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To Whom It May Concern

Competition and Consumer (Notification of Acquisitions) Determination 2025 – May 2025

The Property Council of Australia (the Property Council) welcomes the opportunity to comment on Treasury's exposure draft *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the determination).

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.

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. Consistent with the public announcement in October 2024, the determination seeks to exclude many transactions from this regime.

However, parties to a transaction may choose to voluntarily notify an acquisition despite being exempt from the mandatory notification regime, and this has been central to the Property Council's submissions to the Australian Competition and Consumer Commission (ACCC) on its merger assessment and process guidelines.

For acquisitions that are not exempt, the property industry will become subject to the other provisions of this determination. As such, this submission responds to the issues raised by

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

Treasury (as relevant to the property industry). It does not make any determination of the materiality of each matter.

Section 1-4 and Division 1 of Part 2 – Contract date

The determination applies the turnover test to the specific 'contract date' of an acquisition, defined as the date on which a contract, arrangement or understanding has been entered into.

The reliance on a contract date alone is not practical for the property industry.

As outlined in previous submissions, the property industry operates on a long-term cycle that takes many months or years and is subject to a number of other regulatory regimes, including federal, state and local planning and environmental laws, and investment reviews such as the Foreign Investment Review Board (FIRB).

It is common for property transactions to include conditions or contingencies on the sale for a number of issues, including but not limited to:

- Receiving development or planning approval,
- Securing finance,
- Due diligence by the purchaser,
- The sale of other properties,
- Call and put options, and
- Sunset dates.

All of these conditions within a contract for a property may place the settlement date (and transfer of the legal interest in land) months or even years after the contract date.

The Property Council has already outlined in its submission on the ACCC's draft merger process guidelines about the 12-month threshold for "staleness" of a determination, which will require re-notification (if subject to mandatory notification under the thresholds).

To align the competition assessment and determination as close as possible to when the acquisition practically takes place, acquiring entities should have flexibility to report closer to the anticipated date of settlement, or be provided a longer timeframe before a determination is "stale".

Clarification is also required for property transactions which include options, which typically operate across key dates including an option date, a contract date and finally settlement. Options are a common feature in transactions and development strategies, and do not by themselves indicate a binding agreement to acquire an asset.

Section 1-5 – Connected entity

The determination defines the associated entities of primary entities as per section 50AAA of the *Corporations Act 2001*, which may have significant implications for the property industry due to the nature of common business or finance arrangements.

Minority positions in other entities may inadvertently trigger the connected entity provision, such as in joint ventures, passive investments or managed investment schemes (MISs). The governance structures in these arrangements are diverse, and many entities exercise a minority position but do not exercise control in a substantive, operational sense.

For example, a property fund manager may hold a minority equity position in another entity, such as in a registered MIS or Real Estate Investment Trust (REIT) or invest equity in a joint venture for a particular project.

The determination should clarify that these arrangements are exempt from the definition of associated entities as applied in this case, otherwise funds may inadvertently be included as part of an acquirer's associated entities, significantly inflating and inaccurately reflecting its turnover.

Recommendation 1: amend the determination to explicitly exclude business relationships or investments that reflect minority positions but do not confer control, such as for fund managers in managed investment schemes, managed investment trusts (MITs) or joint ventures

Section 1-6 – Connected with Australia

The determination defines shares and assets connected with Australia under section 1-6.

The explanatory statement refers to existing court decisions to determine intent, that being "…where a company aims to, and has a prospect of, making a profit."

Particularly for international investors, who may not be as familiar with the Australian legal system or its decisions, the determination or the explanatory statement should provide guidance on when 'intent' is established.

Recommendation 2: provide guidance, including explicit criteria or examples, for when 'intent' to carry on a business in Australia is established

Division 2 of Part 2 – Exemption for certain acquisitions

Outside of section 2-20, there are further examples of acquisitions which require clarification, either in the determination or the explanatory statement.

Certain finance arrangements that are common in the property industry may inadvertently lead to an acquisition of an interest in shares or assets.

