EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Corporations (Fees) Act 2001

Corporations (Fees) Amendment (Takeovers) Regulations 2024

The *Corporations (Fees) Act 2001* (Fees Act) provides that various actions required or permitted under the *Corporations Act 2001* (Corporations Act) are chargeable matters, meaning they may attract a fee. Section 4 of the Fees Act defines 'chargeable matters' to include, among other things, the lodgement or registration of documents under the Corporations Act.

Section 8 of the Fees Act provides that the Governor-General may make regulations for the purposes of sections 5, 5A, 6 and 7 of the Fees Act. Section 5 provides that the Governor-General may make regulations prescribing fees for chargeable matters. Subsection 6(1) of the Fees Act provides that a fee may be either a specified amount or the regulations may specify a method for calculating an amount.

The purpose of the *Corporations (Fees) Amendment (Takeovers) Regulations 2024* (the Amending Regulations) is to apply new and increased fees on the lodgement of documents necessary to implement certain takeovers of Australian entities. They do this by amending the *Corporations (Fees) Regulations 2001* (the Fees Regulations).

The new and increased fees better reflect the value to market participants of, and the cost to Government for providing, the framework facilitating takeovers transactions.

Takeovers generally follow statutory procedures governed by the Corporations Act which require the lodgement of documents with the Australian Securities and Investments Commission (ASIC). Most takeovers are effected by one of 2 methods:

- a members' scheme of arrangement – where securityholders vote at a court-ordered meeting on the proposed takeover (or its equivalent, a 'trust scheme', if the entity being acquired is a managed investment scheme); or

- a takeover bid – where offers are made to each individual securityholder to acquire their securities and the bidder is generally entitled to compulsorily acquire remaining securities after reaching 90 per cent ownership.

ASIC applies charges to lodgement of documents at various points of takeover procedures under its Industry Funding Model (IFM) framework. The new fees are not for cost-recovery purposes under the IFM; rather the fees are assessed by reference to the value of the consideration payable for securities in the target entity under the takeover.

For any document lodgement within scope of the Amending Regulations, the value of the consideration payable determines the bracket for calculating the fee. The brackets range from $10 million to greater than $500 million, and the fee amounts range in value from $10,000 to $195,000. All fees are below the $200,000 limit imposed by paragraph 6(1)(a) of the Fees Act. The new and increased fees are not subject to indexation for inflation.

Section 5 of the Fees Act provides that fees imposed under the Fees Act are those prescribed by the Fees Regulations and expressly states that the fees are imposed as taxes. Prescribing fees in regulations is appropriate to maintain consistency with the existing legislative framework and necessary to ensure that all fees for chargeable matters under the Corporations Act are co-located at a single point in the legislation.

The Fees Act does not specify any conditions that need to be satisfied before the power to make the Amending Regulations may be exercised.

Targeted consultation was undertaken with regulators and selected takeovers practitioners. The Amending Regulations were not exposed for public comment as they are part of the 2024-25 Mid-Year Economic and Fiscal Outlook and premature public release could otherwise adversely affect market behaviour.

The Legislative and Governance Forum on Corporations has been consulted on the Amending Regulations.

The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amending Regulations are disallowable. The Amending Regulations' sunsetting status is not relevant as they will be automatically repealed by the operation of the *Legislation Act 2003* after achieving their amending effect (but only after the disallowance period ends).

The new and increased fees apply to documents that are lodged from 1 January 2025 to 31 December 2027.

The Amending Regulations commenced on 1 January 2025.

Details of the Amending Regulations are set out in Attachment A.

A statement of Compatibility with Human Rights is at Attachment B.

The Amending Regulations are estimated to increase receipts by $17.1 million and increase payments by $0.3 million over the 5 years from 2023-24. The payments increase funding to ASIC. All figures in this table represent amounts in $ million:

	2023 – 24	**2024 – 25**	**2025 – 26**	**2026 – 27**	**2027 – 28**
Receipts	0.0	2.8	5.7	5.7	2.8
Payments	0.0	0.3	0.0	0.0	0.0

The Office of Impact Analysis (OIA) has been consulted (OIA ref: OIA24-08437) and agreed that an Impact Analysis is not required. Compliance costs are not more than minor.

