



**Property Council of Australia** ABN 13 00847 4422  
A Level 7, 50 Carrington Street, Sydney NSW 2000  
T +612 9033 1900  
E [info@propertycouncil.com.au](mailto:info@propertycouncil.com.au)  
W [propertycouncil.com.au](http://propertycouncil.com.au)  
in [Property Council of Australia](https://www.propertycouncil.com.au)

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Australian Competition and Consumer Commission  
GPO Box 3131  
CANBERRA ACT 2601

By email only: [MergerReformInfo@accc.gov.au](mailto:MergerReformInfo@accc.gov.au)

To Whom It May Concern

## **ACCC draft merger assessment 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.<sup>1</sup>

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.

The release of the draft merger assessment guidelines represents the next step in the reforming of Australia's mergers and acquisitions control regime. In October 2024 and 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.

In response to this, and to ensure that benign land acquisitions are not captured, the government committed to an exemption from notification for land acquisitions made in relation to residential property development or by any business that is primarily engaged in buying, selling or leasing property and which does not intend to operate a commercial business (other than leasing) on the land, unless those acquisitions are captured by additional targeted notification requirements.

The exposure draft *Competition and Consumer (Notification of Acquisitions) Determination 2025* (the determination) confirms this exemption, which further provides an exception for extensions or renewals of a lease for land upon which a commercial business is operating.

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

The Property Council will make a separate submission to Treasury on the exposure draft determination; however, it is important to recognise that many property transactions will not be exposed to the mandatory, suspensory notification regime – in part due to their low-or-no risk nature from a competition perspective.

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 assessment guidelines would now apply to their transaction as it becomes subject to the requirements of the regime.

In reviewing the draft assessment guidelines, the Property Council has taken close interest on three sections, namely Section 1 and Appendix 1 concerning the meaning of 'market' and its definition, Section 6 concerning countervailing factors namely barriers to entry or expansion, and Section 7 regarding public benefits and the weighing of benefits and detriments.

### **Analytical framework and market definition**

The Property Council has made representations in the past regarding the definitions of markets for property sectors, including commercial, industrial, and residential property markets.

The Act requires the ACCC to identify the market or markets of a transaction to assess whether a substantial lessening of competition may take place if it proceeds.

Whilst the outcome of any market assessment is not itself determinative of whether a particular transaction requires further or no competition assessment (as outlined in Appendix 1), the guidelines state that "...it is often unnecessary to settle on the relevant market or markets for the purposes of a competition assessment" (paragraph 1.20), such as when there may be several plausible markets and if it is assessed that there is a substantial lessening of competition in each of them, and therefore the ACCC is not required to reach a definitive conclusion on market definition.

This discretion by the regulator may lend to efficiencies in the process. However, it will deny procedural fairness for the merger parties involved, or at the very least risk reduce the transparency and predictability of decisions for merger parties.

Without a definitive determination of the relevant market or markets, the parties involved cannot effectively understand the basis of the ACCC's assessment, respond with appropriate evidence, or challenge the outcome if necessary.

At a Phase 2 assessment, merger parties face heightened scrutiny and may be required to provide additional evidence to the ACCC. Procedural fairness for parties will be improved if they have a clear understanding of the framework in which the transaction is being assessed.

**Recommendation 1:** amend the guidelines to require the ACCC to make a determination of the relevant market or markets of a transaction, if the transaction proceeds to a Phase 2 review.

The ACCC must also have the capacity to accurately define the market of a particular transaction in the property industry. Whilst not strictly within the assessment guidelines, without an accurate

and timely definition of a market (and therefore its impact on substantial lessening of competition), some transactions may be unnecessarily delayed or opposed by the regulator.

The Property Council's previous submissions to Treasury in 2024 on the proposed reforms outlined the material commercial consequences of uncertainty and delay on the property industry and the broader economy.

For transactions that proceed to a Phase 2 assessment, and a subsequent public benefits or Tribunal determination, there is a substantial impact on the day-to-day running of the business. This extends beyond the regulatory or administrative burden of dealing with a protracted competition review (such as the demand on existing staff resources or the costs of external advisers), but also to project financing and slowed development timelines which can represent a material risk to a business, project feasibility and a company's financial performance.

The downstream impacts of these decisions adversely impact end purchasers, tenants, customers and the broader economy, where transactions are unable to proceed for a period of time.

It is not sufficient for the regulator to make a determination of the market – it needs to be an accurate and timely determination which relies on objective evidence. The impact on industry of inaccurate or incomplete definitions of particular markets is not immaterial or insignificant. It has impacted on the delivery of housing in Australia at a time when housing is a national priority, and the government has otherwise set a welcome and ambitious target of 1.2 million new homes by 2029.

As part of its assessment guidelines, the ACCC should articulate not just how but *who* is making its assessments, their subject-matter expertise and experience.

In addition, the ACCC should consult with industry bodies such as the Property Council to better understand markets for particular asset types, in particular in new and emerging markets and assets.

**Recommendation 2:** amend the guidelines to ensure the ACCC draws on sector-specific expertise when making determinations of the relevant market or markets of a transaction, including through external advisers where appropriate.

