SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Competition Policy Review

Submission on the Issues Paper 14 April 2014

Submission by the

Shopping Centre Council of Australia

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1.0 Executive Summary

The shopping centre industry in Australia is highly competitive. There are now more than 1,350 shopping centres in Australia, in the hands of hundreds of separate owners. As well as competing with each other for tenants and customers, shopping centres also compete with the other retail formats for both. These other retail formats generate around 60% of retail sales.

There are very few barriers to entry to the industry. We have addressed in this submission the occasional claims that planning and zoning requirements erect competitive barriers to so-called 'new retail formats'. Increasingly shopping centres, and the retailers who comprise these centres, find themselves in competition with on-line retailers who are not impeded by various regulatory restrictions on physical retailing (trading hours regulation, retail lease regulation, planning requirements etc.).

We have commented in this submission on some of the main regulatory barriers to competition in the retailing industry. We have also addressed issues of concern about competition law.

We have made the following recommendations in order to promote competition across the Australian economy:

1. **The removal of remaining regulation of shop trading hours. We recognise this is a matter for state governments. Nevertheless the Federal Government can significantly influence the decisions of these governments, through COAG and in other more direct ways. The Review Panel should recommend the Federal Government seek to persuade the remaining States to either completely deregulate trading hours (as in the ACT and the NT) or adopt the Victorian/Tasmanian model (where shops can open at any time, on any day, except Christmas Day, Good Friday and Anzac Day morning.**

2. **The Review Panel should recommend that State and Territory Governments adopt the recommendations of the Productivity Commission from the inquiry into the market for retail tenancy leases in Australia and remove retail tenancy legislation provisions regulating shopping centres and replace these with a voluntary code of conduct for shopping centre leases, enforceable by the ACCC, which avoids "intrusions on normal commercial decision making in matters such as minimum lease terms; rent levels; and availability of a new lease".**

3. **The Review Panel should recommend that all State and Territory Governments provide exemptions for 'related entities' and 'large property owners' in relevant real estate agents legislation, similar to that provided by the Queensland Government in section 7 and 8 of the *Property Occupations Act*.**

4. **The Review Panel should recognise that shopping centre developers have a major interest in Australia's planning systems, including restrictions to investment and competition, given their significant development pipeline.**

5. **The Review Panel should recognise the Productivity Commission's previous findings and recommendations in relation to the competition in Australia's planning systems and endorse these as the basis for reforms to be progressed at the relevant State and Territory levels.**

6. **The Review Panel should recognise that competition issues can be 'traded off' with other important public policy issues under Australia's planning systems, where the benefits are considered to outweigh the costs, such as productivity, public investment efficiency and employment concentration.**

7. **The Review Panel should recognise the various pubic goods provided by Australia's planning systems including transport efficiency and productivity, environmental and heritage protection, resource protection, employment growth and minimising land-use conflict.**

8. **The Review Panel should recommend that competitive neutrality should guide reforms to improve retail competition through Australia's planning systems, to ensure that no retail format gets a competitive advantage over another.**

9. **The Review Panel should reinforce that competition or loss of trade is not a valid planning consideration when appealing new development proposals.**

10. **The Review Panel should recommend that an objective of all planning systems should be 'as-of-right' development which does not require a formal development application.**

11. **No amendments be made to the unconscionable conduct provisions of the *Competition and Consumer Act* (at least until the amendments which began operation in 2012 have been given a chance to be tested by the courts).**

12. **Retail tenancy leases which are already regulated by State/Territory retail tenancy legislation be excluded from any regulation of unfair contract terms regulation in business-to-business contracts.**

13. **Section 50 of the *Competition and Consumer Act* be amended to ensure that a renewal of a lease to a supermarket operator, and the exercise of an option in a lease to a supermarket operator, is not considered an acquisition of an asset under section 50.**

14. **Section 93AB of the *Competition and Consumer Act* be repealed.**

15. **The joint venture provisions of the *Competition and Consumer Act* be amended so as to clarify that they protect:**

    a) **joint ventures where the joint-venture vehicle is a trust or an incorporated entity; and**

    b) **oral joint decisions made by representatives of the joint venturers at joint-venture committee meetings (where the terms of the joint-venture agreement have been reduced in writing and those terms envisage such decisions being made at joint-venture committee meetings for the purposes of the joint-venture).**

16. **Section 7(3)(b) and section 10(1B) of the *Competition and Consumer Act* be repealed.**

We would be happy to elaborate further on this submission.

2.0 Competitive Structure of the Shopping Centre Industry

2.1 Structure of the competitive market for retail tenancy leases

Contrary to popular perception, shopping centres do not dominate the retail landscape in Australia. The bulk of the market for retail tenancy leases exists outside shopping centres in a range of other retail property formats, including CBDs, high streets and strip shops, food courts, arcades, bulky goods and homemaker centres and brand outlet centres. These non-shopping centre locations comprise around 62% of total retail space and generate around 60% of retail sales. By contrast, shopping centres comprise only 38% of total retail space; contain around 35% of all retail shops; and generate around 40% of total retail sales.

Despite their public prominence, the high-traffic, high-rent 'regional' shopping centres (i.e. those containing one or more department stores, such as Chadstone Shopping Centre and Westfield Bondi Junction) do not dominate the shopping centre industry. These represent only 6% of all shopping centres; contain around 28% of shopping centre retail space; and generate around 12% of all retail sales. Neighbourhood shopping centres (or supermarket-based shopping centres) comprise the largest number of shopping centres (69% of the total); contain 30% of shopping centre retail space; and generate around 12% of retail sales. Sub-regional shopping centres (i.e. those whose major anchor is a discount department store) comprise 21% of all shopping centres; contain 40% of all shopping centre retail space and generate 14% of retail sales. (The balance comprises CBD shopping centres).

The ownership of shopping centres in Australia is widely held. There are more than 20 different owners (many are in co-ownership) of Australia's regional shopping centres; at least 100 different owners of sub-regional shopping centres; and at least 500 different owners of neighbourhood shopping centres.

2.2 Barriers to entry to the industry

Barriers to entry constitute an important tool for evaluating the competitiveness or otherwise of any market. Provided that barriers to entry are absent or low, and that there is either actual or potential contestability in the markets concerned, then competitive market outcomes are likely to ensue. This is not to suggest that markets cannot exhibit segmentation into 'prime' and 'sub-prime' elements - they do, both in retail markets and in other markets – but competitive tensions between segments exert market discipline on both. Other than the availability of 'anchor tenants' (discussed below) the industry in Australia does not exhibit any other obvious barriers to entry. Indeed concerns are raised from time to time by retail businesses about excessive development of retail space in the face of new retail property investments. However the structure of the market is continually evolving and different sectors wax and wane.

While there is a diversity of speciality tenants and 'mini-major' tenants in the Australian retail market, there is a limited number of 'anchor tenants' due to the limited size of the consumer market. There are only two major chains of department stores; only three major chains of discount department stores in the hands of only two owners; and only two major chains of supermarkets with a smaller 'third force' (comprising Aldi, Metcash/IGA, Action and smaller chains, such as Action, Drakes, Dewsons, Supabarn, Foodland and Foodbarn). By definition, regional and sub-regional shopping centres cannot be developed without securing either a department store or a discount department store, respectively, as an anchor tenant. This, of course, limits the number of such shopping centres in Australia. This also applies to redevelopments of shopping centres. It will not possible for an owner of a neighbourhood shopping centre to redevelop and expand that centre into a sub-regional shopping centre without a commitment by a discount department store to lease space in that redevelopment. Similarly a sub-regional shopping seeking to redevelop that shopping centre as a regional shopping centre, or for a regional shopping centre to become a 'super-regional' shopping centre, would need a pre-commitment by another department store to lease space in that redevelopment.

Over the last decade retailing from shopping centres (and from other retail formats) has faced a new competitor in the form of on-line retailing and also retailing facilitated by mobile devices. While the proportion of retail sales generated by these devices is still relatively small – around 4-6% of overall sales – the annual rate of growth of on-line retailing is substantial. In certain categories of retailing, such as books and sporting goods, the proportion of sales generated online is now in double figures. Online retailing is not impeded by the regulatory barriers to competition which are outlined in the remainder of this submission. Indeed in one area – the taxation treatment of goods purchased overseas and worth less than $1,000 – overseas online retailers are given a significant advantage over Australian retailers (including Australian online retailers). This low value threshold for GST purposes has been accurately described as a 'reverse tariff'.

Australia's planning and zoning systems, and in particular strategic planning policies such as 'activity centres policies', have occasionally been described as 'anti-competitive' or a presenting a barrier to entry to so-called 'new retail formats'. This is sloppy thinking and we have addressed this in section 4.0 (Regulatory restrictions on land use).

