

CCQ Exam Sample Notes

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Consumer Law Summaries

Consumer Guarantees

Manufacturers can only be pursued for ss54, 56, 58, 59

Define and Identify the Parties

- Is [P] a consumer?
- Is [D] a 'manufacturer'? (as defined in s7 ACL)
- Is [D] a 'supplier'? (S2)

Have the [goods/services] been supplied in 'trade or commerce'?

Are these [goods/services] excluded from Part 3-2?

Which guarantees for goods has [D] breached? Guarantee as to

1. title (s 51)
2. undisturbed possession (s 52)
3. undisclosed securities (s 53)
4. acceptable quality (s 54)
 - Was [P]'s attention drawn to unacceptable quality? (s54(4))
 - If goods are displayed for sale or hire (s54(5) applies satisfying s54(4))
 - Abnormal use or examination revealing unacceptable quality
5. Fitness for any disclosed purpose (s 55)
 - (i) Guarantee A: Disclosed purpose by consumer
 - Relying on skill and judgement of [supplier/manufacturer/representative] (s55(3))
 - (ii) Guarantee B: Supplier's representation as to fitness for purpose
6. supply of goods by description (s 56)
7. supply of goods by sample/demonstration model (s 57)
8. repairs and spare parts (s 58) - only applies to manufacturers
9. express warranties (s 59)

Which guarantees for services has [D] breached? Guarantee as to...

1. due care and skill (s 60)
2. fitness for a particular purpose (s 61) - architect or engineer
 - s61(3) no reliance or unreasonable to rely + s61(4) architect or engineer
3. reasonable time for supply (s 62)

What relief is [P] entitled to for the supply of goods?

1. For the supply of goods by suppliers
 - (iii) Option 1: Non-major failure and CAN be remedied
 - (iv) Option 2: Major failure OR not a major failure but cannot be remedied
 - (v) Claim for damages
2. For the supply of goods by manufacturers

What relief is [P] entitled to for the supply of services?

Unfair contract terms

1. Is this contract 'a **consumer contract** OR **small business contract**'? (as required by s23(1))
 - **RED FLAG**: Is number of employees < 20? **small business contract**
2. Is the contract a 'standard form contract'?
3. Is [insert term] an Unfair Term?
 - (i) Would [insert term] cause a 'significant imbalance'?
 - s25 (Exclusion Clauses, Unilateral Right to Vary, Disadvantage in Litigation, Penalty)
 - (ii) Reasonably necessary to protect [D]'s legitimate interests
 - **RED FLAG**: Different pricing packages
 - (iii) Detriment
 - Transparent (s24(2)(a))
 - **RED FLAG**: Where in contract is clause (plain language, legible, presented clearly, available)

UCC s21

. . .

Unfair Contract Terms

RED FLAG: Clauses in the question

Introduction

[P] may seek to take action against [D] pursuant to Part 2-3 ACL. s23 states a term of a **consumer contract** or a **small business contract** is void if (a) the **term is unfair** (in accordance with ss24 & 25); and (b) the contract is a **standard form contract** (in accordance s27). Unfairness is assessed at the time the contract was formed (*Kimberley Discovery Cruises* at [58]). As the contract is not of the type listed in s28(1)(a)-(d), Part 2-3 applies.

General notes:

- Look at the contract and ask if it is a **consumer contract** or a **small business contract** and whether it is a **standard form contract**.
- Step 1 and 2 relate to discussion around the contract. Step 3 relates to discussion around specific clauses.
- Look at specific terms: is the term unfair and can it be matched with one of the examples in s25.
- Part 2-3 = s23-28

s23(1) states a term of a **consumer contract** or a **small business contract** is void if:

- (a) the **term is unfair**; and (see ss24 & 25)
- (b) the contract is a **standard form contract** (see s27)

1. Is this contact 'a **consumer contract** OR **small business contract**'? (as required by s23(1))

Consumer contract: As the facts detail an individual consumer ([P]) accompanied by a business ([D]), the contract may be a **consumer** contract.

Small business contract: As [P] and [D] are business, the contract may be a **small business contract**.

1.1 Is this contract a **consumer contract**?

Yes —> See Step 2

No —> See Step 1.2

Model response: To be a consumer contract the contract must be for the supply of goods or service (s23(3)(a)) or a sale or grant of an interest in land (s23(3)(b)) to **an individual** whose acquisition of the goods, services or interest is wholly or predominantly for **personal, domestic or household use or consumption**.

