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Regulatory Reform and Implementation
Australian Securities and Investments Commission
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Via email: rri.consultation@asic.gov.au

To Whom It May Concern

Net tangible assets requirement for responsible entities – consultation paper 388

The Property Council of Australia (the Property Council) welcomes the opportunity to respond to ASIC's consultation paper 388 (CP 388) regarding net tangible assets (NTA) requirement for responsible entities (REs).

The Property Council is the peak body for owners and investors in Australia's $670 billion property industry. We represent owners, fund managers, superannuation funds, developers, and investors across all four quadrants of property investments: debt, equity, public and private.

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.

In preparing this submission, we are mindful that matters concerning the Shield Master Fund (Shield) and First Guardian Master Fund (First Guardian) are before the Federal Court. We do not comment on the merits of those proceedings and refer only to the consultation paper's stated policy rationale and other publicly released material.

This submission sets out the principal policy considerations that should, in our view, lead ASIC to retain the current settings. That approach betters reflects the threshold issue raised by the consultation paper: that is whether ASIC has established an evidenced case for change.

Executive summary

The Property Council's position is as follows:

- **ASIC has not established a relationship between the recent scheme collapses referred to in the consultation paper and the current NTA settings.** The paper acknowledges that increasing the NTA requirement alone will not prevent collapses of managed investment schemes (MISs) or fully compensate investors for losses.

- **The paper does not adequately demonstrate that the current requirements are failing to meet their stated objectives.** The fact that key thresholds were last reset in 2013 may justify review, but it does not by itself justify an increase.
- **The proposed increases would materially increase compliance costs, tie up productive capital, and create a chilling effect on competition by raising barriers to entry and expansion, particularly for smaller and specialist REs.**
- **The proposals are not proportionate or targeted to demonstrated harm.** They would affect the whole market despite the absence of evidence that sector-wide NTA inadequacy was a contributing cause of the failures that prompted the review.
- **If ASIC nevertheless considers that some amendment is necessary, it should be limited to a one-off CPI-linked adjustment to the thresholds since 2013.** ASIC should not adopt automatic annual indexation, and should not revisit the settings again before 2035 absent of clear evidence of regulatory failure or material market change.
- **Any broader review of NTA settings should clearly distinguish between retail and wholesale customers, funds and markets.** In the absence of evidence of harm, wholesale funds and unregistered schemes should not be treated as though they raise the same policy considerations as retail registered schemes.

A strong evidence base for change has not been established

CP 388 identifies the objectives of the NTA requirement as ensuring that a RE has adequate financial resources to meet operating costs, that it is an entity of substance, that there is some capacity for orderly transition or wind-up if the RE fails, and that sufficient liquidity is available for immediate and unexpected expenses.

The paper also expressly states that the NTA requirement is **not intended to address market or credit risks, prevent insolvency, or compensate clients for unexpected losses.**

Those statements are important. They mean the policy question is not whether recent scheme failures are concerning, the question is whether the current NTA settings failed to serve the particular objectives for which they exist. The consultation paper does not answer that question with evidence.

The paper refers to the review being undertaken in light of recent scheme collapses, which whilst not explicit is clearly a reference to Shield and First Guardian, consistent with the reference by Treasury in its recent review of registered MIS oversight and governance.

However, it does not demonstrate that those matters occurred because responsible entities lacked the level of capital required under the current framework, nor does it explain how higher NTA thresholds would have prevented, detected, delayed or materially ameliorated the misconduct or losses at issue.

The Property Council maintains its long held position that regulatory interventions should be directed against harm to consumers, not merely to the surrounding context in which harm occurred.

Indeed, the consultation paper acknowledges that increasing the NTA requirement alone will not prevent MIS collapses or fully compensate investors who suffer loss. That concession substantially weakens the case for broad-based increases that would apply across the whole sector.