2.3 Highly regulated retail tenancy market

We are unaware of any other country in the world which has such a highly regulated retail tenancy market as Australia. Indeed in most countries, such as New Zealand and the United States of America, there is no specific regulation of retail tenancies.

In all Australian States and Territories (except Tasmania which has a mandatory code of conduct, made by regulation), there is very detailed and prescriptive legislation regulating all aspects of the retail tenancy relationship, beginning even before a tenant signs a lease. If the provisions of a lease do not meet the minimum standards laid down in the legislation then the lease provisions are void and the legislative provisions prevail. We do not believe this level of regulation is proportionate to the problems it is seeking to address. The current regulation has a 'stifling' effect on the industry and certainly imposes significant costs on the retail tenancy market which must ultimately be borne, when market conditions permit, by retail tenants and customers.

We have addressed this further in section 3.2 of this submission.

2.4 Productivity Commission and Other Inquiries

The shopping centre industry has been involved in three separate inquiries by the Productivity Commission in recent years, all of which have involved examining elements of competition within the industry. These are the *Market for Retail Tenancy Leases in Australia* in 2008 ("the 2008 Retail Leases Inquiry")*; Planning, Zoning and Development Assessments* in 2011, which included a focus on 'Competition and Retail Markets', ("the 2011 Planning and Zoning Inquiry"); and the *Economic Structure and Performance of the Australian Retail Industry* in 2011 ("the 2011 Retail Industry Inquiry"). The Productivity Commission is also currently undertaking a *Study into the Relative Costs of Doing Business in Australia: Retail Trade Industry.* In addition, in 2008, the Australian Competition and Consumer Commission conducted an *Inquiry into the competitiveness of retail prices for standard groceries* ("the ACCC Grocery Inquiry") which involved aspects of the shopping centre industry, including making recommendations about planning and zoning laws affecting supermarkets and restrictive covenants in supermarket leases (which have now been removed). Very few industries in Australia have been as intensively investigated as the shopping centre industry in recent years. This is surprising given, as we have noted in sections 2.1 and 2.2, the industry is very competitive (both in terms of competition for retailers and competition for customers) and there are few barriers to entry to the industry.

3.0 Regulatory Impediments to Competition

3.1 Trading Hours Regulation

The Productivity Commission, in its 2011 Retail Industry Inquiry, investigated the regulation of shop trading hours in detail and recommended that "retail trading hours should be fully deregulated in all states (including on all public holidays)", just as they are in the Australian Capital Territory and the Northern Territory.

Trading hours are effectively deregulated in Victoria and Tasmania: all large shops can open at any time, on any day, except Christmas Day, Good Friday and the morning of Anzac Day. Since these are voluntary closed days in the ACT and NT, full deregulation is unlikely to result in any different trading patterns than currently exist in these states.

Trading hours in NSW are not as liberal since (other than in some limited geographic areas) shops also cannot trade on Boxing Day and Easter Sunday. The NSW Government has attempted to remove trading restrictions on Boxing Day but the relevant legislation failed to pass the Legislative Council.

Trading hours in Queensland are heavily regulated with around 20 different trading hours zones existing in the State. The Queensland Government is still to make a decision on the final report of the Queensland Competition Authority on *Measuring and Reducing the Burden of Regulation* which identified 'trading hours restrictions' as one of ten 'fast track priority reforms'. The QCA noted "the potential benefits of reform include an increase in retail productivity, more shopping convenience for the broader community and lower prices."

Western Australia has taken action since the 2011 inquiry. In August 2012, Sunday trading and trading on most public holidays was permitted for the Perth area (but with limited trading hours of 11am to 5pm). The WA Economic Regulation Authority, which has been conducting an inquiry into microeconomic reform in the State, recently recommended the effective deregulation of trading hours (i.e. the same trading arrangements as Victoria and Tasmania).

Unfortunately trading hours in South Australia are still highly regulated. Sunday trading hours remain fixed at 11am to 5pm more than a decade after Sunday trading was introduced for Adelaide. The vast majority of shops in Adelaide are not permitted to open on any public holiday. This meant, for example, over the most recent Easter period, shops were closed on three of the four days between Good Friday and Easter Monday. This is obviously absurd and extremely harmful to the retail industry. Regrettably in 2012 the Government gave legislative effect to a secret deal in 2011 between the Shop Assistants Union (SDA) and Business SA, subsequently endorsed by the Government, to permit shop trading (but only in the Adelaide CBD) between the hours of 11am to 5pm on most public holidays in return for declaring Christmas Eve and New Year's Eve (after 7pm) as public holidays for all industries, not just the retail industry. We brought this anti-competitive arrangement, which offends the objective of 'competitive neutrality', to the attention of the ACCC but it declined to get involved.

Restrictions on the hours when physical shops can open are discriminatory. Internet retailing can be conducted at any time and on any day. The retention of trading hours regulation handicaps physical retailers from competing with online retailing. In addition, while trading hours are still heavily regulated in many European countries, no such restrictions apply in Asian countries, the United States (except in limited areas where so-called 'blue laws' still operate) and very limited regulation applies in New Zealand.

Recommendation: The regulation of trading hours is a matter for state governments. Nevertheless the Federal Government can significantly influence the decisions of these governments, through COAG and in other more direct ways. We therefore submit that the Review Panel should recommend the Federal Government seek to persuade the States to either completely deregulate trading hours (as in ACT and NT) or adopt the Victorian/Tasmanian model (where shops are only required to close on Christmas Day, Good Friday and Anzac Day morning).

3.2 Retail Tenancy Regulation

This issue has already been thoroughly examined by the Productivity Commission in its 2008 Retail Leases Inquiry and 2011 Retail Industry Inquiry.

The market for retail tenancy leases in Australia is now heavily regulated. In all States and Territories there is very detailed and prescriptive legislation regulating all aspects of the retail tenancy relationship, beginning even before a tenant signs a lease.

We are unaware of any other country in the world with such a highly regulated retail tenancy market and the Productivity Commission found that "*Australia is unique in its specific regulation of retail tenancies.*" This is in contrast to other countries with which Australia generally likes to compare itself. New Zealand, for example, does not have retail tenancy legislation. The only regulation of leases is contained in the *Property Law Act* which applies to all property classes, not just to retail property. There is no retail tenancy legislation in the USA. Even in the United Kingdom (UK), where the *Landlord and Tenant Act 1954* applies to all commercial property, there is no specific retail tenancy legislation to protect retail tenants.

Retail tenancy legislation adds substantially to regulatory, administrative and compliance costs and, where market conditions permit, these costs are passed on to retailers and to consumers. Not only does this legislation regulate the leases of 'small retailers' but also covers retail chains with hundreds of stores, including in some States, retail chains that are listed on the stock exchange. The rules and restrictions imposed by retail tenancy legislation impose costs particularly on the shopping centre distribution channel that are not imposed on other retail distribution channels (including the internet) or on similar retail shopping centres in other countries.

The Productivity Commission 2008 Retail Leases Inquiry recommended a voluntary code of conduct for shopping centre leases, enforceable by the ACCC, to replace retail tenancy legislation. As part of this move to a code of conduct for shopping centre leases, the code should "*avoid intrusions on normal commercial decision making in matters such as minimum lease terms; rent levels, and availability of a new lease*". With shopping centres no longer covered by retail tenancy legislation, state and territory legislation would only be relevant for retail leases outside shopping centres. The Productivity Commission recommended state and territory governments "*should remove those restrictions in retail tenancy legislation that provide no improvements in operational efficiency, compared with the broader market for commercial tenancies*".

This recommendation has been ignored by all governments. A review of the NSW *Retail Leases Act* is currently underway but the Issues Paper for this review gives scant consideration to the Productivity Commission's main recommendation in 2008 and makes no effort to reduce the amount of regulation. Indeed the Issues Paper, if it was adopted, would lead to an increase in regulation. A review of the Queensland *Retail Shop Leases Act* did focus on removing some unnecessary regulation, although this was largely driven by the Queensland Government's welcome seriousness about 'red tape reduction'.

Unfortunately it has been our experience that the costs imposed by retail tenancy regulation receive little consideration by state or territory governments before regulation is imposed. Although most governments require the preparation of some form of regulatory impact statement (RIS) to assess the costs and the benefits of proposed new regulations, it has been our experience in the regular reviews of retail tenancy legislation that these cost assessments, if they occur at all, are perfunctory at best.

Little real attempt is made to properly consider what new costs are being imposed on the retail tenancy market (both property owners and tenants and ultimately consumers as well) when retail tenancy regulation is expanded. Nor is any consideration given to whether the goals could be achieved by less intrusive means.

