

Merger thresholds: Exposure Draft Instrument

The thresholds below are extracted from the draft instrument released for consultation by the Government, on 28 March 2025.

Colour coding added by Ashurst.

Part 2 – Circumstances where acquisitions require notification

Division 1 – General circumstances

There are three general circumstances where acquisitions will require notification.

1. Acquisitions resulting in large or larger corporate groups (Section 2-1)

Under subsection 51ABP(1) of the Act, the following circumstances are determined for the purposes of paragraph 51ABO(a) of the Act in relation to an acquisition:

- a. the acquisition is of shares or assets; and
- b. the shares or assets are connected with Australia; and
- c. the acquisition satisfies the combined acquirer/target turnover test on the contract date; and
- d. one of the following is met:
 - i. the acquisition satisfies the \$50m acquired shares or assets turnover test on the contract date;
 - ii. the acquisition satisfies the transaction value test; and
- e. the acquisition is not covered by Division 2 of this Part.

2. Acquisitions by very large corporate groups (Section 2-2)

Under subsection 51ABP(1) of the Act, the following circumstances are determined for the purposes of paragraph 51ABO(a) of the Act in relation to an acquisition:

- a. the acquisition is of shares or assets; and
- b. the shares or assets are connected with Australia; and
- c. the acquisition satisfies the very large corporate group turnover test on the contract date; and
- d. the acquisition satisfies the \$10m acquired shares or assets turnover test on the contract date; and
- e. the acquisition is not covered by Division 2 of this Part.

3. Creeping or serial acquisitions (Section 2-3)

Under subsection 51ABP(1) of the Act, the following circumstances are determined for the purposes of paragraph 51ABO(a) of the Act in relation to an acquisition:

- a. the acquisition is of shares or assets; and
- b. the shares or assets are connected with Australia; and
- c. the acquisition satisfies either the combined acquirer/target turnover test or very large corporate group turnover test, on the contract date; and
- d. one of the following is met:
 - i. where the combined acquirer/target turnover test is satisfied—the acquisition satisfies the \$50m accumulated acquired shares or assets turnover test on the contract date;
 - ii. where the very large corporate group turnover test is satisfied—the acquisition satisfies the \$10m accumulated acquired shares or assets turnover test on the contract date; and
- e. the acquisition does not satisfy the small acquisition test; and
- f. the acquisition is not covered by Division 2 of this Part.

Note: different notification rules apply to supermarkets acquiring supermarket businesses or land for supermarket businesses.

Division 2 – Exceptions to the general circumstances

The following circumstances are covered by Division 2 and therefore notification will not be required.

Certain land acquisitions

1. This Division covers an acquisition that has the effect that a person will acquire a legal or equitable interest in land (including vacant and developed land) for any of the following purposes:
 - a. developing residential premises;
 - b. any purpose of the person in carrying on a business primarily engaged in buying, selling or leasing land, other than a purpose relating to operating a commercial business on the land.
2. This Division also covers an acquisition of a legal or equitable interest in land if the acquisition is an extension or renewal of a lease for land upon which a commercial business is currently being operated.

Liquidation, administration, receivership etc

This Division covers an acquisition by a person in the person's capacity as an administrator, receiver, receiver and manager or liquidator (all within the meaning of section 9 of the Corporations Act 2001).

Succession

This Division covers an acquisition that takes place solely because of a testamentary disposition, intestacy or a right of survivorship under a joint tenancy.

Financial securities

1. This Division covers an acquisition to which subsection (2), (3), (5) or (6) applies.

Rights issues

2. This subsection applies to an acquisition that results from an issue of securities that satisfies all of the conditions in item 10 of the table in section 611 of the Corporations Act 2001, as affected by section 615 of that Act.
3. This subsection applies to an acquisition that results from an issue of securities that would satisfy all of the conditions in item 10 of that table (as affected by section 615) if the following matters were disregarded:

- a. some or all persons who are offered securities as an exempt investor may:
 - i. receive the offers before other persons to whom offers are made; or
 - ii. be given a period of time to accept the offers which is less than the period of time given to other persons to whom offers are made;
- b. the securities may be issued to a person as an exempt investor before securities are issued to other persons under the offers, provided that under the terms of the offers any such issue to an exempt investor is to occur no earlier than 2 months before the issue of securities to other persons who are not exempt investors;
- c. under the terms of the offers:
 - i. offerees who are not exempt investors are able to trade rights to be issued securities under the offers on a prescribed financial market until a specified time for acceptances of offers has closed; and
 - ii. offerees who are exempt investors are not able to trade rights to be issued securities under the offers.

