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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

EXPOSURE DRAFT EXPLANATORY MATERIALS

TREASURY LAWS AMENDMENT BILL 2024: ACQUISITIONS

EXPOSURE DRAFT EXPLANATORY MATERIALS

Consultation preamble

Treasury seeks feedback on the effectiveness of this exposure draft explanatory material in explaining the policy context and operation of the proposed new law, including, but not limited to:

- how the new law is intended to operate;
- whether the background and policy context is sufficiently comprehensive to support understanding of the policy intent and outcomes of the new law;
- the use of relevant examples, illustrations or diagrams as explanatory aids; and
- any other matters affecting the readability or presentation of the explanatory material.

Feedback on these matters will assist to ensure the Explanatory Memoranda for the Bill aids the Parliament's consideration of the proposed new law and the needs of other users.

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Glossary

This Explanatory Memorandum uses the following abbreviations and acronyms.

Abbreviation	Definition
ADJR	<i>Administrative Decisions (Judicial Review) Act 1977</i>
Commission	Australian Competition and Consumer Commission
CCA	<i>Competition and Consumer Act 2010</i>
SES	Senior Executive Service
Tribunal	Australian Competition Tribunal

Chapter 1: Overview

General outline

- 1.0 This Bill amends the CCA to overhaul the existing framework for merger review and replace it with a single mandatory and suspensory administrative system for acquisitions (noting foreign acquisitions will continue to also be subject to the process under the *Foreign Acquisitions and Takeovers Act 1975* (FATA)) with the Commission as the first instance administrative decision-maker.
- 1.1 A corporation or person that is a party to an acquisition must provide a notification to the Commission if the acquisition is a notifiable transaction. The acquisition must not be put into effect unless the Commission has made a determination that it may be put into effect.
- 1.2 A single, streamlined process for the review of acquisitions (except for foreign acquisitions) will enhance efficiency, predictability and transparency for businesses, stakeholders and the community. It will strengthen merger control by targeting those mergers most likely to cause harm, through a risk-based system. Further, by moving from a judicial enforcement model to an administrative system, business will benefit from guidance and engagement with the Commission as the expert decision-maker. This will reduce uncertainty and improve predictability. The Commission will undertake an economic and legal, evidence-based assessment of notified acquisitions, improving outcomes for competition and consumers. This will deliver lower prices, improved quality and service for consumers, businesses and the wider community. Importantly, it will meet community expectations that the Commission can detect and stop harmful anti-competitive acquisitions.

Context of amendments

Australia's approach to mergers and acquisitions

- 1.3 Mergers and acquisitions (acquisitions) are important for building a more productive and dynamic economy. They allow businesses to achieve greater economies of scale, and to access new resources, technology and expertise.
- 1.4 While most acquisitions are unlikely to raise competition concerns, some can harm competition which can lead to businesses increasing prices for consumers and not passing economic gains on to consumers. Australia's merger control framework plays a crucial gatekeeper role in focusing on preventing the small

number of acquisitions that could substantially lessen competition, thereby harming consumers and the wider economy.

- 1.5 Australia's current approach to control of mergers and acquisitions prohibits acquisitions that are likely to have the effect of substantially lessening competition, assessed through three pathways: informal review by the Commission; formal merger authorisation by the Commission; and Federal Court proceedings related to the acquisition. As businesses are not legally required to notify the Commission before completing a transaction, they can also choose to proceed without seeking clearance through one of the three pathways. However, this may put the businesses at risk of the Commission subsequently investigating and taking legal action if it considers the acquisition has the effect or likely effect of substantially lessening competition.
- 1.6 Informal review, a process which has developed without any legislative framework, enables businesses to manage regulatory risk and seek the Commission's non-binding view on whether an acquisition is likely to substantially lessen competition.
- 1.7 Merger authorisation is a formal legislative process which allows the Commission, and the Tribunal on review, to provide businesses with immunity from court action under competition law for a proposed merger or acquisition if it is satisfied that it would not be likely to substantially lessen competition or that it is likely to result in a net public benefit.
- 1.8 Federal Court proceedings are those in which the Commission, parties to the acquisition or third parties can seek orders relating to the acquisition.

The Commission's Informal Review Process

- 1.9 Instead of applying for formal authorisation from the Commission, businesses may opt to seek an informal view from the Commission on whether an acquisition is likely to breach the prohibition against anti-competitive acquisitions to manage regulatory risk.
- 1.10 Currently, most transactions are notified to the Commission via this process. The Commission has established procedures for the informal review process including, for example, receiving submissions from businesses, consultation with stakeholders, and issuing voluntary and compulsory information requests. The Commission also maintains a public register for transactions subject to public informal review. However, the informal process is voluntary and not legislated, and the Commission's view is non-binding.

The Commission's Formal Authorisation Powers

- 1.11 The Commission may grant authorisation for an acquisition following a voluntary application by the relevant corporation or persons if it is satisfied the acquisition is not likely to substantially lessen competition or if the likely public benefit arising from the transaction outweighs the likely public detriment.

- 1.12 A formal Commission authorisation provides businesses with immunity from court action under competition law for a proposed transaction.
- 1.13 The Commission may vary, revoke or substitute merger authorisations. They may also specify conditions in an authorisation, including that the relevant corporate person must give, and comply with, a court enforceable undertaking.
- 1.14 The Commission must keep a register of applications for authorisations, including merger authorisations, and publish the receipt of each application. The Tribunal can review the Commission's decision to grant, decline to grant, vary or revoke an authorisation. It is not a rehearing.
- 1.15 The Tribunal conducts a limited merits review of the Commission's determinations. The Tribunal can substitute the ACCC's decision for a correct or preferable decision however can only consider the information that was before the Commission during its determination, information the Tribunal requests from the Commission, new information not in existence during the Commission's determination, and information for clarification of those other sources of information.
- 1.16 A person must not give the Commission or the Tribunal information that is false or misleading in connection with an application for a merger authorisation.

Federal Court's consideration of mergers and acquisitions

- 1.17 The Commission, the Minister, transaction parties, or third parties can seek orders from the Federal Court where they have concerns that an acquisition may contravene the law (that is, it is likely to have the effect of substantially lessening competition).
- 1.18 Such orders can include an injunction application by the Commission to restrain the acquisition prior to completion, or an order that the completed acquisition is void, with divestiture and substantial penalties, post-completion. Another such order is an application by the Commission to disqualify a person from managing corporations under certain circumstances, and if such an order is justified.
- 1.19 The Commission may also apply to the Federal Court for a range of orders if the Commission considers that the person who gave a court enforceable undertaking has breached any of its terms. The transaction parties may seek a declaration in the Federal Court that an acquisition does not substantially lessen competition. Third parties may seek a declaration, divestiture or penalties. In these circumstances, such relief is at the discretion of the Federal Court and the evidentiary burden of proving the case is usually on the party seeking the orders.

The current approach to merger control is not fit-for-purpose

- 1.20 On 23 August 2023, the Government announced a Competition Review to provide advice on how to improve competition across the economy, with a focus on reforms that would increase productivity, reduce the cost of living and/or lift wages. In particular, the Competition Review Taskforce was asked to consider proposals put forward by the Commission around merger reform, as well as other competition law issues.
- 1.21 The Competition Review Taskforce released a consultation paper on 20 November 2023 seeking views on:
- the effectiveness of Australia’s current merger rules and processes to enable beneficial mergers while addressing those that could be anti-competitive, and
 - options for improving Australia’s merger rules and processes.
- 1.22 The Competition Review Taskforce consulted a diverse range of stakeholders – including the Commission, businesses, industry associations, academics, consumer groups and small business representatives. Stakeholder feedback identified shortcomings of the current approach to merger control, which are briefly outlined below.
- 1.23 For business, some uncontentious mergers are subject to delays, uncertainty, and added costs with only limited guidance provided by the Commission.
- 1.24 For the wider community, engaging with the Commission’s merger reviews is often difficult and the current approach lacks transparency.
- 1.25 For the Commission, the voluntary nature of the current approach to merger review can mean it may not receive timely, upfront notifications of proposed acquisitions. This can impede its ability to detect and prevent anti-competitive mergers and acquisitions effectively and efficiently. For example, there have been instances where businesses threatened to complete a transaction before the Commission has completed its review, failed to notify (including for international cross-border mergers and acquisitions), and/or provided insufficient or inaccurate information to the Commission.
- 1.26 In addition, the cost of merger control is borne by the public due to the lack of viable cost recovery mechanisms in a voluntary system.
- 1.27 The Commission has also raised concerns about enforcement under the current approach where there is uncertainty or several possible future outcomes. This is because of factors such as:
- the emphasis courts place on having to predict the likely state of competition in the future with and without the merger or acquisition,
 - the information asymmetry between transaction parties and the Commission, and

- the reluctance of third parties to give evidence in court.
- 1.28 The following types of acquisitions by businesses also do not appear to be adequately captured by the current approach to merger control:
- creeping or serial acquisitions (a series of small acquisitions by businesses which individually do not result in material changes to market concentration or competitive dynamics, but over time forms part of a strategy of consolidation),
 - acquisitions by incumbents of nascent competitors (acquisitions by a leading company in its industry of a firm who may potentially pose a serious competitive threat to that leading company), and
 - expansions into related markets, including by digital platforms.
- 1.29 On 10 April 2024, taking into account stakeholder feedback, the Government announced proposed reforms to improve Australia’s merger rules by introducing a mandatory and suspensory administrative merger control system. The new system will be simpler, faster, more transparent and targeted, and will meet community expectations that the ACCC can detect and stop harmful anti-competitive acquisitions.

Summary of new law

- 1.30 The amendments replace the current approach with a single mandatory and suspensory administrative system for acquisitions.
- 1.31 The amendments introduce a mandatory obligation on parties to acquisitions above certain thresholds to notify the Commission of the proposed acquisition before putting it into effect. Thresholds will be set in the regulations and determined by the Minister.
- 1.32 Thresholds will be regularly reviewed and set with respect to evidence of the risk of potential harms to the community over time. The Commission will regularly report on the number of notifications captured by the thresholds.
- 1.33 The amendments provide that an acquisition must not be put into effect in circumstances where:
- it has not been notified to the Commission,
 - it has been notified to the Commission, but the Commission has not determined that it can be put into effect,
 - the Commission has determined it may be put into effect subject to conditions, and those conditions have not been met,
 - an application for a substantial public benefit determination is still under consideration or has not yet been determined,

- or an interested party has sought review by the Tribunal.
- 1.34 An acquisition that has been put into effect when it must not be is rendered void by the amendments.
- 1.35 The Commission will assess notified acquisitions by applying the substantial lessening of competition test. This includes considering whether competition will be substantially lessened through the creation, strengthening or entrenching a substantial degree of power in a market. This also requires considering how all the relevant markets may be affected by the acquisition, such as the product and/or geographic markets in which the parties compete or operate, as well as adjacent markets, whether that is at a national or local level or between Australia and outside Australia.
- 1.36 The amendments establish a two-phased approach for the Commission’s assessment of an acquisition against the substantial lessening of competition test. All notified acquisitions will be considered by the Commission in an initial stage, known as Phase 1.
- 1.37 For acquisitions that the Commission reasonably suspects will be likely to substantially lessen competition, the Commission may determine that the acquisition be subject to a further in-depth stage, Phase 2 and during Phase 2 issue a notice of competition concerns to the parties outlining the Commission’s preliminary assessment of whether the acquisition would be likely to substantially lessen competition in any market. At the end of Phase 2, the Commission must determine that an acquisition may be put into effect, with or without conditions, unless it reasonably believes that the acquisition would be likely to substantially lessen competition.
- 1.38 The amendments set out the timeframes in which the Commission must make its determination under Phase 1 and Phase 2.
- 1.39 It is the intention of the Government that the administration of the system operates to deliver timely decision making. The amendments provide for this through the four levels of decision making, primarily by implementing a two-phased scaled approach to the assessment of the competition impacts of regulated acquisitions, a process for considering substantial public benefit applications and providing for merits review via the Tribunal, which appropriately balance timely decision making and the interests of parties. To promote timely decision making on the merits, the opportunity to seek review under the Administrative Decisions Judicial Act 1977 has been limited.
- 1.40 The Government considers that parties to an acquisition should be able to engage with the Commission on the status of their applications on a regular and reasonable basis. Further, the Commission will issue new and updated guidance on areas of where the Commission has concerns for competition to inform parties involved in possible acquisitions.
- 1.41 While the current system fundamentally relies on enforcement and court decisions for setting incentives for merger parties, an administrative system shifts the emphasis to the Commission as an administrative steward to provide

public guidance and meaningful engagement for merger parties and strengthens powers for identifying and stopping anti-competitive mergers. This will provide more certainty for mergers and improved community understanding of competition concerns – and most importantly, less incentive for anti-competitive mergers.

- 1.42 Consistent with the object of the CCA, it is also the intention of Government that the Commission has the capacity to prevent acquisitions that have an anti-competitive effect on Australians irrespective of the location of the parties to the acquisitions. The Commission will have the powers to assess acquisitions that impact Australia wherever those acquisitions occur or wherever the parties are located.
- 1.43 To create the new system, the amendments add new Division 1A into Part IV. New Division 1A in Part IV sets out contravention provisions which are replicated in the Schedule version of Part IV, to include them as part of the Competition Code. This ensures they operate in all States and Territories of Australia.
- 1.44 The amendments also introduce new Part IVA into the CCA which comprises five Divisions:
- Division 1 – sets out key definitions and when acquisitions must be notified (see Chapter 2: Scope of regulated acquisitions, below)
 - Division 2 – sets out the notification requirements (see Chapter 3: Notification requirements and suspensory rule, below)
 - Division 3 – sets out the substantial lessening of competition test and process (see Chapter 4: Substantial lessening of competition, below)
 - Division 4 – sets out the substantial public benefit test and process (see Chapter 5: Substantial public benefits, below)
 - Division 5 – sets out miscellaneous matters (see Chapters 2, 6 and 7, below).

[Schedule 1, item 39, section 51ABA of the CCA]

- 1.45 Part IX of the CCA has been amended to include Divisions 1A and 1B to provide for limited merits review by the Tribunal (see Chapter 6: Review, below).
- 1.46 These provisions, and any other provision of the CCA relating to these provisions, are defined as an ‘acquisitions provision’.

[Schedule 1, item 7, subsection 4(1) of the CCA]

Chapter 2: Scope of regulated acquisitions

Outline of chapter

- 2.0 This chapter explains the scope of acquisitions that are subject to the new system. The provisions have broad application to both direct and indirect acquisitions of shares or assets by corporations, as well as acquisitions of control over corporations. The acquisitions provisions also apply to acquisitions by a person due to the application of the Competition Code by the States and Territories.
- 2.1 However, the amendments also include exclusions that operate to carveout certain types of transactions that are unlikely to raise competition concerns, such as acquisitions below a 20% voting power threshold (absent control), temporary holdings by financial institutions, intra-group restructures and ordinary business transactions. The amendments also include other relevant provisions on related concepts such as the meaning of control and who is considered a party to an acquisition.
- 2.2 This chapter also explains how the acquisitions provisions apply to different structures such as partnerships and unit trusts.

Detailed explanation of new law

Regulated acquisitions

- 2.3 The acquisitions provisions apply to the direct or indirect acquisition of:
- shares (either by a corporation in the capital of a body corporate, or in the capital of a corporation)
 - assets (of a corporation, or of a person by a corporation).
- [Schedule 1, item 39, section 51ABB of the CCA]***
- 2.4 Under existing subsection 4(4) of the CCA, a reference to the acquisition of:
- shares in the capital of a body corporate shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such shares

- assets of a person shall be construed as a reference to an acquisition, whether alone or jointly with another person, of any legal or equitable interest in such assets.
- 2.5 However, the new law ensures the framework focuses on acquisitions that provide control or the ability to materially influence the acquired business or are capable of affecting the competitive structure of a market.
- 2.6 Consistent with this, for acquisitions of shares, if the acquiring person's voting power is 20% or more, the person is presumed to control the body corporate and is subject to the acquisitions provisions. This presumption is rebuttable if it can be proved that the person does not have control of the body corporate. Conversely a person who acquires less than 20% of the voting power can nonetheless be taken to control of the body corporate if so proven.
- [Schedule 1, item 39, subsection 51ABC(2) of the CCA]***
- 2.7 The new law then operates to exclude certain acquisitions of shares and assets from the acquisitions provisions that are not considered capable of affecting the competitive structure of a market.

Excluded acquisitions

Excluded acquisitions of shares

Acquisitions that do not give control

- 2.8 An acquisition of shares is excluded from the acquisitions provisions if:
- immediately before the acquisition, the acquiring person (either alone or jointly with a related bodies corporate) controlled the body corporate, and
 - immediately after the acquisition, does not control the target.
- 2.9 As per paragraph 2.6 above, if the acquiring person's voting power is less than 20%, the person is taken not to control the body corporate and is excluded from the acquisitions provisions. This presumption is rebuttable if it can be proved that the person does have control.
- [Schedule 1, item 39, subsection 51ABC(1) and paragraph 51ABC(2)(a) of the CCA]***
- 2.10 Control of a body corporate means the capacity to directly or indirectly determine the policy of the body corporate in relation to one or more matters. In determining whether a person has such capacity:
- the practical influence the person can exert (rather than the rights it can enforce) is to be considered, and

- any practice or pattern of behaviour affecting the policies of the body corporate is to be taken into account.