Unfortunately the existence of retail tenancy legislation in Australia has created a 'protectionist' mentality on the part of Australian retailers and the general response to the inevitable risks and realities of retailing has been to demand more and more regulation. Many of the retailers demanding additional regulation operate in countries such as Singapore, New Zealand and the USA, where no such regulation exists.

Regrettably we may soon see the addition of yet another layer of regulation of retail leases with the Federal Government's pledge to extend the unfair contract terms legislation in the Australian Consumer Law to business-to-business contracts. The Government has given no commitment that retail tenancy leases will be exempted from this new law even though these leases (contracts) are already regulated by governments. We address this in section 5.2.

Recommendation: State and Territory Governments adopt the recommendations of the Productivity Commission from the inquiry into the market for retail tenancy leases in Australia and remove retail tenancy legislation provisions regulating shopping centres and replace these with a voluntary code of conduct for shopping centre leases, enforceable by the ACCC, which avoids "intrusions on normal commercial decision making in matters such as minimum lease terms; rent levels; and availability of a new lease.

3.3 Occupational Licensing

Among the regulatory impediments to competition which the Competition Policy Review is examining are "restrictions on who can provide certain products and services (occupational licensing)". This is a major issue for shopping centre owners and managers (and other commercial property owners and managers).

By an accident of history, shopping centre owners and managers are subject to real estate agent regulation under state/territory legislation which imposes significant extra costs on the industry. This legislation was originally introduced in order to protect the ordinary 'consumer' (i.e. property owner) in their dealings with real estate agents. This legislation pre-dated the rise of the sophisticated property owning companies and institutions but such companies are now 'caught' by the legislation. This means if those companies employ a manager to buy, sell, manage or lease the property then that agency relationship is now regulated by the real estate agents legislation. This is despite the fact that the 'consumers' being protected by this regulation are generally large sophisticated companies which do not need, or want, this legislative protection. Even more absurdly the regulation applies to the agency relationship even when the manager is a related-party entity to the property owner. Thus, for example, Westfield Shopping Centre Management must comply with the provisions of the Act even when it is managing centres owned by Westfield Group and AMP Capital Shopping Centres must comply with the Act when managing centres owned by AMP Capital Investors. This is even more nonsensical. We have estimated that this is costing the shopping centre industry around $6 million per annum around Australia.

The retention of these occupation-based restrictions cannot be justified on the grounds of concern for occupational standards. The real estate license required in each state (e.g. Certificate IV in NSW which can be obtained from the NSW Fair Trading website) is overwhelmingly oriented to those who are engaged in residential tenancies and residential real estate agency work. The licence has no professional relevance to those who are engaged in managing or leasing a shopping centre or an office block.

We originally sought to achieve exemptions from such legislation through the proposed national licence for real estate agents under the National Occupational Licensing System (NOLS). With the demise of NOLS we are now seeking state-by-state exemptions. The Queensland Government has recently legislated to grant exemptions from licensing and regulation for managers/agents which are managing property owned by an entity which is related to the manger/agent (a 'related entity' exemption) and for managers/agents managing property on behalf of large, professional property owners (a 'large property owner' exemption). The Victorian Government has also announced that it will gazette a regulation to provide the same exemptions, as a result of recommendations by the Red Tape Commissioner.

The Productivity Commission, in the 2011 Retail Industry Inquiry, said there was a prima facie case for examining "*whether this regulation is too broad in its application and could be better targeted, but these questions are best left to separate review processes*" (p. 413). This review has now been completed, most notably in the regulation impact statements for the proposed national real estate license. The *Decision Regulation Impact Statement: Proposal for national licensing for property occupations* ("the Decision RIS"), in July 2013, noted "*an exemption from engaging a licensed real estate agent for non-residential property transactions between related entities has received full support from the industry"* and proposed *"an exemption from the requirement to hold a real estate agent's licence or agent representative registration for non-residential property transactions between related entities"* (p.29). The principle of a 'large or sophisticated consumer' exemption was also acknowledged in the Decision RIS*: "The risks in large non-residential property transactions appear to be adequately managed through the general sophistication of clients and trajectories, such as legal contracts and agreements. Licensing would be unnecessary for this sector as owners of multi-million dollar commercial properties would most likely be professional property investment companies. These companies would be conversant in the business of understanding the risks of owning and investing in non-residential property assets. An exemption would mean that there would be no requirement to go through a licensed real estate agent for very large non-residential property transactions." (p.28).*

Given the regrettable demise of the National Occupational Licensing System, these exemptions should now be implemented directly by other State and Territory governments and in their relevant Estate Agents Legislation.

Recommendation: All State and Territory Governments be encouraged to provide exemptions for 'related entities' and 'large property owners' in relevant real estate agents legislation, similar to that provided by the Queensland Government in section 7 and 8 of the *Property Occupations Act*.

4.0 Regulatory Restrictions on Land Use

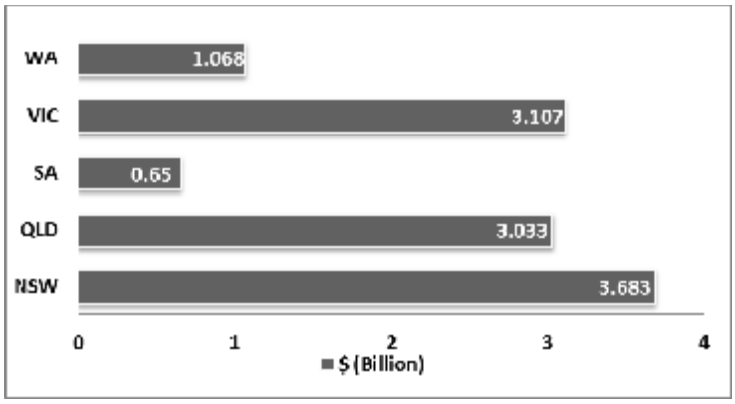
The Issues Paper states (at page 16) that:

> ***2.19. Land use restrictions may take many forms, including planning restrictions, zoning laws and development assessment procedures. Various policy rationales are offered to justify why unfettered development of land is not permitted. These include environmental considerations and the need to coordinate community services.***
>
> ***2.20. However, inflexible restrictions on land use or complex and costly approvals procedures may create significant barriers to business entry or expansion, and may result in land not being allocated to its highest-valued use. In addition, some policy rationales may be anti-competitive in essence – for example, rejecting a planning application because it may have an adverse impact on existing businesses.***

The Issues Paper then raises the specific question whether there are "*planning, zoning or other land development regulatory restrictions that exert an adverse impact on competition*" and "*can the objectives of these restrictions be achieved in a manner more conducive to competition*".

Our members have an obvious interest in Australia's planning systems given they are major developers. We last surveyed our members' development pipeline in mid-2013, which highlighted an $11.5 billion development pipeline across Australia, at an average of $240 million across 48 projects. This means 48 separate and complex interactions across Australia's planning systems and regulatory frameworks, including the various restrictions that apply. A breakdown of the value of our members' projects across different jurisdictions is outlined at Table 1 below:

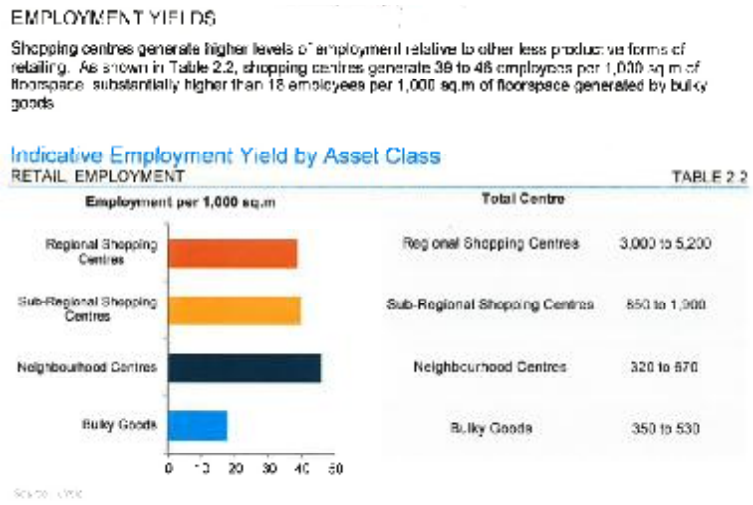
Table 1: SCCA member development pipeline ($ Billion)



There are various reasons why Australia's state, territory and local governments undertake land-use planning. This is reflected by the fact that land-use planning exercises are generally subject to broad consultation including across various levels of government, industry and the community. It is important the Review Panel is aware that planning is not a single issue framework whereby 'competition' is, or should be, the sole or leading factor. Indeed productivity improvements and public investment efficiency are often typically 'traded-off' against competition issues because the benefits are considered to outweigh the costs. This can include enabling the "highest-valued use" of land through densification and mixed-uses in a CBD or town centre and improving the productivity of public transport investment by focussing development around or near train-stations. This can also include other economic policy objectives, such as the concentration and protection of industrial land near major transport hubs and port facilities.

