SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Competition Policy Review

Submission on the Competition Policy Review Draft Report – September 2014

Submission by the

Shopping Centre Council of Australia

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1.0 Executive Summary

Thank you for the opportunity to provide this submission in response to the *Competition Policy Review Draft Report*. We are pleased that many of the issues raised in our submission in response to the Issues Paper have been addressed in the Draft Report and the strong emphasis the Review Panel has given to retail and retail markets in its deliberations is very welcome.

The Shopping Centre Council of Australia (SCCA) has made 10 recommendations in response to a number of the Review Panel's *Draft Recommendations* and summary views expressed throughout the Draft Report. While strongly endorsing a number of the Review Panel's recommendations, such as its position on the deregulation of trading hours, we have recommended changes to the detail of others. For example, while supporting the Review Panel's suggestion of "competition principles" with regard to state and territory planning and zoning legislation, we have recommended that the suggested principles be reconsidered in the preparation of the Review Panel's Final Report to ensure they appropriately emphasise the principle of "competitive neutrality" (ie. no retail format or entrant should receive a competitive advantage over another).

We look forwarding to engaging with the Government at an appropriate time to see the important and necessary reforms recommended by the Review Panel adopted and implemented with the cooperation of the relevant tier/s of Government.

We make the following recommendations to the Review Panel for its consideration in the preparation of its Final Report to Government.

Planning and zoning

1. We recommend that the Review Panel revisit their recommended "competition principles" and reframe them to focus on delivering "competitive neutrality" within planning and zoning legislation. No retail format or entrant should receive a competitive advantage over another.

2. The Review Panel should investigate the un-level playing field which exists between non-aviation (particularly retail) related development on airport land and similar development which occurs off airport land and make recommendations to review the un-level playing field.

Cartel conduct prohibition

3. We recommend that the joint venture provisions of the Competition and Consumer Act be amended to clarify that they protect:

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

    - oral joint decisions, which are appropriately recorded or minuted, 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).

Authorisation and notification

4. We recommend that further consideration be given by the Panel to the reasons why small businesses are generally ignoring the notification provisions (in particular), and the authorisation provisions, before any further liberalisation of these provisions is adopted.

Retail trading hours

5. We support the Panel's recommendation on retail trading hours and the suggestion, if any restrictions are to be retained, "these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day".

Pharmacy

6. We support the Panel's recommendation that the renegotiation of the Community Pharmacy Agreement provides an opportunity to address anti-competitive elements of the current regulation of pharmacies.

Occupational licensing

7. We recommend that the Panel recommend that similar reviews be carried out in all states and territories with a view to eliminating or liberalising unnecessary occupational licensing standards and requirements in order to reduce regulatory burdens and reducing barriers to entry to industries.

Unconscionable conduct

8. We agree with the Panel that "active and ongoing review of these (unconscionable conduct) provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. If deficiencies become evident, they should be promptly remedied."

Acquisition of supermarket leases

9. We repeat our previous recommendation that 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.

Liquor licensing

10. We agree with the Panel that the "ongoing review" of liquor retailing regulations should occur to "ensure that they are meeting their stated objectives at least cost to consumers".

We would be happy to elaborate on any aspect of this submission. The SCCA's contact details are provided at page 11.

2.0 Response to Draft Recommendations

The following provides a response to a number of the Review Panel's Draft Recommendations.

2.1 Draft Recommendation 10 – Planning and zoning

We support the introduction of "competition principles" into state and territory planning and zoning regulations. If universally adopted, and drafted in a way which gives supremacy to competitive neutrality, we think this approach could assist to level the playing field with regard to retail development across Australia.

The Review Panel should remain mindful of our earlier recommendation that the "Review Panel should recognise the various public goods provided by Australia's planning systems including transport efficiency and productivity, environmental and heritage protection, resource protection, employment growth and minimising landuse conflict" (p.3) ie. competition is only one of a number of relevant policy issues taken into consideration, and traded off to greater or lesser degrees, by planning authorities. In this regard, competition principles should not be seen by the Review Panel or stakeholders as a step toward the deregulation of planning and zoning laws, but a platform to maximise competition in the context of the other public goods that are delivered through the planning system. We generally described the benefits of an activity centres based approach to planning, for example, in our earlier submission.

