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To Whom It May Concern

ACCC draft merger process guidelines – April 2025

The Property Council of Australia (the Property Council) welcomes the opportunity to comment on the Australian Competition and Consumer Commission's (ACCC) draft merger assessment guidelines.

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.¹

The property industry is the country's second largest employer, providing over 1.4 million jobs to Australians, representing a direct gross domestic product (GDP) contribution of \$232 billion, or 10.6 per cent of total GDP, as well as 18.2 percent of total tax revenues totalling \$129.6 billion.

As outlined in the Property Council's submission on the merger assessment guidelines, prior to the passing of the *Treasury Laws Amendment (Mergers and Acquisitions Reform) Bill 2024*, the government agreed with the Property Council's assessment that many low-or-no risk property transactions would be captured under the mandatory, suspensory notification regime, in part due to the volume of complex, capital-intensive transactions.

However, parties to a transaction may choose to voluntarily notify an acquisition despite being exempt from the mandatory notification regime. This will provide certainty for parties to a transaction.

For these parties, who would ordinarily be exempt from notification, the merger process guidelines would now apply to their transaction as it becomes subject to the requirements of the regime.

There are seven sections of closest interest for the Property Council, being Section 3 on notification waivers, Section 4 on pre-notification engagement, Section 5 regarding notifying an acquisition (in particular concerning foreign investment proposals), Section 6 on phase 1

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

assessments, Section 7 on phase 2 assessments, Section 8 on public benefit applications and Section 9 on timeline extensions and adjustments.

Notification waivers

The guidelines outline the process for applying for a notification waiver, a voluntary mechanism for acquiring entities to seek relief from the mandatory and suspensory notification regime.

The Property Council has supported the concept of the notification waiver process since Treasury began consulting on reforms to the merger control regime in 2023. In the Property Council's January 2024 submission, we outlined that a robust process should "...ensure that non-contentious mergers are cleared expeditiously."

Since then, the notification waiver has been removed and then returned to the proposed regime, however its final form has settled on simply a waiver of the mandatory notification process, and does not exempt the acquisition from section 50 of the *Competition and Consumer Act 2010* (the Act), regarding a substantial lessening of competition.

As outlined previously, many property transactions will be exempt from notification as they meet the exception for certain land acquisitions as defined under Section 2-20 of the exposure draft *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the exposure draft determination).

In effect, these acquisitions have a *de facto* notification waiver, as their obligations to notify the ACCC are set aside (unless they choose to voluntarily notify).

However, there is ambiguity regarding whether parties to an acquisition that are otherwise exempt to notify due to the provisions in the exposure draft determination (i.e. many property transactions), may still access the notification waiver process where there is ambiguity or uncertainty regarding a transaction, such as a concern the acquisition may substantially lessen competition in any market.

As outlined in the guidelines, the notification waiver process is a more efficient, streamlined process that requires the ACCC to make a determination, albeit one that does not shield a particular acquisition from Section 50 of the Act.

For those entities and transactions exempt from mandatory notification under section 2-20 of the exposure draft determination, there is a material disadvantage from not having the discretion to access these waivers during the pre-notification process, and would lose a valuable tool in assessing whether a transaction is at-risk of being denied during a formal Phase 1 and 2 assessment.

Is it not yet clear how many entities may seek a notification waiver for a transaction that is otherwise already exempt from notification under 2-20 of the exposure draft determination. However, as a matter of policy, the guidelines should not exclude any entity from submitting a notification waiver application and receiving a determination from the ACCC.

Recommendation 1: amend the guidelines to explicitly allow any transaction, including those exempt from mandatory notification under section 2-20 of the exposure draft determination, to access the notification waiver process.

Pre-notification engagement

The Property Council welcomes a robust framework for engagement with the ACCC during the pre-notification period (including through the notification waiver process).

A key recommendation of the Property Council for the pre-notification period is to ensure that this informal period is included in any evaluation of whether the overall assessment process is working effectively and in a timely manner.

As outlined in the guidelines, the nature and extent of engagement during this period will differ for each acquisition.

The ACCC will tailor its engagement during this period to the complexity of the transaction and may require a draft notification or a number of briefings and meetings with officials to discuss the nature and intricacies of the acquisition.

Of course, the ACCC is motivated to “front-end” as much of its engagement during this period, mostly because it streamlines the assessment process if the transaction is eventually notified and requires a Phase 1 determination.