LAW

s23(3): A **consumer contract** is a contract for

(a) a supply of goods or service; or

(b) a sale or grant of an interest in land;

to **an individual** whose acquisition of the goods, services or interest is wholly or predominantly for **personal, domestic or household use or consumption**

Q1. Does s23(3)(b) apply?

YES —> Go to Q3

No —> Go to Q2. Does s23(3)(a) apply?

[Yes/No]. This is because there is [a/no] 'sale or grant of an interest in land' (s23(3)(b)).

Q2. Does s23(3)(a) apply?

....

Step 2: Is the contract a 'standard form contract' (i.e. Boilerplate Contracts) (as required by s23(1)(b))?

Core terms v 'standard form' or 'boilerplate' (template) terms

- 'core terms' — dealing with price and product description
- 'standard form' or 'boilerplate' terms covering all other contract terms, including warranties, return of goods policies, privacy, indemnities, waivers, dispute resolution and choice of law or forum

Example: You buy a fridge for \$10k (price=core term), it may be stupid, but it's not unfair

Model response: As [P] would allege the 'contract is a standard form contract, it is presumed to be a standard form contract unless [D] ... proves otherwise' (s 27(1)). What is 'standard form' is not defined but s27(2) states in determining whether a contract is a standard form, a Court may consider matters it thinks relevant, but must take into account the following.

Sample application:

- This contract was solely drafted by [D] (s27(2)(b)) which indicates they had all the bargaining power (s27(2)(a)). The lack of negotiations (s27(2)(d)) between [P] and [D] suggests the contract was presented on a 'take it or leave it' basis (s27(2)(c)). Further, the contract terms do not take into account specific characteristics [P] (s27(2)(e)).
- This contract was drafted by [D] and [P] (s27(2)(b)) which indicates the bargaining power was distributed between both (s27(2)(a)). The presence of negotiations (s27(2)(d)) between [P] and [D] suggests the contract was presented on a 'take it or leave it' basis (s27(2)(c)). Further, the contract terms do take into account specific characteristics [P] because [insert reason] (s27(2)(e)).

Furthermore as the court can consider other matters (s27(2)(f)), they will likely take into account that all [insert consumers/small business] were offered the same contract when entering into [insert contract] without any modification. Ultimately, the contract is a standard form contract.

Step 3: Is [insert term] an Unfair Term?

Section 24(1) states a term of a consumer contract or small business contract is **unfair if** (a) it would cause a **significant imbalance** in [P] and [D]'s rights; **AND** (b) it is **not reasonably necessary** in order to **protect the legitimate interests** of [P]; **AND** (c) it would cause **detriment** to [D]. This step involves a discussion of each individual clause to establish whether they are unfair. The onus is on [P] to prove (a) and (c) (*Chrisco Hampers* at [43]) whereas [D] has the onus of proving (b).

Applying s24(1) to [insert term]

3.1 Would [insert term] cause a 'significant imbalance'? (s24(1)(a))

Yes—>See 3.2

No—> Assuming I am wrong, See 3.2

Model introduction: There will be significant imbalance if “a term is so weighted in favour of the supplier as to tilt the parties’ rights and obligations under the contract significantly in its favour” (*ACCC v CLA Trading*) ‘Significant ...means “sufficiently large to be important” (See *CLA Trading; Jetstar* at [104]-[105]).

Option 1: Clause impacts [P]

Clause [X] is grossly unequal because **[insert logical reasons from facts]**.

Option 2: Clause impacts [D] and [P]

This term is not grossly unequal because both [D] and [P] are equally restricted by this clause. However, this contract as a whole (s24(2)(b)) is standard form because it was drafted by [D]. This means it is unilaterally favouring [D]'s interests, clause [X] is potentially grossly unequal. Moreover, clause [X] is grossly unequal because **[insert logical reasons from facts]**.

Mirror image test:

Model introduction: The mirror test (whilst not holding legal weight) considers that if [D] has protections but [P] does not a significant imbalance may exist.

Option 1: No equivalent protection under another term

....

