goods or services.

Item 19 of Division 3 requires certain documents relating to the proposed acquisition in the possession, power or control of each of the parties that were prepared by or for, or received by, the Board or Board Committee (or equivalent body) or the shareholders' meeting of the party within the 2 years prior to the date the notification is made. It should be noted that material dealing with a subject matter unrelated to the acquisition which has been separately considered by the Board or Board Committee need not be produced.

Item 20 of Division 3 requires certain documents (including, but not limited to, reports, presentations, studies, internal analyses, industry/market reports or analysis, including customer research and pricing studies) in the possession, power or control of each of the parties that were prepared, received or published within the 2 years prior to the date the notification is made.

Item 21 of Division 3 requires the notifying party to identify the documents provided in response to items 16 to 20 of Division 3 that the parties consider to most comprehensively support the responses given in this notification.

Items 22 to 24 – Appendices

Item 22 of Division 3 requires additional questions to be answered if the acquisition is a horizontal acquisition. A note to the item clarifies that an acquisition is a horizontal acquisition if the parties to the acquisition are suppliers or buyers, or potential suppliers or buyers, of the same or similar goods or services in a market.

Item 23 of Division 3 requires additional questions to be answered if the acquisition is a vertical acquisition. A note to the item clarifies that an acquisition is a vertical acquisition if the parties to the acquisition engage, or potentially engage, in activities in relation to goods or services at different functional levels (upstream or downstream) of the same vertical supply chain. For example, a manufacturer of a product, such as a processor of raw milk, and a retail or wholesale distributor of the processed product operate on the same vertical supply chain for that product. An electricity generator and an electricity retailer operate on the same vertical supply chain for electricity.

Item 24 of Division 3 requires additional questions to be answered if the acquisition is a conglomerate acquisition. Notes to the item clarify that an acquisition is a conglomerate acquisition if the parties to the acquisition are actual or potential suppliers or buyers of adjacent goods or services. A good or service is adjacent if they are not in the same market or in the same supply chain, but are related in another way. For example, goods targeting similar customers or that may be purchased or supplied together.

Item 25 – Declaration

Item 25 of Division 3 requires an authorised person of each notifying party to complete a declaration.

Appendix A – Horizontal acquisitions

A1 of Appendix A to Division 3 requires a description of how competition works for each relevant good or service where the parties overlap.

Appendix B – Vertical acquisitions

B1 of Appendix B to Division 3 requires information and evidence on whether the merged entity would have the ability and incentive to engage in input or customer foreclosure post-acquisition.

B2 of Appendix B to Division 3 requires details including components of gross profit margins and average upstream and average downstream prices for a relevant fiscal period.

Appendix C – Conglomerate acquisitions

C1 of Appendix C to Division 3 requires information and evidence on whether the merged entity would be in a position post-acquisition to foreclose competitors.

Division 4 – Application for public benefit determination: form

Division 4 sets out the requirements for the public benefit application.

All references to a 'party to the acquisition' in this Division are references to each notifying party of the acquisition, the target of the acquisition, and each connected entity of the notifying party and target unless the contrary intention is stated.

Item 1 – Parties to the acquisition

Item 1 of Division 4 requires that information about each party to the acquisition, such as party name, identifying number if applicable (for example, ABN, ACN or international equivalent) and contact details, be provided.

Item 2 – Summary of public benefits and detriments

Item 2 of Division 4 requires the notifying party to provide a non-confidential summary of the public benefits and detriments likely to result from the acquisition.

Items 3 to 4 – Public benefits

Item 3 of Division 4 requires the notifying party to identify any public benefits that it considers would be likely to result from the acquisition.

Item 4 of Division 4 requires the notifying party to provide further details to support the public benefits identified in response to item 3. These details include information and evidence (for example data, if available). Item 4 lists the matters which the information and evidence should relate to.

Item 5 – Public detriments

Item 5 of Division 4 requires the notifying party to identify any public detriments, other than harm to competition, that would be likely to result from the acquisition. Identifiable public detriments are only those known, or reasonably ascertainable, by the notifying party. Additionally, item 5 requires the notifying party to provide with the identification of public detriments a description of their scale including estimates (if available).

Item 6 – Weighing public benefits and detriments

Item 6 of Division 4 requires the notifying party to provide detailed reasons explaining why the acquisition would be likely to result in a benefit to the public that outweighs the likely result of a detriment to the public. These detailed reasons are to be provided in consideration of all the circumstances.

