



Action for Public Transport (N.S.W.) Inc.

APT NSW

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Competition Policy Review Secretariat
The Treasury
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Submission on Harper review of competition policy

Introduction

Action for Public Transport (NSW) (“APT NSW”) is a transport advocacy group active in Sydney since 1974. Our members are users of public transport services.

We make this submission because there are aspects of the review that could have negative consequences for the users (consumers) of public transport services.

Competition principles

The first draft recommendation in the draft report (p.24) begins:

The Panel endorses competition policy that focuses on making markets work in the long-term interests of consumers.

Draft Recommendation 1 then sets out the principles the Panel believes should guide the Commonwealth, State and Territory and local governments in implementing competition policy:

- legislative frameworks and government policies binding the public or private sectors should not restrict competition;***
- governments should promote consumer choice when funding or providing goods and services and enable informed choices by consumers;***
- the model for government provision of goods and services should separate funding, regulation and service provision, and should encourage a diversity of providers;***
- governments should separate remaining public monopolies from competitive service elements, and also separate contestable elements into smaller independent***

business activities;

- *government business activities that compete with private provision, whether for-profit or not-for-profit, should comply with competitive neutrality principles to ensure they do not enjoy a net competitive advantage simply as a result of government ownership;*

- *a right to third-party access to significant bottleneck infrastructure should be granted where it would promote a material increase in competition in dependent markets and would promote the public interest; and*

- *independent authorities should set, administer or oversee prices for natural monopoly infrastructure providers.*

These principles encapsulate a particular political philosophy and agenda, which has its defenders and its detractors.

Reading through the submissions made to the Panel, we have noted that consumer groups and small businesses are, in the main, concerned with what we might be regarded as the traditional anti-competitive role of bodies like the ACCC: such as preventing cartel behaviour, collusion, market concentration, and unfair and predatory practices. This traditional role is not mentioned in the above principles, but it is mentioned in the terms of reference:

1.1 no participant in the market should be able to engage in anti-competitive conduct against the public interest within that market and its broader value chain.

It appears that the ACCC's role in enforcing Australia's competition laws is highly valued by consumers and by small business. The locus of support for the radical "small government" or "privatisation" agenda added to the mission of the consumer watchdog in 1993, and re-stated in the above competition principles, lies elsewhere.

Many of our members are inclined to think of themselves as citizens living in a society, not as consumers living in an economy. Most of us are disinclined to spend our days painstakingly comparing products and plans in search of the best deal for essential services, even if we are adept at reading fine print.

We think that if the aim of the exercise is to promote the "long-term interests of consumers", the voice of consumers should be dominant. Their real-life concerns and experiences should guide policy, and ideology should give way to empirical evidence.

Public interest test

The competition principles are modified by a "public interest" test:

Applying these principles should be subject to a 'public interest' test, so that:

- *the principle should apply unless the costs outweigh the benefits; and*

• any legislation or government policy restricting competition must demonstrate that:

- it is in the public interest; and**
- the objectives of the legislation or government policy can only be achieved by restricting competition.**

We are glad that there is a “public interest test”, but we oppose the inclusion of the first leg of the test:

• the principle should apply unless the costs outweigh the benefits;

At first glance the idea sounds reasonable enough, but in practice it refers to cost-benefit analysis. As currently practiced, cost-benefit analysis has serious limitations as a decision-making tool. For example, the cost-benefit analysis used by IPART to determine fares does not include consideration of benefits most people probably assume would be considered, such as the health impacts of creating car-dependent communities¹.

The quest for a single number to sum up all the consequences of a government decision is probably misguided in the first place. Cost-benefit analysis ignores the question of who gets the benefits and who pays the costs. Most of the costs might fall on one group, and most of the benefits on another. Reverse the situation entirely, and the ratio will be unaffected. Yet the consequences of the decision are in reality very different.

We note that this part of the public interest test does not appear in Recommendation 11 (p.34):

All Australian governments, including local government, should review regulations in their jurisdictions to ensure that unnecessary restrictions on competition are removed.

Regulations should be subject to a public benefit test, so that any policies or rules restricting competition must demonstrate that:

- they are in the public interest; and**
- the objectives of the legislation or government policy can only be achieved by restricting competition.**

Of the two formulations, we prefer the one in Recommendation 11.

