3 November 2025

Law Council
OF AUSTRALIA

Competition Taskforce
The Treasury
Langton Crescent
Parkes ACT 2600

By email: CompetitionTaskforce@treasury.gov.au

Dear Taskforce

Response to exposure draft of the *Competition and Consumer (Notification of Acquisitions) Amendment (2025 Measures No. 1) Determination 2025* (the draft determination)

This submission is made by the Competition and Consumer Committee of the Business Law Section, with some input from the Superannuation Committee of the Legal Practice Section of the Law Council of Australia (the **Committees**).

The Committees welcome the opportunity to comment on the draft determination. Given the very short window for responding to the consultation and the urgency required in terms of any finalisation of the instrument, we focus in this short submission only on a number of critical concerns with the determination.

1. Certain classes of acquisition that do not result in control still required to be notified

(a) Significant and late expansion of the classes of acquisition that are required to be notified

The Competition Committee notes the policy intention is to ensure that, if a person acquires a stake in a private entity taking them above 20 per cent or acquires a stake in any entity from above 20 per cent to 50 per cent+, the acquisition is required to be notified even if this does not give rise to control for the purposes of section 51ABS. We note that this will substantially extend the scope of the regime and, at times, introduce the need for repeated notifications.

In the Competition Committee's view, the clear legislative purpose of section 51ABS(1) is that acquisitions that do not result in control do not have to be notified. It was against this background that Treasury consulted on the legislation, and against which Parliament assessed the impact of the new mandatory notification regime on business generally. Admittedly, section 51ABS(5) does allow for a class of acquisition that does not result in control still having to be notified, but the effect of the proposed sections 3-10 and 3-11 of the draft determination is to materially wind back the scope of section 51ABS(1) in a way that the Committee believes was not contemplated at the time the legislation was consulted on or passed. The practical reality of the expansion of the notification requirements under the

determination is that they are sufficiently broad that they now leave little for the control test in section 51ABS to do.

The Committees are also concerned that this significant expansion of the regime is being introduced so late. The draft control instrument potentially brings a significant number of transactions into the regime which would not previously have been caught. This is in circumstances where:

- Advisers have been engaged for several months in educating clients about the regime and, in particular, on the need to apply the 'control test' as the primary and important gating point.

- Clients with deals that would be captured by these new and expanded rules have been, or risk effectively being, deprived of the opportunity to seek a section 189 letter.

- In some cases, advisers may have advised clients that their deals are not captured by the regime if they are not acquiring a controlling interest and parties may have entered into agreements with no ACCC condition, on that basis.

In this regard, the late introduction of the draft control instrument is not the same as the introduction of new or wider exemptions such as those that have been flagged by Treasury. Additional or wider exemptions remove transactions from the regime, and therefore reduce exposure to the risk of voided deals. The draft determination does the opposite.

In these circumstances, the Committee considers that, if the provisions of the draft control instrument are to be implemented, strong consideration should be given to a transitional period before the new Division 2 of the Competition and Consumer (Notification of Acquisitions) Determination 2025 takes effect. This could be achieved by changing the wording in item 2(b) of the table in section 2(1) of the draft control instrument from 1 January 2026 to 1 July 2026.

(b) Unintended and material over-capture if 'voting power' (within the meaning of the Corporations Act) is used in sections 3-10 and 3-11 as the test to aggregate shareholdings for the purposes of the 20 per cent and 50 per cent thresholds

Section 3-10 requires notification of an acquisition in an unlisted entity that results in someone's "voting power" increasing from 20 per cent or below to more than 20 per cent, while section 3-11 requires notification of an acquisition in any body corporate that results in someone's voting power increasing from a starting point that is 20 per cent or more to 50 per cent or more. Presumably the intention here is to aggregate, for the purposes of the 20 per cent and 50 per cent thresholds, shareholdings held by persons who are effectively acting together in relation to outcome of decisions about the financial and operating policies of the company.

The issue with using 'voting power' as the test is that such Corporations Act definition will result in significant unintended over-capture of acquisitions in the context of an unlisted body corporate. This is so for the following reasons:

- A person's voting power in a body corporate is the sum of that person's "relevant interest" in shares in the body corporate and their "associates" relevant interest in

shares in the body corporate. "Associate" is defined very broadly in section 12(2) of the Act to mean:

- controlled entities and entities under common control (section 12(2)(a));
- persons with whom the primary person has, or proposes to enter into, a relevant agreement for the purpose of controlling or influencing the composition of the designated body's board or the conduct of the designated body's affairs (section 12(2)(b));
- a person with whom the primary person is acting, or proposing to act, in concert in relation to the designated body's affairs (section 12(2)(c)).