ATTACHMENT A

Details of the *Corporations (Fees) Amendment (Takeovers) Regulations 2024*

Section 1 – Name

This section provides that the name of the Amending Regulations is the *Corporations (Fees) Amendment (Takeovers) Regulations 2024* (the Amending Regulations).

Section 2 – Commencement

The Amending Regulations commenced on 1 January 2025.

Section 3 – Authority

The Amending Regulations are made under the *Corporations (Fees) Act 2001* (the Fees Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument are amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 - Amendments

Definitions and other preliminaries

Item 1 of Schedule 1 to the Amending Regulations inserts new definitions to support the operation of the new and increased fees on the lodgement of documents necessary to implement certain takeovers of Australian entities. The defined terms are 'control transaction', 'Part 5.1 arrangement', 'regulation 4 body' and 'threshold value'. These are each explained in context further below in this explanatory statement.

Item 2 makes a minor drafting amendment to Part 2 of the Fees Regulations to insert Division 1 – Schedules 1 and 2. Item 3 removes some redundant words from a heading. Item 4 updates the cross-references in a note, which signpost the new and other existing provisions that prescribe fees.

Item 5 sets out the substantive provisions concerning the circumstances in which the new and increased fees are payable. Each circumstance is explained below in turn. References to regulations, subregulations and paragraphs are to provisions of the Fees Regulations as amended by the Amending Regulations, unless otherwise specified.

Schemes of arrangement (Part 5.1 arrangements)

Subregulation 4(2) defines that a Part 5.1 arrangement in relation to a regulation 4 body means a compromise or arrangement under Part 5.1 of the Corporations Act between the regulation 4 body and its members, or a class of its members. This is a subset of what are commonly known as 'schemes of arrangement'.

Subregulation 4(3) provides that a 'regulation 4 body' is a listed company, an unlisted company with more than 50 members, or a listed registrable Australian body that is registered under Division 1 of Part 5B.2 of the Corporations Act.

For Part 5.1 arrangements, subregulation 4B(1) specifies that a 'control transaction' involves one or more Part 5.1 arrangements in relation to a regulation 4 body.

More specifically, subregulation 4B(1) defines a control transaction in respect of a regulation 4 body as one or more Part 5.1 arrangements resulting in a person beginning to control the regulation 4 body; or resulting in the voting power of a person in the regulation 4 body increasing. Paragraph 4B(1)(b) further clarifies that voting power must increase either from 50 per cent or below to a point of more than 50 per cent; or from a starting point that is above 50 per cent.

See section 50AA of the Corporations Act for the meaning of 'control' in relation to relevant entities, which applies because of subsection 4(2) of the Fees Act.

Subregulation 4B(2) carves out 2 scenarios where one or more Part 5.1 arrangements do not amount to a control transaction. The first situation is characterised by an exchange of securities in the regulation 4 body for securities in a body or managed investment scheme (the new body) such that subregulation 4B(3) applies. Subregulation 4B(3) applies if the voting power each member of the regulation 4 body (or each member of a relevant class) had in the regulation 4 body immediately before the exchange is the same as their voting power in the new body immediately after this exchange. This is commonly known as a 'top-hatting' arrangement.

The second situation carved out in subregulation 4B(2) from the meaning of a control transaction is where the Part 5.1 arrangement/s are merely part of an internal restructure or reorganisation of related bodies corporate or a group of persons related by means of trust or partnership.

Regulation 4 provides that a fee with a value determined in subregulation 4(4) is prescribed for lodging a copy of an order of approval of a Part 5.1 arrangement in relation to a regulation 4 body with ASIC under subsection 411(10) of the Corporations Act, subject to further qualifiers.

Subregulation 4(1) stipulates that the fee is payable if:

- the Part 5.1 arrangement is, or is part of, a control transaction in relation to the regulation 4 body; and
- the threshold value for the lodgement is equal to or greater than $10 million; and
- lodgement occurs between 1 January 2025 and 31 December 2027.

Subregulation 4(4) inserts a table of the fee brackets applicable to the lodgement. The fee for a particular lodgement is to be determined by reference to the 'threshold value' of the lodgement. The fee payable is not indexed for inflation.