[Schedule 1, item 39, subsections 51ABC(3) and (4) of the CCA]

- 2.11 Practical influence can arise through different sources of influence, for example, the ability to directly or indirectly influence the outcome of decisions of the body corporate's policy in relation to one or more matters. In practice, these matters can be wide-ranging and could relate to the body corporate's:
- financial and reporting policies
 - practices
 - operations
 - dealings
 - behaviours or patterns, or
 - actions or activities.
- 2.12 Consideration of any practice or pattern of behaviour affecting the body corporate is important because it is the substance rather than the form of the arrangement that will determine whether there is the ability to materially influence the body corporate.
- 2.13 However, a person is not taken to have the capacity to control under this exclusion if the person has the capacity to determine the policy of a body corporate and is under a legal obligation to exercise that capacity for the benefit of someone other than their own members. For instance, this may be to meet fiduciary obligations or director duties.

[Schedule 1, item 39, subsection 51ABC(5) of the CCA]

Temporary holding of shares

- 2.14 Similarly, an acquisition of shares by a financial institution (defined as an authorised deposit taking institution, bank, building society or credit union) or authorised insurance company (defined as a company authorised to carry on insurance business or registered under the *Life Insurance Act 1995*) is excluded if:
- the shares are held on a temporary basis with a view to reselling them
 - the ordinary course of business of the holder includes transactions and dealings in securities for the holder's own account or for the account of others, and
 - the holder either does not exercise voting rights in respect of the shares, exercises such voting rights only to maintain their value, or exercises voting rights only to prepare for the disposal of the body corporate, its assets or the shares themselves (with the disposal taking place within 12 months).

[Schedule 1, item 39, subsections 51ABC(6) and (7) of the CCA and item 7, subsection 4(1) of the CCA]

- 2.15 This exclusion allows financial institutions and companies that acquire shares temporarily as part of conducting ordinary business to make such transactions under certain conditions. This recognises that these transactions are generally not driven by a desire to gain control or material influence over the entity in which the shares are held, but rather to generate returns or manage risk. Their exclusion from the acquisitions provisions ensures the new system targets transactions more likely to have an effect on competition and minimises regulatory burden for transactions that if the conditions are met will be unlikely to do so.
- 2.16 Twelve months is a reasonable timeframe to prepare for and complete disposal without turning a temporary holding into de facto control. The twelve-month limit on disposals made in connection with the exercise of voting rights imposes an anti-avoidance constraint to prevent acquirers of temporary financial holdings from making decisions that may influence the competitive behaviour of the target.

Excluded acquisitions of assets

Acquisitions of shares are not also acquisitions of assets

- 2.17 The law clarifies that a reference in the acquisitions provisions to an acquisition of an asset does not include a reference to an acquisition of a share in the capital of a body corporate. This is to avoid overlap between acquisitions of shares that give rise to control and acquisitions of assets, both of which are expressly provided for. For avoidance of doubt, an acquisition to which the acquisitions provisions apply might involve the acquisition of both shares and assets.

[Schedule 1, item 39, section 51ABD of the CCA]

Other excluded acquisitions

Internal restructures and reorganisations

- 2.18 The acquisitions provisions do not apply to an acquisition that is, or is part of, a restructure or reorganisation of persons who are related as either related bodies corporate (as defined in section 4A of the CCA) or by means of trust or partnerships.

[Schedule 1, item 39, section 51ABE of the CCA]

Acquisitions as an administrator, receiver etc. or pursuant to a testamentary disposition etc.

- 2.19 Acquisitions that are excluded are:

- by a person in their capacity as an administrator, receiver, receiver and manager or liquidator (all within the meaning of section 9 of the *Corporations Act 2001*), or
- take place pursuant solely to a testamentary disposition, intestacy or a right of survivorship under a joint tenancy

[Schedule 1, item 39, section 51ABF of the CCA]

- 2.20 In the first circumstance, actions are generally undertaken in an official capacity (for example, for the purposes of insolvency proceedings) and are not intended to be captured by acquisitions provisions.
- 2.21 In the second circumstance, such acquisitions are not generally the result of commercial decisions and are not intended to be captured by the acquisitions provisions.

Other definitions

Parties to acquisitions

- 2.22 The amendments define who is considered a party to an acquisition (and makes consequential amendments to the definition of party under subsection 4(1) of the CCA)). This definition is relevant for who owes obligations under the acquisitions provisions, including the obligation to notify the Commission of certain acquisitions.

[Schedule 1, item 39, section 51ABM of the CCA and item 10, subsection 4(1) of the CCA]

- 2.23 A party to an acquisition (of shares or assets) is:
- the person (a principal party to the acquisition) who acquires the shares or assets,
 - without limiting the above—a person that is a party to a contract, arrangement, or understanding pursuant to which the acquisition takes place.

[Schedule 1, item 39, subsection 51ABM(1) of the CCA]

- 2.24 The term ‘principal party’ is used to identify key persons generally involved in an acquisition based on the type and nature of the transaction. The law clarifies that references to parties or principal parties to an acquisition that has not yet been put into effect are to be understood as references to parties or principal parties if the acquisition were to be put into effect. This ensures that acquisitions provisions can apply to proposed or purported acquisitions before they are put into effect.

[Schedule 1, item 39, subsection 51ABM(2) of the CCA]

2.25 Other key definitions relevant to the new system are inserted or amended in existing subsection 4(1) of the CCA.

[Schedule 1, items 7 to 11, subsection 4(1) of the CCA]

Expanded concept of asset and reduced ordinary course of business exclusion

2.26 The amendments effectively expand the concept of asset for the purposes of the acquisitions provisions, subparagraphs 45(4A)(c)(ii) and (4B)(a)(ii) and paragraph 88(8)(e) to capture the following:

- any kind of property
- a legal or equitable right that is not property (including any part of, or an interest in, goodwill or interest in it or an interest in a partnership).

[Schedule 1, item 39, section 51ABN of the CCA]

2.27 The law looks to the substance of what is being acquired or disposed of rather than the legal form of the acquisition of an asset. Assets that may be acquired include legal or equitable interests in tangible assets such as facilities or inventory, intangible assets such as intellectual property rights or licences, and contractual and other rights such as leases.

2.28 Under subsection 4(4) of the CCA, acquisitions that are in the ordinary course of business are not treated as acquisitions for the purposes of the CCA. The amendments ensure that acquisitions that involve routine day-to-day transactions that enable a business to function should continue to be excluded except for acquisitions of land or patents.

[Schedule 1, item 39, paragraphs 51ABN(2)(a) and (2)(b) of the CCA]

2.29 The acquisition of these assets has the potential of raising competition concerns given their nature and strategic use in commercial transactions. Land is an essential input for many industries and the acquisition of land holdings could for example, create barriers to entry or expansion. Similarly, the acquisition of patents could have the potential of conferring exclusive rights in a manner that restricts competition. Therefore, the acquisitions provisions are intended to capture such transactions.

Application to partnerships and unit trusts

2.30 The acquisitions provisions apply to partnerships and unit trusts subject to certain modifications. These modifications ensure that the acquisitions provisions can effectively cover acquisitions involving these structures, attributing obligations and liability in a manner that reflects their practical and economic realities.

[Schedule 1, item 39, sections 51ABZY and 51ABZZ of the CCA]

Treatment of partnerships

2.31 The acquisitions provisions apply to partnerships as if they were persons, but with the following changes:

- Obligations are imposed on each partner but may be discharged by any of the partners.
- Offences otherwise committed by the partnership are taken to be committed by each partner who did the relevant act or omission (or aided, abetted, counselled, procured or was knowingly concerned in the relevant act or omission).

[Schedule 1, item 39, subsections 51ABZY(2) and (3) of the CCA]

2.32 The same applies in relation to contraventions of civil penalty provisions.

[Schedule 1, item 39, subsection 51ABZY(4) of the CCA]

2.33 The amendments also provide that a reference to a corporation includes a partnership if all the partners are corporations and a change in the composition of the partnership does not affect the continuity of the partnership.

[Schedule 1, item 39, subsections 51ABZY(5) and (6) of the CCA]

Treatment of unit trusts

2.34 The acquisitions provisions apply to unit trusts as if they were persons, but with the following changes:

- If the unit trustee has a single trustee, obligations are imposed on the trustee, offences are taken to be committed by the trustee and a reference to a corporation includes the trust if the trustee is a corporation.
- If the unit trustee has multiple trustees, obligations are imposed on each trustee but may be discharged by any of the trustees, offences are taken to be committed by the trustee who did the relevant act or omission (or aided, abetted, counselled, procured or was knowingly concerned in the relevant act or omission), and a reference to a corporation includes the trust if all of the trustees are corporations.

[Schedule 1, item 39, subsection 51ABZZ(2) and (3) of the CCA]

2.35 The same applies in relation to contraventions of civil penalty provisions.

[Schedule 1, item 39, subsection 51ABZZ(4) of the CCA]

Chapter 3: Notification requirements and suspensory rule

Outline of chapter

- 3.0 The chapter explains amendments to introduce the new notification requirements, the suspensory rule and related provisions.
- 3.1 The amendments require a party to an acquisition that is above certain thresholds to notify the Commission before putting the acquisition into effect. The acquisition must not be put into effect unless the Commission has made a determination that it may be put into effect (with or without conditions).
- 3.2 The amendments deal with circumstances where notification is incomplete or misleading, where the Commission may request more information and where the Commission may cease considering a notification.

Detailed explanation of new law

Notification of acquisitions

- 3.3 All acquisitions that meet a threshold prescribed by regulations or are determined by the Minister by legislative instrument are required to be notified to the Commission.

[Schedule 1, item 39, subsection 51ABG(1) and section 51ABH of the CCA]

- 3.4 To avoid doubt, and without limiting how an acquisition may be prescribed by the regulations or determined by the Minister, an acquisition may be determined wholly or partly by reference to:
 - the value of an acquisition or of a contract, arrangement or understanding,
 - a party, or a class of parties, to an acquisition or to a contract, arrangement or understanding,
 - an asset or a class of assets,
 - a business or class of businesses,
 - the turnover of an entity, part of an entity, a business or part of a business,
 - a market or a class of markets, or

- another acquisition, or a class of acquisitions.

[Schedule 1, item 39, subsection 51ABG(2) of the CCA]

3.5 The details of the relevant thresholds for notification will be set out in regulations to provide flexibility to update or calibrate them over time. This ensures that the new system is risk-based, and targets acquisitions most likely to result in harm to competition and consumers (including, for example, serial acquisitions and acquisitions of nascent competitors), while reducing the overall compliance burden on businesses.

3.6 In response to evidence-based concerns regarding certain high-risk acquisitions (for example, in industries or sectors with high market concentration or high barriers to entry or expansion), the Minister may, by legislative instrument, determine acquisitions that are required to be notified.

[Schedule 1, item 39, subsection 51ABH(1) of the CCA]

3.7 In making a determination, the Minister may consider any reports or advice from the Commission and undertake consultation required under section 17 of the *Legislation Act 2003*.

[Schedule 1, item 39, subsection 51ABH(2) of the CCA]

3.8 The Minister's determination must not be expressed to commence earlier than the 30th day after the instrument is registered under the *Legislation Act 2003*. Unless the determination is repealed earlier, the determination is repealed on the fifth anniversary of the registration of the determination under the *Legislation Act 2003*.

[Schedule 1, item 39, subsections 51ABH(3) and (4) of the CCA]

3.9 It is intended that sectors of concern identified by the Minister, and subject to Ministerial determination, should not last for a longer time period as that makes them semi-permanent, and markets and competitive dynamics may change over time. This is also shorter than the mandatory sunset period of 10 years, as set in subsection 50(1) of the *Legislation Act 2003*.

3.10 The regulations may provide that an acquisition is required to be notified because it satisfies certain thresholds or falls within a certain class. Classes of acquisitions may also be set out in a Ministerial determination to allow acquisitions involving parties operating in particular industries or acquisitions of a particular type to be notifiable.

3.11 An acquisition is a *notified acquisition* if the Commission is notified of a proposal to put an acquisition into effect, regardless of whether the acquisition is otherwise required to be notified.

[Schedule 1, item 39, subsections 51ABQ(1) and (2) of the CCA]

3.12 An acquisition can be a notified acquisition irrespective of whether or not the acquisition is required to be notified. For example, an acquisition that does not

meet the threshold or Ministerial determination may be voluntarily notified and be subject to the requirements of the new system.

- 3.13 For a notified acquisition, the principal party that makes the notification, or each of the principal parties that jointly make the notification, is a **notifying party** in relation to the notification.

[Schedule 1, item 39, subsection 51ABQ(3) of the CCA]

- 3.14 The **effective notification date** is the day the notification is made.

[Schedule 1, item 39, subsection 51ABQ(4) of the CCA]

- 3.15 The Commission must give each notifying party written notice that the Commission has received the notification and confirm the effective notification date.

[Schedule 1, item 39, subsection 51ABQ(5) of the CCA]

- 3.16 The notification of the acquisition must be made in writing by the principal party or parties, and accompanied by the prescribed fee (if any). The notification is taken not to be made before the fee (if any) is paid. The fees will be set in regulations to enable them to be updated as necessary to reflect changes in the economy and be more responsive to the experience of businesses subject to the fees.

- 3.17 This approach is also consistent with the practice for other fees in the CCA (for example, the fees for authorisation applications). This is to ensure they are set at appropriate levels, with cost recovery for the Commission, and are not disproportionate for businesses, especially small businesses.

[Schedule 1, item 39, subsections 51ABR(1) and (2) of the CCA]

Notifications may cover multiple acquisitions

- 3.18 A notification may be a proposal to put two or more related acquisitions into effect if:

- those acquisitions together constituted a single acquisition,
- each party to those acquisitions were a party to that single acquisition, and
- each principal party to those acquisitions were a principal party to that single acquisition.

[Schedule 1, item 39, subsection 51ABR(3) of the CCA]

- 3.19 This recognises that a commercial transaction may involve multiple acquisitions by different parties. For example, multiple parties might individually buy shares to jointly or collectively take over a business. In this situation, these share purchases should not be treated as separate transactions that need to be assessed separately. Further, the parties may choose to notify together to minimise regulatory burden on the Commission and the parties.

- 3.20 For avoidance of doubt, even if the parties do not notify together, the Commission may still have regard to the identity of the acquirers involved and the effect their acquisitions may have on competition, rather than artificially distinguishing between separate acquisitions.

Notifications may specify related restrictions

- 3.21 If the acquisition is an acquisition of a share in the capital of a body corporate, a notification may detail any restriction directly related to an acquisition of shares or assets if:
- it is under a contract, arrangement or understanding,
 - it is on a party to the acquisition, their subsidiary, or an agent of a party or their subsidiary, and
 - it is directly related to, and necessary for, putting the acquisition into effect.

[Schedule 1, item 39, subsection 51ABR(4) and section 51ABO of the CCA and item 7, subsection 4(1) of the CCA]

- 3.22 An example of a restriction is a non-compete restriction on the vendor of the business solely for the protection of the purchaser in respect of the goodwill of the business.

Scope of section 51

- 3.23 The exception in subsection 51(2) is amended to extend the exception to directly related restrictions (see section 51ABO for when a restriction is directly related to an acquisition). This means that in determining whether a contravention of Part IV (other than section 45D, 45DA, 45DB, 45E, 45EA or 48) has been committed, regard shall not be had to directly related restrictions which meet the applicable requirements of subsection 51(2) as amended. This does not apply if the restriction is subject to a condition that it will not come into force until the acquisition is notified, and such notification occurs within 30 days.

[Schedule 1, item 38, subsection 51(2AAA) of the CCA]

Multiple notifying parties

- 3.24 Where there is more than one notifying party in relation to a notification of an acquisition:
- a reference to giving a notice to the notifying party is taken to refer to giving a notice to any of those notifying parties, and
 - a reference to the notifying party doing a thing (such as giving additional information or documents or making a request or

application) is taken to refer to all of those notifying parties doing that thing jointly.

- 3.25 This is intended to facilitate administrative efficiency and minimise the burden and cost on the Commission and notifying parties by avoiding the lodgement and processing of individual, identical notices.

[Schedule 1, item 39, subsection 51ABR(5) of the CCA]

Powers of the Commission to address incomplete and misleading notifications and changes of fact

Notifications that are incomplete or misleading

- 3.26 The Commission may determine that there is no effective notification date if a notification is incomplete, misleading or false in any material respect. This is intended to incentivise and encourage notifying parties to provide all relevant, accurate and required information in the first instance. This ensures the Commission has sufficient information to conduct reviews efficiently and effectively.
- 3.27 The Commission may only do so if it has not made a determination in respect of the notification under subsection 51ABW(1) (that the acquisition may be put into effect (with or without conditions) or must not be put into effect).
- 3.28 The determination (that there is no effective notification date) must be made within a reasonable period after the Commission begins to consider that a notification is materially incomplete, materially misleading or contains information that is materially false.

[Schedule 1, item 39, subsections 51ABS(1), (2) and (3) of the CCA]

- 3.29 Subsection 172(3) of the CCA provides that strict compliance with a prescribed form is not required for the purposes of the CCA and substantial compliance is sufficient. In considering whether a notification is materially incomplete, materially misleading or contains information that is materially false, the Commission may have regard to:
- the extent to which the notification:
 - is made in the form determined by the Minister, and
 - includes, or is accompanied by, any information or document determined by the Minister, or
 - any additional information or documents given to the Commission in response to any previous determination that the notification does not have an effective notification date, or

- any material change of fact that the Commission becomes aware of after the notification is made and that is material to the Commission making a decision.

[Schedule 1, item 39, subsections 51ABS(4) and (5) of the CCA]

- 3.30 The determination by the Minister under subsection 51ABS(5) is a legislative instrument but not disallowable pursuant to that subsection. It is important that the form and requirements for any accompanying information or documents can be readily modified from time to time to ensure the Commission is able to acquit its functions and duties under the new system. It is also important to provide certainty to parties that the form and accompanying requirements will not be subject to disallowance. As the new system will operate in all States and Territories of Australia via the Competition Code, the details of the system are the product of negotiations with the states and territories as part of the 1995 Intergovernmental Conduct Code Agreement.