In addition to the points raised above, governments can also promote activity centres or clusters as a focus of 'employment'. In this regard, we note that shopping centres have higher retail employment ratios than other forms of retailing such as bulky goods outlets. The following table prepared by Urbis illustrates the differences between asset classes:

Table 2: Urbis Indicative Retail Employment Yields



The Review Panel should note that every State and Territory government (and in the case of Queensland, Brisbane City Council) frames their metropolitan planning strategies around the principles noted above.

Even in the case of competition, the Review Panel should be aware that many competition-related critiques of land-use planning can be simplistic and narrow in public policy terms. This includes critiques that the 'activity centre' approach to land-use planning is anti-competitive. Such critiques ignore the fact that retail competition can be best enabled when competitors are in the same market and have equal planning terms and conditions. Even where the planning system enables entry to the market, opponents will then cite land cost as a barrier to entry, as if no other company wants to enjoy the competitive benefit of lower land costs. We do not believe the Review Panel should entertain the pleading from groups that argue for their own special planning case at the expense of competitive neutrality, a timely level playing field, broader public policy and other benefits such as productivity (a case of the tail seeking to wag the dog, so to speak).

The Review Panel should also note that even where some jurisdictions have progressed with 'competition' reforms previously recommended by the Productivity Commission (see below), such as Victoria, they still need (through the recently released *Plan Melbourne* planning strategy) a structured planning framework to enable broader benefits such as transport efficiency and productivity, employment density and labour agglomeration, mixed-uses, environmental sustainability and liveability.

Competition and planning: an existing platform

The Issues Paper also refers to the Productivity Commission's 2011 Planning and Zoning Inquiry as 'further reading' on this issue. In this regard, the Review Panel should note that competition issues in Australia's planning systems, and the issue of regulatory 'restrictions', have been exhaustively investigated over the past seven years through Productivity Commission and Australian Consumer and Competition Commission studies and inquiries (refer to section 2.4 of this submission for complete reference) and there is a clear set of findings and recommendations that should be the foundation of reforms to be progressed at the state and territory level.

The Productivity Commission's 2008 Retail Leases Inquiry broadly recommended that "*while recognising the merits of planning and zoning in preserving public amenity, states and territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation".* The 2011 Retail Industry Inquiry went into further detail and made five recommendations (one of which cross-referenced the Commission's 2011 Planning and Zoning Report, which identified five "best practice approaches to support competition in land use markets"). When considering the Productivity Commission's findings and recommendations across these three previous reports, they encompass the following:

1. **A broadening of business zoning and reduction of prescriptive requirements to allow the location of all retail formats in existing business zones.**
2. **More 'as-of-right' development to reduce business uncertainty and remove the scope for gaming by competitors.**
3. **Impacts on existing businesses should not be a consideration during development assessments. Impacts on new retail locations on the viability of activity centres should be considered during the strategic planning process.**
4. **Ensure third party appeals processes have clear grounds for appeal and allow the awarding of costs against parties found to be appealing for purposes other than planning outcomes.**

Rather than cover the same ground, we believe the Review Panel should recommend that the above sensible 'competition' findings and recommendations are progressed. As we stated in our submission to the Productivity Commission's most recent inquiry, the 2011 Retail Industry Inquiry:

> ***"We are concerned that retail planning issues run the risk of being subjected to a never-ending round of inquiries, with little chance for reforms to be pursued, measured and refined. There is an opportunity cost of re-hashing the same issues (often raised by a minority of retail industry participants seeking special treatment), and not pursuing actual reforms that seem to have widespread support".***
>
> **(SCCA Submission, Productivity Commission Inquiry into the Economic Structure and Performance of the Australian Retail Industry).**

The 2011 Planning and Zoning Inquiry 'competition' findings and recommendations also have the advantage of being considered against the broader aspects of Australia's planning systems such as strategic land-use planning, integration with transport systems, and development assessment procedures. We therefore substantially support the Commission's findings and recommendation and believe that, broadly, they provide the following advantages:

- **Ensure that retail is maintained as a critical issue for the planning system and considered with broader aspects of the planning system.**
- **The consideration of retail competition issues in the context of broader planning issues, and other government priorities, such as transport infrastructure investment programs.**
- **Highlight the multiple benefits of the activity centres policy approach to land-use planning (which has, for instance, recently been reinforced in *Plan Melbourne* and the Brisbane City Plan), including greater retail competition, so long as local level zoning is flexible to enable a broad range of retail types.**
- **Ensure that retail and competition issues, and reforms, can be progressed under a uniform national framework.**

Focus areas for the Review Panel

In this regard, given the well-established foundation of 'competition' reform findings for Australia's planning systems, we believe the Review Panel's focus should be on:

- **Which jurisdictions have progressed with the Productivity Commission's previous findings and recommendations?**
- **Where reforms haven't been progressed, what were the justifications and did real limitations apply?**
- **How can competitive neutrality be ensured in progressing with any reform?**
- **How can the Federal Government provide incentives to tardy states to progress with reform?**

These themes form the basis of our commentary above and below.

Progress with the Commission's previous findings

The most comprehensive pursuit of the Productivity Commission's previous findings and recommendations has been the Victorian Government's zoning reforms which commenced in 2013 and were finalised in an announcement on 29 May 2014 to remove outstanding retail floor space caps (a decision which we have strongly welcomed). Broadly these reforms:

- **consolidated five previous zonings (B1, B2, B3, B4, B5) into two (C1, C2) (in line with the Productivity Commission's Recommendation No. 1 noted above);**
- **enabled new uses in zones that were previously restricted (e.g. bulky goods outlets were restricted in the previous B5 zone, but it's compression into the new C1 zone now enables such development);**
- **enabled more (but not all) development to proceed 'as-of-right' (in line with the Productivity Commission's Recommendation No. 2 noted above);**
- **enabled small supermarkets to be permitted within the IN3 (light industrial) zone; and**
- **removed retail floor space caps within certain zones (and activity centres) to enable further growth.**

The removal of floor space caps was done in two stages, with caps in the above mentioned zones removed in July 2013 and caps in 'other' instruments (such as Development Plan Overlays) were announced for removal (covering 22 locations across Melbourne) on 29 May 2014.

Other jurisdictions have good competition platforms. The Queensland system already has a relatively high level of 'as-of-right' development, so already had a strong basis in terms of the Commission's findings and recommendations. In August 2010, the West Australian Government removed retail floor space caps that were in place since 1991. This has helped facilitate a major increase in retail development proposals, particularly in areas that were previously 'capped', such as AMP's $750 million Garden City Booragoon redevelopment which recently had its structure plan approved.

The NSW Government made a conscious effort to bring about change in 2010 through the release of a report for consultation titled *Promoting Economic Growth and Competition* through the Planning System, as well as a *Draft Competition State Environmental Planning Policy (SEPP)*. The SEPP aimed to clarify that the commercial viability or loss of trade on a commercial development is not a valid planning consideration, as well as the removal of restrictions such as planning provisions that prescribed the number of a particular type of retail premises. The clarification about commercial viability and loss of trade was merely a restatement of the High Court's decision in *Kentucky Fried Chicken Proprietary Limited v Gantidis and Another (1978) 140 CLR 675*. The High Court decided that the fear of economic competition should not in itself be regarded as a proper planning ground.

In addition, the NSW Government sought to achieve major planning reforms in 2013, which included more 'as-of-right' development. However, the *Planning Bill 2013* was rejected in the Legislative Council and has not progressed. In our view NSW consistently fails to deliver on reform in relation to retail planning policy and where it attempts to do so, it proceeds in an ad hoc and piecemeal manner. We are about to lodge a submission with the NSW Government to seek to have a comprehensive retail planning policy developed, which should better enable a more competitive market and a level playing field.

General overview of planning system objectives

The Review Panel has raised the issue of 'restrictions' in Australia's planning systems and whether the objectives of such restrictions can be achieved in a manner more conducive to competition.

As a first point, the Review Panel should note that best pursuit of competition reforms is to ensure that all retail competitors have access to the same area (e.g. through zoned land) in order to compete with each other, and also have the same assessment processes and development controls and conditions.