Note: This subsection reflects the modification of the table in section 611 of the Corporations Act 2001 by section 5 of the ASIC Corporations (Takeovers—Accelerated Rights Issues) Instrument 2015/1069.

- 4. Subsections (2) and (3) extend to an acquisition by a person as underwriter to the issue or sub underwriter.

Dividend reinvestment etc and underwriting of fundraising

- 5. This subsection applies to an acquisition that results from an issue of securities that satisfies all of the conditions in item 11 or item 13 of the table in section 611 of the Corporations Act 2001.

Buy-backs

- 6. This subsection applies to an acquisition that results from a buy back authorised by section 257A of the Corporations Act 2001.

Money lending and financial accommodation

This Division covers an acquisition of a share or asset, that is a security interest, by a person if:

- a. the security interest is taken or acquired:
 - i. in the ordinary course of the person's business of the provision of financial accommodation by any means and on ordinary commercial terms; or
 - ii. for the benefit of one or more other persons in relation to financial accommodation provided by them in the ordinary course of their business of the provision of financial accommodation by any means and on ordinary commercial terms; and
- b. the person whose property is subject to the security interest is not an associate of any other person mentioned in this section.

Nominees and other trustees

This Division covers an acquisition of an asset, that is an interest in securities, by a person as a bare trustee if a beneficiary under the trust has a relevant interest in the securities because of a presently enforceable and unconditional right of the kind referred to in subsection 608(8) of the Corporations Act 2001.

Note: This section will often apply to a person who holds securities as a nominee.

Exchange-traded derivatives

This Division covers:

- a. an acquisition of an asset in the form of an exchange-traded derivative; and
- b. if, at the time of that acquisition, the derivative confers an equitable interest in a share or asset—the acquisition of that equitable interest.

Definitions / tests

Combined acquirer/target turnover test

1. An acquisition satisfies the combined acquirer/target turnover test at a time if the sum of all of the following, at that time, is \$200 million or more:
 - a. the current GST turnover of the principal party to the acquisition;
 - b. the current GST turnover of each connected entity of the principal party to the acquisition;
 - c. where the acquisition is in shares in a body corporate—the current GST turnover of the body corporate;
 - d. the current GST turnover of each connected entity of the body corporate mentioned in paragraph (c) (other than an entity not being indirectly acquired as a result of the acquisition);
 - e. where the acquisition is of an asset—the current GST turnover of the target to the acquisition to the extent that it is attributable to the asset.

Example: For paragraph (e): a principal party acquires one store from a corporation that owns 10 stores; or the bottle manufacturing arm of a bottled drink producer and supplier; or the dog grooming business of a pet supplies corporation. The current GST turnover to be included in the calculation is that part of the current GST turnover of the target as is attributable to the store, bottle manufacturing arm or dog grooming business.
2. For the purposes of subsection (1), do not include the current GST turnover of any entity mentioned in a paragraph in subsection (1) if the entity is a member of a GST group (within the meaning given by the A New Tax System (Goods and Services Tax) Act 1999) and the current GST turnover of another member of the GST group is already included in the calculation.

Very large corporate group turnover test

1. An acquisition satisfies the very large corporate group turnover test at a time if the sum of all of the following, at that time, is \$500 million or more:
 - a. the current GST turnover of the principal party to the acquisition;
 - b. the current GST turnover of each connected entity of the principal party to the acquisition.
2. For the purposes of subsection (1), do not include the current GST turnover of any entity mentioned in a paragraph in subsection (1) if the entity is a member of a GST group (within the meaning given by the A New Tax System (Goods and Services Tax) Act 1999) and the current GST turnover of another member of the GST group is already included in the calculation

\$50m acquired shares or assets turnover test and \$10m acquired shares or assets turnover test

1. An acquisition satisfies the \$50m acquired shares or assets turnover test at a time if the sum of all of the following, at that time, is \$50 million or more:
 - a. where the acquisition is in shares in a body corporate—the current GST turnover of the body corporate;
 - b. the current GST turnover of each connected entity of the body corporate mentioned in paragraph (a) (other than an entity not being indirectly acquired as a result of the acquisition);
 - c. where the acquisition is of an asset—the current GST turnover of the target to the acquisition to the extent that it is attributable to the asset.
2. An acquisition satisfies the \$10m acquired shares or assets turnover test at a time if the sum of all of the following, at that time, is \$10 million or more:
 - a. where the acquisition is in shares in a body corporate—the current GST turnover of the body corporate;
 - b. the current GST turnover of each connected entity of the body corporate mentioned in paragraph (a) (other than an entity not being indirectly acquired as a result of the acquisition);
 - c. where the acquisition is of an asset—the current GST turnover of the target to the acquisition to the extent that it is attributable to the asset.
3. For the purposes of subsections (1) and (2), do not include the current GST turnover of any entity mentioned in a

paragraph in subsection (1) or (2) if the entity is a member of a GST group (within the meaning given by the A New Tax System (Goods and Services Tax) Act 1999) and the current GST turnover of another member of the GST group is already included in the calculation.