3.2 Is [insert term] reasonably necessary to protect [D]'s legitimate interests? (s24(1)(b))

Yes—>See 3.2

No—> Assuming I am wrong, See 3.2

Introduction: It is presumed that [insert term] is not reasonably necessary to protect legitimate business interests, unless [D] proves otherwise (s24(4)). Was there an actual legitimate business reason for having clause [X] in the contract (*Jetstar*)? A broad view of what is considered legitimate interests is taken and a “legitimate interest may not be purely monetary” (*Paciocco*). A legitimate interest may be “intangible and unquantifiable” such as an interest in contractual performance (*Paciocco*).

Sample response: No legitimate interests

On the facts, there is nothing to suggest there is a legitimate interest of [D] to have this term [X] included and the ACCC could even argue that this term is actually unnecessary because [insert reason].

Two price packages

RED FLAG: different pricing packages on the facts.

Just like in *Jetstar*, [D] is offering two different pricing options and that suggests that this term requiring [insert requirements] is actually protecting illegitimate business interests by way of making [contract 1] appear more appealing than [contract 2]. If this clause was not included in [contract 1], [consumers/small businesses] would not enter into it (cf to how in *Jetstar* it was in Jetstar’s interest to have a fee for booking changes on its cheaper ticket because this made its more expensive ticket, with the ability to change bookings without a fee, more alluring to customers). On these facts ...

Issue: Parts of term protect its legitimate interests but some do not

Principle: Even if a supplier can show that parts of a term protect its legitimate interests, if other parts of the term are not reasonably necessary, the entire term may be void (*CAV v Backloads.com*)

Markets, Market Power and Competition

Introduction

Note: Skip for discussion of exclusive dealing

A discussion of (1) how market definition and (2) market structure is relevant for determining if a SLC has occurred. These two elements will demonstrate whether [D]'s [insert conduct]

- acquisition of shares/assets in [company 2] [**inside/outside**] Australia (**s50 + 50A**)
- agreement pursuant to s45
- refusal to deal/tying/bundling/predatory pricing (s46)
- exclusive dealing (s47)

is anti-competitive and prohibited by the CCA. s2 states 'the object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.' SLC is the conditional prohibition, which if satisfied, will restrict [D]'s conduct under [s50/45/46/47].

Note: Cartel conduct (s45AA-s45AR) and RPM (s48) are prohibitions per se.

Step 1: Discuss other area of notes

Step 2: How is the 'market' defined?

Note: If given two markets on the facts, ACCC will argue they are separate whereas [P] will argue they are combined and is broader

- This step involves determine what products/services are within or outside the market (it does not relate to competitors)

Model introduction: When determining whether [conduct] has or is likely to have the effect of SLC, both [Plaintiff/the ACCC] and [D] may try to define the market differently. Defining a market involves 'value judgments about which there is some room for legitimate differences of opinion' (*Flight Centre at 156*). s4E CCA states a 'market means a market in Australia' and when market is 'used in relation to goods or services, [the market] includes a market for **those goods or services** AND other goods or services that are **substitutable for** ... or ... competitive with the **first-mentioned goods or services**' (see also *Queensland Wire at 188*).

Sample response: Market is not contentious

On these facts it does not appear contentious that the market will be defined as the [insert market e.g. Melbourne cinema market].

- The size of the market (broad or narrow) is determined by how the market is defined (STEP 2).
- The level of competition (high or low) is determined by the structure of the market (STEP 3).

Market Dimensions: how to physically define a market?

Model Introduction: The following 4 market dimensions require consideration to define the market ([QCMA](#)).

(1) Product Market (see above):

Model response: The product dimension refers to 'the types of services supplied' ([Flight Centre](#) at 156). In defining the product dimension of the market, the (1) Small but Significant Non-Transitory Increase in Price (SSNIP) test, (2) cross elasticity of demand and (3) demand and supply substitutions require consideration ([Cellophane](#); [QCMA](#)).

Sample response

The ACCC will attempt to define the product market narrowly to [insert disputed good e.g. the beer market] whereas [D] wants to define the market broadly to the [insert wider market e.g. the alcohol market] which encompasses substitutes such as [insert substitutes e.g. cider] (cf [Tooth & Toohey](#) arguments for market being beer or alcohol).

Question to answer yourself:

- What is being sold/are there any substitutes? If there are substitutes, which products are close substitutes for the product in question?
- Give regard to existing and potential product substitutes and competing players in the market

(1) SSNIP Test ([Metcash](#))

The SSNIP test considers whether a slight price increase (5% per [Merger Guidelines](#)) of

- [D]'s [insert product]
- [narrowly defined good e.g. craft beer]

would cause a considerable number of customers to substitute it for a different product with a similar function?