No planning system in Australia – or indeed (to our knowledge) the world – allows 'unfettered' or the completely de-regulated development of land. All planning systems have some form of regulation to instil community confidence in the process and ensure public goods such as infrastructure coordination and efficiency, environmental, heritage and resource protection and to minimise land-use conflict. To take this one step further, all governments utilise the concept of urban concentration and consolidation to both maximise and pursue economically efficient outcomes such as transport efficiency and productivity, mixed-uses, vibrancy, labour agglomeration and competition (as noted in the previous section). Various governments can also want retail investment to be leveraged for other investment opportunities by promoting their location principally within activity centres and clusters, such as residential and office markets, as well as civic investment (e.g. libraries, bus interchanges) and government services.

The Productivity Commission's 2011 Retail Industry Inquiry recommendations sensibly recognised that "*effective planning and zoning regulation is important to encourage well-functioning cities, infrastructure and housing markets which in turn contributes to improving Australia's productivity and wellbeing*". We say "sensibly recognised" because, to suggest otherwise, would fly in the face of the objectives and long-standing practical realities of strategic planning. The Review Panel should refer to the most recent planning strategies such as *Plan Melbourne* and the Brisbane City Plan, as well as the Sydney Metropolitan Strategy, as relevant examples.

Planning Ministers and officials also try to balance the issue of suburban 'anti-development' politics to alleviate concerns about development being spread across suburban areas. As an example from a 'planning system' perspective, the Review Panel should note the NSW *Planning Bill 2013* which sought to streamline development assessment and approvals (including more 'as-of-right' development) and adopt a single state planning policy framework. This was thwarted largely by organised opposition from community groups such as the Better Planning Network. Another example from a regional planning strategy perspective is Brisbane City Council's proposed new City Plan, which is currently being finalised, which promotes the fact that only 7% of Brisbane's urban area will be affected by growth. This is promoted as having the benefit of 'protecting' the suburbs and highlight that future residential and non-residential growth – principally through densification – will occur in major centres and clusters. The Victorian Government's *Plan Melbourne* also pursues a similar approach.

From a retail policy perspective, the Victorian Government's announced (but still to be gazetted) further abolition of retail floor space caps from local council planning instruments is likely to be met with some resistance from local councils and small retailers, according to the weekly industry publication *Inside Retail* (30 May 2014).

Unnecessary restrictions and competitive neutrality

There are six broad areas of regulation within planning systems which apply to retail development, where unnecessary restrictions can be said to be applied, including:

- **Strategic planning (i.e. suggesting an area is to be retained as a smaller 'village' which raises expectations about low growth).**
- **Land-use (i.e. what use – which relates to land-use definitions – is permissible and prohibited.**
- **Pre-Development Application (DA) requirements (i.e. the requirement for a 'structure plan' or 'master plan' which includes community consultation and must be approved before a DA can proceed).**
- **Development application and assessment (i.e. whether a DA is needed and the process upon which it is assessed (e.g. by independent experts, under staff delegation or elected councillors); including community consultation).**
- **Development controls (i.e. building height, density, setbacks, car parking and design requirements).**
- **Infrastructure contributions (i.e. a cash or work-in-kind contribution towards public infrastructure for councils (e.g. libraries, swimming pools), state agencies (e.g. roads), and utilities (e.g. electricity sub-stations).**

In considering planning restrictions, it is critical the Review Panel recommends that competitive neutrality is achieved in the pursuit of competition reforms in Australia's planning systems. Even in the case of Victoria's reforms, in coming to a 'balanced' planning outcome, it could be interpreted that it hasn't fully enabled competitive neutrality. To take one example, the 'as-of-right' development provided for small supermarkets in the IN3 zone is not available to retail premises or restricted retail premises where such developments still require a planning permit. This obviously reflects broader planning system issues, but it is an example where the sole pursuit of competition reforms can be in conflict with broader issues.

We have highlighted below a few specific examples of planning restrictions, consistent with the six broad areas of planning regulation noted above, that also present issues with a lack of competitive neutrality:

<u>Preferential zoning</u>

Some planning schemes enable some retail formats (e.g. bulky goods, large format) to locate and develop in some areas, while other retail formats cannot. As an example, in NSW, 'bulky goods premises' are able to develop in the B5 Business Development zone however 'shops' (such as shopping centres) cannot. Similarly, the previously proposed NSW Activity Centres Policy provided that all retail formats except shopping centres can locate in out-of-centre locations, despite there needing to be a 'net community benefit' test in such circumstances. Aside from having a 'retail' monopoly in such zoned land, generally such land has much lower land costs (and therefore lower government imposed council rates, land tax and fire and emergency services levies), and lesser development requirements such as design and development contributions (see below).

<u>Floor space caps</u>

The draft Logan Planning Scheme (Qld) proposes imposing retail floor space caps in certain areas and not others. In addition, since the Productivity Commission's recommendations, the ACT Government's Draft Variation 304 to the *Territory Plan* sought to impose a supermarket floor space cap in local centres.

Development contributions

There are also competitive neutrality issues concerning development contributions.

In Queensland, for example, there is a 'standard' maximum infrastructure charge for shopping centre development of $180/m^2 of Gross Floor Area. However a 'warehouse' – such as a bulky goods outlet – has a lower charge of $140/m^2. A 10,000m^2 shopping centre development would pay $400,000 more than an equivalent bulky goods outlet. Further, due to the required location of shopping centres in activity centres, which are often adjacent to state (i.e. major) roads, there are often additional and more costly road-related conditions imposed, such as intersection upgrades.

This places shopping centres at a competitive disadvantage compared with other retail formats.

Structure planning

Under some planning schemes, such as Perth's Activity Centres Policy, retail developments in certain locations are required to undertake structure plans which outline long-term urban outcomes. This can facilitate a better outcome, but it can also add time, cost and uncertainty to the development process. Developments in out-of-centre locations, however, do not have to comply with this requirement.

Mixed-use (e.g. residential) requirements

It is becoming a requirement, such as in West Australia and Queensland, to provide residential uses as part of a retail development. While this can be a positive in certain markets, it can adversely impact a project. Further, residential uses can 'lock out' future retail expansions through strata titling and create conflict whereby residents complain about commercial activities. Generally, only retail development within activity centres are required to address such provisions.

Design requirements

Some retail developments must comply with relatively more stringent design requirements. As an example, the NSW Government has previously proposed Centres Design Guidelines which would only apply to retail developments within activity centres; would interfere with retail fundamentals (such as seeking to prescribe tenancy uses, mix and sizes); and also seek to impose a one-sided perspective on 'good design'. The Guidelines were proposed to only apply to retail development within activity centres, whereas retail development outside these areas would not be required to comply with them.

Development conditions

Under the draft Brisbane City Plan noted previously, there was a proposed policy that where a development was co-located or adjacent to a public transport facility, the developer would be required to build commuter parking. This would have severely penalised retail development within major centres where such facilities exist, versus retail development in other locations (e.g. light industrial areas) where such public transport facilities generally do not exist. Aside from this fact, it should not be the responsibility of a private developer to provide parking facilities for either commuters or non-users of their shopping centre. Our modelling showed this would be a major additional cost impost on development (approximately $5 million per facility in construction cost alone). This policy has now been removed.

Planning permit fees

It was announced in the Victorian State Budget on 6 May 2014 that from 1 July 2015, planning permits with a development cost of $1 million or more will be required to pay a new levy to help fund the Metropolitan Planning Authority. We are currently seeking further clarification but, at face value, this would appear to mean that developers who can develop 'as-of-right' will not have to pay this levy, thereby discriminating against those who are caught and impacted by such a change.

Delivery times

Brisbane City Council's new City Plan, which was exhibited last year and which encourages mixed-use development in major activity centres, sought to restrict shopping centre delivery times within certain areas to the hours 6am-7pm in order to avoid "*detrimental impacts on the amenity of adjoining residents*". We raised concerns with this provision (which formed part of 1 of 69 "performance outcomes" for such areas) as it would put certain shopping centres at a disadvantage to other locations; inhibit a retailer's ability to efficiently manage supply logistic;, and be in conflict with another one of Council's desired outcomes for an '18 hour economy' as part of encouraging a vibrant city. This proposed restriction has been amended in the final draft (with a solution for broader, but still restricted, hours or delivery activities which do not generate disturbing noise) but it highlights the potential for restrictive retail provisions amidst broader desired community outcomes and an unlevel playing field between major activity centres and other locations.

In light of the above, the Review Panel should note that no retail property company or retail format is unique in experiencing challenges, inconsistencies, cost imposts or having their preferred outcomes thwarted as a result of Australia's planning systems; or wanting to have the lowest possible costs when acquiring land, accessing new markets or undertaking development.

In the case of SCCA members, this includes issues in relation to regional planning schemes, zoning, definitions, development approvals, design requirements, land owner consents, prescriptive controls, state agency conditions, community consultation requirements and infrastructure charges and contributions. In all cases there is a need to work proactively with governments to try and align with their own growth objectives, retailers and surrounding communities.