Zoning and planning

The Draft Report identifies “planning and zoning rules” as a priority area for reform,

¹ Action for Public Transport (NSW) submission to IPART Review of External Benefits of Public Transport 2014

noting that it was originally identified in the NCP process (in the 1990s).

Draft Recommendation 10 reads:

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

The principles should include:

- ***a focus on the long-term interests of consumers generally (beyond purely local concerns);***
- ***ensuring arrangements do not explicitly or implicitly favour incumbent operators;***
- ***internal review processes that can be triggered by new entrants to a local market; and***
- ***reducing the cost, complexity and time taken to challenge existing regulations.***

The rationale for this recommendation is the view that:

Regulations relating to planning and zoning often restrict competition and impede structural change. Such restrictions can be addressed by including competition principles among the objectives of the various state and territory laws dealing with planning and zoning to ensure that competition issues are always considered.

APT NSW does not believe that this is still a priority area for reform. There have been many changes since the 1990s, and a major report by the Productivity Commission in 2011 has already made recommendations on the same subject in a very lengthy and detailed report.

Centres policies

It seems to APT NSW that the statements made in the report could stem largely from the submissions of a handful of developer lobby groups who hope to use the Panel to advance their campaign against “Centres Policies”.

The 2011 Productivity Commission Report summarised the nature and purpose of centres policies:

Centres policies are designed to create areas — commonly referred to as ‘activity centres’ — that will attract and support large numbers of people for a variety of purposes including employment; retail/shopping; communities services (such as health and professional services, government services and education facilities); and social activities. These policies have an effect on the allocation of land for different uses in cities and their placement.

....

Part of the rationale for locating so many activities in centres is to improve the accessibility, productivity and the efficient use of infrastructure — particularly public transport. Activity centres are intended to decrease car travel by providing a single destination to meet the majority of most people’s everyday needs. Activities

that may be located in centres typically include a range of residential, retail, commercial, government, educational, research and/or social activities.²

Centres policies are a classic example of integrated land use and transport planning, which APT NSW fully supports. So do other transport groups (see Bus Industry submission). Concentrating activity in well-serviced centres is good for the passengers we represent, as services to central points can be, and usually are, more frequent and direct.

As a productivity issue, jobs that can be accessed by public transport are a good way to address high rates of unemployment and disengagement from the workforce. APT NSW has made a submission to a recent Senate Inquiry on this subject.³

Centres policies originated with State governments, not local governments. The Panel should not assume that the motivation behind them is the protection of incumbent businesses. The Productivity Commission report noted that:

All jurisdictions with a strategic land use plan have activity centres policy provisions of some kind — either as stand alone policy documents or as a part of their strategic plan ... These policies encourage the location of particular activities in a designated hierarchy of ‘activity centres’; and discourage, to varying degrees, ‘out-of-centre’ developments (usually of commercial activities).

The conclusion reached by the Productivity Commission in 2011 was that “activity centres are also endorsed by business groups”. It quoted the submission made to it by the Shopping Centre Council of Australia:

‘activity centres policies that promote commercial and retail developments to co-locate within identified activity centres (such as regional, town and village centres) should remain the cornerstone of orderly and proper planning and must be maintained’⁴.

A cogent example of why centres policies exist can be seen in the Orange Grove case, in which Jennifer Westacott, then Director of Planning, rightly overruled a junior planner and recommended against a rezoning to allow an out-of-centre development by a close friend of well-known Sydney identity Joe Tripodi.

The 2011 Productivity Commission report noted:

Concerns about ending up with a town centre that is devoid of thriving ‘competitive’ businesses are widespread among both community and

² Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.115.

³ Senate Standing Committee on Rural and Regional Affairs and Transport, inquiry into the role of public transport in delivering productivity outcomes January 2014

⁴ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.3

regulators.

There are numerous examples of ‘dead’ town centres that have resulted partially from poor planning decisions by governments and a lack of consideration of the development proposal in the context of existing activities (Kennedy 2004; Witherby 2000; Rohde 2004).

It notes that the National Association of Retail Grocers Australia (NARGA) claim that many Australian towns have:

... a small shopping centre out of town and a substantial proportion of empty shops (amongst dollar stores) in the main street ... In each case the appropriate planning processes would have been followed. The question is whether these properly assessed the net impact on the town or on competition in the affected sectors. Local government would have been sold on the “extra jobs” provided by the new development, not realising that in many cases these came at the expense of existing employment and the loss of existing businesses, diversity they offered and the support they gave to local communities (sub. 47, p. 4)⁵

Similar concerns were conveyed to the Panel, but despite claiming that it is “sensitive to these concerns” the Draft Report brushes them aside on p.68 because “they do not of themselves raise issues for competition policy or law”.