Likewise, "relevant interest" is defined very broadly in section 608 of the Act (e.g. to include power to control disposal of a share, as well as power to control the right to vote attached to a share).

- A practical issue with the breadth of these definitions in the context of a private company (i.e. an unlisted entity) is that, for the vast bulk of those private companies, a person will become an "associate" of each other shareholder in the company once they acquire any shares in the company, even though they are not acting in concert in any way with those other shareholders, but are rather acting solely in their own commercial interests. This arises because almost all private companies which are under some form of joint ownership will have in place a shareholders' agreement or other similar document which provides for the ongoing governance of the company and operation of the business of the company. This will include provisions dealing with the composition of the board of the company, and provisions restricting the disposal of another shareholder's shares (e.g. standard pre-emptive rights on transfer). When a person acquires shares in the company and becomes a party to such an agreement, they will usually become "associates" of all other shareholders in the company under section 12(2)(b) of the Corporations Act, because they become parties to an agreement, arrangement or understanding entered into for the purpose of controlling or influencing the composition of the board, even though they are not acting together with any of the other shareholders in relation to board representation. Such a person will also likely become an "associate" of all other shareholders under section 12(2)(c) of the Corporations Act because, under the terms of the shareholders agreement, they may be acting in concert in relation to the company's 'affairs', because 'affairs' is defined so broadly in section 53 of the Act. Such a person will also acquire a 'relevant interest' in all other shareholders' shares, because of their right to control the disposal of those shares under the pre-emptive rights provisions in the shareholders' agreement.

- The practical consequence of this in relation to a private company is that it is likely that, at the time a person acquires any shares in the company, they will acquire 'voting power' of 100 per cent in the company, even if they are only acquiring, say, a 1 per cent shareholding. As section 3-10 is currently drafted, that person would need to notify their acquisition of a 1 per cent shareholding, which is not consistent with the intent of the regime. Also, if that person subsequently increased their shareholding to above 20 per cent, or from above 20 per cent to more than 50 per cent, they would not have to notify, as their "voting power" would be 100 per cent before the acquisition and would remain 100 per cent after the acquisition. This is also obviously not the intent of the regime.

- Another practical issue with the voting power concept in the superannuation context is that the voting power of a superannuation trustee arising from assets held in a fiduciary capacity must be added to the voting power of the trustee's related bodies corporate (being 'associates' within the definition referred to in section 1(b) above). This ignores the fact that a superannuation trustee is required to exercise the votes attaching to fund assets (e.g. shares or managed fund units) in the best financial interests of superannuation fund members—not the interests of the trustee itself or any corporate group of which it may be part. Similar issues arise for other structures that involve investing through trusts: eg registered managed investment schemes.

- Sections 3-10(2)(c) and 3-11(2)(b) need to be amended so that sections 3-10 and 3-11 only require notification of acquisitions of a genuine 20 per cent or 50 per cent interest. A relatively simple way to achieve this for section 3-10(2)(c) would be to only require notification where the acquisition results in the legal and/or beneficial interests in shares in the body corporate held by the acquirer and the acquirer's "Concert Parties" increasing from 20 per cent or below to more than 20 per cent, where "Concert Parties" means:

  - a related body corporate: ie, a body corporate the primary person controls; a body corporate that controls the primary person; or a body corporate that is controlled by an entity that controls the primary person; or

  - a person with whom the primary person is acting, or proposing to act, in concert in relation to the outcome of decisions about the body corporate's financial and operating policies.

  Similar amendments would then also be made to section 3-11(2)(b).

- If, despite the above, it is proposed to continue to use definitions from the Corporations Act for the purposes of the 20 per cent and 50 per cent thresholds, then it should be made clear that this is the Corporations Act as amended by ASIC instrument. This is the case as the operation of the relevant provisions in Chapter 6, including the definitions of 'relevant interest' and 'associate' have been materially amended by ASIC instruments, which may not be captured by a simple reference to the Corporations Act.