Model response:

As a slight price increase of [insert D's product e.g. beer] [**would not/would**] cause a considerable number of customers to substitute it for a different product with a similar function (such as [insert substitute e.g. cidar])

- the two products are not mutually substitutable and therefore **do not compete** in the same market (s4E CCA; cf no banana substitute in *United Brands*).
- [insert substitute e.g. cidar] is a substitute. Therefore, the two products **compete** in the same market (s4E CCA; contrast to no banana substitute in *United Brands*).

Different between Cross-Elasticity and SNIIP

Cross Elasticity considers **increases** and **decreases** (**big/small** increases and decrease) whereas SSNIP considers only **small increases**.

(2) Cross-Elasticity of demand (*Boral*)

Change in price of disputed goods

Increase in disputed products' prices

Model response: If the price of [insert disputed product e.g. cellophane] was to be slightly increased over a long period of time...

- a **considerable** number of customers of [insert disputed product e.g. cellophane] would switch to [insert substitute market eg flexible wrappings]. Thus, a **high** cross elasticity of demand exists between the interchangeable products, that the products **compete in the same** market (s4E CCA; cf pencils and pens: *Queensland Wire*).
- customers would continue to purchase [insert disputed product e.g. cellophane] given [it is rare/there are no substitutes available/loyal customers]. Thus, a **low** cross elasticity of demand exists between [insert disputed product e.g. cellophane] and any substitutes. Therefore, the products **do not compete in the same** markets (*Cellophane*; s4E CCA; **contrast to** pencils and pens: *Queensland Wire*) and [insert disputed good e.g. cellophane] represents the entire market.
- If slight increase in price = **large** amount of customers of disputed goods would **switch** to substitute = disputed goods and substitutes are in **same** market
- If slight increase in price = **no customers** of disputed goods would **switch** to substitute = disputed goods and substitutes are in **different** market

(3) Demand and Supply Substitutes:

Demand substitutes

Aligned with the discussion of cross elasticity above, if prices of [insert disputed good e.g. beer] go up, it [is/is not] likely consumers will buy something else (such as [insert substitute e.g. cider]).

Supply substitutes

ASK: How easy is it for another supplier to enter the market of [insert disputed goods]?

Model response: Products are in the same market if a firm can readily switch production from one product to another (*Fortescue*). Applied here, it is [likely/unclear/unlikely] firms making/providing [insert substitute e.g. cider] could enter the [insert disputed goods e.g. beer] market if prices of [insert disputed goods e.g. beer] was slowly and slightly increased. This is because entering into the [insert disputed goods e.g. beer] market [would not/would] require a complete change of operations. Hence, the market is likely to be [broad/narrow] and encompass the [insert broad/narrow market e.g. alcohol or beer] market.

- E.g. If all current producers of product e.g. electric toothbrush increased prices by 5-10%, how long until drill manufacturers started producing electric toothbrushes
- E.g. How easily can a company change their operations to make a product which is a substitute e.g. how easily can a co swap from making pencils to pens

(2) Functional Market:

...

(3) Geographical Market:

...

(4) Temporal Market:

...

Conclusion re market definition:

I opine the Court will accept [D/the ACCC]'s [broad/narrow] market definition: the [insert broad/narrow market e.g. alcohol/beer] market].

Step 3: How competitive is the market?

- This step involves determining how much market power [D] has.
 - High level of competition in a market = low market power for [D]
 - Low level of competition in a market = high market power for [D]

Model introduction: Market power is 'the ability of a firm to raise prices above the supply cost without rivals taking away customers in due time' (*Queensland Wire*). How much market power [D] has will determine if their conduct results in a SLC in the market. The level of competition in a market OR the level of market power [D] has, is determined by the market structure (*QCMA*).

What is the market structure?

Model introduction: [Plaintiff/The ACCC] will argue the market is not very competitive whereas [D] will argue the contrary. In order to determine whether a market is competitive, the Court will consider 5 elements of market structure; discussed below, the second is most important and first is second most important (*QCMA at 189*).

(1) Number of competitors in the market and their market share

On these facts, there are [insert low/high] number of firms in the market ([insert list of firms]) and the market share of them are [insert market shares], respectively. This market is thus [concentrated/non-concentrated].