[Schedule 1, item 39, subsection 51ABS(7) of the CCA]

- 3.31 If the Commission determines that a notification should be taken never to have had an ***effective notification date***, it must give to the notifying party written notice of the determination and the grounds on which the Commission considers that a notification is materially incomplete, materially misleading or contains information that is materially false.

[Schedule 1, item 39, subsection 51ABS(7) of the CCA]

- 3.32 In circumstances where the Commission has determined that the notification does not have an ***effective notification date***, the Commission cannot consider the acquisition any further under subsection 51ABW(1).

[Schedule 1, item 39, subsection 51ABS(8) of the CCA]

Providing additional information and documents

- 3.33 The following applies where the Commission has made a determination in writing that there is no effective notification date and the notifying party has provided the Commission with additional information or documents in response to the Commission determination.
- The additional information or documents must be given in writing and accompanied by the fee (if any) prescribed by the Minister.
 - The Commission will not consider any additional information or document before the requisite fee (if any) is paid.
 - The effective notification date of the notification of the acquisition becomes the day that the additional information or documents are given.

- The Commission must give the notifying party written notice of the effective notification date.

[Schedule 1, item 39, section 51ABT of the CCA]

- 3.34 This situation should be distinguished from the requirement to provide the Commission with additional information during the assessment process (see paragraph 7.34).

Material changes of fact

- 3.35 The notifying party is under an ongoing obligation to notify the Commission of any material changes of fact in the notification until the Commission makes a determination.

[Schedule 1, item 30, section 45AX of the CCA]

- 3.36 If the Commission becomes aware of a change of fact relating to a notification, and it reasonably considers that the change is material to the Commission's determination, it may (in writing) determine that the ***effective notification date*** of the notification of the acquisition is the date on which the Commission becomes aware of the change of fact. As noted above, strict compliance with a prescribed form is not required for the purposes of the CCA and substantial compliance is sufficient (see subsection 172(3) of the CCA). Therefore, the change must be *material* before the Commission amends the effective notification date.

[Schedule 1, item 39, subsections 51ABU(1) and (2) of the CCA]

- 3.37 An example of a material change of fact could include changes in the competitive constraint imposed by a major competitor if that major competitor exits the market.
- 3.38 The Commission's determination must be made within a reasonable period after it becomes aware of the change of fact, and it must give the notifying party written notice of its decision.

[Schedule 1, item 39, subsections 51ABU(3) and (4) of the CCA]

When the Commission may cease considering a notified acquisition

- 3.39 The Commission may cease considering a notified acquisition if it has not yet determined that the acquisition may be put into effect (with or without conditions) or must not be put into effect and in circumstances where it reasonably believes that the parties to the acquisition no longer intend to put the acquisition into effect.
- 3.40 For example, the Commission may reasonably reach this conclusion based on a public announcement by the parties, or evidence of a good faith intention or binding agreement to conclude an agreement.

[Schedule 1, item 39, subsection 51ABV(1) and (3) of the CCA]

- 3.41 The Commission must also cease considering the notification if it is requested to do so, in writing, by the notifying party in relation to the notification.
- 3.42 A decision by the Commission to cease considering the notification must be made in writing and be given to the notifying party.

[Schedule 1, item 39, subsection 51ABV(2) and paragraph 51ABV(5)(a) of the CCA]

- 3.43 If the Commission decides to cease considering a notification, Commission considerations of incomplete and misleading notifications and changes of fact (subdivision B), and substantial lessening of competition (Division 3) will also not apply to the notification.

[Schedule 1, item 39, paragraph 51ABV(5)(b) of the CCA]

- 3.44 A decision to cease considering the notification of an acquisition means that the acquisition is stayed and must not be put into effect.

[Schedule 1, item 39, note to subsection 51ABV(5) of the CCA]

- 3.45 To avoid doubt, a decision to cease considering the notification of an acquisition does not have the effect that the acquisition ceases to be a ***notified acquisition***.

[Schedule 1, item 39, subsection 51ABV(6) of the CCA]

When acquisitions are stayed, are subject to conditions, have not been finally considered, or become stale

When acquisitions are stayed

- 3.46 An acquisition is stayed in the following circumstances:
- If the acquisition is required to be notified but has not been.
 - If the acquisition has been notified but has not been finally considered (see paragraph 3.50 for information regarding when an acquisition has been notified but not finally considered).
 - If the Commission has determined that the notified acquisition must not be put into effect (subsection 51ABW(1)) and the Commission has not subsequently determined that the acquisition is of substantial public benefit (paragraph 51ABZL(1)(a) or (b)).
 - If the acquisition has been notified and the most recent notification is stale (see paragraph 3.55 for information regarding when an acquisition notification has become stale).

[Schedule 1, item 39, section 51ABI of the CCA]

3.47 A stayed acquisition cannot be put into effect. If it is put into effect, it is considered void (see paragraph 3.72).

When acquisitions are subject to conditions

3.48 These amendments allow the Commission to make a determination that an acquisition may be put into effect if it considers that any competition concerns can be mitigated, or that there would be a substantial public benefit, if the parties to the acquisition comply with certain conditions. The Commission may determine the nature, form and scope of the conditions imposed, and will also have regard to its effect on consumers and any resulting consumer benefits.

3.49 Putting an acquisition into effect is subject to a condition if:

- the most recent determination in respect of a notification of the acquisition (under subsection 51ABW(1)) is a determination that the acquisition may be put into effect subject to that condition (the determination condition) and, since making that determination, the Commission has not made a determination on a substantial public benefit application (under subsection 51ABZL(1)) in respect of the notification, or
- the most recent determination in respect of a notification of the acquisition (under subsection 51ABZL(1)) is a determination that the acquisition would be of substantial public benefit, subject to that condition (the substantial public benefit condition), and, since making that determination, the Commission has not made a determination (under subsection 51ABW(1)) in respect of a notification of the acquisition. This provides for situations where the Federal Court might require the Commission to remake its competition decision (under subsection 51ABW(1)) due to an error of law. Therefore, it is possible the Commission might have made a substantial public benefit determination only for it to be superseded by a competition decision under subsection 51ABW(1).

[Schedule 1, item 39, section 51ABL of the CCA]

When notifications have not been finally considered

3.50 An acquisition is stayed and cannot proceed, if it has been notified but not been finally considered.

3.51 A notification of an acquisition has not been *finally considered* in any of the following circumstances:

- the notification does not have an effective notification date;
- the notification has not received an acquisition determination under subsection 51ABW(1) (including because the Commission has decided under section 51ABV to cease considering the notification),

- the notification is the subject of an ongoing substantial public benefit application (or the Commission has decided under section 51ABZK to cease considering the Substantial Public Benefit application),
- the notification has received an acquisition determination but the period for Tribunal review has not ended,
- the notification is the subject of an ongoing Tribunal review,
- the notification was subject to a Tribunal review, that review application was withdrawn by the applicant, and the period for seeking reinstatement of that review application has not ended.

[Schedule 1, item 39, paragraphs 51ABJ(a), (b), (c), (f) and (g) of the CCA]

- 3.52 A notification of an acquisition has also not been finally considered if a substantial public benefit application (see paragraphs 5.3 to 5.5) has been made in relation to the notification and the Commission has not made a determination on that application.
- 3.53 However, if the Commission has made a determination that an acquisition may be put into effect subject to specified conditions and the Commission has decided to cease considering the substantial public benefit application, a notification of an acquisition has been ***finally considered***. This will generally be where the parties decide they no longer wish to proceed with a substantial public benefit application and instead would prefer to proceed with their acquisition with the conditions specified in the Commission's earlier determination that was made on competition grounds (under 51ABW(1)(b)).

[Schedule 1, item 39, paragraphs 51ABJ(d) and 51ABJ(e) of the CCA]

- 3.54 A notified acquisition that is not finally considered is stayed (see paragraph 3.46 for further information) and cannot be put into effect. If it is put into effect, it is considered void (see paragraph 3.72).

When notifications become stale

- 3.55 A notification of an acquisition becomes ***stale*** (and cannot be put into effect) 12 months after the time (if any) at which the Commission either:
- makes a determination that the acquisition may be put into effect (either subject or not subject to specified conditions), or
 - if a substantial public benefit application relates to the notification – makes a determination that the acquisition would be of substantial public benefit (including a determination that the acquisition would be of substantial public benefit if specified conditions were complied with).

[Schedule 1, item 39, section 51ABK of the CCA]

- 3.56 There are many reasons that a notification of an acquisition should become stale. Market conditions can materially change a year after the determination, meaning the Commission’s assessment that the acquisition is not likely to substantially competition or would be of substantial public benefit may no longer be accurate, so the acquisition must be re-notified to the Commission before it may be put into effect.

Obligations for persons involved in acquisitions under the new system

- 3.57 The new system is located in the new Division 1A of Part IV in Chapter 3—Restrictive trade practices. The new Division contains four subdivisions:
- Subdivision A—Preliminary
 - Subdivision B—Obligations
 - Subdivision C—Acquisitions void if put into effect while stayed
 - Subdivision D—Miscellaneous

[Schedule 1, item 30, Division 1A and subdivisions A, B, C and D of the CCA]

- 3.58 Subdivision A deals with a key concept for the new acquisitions control system, a person ‘purportedly putting an acquisition into effect’. Putting an acquisition into effect also includes purportedly putting an acquisition into effect. A person purportedly puts an acquisition into effect if they engage in conduct that would, apart from Division 1A, constitute putting the acquisition into effect.

[Schedule 1, item 30, section 45AV of the CCA]

- 3.59 The concept is relevant to circumstances where an acquisition is purportedly put into effect otherwise than in accordance with the Commission’s determination, or where the time period has otherwise elapsed. This purported acquisition will be void.
- 3.60 Subdivision B establishes the obligations for persons involved in acquisitions. These obligations are:
- notifying the Commission of certain acquisitions,
 - notifying the Commission of material changes of fact in relation to notified acquisitions, and
 - not putting a stayed acquisition into effect.

Commission must be notified of certain acquisitions

- 3.61 The Commission must be notified of certain acquisitions.

- 3.62 A person contravenes the requirement to notify the Commission of an acquisition if:
- the person is a principal party to an acquisition, and
 - the acquisition is required to be notified, and
 - the acquisition is put into effect, and
 - when the acquisition is put into effect:
 - the acquisition is not a notified acquisition, or
 - no notification of the acquisition has an effective notification date (see paragraph 3.14 for further information regarding the effective notification date), or
 - the latest notification of the acquisition that has an effective notification is stale (see paragraph 3.55 for information regarding when a notification is stale).

[Schedule 1, item 30, section 45AW of the CCA]

- 3.63 The intent of this notification obligation is that a corporation or person that is a party to an acquisition must provide a notification to the Commission if the acquisition falls within a class specified in the regulations or a legislative instrument made by the Minister before the acquisition is put into effect (see paragraph 3.3 for further information regarding acquisitions determined by the regulations or Ministerial instrument). The class is known as a ‘notifiable transaction’. Notification by one of the parties/proposed parties to the acquisition is sufficient to satisfy the obligation to notify (see paragraph 3.24 for further information regarding multiple notifying parties).

Commission must be notified of material changes of fact in relation to notified acquisitions

- 3.64 As discussed in paragraph 3.35 notifying parties have an obligation to keep the Commission informed of material changes of fact relevant to notified acquisitions that are still being determined by the Commission.
- 3.65 The obligation is engaged when the notifying party becomes aware of a material change in fact either on or after the acquisition is required to be notified, at the time of notifying or the commencement of the effective notification date. The change of fact must be relevant to the notified acquisition and material, in that it is of meaningful significance to the Commission’s determination of the notified acquisition. An example of a material change of fact would be the immediate or short-term exit of a major competitor or the destruction of assets relevant to the Commission’s assessment of the notified acquisition.

[Schedule 1, item 30, subsections 45AX(1) and (2) of the CCA]

- 3.66 The obligation also arises in circumstances where the Commission is actively considering a substantial public benefit application made by the notifying party and the notifying party becomes aware of a relevant substantial change of fact that is material to the Commission's determination.

[Schedule 1, item 30, subsection 45AX(3) of the CCA]

- 3.67 Material changes of fact must be reported to the Commission as soon as practicable after the person becomes aware of the change. If the person is the only notifying party, they are required to notify the Commission. If there are multiple notifying parties, then all the notifying parties must notify the Commission jointly.

[Schedule 1, item 30, subsection 45AX(4) of the CCA]

- 3.68 A person who ought reasonably to be aware of a change is presumed to be aware of the change.

[Schedule 1, item 30, subsection 45AX(5) of the CCA]

- 3.69 What constitutes a material change of fact is left to the discretion of the Commission. It is intended that the Commission would have regard to market developments or other competitively significant events when considering whether there has been a material change of fact. For a change of fact to be material it must be of meaningful significance to the Commission's determination of the notified acquisition. Examples of a material change of fact could include changes in the competitive constraints imposed by a major competitor if that major competitor exits the market.

Stayed acquisitions must not be put into effect

- 3.70 A person must not put an acquisition into effect if the acquisition is stayed. A person contravenes this obligation when they put an acquisition into effect and the acquisition is stayed.

[Schedule 1, item 30, section 45AY of the CCA]

- 3.71 When an acquisition is stayed is discussed at paragraph 3.46.

Acquisitions void if put into effect while stayed

- 3.72 If an acquisition is put into effect in circumstances where the acquisition is stayed, the acquisition (and any directly related restriction) is, and is taken always to have been, void.

[Schedule 1, item 30, subsections 45AZA(1) and (2) of the CCA]

- 3.73 However, the Federal Court may order that the voiding of the acquisition, or its related acts, does not apply. Before making such an order the Federal Court must have regard to the seriousness of the related contravention of section 45AY (that is, a person putting into effect an acquisition that is stayed), including the effect of the contravention on persons who are not parties to the

acquisition. Apart from specific regard to those matters, the Federal Court is given discretion to determine when it is appropriate to come to make orders. In certain circumstances, it may be appropriate for the Federal Court to order that the voiding does not apply to ensure a just outcome, or avoid a perverse outcome, and ameliorate the impact of the voiding in appropriate circumstances.

- 3.74 For example, where the failure to notify was inadvertent, done in good faith and/or could not have been foreseen by the parties. In making such orders, it is expected that the Federal Court may have regard to other criteria that are linked with contravention of the suspensory rule, but not the substantive competition issues.

[Schedule 1, item 44, section 77E of the CCA]

Specified conditions for acquisitions must be complied with

- 3.75 A person who puts an acquisition into effect that is subject to specified conditions must comply with those conditions. A failure to comply with any of the conditions constitutes contravention of the provision.

[Schedule 1, item 30, section 45AZ of the CCA]

- 3.76 When an acquisition is put into effect subject to specified conditions is discussed at paragraph 3.48.

Chapter 4: Substantial lessening of competition

Outline of chapter

- 4.0 The amendments require the Commission to allow a notified acquisition to be put into effect unless the Commission reasonably believes that the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
- 4.1 The substantial lessening of competition test requires consideration of the closeness of competition between the parties to the acquisition, to understand what is lost as a result of the acquisition. It is a widely understood framework for assessment of acquisitions as it is currently applied in Australia (see section 50 of the CCA) as well as provisions such as misuse of market power (see section 46 of the CCA) and anti-competitive contracts, arrangements, undertakings (see section 45 of the CCA).
- 4.2 The amendments emphasise the importance of considering the competitive structure of the market in the context of the overall assessment of the effects of the acquisition on competition, by making it clear that a substantial lessening of competition includes creating, strengthening or entrenching a substantial degree of power in a particular market or any market.
- 4.3 The amendments also emphasise the importance of certain principles when applying the test. The assessment of whether an acquisition would have the effect, or be likely to have the effect of substantially lessening competition in any market is a complex economic and legal assessment of the likely forward-looking effects of an acquisition requiring a single evaluative judgement. The principles relate to the need to maintain and develop effective competition within markets in view of, among other things, the structure of all the markets concerned and the conditions for competition, and the actual or potential level of competition in those markets; and the market position of the businesses concerned. This is intended to focus on maintaining and developing the conditions for competition in the market as a whole.
- 4.4 These principles are intended to ensure explicit emphasis is placed on economic methodology and analysis of competitive effects. Unlike the ‘merger factors’ that currently exist in subsection 50(3) of the CCA, rather than acting as a checklist, the intent is for the principles to guide the Commission’s decision-making towards outcomes that promote competition and protect consumers, based on economic and legal analysis of evidence, information and data of the competitive impact of an acquisition.

- 4.5 The specific conditions of competition that would prevail absent the acquisition will be considered as part of the substantive competitive assessment. This recognises both the limitations of inherently uncertain counterfactuals (that is, hypothetical future scenarios without the acquisition) and their use as a tool to consider prospective effects.
- 4.6 To address concerns regarding serial acquisitions and roll-up strategies, in making its determination, the amendments allow the Commission to consider the cumulative effect of all acquisitions put into effect within three calendar years of the effective notification date, whether or not they were individually notifiable.