Section 2-24 provides for an exception for money lending and financial accommodation, where the acquisition is a security interest and the person whose property is subject to the security is not an associate.

Further clarity is required for the following arrangements:

- **Mezzanine financing and other convertible instruments**: where options or rights allow the financier to convert the debt into an equity position, in lieu of repayment and often when a loan defaults
- **Enforcement of a security interest**: whilst there is an exception for security interests under 2-24, clarity is required whether this applies only when the interest is acquired (when the share or asset becomes collateral), or when the security interest is enforced such as when a loan defaults
- **Other debt-for-equity swaps**: such as seen in some complex restructuring transactions, debt can be capitalised into equity, leading to a (partial) acquisition of the asset, often seen in distressed situations

In these arrangements, the acquisition takes place outside of a traditional commercial arrangement, but is rather standard development financing. In these cases, the acquisition is not competitively motivated in the practical sense, and the finance lender is not (commonly) a direct competitor.

Without a clear exception for these financial arrangements, it may discourage capital flows into property development, as financiers may be liable to a competition assessment and potential divestment of their asset, or be required to conduct their own competition assessments before offering finance or taking security of a particular asset.

The explanatory statement could clarify that so long as the acquirer did not hold operational control and did not acquire shares or assets with the purpose of operating a business, and only as part of financial recovery, the acquisition is exempt from the regime.

Recommendation 3: provide an exemption for acquisitions of interests as a result of convertible securities of debt to equity or the enforcement of a security interest where the acquisition has occurred in the ordinary course of business of financing

Section 2-20 – Certain land acquisitions

The Property Council has welcomed the adoption of section 2-20 which exempts certain land acquisitions including the development of residential premises and for businesses primarily engaged in buying, selling or leasing property.

In the Treasurer's second reading speech, the government announced the exemption in order to "...avoid clogging up the system with simple land purchases", and a number of potential notifications of low-or-no risk property transactions have been avoided.

However, there remains a significant number of remaining transactions which have the potential to overwhelm the ACCC's resources, slowing down the assessment of other transactions and otherwise placing significant regulatory risk on the property industry.

This submission highlights the key themes which need to be addressed in an updated section 2-20 in order for that section to meet its broad intent, and proposes options for alternative drafting which meets these objectives.

New leases

The determination currently provides an exemption for an extension or renewal of a lease for land upon which a commercial business is currently being operated.

CBRE estimates that that over the past five years there has been an average of nearly 20,000 commercial property leases in Australia each year.

Current estimates show that approximately 50% of leases are extensions or renewals, in part due to high fit-out costs and other considerations discouraging tenants from relocating.

On these estimates, there are around 9,000 leases each year which will be caught up in the merger control regime, as all will incur compliance costs and require an evaluation of their materiality by lessees and lessors, reviewed as part of a three-year assessment, and potentially delayed through a pre-engagement or notification waiver process.

The overwhelming majority of leases do not pose a competition concern. For example, and despite presenting no conceivable competition risks, long-term and/or high-value leases for office space in Australia's central business districts (in particular) could meet the notification thresholds particularly as part of a three-year assessment of other leases undertaken by the lessee.

Whilst most leases would not meet the notification thresholds, all leases would now require a standard competition clause which voids the agreement if the ACCC does not issue a positive determination. This represents a material additional regulatory burden and introduces significant risk into each new lease.

While commercial businesses primarily engaged in buying, selling or leasing have an exemption from mandatory notification, they are still brought directly into the suspensory regime through the uncertainty of their leases in the broader market, which represents their core business.

Rather than require all new leases to be subject to a materiality assessment by lessees and lessors, leases should only be included in the mandatory, suspensory regime if they meet additional notification requirements outlined in Part 3 of the determination.

Whilst covered by an exception from the notification regime, leases would still be subject to section 50 of the *Competition and Consumer Act 2010*, covering the substantial lessening of competition in a market.

This is a proportionate regulatory response to the risk profile of leases, and the government should take a targeted approach rather than create the substantial uncertainty of a blanket approach to leases.