As this pre-engagement period is undefined, it could last a number of weeks or months before the ACCC is comfortable in encouraging the applicant to make a formal application. It is critical that, for the purpose of reviewing the regime in future years, that the time elapsed during the pre-notification period is included in any calculation of the total time it takes for an acquisition to be assessed and receive a determination.

Recommendation 2: amend the guidelines to ensure that the ACCC gathers and retains data for the time elapsed through pre-notification, for the purposes of assessing how long it takes a transaction to graduate through the suspensory regime.

The beginning of the pre-notification period should be defined as when parties to a notifiable acquisition lodge an engagement request via the mergers portal.

Recommendation 3: amend the guidelines to provide guidance for what standard of service should be expected by notifying parties during the pre-notification period, such as how long they should expect an initial response, to the typical length of time the process could take.

Notifying an acquisition—foreign investment proposals

Section 5 of the guidelines contains advice regarding the interactions between foreign investment proposals subject to the Foreign Investment Review Board’s (FIRB) assessment process, and the ACCC’s merger control regime.

The most pressing issue for foreign investors is the interaction between the two regimes during the transition period between July 1 2025 and 1 January 2026, and the risk that some transactions may be delayed past the 31 December 2025 deadline for the informal merger review process.

It is not yet clear how Treasury plans to appropriately resource FIRB to assess a likely flood of applications from entities who would prefer to undertake the ACCC’s informal review process, in particular in the lead up to 1 October 2025 (the “drop dead” date advised by the ACCC).

The Property Council welcomes the advice that the ACCC is actively working with Treasury on the interaction between the two regimes. It is directly within the ACCC’s interest to work to ensure

that both Treasury and FIRB are appropriately resourced to provide their assessments of foreign investment proposals in a timely manner, which are also subject to the merger control regime.

If not appropriately resourced, the ACCC may receive many more applications for informal review past 1 October 2025, risking their capacity to make a make an assessment prior to the 31 December deadline.

Besides being an entirely unsatisfactory outcome and delay for industry and international investors – the Property Council has a number of times explained the impact of uncertainty and delay on transactions particularly in the property sector – it risks the ACCC being overwhelmed with applications under the new regime on 1 January 2026.

Recommendation 4: work with Treasury and FIRB to ensure agencies are appropriately resourced during the transition period to ensure, wherever possible, any acquisitions seeking an informal review prior to 1 October 2025 are considered in time.

Phase 1 assessments

As outlined previously, the exposure draft determination contains an exemption from mandatory notification for certain land acquisitions for the following purposes:

- a) developing residential premises;
- b) any purpose of the person in carrying on a business primarily engaged in buying, selling or leasing land, other than a purpose relating to operating a commercial business on the land.

In addition, there is a further exception which covers an acquisition of a legal or equitable interest in land if the acquisition is an extension or renewal of a lease for land upon which a commercial business is currently being operated.

The government has agreed with the Property Council's assessment that many low-or-no risk property transactions would have been captured under the mandatory, suspensory notification regime without the exception in place, in part due to the volume of capital-intensive, complex transactions.

However, some entities will choose to notify acquisitions for clarity and certainty. For those entities, and consistent with the government's exposure draft determination, the ACCC should develop a fast-track protocol specific for the property sector to ensure that otherwise low-or-no risk transactions can be graduated through the regime as early as possible, being Day 15 for a Phase 1 early determination.

As recommended in our submission on the merger assessment guidelines, the ACCC will need to be resourced appropriately to draw upon either internal or external subject matter experts in order to consistently meet a Phase 1 early determination at Day 15.

Recommendation 5: develop a property-specific fast-track protocol, consistent with the government's exception for certain land acquisitions under section 2-20 of the exposure draft determination, in order to allow otherwise low-or-no risk transactions to be approved at the beginning of the Phase 1 early determination period, at Day 15.

In addition, the Property Council strongly supports the deeming provisions contained within paragraph 6.5, where if it eventuates that the ACCC does not take either of these steps before the end of a Phase 1 determination, then the ACCC is deemed to have determined that the acquisition may be put into effect.

Stale determinations after 12 months

In previous submissions to Treasury the Property Council has outlined the long lead times which occur in the property industry regarding mergers and acquisitions, particularly for property acquisitions where there are other competing timeframes such as FIRB, finance, planning and environmental approvals.