Such planning system challenges are in the context of SCCA members continuing to innovate with their development programs. In this regard, their development proposals are not merely limited to 'retail' uses, or traditional or 'tried and tested' models. New entrants to the Australian retail market are often described as 'new retail formats' but it is actually our members who are constantly assembling 'new retail formats'. This includes the incorporation of leisure and lifestyle uses as well as integration with government owned and licensed public transport facilities and interchanges. This also includes the incorporation of residential uses, which is an increasingly desired outcome of State and local governments as enshrined in planning schemes (e.g. *Plan Melbourne*), infrastructure programs (e.g. WestConnex in Sydney) and more detailed structure planning exercises (e.g. Perth's Activity Centres Policy). This is seeing the traditional model of mixed-use development turned on its head, whereby previously it was often the case of residential developers incorporating street level retail. It is now the case where retail developers are incorporating residential uses into their proposals. This objective of governments can, however, present significant planning challenges that can create an unlevel competitive playing field between retail developments in activity centres and out-of-centre locations; as we have outlined above.

Recommendations:

The Review Panel should recognise that shopping centre developers have a major interest in Australia's planning systems, including restrictions to investment and competition, given their significant development pipeline.

The Review Panel should recognise the Productivity Commission's previous findings and recommendations in relation to competition in Australia's planning systems and endorse these as the basis for reforms to be progressed at the relevant State and Territory levels.

The Review Panel should recognise that competition issues can be 'traded off' with other important public policy issues under Australia's planning systems, where the benefits are considered to outweigh the costs, such as productivity, public investment efficiency and employment concentration.

The Review Panel should recognise the various pubic goods provided by Australia's planning systems including transport efficiency and productivity, environmental and heritage protection, resource protection, employment growth and minimising land-use conflict.

The Review Panel should recommend that competitive neutrality should guide reforms to improve retail competition through Australia's planning systems, to ensure that no retail format gets a competitive advantage over another.

The Review Panel should reinforce that competition or loss of trade is not a valid planning consideration when appealing new development proposals.

The Review Panel should recommend that an objective of all planning systems should be 'as-of-right' development which does not require a formal development application.

5.0 Competition Laws

5.1 Unconscionable conduct in business transactions

The unconscionable conduct provisions of the *Competition and Consumer Act* (Part 2-2 of Schedule 2) and, in particular, section 21 (the former section 51AC of the *Trade Practices Act*) are among the most reviewed provisions of the Act. The frequency of these reviews might suggest the provisions themselves are problematic. This is not the case. Rather, as was intended by the Federal Parliament, the courts have interpreted the term "unconscionable" in section 21 more broadly than the interpretation developed by the courts of equity. In particular, the courts have accepted that large businesses might now be caught by section 21 not only when dealing with someone under an inherent disadvantage because of something personal such as lack of education, drunkenness or illness (as covered by the equitable doctrine) but also when dealing with someone in a weaker commercial position, including smaller businesses.

The fact that there have not been many section 21 (or section 51AC) cases is not evidence that the unconscionable conduct provisions are failing in their purpose. Rather this is evidence that they are achieving their purpose. The true test of a law should be its success in changing behaviour. The success or otherwise of road safety laws, for example, is judged by the reduction in traffic accidents and deaths; not by the number of successful prosecutions for breaches of the law. In the area of retail leasing, to take one area, the Productivity Commission has noted: "*while there is a relatively limited case history pertaining to unconscionable conduct claims, threat of action under unconscionable conduct provisions appears to have had an influence on market conduct.*"

The relatively small number of unconscionable conduct cases brought before the courts is the result of a range of factors: the small number of complaints actually made to the ACCC (itself an indication that the incidence of such behaviour has always been vastly exaggerated); the wide availability of alternative forms of relief under both the *Competition and Consumer Act* and other legislation; a better educated and better informed small business constituency; and a more heavily regulated market in the retail tenancy and franchising industries.

It is our experience, for instance, that major shopping centre owners and managers now devote significant resources to education and compliance courses for their staff in order to ensure they are aware of their legal and ethical obligations in dealing with tenants, franchisees and other parties. No reputable shopping centre owner or manager wants to be accused of acting unconscionably or to be found to have acted unconscionably. Such a finding has wider commercial ramifications, as well as the liability flowing from the particular action.

The fact that there have been so many reviews of the unconscionable conduct provisions is simply a reflection of a persistent campaign by some to replace the word 'unconscionable' with 'unfair' or to expand the provisions to include reference to 'unfair conduct'. As the former NSW Chief Justice James Spigelman has stated, (in *Attorney General (NSW) v World Best Holdings Ltd [2005] NSWCA261),* if this was the case, the provisions would be transformed into "the first and easiest point of call" when a dispute about a retail lease arises. So far this campaign has been unsuccessful.

The most recent review of the provisions followed an inquiry, conducted by the Senate Economics Committee, into the statutory definition of unconscionable conduct in 2009. Following recommendations by that Senate Committee the Federal Government established an Expert Panel (comprising Professor Bryan Hourigan, Mr Ray Steinwall and Mr David Lieberman) to undertake further examination. The Expert Panel recommended the inclusion in the unconscionable conduct provisions of a number of interpretative principles to assist courts in the interpretation, development and application of the provisions. These were outlined by the then Parliamentary Secretary, Mr David Bradbury, in the Second Reading Speech on the *Competition and Consumer Legislation Amendment Bill 2011* in the House of Representatives on 15 June 2011. The amendments began operation in 2012.

In the light of these recent legislative amendments, and the fact that they have been operative for less than three years, there is no justification for further amendments at this time. The statutory interpretation of the unconscionable conduct provisions continue to evolve and the courts should be given an opportunity to test whether these amendments have satisfied claims that the provisions are difficult to interpret. The recent announcement by the ACCC that it is bringing proceedings under these provisions against Coles Ltd over matters to do with supplier contracts, and Coles' statement that it will vigorously defend these proceedings, will inevitably lead to further judicial interpretation.

Recommendation: No amendments be made to the unconscionable conduct provisions of the *Competition and Consumer Act* (at least until the amendments which began operation in 2012 have been given a chance to be tested by the courts).

5.2 Unfair contract terms in business transactions

There is ambiguity about whether the proposed extension of the regulation of unfair contract terms (contained in Schedule 2 of the *Competition and Consumer Act*) to include business-to-business transactions is a matter to be considered by the Competition Policy Review. We note that the terms of reference of the Review (3.3.4) make reference to whether the "*protections against unfair and unconscionable conduct, provide an adequate mechanism to encourage reasonable business dealings across the economy – particularly in relation to small business".* The Issues Paper for the Review states: "*Noting that small businesses can face many of the same issues as individual consumers do when negotiating contracts, the extension of these provisions to standard form small business contracts is currently being considered by Australian governments."* Since this Issues *Paper* was released, the Federal Government has released a Consultation Paper on 'Extending Unfair Contract Term Protections to Small Businesses' and this seems to reaffirm that the Federal Government intends to proceed with its election commitment to extend unfair contract terms regulation to business transactions, irrespective of any consideration by the Competition Policy Review.

We find it odd that a so-called "root and branch" review of competition policy and law could proceed by ignoring such a major proposed development in competition law. This is particularly the case since we are unaware of any other major country which regulates business contracts in this way. There are good reasons why other countries have not adopted such an intervention in business-to-business transactions. They recognise that it is vital for the efficient operation of a market economy that business relationships are able to be formed and operate within a legal framework that provides certainty and instils business confidence. It is also vital that bargains that are struck will endure and be enforceable. This is why it has long been accepted, including in Australia, that courts should not restrict freedom of contract, nor interfere with the sanctity of contracts, unless a compelling case for intervention has been established.

The relationship between business and consumer (for which the unfair contract terms regulation was conceived) is quite different to that between business and business. Businesses, whether large or small, must do their homework if they are to succeed and must take responsibility for the business decisions they make. The business-to-business contract, unlike the business-to-consumer contract, is commercial in nature and one on which small businesses could be expected to obtain legal and financial advice. Even if legal advice is not obtained businesses, including small businesses, have greater knowledge of contractual terms and have greater resources to enforce other legal and contractual remedies. In a competitive market, businesses (again including small businesses) also have greater opportunity to negotiate terms than do ordinary consumers.