Recommendation 4: expand the section 2-20 exception for certain land acquisitions to cover all leases, not just extensions or renewals of leases, unless covered by additional notification requirements

Lease transactions are currently incompatible with the notification thresholds and are otherwise not clarified in the determination.

In addition to the aggregation rules under section 1-10 potentially capturing otherwise benign leases, it is unclear how the transaction value or turnover tests would be applied – for example, it is not clear the relevance of the turnover of a landlord is to competition in another industry, or whether an incentive or capital upgrade would be included in the value of a transaction.

Ancillary functions to buying, selling or leasing

The determination establishes an exception for certain commercial property transactions, where the business is primarily engaged in buying, selling or leasing land, and where the acquisition is for a purpose other than operating a commercial business on a land.

The explanatory statement further explains that property development activity (such as developers acquiring land) is covered by the exception.

In the first instance, section 2-20 should be updated to include 'developing' as part of an exempt purpose of a person, in order to provide certainty for industry.

There is currently significant uncertainty about the definition of "...operating a commercial business on the land", which is as yet undefined by the determination.

Many property businesses undertake ancillary commercial property management functions in addition to buying, selling or leasing land. These long-term business models are unique to the property industry and serve either to provide bespoke housing solutions, specialised asset management, or manage assets in-house rather than through an external provider.

For example, there are a number of alternative housing solutions which provide residential premises, including:

- Build-to-rent (BTR) housing
- Purpose-built student accommodation (PBSA)
- Retirement living and land lease communities

Each of these residential premises have a number of long-term services that are ancillary to its core landholding and leasing function, which are critical to the operation of these assets. They can include (but are not limited to):

- Leasing and tenancy management,
- Reception or concierge services,
- Facilities management, including communal spaces such as clubhouses, pools or gyms,
- Infrastructure maintenance, including roads or common property, and
- Security and emergency call systems.

Section 2-20(1)(a) provides for an exception for developing residential premises, which is defined as having the same meaning as in section 195-1 of the *A New Tax System (Goods and Services Tax) Act 1999*, being:

> ***"residential premises"*** *means land or a building that:*
>
> *(a) is occupied as a residence or for residential accommodation; or*
>
> *(b) is intended to be occupied, and is capable of being occupied, as a residence or for residential accommodation;*
>
> *(regardless of the term of the occupation or intended occupation) and includes a floating home.*

BTR, PBSA, retirement living and land lease communities meet this definition of "residential premises", and therefore their activities in developing the site would be exempt under section 2-20(1)(a), but it is unclear if their ongoing ancillary activities are exempt under section 2-20(1)(b).

The explanatory statement should be clarified to include these specific models for delivering residential premises. Without a clarification, the development of these residential premises may not be covered by the existing exception, despite the government's clear intent to do so.

In addition, certain commercial properties have operations that are ancillary to the buying, selling or leasing of land. For example, data centres involve the development, leasing and management of properties for the purpose of generating rental income, predominantly through leases but also through operating agreements which are commercially the same as a rental agreement.

Recommendation 5: expand the exception for certain land acquisitions to include 'developing' and 'managing' land, in order to provide certainty and clarity, consistent with the original policy intent

Recommendation 6: clarify that operating a commercial business does not include operations that are ancillary to buying, selling, leasing, developing or managing a property such as facilities and asset management, maintenance, concierge services or shared amenities

Clarify arrangements for lease variations and re-gearing

Without the certainty of exempting new leases (other than those captured by other notification requirements) there are a number of issues which will require clarification in order to make the existing distinction between new leases and lease extensions and renewals workable and clear.

In Australia, the determination of when a variation in a lease constitutes a new lease or the continuation of an existing lease is determined by both the substance of the amendment and the nuances of the particular jurisdiction it takes place in.

Under Australian common law, the concept of surrender and regrant provides that where the amendment of an existing lease meets a threshold that is inconsistent with the original lease, it is defined a new lease (the surrender of the lease, and regranting of the lease under new terms).