Detailed explanation of new law

- 4.7 Schedule 1 to the Bill amends section 4G of the CCA to clarify the meaning of *substantially lessening competition*. The concept is tied to competition in the market and means that a substantial lessening of competition can include creating, strengthening or entrenching a substantial degree of power in a particular market or any market. The amendments make clear that the meaning of substantially lessening competition is not affected by sections 51ABG and 51ABH of the CCA, or regulations or legislative instruments made pursuant to those sections.
- 4.8 The amendments to section 4G are intended to increase the focus on the market power of the parties to the acquisition and clarify that even an incremental change in market power, may still amount to a substantial lessening of competition if the acquisition (or other act, for provisions other than the acquisitions provisions) strengthens the acquirer's market power (that is, their ability to act with a degree of freedom from competitive constraints) or protects their market power in an enduring way. In addition, establishing a position of substantial market power in another market that the acquirer (or relevant business) previously did not operate in, may also constitute a substantial lessening of competition depending on the characteristics of the parties involved or nature of the market.
- 4.9 Section 4G is a general definition provision that applies to references to 'lessening of competition' across the CCA. Given the 'substantial lessening of competition' test is widely applied across the CCA, it is appropriate that it has a consistent meaning in the context of the acquisitions provisions and other provisions of the CCA hence why the amendment is located in section 4G.

[Schedule 1, items 13, 14 and 15, section 4G of the CCA]

- 4.10 The framework for considering whether the acquisition, if put into effect, would substantially lessen competition in any market is provided for in Division 3 of the new Part IVA of the CCA, titled 'Commission consideration

of acquisitions: substantial lessening of competition'. This Division contains two Subdivisions:

- Subdivision A—Commission consideration of acquisitions
- Subdivision B—Process for considering acquisitions

Commission's consideration of acquisitions

4.11 The amendments provide that if the Commission is notified of a proposal to put an acquisition into effect (see paragraph 3.11), the Commission has three options. It may, in writing, determine that the acquisition:

- may be put into effect,
- may be put into effect subject to specified conditions, or
- must not be put into effect.

4.12 To assist, an example of a specified condition is provided in the note to the section. It provides that a condition might be that a specified person must give an undertaking to the Commission for the purposes of section 87B and comply with the undertaking.

[Schedule 1, item 39, subsection 51ABW(1) of the CCA]

4.13 The Commission must not determine that the acquisition may be put into effect subject to conditions unless the Commission reasonably believes that:

- there is a real, and not merely a remote, possibility that the acquisition, if put into effect, would be likely to substantially lessen competition in a market, and
- the conditions would comprehensively address that possibility, including by addressing the adverse effects of such a substantial lessening of competition in a market.

[Schedule 1, item 39, subsection 51ABW(2) of the CCA]

4.14 The Commission must not determine that the acquisition must not be put into effect unless the notification is subject to Phase 2 review (a process intended for in-depth economic and legal analysis of acquisitions the Commission reasonably suspects may be anti-competitive following the Phase 1 review), the Commission has given a notice of competition concerns in relation to the notification and it reasonably believes that putting the acquisition into effect would have the effect, or be likely to have the effect, of substantially lessening competition. There must be a causal link between the acquisition and the effect, or likely effect, on competition for the Commission to make a determination that the acquisition must not be put into effect.

[Schedule 1, item 39, subsection 51ABW(3) of the CCA]

- 4.15 The process for determining the notification be subject to Phase 2 review is discussed at paragraphs 4.48 to 4.57.
- 4.16 It is intended that the Commission will apply its expertise and exercise its discretion having regard to all the relevant information before it. The belief it forms must be more than a mere suspicion. It is expected that the Commission would consider the relevant matters discussed at paragraphs 4.22 to 4.40 when exercising its discretion.
- 4.17 The Commission must give written notice of its determination to the notifying party.

[Schedule 1, item 39, subsection 51ABW(4) of the CCA]

Restrictions

- 4.18 If a notification of an acquisition of shares in the capital of a body corporate specifies a directly related restriction (see subsection 51ABR(4)) a determination in respect of the notification may include a declaration that paragraph 51(2)(e) (see paragraph 3.23) does not apply to the restriction.

[Schedule 1, item 39, subsection 51ABZA(1) of the CCA]

- 4.19 This means that regard can be had to any provision of a contract, arrangement or understanding, to the extent to which the provision provides for a specified restriction, in determining whether a contravention of a provision of Part IVA has been committed.
- 4.20 The Commission must not include such a declaration in relation to the restriction unless the Commission reasonably believes that the restriction:
- is not directly related to the acquisition,
 - is not solely for the protection of a principal party to the acquisition in respect of the goodwill of a business:
 - acquired as part of the acquisition, or
 - carried on by the body corporate, or
 - is not necessary for the protection of a principal party in that respect.

[Schedule 1, item 39, subsection 51ABZA(2) of the CCA]

- 4.21 The effect of this declaration is that regard can be had to the restriction in determining whether a contravention of a provision of Part IV has been committed, and any immunity conferred by the operation of the law in relation to the notified acquisition does not apply to the restriction.

Relevant matters

- 4.22 When determining whether a notified acquisition is to be put into effect, put into effect subject to specified conditions, or not put into effect, there are matters that the Commission must have regard to and matters that the Commission may have regard to. In doing so, the Commission may have regard to any relevant documentation or information, including the contract, arrangement or understanding or proposed contract, arrangement or understanding to which the acquisition relates and any included restriction that is directly related to, and necessary for putting the acquisition into effect.
- 4.23 The Commission must have regard to the object of the CCA, which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.
- 4.24 The Commission must also have regard to all relevant matters, including the interests of consumers.

[Schedule 1, item 39, subsections 51ABX(1) and (2) of the CCA]

- 4.25 Without limiting these obligations, the Commission may also have regard to the following matters:
- the need to maintain and develop effective competition in markets,
 - the effect of the acquisition on conditions for competition,
 - the following matters relating to the parties to the acquisition:
 - their market positions,
 - their economic and financial power,
 - their commercial relationships,
 - the following matters relating to any market that could be affected by the acquisition:
 - the alternatives to the goods or services offered by the parties to the acquisition that are available to suppliers, consumers and users of goods and services,
 - the access of suppliers, users or consumers of goods or services to supplies, input (including data) or markets,
 - barriers to entry,
 - supply and demand trends for goods and services,
 - technical innovations, economic developments and productivity gains that could result from the acquisition, including the extent to which they would be to the advantage of consumers, and the extent to which they would result in, or increase, obstacles to competition.

4.26 The information required by the Commission in assessing an acquisition will be reflective of this list. It is not exhaustive and not intended to limit the Commission's discretion as it relates to what constitutes a relevant matter. Not all of the specified relevant matters will apply in every case. However, it is intended that if a specified relevant matter does apply, the Commission must take it into account.

[Schedule 1, item 39, subsections 51ABX(1), (2) and (3) of the CCA]

4.27 The Commission may consider the need to maintain and develop effective competition in markets, in view of, among other things, the structure of the relevant markets, and actual or potential competition from persons carrying on business in Australia, whether the persons are located in Australia or elsewhere. The need to maintain and develop effective competition entails consideration of the competitive performance of markets, and within that framework promoting competition by maintaining and developing effective competition.

4.28 This means considering how an acquisition may impact on the ability and incentives of competitors (both existing competitors and potential future entrants to a market) to retain or foster competitive tension. This may also involve considering how all the relevant markets may be affected by the acquisition, such as the product and/or geographic markets in which the parties compete or operate, as well as adjacent markets, whether that is at a national or local level or between Australia and outside Australia. For example, heightened barriers to entry that deters the prospect of new entrants into the relevant market may be a relevant consideration.

[Schedule 1, item 39, subsection 51ABX(4) of the CCA]

4.29 In considering the effect of the acquisition on conditions for competition, the Commission may take into account the closeness of competition between the parties to the acquisition, and whether the competitive environment that may result from the acquisition proceeding, would be conducive to, promote or hinder competition. For example, an acquisition that leads to the removal of a competitor with products or services with similar characteristics where the parties closely follow each other's pricing, range or service offerings may reduce competitive tension and be an indicator of a less competitive environment.

4.30 Similarly, it is intended that the Commission could take into account the impact of vertical acquisitions of key inputs, such as the acquisition of a key facility that downstream businesses rely on, and what intermediate or longer-term impacts this may have on the ability and incentives of market participants.

4.31 The Commission may also take into account the market position of the parties to the acquisition and their economic and financial power. This includes the commercial relationships between the parties to the acquisition and between each of the parties to the acquisition and third parties. This is because, for example, the nature of vertical relationships in supply chains (including

existing customer and/or supplier relationships) or the extent to which there is vertical integration, may impact on competition. The Commission may also take into account the alternatives to the goods and services offered by the parties that are available to suppliers and users, their access to supplies, inputs including data or any markets, any barriers to entry or expansion, supply and demand trends for the relevant goods and services, and the interests of the consumers.

- 4.32 In determining whether the Commission reasonably believes that the acquisition will be likely to have the effect of substantially lessening competition, this may occur by creating, strengthening or entrenching a substantial degree of power in any market (see subsection 4G(2)). The Commission may also consider the degree and nature of competitive constraints (including their absence) on the parties to the acquisition. Competitive constraints may come from, for example, other competitors, or buyers of the goods or services.
- 4.33 An acquisition may result in technical innovations, economic developments, productivity gains and efficiencies, which can reduce costs, allow businesses to achieve economies of scale and increase innovation yields (for example, by combining research and development efforts). The Commission may take these into account including the extent to which it would advantage consumers or would result in, or increase, obstacles to competition. It is intended that the Commission in considering the advantage to consumers will consider the likelihood of them eventuating, whether they would directly result from the acquisition and the incentive to pass those benefits onto consumers.
- 4.34 The Commission may have regard to any documentation or information relevant to the acquisition. The documentation includes the contract, arrangement or understanding, or proposed contract pursuant to which the acquisition is to take place. The information could include information as to the understanding arrived at, or proposed understanding to be arrived at.
- 4.35 The Commission may also consider any restrictions contained in the documents and information that the Commission is to have regard to.

[Schedule 1, item 39, subsection 51ABX(5) of the CCA]

- 4.36 It is intended that the Commission be able to take into account the impact of serial acquisitions, which are acquisitions by parties which individually may not substantially lessen competition but may have the effect of substantially lessening competition when combined.
- 4.37 The current acquisition (the acquisition the Commission is notified of) is taken to have the effect, or be likely to have the effect, of substantially lessening competition in any market if the cumulative effect of the current acquisition and any acquisitions of shares or assets that are put into effect during the 3 years ending on the effective notification date of the current acquisition that involve the same industry as the current acquisition would be, or be likely to be, to substantially lessen competition in any market.

[Schedule 1, item 39, section 51ABZ of the CCA]

- 4.38 Three years is considered an appropriate reference period to capture strategic business behaviour and take account of dynamic conditions of competition in markets.
- 4.39 The Commission may have regard to any conditions that it could specify as applying to an acquisition including:
- the effect on the interests of consumers that compliance with the conditions would have, or be likely to have, or
 - without limiting the Commission having regard to the effect on the interests of consumers – any consumer benefits that would result, or be likely to result from compliance with the conditions.

[Schedule 1, item 39, subsection 51ABX(6) of the CCA]

- 4.40 The Commission has discretion to consider any commitments (including in the form of undertakings) offered by the parties to the acquisition in making a determination subject to certain timeframes. The Commission must not have regard to a commitment offered by a party to the acquisition if the commitment or undertaking is offered later than 20 business days (defined as not a Saturday, Sunday, ACT public holiday or day occurring between 23 and 31 December) after the notification is made (that is, the *effective notification date*). However, if the notification is subject to Phase 2 review, the Commission may have regard to a commitment or undertaking if it is offered no later than the 50th business day occurring on or after the start of the Phase 2 determination period, or if subsection 51ABZT(3) applies to the commitment or undertaking in relation to the Phase 2 determination period.

[Schedule 1, item 39, sections 51ABY and 51ABP of the CCA]

Process for considering acquisitions

- 4.41 Schedule 1 to the Bill provides for the process for considering acquisitions under the new Part IVA of the CCA.

Time for making determinations

- 4.42 As acquisitions are time-sensitive, prompt decision-making is critical. Clear review timelines are an important procedural safeguard and will assist parties in transaction planning and interested stakeholders in engaging with the Commission's review. To support prompt reviews, timelines are set for the Commission's review.
- 4.43 These timelines are predicated on the Commission having the information and evidence it needs. Therefore, timing can be extended in certain circumstances, for example, if the Commission requests additional information.

4.44 The earliest time that the Commission may make a determination is 15 business days after the effective notification date of the notification. After that 15-business day period in Phase 1, the Commission may make a determination at any point in Phase 1 or at any point in Phase 2, subject to the time limits set out in section 51ABZC and 51ABZF.

[Schedule 1, item 39, subsection 51ABZB(1) of the CCA]

4.45 This 15-business day period ensures that stakeholders have adequate time to engage with the Commission and make submissions in relation to the notification. It also allows the option of prompt determination if no concerns are identified by the Commission.

4.46 If the Commission does not make a determination within the *determination period*, it is deemed to have made a determination that the acquisition may be put into effect. The *determination period* is the *phase 1 determination period* for the notification, or the *phase 2 determination period* for the notification (if the notification is subject to Phase 2 review).

[Schedule 1, item 39, subsections 51ABZB(2) and (3) of the CCA]

- The *phase 1 determination period* is 30 business days starting on the first business day after the effective notification date, subject to any extensions under section 51ABZT of the CCA.

[Schedule 1, item 39, section 51ABZC of the CCA]

- The *phase 2 determination period* is 90 business days starting immediately after the end of the Phase 1 determination period, subject to any extensions under section 51ABZT of the CCA. If the Commission does not give the notice of competition concerns within the allowed 25 business days, the Phase 2 determination period is extended by the number of days on which the Commission has not given such a notice. If the Commission extends the period of time for making submissions in relation to the notice of competition concerns, the Phase 2 determination period is extended by the same number of days.

[Schedule 1, item 39, section 51ABZF of the CCA]

4.47 If the Commission purports to make a determination in respect of a notification of an acquisition, and the determination is invalid or the Federal Court or Tribunal sets the determination aside or requires the Commission to remake the determination, this does not result in the Commission having been taken to have made a determination at the end of the determination period. Thus, these circumstances do not automatically lead to the acquisition being put into effect.

[Schedule 1, item 39, subsections 51ABZB(4) and (5) of the CCA]

4.48 If the Commission decides that a notification of an acquisition is to be subject to Phase 2 review, it must do so in writing during the Phase 1 determination period.

4.49 The Commission may decide that the notification be subject to Phase 2 review if the Commission reasonably suspects that the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market. Further, the Commission must not have determined that the acquisition may be put into effect subject to specified conditions.

4.50 The Phase 2 review allows the Commission to undertake in-depth legal and economic analysis of acquisitions identified as most likely to be anti-competitive following Phase 1 review.

[Schedule 1, item 39, subsection 51ABZD(1) of the CCA]

4.51 The Commission must give the notifying party written notice that it has decided the notification be subject to Phase 2 review. The written notice must detail the day by which the fee (if any) for Phase 2 review must be paid. The fee and the timing for payment of the fee are both prescribed by regulations.

4.52 The Commission must not make an acquisition determination if the fee has not been paid. Further, the Commission is taken to have ceased considering the notification if the fee is not paid on or before the time for payment expires and it has not already decided to cease considering the notification.

[Schedule 1, item 39, paragraphs 51ABZD(2)(b), (c) and (d) of the CCA]

4.53 Schedule 1 to the Bill amends the ADJR Act by adding that decisions under subsection 51ABZD of the CCA are excluded from ADJR Act review. The decision to subject a notification to Phase 2 review is procedural in nature and part of a larger acquisition review process. It is important that the Commission is able to provide a timely decision about whether an acquisition should be put into effect which would not be possible if review were available and sought on the decision to subject the notification to Phase 2 review. Safeguards are provided for in the Bill to ensure the process is subject to review and notifying parties have an opportunity to be heard on matters which may affect the Commission's acquisition determination, including those safeguards under section 51ABZE of the Bill.

[Schedule 1, item 2, Schedule 1 to the ADJR Act]

4.54 Within 25 business days after the start of the Phase 2 determination period, or as soon as practicable thereafter, the Commission may provide written notice (a 'notice of competition concerns') which sets out the Commission's preliminary assessment of whether the acquisition, if put into effect, would have the effect, or be likely to have the effect, of substantially lessening competition in any market. Combined with the effect of subsection 51ABW(3), the Commission must issue a notice of competition concerns within this time period to be able to determine a merger must not be put into effect.

4.55 The Commission may also set out the grounds on which the Commission makes that assessment, including the relevant material facts, and the material information and material evidence the Commission relies on in making that assessment. The notifying party is to be given a reasonable opportunity to

make oral or written submissions to the Commission in relation to the grounds set out in the notice to ensure procedural fairness. The notifying party may also request additional time to make such submissions to the Commission, if required.

- 4.56 The notice of competition concerns is an important procedural safeguard to inform the notifying party of the Commission’s preliminary assessment of its objections to the notified acquisition and is intended to complement and provide particulars of objections raised by the Commission during the Phase 1 process as well as any other relevant matters. This process is intended to ensure that the Commission sets out and explains its objections or concerns, substantiated by material facts, material evidence and other material information, to the notifying party. The notifying party will have the opportunity to respond ahead of the Commission’s determination to ensure procedural fairness. The notifying party may also request additional time (more than once) to make such submissions to the Commission, if required.
- 4.57 Upon receiving the notice of competition concerns, the notifying party has 15 business days to make submissions to the Commission. Unless an extension is granted, the Commission is not to take into account submissions from the notifying parties on the notice of competition concerns received after this period expires. This ensures the Commission has sufficient time to assess, consider and take into account the submissions ahead of making its determination.

[Schedule 1, item 39, subsections 51ABZE(1) to (5) of the CCA]

- 4.58 Section 51ABZE does not prevent the Commission from making an acquisition determination at any time before the end of the determination period.

