Urban Development Institute of Australia
NATIONAL

18 September 2024

Competition Taskforce
The Treasury
Langton Crescent
PARKES ACT 2600
By Email: CompetitionTaskforce@treasury.gov.au

Dear Sir Madame

**Merger Notification Thresholds Submission**

Thank you for the opportunity to provide our recommendations on the Merger Notification Thresholds for ACCC to identify and safeguard against anti-competitive behaviour (**the proposal**).

We deeply appreciate your time earlier this week to clarify a few points ahead of our submission.

The Urban Development Institute of Australia (UDIA) National is the development industry's most broadly representative peak body with more than 2,000 member organisations - spanning top tier global enterprises, consultants, small and large-scale developers and local governments.

We represent the entire range of housing development from institutional housing providers (at about 20% of the housing delivered), as well as the large and small-to-medium sized enterprises that deliver around 80% of the rest of the housing.

The development and construction industry delivers 9% of Australia's GDP and creates jobs for 1.307 million Australians. Every dollar invested into housing construction delivers $2.90 in broader economic activity.

Our members deliver the majority of affordable market housing across Australia. Much of the housing created by our members is sold near or below median house prices and relies on the operation of a competitive market.

UDIA National champions the ACCC mission to prevent anti-competitive impacts from mergers and acquisitions. It is critical to ensuring the appropriate operation of markets. It is extremely difficult to successfully operate in housing development industry (and market), and our members must have a level playing field that maintains competitive marketplace for the benefit of all operators.

It is important to get the thresholds and notifications right in order to ensure the ACCC is not missing critical activities, swamped by irrelevant notifications nor inadvertently undermining housing projects and businesses.

Our members are concerned that unless several changes are made including revising/clearly defining the turnover thresholds and strictly targeting the intended applicants, the ACCC will:

1) capture significantly more irrelevant transactions and be unable to clear applications in a timely fashion.
2) inadvertently restrict the core business of housing providers – housing projects are inventory for Developers to generate cashflow revenue, not strategic plays to increase market share.
3) cause projects to fall through because of application delays pausing transactions.

## The issue

From our discussion earlier this week, we understand that the proposed Merger & Acquisitions notification is required for thresholds that include purchase of property even where it is core business – meaning all housing projects where:

1) The housing provider together with the housing project (as relevant), have combined turnover of at least $200m and the project has at least $40m Australian turnover(or global transaction value of $200m);or
2) The housing provider has at least $500m turnover and the project has at least $10m Australian turnover (or global transaction value is $50m); or
3) The housing provider in either case above, purchase assets over the last 3 years with a total asset turnover of $40m or $10m respectively where those acquisitions push the housing provider above the monetary threshold.

Presumably any projects acquired as serial acquisitions in that time or thereafter (over the project thresholds of $40m or $10m respectively), will be notifiable. (If it is all projects once the threshold is reached, that would be unworkable).

Our understanding on the operation of the thresholds (taking the first limb as an example), is that the a Developer will reach the monetary threshold where they have at least $200m turnover or where their existing turnover and the project would combine to reach at least $200m (ie: a developer with $160m turnover and a project of $40m).

If the project does not have turnover or the turnover is below $40m, (so fails the Australian asset turnover test), the project would be assessed against global transaction value of $200m. Meaning that the developer would need to have $200m turnover to reach the monetary threshold and the project would need a transaction value of $200m itself.

The Treasury intend for the calculation of transaction value and turnover to be clarified under further regulation/subordinate legislation – we gather that these calculations will be well documented in subordinate legislation **before** the proposal is finalised so that industry can accurately assess the impact and practicality of the proposal.

We note also there are market concentration thresholds that can apply, however, with a requirement of 25% market share or share of supply (and $20m project turnover), or 50% market share or share of supply (and $10m project turnover), there are no major housing providers that hold sufficient market concentration to hit those thresholds. The largest institutional developers only deliver circa 20% of housing supply nationwide. It is a highly fragmented market nationwide which means neither market share nor share of supply will be hit by developers on a nationwide market.

If that market share is intended to be broken down into regions, the market concentration approach, if it is too small a breakdown will be largely unworkable because it is quite possible to have a regional area with only (say) two mid-sized developers building relatively small projects of $20m (about 30 units or 36 lots) that would be caught. Critically the "market concentration" would be largely irrelevant because the size of the market would not support more product nor more developers - in other words, stopping the transaction would not result in more developers, only less housing.

These are fundamentally transactions to derive operating profit from the project itself, NOT transactions to accumulate market concentration. The properties are not held but ultimately on-sold as part of the business model.

On this basis the market concentration thresholds do not properly approximate "market share".

Notification, upon hitting the threshold(s), means the ACCC will assess any anti-competitive issues over a 3-4 week period for the majority (based on 300-500 more cases), and either:

1) approve the asset purchase:
   a. **Phase 1 (3-4 weeks):** we note the ACCC estimates that 80-90% of notifications will be cleared within 3-4 weeks.
   b. If further analysis is required, the application goes to a Phase 2 assessment.
2) require the asset purchase to proceed through to full assessment:
   a. **Phase 2 (unclear timeframe but assumed to be months):** applications will undergo standard ACCC assessment process to determine if the transaction should be stopped or can proceed.