Across the property industry these lease variations can take a number of forms and are initiated by both landlords and lessees. For example, in order to accommodate a lease extension, or an adjustment to rent, or to provide an incentive package or undertake capital upgrades, it is common for landlords and lessees to forgo an existing lease and establish a new one.

In this case, there is no change in the competitive structure – the relationship between the landlord and the tenant remains the same, there is no change in market share, and the control of the asset does not change. In many respects, outside of an incentive package or capital upgrade, there could be no discernible change in the relationship.

If these arrangements are considered new leases, and not lease extensions or renewals, they may discourage upgrades to buildings, including critical decarbonisation initiatives, delay or deter investment in our employment-generating precincts, or otherwise remove a tool for landlords to retain customers, that is providing them an incentive package or capital upgrade.

Potentially undermining investment in our employment-generating precincts in order to retain a strict definition between new leases and lease renewals and extensions is not proportionate and is overly complex and burdensome.

If the determination does not exempt new leases, other than those captured by additional notification requirements, then section 2-20 must be expanded to clarify that a lease variation or re-gearing (including those that satisfy surrender and regrant under Australian common law), should be treated as lease renewals or extensions, so long as the relationship between the landlord and the lessee, and the premises (outside of capital upgrades) remains substantially the same.

This is a complex but ultimately necessary solution to avoid the uncertainty resulting from a distinction in the determination between new leases and lease renewals and extensions.

It can be better addressed by simply exempting new leases, other than those captured under additional notification requirements.

Recommendation 7: if new leases are not exempt, expand section 2-20(2) to clarify that lease variations or re-gearing, including those that satisfy surrender and regrant under law, are considered lease renewals and extensions, so long as they do not materially amend the parties to the agreement or the nature of the premises

Agreements for lease

An agreement for lease is a agreement between a landlord and a tenant in order to enter a formal lease sometime in the future, usually contingent on a number of conditions.

As outlined previously in this submission under the response to section 1-4 and Division 1 of Part 2 regarding the use of the contract date, these conditions or contingencies could include receiving development or planning approval, securing finance or subject to capital upgrades such as those offered in an incentive package.

Under the current drafting of the determination, the use of the phrase "an acquisition of a legal or equitable interest in land" could include an agreement for lease or similar pre-lease arrangement.

In the case of an agreement for lease, no leasehold interest has yet been established. As such, there is no material change to competition and no control has been established. In the property industry, agreements for lease clearly do not grant possession of the property or a right to occupy, which is only established upon the execution of a lease.

In addition, contract terms may materially change between an agreement for lease and a lease itself, or a lease is executed over 12-months after an agreement for lease (which is the threshold established for 'staleness' of a determination).

In these examples, lessees would be required to renotify, duplicating the regulatory burden on both the entity and the ACCC.

Considering that not all agreements for lease become leases, the determination should clarify that agreements for lease, including other pre-lease agreements that are prior to the establishment of a leasehold interest, are explicitly exempt from notification. Comparisons to other jurisdictions in Europe and North America show that global practice does not capture pre-lease agreements such as agreements for lease.

The Property Council understands that some businesses or industries may wish to notify the regulator at the agreement for lease stage, rather than a later date, which is more conducive with their particular business practices. These businesses should have access to notification on a voluntary basis only, and agreements for lease should not be a mandatory or preferred option for notifying.

The highly diverse practices of individual businesses and agreements mean that providing for a mandatory, rather than flexible, regime around agreements for lease will significantly negatively impact one industry or another.

Recommendation 8: explicitly exempt pre-lease agreements or arrangements such as an agreement for lease, consistent with the original policy intent, but allow acquirers flexibility to voluntarily report them if it provides certainty or clarity

Acquisition of land-rich entities
The exception should take a substance-over-form approach to property transactions.

The explanatory statement should clarify that the acquisition of an investment vehicle, corporate structure or holding entity that is land-rich (akin to the "Australian Land Trust" and "Australian Land Corporation" concepts used in the *Foreign Acquisitions and Takeover Act 1975* (Cth)), and its purposes meet the definitions expressed in sections 2-20(1)(a) and (b), is exempt from notification.