Determining the threshold value of a lodgement

The methodology for calculating the threshold value of a lodgement is set out at regulation 4C for control transactions in relation to a regulation 4 body.

Subregulation 4C(2) provides that, to calculate the threshold value for a lodgement under subsection 411(10) of the Corporations Act pertaining to a regulation 4 body, a security is a share in the regulation 4 body, other than a share issued under the control transaction.

Subregulation 4C(3) provides that the threshold value of the lodgement for a control transaction in relation a regulation 4 body is to be determined by multiplying the value of the consideration payable per security by the number of securities at lodgement, including any securities which are not acquired or cancelled under the control transaction. The value of the consideration payable per security is the cost for acquiring a security or for the cancellation of a security.

Subregulations 4C(4) and 4C(5) clarify that the value of consideration payable per security is to be determined by reference to that specific class of security. If there are 2 or more classes, subregulation 4C(5) clarifies that the total threshold value is calculated by adding up the threshold value of each class of securities as calculated under subregulation 4C(3).

The calculation must be determined by reference to the value of the consideration payable per security at the time of lodgement of the copy of the order of approval.

Aside from the above stipulation about the time of calculation, the Amending Regulations are not prescriptive about how the payer should calculate the value of the consideration for the threshold value formula. However, the intention is that the payer may have regard to the valuations of the consideration set out in the schemes of arrangement explanatory statement to the extent relevant.

Where the consideration is cash in Australian dollars, the consideration is the amount of the cash sum. Where the cash consideration is in a foreign currency amount, the intention is for the value of the consideration to be the foreign cash amount converted to Australian dollars using the exchange rate as at the date of lodgement of the court approval.

Where the consideration is securities in a listed entity, the intention is that the payer may rely on the market price at lodgement of the court approval, for example the price as at the closing of the market on the day before the lodgement.

Where the consideration is securities in an unlisted entity, the intention is that the payer may rely on the value as at the time of the lodgement of the court approval and draw on supporting documentation, for example an independent expert report. If the documentation, for example an independent expert report, puts forward a range of values, the intention is that the payer may rely on the middle point of the range. This is not to imply that a payer needs to obtain an independent expert report merely for the purposes of calculating the threshold value under these regulations. In the absence of supporting documentation or an independent expert report, the intention is that the payer can calculate the value of the unlisted securities based on their genuine assessment of what a willing but not anxious buyer would pay for that unlisted security.

Trust schemes

For trust schemes, subregulation 4B(4) provides that an arrangement (the trust scheme) is a control transaction in relation to a listed registered scheme if it results in a person beginning to control the registered scheme; or causes the voting power of a person in the registered scheme to increase from 50 per cent or below to more than 50 per cent or from a starting point that is above 50 per cent.

Subregulation 4B(5) clarifies that for the purposes of working out whether a person begins to control the listed registered scheme in subregulation 4B(4), the section 50AA definition of 'control' in the Corporations Act is to be applied, alongside the relevant modifications set out in paragraphs 604(1)(a) to (h) of the Corporations Act in relation to the listed registered scheme. That is, for the purposes of working out control, the definition of 'control' is to be read as if the listed registered scheme is a listed company.

Regulation 4A emulates the framework for fees explained above for lodging a copy of the new or modified constitution of a listed registered scheme with ASIC under subsection 601GC(2) of the Corporations Act, where the constitution was modified or repealed and replaced as part of a control transaction in relation to the scheme. The value of the fee is determined according to the table at subregulation 4A(2), by reference to the threshold value of the lodgement.

Note that the new fee introduced by the Amending Regulations only applies to a control transaction in relation to *listed* registered schemes.

Determining the threshold value of a lodgement

The methodology for calculating the threshold value of a lodgement is set out at regulation 4C for control transactions in relation to a listed registered scheme.

Subregulation 4C(2) provides that, to calculate the threshold value for a lodgement under subsection 601GC(2) of the Corporations Act, a security is an interest in the listed registered scheme, other than an interest issued under the control transaction.

Subregulation 4C(3) provides that the threshold value of the lodgement for a control transaction in relation to a listed registered scheme is to be determined by multiplying the value of the consideration payable per security by the number of securities at lodgement, including any securities which are not acquired or cancelled under the control transaction. The value of the consideration payable per security is the cost for acquiring a security or for the cancellation of a security.