Several independent inquiries have cast doubt on whether the concept of 'unfairness' would provide much benefit for regulating business relationships. A Senate Committee in 2004 (in the context of introducing 'unfairness' in the unconscionable conduct provisions) stated "*introducing the concept of 'unfairness' to section 51AC carries a serious risk of making the section unworkably ambiguous, by calling on concepts with an unclear legal meaning. It is not clear that 'unfair' would represent a lesser test than 'unconscionable' or that such a provision would enhance protection for small business.*"

Coalition Senators on the Senate Committee supported the recommendation not to introduce these concepts into section 51AC. They added: "*It is our belief that the consequence of [introducing "vague new statutory language into section 51AC] would make the meaning of the section so open to a variety of different interpretations that it would be inimical to the development of a coherent and relatively clear body of law. Furthermore the transactional uncertainty which the introduction of such language would produce would have undesirable consequences for commerce, the social cost of which is difficult to assess. Paradoxically, it is likely to be the very persons whom the section is designed to protect (i.e. persons in position of relative weakness in a transaction) who would suffer most from such transactional uncertainty.*"

We agree with the findings of the Senate Committee in 2004 that the concepts of "fairness" and "unfairness" are unworkable in business-to-business transactions and provide no meaningful guidance as to how business is to act in a particular transaction with another business. Commercial parties want laws that, in any given situation, ensure both parties, when seeking legal advice as to their rights and obligations, can expect the same clear and confident answer from their advisers. Those laws should ensure that neither party will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court, or the lottery of which judge or arbitrator may be sitting on the bench or the tribunal.

It is undesirable for judges to decide that business conduct is illegal simply by reference to idiosyncratic or personalised notions of fairness and justice unguided by law, as some kind of misguided "individualised justice", "discretionary remedialism" or abandonment of "principle" for "pragmatism".

The Productivity Commission in the 2008 Retail Leases Inquiry also considered the arguments for expanding the concept of unconscionable conduct to include "fairness" in the area of retail tenancies. The Commission noted: "*In business transactions, a 'hard bargain' does not necessarily constitute unconscionable conduct. Attempting to legislate what constitutes a 'fair' transaction, and what does not, is inherently difficult and is likely to add further uncertainty to the meaning of unconscionability and potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increased uncertainty*."

The Productivity Commission also noted it was possible that introducing regulations relating to 'fairness' in business-to-business transactions could lead to 'moral hazard'. "*Businesses would be afforded greater protection when undertaking negotiations or in a business transaction, increasing the likelihood of bad decision making through the reduced negative consequences of such decisions. In the Commission's assessment, extending the principle of unconscionable conduct is likely to place constraints on the efficient operation of the market and should be avoided.*"

The Commission further noted that it had "*received no compelling evidence during the inquiry [into the market for retail tenancy leases in Australia] from those advocating extending the provisions of unconscionable conduct that such an approach would be effective in reducing market tensions and the cost of contracting.*"

In the case of retail leases, the contractual relationship between the lessor and the lessee is already heavily regulated by governments as we noted in section 3.2 of this submission. In every state and territory in Australia there is retail tenancy legislation which governs all aspects of the relationship between landlords and tenants, beginning even before the lease is signed. The Victorian *Retail Leases Act*, for example, is 128 pages long and contains 121 sections and this does not include the Regulations made under the Act. (There has been a near quintupling of the amount of regulation since the original *Retail Tenancies Act* was introduced in Victoria in 1986). If a retail lease provision does not conform to the minimum provisions specified in the *Retail Leases Act,* the lease provision is void and the Act's provisions overrule the lease. In the light of existing retail tenancy legislation, and the significant protections it provides to retail tenants, we find it difficult to understand the justification for further government regulation of a contract which is already heavily regulated by governments. This would add substantially to the cost of doing business in Australia.

Given the existence of, the scope of and yet the low demand (in the context of retail leases) for the catch-all unconscionable conduct provisions, there is no justification now to introduce a provision requiring "fairness" in the leasing of retail space in Australia. The minimum standards laid down in state and territory retail lease legislation have been the subject of decades of discussion, debate, and refinement involving experts with considerable leasing experience representing tenants, landlords and government. Those minimum standards should not be subverted in particular cases by judges who may not have the same level of expertise, experience and industry-wide focus and who may be obliged to apply idiosyncratic or personal notions of fairness. Rather, where a lease satisfies the minimum standards laid down by the retail tenancy legislation, the lease should not be subject to challenge for allegedly failing to be 'fair'.

Our interpretation of the Terms of Reference and Issues Paper is that this is an issue that will be examined by the Competition Policy Review. For the reasons we have outlined, we recommend that if the Review recommends the extension of unfair contract terms regulation to business transactions that it also recommends the exclusion from this regulation of any retail lease which is already regulated by state or territory retail tenancy legislation.

Recommendation: Retail tenancy leases which are already regulated by State/Territory retail tenancy legislation be excluded from any regulation of unfair contract terms regulation in business-to-business contracts.

5.3 Acquisition of supermarket leases

In 2008, following the ACCC Grocery Inquiry, the ACCC wrote to major shopping centre landlords advising that it now intended to investigate future acquisitions of supermarket sites to establish whether these might involve a substantial lessening of competition in the grocery industry. This investigation would be based on section 50 of the *Trade Practices Act* (now section 50 of the *Competition and Consumer Act*). This section prohibits a corporation from acquiring "any assets" if the acquisition "*would have the effect, or be likely to have the effect, of substantially lessening competition in a market.*" The ACCC advised shopping centre owners that it would now adopt a very broad interpretation of what is "an asset" under section 50 and that, in its view, this would involve acquisition of leases (whether by way of entering into a lease or an assignment); acquisition of an option to acquire land; and the acquisition of freehold land. The commission also said it regarded the renewal of an existing lease to a supermarket operator, and the exercise of an option in an existing lease to a supermarket operator, as also being caught by section 50. This was a major change in approach by the ACCC. Previously such lease transactions had not generally been regarded as attracting the potential application of section 50 and there is legal doubt whether section 50 'stretches' as far as the ACCC claims.

This has affected shopping centre owners in three ways. First, and most directly, there is now an onus on supermarket operators and shopping centre owners to ensure that such acquisitions are notified to the ACCC at least six weeks before the proposed acquisition takes place so that the commission can investigate whether or not this would result in a 'substantial lessening of competition' in the local area. The ACCC has advised that in built up areas it would generally define the 'local area' as one within a five kilometre radius, although obviously in less developed locations a greater area would need to be taken into consideration.

Second, this increased scrutiny by the ACCC inevitably impacts on the viability of proposed new shopping centres and the viability of proposed redevelopments of existing shopping centres. This is because the choice of a supermarket anchor now involves more than just the negotiation of an agreement for lease between the developer and the developer's preferred supermarket anchor. If the ACCC objects, on competition grounds, to the preferred anchor then the alternative supermarket anchors (who are limited in number) have been placed in a position where they can drive an even harder bargain with the owner over lease terms and conditions.

This is particularly the case given the ACCC's claim that the renewal of an existing lease to a supermarket operator, and the exercise of an option in an existing lease to a supermarket operator, is now 'caught' by section 50. This could have a devastating effect on the viability of an existing shopping centre and on the tenants who comprise the shopping centre. Supermarket leases are generally for around 20 years and more, particularly with options. If the ACCC prevented the renewal of a lease on the grounds of an assessment of competitive conditions at least 20 years after the lease was entered into, the shopping centre owner would be placed in an invidious position. Given the limited availability of alternative supermarket operators, and the knowledge of the ACCC's actions, the bargaining power of those alternative supermarket operators would be substantially enhanced. It is not an exaggeration to say that the future viability of the shopping centre would be at risk which would have a significant impact on the speciality tenants in that shopping centre.

We disagree that the renewal of a lease to a supermarket operator, and the exercise of an option in a lease to a supermarket, should be regarded as an acquisition of "an asset" and, if necessary, an amendment be made to section 50 to ensure that it is not treated as such.

Recommendation: Section 50 of the *Competition and Consumer Act* be amended to ensure that a renewal of a lease to a supermarket operator, and the exercise of an option in a lease to a supermarket operator, is not considered an acquisition of an asset under section 50.

5.4 Authorisations and notifications, collective bargaining

Small business organisations argued to the Dawson Inquiry that the authorisation provisions of the Act for collective bargaining were too cumbersome and time consuming and that small businesses should be exempt from these provisions. The Dawson Inquiry did not accept these arguments and argued that an unfettered ability by small businesses to bargain collectively would allow anti-competitive and undesirable outcomes to occur. The Inquiry, however, recommended that the 'authorisation' process be replaced by a 'notification process'. Under the authorisation process the ACCC is required to determine whether or not collective bargaining should be permitted and the collective bargaining cannot take place until the ACCC has made its decision. Under a notification process the onus is reversed and the collective bargaining may proceed after a certain defined period, unless the ACCC objects to the arrangement within that period of time.