[Schedule 1, item 39, subsection 51ABZE(6) of the CCA]

Chapter 5: Substantial public benefits

Outline of chapter

- 5.0 The amendments create a process for the Commission to determine whether an acquisition may be put into effect even if it would otherwise be anti-competitive. The Commission may only make such a determination if it considers that the acquisition is of public benefit, and that benefit would substantially outweigh the anti-competitive detriment of the acquisition.
- 5.1 The Australian economy is undergoing significant structural shifts including the rise of the care economy, rapid transformation to net zero and the growth of the digital economy. Allowing the Commission to consider whether an otherwise anti-competitive acquisition raises substantial and meaningful net public benefits is important as our economy responds to these challenges.
- 5.2 The amendments provide for a sequential approach, that is, assessing competitive effects before public benefits, which is different from the current merger authorisation test in subsection 90(7) of the CCA, where both are assessed concurrently.

Detailed explanation of new law

Substantial public benefit

Making a substantial public benefit application

- 5.3 The notifying party to an acquisition may apply under the substantial public benefit process if the Commission determines that the acquisition must not be put into effect, or may only be put into effect with specified conditions. This is called a ‘substantial public benefit application’.

[Schedule 1, item 39, subsections 51ABZG(1) and (6) of the CCA]

- 5.4 Such an application must be made in writing, in the form determined by the Minister, within 21 days of the Commission’s determination. Such an application must include, or be accompanied by, any information or document determined by the Minister. The regulations may prescribe a fee for a substantial public benefit application. An application is taken to have not been made if the notifying party has not paid the fee.

[Schedule 1, item 39, subsections 51ABZG(2), (3) and (5) of the CCA]

- 5.5 The determination by the Minister under subsection 51ABZG(2) is a legislative instrument but not disallowable pursuant to that subsection. The same justification as set out at paragraph 3.30 above applies.

[Schedule 1, item 39, subsection 51ABZG(4) of the CCA]

- 5.6 Acquisitions are time sensitive transactions. As such, the legislation sets specific times within which the Commission must take various actions. To ensure the Commission is not disadvantaged by information that arrives late, the amendments introduce the concept of *effective application date*. This is the day the application is made. The Commission's deadline for the substantial public benefit process is tied to this effective application date. The parties are made aware of these timeframes as the Commission is required to give written notice that it has received the substantial public benefit application and confirm the effective application date.

[Schedule 1, item 39, subsections 51ABZG(7) and (8) of the CCA]

Substantial public benefit applications that are incomplete or misleading

- 5.7 The Commission may determine that the application does not have an effective application date (if it has not already made a determination in relation to the application) and it considers that the application is materially incomplete, materially misleading, or contains information that is false in a material particular. If the Commission makes a determination that the application does not have an effective application date, the Commission must not make a determination in relation to the substantial public benefit application.

[Schedule 1, item 39, subsections 51ABZH(1), (2) and (6) of the CCA]

- 5.8 The Commission must make this determination that an application does not have an effective application date in writing, within a reasonable period.
- 5.9 The Commission may have regard to:
- the extent to which the application includes, or is accompanied by, any information or document that is made in the form determined by the Minister,
 - any additional information or documents provided by the notifying party in the circumstances where the Commission has previously determined that the application does not have an effective application date because it is incomplete or misleading, and
 - any change of fact that the Commission becomes aware of after the notification is made, and that is material to the Commission's decision that the notification was incomplete or misleading. Strict compliance with a prescribed form is not required for the purposes of the CCA and substantial compliance is sufficient (see subsection 172(3) of the

CCA). Therefore, the change must be material before the Commission amends the effective application date.

[Schedule 1, item 39, subsections 51ABZH(3) and (4) of the CCA]

- 5.10 What constitutes a reasonable period of time is not provided for in Schedule 1 to the Bill as it is considered that this will vary depending on the nature and circumstances of the application. If the application is voluminous and complex it is considered that a reasonable period of time will be longer than if the application is short and straightforward.
- 5.11 If the Commission determines that an application does not have an effective application date it must give the notifying party written notice of the decision and the grounds on which the decision was made.

[Schedule 1, item 39, subsection 51ABZH(5) of the CCA]

- 5.12 The notifying party may apply for internal review by the Commission, if the decision was made by a delegate of the Commission, or otherwise to the Tribunal for review of the decision (see paragraph 6.15 for more information).
- 5.13 If the Commission determines that the application does not have an effective application date, the notifying party may provide the Commission with additional information and documents.
- 5.14 The application will get a new effective application date if the notifying party provides additional information (in writing) and additional documents to address the deficiency of their application.
- 5.15 However, the additional information and documents are not taken to have been given if the fee (if any) prescribed by the regulations has not been paid.
- 5.16 The new effective application date will be the day the additional information or documents are provided and the Commission must give the notifying party written notice of the new date.

[Schedule 1, item 39, section 51ABZI of the CCA]

Material changes of fact

- 5.17 The Commission may also determine a different effective application date if it becomes aware of a material change in fact in relation to the proposal to put the acquisition into effect. The effect of this is that the effective application date changes to the date on which the Commission becomes aware of the change of fact (if the Commission reasonably considers the change to be material). As noted above, strict compliance with a prescribed form is not required for the purposes of the CCA and substantial compliance is sufficient (see subsection 172(3) of the CCA). Therefore, the change must be *material* before the Commission amends the effective notification date.

5.18 The Commission may only determine that the application does not have an effective application date if it has not already made a determination in relation to the application.

5.19 The Commission must make this determination of a new effective application date in writing and within a reasonable period after becoming aware of the material change of fact. The Commission must give written notice to the notifying party of the determination.

[Schedule 1, item 39, section 51ABZJ of the CCA]

5.20 The notifying party may apply for internal review by the Commission, if the decision was made by a delegate of the Commission, or otherwise to the Tribunal for review of the decision (see paragraphs 6.4 and 6.15).

Ceasing to consider a substantial public benefit application

5.21 The Commission may cease considering a substantial public benefit application if it reasonably believes that the parties to the acquisition no longer intend to put it into effect.

[Schedule 1, item 39, subsection 51ABZK(3) of the CCA]

5.22 For example, the Commission may reasonably reach this conclusion based on a public announcement by the parties, direct confirmation by the parties that they are abandoning the transaction, or evidence of a good faith intention or binding agreement to conclude an agreement.

5.23 The Commission must also cease considering an application if requested to do so in writing by the notifying party.

[Schedule 1, item 39, subsection 51ABZK(2) of the CCA]

5.24 The Commission can only make a determination to cease considering a substantial public benefit application if it has not already made a determination regarding whether to put the notified acquisition into effect (with or without conditions) or not put the notified acquisition into effect.

[Schedule 1, item 39, subsection 51ABZK(1) of the CCA]

5.25 A decision to cease considering a substantial public benefit application must be made in writing and the Commission must give written notice of its decision to the notifying party.

[Schedule 1, item 39, subsection 51ABZK(5) of the CCA]

5.26 The notifying party may apply for internal review by the Commission, if the decision was made by a delegate of the Commission, or otherwise to the Tribunal for review of the decision (see paragraph 6.15 for more information).

Determining a substantial public benefit application

5.27 When a substantial public benefit application has been made, the Commission may determine (in writing):

- that the acquisition would be of substantial public benefit,
- that the acquisition would be of substantial public benefit if specified conditions were complied with, or
- not to make the determination applied for.

[Schedule 1, item 39, subsection 51ABZL(1) of the CCA]

5.28 The Commission must not make a determination that the acquisition would be of substantial public benefit, or would be if subject to specified conditions, unless it is satisfied on reasonable grounds that, were the acquisition put into effect (and specified conditions complied with):

- the acquisition would result, or be likely to result, in a benefit to the public, and
- the benefit would substantially outweigh any detriment to the public that would result, or be likely to result, from the acquisition.

[Schedule 1, item 39, subsections 51ABZL(2) and (3) of the CCA]

5.29 The Commission has broad discretion to consider what constitutes a public benefit, providing it with the flexibility to enhance the welfare of Australians by approving acquisitions that have a net desirable effect on the economy. However, the public benefit must substantially outweigh any detriment to the public that would result, or be likely to result, from the acquisition to satisfy the test.

5.30 The Commission must give a written notice of its determination to the notifying party. This determination is subject to review by the Tribunal.

[Schedule 1, item 39, subsection 51ABZL(4) of the CCA]

5.31 When making its determination, the Commission must have regard to the objects of the CCA, which is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection. The Commission must also have regard to all relevant matters, including the interests of consumers.

[Schedule 1, item 39, subsections 51ABZM(1) and (2) of the CCA]

5.32 In addition, the Commission may also have regard to:

- the contract, arrangement, understanding or proposed contract, arrangement or understanding pursuant to which the acquisition is to take place, and

- any restrictions under a contract, arrangement or understanding that is directly related, and necessary for, putting the acquisition into effect and is not declared by the determination to be a restriction to which paragraph 51(2)(e) does not apply (see paragraph 4.18).

[Schedule 1, item 39, subsection 51ABZM(3) of the CCA]

5.33 If the Commission is minded to determine that the acquisition would be of substantial public benefit if specified conditions were met, it may have regard to the following:

- the effect on the interests of consumers that compliance with the conditions would have, or be likely to have,
- without limiting that consideration, any consumer benefits that would result, or be likely to result from compliance with the conditions.

[Schedule 1, item 39, subsection 51ABZM(4) of the CCA]

5.34 These matters that the Commission must and may have regard to are intended to incentivise parties to an acquisition to engage constructively and provide comprehensive remedy proposals that address the Commission's concerns. However, the Commission is not precluded from accepting a remedy proposal that is not likely to result in consumer benefits, and may ultimately choose to do so, if it has turned its mind to these matters.

5.35 The Commission must not have regard to a commitment or undertaking offered by a party to the acquisition unless it is offered within specified periods.

[Schedule 1, item 39, section 51ABZN of the CCA]

5.36 If a notification of an acquisition of shares in the capital of a body corporate specifies a related restriction (see paragraph 3.21), a reference in Subdivision D to something that results from the acquisition is taken to include a reference to something that results from the restriction.

[Schedule 1, item 39, section 51ABZO of the CCA]

Process for considering substantial public benefit applications

5.37 The Commission must not make a decision in the first 15 business days after the effective application date of the application.

[Schedule 1, item 39, subsection 51ABZP(1) of the CCA]

5.38 This ensures that stakeholders have adequate time to engage with the Commission and make submissions in relation to the application.

5.39 The Commission has 50 business days from the effective application date to make a substantial public benefit determination unless that period is extended under section 51ABZT. If the Commission does not make a determination within that period, it is taken to have not made the determination applied for.

[Schedule 1, item 39, subsections 51ABZP(2) and 51ABZR(1) of the CCA]

- 5.40 It should be noted that if the Commission does not give a **substantial public benefit assessment** in relation to the application before the end of 20 business days after the effective application date, the (50 business days) determination period is extended by the number of days (occurring after the end of those 20 days) by which the Commission does not give the substantial public benefit assessment. If the Commission extends the period for making submissions in relation to the assessment, the determination period is extended by the same number of days.

[Schedule 1, item 39, subsections 51ABZR(2) and (3) of the CCA]

- 5.41 This is intended to provide clear timelines to support prompt reviews, while allowing the Commission sufficient time to assess the application. Timing can be extended in certain circumstances. For example, if the Commission requests additional information, a remedy proposal is offered, or if requested by the notifying party (see paragraph 7.49 for when extensions of determination periods may be granted).
- 5.42 Further, if the Commission does not make a determination in that time, it is deemed to have refused the application. The substantial public benefit application process is only available for acquisitions that have been determined to substantially lessen competition (which are prohibited) or where conditions have been specified to address a potential substantial lessening of competition. Therefore it is intended that if the Commission makes no decision, the original determination stands.
- 5.43 The amendments provide that if the Commission's determination is invalidly made, or the Federal Court or Tribunal sets aside or remits the determination, the purported determination is taken to not have occurred.

[Schedule 1, item 39, subsections 51ABZP(3) and (4) of the CCA]

- 5.44 If a substantial public benefit application in relation to a notification of an acquisition has an effective application date, the Commission must give the notifying party a **substantial public benefit assessment**. The **substantial public benefit assessment** will set out the Commission's preliminary assessment of the benefits and detriments to the public that the Commission has identified could result, or be likely to result, from the acquisition, including an assessment of the significance of those benefits and detriments, and the grounds on which the Commission makes the assessment, including the relevant material facts and the material information and material evidence the Commission relies on in making the assessment. The assessment must be given at the end of 20 business days or if not practicable to give the assessment by that day, as soon as practicable.

[Schedule 1, item 39, subsections 51ABZQ(1) and (2) of the CCA]

- 5.45 The Commission must give the notifying party a reasonable opportunity to make oral or written submissions in relation to the assessment before the

Commission makes a determination. However, when making the determination, the Commission must not consider submissions received more than 15 business days after it gave the assessment to the party, unless the notifying party requests additional time, which they can do more than once, to make such submissions to the Commission (if required).

[Schedule 1, item 39, subsections 51ABZQ(3) to (5) of the CCA]

5.46 The Commission may extend the period it has to consider a substantial public benefit application by written notice to the notifying party. It may do so in any of the following circumstances:

- A notifying party offers, in writing, a remedy via a commitment or undertaking in accordance with subsection 51ABZT(3), and the extension is for no more than 15 business days.

5.47 If the determination period is extended because of any reason except for the offering of a remedy, the determination period may be extended again by the same number of days if a party to the acquisition then offers a remedy in accordance with subsection 51ABZT(3). Further extensions are not available for remedy offers, in order to incentivise parties to provide a comprehensive remedy proposal at the first instance.

[Schedule 1, item 39, subsections 51ABZT(3) and (4) of the CCA]

5.48 It should be noted that extensions may be granted under the same circumstances in relation to the phase 1 and phase 2 determination periods.

Chapter 6: Review

Outline of chapter

- 6.0 The amendments provide for internal review, and limited merits review of decisions by the Commission under the new system. The merits review provided is similar to the existing merits review of merger authorisation decisions. Judicial review of decisions by the Tribunal will be available in the Federal Court.
- 6.1 The existing merits review approach for merger authorisations is broadly appropriate for the new system. The scope and basis for Tribunal review will be consistent with the current merger authorisation approach (that is, applying the same test as the Commission and not a rehearing).
- 6.2 Some modifications have been made to certain elements of Tribunal review. This is appropriate, as these amendments help to improve the Tribunal's operation.
- 6.3 The ability to seek Tribunal review represents an important safeguard for parties to an acquisition and interested third parties and promotes the integrity of the system. The Tribunal, with its independent economic, business and legal expertise, will improve the quality and consistency of Commission decisions and promote good decision-making by the Commission based on sound economic and legal principles.

Detailed explanation of new law

Internal review of decisions

- 6.4 The notifying party in relation to the notification may apply (in writing) to the Commission for an internal review of a reviewable decision if the decision was made by a delegate of the Commission.

[Schedule 1, item 39, subsection 51ABZV(2) of the CCA]

- 6.5 The following are reviewable decisions:
- in respect of a notification of an acquisition:
 - a determination that a notification of an acquisition should be taken not to have an effective notification date (in response to incomplete or misleading notifications under subsection 51ABS(1)) or a determination that the effective notification date

- is the date on which the Commission becomes aware of a material change of fact (under subsection 51ABU(2)), and
 - a decision to cease considering a notification if the Commission reasonably believes that the parties to the acquisition no longer intend to put the acquisition into effect (under subsection 51ABV(3)),
 - in respect of a substantial public benefit application in relation to a notification of an acquisition:
 - a determination that a substantial public benefit application in relation to a notification of an acquisition should be taken not to have an effective application date (in response to incomplete or misleading substantial public benefit applications under subsection 51ABZH(1)) or a determination that the effective notification date of the application is the date on which the Commission becomes aware of a material change of fact (under subsection 51ABZJ(2)), and
 - a decision to cease considering a substantial public benefit application if the Commission reasonably believes that the parties to the acquisition no longer intend to put the acquisition into effect (under subsection 51ABZK(3)).
- 6.6 An application for an internal review must be made within 28 days after the day on which the decision was made.
- [Schedule 1, item 39, subsections 51ABZV(1) and (3) of the CCA]***
- 6.7 The Commission must review the decision, and affirm, vary or revoke the decision within 90 days after receiving an application for internal review.
- 6.8 If it revokes the decision, the Commission must make such other decision (if any) that the Commission thinks appropriate.
- 6.9 The Commission must, as soon as practicable after reconsidering and making the internal review decision, give the notifying party a written statement of the Commission’s reasons for the decision.
- [Schedule 1, item 39, subsections 51ABZV(4) and (5) of the CCA]***
- 6.10 A delegate of the Commission can reconsider the decision and perform the Commission’s functions under subsections 51ABZV(4) and (5). If the delegate is making the internal review decision, the delegate must not have been involved in making the original reviewable decision and must hold a position or perform duties of a higher level than the delegate who made the original reviewable decision.
- [Schedule 1, item 39, subsection 51ABZV(6) of the CCA]***

- 6.11 Both the original reviewable decision made by the Commission itself (see paragraph 6.5) and the internal review decision can be subject to review by the Tribunal.

[Schedule 1, item 39, subsection 51ABZV(7) of the CCA]

Merits review of determinations

- 6.12 Schedule 1 provides for an amended Tribunal review process that adopts the existing limited merits review process for determinations made by the Commission under the merger authorisation process, with some modifications discussed below.
- 6.13 Paragraphs 6.15 to 6.39 below outline the limited merits review process applicable only to acquisition determinations. The existing limited merits review in the CCA will continue to apply to all determinations that are not acquisition determinations.

Tribunal review of applications – general

- 6.14 The amendments retain limited merits review for decisions of the Commission outside of the acquisitions system. No changes are made to these processes.

