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To Whom It May Concern

Mergers and acquisitions reform – exposure draft legislation

The Property Council of Australia (the Property Council) welcomes the opportunity to respond to Treasury's exposure draft of the *Treasury Laws Amendment Bill 2024: Acquisitions* (the proposed reforms).

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 industry is the country's second largest employer, representing a direct gross domestic product (GDP) contribution of $232 billion, or 10.6 per cent of total GDP, as well as 18.2 per cent of total tax revenues totalling $129.6 billion.

Our industry is particularly sensitive to changes in the mergers and acquisitions control regime due to three factors: the value, the volume and the frequency of transactions which take place across the spectrum of residential and commercial assets.[1]

A control regime which creates barriers to entry or expansion in the property market, stymies potential deals and diminishes economic activity damages not just the property industry but the broader economy and prosperity of Australia.

How uncertainty and delays impact industry and the economy

The Property Council's submission on the November 2023 consultation paper outlined a number of impacts that a poorly calibrated and restrictive merger control regime would have on the property industry, including the impact on the competitive landscape and productivity, as well as the distortion of the market and the bid process.

We are unable to quantify the precise impact of the proposed reforms without the context of the notification thresholds. However, in its 2023 submission to Treasury, the Australian Competition

[1] Property Council commentary in no way applies to shopping centre or retail matters, only to other commercial assets.

and Consumer Commission (ACCC) proposed an acquirer or target turnover threshold of $400 million and a transaction value threshold of $35 million, and we can provide an assessment based on these figures.

Over the past ten years, over 2,900 property transactions have taken place in Australia which would exceed a transaction threshold of $35 million, or an average of 290 per year.[2] These transactions alone would almost exceed the number of total transactions that Treasury has stated the regulator would look at each year, being 300.

We understand that other submissions may refer to a higher number of transactions above a $35 million threshold. As such the figure used in this submission should be considered a minimum, conservative estimate.

Case study: REIT
As an example, an Australian Real Estate Investment Trust (REIT) with a turnover over $400 million has made at least 40 transactions in the past 10 years over $35 million.

With the proposed reforms there would be a substantial impact on the day-to-day running of the business, further than just the significant regulatory burden of dealing with a protracted competition review process, including the demand on staff or the additional cost of external advisers.

Delays of up to 120 business days (24 weeks) for a Phase 2 in depth review, 170 business days (34 weeks) for a substantial public benefits determination or 230 business days (46 weeks) for a Tribunal determination represents a material risk to the business's operations and the financial performance of the group.

With development or acquisition plans delayed there are revenue impacts and cost implications. Project related expenses including holding costs continue to grow the longer the delay. These costs are borne by the acquirer and vendor, not the regulator, and there is the potential for deterioration in the value of an asset where development is slowed or neglected.

As property values are particularly sensitive to interest rate changes, any delays associated with Phase 2 determinations and further reviews would increase the risk of broken transactions.

With at least 40 transactions over 10 years subject to these reviews, the costs would not be immaterial and would impact directly on the product they deliver, whether that is new commercial and industrial developments to meet the growing economy or delivering much needed housing supply.

Issues with project financing and slowed development timelines lead to a lower delivery capacity, directly impacting jobs and dampening economic activity.

Broader impacts on the economy
More broadly, the risk of these delays deters domestic and foreign investors from considering Australian real estate as we compete in a global environment for capital where time is one of the greatest costs to projects.

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[2] Data provided by MSCI, property transactions in Australia over 10 years above $35 million.

Australia has a diverse range of domestic and foreign owners, each with different priorities and aims. However, with reduced interest from investors, and the risk of conducting a transaction is greatly increased, there would be a marked reduction in transaction volumes and subsequent drop in market liquidity.

Lower liquidity leads to poorer outcomes for investors, such as shareholders and superannuation funds, and impacts on their returns, capacity to finance and raise capital, and ultimately influences investor behaviour and risk appetite.

For foreign investors, who remain a primary source of capital in 2024, the resulting impacts are worsened as they navigate Australia's foreign investment framework, including approval by the Foreign Investment Review Board (FIRB). Notwithstanding the government's recently announced reforms, FIRB approvals and the associated delays on project timelines significantly impacts investor behaviour.

It is not clear whether the government has assessed these impacts, extrapolated across the economy. Slowed growth and job creation, higher cost of capital and a higher regulatory burden on business will lead to poorer outcomes for the Australian economy.

Entrenching the inefficient allocation of resources, and the associated lost economic benefits from changes in land use, would be coupled with a loss of revenue for state and federal governments from stamp duty and other taxes.