Before increasing financial requirements for all responsible entities, ASIC should identify how the current requirements are not meeting their objectives, the nature and scale of the deficiency, the entities most affected, and why less burdensome alternatives would not address the concern.

ASIC's consultation paper does not adequately demonstrate that the current NTA settings are failing, or that the recent scheme failures establish a case for the proposed increases.

The fact that thresholds were set in 2013 is not a policy basis for an increase

The consultation paper places weight on the fact that financial thresholds have not been amended since 2013, and that some limbs of the framework date back earlier. That history is relevant to whether a review is appropriate – it is not, however, a sufficient policy basis for increasing requirements.

A threshold can remain unchanged for a long period and still be adequate for its regulatory purpose. The relevant issue is not the recency of its setting, but its functional adequacy.

If current settings continue to support responsible entities' operating costs, liquidity needs and orderly transition arrangements, then the current requirements are meeting their policy objective.

It is critically important to note that the NTA requirement is not a capital buffer of the kind imposed to absorb operational losses or compensate investors. The consultation paper itself recognises that the NTA requirement is different in purpose from APRA's operational risk financial reserve regime for superannuation trustees.

Policy settings in this area should not drift toward an APRA-style capital model without a clear legislative and policy foundation.

Accordingly, the age of the thresholds may justify reviewing the regime, however it should not predetermine the outcome of that review.

The proposals are not proportionate or targeted to demonstrated harm

The Property Council supports proportionate, targeted and evidence-based regulation. That principle also underpinned our submission to Treasury on broader MIS governance reforms.

Reform should target the demonstrated source of consumer harm and should not impose sector-wide burdens where the connection to harm is weak or unproven.

On the material released, the proposals in CP 388 do not satisfy that test. They would apply broadly across responsible entities regardless of business model, asset class, scale, complexity or historical compliance performance of the RE. That is a blunt response to a problem that has not been shown to be caused by sector-wide NTA insufficiency.

This concern is particularly acute in property MIS structures, including internally managed stapled groups, where financial requirements can interact awkwardly and inefficiently with integrated group capital management.

This is especially so where the RE forms part of an integrated stapled structure in which the economic ownership of the RE and the scheme materially overlap, such that entity-level NTA settings may duplicate or misalign with group-level capital management without a clear corresponding benefit to investors.

As we noted in our submission to Treasury, the policy objectives commonly cited for RE financial requirements are not necessarily engaged in the same way in all structures. Reform therefore needs to be sufficiently calibrated to avoid imposing artificial capital burdens without corresponding investor benefit.

The likely compliance costs

The paper specifically seeks feedback on likely compliance costs. In the Property Council's view, those costs are likely to be significant and will not be borne by responsible entities alone. Their magnitude will vary depending on the number of REs operated and the structure of the relevant business.

1. Productive capital is tied up and becomes unavailable for operational use
Additional NTA must be funded and, given the liquidity settings, a substantial proportion must be held in cash or liquid assets rather than deployed productively in the business, which creates a real opportunity cost.

This is particularly significant for responsible entities whose earnings are received progressively over time, are uneven across reporting periods, or are associated with specialist strategies operating at smaller scale. In those cases, additional capital must sit in cash or other low-yield liquid assets rather than being available to support staffing, systems, governance and compliance expenditure.

To the extent those additional capital costs are recovered through fees or pricing, they may also reduce investors' net returns.

2. Treasury, governance, audit and assurance costs increase
Higher thresholds are not compliance-neutral. They require boards and management to revisit capital structures, internal treasury settings, monitoring frameworks, attestations and audit processes.

If thresholds move regularly, the burden compounds. Annual indexation would be particularly impractical, requiring repeated recalculation, planning and reserving exercises, with disproportionate impacts on smaller responsible entities.

Annual movement may also create practical difficulties where NTA support is provided through eligible undertakings or other pre-set support arrangements, because the committed amount may need to be revised each time the indexed threshold changes.