In conjunction with these market shares, [D]'s market share would become [very/moderately/not] large (i.e. [insert market share]) and is [comparable/distinguishable] to Arnotts whom had 80% of the biscuit market after the merger: *Arnotts*.

As there are [many/few] firms, [D]'s market share is [less/more]. Thus, the market is [more/less] competitive and [D] has [less/more] market power.

If [D] has a large market share

On these facts [D] has a large market share. Whilst large market share may 'be evidence of market power', one must also consider 'the ease with which new competitors can enter the market' (*Queensland Wire*). It is only when there are high barriers to entry in a market that a firm can genuinely have market power.

(2) Barriers to entering the market

How difficult is it for new firms to enter market and secure a viable market share? If a market has low barriers to entry, there will be potential competition even if there is no *actual* competition (*QLD Wire*).

Applied here, the market is [easy/difficult] to enter (i.e. barriers to enter the market are [low/high]) because of ...

1. ... [a lack/the existence] of **legal/regulatory barriers in the form of** [insert legal barrier e.g. IP rights, licensing conditions e.g. food/limits on the number of market participants, environmental regulations] (*Tooth and Tooheys*; cf regulatory barriers in *Baxter*)
2. ... [a lack/the existence] of **barriers to exit**, specifically high 'sunk' costs (*Baxter*)

....

Therefore, since the market is [easy/difficult] for new competitors to enter the market, the market has [more/less] potential competition and [D] has [less/more] market power. [D] [could not/could] increase prices above the competitive level without constraint.

Mergers

Introduction

- Option 1: As the **merger** has **already occurred**, authorisation cannot be granted for the merger (ss88(1);(6)) to remove the risk of legal action under s50 for [D] (s88(2)(a)) and notification cannot be provided.
- Option 2: As the **merger** has **not already occurred**, I recommend [P] seek authorisation for the merger (ss88(1);(6)) or provide notification informing the ACCC of their intention to engage in this conduct. If the ACCC grants authorisation, this removes the risk of legal action under the competition provisions for [D] (s88(2)(a)). Unless the ACCC revokes this notification, [D] will have permission to engage in the aforementioned conduct.

[D]'s acquisition of [company]'s [shares/assets] by [D] may be anticompetitive and therefore in breach of s50.

Model introduction: Section 50[(1)/(2)] states 'a [corporation/person] must not **directly or indirectly**' 'acquire shares in the capital of a [body corporate/corporation]' (s50(1)(a)) or acquire any assets of a [person/corporation]' (s50(1)(b)) if the acquisition would have the effect, or be likely to have the effect, of [SLC] in any market (s50(1)). 'The application of s 50 requires a single evaluative judgment' (*Pacific National* at [246]).

Difference between s50(1) and (2): Who the acquirer is: s 50(1) covers acquisitions by corporations, s 50(2) covers acquisitions by individuals and entities ≠ corporation.

Different mergers

Horizontal - merger between 2 firms at same functional level (e.g. retailer and retailer)

Vertical - merger between 2 firms operating at different functional levels of the same vertical supply chain (e.g. retailer and manufacturer or wholesaler and manufacturer)

Conglomerate - merger across entirely different products (e.g. a mobile phone company and acquiring vacuum cleaning company) - very difficult to show a SLC

S50 Prohibition of acquisitions that would result in a substantial lessening of competition

(1) A corporation must not **directly or indirectly**:

- (a) **acquire shares** in the capital of a body corporate; or
- (b) **acquire** any **assets** of a person;

if the acquisition would have the **effect, or be likely to have the effect**, of **substantially lessening competition** in any market.

(2) A person must not **directly or indirectly**:

- (a) **acquire shares** in the capital of a corporation; or
- (b) **acquire** any **assets** of a corporation;

if the acquisition would have the **effect, or be likely to have the effect**, of **substantially lessening competition** in any market.

(6) In [s50] section: **market** means a market for goods or services in: (a) Australia; or (b) a State; or (c) a Territory; or (d) a region of Australia.

Elements of a s50 claim

Step 1: Has [D] 'acquire[d]' [**shares/assets**]?

Model response: For the purposes of s50[(1)/(2)](a)...