Many transactions, which may have remained confidential throughout the negotiating period, would now have commercially sensitive information placed into a public process. This itself may deter transacting parties from choosing a partner who would be considered at-risk for significant delays due to a competition review.

The effects on the property industry are clear. Uncertainty in dealmaking deters domestic and foreign investors, it reduces transaction volumes and market liquidity, and slows economic activity.

A risk-based framework for industry

The thresholds as proposed by the ACCC would disproportionally impact the property industry due to the value, volume and frequency of major transactions between market participants.

The Australian property industry shows limited evidence of market concentration amongst its participants.

As property has not been identified as a concentrated industry in Australia, the government should assess it and other industries through a risk-based framework, such as providing for different thresholds for different asset types commensurate with their impact on market concentration and proven (not theoretical) negative outcomes for consumers.

Recommendation 1: that the government initiates a parliamentary inquiry into the economic impacts of the *Treasury Laws Amendment Bill 2024: Acquisitions* on the broader economy, including on Australia's competitiveness for domestic and foreign investment

Recommendation 2: that Treasury conducts consultation on implementing a risk-based merger control regime with industry specific notification thresholds, such as for property transactions, and consider indexing any monetary thresholds

Public consultation on the notification thresholds

The Bill seeks to amend the Competition and Consumer Act (CCA) to overhaul the existing framework reviewing mergers and acquisitions and replace it with a mandatory, suspensory administrative model.

As outlined previously however, the Bill does this divorced from the key determinant of the impact to industry: the notification thresholds, including the value of a transaction, the turnover of an entity, or its market or class of asset.

Without any public consultation on these thresholds, we are unable to quantify the precise impact of the proposed regime on the Australian property industry. We believe the government should have consulted on the thresholds prior to or concurrently with the exposure draft legislation.

The government's position paper in April 2024 only mentioned that targeted mandatory notification thresholds would be introduced, and that Treasury anticipates that the thresholds will result in a similar number of notifications to the ACCC each year. Without detail on the thresholds, this claim cannot be assessed by industry.

Recommendation 3: the government immediately halts progression of the *Treasury Laws Amendment Bill 2024: Acquisitions*, until such a time as industry has been formally consulted on the notification thresholds, including its transaction, turnover and market share thresholds

Calibrating the notification thresholds

The government has not yet articulated its plans to resource the ACCC to administer the new regime. Budget 2024-25 outlines that the government will provide $13.9 million over five years to progress competition reforms, including the mergers and acquisitions reforms being undertaken.

On the current exposure draft, the government would have modelling to suggest what the number of additional personnel, including both administrative and subject matter experts, to meet the (yet undefined) growing number of notifications.

Industry has expressed its concern in the ACCC's capacity to meet its expanded remit and workload, and the lack of procedural safeguards for fee-paying participants who will not have recourse to address these before a proposed review in 2029.

As a priority, and before funding a greater workforce to meet an expanded notification regime, the government should prioritise getting the thresholds calibrated appropriately. This will allow the government to keep its commitment to assessing the same number of proposals each year (approximately 300), to not be burdened with unnecessary and low-risk transactions, and not require significant and ongoing expenditure in order to properly resource the regulator.

Deeming provisions

The proposed reforms outline that the ACCC, if it reasonably suspects an acquisition will substantially lessen competition, may refer it to a further, in-depth Phase 2 assessment. Without a properly resourced workforce, the ACCC may be incentivised to graduate acquisitions from Phase

1 to Phase 2 in order give itself more time (and resources) to meet its obligations to notifying parties, and receive an additional fee.

Further to this, through the process for considering substantial public benefits applications, the proposed reforms refer to a default position that if the ACCC does not make a determination within the timelines, it is deemed to have refused the application – in essence, no decision means the original determination stands.

Fee-paying parties expect the regulator to making prompt reviews and be resourced to do so, and the proposed reforms should not entrench a position that inherently protects it from poorly calibrated thresholds or being under resourced by government.

Recommendation 4: that Treasury should amend the process for considering substantial public benefits applications to align it with the proposed provisions in *Schedule 1, item 39, subsections 51ABZB(2) and (3) of the CAA*, where if the ACCC does not making a determination within the appropriate period, the acquisition may be put into effect

Other key issues

Removal of land as an ordinary course of business exclusion
The proposed reforms reduce the ordinary course of business exclusion to remove land and patents, and ensure they are treated as acquisitions for the purpose of the Act.

As outlined previously, the property industry is impacted disproportionately due to the value, volume and frequency of transactions that take place. Introducing an economy-wide removal of this exemption impacts not just the property industry but all industries which intersect with land.