(c) The draft determination under section 51ABS(6) may have the unintended effect that notification is required regardless of the monetary thresholds under section 51ABO, or the exceptions in Division 2 of the existing determination

We consider that there is a reasonable argument that the legislative drafting of section 51ABS(5) requires a transaction to be notified if it meets the requirements of the draft determination, and irrespective of whether it otherwise satisfies the transaction value or revenue thresholds.

While the Explanatory Statement suggests that section 51ABS(5) is intended only to qualify those cases in which an entity may be deemed to control another, the legislative language goes further and requires an acquisition of shares that is in a class under the determination **to be notified**. This is not qualified or limited to circumstances that meet the monetary thresholds set under section 51ABO. Indeed, the thresholds set by the Minister under section 51ABP are explicitly stated to only be for the purpose of section 51ABO.

The concern is reinforced by section 51ABO itself, which is said to be *subject to* Subdivisions B and C (therefore including section 51ABS). The drafting note to that section reinforces this.

Evidently, if this is the case, the effect of the current drafting of the draft determination is to require all transactions involving stakes over 20 per cent of all entities to be notified, irrespective of deal value or the revenue of the acquirer or target. This is clearly not the intent of the regime.

We suggest that this issue can be resolved by including in the determination drafting that clarifies that the 'class of acquisitions' to which the determination applies under section 51ABS(6) is specifically only those that also meet the thresholds determined for the purpose of section 51ABO.

Applying the same reasoning above, the Competition Committee is concerned that the exceptions in Division 2 of the existing *Competition and Consumer (Notification of Acquisitions) Determination 2025* **(Notification Instrument**) are not engaged where the red line tests in the draft control instrument apply.

This can again be addressed through expressly incorporating a reference to the exceptions in defining the class of acquisitions to which the draft control instrument applies under section 51ABS(6).

(d) Drafting clarification for section 3-11

As a more technical matter, the Committee considers section 3-11 would benefit from additional drafting clarification to avoid unintended effects.

In particular, section 3-11(b) specifies that notification must be made where an acquisition leads to someone's voting power increasing from a "*a starting point that is 20 per cent or more to 50 per cent or more*".

The Explanatory Statement describes this rule as affecting a transaction "***crossing** the 50 per cent voting power threshold (from a starting point at or above 20 per cent)"* and explains that the provision "*captures **transitions to majority control** that represent qualitative changes from shared or constrained decision-making to substantial autonomy in corporate governance matters"* (emphasis added).

However, unlike the other classes of acquisitions that the draft control instrument proposes to deem as notifiable, section 3-11(b) does not include the word "below" to indicate the maximum position the person's voting power must be *before* the relevant acquisition. To illustrate an effect of this, which the Committee believes is unintended based on the comments in the Explanatory Statement, a person with an existing 60 per cent voting share could acquire a further 20 per cent voting share in an entity, and that transaction would still technically meet the requirements for notification under section 3-11.

We suggest this could be addressed via clarificatory amendment to section 3-11(b) to add the underlined text below, so it reads as follows:

> *(b) the acquisition results in someone's voting power (within the meaning of the Corporations Act 2001) increasing from a starting point that is 20 per cent or more <u>and below 50 per cent</u>**,** to 50 per cent or more*.

2. Issues affecting superannuation trustees and other fiduciaries

The draft determination would exacerbate existing problems and uncertainties about how the acquisition provisions and current Notification Instrument apply to superannuation funds and other financial services entities that acquire and hold assets on trust. This submission does not canvass all those concerns—concerns relating specifically to superannuation have been the subject of a brief submission to Treasury from the Superannuation Committee.

In summary, the key concerns about the draft determination (and how it would operate with existing provisions of the Notification Instrument) are as follows:

a) 'Voting power' concept ignores fiduciary capacity

Section 50AA(4) of the Corporations Act deems a person not to have control if that control must be exercised for the benefit of other persons (subject to certain exceptions). This exception is incorporated into the merger reforms: see Competition and Consumer Act section 51ABS(1).

This exclusion is presently available to mitigate some of the potentially inappropriate effects of the acquisitions provisions on superannuation trustees and other fiduciaries but the exclusion would be over-ridden by the amendments.

As sections 3-10 and 3-11 are based on voting power, and not control, the draft instrument effectively overrides the Corporations Act rules, and so will require superannuation trustees (and other entities holding investments on trust) to notify the ACCC of relevant acquisitions of bodies corporate, even though the superannuation trustee will never have control over the body corporate. This is clearly not the intent of the regime.