⁵ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.296



A weak centre – North America



A weak centre - Villawood



A strong centre (Bankstown)

Centres policies are not “anti-competitive”

It is not “anti-competitive” for governments with responsibility for infrastructure to use planning controls to maximise the use of existing infrastructure and limit the demand for additional infrastructure. It is just common sense and prudent use of public money. In the same way, since the 1970s new housing development has been confined to areas that are, at a bare minimum, sewerred and connected to water supply.

Indeed, there are many submissions from smaller businesses and their representatives that suggest that acceding to developer demands to lift restrictions on “out-of-centre” development is more likely to work **against** competition. If small businesses all wind up as tenants in freestanding, single-owner shopping centres dominated by chain retailers, this does not seem an unreasonable proposition.

The Productivity Commission recorded a complaint from the Institute of Public Affairs that:

... application of restraints presented by activity centres policies ‘have become the means by which shops and shopping centres are protected from competition.’⁶

Submissions to the Panel’s Issues Paper made by the UDIA and the Urban Taskforce are of similar tenor.

⁶ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.286

On the other hand, the Shopping Centre Council of Australia (SCCA) view in its submission to the Productivity Commission was that:

These planning and zoning issues engender competition concerns for existing businesses, when new retail entrants are offering much the same types of goods and services as existing businesses, drawing on the same customer base, but are, for whatever reason, receiving different regulatory treatment through planning and zoning systems. For example, the new retailers may:

- have access to sites which are available at comparatively lower prices and are less costly to develop (such access is made possible either through spot rezonings or by meeting prescriptive definitions on the business type)*
- be less affected by planning and zoning requirements for public amenity and infrastructure (because of the lesser requirements on out-of-centre sites)*
- receive differential treatment in the rezoning of land.*

On the basis of such reasons, the SCCA contend that ‘it is these requests for special treatment that are anti-competitive’ (sub. 43, p.6). Instead of working within existing requirements, some large retailers and developers negotiate to their commercial advantage for changes to existing requirements.⁷

The ACCC 2008 grocery inquiry also notes:

The extent to which the dominant presence of the MSCs in centres inhibits the ability for other supermarkets to successfully enter local markets is exacerbated by the fact that very few shopping centres in Australia are able to successfully maintain three full-line supermarkets. This, combined with the ‘must have’ status of Coles and/or Woolworths for centre owners, all but forecloses access to major shopping centres for independent retailers in most instances.

In short, developers are reluctant to offer prime sites to independent operators as they are unlikely trade as successfully as the MSCs. Conversely, one reason, among others, that independent operators are unable to trade as successfully as the MSCs is an inability to access prime sites.

*...
As well as affecting competition at the local level, the dominance of the MSCs in obtaining prime supermarket sites has broader network effects as it affects the ability of independents to establish a successful chain of stores necessary to compete with the MSCs at a regional, state or national level.⁸*

Fortunately, the Productivity Commission did not come down in the last shower. It

⁷ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.324

⁸ Report of the ACCC inquiry into the competitiveness of retail prices for standard groceries p.184

noted:

This pressure by retailers to locate outside of activity centres appears not to be related solely to the availability, or otherwise, of sites within activity centres.

...

The potentially lower site costs in out-of-centre locations and lesser development requirements (for example, in the form of fewer public amenities, lower infrastructure charges, fewer constraints on building appearance) afford considerable competitive advantage to the large format retailers over other businesses retailing similar products in centre locations.⁹

...

The potentially large changes in land values associated with rezoning provide incentives for landowners, developers and others to lobby for or against rezoning and changes to activities allowed in particular areas... some retailers have achieved considerable competitive advantages in recent years over other retailers by purchasing lower priced land outside of activity centres and successfully lobbying planners to have that land rezoned (up-zoned) for retailing activities¹⁰.

The Productivity Commission has said:

While it may be advantageous to have a planning system which facilitates a range of business models, it could also be expected that there is a point at which business models should be somewhat adaptable to local conditions¹¹.

This is exactly what seems to have happened. Retailers that in the US would be found in what are commonly called “edge cities”, accessible only by car have adapted to Australian conditions and aspirations and are now commonly found in main streets and centres. Australians have not been deprived of innovative shopping opportunities¹².

