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18 June 2025

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To Whom It May Concern

Mergers and acquisitions reform – cost recovery fees consultation paper

The Property Council of Australia (the Property Council) welcomes the opportunity to comment on Treasury's cost recovery fees consultation paper (the consultation paper) on mergers and acquisitions reform.

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.

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, and to Treasury on the exposure draft *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the exposure draft Determination).

As such, the Property Council has taken a close interest in the cost recovery fees framework proposed under the new merger control regime and have assessed that:

- The cost of fees is high, particularly when coupled with foreign investment proposal fees

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

- The fee structure is too rigid and does not recognise the difference between simple and complex transactions
- Smaller transactions are disproportionally impacted, and
- There is insufficient clarity for fees on sequential or options-based transactions.

Supporting productivity growth is a central policy priority for the government and it is essential that the design of the merger control regime, including its cost recovery framework, reflects the principles of economic efficiency rather than simply regulatory cost neutrality.

The cost of fees is high

At their baseline, the costs imposed on Phase 1 and Phase 2 reviews is significant and could have a profound impact on industry's behaviour and their interaction with the control regime, including those transactions otherwise exempt from notification making voluntary notifications.

Coupled with fees for investment proposals to the Foreign Investment Review Board (FIRB), the total regulatory cost of some transactions could exceed $2 million, before any transaction-related costs (including legal fees or preparation of competition reviews) is incurred.

The stacking of these regulatory costs will have a detrimental effect on capital deployment and discourage foreign and institutional capital, including foreign pension and sovereign wealth funds, from deploying in Australia.

For property, there are significant other costs incurred from Commonwealth, State and territory governments, including stamp duty, land tax and foreign investor surcharges. Whilst outside the scope of this paper, these other regulatory costs directly discourage investment into Australia.

It is not possible to identify which individual regulatory regime or cost ultimately causes a foreign investor to withhold deploying capital to Australia. Investors assess a jurisdiction's overall regulatory environment not in isolated regimes and costs, but in aggregate.

While individual fees or costs may appear reasonable, or be backed by a methodology such as under the Australian Government Charging Framework, ultimately all can contribute to making an otherwise viable investment commercially unworkable, either by the direct financial costs or the cost of delay (which is a significant and ongoing concern with the government's proposed merger control regime).

In addition, for transactions otherwise exempt from mandatory notification (such as through section 2-20 of the exposure draft Determination), the proposed fees will disincentivise voluntary engagement with the regime and potentially lead to perverse outcomes. It is in the regulator's direct interest to encourage voluntary notifications where there is significant uncertainty in order reduce the risk for post-completion enforcement.

Ultimately, the consultation paper lacks an economic impact assessment on M&A activity and investment into Australia, and whether its fee structure is actively encouraging or discouraging the very activity it is seeking to regulate.

Treasury's April 2024 consultation paper states that "mergers and acquisitions are important for building a more productive and dynamic economy" and that "…most mergers are unlikely to raise competition concerns".

If the activity is important to the economy, and most are unlikely to raise competition concerns, then the fee structure should not discourage that activity.

A merger control regime should be supporting efficient market-led outcomes and boost investor confidence, and without an appropriate analysis of the impact of the fee structure on transaction volumes, investor sentiment or, ultimately, Australia's competitiveness for global capital is a gap in the policy's design.

Without this, it is difficult to quantify whether the proposed fee structure strikes the right balance between funding the work of the ACCC and sustaining healthy sentiment amongst investors, however we have assessed that the current fee structure will be viewed negatively by domestic and foreign investors alike.

The fee structure is too rigid and smaller transactions are disproportionately impacted

The fee structure as currently proposed does not recognise the difference between simple and complex transactions (and therefore the complexity of the review undertaken by the ACCC), and implements a blunt single-fee model that may unnecessarily increase costs for both the regulator and parties to a transaction.

While it is clear that whilst transactions and the subsequent complexity of their reviews will be varied, the fee structure implements a one-size-fits-all category for transactions which does not scale by complexity or transaction risk.

As outlined previously, this rigid fee structure is increasing costs on otherwise low-or-no risk transactions and will impact investor sentiment and our competitiveness for global capital.

The United States' Federal State Commission (FTC) implements adjusted filing fees for premerger notifications applicable to the size of the transaction, which reduces the regulatory cost on smaller deals and allocates higher fees to larger, more complex transactions. This fee structure, however, would disproportionately impact property being a capital-intensive industry with a number of low-or-no risk transactions.