Subregulations 4C(4) and 4C(5) clarify that the value of consideration payable per security is to be determined by reference to that specific class of security. If there are 2 or more classes, subregulation 4C(5) clarifies that the total threshold value is calculated by adding up the threshold value of each class of securities as calculated under subregulation 4C(3).

The calculation must be determined by reference to the value of the consideration payable per security at the time of lodgement.

Similar to schemes of arrangement as explained above, aside from the stipulation about the time of calculation, the Amending Regulations are not prescriptive about how an acquirer should calculate the value of the consideration for the threshold value formula. However,

the intention is that the payer may have regard to the valuations of the consideration set out in the disclosure documents prepared for the purposes of a trust scheme to the extent relevant.

Where the consideration is in securities in a listed entity or securities in an unlisted entity, the intention is that the payer may rely on the value as at lodgement in a similar way as outlined above for schemes of arrangement.

Takeover bids

A takeover bid may involve a bidder lodging a compulsory acquisition notice under section 661B of the Corporations Act, or a notice to the remaining holders informing them of their right to be bought out under section 662B of the Corporations Act.

Subregulation 4D(1) provides that a fee is payable for lodging a notice under paragraph 661B(1)(b) of the Corporations Act relating to a compulsory acquisition of securities following a takeover bid. A fee is payable in these circumstances if the threshold value of the lodgement is equal to or greater than $10 million and the lodgement of the notice occurs between 1 January 2025 and 31 December 2027.

Subregulation 4D(2) sets out the table of the fee brackets for lodging a compulsory acquisition notice. The fee for a particular lodgement is to be determined with respect to the threshold value for the lodgement calculated pursuant to regulation 4F. The fee payable is not indexed for inflation.

The fee determined under subregulation 4D(2) applies together with the existing fee applicable to lodging a notice with ASIC under paragraph 661B(1)(b) of the Corporations Act, as imposed by item 135 of Schedule 1 to the Fees Regulations.

Subregulation 4E(1) provides that a fee is payable for lodging a notice under paragraph 662B(1)(b) of the Corporations Act relating to a notice to the remaining holders informing them of their right to be bought out following a takeover bid. A fee is payable in these circumstances if the threshold value of the lodgement is equal to or greater than $10 million and the lodgement occurs between 1 January 2025 and 31 December 2027.

Subregulation 4E(2) sets out the table of the fee brackets for lodging a notice to the remaining holders informing them of their right to be bought out. The fee for a particular lodgement is to be determined with respect to the threshold value of the lodgement calculated pursuant to regulation 4F. The fee payable is not indexed for inflation.

The fee determined under subregulation 4E(2) applies together with the existing fee applicable to lodging a notice with ASIC under paragraph 662B(1)(b) of the Corporations Act, as imposed by item 136 of Schedule 1 to the Fee Regulations.

Regulation 4G clarifies that any fee prescribed by the Amending Regulations for lodging a compulsory acquisition notice or notice of right to be bought out is in addition to any fees prescribed under Division 1 of Part 2 of the Fees Regulations for the lodgement. The fees prescribed under Division 1 of Part 2 of the Fees Regulation for lodgements are those indicated above in items 135 and 136 of Schedule 1 to the Fee Regulations.

Determining the threshold value of a lodgement

The formula for calculating the threshold value for a lodgement is set out at subregulation 4F(1). The value is determined by multiplying the value, at lodgement, of the consideration payable per security by the total number of securities in the bid class at lodgement which includes all securities in that class, even securities the bidder and its associates may already have a relevant interest in.

Subregulation 4F(2) provides that if 2 or more takeover bids, by the same bidder, for securities in the same target occur together, the total threshold value is calculated by adding the threshold values for each bid as calculated under subregulation 4F(1).

The calculation must be determined by reference to the value of the consideration at the time of lodgement.

Aside from the above stipulation about the time of calculation, the Amending Regulations are not prescriptive about how a bidder should calculate the value of consideration for the threshold value formula. However, the intention is that bidders may have regard to the valuations of the consideration set out in the takeover documents.