Item 7 – Contact details for interested parties

Item 7 of Division 4 requires the notifying party to provide contact details for any known, or reasonably ascertainable, persons and class of persons (for example, a representative body). These persons are those additional to the parties already identified in the notification. These persons are only those that are likely to be impacted by or may have an interest in commenting on the public benefits and detriments that would be likely to result from the acquisition. Details are to include, to the extent possible, a specific contact person, full details, and a direct telephone number. An example of this would be John Smith (john.smith@xyz.com, not info@xyz.com) and John Smith's direct telephone number (not a general contact number).

Items 8 and 9 – Additional information and documents required

Item 8 of Division 4 requires the notifying party to provide any other information or documents relevant to the Commission's consideration of the public benefit application.

The additional information or documents that must be provided are those that the notifying party considers to be relevant to, or may assist, the Commission's consideration of the application.

Item 9(a) of Division 4 requires the notifying party provide to the Commission all transaction documents not previously provided. These must be the final or most recent versions of the documents. The documents could include sale and purchase agreements, heads of agreement, and any other agreements between the parties related to the acquisition. The term 'any other agreements' includes supply or other ancillary agreement that are conditional on the acquisition.

Item 9(b) of Division 4 requires the notifying party also provide to the Commission any updated versions of any such transaction documents previously supplied to the Commission.

Item 10 – Declaration

Item 10 of Division 4 requires an authorised person of each notifying party of the acquisition to complete a declaration.

Part 7 – Miscellaneous

This Part contains five divisions. Division 1 provides for indexation of the notification thresholds. Division 2 sets out the requirements for making a Tribunal review application. Division 3 provides an anti-avoidance provision and foreign currency rules. Division 4 provides for how to translate amounts into Australian currency for the purposes of the Determination. Division 5 provides for fees relating to notification of acquisitions.

Division 1 - Indexation

<u>Section 7-1 – Indexing relevant amounts</u>

This section provides for the indexation of the notification thresholds (sections 1-9, 1-10, 1-12, 1-13 and 1-14, discussed above). Indexation is required to ensure the thresholds do not decline in real terms when there is inflation.

Subsection 7-1(1) provides that indexation starts from 1 January 2027. Indexation starts from this date because it is 12 months after the notification requirements of the new system commence on 1 January 2026.

Subsection 7-1(2) provides the method statement for calculating the indexation factor for 1 January each financial year. The 'indexation factor' is the amount determined when following the method statement. The method statement is set out in a box below subsection 7-1(2). It requires determining the GDP implicit price deflator value for the previous calendar year (the calendar year), the GDP implicit price deflator value for the calendar year immediately prior to the calendar year (the previous calendar year), and dividing the calendar year by the previous calendar year.

Subsections 7-1(3) and (4) detail how to round the relevant figures. Subsection 7-1(5) provides that an amount – for example, the tier-1 acquired shares or assets revenue test – should not be indexed if the indexation factor is 1 or less.

Section 7-2 – Meaning of GDP implicit price deflator value

The method statement requires use of the GDP implicit price deflator value. The term 'GDP implicit price deflator value' is defined in subsection 7-2(1) as the value published by the Australian Statistician and the note to that subsection directs to where that can be viewed on the internet.

Subsection 7-2(2) clarifies that where the GDP implicit price deflator value for a relevant period is changed by the Australian Statistician, the first published value is to be used for the purposes of section 7-1.

Subsection 7-2(3) provides that if, before or after the commencement of Part 1 of the Determination, the Australian Statistician has changed or changes the index reference period for the GDP implicit price deflator value then, for the purposes of applying section 7-2 after the change took place (or takes place), have regard only to values published in terms of the new index reference period.

Division 2 – Tribunal review

Section 7-20 – Application for Tribunal review of certain decisions

This section sets the time limit and application requirements for review of a procedural decision under section 100A of the CCA. The application must be made within 7 days after the day notice is given to the applicant of the relevant decision and must include the information set out at subsection 7-10(3). Giving notice is a standard process for the Commission, and will usually be done within a day. The note clarifies that the notifying party of a notification of an acquisition may apply to the Tribunal for review of certain decisions.

Section 7-21 – Application for Tribunal review of acquisition determinations – main information

This section sets the application requirements for review of an acquisition determination under section 100C of the CCA. The note to subsection 7-21(1) clarifies that the notifying party of a notification of an acquisition, or another person allowed by the Tribunal, may apply to the Tribunal for review of an acquisition determination.

Reflecting the fact that third parties can also seek review by the Tribunal, there are different application requirements for third parties seeking review of an acquisition determination as opposed to the notifying party. Paragraph 7-21(2)(a) requires the notifying party to include in their application information and documents set out in subsections (3) and (4). Paragraph 7-21(2)(b) requires other persons to include in their application information and documents set out in subsections (3) and (5).

Unlike the previous section, there is no application time limit set by this section, because section 100C of the CCA sets the time limit at 14 days after publication of reasons on the public register.