**We note:** Applicants unsure of whether the thresholds apply can apply for a waiver, which will be assessed within 30 days. Presumably, the application that does not get waived, goes through the two stages above.

At each Phase, the applicant pays a fee and we are crucially aware that the ACCC timeframes for clearing the majority of applications (and the ability to assess the remainder in a timely fashion) is based on there only being 300-500 additional cases under the proposal.

There is considerable confusion in the industry on the operation and calculation of the thresholds and the current policy articulation is not well suited to housing project acquisition. We are currently hearing from various lawyers in property that there are several conflicting interpretations of the thresholds.

It is very clear no matter the approach taken, there needs to be clearer purpose-made thresholds for projects that outline succinctly, how the thresholds, turnover and transaction value operate and are calculated – it is simply too difficult in its current format and will lead to considerable confusion.

That confusion will mean over reporting of irrelevant transactions or inadvertent omission of relevant transactions.

The concern is that for property developers and other high frequency land providers, **requiring notification of land transactions where those projects are core business, is akin to the ACCC telling businesses what inventory they can have on hand to develop and directly impacts the operating activities** – the equivalent of telling a car manufacturer they can or cannot make more cars.

## The Problem

In its current form, the proposal seems a step beyond stopping anti-competitive mergers and will also restrict property development organisations from conducting their core business.

Housing productivity is already at decade lows and this will risk pushing it down further.

The primary problem with the current approach for the housing industry is that by including land as core business without specifying what types of transactions are of concern, Government is (rightly), trying to capture transactions designed to accumulate market share (capital acquisitions), but are actually capturing transactions that are simply sales for operations – the property is the product (inventory acquisitions).

We support ACCC powers to stop genuine anti-competitive behaviour in an efficient way that does not disrupt the majority of the market, but there are several issues that concern industry:

1) **The extension of notifications to projects as well as businesses and especially land used in the course of business will significantly disrupt the industry.** The ACCC will be telling property businesses what inventory to hold and directly impact operating activities.

   It is ultimately possible to resolve this problem if the legislation excluded land purchased as inventory for improvement and later sale, (or) for delivery of housing supply. It would still allow Government to identify property acquisitions that concentrated market share while avoiding interfering with transactions that are part of a fundamental business model for purchase and sale of land.

2) **Using "Turnover" and low thresholds will target a large volume of very small projects/players of no interest to the ACCC** – Property Developments are capital intensive for the returns:

   a. **A transacting organisation with $160m turnover would trigger the notification (with a $40m project)** That is a mid-size developer making about $24m net profit a year and only delivering 224 dwellings – a large group given only circa 20% of all housing is built by institutional/very large developers with the rest by a mix of developers including small to medium sized enterprises.

   b. **Projects of $10m turnover (project cost), are as little as 12-15 units and 18 lots.**

   c. **$40m projects are as little as 48-60 units and 68 lots..**

   **NB: We will provide data on the anticipated volumes of transactions as soon as they are finalised.**

   The concern with serial acquisitions revolves around:

   a. **A lack of clarity on what projects must be notified** – Once the monetary turnover threshold is reached, we assume only projects that then meet the "Australian turnover" thresholds will be notifiable otherwise every project acquired by the business under the serial acquisitions rule, would be notifiable. If the intention is to notify on every project acquisition, it is fundamentally unworkable from a property perspective. The business model requires property/project acquisition to develop housing. **There is genuine confusion amongst professionals on this point and it requires clarity.**

   b. **The "serial acquisitions" for organisations in the business of buying and selling property does not equate to dollar for dollar increase in their balance sheet -** We note that for housing providers who only hold property in order to develop and then sell those properties, it would seem this proposal is impractical – there is no accumulation of balance sheet value by the housing provider (other than retained annual operating profit), so aggregating project

turnover does not result in a the same aggregated increase in business. You could easily have a $160m business that does four $10m dollar projects (which are all sold with only a fraction as retained profit), effectively hitting the $200m threshold but the business in reality nowhere near $200m. This potentially brings more mid-sized development businesses under the net and artificially overstates their size.

In many cases it will not take long to hit that threshold.

Industry is also concerned that there is no clarity on the intended meaning of "turnover" and it should not be left to regulation after the legislation is passed, as it means members are unable to confirm the approach is sound.

Much of the concern rests on the definition of turnover for asset transactions. It's not clear, and in fact the paper says it will be defined in the regulation.

For example, if we look at the $10m turnover concept there are at least two possible approaches with vastly different outcomes:

- Small ACCC net: $10m Turnover limited to current income generation of asset being acquired. Which excludes the transaction value and the future development income. E.g, a site acquired for future res development with a shed generating less than $10m p/a would not be notifiable unless transaction value is >$50m. So just large transactions captured.
- Large ACCC net: $10m includes income from sale of asset or future development income. The reverse of above. Mid and large transactions are captured.