[Schedule 1, item 54, sections 100A and 100B of the CCA]

Tribunal review of applications – acquisition determinations

- 6.15 A person dissatisfied with a Commission determination about a notification of an acquisition (hereafter, the applicant) may, as prescribed and within 14 days of the Commission’s determination, apply to the Tribunal for a review of the determination.

[Schedule 1, item 54, subsection 100C(1) of the CCA]

- 6.16 The Tribunal must review the acquisition determination if the applicant was the notifying party in relation to the notification or if the Tribunal is satisfied that the applicant has a sufficient interest. The CCA does not define the term ‘sufficient interest’; however, for the purposes of this provision, it is intended to capture consumer associations and consumer interest groups that can demonstrate some particular interest in the subject matter in the Commission’s determination to bring an application for review to the Tribunal.

[Schedule 1, item 54, subsection 100C(2) of the CCA]

- 6.17 Under subsection 109(2) of the CCA, the Tribunal may, upon such conditions as it thinks fit, permit a person to intervene in proceedings before the Tribunal.

6.18 A notifying party of a notification is entitled to participate in any proceedings before the Tribunal instituted by another person in relation to an acquisition determination in respect of the notification.

[Schedule 1, item 58, subsection 109(1AA) of the CCA]

6.19 The Tribunal may make a determination by consent of the applicant, the notifying party (if the applicant is not the notifying party) and all persons (if any) who have been permitted to intervene in the review proceedings.

6.20 The Tribunal may make such a determination, whether or not:

- it reasonably believes that the effect, or likely effect, of the acquisition would be to substantially lessen competition in any market,
- it reasonably believes that, if the acquisition were put into effect subject to specified conditions, the conditions would comprehensively address the possibility, including addressing the adverse effects of, a substantial lessening of competition in a market;
- it is satisfied on reasonable grounds that the acquisition, if put into effect, would be of substantial public benefit, or
- it is satisfied on reasonable grounds that, if the acquisition were put into effect and the specified conditions complied with, the acquisition would be of substantial public benefit.

6.21 The Tribunal is otherwise bound by the requirements in subsection 51ABW(2), paragraph 51ABW(3)(c) and subsections 51ABW(4), 51ABZL(2) and (3) (whichever is relevant).

[Schedule 1, item 54, subsections 100C(3) and (4) of the CCA]

Limited merits review

6.22 The purpose of merits review is to stand in the shoes of the original decision-maker, and to make the decision de novo. In doing so, the review body needs the ability to perform all the functions and exercise all the powers of the original decision-maker.

6.23 The amendments give the Tribunal those powers and functions in relation to acquisition determinations. The Tribunal may:

- affirm the determination,
- vary the determination,
- set aside and remit the determination, or
- set aside and remake the determination.

[Schedule 1, item 54, subsection 100B(1) of the CCA]

- 6.24 A determination by the Tribunal affirming, setting aside, or varying a determination is to be taken to be a determination of the Commission.
[Schedule 1, item 54, subsection 100B(2) of the CCA]
- 6.25 The Tribunal’s review of an acquisition determination is not a rehearing of the matter.
[Schedule 1, item 57, section 102A of the CCA]
- 6.26 The amendments in section 100N(1) empower the Tribunal to consult with consumer associations and consumer interest groups, and it may have regard to their views in making its decision. This allows for a greater involvement of consumer groups and consumer advocates in the Tribunal review process. This would also allow for the Tribunal to conduct proceedings expeditiously and with as little formality as required for proper consideration of the issues. This has an ongoing effect to minimise costs and facilitate participation by affected stakeholders such as consumer groups.
[Schedule 1, item 54, subsection 100N(1) of the CCA]

Standard review

- 6.27 In support of the principle of the Tribunal standing in the shoes of the original decision-maker, the Tribunal may require the Commission to provide assistance to the Tribunal as required including to give information and make reports. The Tribunal is able to have regard to any information, documents or evidence given to the Commission in connection with the making of the determination to which the review relates. The Tribunal cannot have regard to any information, documents or evidence which the Commission could not have regard to in making the determination.
- 6.28 The Tribunal is also able to allow a person to provide new information, documents or evidence that the Tribunal is satisfied was not in existence at the time the Commission made the determination to which the review relates.
[Schedule 1, item 54, subsections 100N(2), (3), (4) and (5) of the CCA]
- 6.29 The amendments retain the existing restrictions on the information to which the Tribunal may have regard in subsection 102(10) of the CCA. Limitations on the information that may be considered by the Tribunal appropriately balances the interests of all parties to the review. In particular, they are intended to ensure that notifying parties in relation to a notification of an acquisition provide the Commission with all relevant material at the time of the notification, and do not delay the production of that material until later in the process or until Tribunal review. The limitations also facilitate the Tribunal conducting its review expeditiously given the time-sensitive nature of transactions.
[Schedule 1, item 54, subsection 100N(6) of the CCA]

Fast-track review

- 6.30 The amendments introduce a quicker form of review, called ‘fast-track review’. Acquisitions are often time-sensitive, and it is appropriate to allow for a faster form of independent review where only a specific element of the determination is being challenged.
- 6.31 A review becomes a fast-track review if:
- the application for review was made within 7 days of the determination, and
 - the applicant, the notifying party (if the relevant notifying party is not the applicant, but is participating in the proceedings), the Commission and any person that has been permitted to intervene in the proceedings have all consented.
- 6.32 When completing a fast-track review, the Tribunal can only have regard to the information, documents or evidence referred to in the Commission’s reasons for the determination, or the information or documents the regulations require the applicant for review to give to the Commission.

[Schedule 1, item 54, subsections 100D(1) and 100P(1) of the CCA]

- 6.33 The Tribunal also must not make a finding of fact that is inconsistent with a finding of fact made by the Commission in making the determination.

[Schedule 1, item 54, subsection 100P(2) of the CCA]

Time within which Tribunal must make determination on review

- 6.34 As acquisitions are time-critical, the Tribunal’s review should be subject to a time limit in which to make its decision. A fast-track review must be completed in 60 days; other reviews must be completed in 90 days unless:
- the Tribunal allows new information, documents or evidence, in which case the period is 180 days,
 - an extended period of not more than 90 days is determined (in addition to the initial period of 90 or 180 days), due to the matter’s complexity or because of other special circumstances, or
 - an extended period of not more than 60 days is determined (in addition to the initial period of 90 or 180 days), due to the volume of information, documents and evidence before the Tribunal in relation to the matter.
- 6.35 What constitutes complexity or special circumstances is left to the discretion of the Tribunal.

6.36 The Tribunal must, before the end of the initial period, give the parties to the proceedings written notice if it determines that an extended period applies for the review.

6.37 The Tribunal can only grant each extension once.

[Schedule 1, item 54, subsections 100M(2), (3), (4), (5), (6) and (7) of the CCA]

6.38 If regulations require the applicant to give the Tribunal additional information or documents in relation to the application – the time limit for the Tribunal’s review starts at the time the applicant gives the additional information or documents to the Tribunal (if this is later than the day after the last day on which the applicant could apply to the Tribunal for a review of the determination). This provision is intended to allow for the Tribunal to commence its review on a full application.

6.39 The applicant is taken to withdraw the application, if the regulations require the applicant to give to the Tribunal additional information or documents in relation to the application and the applicant does not give the additional information or documents to the Tribunal by:

- for fast-track review – the end of the period starting on the day after the last day on which the applicant could apply to the Tribunal for a review of the determination and ending 14 days later, or
- otherwise – the end of the period starting on the day after the last day on which the applicant could apply to the Tribunal for a review of the determination and ending 30 days later.

[Schedule 1, item 54, subsection 100M(8) of the CCA]

Financial assistance to consumer associations

6.40 The Minister may authorise the grant of financial assistance by the Commonwealth to a consumer association or a consumer interest group.

6.41 The grant may be authorised if the consumer association or a consumer interest group is a participant in relation to an application for review (or has been permitted under subsection 109(2) to intervene in such proceedings), the funding would assist the association or group to participate (or continue to participate) in the proceedings and the association or group would not be able to participate (or continue to participate) without the funding.

6.42 The grant may be subject to conditions.

[Schedule 1, item 54, section 100R of the CCA]

Withdrawing and dismissing applications

- 6.43 These amendments set out the circumstances in which the Tribunal can dismiss an application, including when an application is deemed to have been dismissed because the applicant has withdrawn the application. This includes where the application is not reviewable, where the applicant does not participate properly in the proceeding and where the application is frivolous or vexatious. It also sets out in what circumstances an application can be reinstated after it is dismissed.

Applicants may withdraw applications

- 6.44 The applicant may, at any time, withdraw an application for review of the Commission's decision. This notice must be given in writing to the Tribunal.

[Schedule 1, item 54, subsection 100E(1) of the CCA]

- 6.45 If an applicant withdraws an application, or the Tribunal dismisses an application, the Tribunal must give each participant to the proceedings notice of the withdrawal or dismissal.

[Schedule 1, item 54, section 100L of the CCA]

- 6.46 Other than the applicant, a participant to the proceedings may give written notice to the Tribunal that it wishes to cease being a participant and the Tribunal may order that that participant ceases to be a participant to the proceedings.

[Schedule 1, item 54, section 100K of the CCA]

Tribunal may dismiss application if the parties consent

- 6.47 The Tribunal may dismiss an application for review of the Commission's decision at any time if it has the consent of the participants to the proceedings for review. This includes the applicant for review.

[Schedule 1, item 54, section 100F of the CCA]

Tribunal may dismiss application if fee is not paid

- 6.48 The Tribunal may dismiss an application if a fee payable by the applicant in respect of the application is not paid by the time prescribed by the regulations.

[Schedule 1, item 54, section 100G of the CCA]

Tribunal may dismiss an application if the applicant fails to comply with an order etc.

- 6.49 The Tribunal may dismiss an application if the applicant fails, within a reasonable time, to proceed with the application, or comply with the CCA or

an order of the Tribunal in relation to the proceedings relating to the application.

[Schedule 1, item 54, section 100H of the CCA]

Tribunal may dismiss an application if frivolous, vexatious etc.

6.50 The Tribunal may dismiss an application if the Tribunal is satisfied that the application is frivolous or vexatious.

[Schedule 1, item 54, section 100J of the CCA]

Tribunal may reinstate an application

6.51 If the application is withdrawn, a participant in the proceedings for review (other than the applicant) may apply to the Tribunal for reinstatement of that application within 7 days after the participant receives notice that the application is dismissed (or such longer period as the Tribunal, in special circumstances, allows).

[Schedule 1, item 54, subsection 100E(2) of the CCA]

6.52 If a participant does apply to the Tribunal for reinstatement of the application and the Tribunal considers it appropriate to reinstate, the Tribunal may do so and make such orders as appear to the Tribunal to be appropriate in the circumstances.

[Schedule 1, item 54, subsection 100E(3) of the CCA]

Orders for costs

6.53 The Tribunal may order that a participant in proceedings for review of the acquisition determination pay all or a specified part of the costs of another participant in the proceedings if the Tribunal is satisfied that it is appropriate to do so. This could be if the Tribunal is satisfied that the application is frivolous or vexatious. What constitutes a frivolous or vexatious application is not specified in Schedule 1 to the Bill. It is intended that the Tribunal will have regard to established legal precedent.

6.54 If the Tribunal makes a costs order against a participant, the Tribunal may make further orders that it considers appropriate in relation to the assessment or taxation of the costs.

6.55 The regulations may make provision for and in relation to fees payable for the assessment or taxation of costs ordered by the Tribunal to be paid.

6.56 If a participant is ordered to pay some or all of the costs of another participant in the proceedings, the amount of the costs may be recovered in the Federal Court as a debt due by the participant against the other participant. For example, if a costs order is made against the applicant in favour of the Commission, the Commission may seek recovery in the Federal Court.

[Schedule 1, item 59, section 111 of the CCA]

Tribunal may charge fees

- 6.57 This amendment allows the Tribunal to charge fees in accordance with the regulations. Those fees are charged on behalf of the Commonwealth.
- 6.58 The regulations may determine that fees must be paid if a person makes an application to the Tribunal; in Tribunal proceedings generally such as in relation to production of documents under summons; and if the Tribunal undertakes a taxation of costs.
- 6.59 The regulations may prescribe things such as the circumstance in which a fee must be paid, who should pay it, when payment must be made, any remittal, refund or waiver of fees that should apply.
- 6.60 The regulations can:
- prescribe fees in respect of a particular class or classes of applications, costs, or proceedings,
 - prescribe different fees in respect of different classes of applications, costs or proceedings,
 - prescribe the amount of, or method for working out the amount of, a fee,
 - make provision in relation to the whole or a part of a fee, and
 - provide for the Tribunal to make orders relating to the payment of a fee in relation to a proceeding.
- 6.61 Fees may not be prescribed in a way that would amount to a tax. This is because it is inherent in the concept of a fee that the liability does not amount to taxation.
- 6.62 Any fees imposed under these provisions is a debt owing to the Tribunal (on behalf of the Commonwealth), and can be recovered by the Tribunal (on behalf of the Commonwealth) in a court with jurisdiction to hear the debt recovery matter.

[Schedule 1, item 59, section 112 of the CCA]

Chapter 7: Remedies, enforcement and miscellaneous

Outline of chapter

- 7.0 This chapter explains the enforcement mechanisms and remedies available under the new mandatory and suspensory administrative system for review of acquisitions, as well as other changes made to ensure proper administration of the competition law.
- 7.1 The enforcement framework is designed to strengthen the integrity of the new system and incentivise compliance with notification and review requirements, enabling the Commission to effectively prevent anti-competitive acquisitions. The remedies seek to unwind or prevent acquisitions that contravene the acquisitions provisions while providing appropriate safeguards and due process.
- 7.2 Other miscellaneous changes are made to enhance the regulatory process and safeguard the proper functioning and administration of competition law.

Detailed explanation of new law

Enforcement and remedies

- 7.3 Division 3 of Chapter 5 sets out enforcement mechanisms and remedies available under the new system including orders for failing to notify the Commission, orders with respect to void acquisitions, and an ability for the Commission to seek injunctions from the Federal Court in certain circumstances and/or apply for divestiture orders. Subdivision D of new Division 1A of Part IV also creates a new civil penalty provision for providing false or misleading information.

Orders relating to acquisitions

Orders relating to failures to notify

- 7.4 The Federal Court may, on application by the Commission, order the principal party (or parties) to notify the Commission of an acquisition, in accordance with the new subsection 51ABR(1) of the CCA, if the Federal Court is satisfied that the person has contravened section 45AW by failing to notify an

acquisition that is required to be notified, and the acquisition is not void under subsection 45AZA(2) (including because of an order made under section 77E).

[Schedule 1, item 44, section 77D of the CCA]

- 7.5 This is intended to address situations where a person has breached their obligation to notify the Commission of a notifiable acquisition before putting it into effect. Such an acquisition should ordinarily be void pursuant to section 45AZA (see paragraph 3.72 for information regarding voiding). However, should the Federal Court make orders under section 77E of the CCA that make it appropriate for the Commission to consider the acquisition, the order requires the person to notify the Commission. This enables the Commission to assess the competitive effects of the acquisition and make a determination. It is intended that the Commission, or Tribunal on review, conducts the substantive competition assessment as expert administrative decision-maker, not the Federal Court.
- 7.6 Civil penalties will also be available for failing to notify (see sections 45AW and 76 of the CCA).

Orders relating to void acquisitions

- 7.7 The Federal Court may make orders in relation to acquisitions, or directly related restrictions, that are void or would be void under subsection 45AZA(2) because they were put into effect in breach of the voiding provision (that is, put into effect when the acquisition was stayed).
- 7.8 On application by the Commission or any other person, the Federal Court may:
- make an order that subsection 45AZA(2) is taken not to apply, and never to have applied, to the acquisition or the restriction, or
 - make such other orders as the Federal Court considers appropriate to give effect to the voiding or deal with its consequences.

[Schedule 1, item 44, subsections 77E(1) and (2) of the CCA]

- 7.9 Before making an order that subsection 45AZA(2) is taken not to apply, the Federal Court must have regard to the seriousness of the related contravention of section 45AY (that is, a person putting into effect an acquisition that is stayed), including the effect of the contravention on persons who are not parties to the acquisition. See paragraphs 3.73 to 3.74 above for further information about the Federal Court's power to make such orders.

[Schedule 1, item 44, subsection 77E(4) of the CCA]

- 7.10 Any application for orders under section 77E must be made no later than 6 years after the acquisition was put into effect or purportedly put into effect.

[Schedule 1, item 44, subsection 77E(3) of the CCA]

- 7.11 This time limit balances the need to provide an effective remedy for breaches of the notification obligation with the need to give the parties to an acquisition commercial certainty.
- 7.12 Orders under section 77E are in addition to any divestiture orders that may be available under section 81B where an acquisition determination was made on the basis of false or misleading information or conditions on the determination were not complied with (see paragraphs 7.21 to 7.28).

Injunctions

- 7.13 Schedule 1 to the Bill provides the Federal Court with the power to grant an injunction, on application of the Commission, in the following two scenarios.
- 7.14 The first scenario covers a situation where the Commission had made a determination that a notified acquisition may be put into effect but it was based on false or misleading information given by the party or related body corporate. The Federal Court may grant an injunction if it is satisfied that:
- a person is proposing to put an acquisition into effect, and
 - the Commission made a determination to put the acquisition into effect (with or without conditions) on the basis of information that was false or misleading in a material particular, and
 - the information was given by the person proposing to put the acquisition into effect or, if the person is a body corporate, a body corporate that was related to the person, and
 - if the information had not been given, the determination would not have been made, and
 - apart from the determination, putting the acquisition into effect would contravene Subdivision B of Division 1A of Part IV of the CCA (which covers the obligations under the new system, that is, the requirement to notify, notify the Commission of material changes of fact in relation to a notification, not put a stayed acquisition into effect and comply with conditions).