Section 7-22 – Application for Tribunal review of acquisition determinations – further information and documents

This section works in tandem with the previous section to ensure the Tribunal has all the information it needs to effectively review an acquisition determination in the time it has. Section 100D of the CCA gives the Minister the power to specify additional information that must be provided to the Tribunal within 30 days of the application. This section requires the provision of a concise statement of contentions of fact, economics and law advanced by the applicant; and the material findings of fact, economics and law in the Commission's statement of reasons with which the applicant disagrees.

Division 3 – Anti-avoidance

Section 7-30 – Schemes entered into for the purpose of avoiding notification of an acquisition

The effects of a scheme (or part of a scheme) must be disregarded where it would be reasonable to conclude that the scheme was entered into or carried out for the purpose of avoiding the notification requirement.

Division 4 – Foreign currency

Section 7-40 – Translation of amounts into Australian currency

Division 4 of Part 7 contains section 7-40, which prescribes how to translate amounts into Australian currency for the purposes of the Determination.

Subsection 7-40(1) provides that, for the purposes of the Determination, amounts that are expressed in currencies other than the Australian currency are to be translated into Australian currency. Amounts that are not Australian currency are defined as 'foreign currency'. An example of when translation needs to occur is provided below subsection 7-40(1).

Subsection 7-40(2) sets out a process by which foreign currency can be translated to Australian currency by using the exchange rates used in the financial report prepared by the entity. This process is available where the amount is derived from a financial report by the entity that has been prepared in accordance with 'accounting standards' (see definition in section 1-4 of the Determination) and audited in accordance with the Corporations Act, or a corresponding and equivalent law of a foreign country.

If an entity cannot rely on the process outlined in subsection 7-40(2), subsection 7-40(3) allows the entity to translate foreign currency to Australian currency by using the average exchange rate for the period that most closely corresponds to the period to which the amount relates, and either the exchange rates published by the Reserve Bank of Australia (RBA) or, if the amount is in a currency for which the RBA does not publish an exchange rate, a publicly and commercially available market exchange rate.

Division 5 – Fees relating to notification of acquisitions

Section 7-50 – Determination of fees to accompany notifications, applications, information or documents

Subsection 7-50(1) of the Determination sets out as items in a table the fees payable for certain purposes under the new system. The table also sets out the relevant provisions of the CCA under which each fee has been determined.

Under subsection 51ABU(3) of the CCA, item 1 of the table prescribes a fee of $8,300 to apply for a notification waiver.

Under subsection 51ABX(2) of the CCA, item 2 of the table prescribes a fee of $56,800 to notify a proposed acquisition.

Under subsection 51ABZA(3) of the CCA, item 3 of the table prescribes no fee to provide additional information or documents in response to a decision that a notification does not have an effective notification date.

Under subsection 51ABZC(3) of the CCA, item 4 of the table prescribes no fee to provide additional information or documents in relation to a notification because of a material change of fact.

Under subsection 51ABZO(3) of the CCA, item 5 of the table prescribes no fee to provide additional information or documents in response to a decision to extend the Phase 2 determination period for a notification.

Under subsection 51ABZP(3) of the CCA, item 6 of the table prescribes a fee of $401,000 to make a public benefit application.

Under subsection 51ABZS(3) of the CCA, item 7 of the table prescribes no fee to provide additional information or documents in response to a decision to extend the determination period for a public benefit application.

Under subsection 51ABZU(3) of the CCA, item 8 of the table prescribes no fee to provide additional information or documents in relation to a public benefit application because of a material change of fact.

Subsection 7-50(2) of the Determination sets out the small business fee exemption. This exempts the notifying party from being required to pay the determined fees listed in the table under subsection 7-50(1). In circumstances where there is only one notifying party, the exemption applies if they are a small business entity as defined by the ITAA 1997. In circumstances where there is more than one notifying party, the exemption applies if *all* notifying parties are small business entities. Whether a notifying party is a small business entity for the purposes of subsection 7-50(2) is determined by their income for the income year that includes the contract date.

Section 7-51 – Fee for notification subject to Phase 2 review

Subsection 7-51(1) prescribes a tiered approach to calculating the fee for a notification that is subject to Phase 2 review. The tiers are represented in a table with two columns. Column 1 contains transaction value tests and tiers, and Column 2 contains the amount of the fee per tier. The tier the notification falls into is the greater of the result of the following:

- the market value, as described at paragraph 1-12(a) of the Determination, discussed above;
- the consideration received or receivable, as described at paragraph 1-12(b) of the Determination, discussed above.

Market value or consideration received or receivable, whichever is applicable, is to be calculated on the contract date, or where there is no contract date, the effective notification date.