Special case: more than 2 parties to the acquisitions

4. An acquisition also satisfies the \$50m acquired shares or assets turnover test if:
 - a. there are more than 2 parties to a contract, arrangement or understanding, pursuant to which the acquisition is to take place; and
 - b. the contract, arrangement or understanding involves more than one acquisition of shares and assets; and
 - c. any one of the acquisitions under the contract, arrangement or understanding satisfies subsection (1).
5. An acquisition also satisfies the \$10m acquired shares or assets turnover test if:
 - a. there are more than 2 parties to a contract, arrangement or understanding, pursuant to which the acquisition is to take place; and
 - b. the contract, arrangement or understanding involves more than one acquisition of shares and assets; and
 - c. any one of the acquisitions under the contract, arrangement or understanding satisfies subsection (2).

\$50m accumulated acquired shares or assets turnover test and \$10m accumulated acquired shares or assets turnover test

1. An acquisition satisfies the \$50m accumulated acquired shares or assets turnover test at a time, if, at that time (the test time):
 - a. the acquisition is of shares or assets (the current shares or assets); and
 - b. the principal party to the acquisition, or a connected entity of the principal party, acquired other shares or assets (the previous shares or assets) in the 3-year period ending at the test time; and
 - c. both the current shares or assets and the previous shares or assets relate directly or indirectly, to the carrying on of a business involving the supply or acquisition of the same goods or services, or goods and services that are substitutable for, or otherwise competitive with, each other (disregarding any geographic factors or limitations); and
 - d. the acquisition of the previous shares or assets and the current shares or assets, if treated as a single acquisition, would satisfy the \$50m acquired shares or assets turnover test.
2. An acquisition satisfies the \$10m accumulated acquired shares or assets turnover test at a time, if, at that time (the test time):
 - a. the acquisition is of shares or assets (the current shares or assets); and
 - b. the principal party to the acquisition, or a connected entity of the principal party, acquired other shares or assets (the previous shares or assets) in the 3-year period ending at the test time; and
 - c. both the current shares or assets and the previous shares or assets relate, directly or indirectly, to the carrying on of a business involving the supply or acquisition of the same goods or services, or goods and services that are substitutable for, or otherwise competitive with, each other (disregarding any geographic factors or limitations); and
 - d. the acquisition of the previous shares or assets and the current shares or assets, if treated as a single acquisition, would satisfy the \$10m acquired shares or assets turnover test.

Certain acquisitions of previous shares or assets are to be disregarded

3. In determining whether an acquisition satisfies the \$50m accumulated acquired shares or assets turnover test under subsection (1) or the \$10m accumulated acquired shares or assets turnover test under subsection (2), disregard the acquisition of a previous share or asset where:
 - a. [the acquisition of that previous share or asset was a notified acquisition (other than because of, in combination with other provisions of the Act and this instrument, a previous operation of this section and section @2-3); or]

- b. the acquisition of that previous share or asset satisfied the **small acquisition test** at the time it was put into effect; or
- c. the acquisition of the previous share or asset was not connected with Australia.

Transaction value test

An acquisition satisfies the **transaction value test** if the greater of the following is \$250 million or more:

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

Small acquisition test

1. An acquisition satisfies the **small acquisition test** at a time if the sum of all of the following, at that time, is less than \$2 million:
 - a. where the acquisition is in shares in a body corporate—the current GST turnover of the body corporate;
 - b. the current GST turnover of each connected entity of the body corporate mentioned in paragraph (a) [(other than an entity not being indirectly acquired as a result of the acquisition)];
 - c. where the acquisition is of an asset—the current GST turnover of the target to the acquisition to the extent that it is attributable to the asset.
2. For the purposes of subsection (1), do not include the current GST turnover of any entity mentioned in a paragraph in subsection (1) if the entity is a member of a GST group (within the meaning given by the A New Tax System (Goods and Services Tax) Act 1999) and the current GST turnover of another member of the GST group is already included in the calculation.