We are concerned that the suggested principles outlined in Draft Recommendation 10 perpetuate the unhelpful "incumbent" versus "new entrant" distinction and miss the point we made in our submission to the Issues Paper: "…it is critical the Review Panel recommends that competitive neutrality is achieved in the pursuit of competition reforms in Australia's planning systems" (p. 16). No retail format or entrant should receive a competitive advantage over another and, as we stated in our submission to the Issues Paper, "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)" (p.12).

While we agree that planning and zoning legislation should "focus on the long-term interests of consumers generally (beyond purely local concerns)" and reduce "the cost, complexity and time taken to challenge existing regulations" (as long as the Review Panel contextualises the latter to be for the benefit of all participants in the planning system, not just so-called "new entrants" to a market), we caution against the following recommended principles: "ensuring arrangements do not explicitly or implicitly favour incumbent operators" and "internal review processes that can be triggered by new entrants to a local market".

(We also don't know what the Review Panel means by a "new entrant" or "local market". When does a "new entrant" cease to be "new"? What is the scale of "local" – the local Australian market, or the catchment of a neighbourhood shopping centre? Can existing companies, eg. Scentre Group or Federation Centres, be considered "new entrants" if they are not already in a "local market". Herein begins a circular argument.)

To address the former, any so-called "incumbent" property owner, retail or otherwise, has the benefit of tenure, which they have duly paid for, and undertaken a lawful development in the context of the prevailing planning and zoning legislation, which they would have taken a financial risk on and delivered to a standard which meets community expectations. They also would have made financial contributions to local infrastructure and continue to pay taxes and rates on the property. We don't think this constitutes a favourable "arrangement" - implicit or explicit. It is an arrangement that reflects the nature of their investment and that was delivered lawfully and in accord with relevant policies.

We are not sure what the Review Panel considers are explicit or implicit "arrangements" in current planning and zoning legislation that benefit "incumbent operators", or where potential anti-competitive risks are. Incumbency is a manifestation of Government policy and, in our experience, this is too easily forgotten by some levels of Government, which, in some instances, seem more than willing to introduce an un-level playing for the benefit of so-called "new entrants" seeking development opportunities.

To address the latter suggested principle, rules shouldn't be changed for a group seeking to enter a market, or to allow them to prove a case to develop outside of that market and, consequently, receive the benefit of lower land costs and development risk. Any restrictions on, for example, floorspace or zoning that may inhibit a so-called "new entrant" into a market, would similarly be impinging upon a so-called "incumbent's" opportunity to invest further and grow. Review mechanisms shouldn't be imposed for one section of a market and not another. This contradicts the principle of competitive neutrality and, if the Review Panel's Draft Recommendation was actioned, would build in an un-level playing field into every piece of planning and zoning legislation in Australia. If a review process was to be considered, it should be extended to all market participants.

The Review Panel should note that NSW has a rezoning review mechanism where-by a decision made by a local council to not progress a proposed rezoning can be referred by the proponent of the rezoning to the NSW Department of Planning and Environment for review. This mechanism isn't restricted to so-called "new-entrants". That said, the lack of an appropriate and consistent analysis framework to determine the benefits of a proposal has resulted in this mechanism delivering quite ad hoc outcomes.

The Draft Report also references the suggestion that planning systems inappropriately consider the impact of "new competitor proposals" on established businesses (p. 93). We have also heard this repeated in public forums. We understand this to be incorrect. The impact of a proposal on an established business is not a relevant planning consideration. We suggest that the Review Panel revisit this issue in its final advice to Government.

Since the release of the Issues Paper and the Review Panel's Draft Report, we have provided a submission to the Federal Department of Infrastructure and Regional Development in response to a discussion paper titled *Airports Act 1996: Regulatory Streamline Package: Efficiency Proposals: Master Plan and Major Development Plan*. Although this issue was not front-of-mind when we provided our submission in response to the Issues paper, the proposals in the previously mentioned Discussion Paper have given us cause to bring the issue to the Review Panel's attention.