Where the consideration is cash in Australian dollars, the consideration is the amount of the cash sum. Where the cash consideration is in a foreign currency amount, the intention is for the value of the consideration to be the foreign cash amount converted to Australian dollars using the exchange rate as at the date of lodgement of the notice.

Where the consideration offered is securities in a listed entity, the intention is that bidders may rely on the market price at lodgement of the notice, for example the price as at the closing of the market on the day before the lodgement.

Where the consideration is securities in an unlisted entity, the intention is that the bidder may rely on the value as at the time of the lodgement of the notice and draw on supporting documentation (for example, an independent expert report). If the documentation puts forward a range of values, the intention is that the bidder may rely on the middle point of the range.

This is not to imply that a bidder needs to obtain an independent expert report merely for the purposes of calculating the threshold value under these regulations. In the absence of supporting documentation or an independent expert report, the intention is that a bidder can calculate the value of the unlisted securities based on their genuine assessment of what a willing but not anxious buyer would pay for that unlisted security.

Only one fee payable for arrangements involving multiple chargeable matters

Subregulation 4H(1) provides that for a control transaction in relation to a regulation 4 body that consists of more than one Part 5.1 arrangement, the fee is only be prescribed for one lodgement, and that no fee is prescribed for lodging copies of an order of approval of any of the other Part 5.1 arrangements in the relevant control transaction. This ensures the new fee is only payable once for any lodgement relating to a single takeover transaction and avoids scenarios where the fee is payable for every lodgement as part of a single control transaction that involves multiple Part 5.1 arrangements.

Similarly, subregulation 4H(3) ensures that where there are 2 or more takeover bids, by the same bidder, for securities in the same target occurring together – and a fee that is prescribed by the Amending Regulations for lodging a notice relating to one of the takeover bids is paid – then there shall be no further fee prescribed for lodging a notice in relation to any of the other takeover bids.

Subregulation 4H(2) likewise ensures only one fee is payable in a circumstance where a compulsory acquisition notice and a notice of right to be bought out are both lodged in relation to the one takeover bid.

Finally, subregulation 4H(4) provides that for an 'arrangement' which includes:

- 2 or more control transactions; or
- 2 or more takeover bids for securities in different targets; or
- a control transaction and a takeover bid;

a fee prescribed under the Amending Regulations is only payable in relation to one lodgement, despite the arrangement involving multiple lodgements.

An example is a control transaction or takeover bid in respect of stapled securities, which may involve the lodgement of an order of approval for a company and the lodgement of a modified or new constitution for a registered scheme.

'Arrangement' in this context is taken to have the same meaning as Chapter 7 of the Corporations Act (see section 761B).

ATTACHMENT B

Statement of Compatibility with Human Rights

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

Corporations (Fees) Amendment (Takeovers) Regulations 2024: Schemes and takeovers

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

Overview of the Legislative Instrument

The Legislative Instrument amends the *Corporations (Fees) Regulations 2001* to impose new and increased fees on the lodgement of documents necessary to implement certain takeovers of Australian entities. The new and increased fees better reflect the value to market participants of, and the cost to Government, for providing the framework facilitating takeovers transactions.

Takeovers generally follow statutory procedures governed by the Corporations Act which require the lodgement of documents with the Australian Securities and Investments Commission (ASIC). Most takeovers are effected by one of 2 methods:

- a members' scheme of arrangement – where securityholders vote at a court-ordered meeting on the proposed takeover (or its equivalent, a 'trust scheme', if the entity being acquired is a managed investment scheme); or

- a takeover bid – where offers are made to each individual securityholder to acquire their securities and the bidder is generally entitled to compulsorily acquire remaining securities after reaching 90 per cent ownership.

ASIC applies charges to lodgement of documents at various points of takeover procedures under its Industry Funding Model (IFM) framework. The new fees are not for cost-recovery purposes under the IFM; rather the fees are assessed by reference to the value of the consideration payable for securities in the target entity under the takeover.

For any document lodgement within scope of this Legislative Instrument, the value of the consideration payable determines the bracket for calculating the fee. The brackets range from $10 million to greater than $500 million, and the fee amounts range in value from $10,000 to $195,000. All fees are below the $200,000 limit imposed by paragraph 6(1)(a) of the *Corporations (Fees) Act 2001*. The new and increased fees are not subject to indexation for inflation.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.