A common example of the operation of these provisions is outlined in section 2(b) below.

With respect to this issue, the Superannuation Committee considers there to be two potential drafting 'fixes' as outlined below:

Option 1

Insert a definition of "voting power" into the determination as follows (mirroring section 50AA(4)):

> ***Voting power*** *has the meaning set out in the Corporations Act, except that if one entity (**first entity**):*
>
> *(a) has voting power in a second entity; and*
>
> *(b) is under a legal obligation to exercise that voting power for the benefit of someone other than the first entity*
>
> *the first entity is taken not to have voting power in the second entity.*

Option 2

Insert a definition of "voting power" into the determination as follows (mirroring s48(2) of the Corporations Act):

> ***Voting power*** *has the meaning set out in the Corporations Act, but voting power over shares exercisable in a fiduciary capacity are separated (and not aggregated) with:*
>
> *(a) voting power of the fiduciary's associates; and*
>
> *(b) voting power of the fiduciary in a non-fiduciary capacity.*

b) Inappropriate capture of insignificant acquisitions

A 'successor fund transfer' (**SFT**)[1] will often involve the in-specie transfer of a large and diverse number of assets between funds, including shares and managed fund units. An SFT involving a transfer of assets with a market value of more than $250m to a trustee whose Australian revenue (combined with that of any connected entities) was $200m or more would be a very minor SFT in today's superannuation environment but would probably satisfy the 'transaction value test' in section 1-12 and the notification threshold in section 2-1.

In such circumstances, every share or unit acquisition that involved a voting power change of a kind specified in section 3-10 and 3-11 of the draft determination could be notifiable, regardless of the value of those assets, or whether the company or managed investment scheme, the shares or units in which were being acquired by the successor trustee, carried on any business at all. For example, the transfer of the two $1 shares in a proprietary company with no assets other than $2 of share capital would be notifiable. (The same result could apply to other large transactions outside superannuation and the financial services industry.)

Costs of complying with the notification requirements, or seeking waivers, are likely to be borne directly or indirectly by fund members.

Further, as discussed in the submission from the Superannuation Committee, a focus on notifying individual asset transfers in an SFT risks the ACCC not being in a position to assess the competition risk from the SFT transaction itself.

With respect to this issue, the Superannuation Committee suggests it can be resolved by including wording in the draft determination that clarifies that the 'class of acquisitions' to which the determination applies under section 51ABS(6) is specifically only those that also meet the thresholds determined for the purpose of section 51ABO (similar to that suggested in section 1(c) above).

3. Determining notification waiver applications: surprise hostile takeovers

The Competition Committee welcomes section 6-5 of the draft determination, which enables a waiver application which avoids a number of the timing issues in section 51ABZZL of the Act (surprise hostile takeovers). However, the other unresolved practical issue with section 51ABZZL is that, because of section 51ABZZL(2), it only applies to a proposed takeover bid that is either unconditional, or subject to only a prescribed occurrence condition.

[1] As outlined in the submission from the Superannuation Committee dated 1 August 2025.

The context here is that the vast majority of takeover bids under Chapter 6 of the Corporations Act are off-market takeover bids which, at the time they are made, are subject to one or more defeating conditions (e.g. a minimum acceptance condition). Only a very small number of bids are unconditional on launch. Often, in a conditional takeover bid, the defeating conditions are waived early during the offer period, in order to encourage target shareholders to accept into the bid. It will impact many takeover bids if, despite the fact that the bid may not give rise to any competition concerns whatsoever, the takeover bid has to be subject to a ACCC condition on launch, because the bidder cannot have the proposed surprise hostile takeover bid assessed on a confidential basis before it is launched. There would appear to be no policy reason why a proposed conditional hostile takeover bid should not be able to be assessed on a confidential basis in the same way as a proposed unconditional hostile takeover bid.

Obviously, this issue in section 51ABZZL(2)(a) would require legislative amendment. However, there is no reason to limit the waiver power in the same way. We would therefore suggest that section 6-5(2)(a) of the draft notification be amended so that it only requires the waiver request to include the information in section 51ABZZL(2)(b), not the information in section 51ABZZL(2)(a) which requires that the bid be an unconditional bid.

Conclusion

The Committees would be pleased to discuss any aspect of this submission.

Please contact the chair of the Competition Committee, Peta Stevenson [redacted], if you would like to do so.

Yours sincerely

James Popple
Chief Executive Officer