Forcing all determinations to become “stale” after 12 months is misaligned with the reality of commercial property. Many acquisitions are structured as such that mean, although substantive terms are agreed upfront, they do not have legal effect within 12 months.

This creates two perverse outcomes, which can be mitigated by the ACCC. Firstly, any transactions which move past the 12-month deadline for staleness will require re-notification – double-handling the same transaction which wastes resources for both the ACCC and the parties to the transaction.

In addition to being inefficient, it also creates legal uncertainty for acquiring parties as there may, theoretically, be a different decision to the initial decision by the ACCC. In effect, an acquiring party may not be able to make any other transaction (either in principle or put into effect) in the time between the first determination (at the time the transaction was agreed to) and the second determination (at the time the transaction is put into effect, if after 12 months).

Any mergers or acquisitions, however minor in nature, may jeopardise a previous determination that is yet to be put into effect.

In addition, and of particular interest for property-related transactions, this creates a distorted outcome for entities who, for whatever reason, are not required to make a mandatory notification (such as being exempt under Section 2-20 of the exposure draft determination).

These entities will be discouraged from pre-notification engagement or a voluntary notification because they may be required to make another notification (with associated fees and time delays) at a later date. This greatly undermines the voluntary notification regime and must be addressed by the ACCC prior to the regime’s transition period beginning 1 July 2025.

Recommendation 6: extend the definition of a “stale” determination from 12-months to 24-months, OR

Provide for a sector-specific approach to “stale” determinations, which allow certain transactions subject to long-term planning, finance or market cycles (including property) a period greater than 12 months.

Recommendation 7: allow an additional, zero-cost extension to a “stale” determination, for at least six months.

Phase 2 assessments

Responses to the Notice of Competition Concerns

The Property Council welcomes the opportunity to respond, on behalf of the broader property industry, to individual Notices of Competition Concerns where it deems critical it provide a response to matters raised by the ACCC, including but not limited to the determination of the market or markets of a particular acquisition.

The ACCC should, as part of its stakeholder engagement policies, maintain a list of interested third parties in property-related transactions, and ensure they are notified and invited to contribute to Notices of Competition Concerns related to the sector.

Recommendation 8: develop a list of relevant third parties in the property sector to be notified and invited to respond to property-related Notices of Competition Concerns.

The Property Council strongly supports the deeming provisions contained within paragraph 7.7, where if it eventuates that the ACCC does not make a determination before the end of Phase 2, then the ACCC is deemed to have determined that the acquisition may be put into effect.

Public benefit applications

The Act forces a sequential approach on the ACCC in considering public benefits applications, requiring it to complete Phase 2 assessments (and make a determination on the competition aspects of a transaction), prior to considering a public benefits application.

Whilst this cannot be addressed by the guidelines, the ACCC should recognise this is a highly inefficient process and will unduly delay transactions.

In addition to being an issue requiring review during the first evaluation of the regime, the ACCC should publish advice of what work related to public benefit applications can take place prior to an application be made.

For example, an acquiring entity may flag with the ACCC during the Phase 2 assessment that it intends to make a public benefit application, if it fails the competition assessment. The ACCC should have the discretion to act on this information and conduct any administrative or initial assessments prior to the formal application being made.

Recommendation 9: publish advice on what activities, consistent with the Act, that the ACCC can conduct regarding public benefits applications during a Phase 2 assessment, such as administrative work or desktop assessments.

Timeline extensions and adjustments

The Property Council welcomes some flexibility in the timelines for assessing transactions – it is inevitable that further information comes to light, information may be insufficient or incomplete, or some other administrative error takes place.

The regime, however, provides for a broad discretion for the ACCC to potentially delay proceedings indefinitely. One of the core objectives of the reforms is to provide greater certainty by streamlining the approvals process, however the number of potential extensions to the timeline available to the regulator only provides uncertainty.

The impact of this broad discretion will not be understood until the ACCC begins administering the new regime, and its practice.

The number of potential timeline extensions and adjustments should be considered during the initial evaluation of the regime, and it is not clear whether the ACCC intends to record or publish its reasoning behind each decision, for either the acquiring party or the broader market.

In the meantime, the ACCC should make public its decisions on the Acquisitions Register as part of maintaining transparency and accountability in the regime.

Recommendation 10: the ACCC should make public its decisions and reasoning for all timeline extensions and adjustments as part of a determination on the publicly available Acquisitions Register.

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 sincerely



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