### Barriers to entry or expansion

The guidelines explore the issue of entry or expansion by rivals, the framework for such an analysis and the barriers to entry or expansion (box 8).

As part of its analysis of any property-related transaction, the ACCC must consider a sector-specific approach that acknowledges the nature of the property industry – being long-term not short-term focused – and its structural barriers not found in other markets.

Property markets are distinct from other sectors in Australia. New entry or expansion is rarely rapid, and competition between market participants plays out over a longer cycle.

There are a number of structural barriers faced by market participants. State, local and federal planning or environmental approvals, infrastructure constraints, capital deployment or decisions on staging all impact how new developments come to market.



As such, transactions and developments are planned, financed and delivered over many years, and may not be immediately evident in any desktop review of a project or proposed transaction.

Recognising these structural barriers and the slower, long-term dynamics of the broader market is key to providing an accurate assessment of each transaction. Further, the property sector is often highly fragmented, fungible and without monopolistic characteristics found in other sectors.

As outlined previously, the exposure draft determination has provided an exception for certain land acquisitions with the purpose of developing residential premises, for any business primarily engaged in buying, selling or leasing land, and for lease renewals and extensions – in part because of the low-risk nature of competition across the property sector.

Without an appropriate, property-specific approach acknowledging the long-term realities of the property market, its fragmented nature and unique regulatory, infrastructure and capital requirements, the ACCC may inadvertently classify otherwise low-risk transactions as potentially anti-competitive, resulting in unnecessary delays.

**Recommendation 3:** ensure assessments of entry or expansions by rivals, including barriers to entry or expansion, do not inaccurately classify otherwise low-risk transactions and appropriately consider the long-term nature of competition in the property market.

### Public benefits

The Property Council welcomes and supports a robust public benefits framework for assessing mergers and acquisitions, which is critical to ensuring that transactions that meet national objectives are not unintentionally undermined by the control regime.

The property industry delivers substantial national benefits. Industry is building the homes that will house future Australians, new commercial developments in our employment-generating precincts and cities, as well as critical infrastructure in industrial and logistics across the supply chain which will power our national productivity.

Whilst the Act does not define ‘public benefit’, the Tribunal’s has stated it encompasses “...any contribution to the aims pursued by society”. The National Housing Accord and the nation’s productivity agenda represent two of the critical aims of government and should be recognised by the ACCC when assessing a public benefits application.

The guidelines refer to the weight provided to a particular public benefit, including its nature, characterisation and the identity of the beneficiaries, as well as the time period over which the benefits are received. Given the property market’s characteristics mean that competition develops over a longer period than other sectors, long-term public benefits must be considered when making any assessment.

Some longer-term benefits, particularly in housing and enabling infrastructure, can be difficult to quantify in the short-term, but is no less of critical national importance. In addition, some public benefits can be difficult to quantify, such as broader supply chain resilience in an industrial development, or public amenity as part of a residential or masterplanned community development.

**Recommendation 4:** the ACCC should, aligned with broader government priorities, recognise the following as public benefits:

1. The supply of new homes, including delivery against the National Housing Accord's target to deliver 1.2 million new homes by 2029
2. The supply of commercial and industrial property, to the benefit of the broader economy and productivity
3. The supply of critical enabling infrastructure, including water and electricity

**Recommendation 5:** amend the guidelines to allow the ACCC greater flexibility to consider the medium-to-long term public benefits as part of a sector-specific approach, including for the property industry.

### Other matters

There are three other matters raised within the draft assessment guidelines, namely serial acquisitions, conglomerate effects and coordinated effects, which as currently drafted will have a specific impact upon the property sector. When assessing these matters and property transactions the ACCC must undertake a sector-specific assessment, particularly where certain activity is a feature of the market and not anti-competitive conduct.

#### Serial acquisitions

It is common for property developers to acquire adjacent land parcels across a precinct as part of a development project. These acquisitions are part of the necessary aggregation of individual lots to allow for master planning and delivery of projects – they are not in and of themselves about market concentration.

This critical element of inventory management is benign and rational, and supports long-term planning which is critical for the property industry and the delivery of projects which require scale, coordination and integrated delivery, especially for residential projects.

Without these acquisitions, and left with small and disaggregated land parcels, it is often impossible to deliver new housing estates which will negatively impact the government's ambition to deliver 1.2 million new homes to 2029.

#### Conglomerate effects

It is common practice across the property industry for participants to own and manage diversified property portfolios of funds, covering residential, commercial, and industrial assets.

This diversification reduces exposure to a single asset class and spreads risk, as is required by institutional investors.

The ACCC must recognise that this concept cannot apply rigidly to the property industry, where ownership across similar asset types is the norm.

#### Coordinated effects

The risk of coordinated effects in property markets is limited in part due to the fragmented nature of the industry. Any alignment on price or output is therefore limited, particularly as new stock competes with existing stock across all asset types.

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

Yours sincerely

A handwritten signature in dark ink, appearing to read 'Antony Knepe', with a stylized flourish at the end.

Antony Knepe

**Executive Director – Capital Markets**