3. The burden falls unevenly and most heavily on smaller and specialist managers
Large incumbents may be better placed to absorb increased fixed capital requirements, whereas smaller and emerging managers generally are not.

This means that the proposal is likely to be regressive – the burden will be felt most strongly by the very market participants whose presence contributes to competition, innovation and product diversity.

4. Implementation would generate transitional compliance burden
If ASIC were to proceed with any increase, responsible entities would need sufficient time to build reserves in an orderly way.

The Property Council, in consultation with its members, believes six months would be too short, particularly for smaller REs and those with capital planning cycles that do not permit rapid accumulation of additional liquid capital without affecting investors.

On that basis, if change were made despite the concerns set out in this submission, a transition period of at least 18 months would be materially more realistic than the proposed six months.

The likely effect on competition

The paper also asks stakeholders to address the likely effect on competition. In the Property Council's view, the competition impacts are likely to be adverse.

First, materially higher NTA thresholds would increase barriers to entry. Launching a new RE or bringing a specialist strategy to market would require a larger upfront capital commitment, with a larger share of that capital effectively quarantined for regulatory purposes. This is likely to deter new entrants and reduce the commercial viability of smaller launches.

Second, higher fixed capital requirements would favour scale and incumbency. Larger operators will generally be better able to warehouse the additional capital and spread the cost across a broader base of schemes and revenues. Smaller operators cannot do so as easily.

That being said, the effect is not limited to smaller or emerging managers. Larger operators may also respond by consolidating schemes, rationalising product lines or reducing the use of separate vehicles to manage fixed capital burdens, particularly if a higher fixed floor or per-scheme minimum were adopted. That may lessen product and investor choice across the market as a whole.

Over time, that dynamic is likely to produce further concentration in the market, with fewer managers, fewer specialist products and reduced competitive pressure on price and service quality – this is a net negative for consumers.

Third, there is a real risk of a chilling effect even where firms technically remain able to comply. Businesses may decide not to establish additional schemes or REs, not to expand into new products, or not to enter the retail market at all because the economics become less attractive once additional NTA and liquidity must be held.

Consumers are not well served by a framework that increases capital holdings across the sector at the expense of lower competition, reduced product choice and higher costs – especially where the consumer benefit of the capital increase has not been shown.

Other impacts, costs and benefits

The likely impacts of the proposals extend beyond direct compliance costs and competition effects.

Risk of policy overreach into a de facto prudential model
There is a material risk that repeated ratcheting of NTA requirements, particularly if accompanied by automatic indexation or broader extension to other licensee categories, would shift the regime toward a prudential-style capital model by accretion.

That would be irreconcilable with the stated purpose of the current framework and with the consultation paper's acknowledgement that NTA is not intended to absorb market losses or compensate investors.

Limited demonstrated consumer benefit
On the present information, the likely consumer benefit is uncertain and appears limited. The paper does not quantify the extent to which existing NTA settings have been insufficient to meet operating costs, fund orderly transitions or cover immediate unexpected expenses.

Without that analysis, which should be undertaken by ASIC and not burdened on industry, it is difficult to conclude that the proposed increases would deliver a material net benefit to consumers.

Risk of shifting activity away from registered schemes
If the regulatory settings for registered retail structures continue to be made materially less attractive without a clear evidence base, capital and product development may shift toward the private market and other wholesale structures, reducing choice for retail customers.

Potential distortion to product and strategy settings
A materially higher or differently calibrated NTA requirement may also create unintended distortions in product design. Lower-margin or lower-return strategies may bear a relatively higher regulatory capital cost even where they do not present a greater risk to investor protections.

ASIC should be very cautious about settings that may skew commercial incentives or reduce the viability of certain products without a demonstrated link to better consumer outcomes.

Retail and wholesale funds should not be treated the same

The Property Council's long held position is that retail and wholesale funds should not be treated as though they raise identical policy issues, including for the purpose of NTA calibration.

