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Competition Taskforce
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To Whom It May Concern

Submission on Merger Reform consultation paper – November 2023

The Property Council of Australia (the Property Council) welcomes the opportunity to respond to the Competition Review Taskforce's consultation paper (the paper) on options for modernising Australia's merger regulation.

The Property Council is the peak body for owners and investors in Australia's \$670 billion property industry. We represent owners, fund managers, superannuation trusts, developers, and investors across all four quadrants of property investments: debt, equity, public and private.

The Property Council recognises that fit-for-purpose regulation for mergers is crucial to maintain competitive markets, reduce the abuse of market power and protect consumer interests. The Property Council recognises that any merger regime is ultimately a balance between priorities including promoting business growth and competition, considering economic efficiencies and market dominance, and weighing consumer and corporate interests.

The Property Council recommends that the Competition Review Taskforce strongly consider the impacts that a mandatory, suspensory regime would have upon the institutional property sector, and clarify what impacts a new regime would have on day-to-day business activity, including the sale and acquisition of property, particularly between Real Estate Investment Trusts (REITs).

If a new regime captures the institutional property sector, the Property Council would support formalising the merger control regime, with a mandatory, non-suspensory notification above a specific transaction value threshold, alongside the maintenance of the merger authorisation function. If a new regime is to be suspensory then there is a critical need for a well-defined formal notification waiver process for non-contentious transactions, particularly as they apply in the real estate sector.

This submission outlines impacts to the real estate industry of the options presented in the paper, in particular the Australian Competition and Consumer Commission's (ACCC's) mandatory, suspensory clearance model, as well as a range of specific matters such as mandatory notification thresholds, the application of a 'call-in' test, timeframes for consideration by the regulator and the cost of filing fees.

The case for reforming the merger control process

As expressed in the paper, there is a lack of comprehensive statistical evidence demonstrating a link between Australia's merger control regime, industry concentration and market outcomes in Australia.¹

Without comprehensive, evidence-based research a case has not been established to change Australia's merger control process.

The paper rightly investigates international precedent for changes to the process, to align to systems implemented in Europe or North America, however it doesn't acknowledge the unique legislative and regulatory environment in Australia, and how mergers are practically undertaken in this jurisdiction as opposed to overseas.

Further to this, the Australian commercial real estate sector in particular shows limited evidence of market concentration and this should be taken into consideration when formulating policy settings.

The Property Council strongly recommends that Treasury, supported by the Competition Review Taskforce, the ACCC and the Australian Bureau of Statistics undertake an appropriate root-and-branch review of Australia's historical merger regime and market concentration in the property industry to better understand the national context and what problem - if any - requires a further regulatory response.

Impact on competition and productivity

The paper reflects on declining productivity in the Australian economy and posits that a range of competition indicators such as industry concentration, incumbency and firm mark ups are evidence that the current merger control process is flawed or broken.

The Property Council cautions against an overreliance on productivity growth as evidence for a further regulatory response. It is accepted that poorly designed regulations for mergers can negatively impact on labour productivity, such as regulations that inadvertently allow oligopolies to take place, that reduce competitive pressures and the associated productivity improvements.

However, in the same manner, a poorly designed regulatory environment where time-and resource-consuming processes hamper decision-making and further frustrate non-contentious transactions also negatively impacts on dynamism and economic outcomes.

The Competition Review Taskforce must strongly consider the double-edged sword that any new merger control regime may entail for productivity - theoretically preventing some anti-competitive mergers on one end, but damaging the overall economy through delay and over-regulation.

It is well established that the property industry is highly sensitive to delays, including the opportunity cost of capital commitments, market sensitivities and fluctuations, financing costs and the erosion of investor and shareholder confidence.

¹ The Treasury. (2023). *Merger Reform Consultation paper, November 2023*, p 12

The Property Council submits that a mandatory, suspensory notification regime with significant filing costs will suppress competition and transaction values, with buyers needing to factor in the risk of adverse movements to the cost of capital during this period.

A reduction in competition and transaction values would adversely affect the value of assets, and the paper does not address the impacts this would have on revenue authorities at the State or Federal level which charge ad valorem duties and taxes.

Impact on the bid process and market distortions

To better assess the policy options presented in the paper, further research into the impact of each proposal on the bid process and market distortion is required.

Suspensory regimes by definition impact and diminish competitive advantage. In the property industry the competitive advantage one entity may have over another can be lost due to a delay in realising transactions, where market conditions can change significantly over a short period of time.