This recommendation was partially adopted by the Federal Government. Instead of replacing the authorisation process with a notification process, the Government added the notification process as an alternative to authorisation. This is section 93AA-93AF of the *Competition and Consumer Act*. The ACCC had supported the notification process before the Dawson Inquiry but argued the relevant period when the notification comes into force should be at least 30 days, and in some cases 90 days, after the notification was lodged. The Dawson Inquiry disagreed and argued the relevant period should be only 14 days, an absurdly short period of time to expect that public benefits and public detriments can be adequately considered by the ACCC. The period subsequently adopted by the Federal Government was 14 days.

It is our understanding that since this provision was inserted in 2006 not one small business organisation has taken advantage of this notification process for collective bargaining. This is despite a major publicity and information campaign by the ACCC. This casts severe doubt on the claims made to the Dawson Inquiry that the authorisation processes were too cumbersome, claims which the Dawson Inquiry accepted at face value without testing their validity.

If our understanding is correct that the notification process for collective bargaining has not been used in eight years of operation, there is no justification for retention of the provision. Collective bargaining involving small businesses has continued during this period by means of the authorisation process and this has not proved to be cumbersome.

Recommendation: Section 93AB of the *Competition and Consumer Act* be repealed.

5.5 Joint venture defences (s.44ZZRO, 44ZZRP, 4J)

The fact that retail space in Australia is so widely held by so many different owners in Australia is at least partly due to the fact that owners may own, develop and manage that retail space in joint venture with like-minded persons and entities. It is therefore important that joint ventures, including joint ventures to own and manage shopping centres, are adequately exempted from the cartel provisions and the exclusions provisions.

When considering whether the existing provisions are adequate and operate effectively it is important to appreciate that the relationship of participants in joint ventures in Australia are generally regulated by a written contract called a Joint Venture Agreement which specifies the objects of the joint venture but which vests the decisions on policy and overall control of the joint venture operations in a committee.

By way of example, a leading commercial precedents text in Australia sets out in precedent a simple form of venture agreement. In terms of the management committee in which control of the joint venture is vested this Australia wide precedent provides:

> **The management committee:**
>
> ***4(1) The representative body for the joint venture shall be a management committee (the committee) which shall consist of two, or such other number as the joint ventures may from time to time agree upon, representatives of each joint venturer and the committee shall supervise and control the works and the execution of the contract on behalf of the joint venturers …***
>
> ***5(2) The committee shall, subject to clause 5(1) agree upon and approve all matters relating to the joint venture, the works and the contract including the following:***
>
> ***(a) the appointment of a project manager to manage the joint venture and to have overall responsibility for execution of the works and the terms of his appointment including his duties and functions and services to be performed;***
>
> ***(b) preparation of scope and procedure manuals;***
>
> ***(c) appointment of any solicitor, consultant, accountant, expert, contractor or sub-contractor for completion of the works in accordance with the contract and the terms of their appointment;***
>
> ***(d) details of all invitations to tender and all tender documents;***
>
> ***(e) feasibility studies, budgets, estimates, construction programmes and the like relating to or in connection with the works and the completion of the contract;***
>
> ***(f) insurances in respect of the works or any part thereof;***
>
> ***(g) the taking of legal or arbitration proceedings in relation to the project or the joint venture;***
>
> ***(h) the employment of any staff necessary for the joint venture;***

This form of joint venture agreement is understood to be in wide spread usage in Australia and is typical of shopping centre joint ventures in Australia (of which our members are most familiar).

The problem with the existing joint venture provisions in the *Competition and Consumer Act* is that they only apply to "contracts" containing a cartel provision.

In relation to the requirement that the relevant "cartel provision" be contained in a contract, leading Australian Senior Counsel, Bret Walker SC has advised that:

> ***"It seems to us that the Defence clearly only covers a very narrow sub-set of the potential class of conduct that will be caught by the Offences and the Civil Penalty Provisions. Taking as an example the conduct of a management committee running a shopping centre pursuant to a joint venture, it is difficult to imagine how the decisions which result from the ordinary deliberations of a management committee could ever be terms of a contract. Assuming that that such decisions of a management committee would otherwise fall within the proscribed conduct covered by the Offences and the Civil Penalty Provisions, then the Defence would be ineffective to prevent that conduct being criminal, or exposing those committing it to a liability for civil penalties…***
>
> ***In short, in our opinion, although it is not clear beyond doubt that the conduct the SCCA has referred to will be proscribed by the Offences or the Civil Penalty Provisions, one cannot be certain that it will not be caught by those provisions. As such, the SCCA's concerns seem to us to be well founded. …"***

Similar criticisms of the existing defence were raised by the representatives of the Trade Practices Committee of the Law Council of Australia appearing before a Senate Committee in 2009:

> ***"…we believe the joint venture exceptions to illegal cartel conduct should be broadened so that they apply to arrangements and understandings as well as contracts. This will ensure that non-contractual arrangements which are common in business practice, in particular in relation to management committees of joint ventures, can also benefit from the exceptions."***

The above concerns were referred to in example 1.4 in the Supplementary Explanatory Memorandum to the *Trade Practices Act (Cartel Conduct and other Measures) Bill 2009* which provides:

> ***Example 1.4 demonstrates the interaction of the elements of the venture exceptions.***
>
> ***Example 1.4***
>
> ***Two or more parties enter into a joint venture to own or develop a shopping centre, and have a contract containing clauses to the effect that a management committee comprising representatives of the joint venture parties will decide from time to time the rent and other charges within their shopping centre, and then later proceed to do so. If the original contract that was made has a provision providing for the making of decisions as to rent and other charges by that management committee for the purposes of the joint venture, then the process of making and giving effect to those decisions would appear to be covered by the exception.***

What this Explanatory Memorandum suggests "*would appear to be covered by the exception*" should now be expressed in the legislation to be covered by the exception.

Recommendation: The joint-venture provisions of the Competition and Consumer Act be amended to clarify that they protect:

a. joint ventures where the joint-venture vehicle is a trust or an incorporated entity; and

b. oral joint decisions made by representatives of the joint venturers at joint-venture committee meetings (where the terms of the joint-venture agreement have been reduced to writing and those terms envisage such decisions being made at joint-venture committee meetings for the purposes of the joint-venture).

6.0 Administration of Competition Policy

The *Competition and Consumer Act* effectively requires (in s. 7(3)(b)) at least one Commissioner of the Australian Competition and Consumer Commission to have "knowledge of, or experience in, small business matters". Since 2008 the Act has also required (in s.10(1B)) that "*there will be at least one Deputy Chairperson who has knowledge of, or experience in, small business matters.*"

No satisfactory explanation has ever been given as to why small business was singled out for such special treatment. It is difficult not to escape the conclusion that this outcome is simply a political pandering to the perceived electoral influence of the 'small business lobby'.

Section 2 of the Act states: "*the object of the Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection*". The courts have consistently held that the Act is designed to protect competition; it is not designed to protect particular competitors. Regrettably the provisions in section 7(3)(b) and section 10(1B) send the opposite message: that the protection of consumers may on occasions run second to the protection of small businesses. The objectivity of the ACCC as a competition regulator may be compromised by these provisions; certainly the perception of objectivity has been compromised.

This blurring of the protection of competition with the protection of competitors has been explicitly stated by Mr Ken Phillips, of the Independent Contractors Association, and a leader of the 'small business lobby', in discussing this present Competition Policy Review: "*Competition laws traditionally focus on protecting consumers as a key mechanism to achieving equality outcomes. By considering small business in a similar light as consumers (when dealing or competing with big business) competition laws can advance the cause of market capitalism in delivering for the entire community…This is the moral positioning argument we will be putting to the competition review.*" This argument that the Act should place small business in a similar position to consumers is a logical outcome of the confusion created by section 7(3)(b) and section 10(1B).

Both sections of the Act were inserted prior to the decision by the then Federal Government to appoint an Australian Small Business Commissioner to represent small business interests and concerns to the Australian Government; to assist in educating small businesses; and to seek the resolution of disputes involving small business. The present Federal Government has retained this position and has released a Discussion Paper proposing to give this position legislative authority and to expand its functions to become a Small Business and Family Enterprise Ombudsman. A majority of the States have also now established Small Business Commissioners.

Given these developments there is no longer any justification for requiring the *Competition and Consumer Act* to have special regard for small business expertise in the appointment of Commissioners and Deputy Chairpersons of the ACCC.

Recommendation: Section 7(3)(b) and section 10(1B) of the *Competition and Consumer Act* be repealed.

7.0 Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major shopping centre owners and managers. Our owners own and manage more than 11 million square metres of retail space. Our members are AMP Capital Investors, Brookfield Office Properties, Charter Hall Retail REIT, CFS Retail Property Trust Group, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, Ipoh Management Services, ISPT, Jen Retail Properties, JLL, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, Westfield Group and Westfield Retail Trust.

Contact

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