Continued model response (**shares**)

...section 4(4)(a) states 'the acquisition of shares in the capital of a body corporate ... [refers to] acquisition, whether alone or jointly with another person, of ... legal or equitable interest in ... shares'. These shares prima facie satisfy the definition of shares in s4(1). Applied here, there has been an acquisition of the [**legal/equitable**] interest in shares in the capital of [**insert company 2**]...

- ...alone.
- ...jointly with [insert third person].

Continued model response (**assets**)

...section 4(4)(b) states 'the acquisition of assets of a person ... [refers to] acquisition, whether alone or jointly with another person, of ... legal or equitable interest in ... assets' and is not an 'acquisition by way of charge only or an acquisition in the ordinary course of business'. Applied here, there has been an acquisition of the [**legal/equitable**] interest

in assets (i.e. [insert assets]) of [insert company 2] and this acquisition has not occurred 'by way of charge only or ... in the ordinary course of business' (s4(4)(b)).

Ordinary course of business example: A bank or superannuation fund which commonly acquires assets in its day to day operation)

Has there been a partial acquisition of [shares/assets]?

Note: if we need more information state so!

RED FLAG: Number of shares is not specified e.g. co A bought a **substantial** number of shares from co B'

Yes → Consider *Brisbane Gas*

No → See Step 3

Model response: On these facts, there [has/has not] been a partial acquisition of [shares/assets] because [insert reason e.g. Co A only acquires 40% of shares in Co B, Co acquired all shares in Co B]. ...Even where only some [shares/assets] are acquired, the acquisition may be anticompetitive. What need be asked is whether the amount of [shares/assets] purchased by [D] from [insert company 2] is enough to impact the market (*Brisbane Gas*). *Brisbane Gas* stands for the principle that Courts take a pragmatic view of how much the partial acquisition will impact competition. The *ACCC Merger Guidelines* expressly acknowledge the possibility that acquisition of less than a controlling interest may result in a SLC.

Example of pragmatic approach: A 40% acquisition could effectively give someone a controlling interest depending on the spread of the other shares or it could be a drop in the ocean if the other shareholder owns 60%

Option 1: Purchase more than 50% of shares/assets

As [D] has purchased [>50% e.g. 70%] of the [shares/assets] in [insert company 2], [D] can be said to have control over [insert company 2] by way of majority voting power. Therefore, this partial acquisition is sufficient to impact competition.

- Now, the following question need be asked.

Option 2: Purchase less than 40% of shares/assets

As [D] has purchased [<50% e.g 40%] of the [shares/assets] in [insert company 2], whether [D] can be said to have control over [insert company 2] will depend on how the remain [insert % e.g. 60%] share is distributed.

Option 2.1: How the remaining assets are distributed is unclear (insufficient)

It is unclear how the other [insert % e.g. 60%] of [insert company 2] is held. [Assuming/As] all the shares have equal voting rights, if the remaining [insert % e.g. 60%] is held by one entity, [D] would not have control.

Option 2.2: The remaining assets are widely spread (sufficient)

...

Option 2.3: The remaining assets are held by one entity spread (insufficient)

...

Step 2: Has the acquisition of [shares/assets] been made 'directly or indirectly'?

RED FLAG: Subsidiary of [D] purchased company

Mention if relevant option to purchase shares

The option to purchase shares for value creates an equitable interest. This means that a share option agreement would be caught by s 50 as an acquisition (*TPC v Arnotts Biscuits*).

Directly:

...

Indirectly:

Agent/Trustee

...

Subsidiary

Likely yes. The subsidiary company of [D] (i.e. [insert subsidiary]) has purchased [shares/assets] in [insert company 2]. There is competing case law about whether a purchase by a subsidiary of a holding company is either the indirect purchase of the holding company (view 1) OR the direct purchase by the subsidiary (view 2) (*Gillette*). In other words, whether this purchase by [insert subsidiary] constitutes [shares/assets] being 'indirectly' (s50[(1)/(2)]) acquired is unsettled.

The first view is that a subsidiary (i.e. [insert subsidiary]) purchasing [shares/assets] involves an indirect acquisition on behalf of a parent company (i.e. [D]) in the same way as an agent or trustee (*Gillette*). The ACCC will favour this view.

The second view is that ...

In my opinion, the second view ignores ...

For the purposes of this analysis, in my opinion, [insert subsidiary] acquiring [shares/assets] is an indirect acquisition for [D].