[Schedule 1, item 47, subsection 80AD(1) of the CCA]

- 7.15 A similar ability to order injunctions is also available for declarations relating to directly related and necessary restrictions that were made by the Commission on the basis of false or misleading information.

[Schedule 1, item 47, subsection 80AD(2) of the CCA]

- 7.16 This injunction power is intended to prevent acquisitions from proceeding where the Commission's determination or declaration was based on materially false or misleading information provided by the parties to the acquisition or their related entities. It is also intended to capture instances where parties or

their related entities intentionally withhold information that would materially affect the Commission's determination or declaration.

- 7.17 The power recognises that the Commission would not have determined that such acquisitions may be put into effect, or made such a declaration, if accurate information had been provided, and allows the Commission to intervene to prevent such acquisitions from proceeding in breach of the acquisitions provisions. By allowing the Federal Court to grant an injunction in these circumstances, the amendments also ensure that parties cannot engage in anti-competitive conduct shielded by an acquisition determination obtained through false or misleading representations about related restrictions.
- 7.18 The second scenario covers a potential breach of the new obligations relating to acquisitions in Subdivision B of Division 1A of Part IV (which relate to requiring notification, notifying the Commission of material changes of fact in relation to a notification, not putting stayed acquisitions into effect and compliance with conditions).
- 7.19 Currently, the Federal Court may grant an injunction for conduct that may contravene the competition laws in Part IV of the CCA (see subparagraph 80(1)(a)(i)). The provisions which give rise to the new acquisition obligations will be located in Part IV, and therefore will be covered by the scope of the existing injunctions power in subparagraph 80(1)(a)(i). The Federal Court may grant an injunction if it is satisfied that a person has engaged, or is proposing to engage in any of the following:
- contravening, or attempting to contravene, a provision of Part IV of the CCA,
 - aiding, abetting, counselling or procuring a person to contravene such a provision,
 - inducing, or attempting to induce, whether by threats, promises or otherwise, a person to contravene such a provision,
 - being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision,
 - conspiring with others to contravene such a provision.
- 7.20 The amendments to subsection 80(1A) mean that only the Commission will be able to seek an injunction in relation to potential breaches of the acquisition obligations in Subdivision B of Division 1A of Part IV of the CCA. This would be similar to the position under the current law which provides that only the Commission may seek an injunction for potential breaches of the existing prohibition against anti-competitive acquisitions in breach of section 50.

[Schedule 1, item 46, subsection 80(1A) of the CCA]

Divestiture orders

7.21 If the Federal Court is satisfied that an acquisition has been put into effect on the basis of materially false or misleading information provided to the Commission, or in breach of conditions in the Commission's determination (for example, whether the parties have purported to proceed with the acquisition in a way that is inconsistent with the conditions attached to the Commission's determination), the Federal Court may, on application by the Commission:

- order the disposal of anything acquired (that is, divestiture), or
- declare the acquisition void from the day it occurred.

[Schedule 1, item 48, subsections 81B(1), (2), (3), (4) and (5) of the CCA]

7.22 These powers are intended to provide an effective remedy for circumstances where an acquisition has been put into effect, where otherwise the Commission would have determined that the acquisition should not be put into effect if the true information had been provided, or where the parties have failed to comply with conditions designed to address competition or public benefit concerns.

7.23 The Federal Court may only declare the acquisition void if, in addition to the other requirements, it is satisfied that the vendor (that is, the person from whom the relevant thing was acquired) was involved in the contravention relating to false or misleading information or non-compliance with conditions. If such a declaration is made, the thing acquired is taken not to have been disposed of by the vendor, and the vendor must refund any amount paid by the acquirer.

[Schedule 1, item 48, subsections 81B(6) and (7) of the CCA]

7.24 This ensures that voiding orders in this respect are only made where the vendor was complicit in providing false or misleading information or breaching conditions and provides for the unwinding of any transfers between the parties.

7.25 Alternatively, if the Federal Court decides not to make a divestiture or voiding order under subsections 81B(4) or (5), it may instead accept an undertaking from the person to dispose of any other thing they own.

[Schedule 1, item 48, subsection 81B(8) of the CCA]

7.26 This gives the Federal Court flexibility to tailor the remedy to the specific circumstances of the case and the nature of the acquisition, while still ensuring that the anti-competitive effects are addressed.

7.27 An application for a divestiture or voiding order under section 81B must be made within 3 years after the acquisition was put into effect. This time limit is consistent with the existing section 81A, which provides for divestiture where a merger authorisation was granted on the basis of false or misleading information.

[Schedule 1, item 48, subsection 81B(9) of the CCA]

- 7.28 The Federal Court may also make a divestiture or voiding order under section 81B by consent of all parties to the proceedings, whether or not it is satisfied of all the necessary matters. This allows parties to agree to resolve proceedings by offering a divestiture or voiding undertaking.

[Schedule 1, item 48, subsection 81B(10) of the CCA]

Penalty for false or misleading information

- 7.29 The new law introduces a prohibition on giving false or misleading information to the Commission in relation to matters under the new system.
- 7.30 Specifically, the prohibition applies where a person gives information to the Commission under an acquisition provision and the person is negligent as to whether the information is false or misleading in a material particular. Proof that the person knew, or was reckless as to whether, the information was false or misleading in a material particular, is taken to be proof that the person was negligent.

[Schedule 1, item 30, subsections 45AZB(1) and (2) of the CCA]

- 7.31 The existing pecuniary penalty provisions in section 76 of the CCA apply. Consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the primary objective of this civil penalty is deterrence. Providing false or misleading information, even negligently, could seriously undermine the integrity of the new system and lead to anti-competitive acquisitions based on inaccurate information.
- 7.32 The civil penalty is set at a level that will provide a strong deterrent against conduct that could undermine the new system. The penalty amount is also consistent with existing penalty amounts that apply across the CCA and provides the Commission with a flexible and proportionate enforcement tool to address non-compliance with information requirements.
- 7.33 For the avoidance of doubt, section 86E of the CCA could apply to a contravention of new Division 1A of Part IV. This means that directors can be disqualified if they are involved in the contravention of the new civil penalty provision for providing false or misleading information. The Federal Court must still be satisfied that the disqualification is justified.

Miscellaneous

Information gathering

- 7.34 To support its administrative decision-making, the Commission may:
- invite persons (whether located in Australia or somewhere else) who appear to the Commission to be interested in the acquisition to make written submissions regarding the notified acquisition – for example,

market participants such as consumers, suppliers and competitors, industry associations, or consumer groups, and

- consult with persons (whether located in Australia or somewhere else) it considers reasonable and appropriate to consult with for the purposes of making a determination – for example, other government agencies, economists or industry experts.

7.35 An example of the types of consultations the Commission might engage in is entering into discussions with the parties to the acquisition or with any persons with a view to identifying conditions which would ameliorate any effects of the acquisition on competition.

7.36 When a person is a party to a notified acquisition, the Commission may request, via written notice, that the person provide (either orally or in writing) additional information relevant to the determination. The Commission can also request, via written notice, that any person (including parties) provide (either orally or in writing) particular information relevant to making the determination.

7.37 If the Commission exercises its powers to request information through submissions or consultation, it is required to take this information into account, so long as it is provided in accordance with specified timeframes.

7.38 Equally, the Commission must not take into account submissions or information that is received outside the specified timeframes, namely within 10 business days of the end of the relevant determination period (that is, the Phase 2 determination period or the determination period in relation to a substantial public benefit application). This is to ensure the Commission has sufficient time to consider the submissions or information in making a determination.

7.39 This does not limit the processes associated with submissions in response to a notice of competition concerns or in response to a substantial public benefit assessment.

[Schedule 1, item 39, section 51ABZS of the CCA]

7.40 The Commission's information gathering powers do not prescribe what information that Commission can request. However, it is expected that any information sought by the Commission would be relevant to the notified acquisition. Further, the amendments make clear that the Commission is required to have regard to any information that it obtains through its information gathering powers, indicating the expectation that the information be relevant to the Commission's determination.

7.41 To the extent that the Commission collects and/or uses personal or sensitive information, as defined in the *Privacy Act 1988*, it is required to comply with its privacy obligations under that Act when handling that information.

7.42 Further, persons who are requested by the Commission to provide submissions and additional or particular information are not required to comply. A failure to

provide submissions and additional or particular information means that the Commission's determination will proceed in the absence of such material.

Providing false or misleading information in response to section 155 notices

7.43 Section 155 notices are a key investigatory tool that allow the Commission to gather information to administer and enforce the CCA. The CCA prohibits a person in purported compliance with a notice knowingly furnishing information or giving evidence that is false or misleading. A person who contravenes this prohibition is guilty of an offence punishable on conviction by imprisonment for 2 years or a fine not exceeding 100 penalty units.

[Schedule 1, item 69, subparagraph 155(2)(b)(iia) of the CCA]

7.44 The new system seeks to enhance the Commission's ability to carry out its investigative functions and gather all relevant information and evidence. As part of this reform, the new law introduces a civil penalty for contravention of this prohibition. The new civil penalty amounts are set out as follows:

- For individuals – 200 penalty units per contravention.
- For bodies corporate – 1,000 penalty units per contravention.

[Schedule 2, items 1, 2 and 3]

7.45 Consistent with the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the objective of imposing this civil penalty is deterrence. Knowingly furnishing information or giving evidence that is false or misleading in purported compliance with such notices could undermine the Commission's investigative functions and ability to administer the competition law. The ability to issue notices under this section would also be undermined if recipients could provide false or misleading material.

7.46 Imposing a civil penalty for providing false or misleading information provides the Commission with a flexible and proportionate enforcement tool that is effective in practice and provides the Commission with an additional enforcement tool and is intended to encourage compliance.

7.47 The civil penalty amounts are set at a level that provides a strong deterrent against conduct that could undermine the public confidence in the regulatory process. These amounts are also consistent with civil penalty amounts for similar contraventions across the Commonwealth legislation.

7.48 For the avoidance of doubt, this civil penalty is separate to the civil penalty imposed for contravening the prohibition for providing false or misleading information to the Commission in relation to matters under the new system (see paragraphs 7.29 to 7.33 above).

Extensions of time

- 7.49 The Commission may extend the period it has to consider a determination period by written notice to the notifying party. It may do so in any of the following circumstances:
- If in Phase 1 – A party to the acquisition offers a remedy in the first 20 business days, and the extension is for no more than 15 business days.
 - If in Phase 2 – A party to the acquisition offers a remedy between the 40th and 50th business day, and the extension is for no more than 15 business days.
 - If in the substantial public benefit process – A party to the acquisition offers a remedy in the first 35 business days, and the extension is for no more than 15 business days.
 - In any determination period – The Commission requests information by a specified date, and the notifying party does not meet that date (in which case the period may be extended only by the number of days the notifying party is late).
 - In any determination period – The Commission notifies the party (in accordance with subsection 155(1)) that they must furnish information, produce documents or appear before the Commission regarding the acquisition determination. The extension lasts for the number of days between when the notice is served and when the notice's request is fulfilled.
 - In any determination period – On request of the notifying party, with the extension being for no more days than requested.

[Schedule 1, item 39, section 51ABZT of the CCA]

- 7.50 It is intended that multiple extensions may occur, for example if a section 155 notice is issued and later a remedy is offered. In a situation where a non-remedy extension occurs, the period of time in which a remedy may be offered to gain a further extension of time is increased by the same amount. However multiple remedy extensions are not available, in order to incentivise parties to provide a comprehensive remedy proposal at the first instance.

[Schedule 1, item 39, subsections 51ABZT(3) and (4) of the CCA]

Determinations set aside by court or Tribunal

- 7.51 If the Federal Court or Tribunal sets aside a determination made under subsection 51ABW(1) (competition assessment) or subsection 51ABZL(1) (substantial public benefit assessment) or the Federal Court remits the decision to make such a determination back to the Commission, Division 3 or 4 of Part

IVA applies in relation to the notification or application with certain modifications.

[Schedule 1, item 39, subsection 51ABZU(1) of the CCA]

7.52 The modifications to the process are as follows:

- The Commission is not required to make a determination during the Phase 1 determination period that the acquisition may be put into effect. This means the Commission can proceed directly to a Phase 2 review if it reasonably suspects the acquisition raises competition concerns, without having to first make a determination under paragraph 51ABW(1)(a) or (b).
- The Commission is not required to formally decide the notification be subject to Phase 2 review under section 51ABZD. This removes the need for the Commission to give notice of this decision and the associated fee requirements.
- The Phase 1 determination period for the notification, or the determination period for the substantial public benefit application, is taken to start on the day the Federal Court or Tribunal sets aside the original determination or remits the decision back to the Commission.

[Schedule 1, item 39, subsection 51ABZU(2) of the CCA]

7.53 The resetting of the relevant determination period to start from the date of the Federal Court or Tribunal decision ensures the Commission has adequate time to reconsider the matter, taking into account any new information, changed market conditions, or guidance provided by the Federal Court or Tribunal. This is important to ensure the Commission's new determination is based on a thorough and up-to-date assessment of the competitive effects of the acquisition.

7.54 However, the amendments do not alter the substantive competition test or substantial public benefit test that the Commission must apply in making its new determination. The Commission must still assess whether the acquisition would have the effect, or be likely to have the effect, of substantially lessening competition in any market (under subsection 51ABW(2)), or whether it would result, or be likely to result, in a substantial public benefit that outweighs any detriment (under subsection 51ABZL(2)).

7.55 The amendments also do not affect the ability of the parties to the acquisition or other interested persons to seek review of the Commission's new determination by the Tribunal under Part IX of the CCA. The normal review processes and timeframes will apply to any such review application.

Effective notification or application date determinations set aside by court or Tribunal

- 7.56 If the Federal Court or Tribunal sets aside a determination, or the Commission revokes a decision following internal review, the *effective notification date* of the notification, or the *effective application date* of the application (whichever is relevant) is the day the Federal Court or Tribunal sets aside the determination or the Commission revokes the decision (see paragraph 6.5 for the determinations or decisions that section 51ABZW applies to).

[Schedule 1, item 39, section 51ABZW of the CCA]

Public register of notified acquisitions

- 7.57 The establishment of a register of notified acquisitions will facilitate transparency and ensure that information and documents, such as acquisition determinations made by the Commission, are publicly released and accessible to parties to acquisitions and the community more broadly.

- 7.58 The Commission must keep a register of notified acquisitions on the internet, where it can be available for public inspection.

[Schedule 1, item 39, subsections 51ABZX(1) and (6) of the CCA]

- 7.59 The register must include information or documents for each notified acquisition.

- 7.60 Certain things must be included on the register on the same day they are made. These include:

- The Commission's acquisitions determinations under subsections 51ABW(1) and 51ABZL(1), and a statement of the Commission's reasons for making the determination,
- Any decision that a notification be subject to Phase 2 review under subsection 51ABZD(1).

[Schedule 1, item 39, subsections 51ABZX(2) and (3) of the CCA]

- 7.61 Regulations will set out what other information or documents are to be included, and the time they are to be included, on the register.

[Schedule 1, item 39, subsection 51ABZX(4) of the CCA]

- 7.62 The Commission may correct or update information and documents on the acquisitions register so the register remains accurate and fit-for-purpose.

[Schedule 1, item 39, subsection 51ABZX(7) of the CCA]

- 7.63 This register serves to ensure transparency of the Commission's process and allows any 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 the administrative system and shape the boundaries of

acquisitions control over time as a body of previous determinations, including the economic and legal reasoning, will develop to guide stakeholders.

Review of the operation of Part IVA

- 7.64 The Minister must cause a review of Division 1A of Part IV, Part IVA and Division 1B of Part IX. The persons conducting the review must begin the review on 1 December 2028 at the earliest and must finish and provide the Minister with a written report of the review by 31 December 2029 at the latest.

[Schedule 1, item 39, subsections 51ABZZC(1) and (2) of the CCA]

- 7.65 This review, a few years into the Bill's operation, will allow for timely assessment of the functionality and efficiency of the new system to ensure the system is operating as intended.

- 7.66 After receiving the report, the Minister must cause copies of the report to be tabled in each House of Parliament within 15 sitting days of each house.

[Schedule 1, item 39, subsection 51ABZZC(3) of the CCA]

Delegation

- 7.67 The Commission may delegate its powers under an acquisitions provision to a member of Commission staff who is an SES or acting-SES employee, but only if the Commission is satisfied the staff member has appropriate qualifications, training or experience to exercise those powers.

[Schedule 1, item 39, subsections 51ABZZA(1) and (2) of the CCA]

- 7.68 These provisions are consistent with delegation provisions in other Commonwealth legislation. They are intended to support the Commission to exercise its powers and functions efficiently and effectively, and in a way that is consistent with its internal processes.

- 7.69 To ensure the Commission still has the final say on how its powers under the acquisitions provisions should be exercised, the delegate must comply with any written directions of the Commission when exercising the delegated powers or functions.

[Schedule 1, item 23, subsection 51ABZZA(3) of the CCA]

- 7.70 The Minister may (in writing) delegate any or all of the Minister's functions or powers under an acquisitions provision to an SES level employee or acting SES level employee in the Department of the Treasury if the Minister is satisfied that the person has the appropriate qualifications, training or experience. In performing a delegated function or exercising a delegated power, the delegate must comply with any written directions of the Minister.