Rather than target the entire economy, and further risk the unnecessary notification of a number of transactions, we recommend to alternatively allow the Minister to determine which targeted class of assets or businesses would not receive an exemption.

This will better meet the government's intention to implement a risk-based and targeted regime.

Recommendation 5: that Treasury reinstate land as an ordinary course of business exclusion to acquisitions provisions, and empower the Minister to remove the exemption for targeted classes of assets, businesses or markets

Changes to the substantial lessening of competition test
The proposed reforms provide a new definition for 'substantial lessening of competition', which now includes "…creating, strengthening or entrenching a substantial degree of power in a particular market or any market", and will now cover misuse of market power, anti-competitive contracts, arrangements and undertakings.

This proposed definition goes further than the pre-existing legal threshold and was not consulted on in the November 2023 discussion paper, and its expanded remit not presented by Treasury during the April 2024 government response.

The proposed changes offer uncertainty for industry as it diverges from the existing definition as established through legislation and case law, and would be inconsistent with how substantial lessening of competition is understood elsewhere in the law.

Recommendation 6: that Treasury conduct a separate consultation on its proposed changes to the substantial lessening of competition test, removed from the broader consultation on the *Treasury Laws Amendment 2024: Acquisitions Bill*, and investigate preserving the existing definition currently defined through legislation and established case law

Three-year lookback provision

The proposed reforms refer to a provision to review the cumulative effect of a proposed acquisition with any other acquisitions by the parties concerned in the previous three-year period.

The provision will have regard to any acquisitions from 1 January 2023 (and onwards). The retrospectivity of this provision will mean that parties who have entered into an agreement subject to the merger and acquisition regulation of the day, and prior to this legislation becoming law, may be penalised for their actions in the future.

The government should consider the impact that changes to the substantial lessening of competition test would have on this provision, and ensure that deals undertaken under a different definition are not re-assessed at a later stage under a new definition.

Recommendation 7: that the government should amend the ACCC's process for considering acquisitions and review the three-year lookback provision to ensure any changes to the substantial lessening of competition test are not retrospective

Corporate structures

Clarity is required on how certain common corporate structures would be treated under the proposed reforms. For example, regarding stapled structures noting that many REITs have securities that are comprised of a unit (of a unit trust) that is stapled to a share in a company, which are then traded together. This is relevant to the provisions for permitting reorganisations that occur from one side of the staple to the other.

Further to this, clarity is sought on the role of custodians and trustees in circumstances where they are not in-effect controlling a trust, and aligning the treatment of units in a unit trust and shares in a company.

Presumption of control

The proposed reforms introduce a broad definition of control, with a presumption in the case of acquisitions of shares that if an acquiring party's voting power is 20 per cent or more, it controls the body corporate (and thus is subject to the merger and acquisitions control regime).

The key issue identified is that this presumption is rebuttable, which would allow a participant to argue that is does not control the body corporate, or for the ACCC to argue that a participant below the 20 per cent threshold also controls the body corporate.

By establishing such a low threshold for presumed control at 20 per cent, there will be a significant new burden on participants to prove they aren't in control between the 20-50 per cent range, and therefore risk the associated impacts of the new merger control regime.

In practice, the proposed 20 per cent threshold will inadvertently pick up a large volume of transactions where there is no control, creating an unnecessary burden both on market participants and the ACCC.

The proposed threshold is also at odds with ordinary concepts of control such as those set out in the *Corporations Act 2001 (Cth)*. By having a bespoke concept of control, it will make the regime cumbersome for market participants to adhere to.

Further to this, the April 2024 position paper stated that the ACCC will not have the ability to 'call-in' mergers or acquisitions below the thresholds for review. However, a rebuttable provision for acquisitions below the 20 per cent voting threshold will in effect allow the regulator to require many acquisitions that strictly fall outside the threshold to require assessment (paragraph 2.6 of the explanatory memorandum).

Without clarity on the process for reviewing or rebutting a presumption of control, it is unclear whether this represents a part of the Phase 1 determination process, or a pre-Phase 1 process not outlined in the explanatory materials.

Recommendation 8: that Treasury should review the presumption of control provision in *Schedule 1, item 39, subsection 51ABC(2) of the CCA,* including investigating raising the 20 per cent ownership threshold or reverting to the existing definition of control in the *Corporations Act 2001* and established case law

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

Yours faithfully

Antony Knep
Executive Director – Capital Markets

Appendix A

List of Recommendations

Recommendation 1: that the government initiates a parliamentary inquiry into the economic impacts of the *Treasury Laws Amendment Bill 2024: Acquisitions* on the broader economy, including on Australia's competitiveness for domestic and foreign investment

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