Recommendation 9: amend the determination to clarify that the acquisition of land-rich entities that meet the purposes outlined in section 2-20 can access the exception, consistent with a substance-over-form approach and the original policy intent

Alternative drafting of section 2-20
Appendix A of this submission contains two options that are broadly consistent with the themes outlined previously in this submission.

Option A is the priority and represents the simplest solution, which is to extend the exception to new leases, other than those subject to other notification requirements.

Option B is less simplified and will still regulate approximately 9,000 new leases each year, the overwhelming majority of which represent low-or-no competition risk, but would have to potentially undertake materiality assessments, and an evaluation of each lease going back three years.

If the government chooses not to progress with the simplest solution, that is to exempt new leases, it must consider the issues raised in this submission and ensure they are explicitly clarified in an updated section 2-20, including arrangements for lease variations and re-gearing, agreements for lease and sub-leases.

Divisions 2 and 3 of Part 6 – Notification forms

The notification forms will apply to transactions which meet the notification thresholds, as well as voluntary notification by acquirers otherwise exempt, such as for certain land acquisitions.

The forms are burdensome and represent a significant compliance cost, particularly for otherwise low-or-no risk property transactions.

In the first instance, the government should exempt as many low-or-no risk property transactions from the mandatory notification regime as possible, such as the overwhelming majority of new leases, that are not subject to other notification requirements.

The Property Council has, in previous submissions, outlined the impact on internal resourcing from onerous regulatory regimes, which will be further exacerbated by the notification forms, in particular the long form version and including for voluntary notifiers.

For the property industry, the administrative burden and cost of preparing a long form notification could potentially lead to some notifiers to forgo notification altogether, which would be a distorted outcome.

In re-assessing the notification forms, Treasury should conduct an analysis, informed by industry, of the approximate cost to business of seeking external advisors to prepare a document of this nature, and share that analysis publicly.

Other matters

Further to the topics that Treasury has raised for feedback above, the Property Council is seeking two clarifications which can be included in an updated explanatory statement, namely:

Stapled entities and consolidated groups

The explanatory statement should clarify the requirement for entities operating as stapled entities or as consolidated groups, to avoid multiple applications with partial equity or interest in a transaction.

Sub-leases

The explanatory statement should clarify that sub-leases (that is, a lease subordinate to a head lease interest) is treated for all purposes as a 'lease' under the determination.

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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Appendix A

Section 2-20 – Certain land acquisitions

Option A - Preferred option – new leases removed

(1) This Division covers an acquisition that has the effect that a person will acquire a legal or equitable interest in land (including vacant and developed land) for any of the following purposes:

a. developing residential premises;

b. any purpose of the person in carrying on a business primarily engaged in buying, selling, leasing, developing or managing land, including operations ancillary to those businesses, other than a purpose relating to operating a commercial business on the land.

(2) This Division also covers an acquisition of a legal or equitable interest in land if the acquisition is a lease for land upon which a commercial business will be operated, either a new lease or an extension, variation or renewal, or an Agreement for Lease or similar preliminary agreement (and any variation of such agreement) granting rights in or over land prior to or otherwise in anticipation of the execution or commencement of a formal lease agreement.

Option B - Alternative option – if new leases are not removed

(1) This Division covers an acquisition that has the effect that a person will acquire a legal or equitable interest in land (including vacant and developed land) for any of the following purposes:

a. developing residential premises;

b. any purpose of the person in carrying on a business primarily engaged in buying, selling, leasing, developing or managing land, including operations ancillary to those businesses, other than a purpose relating to operating a commercial business on the land.

(2) This Division also 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.

(3) For the purposes of subsection (2), an acquisition that constitutes a lease variation, re-gearing or other alteration of the terms of an existing lease agreement including the extension of that lease, such that it has the legal effect of creating a new lease agreement, is to be treated as a lease extension or renewal.

(4) This Division also covers an acquisition of an interest in land arising from an Agreement for Lease or similar preliminary agreement (and any variation of such agreement) granting rights in or over land prior to or otherwise in anticipation of the execution or commencement of a formal lease agreement.