3) **The time to approval on notification will blow out as the ACCC is swamped with property transactions.** The ACCC is working on 3-4 week clearance for projects based on 300-500 extra assessments. This appears to be an extreme under-estimation:

   a. In the commercial property world, projects greater than $10m turnover are estimated to be around 580 per year (around 74% of all commercial transactions).

   b. Property Council has already confirmed that even where projects of $35m were targeted, the property transactions alone per year will average 290.

   It is very likely that the ACCC notification process will be overwhelmed – this will mean transactions that are time sensitive will likely fail as the result of notification.

4) **Without a consistent, well understood and commercially accepted methodology for determining anti-competitive issues in the housing industry, housing providers will perceive significant risk (undermining projects) and be unable to self regulate to avoid problems.**

5) **The concerns above indicate there is significant detail on the thresholds policy which must be resolved before implementation and not left to regulation.** Industry cannot determine the true impact of the threshold changes until we see the rules in full. It is impractical to leave this to regulation without determining the detail beforehand.

## The Impact

Unless the thresholds are increased and land excluded or well targeted to exclude housing, the proposal will blow out application volumes, slow down transactions and result in fewer, more costly houses and projects. Transactions for the purchase of projects for housing or property development are extremely time sensitive. Every new step added to a process costs money and any significant delays in settling projects risks stopping projects altogether as costs eat into feasibilities.

It is important to realise, that it is not just the housing developers who will be impacted by the proposal where it cannot be targeted effectively. The list of impacted businesses include:

- **Developers:** mid &large developers (>$200m combined turnover, >$500m individual) will be caught up in monetary threshold criteria.
- **Land owners:** landowners looking to activate sites will be caught up in monetary thresholds, delaying or even voiding transactions.
- **Private equity:** Capital providers who participate in asset transactions will be subject to the same thresholds.
- **Institutional equity:** Large capital providers will also be subject to thresholds.
- **Builders**: builders who take on small-scale development, or who purchase wholesale from developers, will be subject to monetary thresholds.
- **Community Housing providers:** community housing providers, who are dependent on private and institutional equity and partnerships with developers will be subject to the thresholds.
- **Other property acquirers:** non-core business developers will be subject to monetary and market thresholds.
- **End customer:** delays to projects will impact the end value of product. For residential dwellings this could add thousands of dollars to the price of a home.

As noted before, industry values the work of the ACCC to prevent anti-competitive behaviour however the current proposal cuts across relatively small, ordinary transactions that will risk business viability of mid-sized enterprises. At the very least it should be more specifically targeted in terms of applicants and transaction categories/features that raise red flags.

We anticipate that Government does not want to undermine business models that rely on purchase and sale of land for housing supply and carve outs will avoid this issue.

UDIA National is keen to understand the rationale behind both very low transaction thresholds and inclusion of land for housing.

If we understand more precisely what the ACCC wants to target, we may be able to avoid unnecessary collateral impact in the market as well as helping ACCC streamline its process.

Industry will be looking for guidance on the types of transactions that will concern ACCC, so that they can ensure they avoid those transactions or establish that the transaction would not be of concern, well before they spend significant money on pursuing the project.

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## The Solution

Fortunately, the issues and impacts can be relatively easily mitigated in several ways:

- **Recommendation:** Land used in the course of ordinary business should remain excluded. The Minister should lift the exemption as needed for targeted assets, businesses or markets.
- **Recommendation:** The proposal should more specifically target the categories or features of transactions that raise red flags with the ACCC to try and limit the inadvertent impacts on process and industry.
- **Recommendation:** The proposal should also specifically identify transaction types that are of no concern and excluded from notification such as (say) transactions as part of core business that are intended to provide housing supply.

  The legislation should exclude land purchased as inventory for improvement and later sale, (or) for delivery of housing supply. This will avoid targeting business models based on purchase and sale of land for housing.
- **Recommendation:** A turnover definition needs to be reconsidered and articulated as a part of this consultation otherwise we are concerned there will be a massive number of projects brought into the notification regime that will swamp the process.
- **Recommendation:** The threshold for project turnover needs to be closer to $50m across the board.
- **Recommendation:** We ask that a published and agreed methodology for determining anti-competitive behaviour and conditions under which transactions will be fast-tracked, including in relation to the housing industry, be established before the thresholds are changed.
- **Recommendation:** The details of the Merger Notification Thresholds must be resolved ahead of finalising any legislation and not left to regulations, so impacts can be fully understood.

We are keen to meet with you to discuss and clarify the operation of the proposal and workshop any options for reducing the risk of inadvertent impacts. Please let us know when you would be able to meet.

Please do not hesitate to contact the UDIA National Head of Policy and Government Relations - Andrew Mihno on 0406 454 549 to discuss this further.

Yours sincerely

Col Dutton
UDIA National President