[Schedule 1, item 39, section 51ABZZB of the CCA]

- 7.71 This provision is needed because it is not practicable for such functions and powers to only be exercisable at the Ministerial level, but also recognises the significance of the ability to authorise the grant, by requiring the delegation to only be made to an employee at SES level. This is consistent with Senate Standing Committee for the Scrutiny of Delegated Legislation Guidelines—Principle (c).¹

Constitutional basis

- 7.72 Schedule 1 to the Bill amends section 2B of the CCA, which binds the States and Territories insofar as they ‘carry on a business’, to include the new acquisitions provisions. Similarly, the amendments provide that the acquisitions provisions will also apply to local government bodies.

[Schedule 1, items 4, 5 and 6, subsection 2B(1) and section 2BA of the CCA]

- 7.73 Schedule 1 to the Bill amends section 5 of the CCA to extend the application of the new mandatory and suspensory administrative merger control system to conduct engaged in outside Australia by bodies corporate incorporated or carrying on business within Australia, or Australian citizens, or persons ordinarily resident within Australia.
- 7.74 Further, the amendments extend the application of the new system to persons who are not corporations where such persons are engaging in overseas or interstate trade or commerce or trade or commerce within a Territory, between a State and a Territory or between territories, or in the supply of goods or services to the Commonwealth or a Commonwealth authority or instrumentality.
- 7.75 The amendments also extend the application of section 6(2E) of the CCA to the new system. Section 6(2E) extends the operation of cartel prohibitions to apply within a territory or a Commonwealth place and to persons.
- 7.76 Finally, to improve readability, the amendments insert headings *cartel conduct*, *acquisitions*, *payment surcharges*, *Certain provisions of Australian Consumer Law*, and *Offences relating to cartel conduct* before the relevant subsections in section 6 of the CCA.

[Schedule 1, items 16, 17, 18, 19, 20, 21 and 22, paragraphs 5(1)(f), 6(2)(h) and subsections 6(2A), 6(2C), 6(2E), 6(3) and 6(5A) of the CCA]

¹ The Commonwealth of Australia, ‘Standing Committee for the Scrutiny of Delegated Legislation’ Guidelines, February 2022, 2nd Edition, Principle (c), 14. Accessed at: [Guidelines =
Parliam...~https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation/Guidelines). See also Australian Senate, ‘Principle (c): Scope of administrative powers’, revised February 2022.

Chapter 8: Consequential amendments, commencement and transitional rules

Outline of chapter

- 8.0 This chapter provides for the repeal of sections 50 and 50A of the CCA, and amendments to section 88, as part of replacing the existing approach for the control of mergers and acquisitions merger control framework.
- 8.1 This chapter also provides amendments to anti-overlap provisions in sections 45AT and 45, consistent with the scope of the new system.
- 8.2 This chapter explains the approach the amendments provide for transitioning between the two systems, and also consequential amendments to the reforms described in the preceding chapters.

Detailed explanation of new law

Removal of sections 50 and 50A

- 8.3 As part of the transition to the new system the existing prohibitions against anti-competitive mergers and acquisitions in sections 50 and 50A of the CCA are being repealed.

[Schedule 1, item 87]

- 8.4 Consequential amendments have been made throughout the CCA to remove references to sections 50 and 50A and align relevant provisions with the new system set out in Part IVA. This includes updating provisions relating to the application of the CCA, enforcement powers, authorisation processes, and review mechanisms.

- 8.5 The consequential amendments also extend to update *the Financial Sector (Transfer and Restructure) Act 1999* to align with the new system. These consequential amendments, along with the repeal of sections 50 and 50A, are necessary to fully implement the new system and ensure consistency across the CCA and related legislation.

[Schedule 1, items 83 to 86, and 88 to 130]

Amendments to section 88

- 8.6 Schedule 1 to the Bill amends section 88 of the CCA to clarify that only conduct that might contravene Division 1 or 2 of Part IV may be authorised by the Commission under that section. This is intended to prevent any interaction between the authorisation process and the obligations under the new acquisitions control system established in Division 1A of Part IV.

[Schedule 1, items 1, 49 and 50, subsections 88(1), (1A), (2) and (8) of the CCA]

Operation of section 45

- 8.7 Section 45 of the CCA provides for a general prohibition on anti-competitive contracts, arrangements and understandings. As there are also specific prohibitions on certain conduct, section 45 also contains a number of anti-overlap provisions which prevent section 45 applying to conduct which contravenes one of these other specific prohibitions in the CCA.

- 8.8 New subsections 45(4A) to (4C) seek to ensure that the prohibition in section 45 applies to acquisitions which are not notified, and could appropriately be used to prevent or address such acquisitions where they are likely to substantially lessen competition.

[Schedule 1, item 31, subsections 45(4A), (4B) and (4C) of the CCA]

- 8.9 Existing subsection 45(7) of the CCA excludes the application of section 45 to a contract, arrangement or understanding that directly or indirectly provides for the acquisition of shares or assets. The amendments limit subsection 45(7) by inserting a date that discontinues its operation from 1 January 2026. This is appropriate, because the following amendments create new anti-overlap provisions suitable for the new system.

[Schedule 1, item 32, subsection 45(7) of the CCA]

- 8.10 With the introduction of the new system, subsections 45(7A) and (7B) are inserted with consequential amendments to subsection 46A(6). It is intended that the following will be exempt from the application of section 45:
- a contract, arrangement or understanding (including a proposed contract, arrangement or understanding) to the extent that the contract, arrangement or understanding directly or indirectly provides for or would provide for, or a concerted practice to the extent that the practice directly involves an acquisition which is notified to the Commission, and

- the making by a corporation of a contract which directly or indirectly provides for the acquisition of shares or assets which is notified to the Commission:
 - if the contract is subject to a condition that the provision will not come into force unless, and until the acquisition becomes a notified acquisition, and
 - the acquisition becomes a notified acquisition within 30 days after the contract is made.
- 8.11 The defendant bears the evidential burden of proving the exemption applies.
[Schedule 1, items 33 and 34, subsections 45(7A) and (7B) and 46A(6) of the CCA]
- 8.12 Schedule 1 to the Bill extends the carve-out from cartel conduct prohibitions to notified acquisitions. This means that a contract that contains a cartel provision in so far as the cartel provision provides directly or indirectly for an acquisition of shares in the capital of a body corporate, or an acquisition of any assets of a person, is exempt from the cartel conduct prohibitions:
- if the contract is subject to a condition that the provision will not come into force unless, and until the acquisition becomes a notified acquisition, and
 - the acquisition becomes a notified acquisition within 30 days after the contract is made.
- 8.13 The defendant bears the evidential burden of proving the exemption applies.
[Schedule 1, item 28, section 45AMA of the CCA]
- 8.14 The amendments also carve-out the cartel conduct prohibitions from applying to the acquisition of shares or assets, in so far as the relevant cartel provision provides directly or indirectly for the notified acquisition, if the acquisition is a notified acquisition. Again, the defendant bears the evidential burden of proving the exemption applies.
[Schedule 1, item 29, section 45AT of the CCA]

Phasing in of the new acquisitions control system

- 8.15 To support the phasing out of section 50 of the CCA and the current merger authorisation process and the introduction of the new system, the amendments set out commencement and transitional rules on different dates:
- Part 1 to Schedule 1 to the Bill commences the day after Royal Assent.
 - Part 2 to Schedule 1 to the Bill commences on 1 December 2025.
 - Part 3 to Schedule 1 to the Bill commences on 1 January 2026.

- Part 1 to Schedule 2 to the Bill commences on 1 January 2026.
- Parts 2 to 4 to Schedule 2 to the Bill commence the day after Royal Assent.

8.16 The amendments transition from the current approach, which relies on the prohibitions in sections 50 and 50A of the CCA and merger authorisation process in section 88, to a single mandatory and suspensory system administered by the Commission.

8.17 As part of this transition, the prohibitions in sections 50 and 50A will be repealed from 1 January 2026. After this date, acquisitions will be subject to the new system set out in Part IVA.

[Schedule 1, item 85]

8.18 To cover acquisitions that occur during December 2025, before section 50 is repealed, an adjustment is made to section 50 to clarify that the section does not apply to a notified acquisition.

[Schedule 1, item 35, subsection 50(5B) of the CCA]

8.19 Similarly, an adjustment is made to section 50A to clarify that the subsection 50A(1) does not apply to a notified acquisition. These adjustments are made to avoid overlap between the new mandatory and suspensory administrative merger control system and prohibitions under sections 50 and 50A during December 2025.

[Schedule 1, item 36, subsection 50A(7A) of the CCA]

8.20 However, existing prohibitions will continue to apply to acquisitions that were entered into before 1 January 2026, even if they have not yet been completed as at that date. This means the Commission can still take enforcement action under sections 50 and 50A in relation to such acquisitions on and after 1 January 2026.

[Schedule 1, item 73, subsection 188(1) of the CCA]

Amendments commencing day after Royal Assent

8.21 Part 1 to Schedule 1 to the Bill commences on the day after Royal Assent.

[Commencement information, item 1 of the table]

8.22 Item 1 of Part 1 inserts new subsection 88(1A) into the CCA, which provides that an application for an authorisation in relation to section 50 (that is, a merger authorisation) under section 88 must be made on or before 30 June 2025.

8.23 This amendment is intended to close off the current merger authorisation process to new applications from 1 July 2025, in preparation for the commencement of the new system on 1 January 2026.

[Schedule 1, item 1, subsection 88(1A) of the CCA]

Amendments commencing 1 December 2025

8.24 Part 2 to Schedule 1 to the Bill commences on 1 December 2025.

[Commencement information, item 2 of the table]

8.25 The amendments in Part 2 introduce the majority of the new system, including:

- the acquisitions provisions,
- the process for notifying acquisitions to the Commission,
- the Commission’s powers to gather information and make determinations in relation to notified acquisitions.

8.26 The commencement of these provisions on 1 December 2025 allows parties to voluntarily notify acquisitions to the Commission under the new system before the mandatory notification requirements and other remaining aspects of the system commence on 1 January 2026.

8.27 The commencement date allows the Commission to undertake initial assessments and assists in the making of timely determinations once its determination powers commence. Despite this, the Commission will not be able to make final determinations on whether acquisitions may be put into effect until the relevant provisions commence on 1 January 2026.

[Schedule 1, item 39, sections 51ABW and 51ABZL]

8.28 The amendments in Part 2 apply to acquisitions as defined under the new law from the commencement date of 1 December 2025.

[Schedule 1, item 39, section 45AV and related provisions]

Amendments commencing 1 January 2026

8.29 Part 1 to Schedule 2 to the Bill commences on 1 January 2026.

[Commencement information, item 4 of the table]

8.30 The amendments in Part 1 introduce pecuniary penalties for providing false or misleading information to the Commission under paragraph 155(5)(b) of the CCA. These penalties will apply in relation to contraventions of paragraph 155(5)(b) that occur on or after 1 January 2026, regardless of whether the relevant notice under section 155 was given before, on or after that date.

[Schedule 2, items 1-4, section 76 and subsection 155(5) of the CCA]

8.31 The penalties are an enforcement tool to deter the conduct of providing false or misleading information to the Commission and to ensure the integrity of the Commission’s information-gathering powers.

- 8.32 Part 3 to Schedule 1 to the Bill, commencing on 1 January 2026, makes consequential amendments to the CCA and the *Financial Sector (Transfer and Restructure) Act 1999* to update and align relevant provisions and references with the new mandatory and suspensory administrative merger control system.
- [Schedule 1, items 83 to 131]***

Other amendments commencing day after Royal Assent

- 8.33 Parts 2 to 4 to Schedule 2 to the Bill commences on the day after the Act receives the Royal Assent.
- [Commencement information, item 5 of the table]***
- 8.34 The amendments in Part 2 to Schedule 2 to the Bill clarify that neither the CCA nor any other Commonwealth law imposes a duty on a Commonwealth entity to the extent that it would contravene constitutional doctrines or exceed Commonwealth legislative power.
- 8.35 For the purposes of the Competition Code applying as a law of a State or Territory, the amendments provide that any purported duty on a Commonwealth entity is taken to be imposed only to the extent consistent with constitutional limits and is otherwise taken to be a discretionary power.
- [Schedule 2, items 5 and 6, subsections 150FA(5A) and section 150FAA of the CCA]***
- 8.36 The amendments in Parts 3 and 4 to Schedule 2 to the Bill make machinery, miscellaneous, transitional and other necessary updates to the CCA to support the introduction of the new mandatory and suspensory administrative merger control system and to enhance the Commission's ability to administer competition law.
- [Schedule 2, items 7, 8 and 9, subsections 19(1) and (4) of the CCA; Schedule 2, items 10 to 12, section 155AAAA of the CCA]***
- 8.37 Consequential to this, the amendments amend the definition of *merger authorisation* to limit its scope to Division 1 or 2 of Part IV of the CCA. This ensures the existing merger authorisation process continues to apply without change until the new system replaces it from 1 January 2026, subject to transitional arrangements to close off applications from 30 June 2025.

Other consequential amendments

Creation of chapters for the CCA

- 8.38 To improve the CCA's readability, Schedule 1 to the Bill makes a number of minor, consequential amendments to the CCA, including to insert chapter and division headings that group the existing and new Parts of the CCA:

- Chapter 1—Preliminary
 - Encompasses Parts I to IIIAB of the CCA
- Chapter 2—Access to services
 - Encompasses Part IIIA of the CCA
- Chapter 3—Restrictive trade practices
 - Encompasses Parts IV and IVA of the CCA
- Chapter 4—Provisions relating to particular industries, payment surcharges etc.
 - Encompasses Parts IVB to V of the CCA
- Chapter 5—Enforcement and remedies
 - Encompasses Part VI of the CCA
- Chapter 6—Other provisions
 - Encompasses Parts VII to XIA of the CCA
- Chapter 7—Further provisions relating to particular industries etc.
 - Encompasses Parts XIB and XIC of the CCA
- Chapter 8—Miscellaneous
 - Encompasses Parts XID to XIII of the CCA

[Schedule 1, items 3, 26, 27, 39, 40, 41, 42, 51, 63 and 68]

Consequential amendments to undertakings provisions

- 8.39 Section 10.49 of the CCA deals with undertakings by parties to registered conference agreements. Subsection 10.49A(1) requires parties to a registered conference agreement to abide by an undertaking given under section 10.49.
- 8.40 Subsection 10.49A(2) deems subsection (1) to be a part of Part IV of the CCA. In other words, a contravention of an undertaking given under section 10.49 is a contravention of a Part IV provision.
- 8.41 The amendments exclude new Division 1A of Part IV from this deeming. In other words, the amendments provide that a contravention of an undertaking given under section 10.49 is *not* a contravention of the new acquisitions control system.
- 8.42 The amendments make the same provision in relation to similar sections 10.60 and 10.65 (undertakings by ocean carriers).

[Schedule 1, item 60, subsections 10.49A(2), 10.60(2) and 10.65(2) of the CCA]

Ministerial directions

- 8.43 The Minister may give the Commission directions connected with the performance of its functions or the exercise of its powers under the CCA subject to express limitations including Part IV of the CCA. Schedule 1 to the Bill extends the limitations such that the Minister must not give directions relating to the new acquisitions control system.

[Schedule 1, item 23, paragraph 29(1A)(a) of the CCA]

Schedule version of Part IV

- 8.44 Parallel amendments are made to the Scheduled version of Part IV (as set out in Schedule 1 to the CCA) which States and Territories apply via their own legislation, to mirror the amendments to Part IV. Refer to Chapter 3 for further information.

[Schedule 1, items 74 to 82, sections 45AMA, 45AT(3) and (4), 45AV, 45AW, 45AX, 45AY, 45AZ, 45AZA, 45AZB, 45(4A) to (4C), 45(7) to (7B), 50(5B), 51(2)(e), 51(2AAA) and 51(2AAB) of Schedule 1 of the CCA]

Consequential amendments related to the Competition Code

- 8.45 Section 150C provides for the Competition Code, which is the Schedule version of Part IV, and certain other provisions in the CCA. Subsection 150C(2) requires provisions in the CCA that are part of the Competition Code to be read in a way that fits with the Schedule version of Part IV.
- 8.46 New paragraphs 51ABB(c) and (d) would relate to the Schedule version of Part IV, and therefore would be part of the Competition Code under existing paragraph 150C(1)(b). However, item 61 amends subsection 150C(2), such that paragraphs 51ABB(c) and (d) are not included in the Competition Code.
- 8.47 Paragraphs 51ABB(c) and (d) refer to the acquisition of shares in, or assets of, a corporation, which is linked to the corporations power in section 51(xx) of the Commonwealth Constitution. These paragraphs are therefore not needed in the Competition Code version of the acquisitions provisions applied by the States and Territories under the Conduct Code Agreement (1995). This is because paragraph 51ABB(a) refers to acquisitions of shares in the capital of a body corporate and paragraph 51ABB(b) refers to acquisitions of assets of a ‘person’ and in that context apply to any person irrespective of business structure.

[Schedule 1, item 61, subsection 150C(2) of the CCA]

- 8.48 The amendments add determinations made by the Commission to the list in section 150J. This has the effect that the validity of determinations made by the

Commission are not affected only because they were made also for the purposes of the Competition Code.

[Schedule 1, item 62, section 150J of the CCA]

- 8.49 Section 151AI provides that in determining the meaning of a provision of Part IV or VII, Part XIB (relating to anti-competitive conduct in the Telecommunications industry) is to be ignored. The amendments add Part IVA to this provision and heading, such that Part XIB is to be ignored when considering provisions in Part IVA.

[Schedule 1, items 64 and 65, section 151AI of the CCA]

- 8.50 Similarly, the amendments add Part IVA to section 152AK and its heading. The effect of this is that Part IVA joins Parts IV and VII in not being affected by the operation of Part XIC (the Telecommunications access regime).

[Schedule 1, items 66 and 67, section 152AK of the CCA]