- Calculation of fees should be based on the contract date when the acquisition is subject to a contract, arrangement or understanding that has been entered into, pursuant to which the acquisition is to take place.
  - Contract date is a defined term in section 1-4 of the Determination, discussed above.
- Calculation of fees should be based on the effective notification date when there is no contract date. This could be because the acquisition is subject to a proposed contract, arrangement or understanding pursuant to which the acquisition is to take place that has not been entered into, but all of the proposed parties to the contract, arrangement or understanding intend to enter into it.
  - Effective notification date is defined in section 51ABW of the Mergers Act as the day the notification is made.

If the resulting transaction value is $50 million or less, then the notification falls into item 1 (i.e. tier 1) of the table and a fee of $475,000 applies.

If the resulting transaction value is more than $50 million but not more than $1 billion, then the notification falls into item 2 (i.e. tier 2) of the table and a fee of $855,000 applies.

If the resulting transaction value is more than $1 billion, then the notification falls into item 3 (i.e. tier 3) of the table and a fee of $1,595,000 applies.

Subsection 7-51(2) requires the fee determined under subsection (1) to be paid within 7 business days. That timing commences from the day the Commission advises the notifying party that the notification is subject to Phase 2 review.

Part 10 – Application and Transitional Rules

Division 1 – Instrument as made

<u>Section 10-1 – When an acquisition is required to be notified – Application</u>

This section provides that Parts 2 and 3 of the Determination apply in relation to an acquisition that is put into effect on or after 1 January 2026.

The note to the section clarifies that notifications may be made on or after 1 July 2025. However, a requirement to notify only applies in relation to an acquisition that is put into effect on or after 1 January 2026. This is consistent with the application of the relevant provisions of the Mergers Act.

Section 10-2 – When a notification is made

This section provides that Parts 5 and 6 of the Determination (the Acquisitions Register and Forms) apply to notifications made on or after 1 July 2025. This facilitates early notification under the new system.

Section 10-3 – Reviews by the Tribunal

This section provides that Division 2 of Part 7 of the Determination (being Tribunal review) applies in relation to an application for the review of a decision or determination made on or after 1 July 2025. This facilitates early reviews by the Tribunal under the new system.

<u>ATTACHMENT B</u>

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Competition and Consumer (Notification of Acquisitions) Determination 2025

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the Determination) is made under the *Competition and Consumer Act 2010* (CCA). It sets out the general circumstances and classes of acquisitions that are required to be notified to the Australian Competition and Consumer Commission (the Commission). This is part of the new mandatory and suspensory administrative merger control system introduced by the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Act 2024* (the Mergers Act). Under this system, notifiable acquisitions cannot be put into effect until the Commission has been notified, reviewed the proposed acquisition, and determined that it may be put into effect.

The Determination supports the operation of the new merger control system by specifying circumstances in which a proposed acquisition must be notified, including special requirements relating to supermarkets. Supporting these circumstances are various tests that must be met to trigger the circumstances for notification. The Determination also sets out various exemptions to the requirement to notify a proposed acquisition, as well as prescribing forms for the new system and fees. The Determination also contains provisions that provide for indexation of monetary amounts in the Determination, converting foreign currencies to Australian dollars, and Tribunal review rights.

Human rights implications

The Determination engages the right to protection from arbitrary or unlawful interference with privacy under article 17 of the International Covenant on Civil and Political Rights (ICCPR).

<u>Right to Privacy</u>

The Determination engages the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the ICCPR because it:

- requires notifying parties to submit forms, information and documents that may include personal information when notifying a proposed acquisition or making a public benefit application to the Commission (Part 6);
- requires the Commission to publish certain details on its acquisitions register that may include personal information (Part 5).

The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The amendments are necessary as they help to ensure the Commission has the required information to undertake its functions and powers under the new system to determine whether acquisitions would, or be likely to, substantially lessen competition in Australian markets.

These new provisions are appropriate as to the extent the Commission receives personal information as part of their functions and powers, it will handle that information in accordance with its obligations under the *Privacy Act 1998* including under Australian Privacy Principle 3 to not collect personal information unless it is reasonably necessary for, or directly related to, one or more of the Commission's functions or activities.

To further safeguard privacy, section 5-3 of the Determination empowers the Commission to withhold or redact information from the acquisitions register if, among other reasons, it is personal information within the meaning of the *Privacy Act 1988*.

Accordingly, any interference with privacy under the Determination is lawful, necessary, and proportionate, and is therefore consistent with Article 17 of the ICCPR.

Conclusion

The Determination is compatible with human rights as to the extent human rights issues are engaged, such engagement is necessary and proportionate to the intended policy outcome.