The Productivity Commission noted that the SCCA (sub. DR95) had reported that of the 18 countries in which Aldi operates, in only two countries (the USA and France) has it expanded at a faster annual rate than in Australia:

⁹ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.328

¹⁰ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p 342

¹¹Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p 326

¹² Whether or not variations on the theme of a large blank box ever deserved to be described as “innovative” is debatable.

The SCCA also provided evidence of the growth in supermarket developments in five major activity centres in Sydney, Melbourne and Brisbane (sub. DR95). In particular, the number of supermarkets (stores over 400m²) within a five kilometre radius of the main shopping centre in the five selected centres has increased, since 2000, by 25 to 56 per cent in four of the centres and by 80 per cent in the Brisbane example. The new stores were a mix of Woolworths, Coles, Aldi and other (Supabarn and IGA operators).

While the Commission is not in a position to determine how many stores could potentially have opened in these centres had planning conditions been different, these expansions are largely in line with population growth in the relevant areas (appendix C).

The expansion activities of the supermarket groups, combined with estimates of retail grocery floorspace per person that are within ranges generally considered to be adequate (appendix H) are, on the whole, not indicative of an unduly limited supply of sites for retail activity within centres. That said, there may be particular local markets which are more constrained than others¹³.

The submission made by Aldi on the Issues Paper is unhappy about aspects of planning controls, but it does not indicate opposition to locating its stores in business centres.

Well-trodden ground

The Productivity's 2011 report considers all the arguments about the competition implications of zoning and planning in great depth, comes to what seems like balanced conclusions, and makes what seem like sensible recommendations:

In the extreme, planning systems suffer, on the one hand, from planners who try to prescriptively determine how every square metre of land will be used and, on the other hand, from developers who play a strategic game of buying relatively low-value land and attempting to rezone it to make a windfall gain. The scope for both would be reduced if zoning definitions were broadened and zones and other development control instruments were defined in terms of broad uses rather than prescriptive definitions.

...

As well, it may reduce the use of alternative approval mechanisms, such as ministerial call-ins and state significant tracks, which would improve competitiveness by ensuring more businesses face the same assessment criteria.¹⁴

¹³ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.327

¹⁴ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra p.XLVI.

...

The majority of governments (but to a lesser extent in the Northern Territory) take into account the impacts of proposed developments on the viability of existing centres during a rezoning or development assessment. While this is potentially a competition-limiting practice, maintaining the commercial viability of a city's activity centres is usually an important objective of planning systems ... However, it is more appropriate that the impacts on activity centre viability of possible business location decisions be fully considered during plan preparation and review rather than assessed on an ad hoc basis when a particular development is proposed¹⁵.

State governments can be left to implement this recommendation in consultation with the Productivity Commission, and it may be they already have. In our view, there is no need for the Commission to devote its resources to this issue and no need for it to be listed as an ACCC priority at this time.

Counter-productive recommendation

Draft recommendation 10 is that:

All governments should include competition principles in the objectives of planning and zoning legislation so that they are given due weight in decision-making.

One of the concerns cited in the draft report (p.32) is however:

- complex, time-consuming procedures that differ from one part of the country to another.

It is common for groups and agencies with a particular focus to think that a good way to address their issue is to add it to the list of matters land use planners must take into account. In this case this approach would probably increase complexity and add time to the planning process, which is clearly not what the Panel wants to achieve.

Planning assessment systems work by setting out what *is* relevant to a decision – the criteria. At present, as has been pointed out in some submissions, case law establishes that financial effects on individual businesses that could be affected by a new competitor are not relevant, and decisions based on them can be challenged. Considering the impact on the function of centres is on the other hand legitimate.

As discussed above, unraveling competition issues is by no means an easy matter. The practical consequence of this proposal would probably be that applications would need to be accompanied by an expert report so that the assessing body can ***ensure that competition issues are always considered***. It would take time, and money, and different experts acting in good faith might well come to completely different conclusions.

¹⁵ Productivity Commission 2011, Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessment, Research Report, Canberra, p.354

Privatising public transport

It is evident that the Draft Report is proposing to push for the application of NCP principles to public transport:

The Panel outlines in the remainder of this part where it has identified further reforms that should be undertaken in the infrastructure sectors¹⁶.