Market speculation associated with mergers is further exacerbated when entities are delayed in completing transactions.

Ultimately, some entities will be deterred altogether from the merger process where uncertainty occurs, particularly around timing and delays, having flow on effects to competitive tension in the market and driving down asset values.

A regulatory framework that favours certain entities, business models or transactions over others distorts the market and creates an uneven playing field.

The worst impacts upon the market and bid process can be avoided by the implementation of a non-suspensory regime; allowing market participants to not be disadvantaged while undertaking a transaction or bidding, able to complete transactions in the most efficient manner for the parties involved.

Increased regulatory costs and administrative burden

The move to a mandatory notification regime would represent a significant additional administrative burden and associated regulatory costs for the property industry.

Without sufficient detail on what information would be necessary to satisfy an application, it is difficult to quantify the direct financial impact on entities, however it is important that the Competition Review Taskforce recognises that any change to the merger control process (and associated administrative burden) does not exist in a policy vacuum.

The Taskforce must review the broader corporate governance and regulatory requirements that have been placed or proposed on industry in recent years, particularly the institutional property sector. These include, for example but not limited to, proposed climate-related financial disclosures, proposed expansion of the anti-money laundering and counter terrorism financing regime, and amendments to the ASX Listing Rules and ASX Corporate Governance Principles and Recommendations, among others.

As an example, the European Union's *Commissioning Implementing Regulation (EU) No 1269/2013* defines the information that notifying parties must make in their application, not limited to

worldwide, EU and member state-turnover, information on affected markets including the size of the market (in each affected jurisdiction), their market share and that of their competitors.

These requirements, if they were to be implemented in a mandatory regime in Australia, would represent a significant additional information burden on entities and the Competition Review Taskforce must consider the financial impacts on entities and the longer lead times required to fulfil them. Further to this, in the context of real property, it has not been established what regulatory benefit (if any) would be achieved by having regard to participant's information from activities outside of Australia, when considering competition in Australia.

Reversal of the onus of proof

Further to the information burden that will be placed on entities by a new regime, the proposed mandatory process reverses the onus of proof towards merging parties and away from the regulatory authority, being the ACCC.

This reversal is highly significant and is not sufficiently addressed in the consultation paper.

The paper states that most mergers do not raise competition concerns. In 2021, former ACCC Chair Rod Sims stated that "1-2 per cent of acquisitions considered by the ACCC are likely to be contentious and may ultimately be opposed."²

Whereas, using the ACCC's own data, 98-99 per cent of mergers are not contentious and are not opposed, the proposed new regime would create a new presumption that all mergers are considered damaging to competition and the economy until proven otherwise.

The ACCC's own data shows this presumption is demonstrably false, and the reversal of the onus of proof represents a radical policy shift that requires a significantly greater explanation by the ACCC and Treasury for their rationale.

Characteristics of a new merger control regime

The Property Council has identified five specific characteristics of a new merger control process which would determine whether the regulation was fit-for-purpose for the property industry and would represent some of the most significant matters which would determine industry's capacity to support the introduction of a new regime. These are:

- Thresholds for mandatory notification
- The test applied to "call-in" a merger under the threshold
- Timeframes for consideration by the regulator
- The cost of filing fees, and
- Notification waiver process.

Thresholds for mandatory notification

The ACCC has suggested, based on its preliminary analysis, that a threshold for mandatory notification could be set as either:

- Acquirer or target turnover threshold of \$400 million, and/or

² Sims, R. (2021). *Protecting and promoting competition in Australia keynote speech* [Transcript]. Retrieved from <https://www.accc.gov.au/about-us/media/speeches/protecting-and-promoting-competition-in-australia-keynote-speech>

- Global transaction value threshold of \$35 million.

The impact of these thresholds, in terms of the information and regulatory burden they will place on the property industry, will be determined by the granularity and breadth of the disclosures that need to take place.

In practice, these thresholds would represent a significant number of transactions in the institutional property sector. Due to the nature of the property industry and the sum of capital that is used in transactions and mergers, it will be disproportionately affected by a global transaction threshold of \$35 million, as posited in the ACCC's proposal.

The Property Council accepts that it is not a preferable policy outcome to have different thresholds for different industries or asset classes, however this may be a potential way to ameliorate the disproportionate impact on the property industry, alongside the consideration of significantly higher thresholds and a well-defined and efficient notification waiver process for the property industry.