Alternatively, Treasury and the ACCC could consider a tiered fee system for Phase 1 reviews, where applicants can make an assessment of whether a transaction meets the threshold of either a low-risk or complex transaction, with an appropriately balanced fee for each. The ACCC can then quickly assess whether an applicant needs to be charged an additional fee (due to the application's complexity) or be entitled to a refund (if the application was simpler than assessed by the applicant, or if the ACCC finalises a review early).

Recommendation 1: amend the fee structure to better recognise the differences in complexity in transactions, such as adjusting filings fees to whether a transaction is assessed as low-risk or simple

Lastly, the consultation paper states there will be a small business exemption, adopting the Australian Tax Office definition of 'small business entity' with an aggregated turnover of less than $10 million, so as to not disproportionately burden those businesses.

Whilst the inclusion of an exemption is otherwise welcome, it is not clear how many transactions by entities with an aggregated turnover of less than $10 million would have met the notification thresholds, therefore the benefit to the economy is undefined.

In addition, it is not clear if the exemption from fees is extended to just mandatory notifications, or if all notifications (including voluntary) are included.

Notification waiver costs to be credited towards Phase 1 review

The Property Council supports the availability of the notification waiver process as a means to streamline the review of transactions which are unlikely to raise substantive competition concerns but where there is ambiguity about whether the transaction meets the notification thresholds.

Currently, the proposed cost recovery framework imposes a fixed fee with no provision for crediting this amount against a subsequent Phase 1 review in the event that a waiver is denied.

This creates a potential disincentive for industry to engage early with the ACCC and could undermine the purpose of the waiver mechanism, that is to reduce unnecessary regulatory burden and provide certainty for business and regulators.

The ACCC should be encouraging early engagement on transactions rather than discouraging the use of the waiver process altogether. Business may opt for a direct Phase 1 notification, placing greater and unnecessary upfront costs on businesses and increased burden on the regulator.

Much of the information required to support a notification waiver is substantially similar to that required for a Phase 1 review, with the ACCC relying on the same underlying information across both processes, including financial information, and relevant details to determine the market, competitors and customers.

Where the waiver is denied and the matter proceeds to a Phase 1 review, the work undertaken in assessing the waiver materially reduces the scope of work required in the early stages of the Phase 1 review.

Accordingly, the current fee structure fails to reflect the overlapping substantive administrative effort and imposes double costs for what is effectively a continuous regulatory process.

Recognising this overlap by crediting the waiver fee towards the Phase 1 fee would better incentivise businesses to engage constructively with the ACCC at this early stage rather than avoid it altogether.

Recommendation 2: amend the fee structure to adopt a cost-crediting mechanism, where the cost of a failed notification waiver can be credited towards a Phase 1 review, so as to not discourage the uptake of the waiver mechanism

Clarity on fees for sequential transactions

As outlined in previous submissions, there remains the risk that sequential transactions, including the exercising of options, may each attract a separate application and fee, duplicating costs and the regulatory burden on industry.

There is the risk that structurally linked transactions which extend over the "staleness" definition currently proposed (being 12 months) will trigger a second and subsequent fee even if the underlying transaction or competitive landscape has not changed.

In capital-intensive sectors such as property, options-based transactions are prudent to spreading risk and are part of routine, day-to-day business. Developers often secure control of land through options or agreements for lease, which are executed at a later stage when projects are further progressed.

Without a final Determination or merger assessment and process guidelines from the ACCC, it is not clear how these types of transactions will be treated, whether they will be assessed in aggregate at the application stage or need to be re-assessed at each option stage.

However, at a minimum, there should be a zero-cost administrative option for options-based, sequential transactions where the substantive transaction has already been assessed by the ACCC.

For example, if a property transaction with options is assessed by the ACCC and approved, any subsequent exercising of the options should not trigger a second or subsequent assessment or fee.

If, however, a re-assessment does need to take place due to the staleness provision, then there should be a zero-cost administrative option for transacting parties. Parties to a transaction should be able to pay a single fee for a set of linked transactions that form a single merger or acquisition, even if executed over time.

Recommendation 3: Treasury and the ACCC should clarify that the exercise of an option, where pre-notified and substantially unchanged from the original terms, does not trigger a separate fee and additional notification

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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