It then observes:

Public transport reforms have not been pursued as part of competition policy. Public transport governance systems vary from State to State and city to city. For the most part, however, public transport is owned and operated by government. Where the private sector provides substantial operations, for example, private bus operators, taxis and hire car services, these are often regulated or licensed by governments.

...
Extending NCP principles to public transport could see more franchising and privatisation of potentially competitive elements of public transport, stronger application of competitive neutrality principles and removal of regulation that limits competition. This holds the prospect of providing services more efficiently and improving service levels.

The Issues Paper sets out what this would mean in practical terms:

Reforms to government businesses under the NCP included the separation of regulatory and commercial functions, structural separation of contestable from non-contestable activity, the application of cost-reflective pricing, and the commercialisation, corporatisation and in some cases privatisation of government businesses. Where governments retain ownership of businesses, they have been subject to competitive neutrality policy¹⁷.

APT NSW is mindful of the interests of passengers, and would welcome improved service levels. It is by no means evident that the NCP approach would be a positive step towards such a result, and we think there are very good reasons that public transport reforms have not been pursued as part of competition policy (apart from a few brief, expensive and unproductive forays in that direction).

Running a public transport system is a complex and highly specialised endeavour. It requires a deep understanding not only of passenger behaviour, but also of the operation of the system ***as a system***. It requires great skill in network planning, timetabling, information systems. And it requires serious understanding of the land use impacts of transport services, and vice versa.

These are not the skills economists acquire and apply in their work. Like any other professional group, they tend to do what they know how to do. It has been said in a very

¹⁶ Draft Report p.121

¹⁷ Issues Paper p.18

different context: “Just because you have the biggest hammer doesn’t mean that every problem is a nail”.

The NCP approach is the wrong approach for public transport, assuming that a better outcome for consumers is the intended outcome. Looking for opportunities to break the system up into unconnected separate parts is entirely the wrong thing to do. This does not mean that the public transport operators need all be public agencies. Many are not and never have been. Others on the other hand began as private operations, failed, and services were taken over by public sector operators.

The Draft Report quickly slides over what can go wrong:

The experience in Victoria serves as an example of public transport reforms that have ultimately delivered significant benefits despite some initial problems. In the early 2000s urban rail, tram and country passenger rail operations were privatised. However, within a few years most of the operators needed to be bailed out by the Victorian Government. While service levels had improved significantly and passenger satisfaction increased, overestimates of patronage built into the bids meant that the subsidies agreed to under the contracts were insufficient to keep the operators solvent.

In Britain, the privatisation of bus services outside London infamously devastated services and caused a collapse in patronage. The prescription the draft Report proposes is likely to have equally disruptive results:

Through careful contracting, service levels and choice can be maintained or improved through increased private provision. Bus services are likely to be contestable and, while governments may wish to provide a minimum level of service, they should not restrict other providers from entering the market.

The idea that governments would provide a “minimum level of service” (should that perhaps be “prescribe”) is not the way to run a successful public transport system. The network needs to be planned by experts in transit network planning, who understand both the system of which the bus system is a part, and the customers (our members).

APT recognises that the ACCC knows well how to do what it does best, which is to protect consumers from cartel behaviour, predatory practices and so on.

Public transport agencies similarly need to be allowed to do what they do well – or are beginning to do well.

Road pricing and congestion pricing proposals

The draft report canvasses the issue of road pricing and congestion pricing, and again attempts to deal with it as part of competition policy:

Furthermore, in some sectors very little progress has been made. Consumers are seeing significantly cheaper air travel as a result of reforms to the aviation sector. In contrast, there has been little progress in attempting to introduce cost-reflective

pricing in roads and linking revenue to road provision. As a consequence there is the criticism that new roads are being built in the wrong places for the wrong reasons, while too little attention is paid to getting more efficient use of existing road infrastructure.

Draft Recommendation 3 proposes:

Governments should introduce cost-reflective road pricing with the aid of new technologies, with pricing subject to independent oversight and linked to road construction, maintenance and safety.

We agree that the absence of road pricing militates against the greater use of public transport (for which customers pay fares). We do not however favour the hypothecation of any revenue raised to road construction and maintenance. The cost of road construction and maintenance is only one part of the external costs associated with vehicle use.¹⁸

Thank you for the opportunity to comment

Yours Faithfully

Jim Donovan
Secretary
Action for Public Transport (NSW)

¹⁸ Action for Public Transport submission to IPART review of external benefits of public transport, 2014.