The test applied to 'call in' a merger under the threshold

It is not clear in the paper what precise test will be applied by the ACCC in their proposal to 'call in' a merger under the mandatory notification threshold.

The ACCC's March 2023 proposal for merger reform states that "where a transaction does not meet the notification thresholds, but nonetheless raises potential competition concerns, the ACCC could exercise its discretion to 'call in' the transaction so it can be assessed in the formal regime."³

The key issue in the ACCC's proposal is the application of discretion. In the current informal merger regime, the ACCC maintains broad discretion in the matters it considers anti-competitive and as such initiates court action against. The Property Council understands that this one of the most broad and undefined discretion amongst the jurisdictions referred to in the paper.

In the formalisation of the merger control process, any proposal must clearly define the call in power, including guidelines and principles by which it can be used, as well as mandating the public reporting of its reasoning and methodology for doing so.

The call in power represents uncertainty for the property industry, which affects the capacity of industry to do business. For example, for those mergers that fall under the threshold, any existing compliance and regulatory costs would already be priced into any transaction.

In the case where the ACCC - of its own discretion - 'calls in' a merger for additional scrutiny, the subsequent delay, additional filing fees or a combination of other factors could render a transaction unfeasible. Industry needs certainty to conduct its business efficiently and effectively, and a clearly defined call in power is central to this so it can be priced and accommodated accordingly.

³ Australian Competition and Consumer Commission. (2023). *Outline to Treasury, ACCC's proposals for merger reform*, p 9

Timeframes for consideration by the regulator

The Property Council is not proposing specific statutory timeframes if a mandatory, suspensory process was to be established. Appendix D of the paper outlines a number of options defined in days, working days, weeks and months.

The central concern for the property industry is that the ACCC is appropriately resourced by government to conduct its regulatory responsibilities in a timely manner, and that any extensions to the timeframe for consideration should be rare and not the norm.

The Property Council also notes that even if a regime is not suspensory, the threat of potential recourse or the initiation of an inquiry by the ACCC has a similar effect on business, that is until they are 'cleared' by the ACCC (either formally or informally) the property industry would be impacted on its ability to conduct its business and finalise a transaction.

The Property Council strongly recommends that timeframes for consideration are reflected as best practice in the international market (i.e. as short as possible), so as to limit the negative impact on entities and on Australia's global competitiveness.

The cost of filing fees

Associated taxes, fees and charges represent the single greatest impact on the viability of any transaction in the property sector. Under the cost recovery principles expressed in the paper, a review could cost the entities involved in a merger upwards of \$350,000 per transaction.

The Property Council strongly recommends that any amendments to the merger control process do not place additional costs on doing business, and any reviews should be funded from general tax revenue. The fast pace of change in the tax and charges landscape is already impacting on the competitiveness of the property sector in Australia for international capital, not limited to the proposed changes to Thin Capitalisation rules and the need to reform withholding tax rates for Managed Investment Trusts (MITs).

The existing regime allows entities to, on their own advice, undertake a merger authorisation application at a cost of \$25,000. Conversely, the proposed mandatory and suspensory regimes would place the overwhelming financial burden of the regulatory change on the 98-99% of mergers that - according to the ACCC - do not represent a risk to competition.

Notification waiver process

A well-formulated, robust and swift notification waiver process will be vital in any changes to the merger control process, to ensure that non-contentious mergers are cleared expeditiously.

The ACCC's proposal states that the "...process could have a short timeframe, require less upfront information and adjusted fees."⁴ It is the Property Council's strong view that this should be the norm, not an exception to a merger control process.

The Property Council would support a process that enables the institutional property sector to more efficiently navigate the merger control regime - it would need to have the capability to meet the needs of industry, be consulted on closely and be amendable to ensure it remains fit-for-purpose.

⁴ Australian Competition and Consumer Commission. (2023). *Outline to Treasury, ACCC's proposals for merger reform*, p 9

An effective notification waiver process would greatly reduce the impact of a mandatory, suspensory regime, in particular time delays and filing fees, but only if the threshold of what transactions are eligible for a notification waiver is institutionalised, well-defined and broadly understood by industry.

Following this review, if the Government chooses to reform the merger control process, then Treasury must engage with the Property Council and industry immediately to ensure the notification waiver process is central to the development and implementation of a new regime.

The Property Council would welcome the opportunity to discuss this submission in more detail. Please reach out to Dan Rubenach, Policy Manager at drubenach@propertycouncil.com.au to arrange a meeting.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Antony Knepe', with a small dot at the end.

Antony Knepe
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