CP 388 is directed to responsible entities of registered schemes, but it also seeks feedback on whether similar approaches should be adopted for other AFS licensees and whether NTA requirements should be extended to categories that do not currently have them.

ASIC should resist any assumption that increases for retail registered schemes should flow through on a one-to-one basis to wholesale funds, unregistered MISs or other categories of AFS licensees.

Different markets, investor cohorts, disclosure frameworks, governance structures and risk allocations may justify different treatment. At a minimum, any broader extension should require its own evidence base and policy analysis rather than proceeding carte blanche.

The concessional NTA requirement and liquidity settings

The paper also asks whether the concessional NTA requirement remains appropriate and whether the liquidity component should be changed. The Property Council does not support tighter settings on the present information.

The current framework already requires, regardless of whether the concessional or non-concessional test applies, that at least 50 per cent of the NTA requirement be held in cash or cash equivalents, with a minimum of $150,000, and that 100 per cent of the NTA requirement be held in liquid assets.

Those are already significant constraints, and no persuasive evidence has been presented that further tightening is necessary to meet the stated policy objectives.

Similarly, the paper does not establish that the existing concessional settings, including the current minimum and cap settings, are failing in practice across the market.

The current averaging approach for the fund-assets limb also appears to create uncertainty where a responsible entity has ceased to operate a scheme during the averaging period, including because the scheme has been transferred to another responsible entity or wound up. ASIC should clarify that schemes no longer operated by the responsible entity are not taken to continue inflating the responsible entity's NTA requirement through the averaging methodology. Otherwise, capital may remain unnecessarily trapped by reference to assets no longer managed, which would be inefficient and disproportionate to the underlying policy objective.

The proposal to increase the $150,000 floor to as much as $1 million, or to apply the threshold on a per-scheme basis, would be particularly disproportionate and would sharply magnify the adverse competition and cost effects identified above. The same caution applies to increasing the $5 million cap absent a demonstrated deficiency in the existing settings.

A per-scheme minimum would be especially distortionary because it would create a direct incentive to consolidate schemes for regulatory capital reasons, even where separate schemes better reflect different assets, strategies or investor cohorts.

Recommendation

The Property Council's primary position is that no change has been justified on the material currently available. However, if ASIC decides that some amendment is necessary, it should adopt the narrowest and least distortive option available.

Any change should be limited to a one-off CPI-linked adjustment to the relevant thresholds since 2013. That approach is the least disruptive option identified in the consultation paper and, while still not positively warranted on the current record, is more defensible than the more aggressive alternatives because it is at least linked to preserving the approximate real value of existing thresholds rather than recasting the policy settings altogether.

Any such amendment should be subject to the following conditions:

1. It should be a one-off adjustment only, not an automatic annual or periodic indexation mechanism,
2. ASIC should not revisit the settings again before 2035[1] unless it can identify a clear evidence base showing that the framework is not meeting its objectives or that market circumstances have materially changed,
3. There should be no increase to the concessional floor beyond a CPI-linked one-off update and no move to a per-scheme minimum,

[1] If increased, a further review in 2035 would mean nine years would take place before a further review of the requirements. This is less than the time the current thresholds were set (2013) and today (2026) of 13 years.

4. There should be no further expansion of NTA requirements to wholesale funds, unregistered schemes or other AFS licensees absent of regulatory failure or material market change, and

5. If any increase is made, ASIC should allow a transition period of at least 18 months and clarify the operation of the average value of fund assets test so that schemes no longer operated by the responsible entity, including schemes transferred to another responsible entity or wound up, do not continue to inflate the responsible entity's NTA requirement.

We would welcome the opportunity to engage further with ASIC on any proposed amendments to NTA requirements for responsible entities, or on other matters raised during this consultation.

The Property Council welcomes the opportunity to discuss this submission in more detail. Please contact [redacted], National Policy Director at [redacted] to arrange a meeting.

Yours sincerely

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[redacted]
Executive Director – Capital Markets
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