Non-aviation related development on airport land is not subject to the prevailing state and territory based planning and zoning laws. This creates an un-level playing field, particularly between retail development on and off airport land and should be the subject of consideration by the Review Panel in its final advice to Government.

1. **We recommend that the Review Panel revisit their recommended "competition principles" and reframe them to focus on delivering "competitive neutrality" within planning and zoning legislation. No retail format or entrant should receive a competitive advantage over another.**

2. **The Review Panel should investigate the un-level playing field which exists between non-aviation (particularly retail) related development on airport land and similar development which occurs off airport land and make recommendations to review the un-level playing field.**

2.2 Draft Recommendation 22 – Cartel conduct prohibition

We welcome the Panel's draft recommendation 22 which includes a recommendation that there should be a broad exemption from the cartel provisions for joint ventures and similar forms of business collaboration (whether relating to the supply or the acquisition of goods and services).

To the extent that joint ventures are not pro-competitive they are already caught by section 45 of the Act. The current exemption for joint ventures is too narrowly framed such that it catches legitimate commercial dealings including, potentially, the decisions of joint venture committees which may not themselves have been reduced to writing in a 'contract' (as detailed in our submission of 6 June 2014 at pages 23-24).

3. **We recommend that the joint venture provisions of the Competition and Consumer Act be amended to clarify that they protect:**

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

    - **oral joint decisions, which are appropriately recorded or minuted, 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).**

2.3 Draft Recommendation 34 – Authorisation and notification

Unfortunately the Draft Report appears to perpetuate the belief that the scant use of the authorisation and notification provisions of the Act is the result of a lack of awareness of these provisions by small business. The report states that "the [notification] provisions are not being used as frequently as they might be" (p.65) and that there appears to be a need to enhance small business awareness of the notification process" (p. 250). This is despite the fact that the ACCC embarked on a major publicity and information campaign after the Act was amended to introduce the notification process, following the Dawson Inquiry. As we noted in our submission of 6 June 2014: "It is our understanding that since [the notification] provision was introduced in 2006 not one small business organisation has taken advantage of this notification process for collective bargaining".

There is an alternative explanation for this lack of use of these provisions: many small businesses believe they can achieve a better outcome from negotiations by looking after their own interests in individual negotiations with suppliers. Instead the Panel (like the Dawson Inquiry) appears to accept at face value the arguments by only a few that the lack of use of these provisions is the result of complexity or a lack of awareness. As a result further liberalisation of the notification process for collective bargaining is recommended by the Panel (Draft Recommendation 34). We believe that no evidence is produced for this recommendation.

4. **We recommend that further consideration be given by the Panel to the reasons why small businesses are generally ignoring the notification provisions (in particular), and the authorisation provisions, before any further liberalisation of these provisions is adopted.**

2.4 Draft Recommendation 51 – Retail trading hours

We strongly support the Panel's recommendation on retail trading hours and the suggestion, if any restrictions are to be retained, "these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day". As the Panel notes, on page 105, "the relevant policy question is whether the restrictions are in the public interest, not whether they are in the interest of particular competitors". Since the Panel's Draft Report the Productivity Commission's Research Report on the Relative Costs of Doing Business in Australia: Retail Trade has been released (in September 2014) and this further supports the Panel's draft recommendation. The Productivity Commission found, in addition to the economic benefits that deregulation of trading hours would bring, "it would also increase choice and convenience for consumers" and would "enhance employment opportunities particularly for younger and older workers and those working part-time or on a casual basis".

One point which has not been sufficiently stressed is the extent to which existing restrictions discriminate against particular retailers, consumers and shopping centre owners on the basis of where they locate or live within a city or state. On Boxing Day in Sydney, for example, residents, retailers and shopping centres which are lucky enough to fall within a randomly drawn line defining a 'Sydney Trading Precinct' will be able to shop and trade on that day (one of the best retail trading days of the year) but the vast majority of people who fall outside these boundaries will be denied this privilege. On all public holidays in Adelaide, those retailers and shopping centres lucky enough to be located within the boundaries of the Adelaide CBD will be able to trade on those days (for a limited number of hours) while those who fall outside these boundaries are unable to open their doors. (It is worth noting that the Secretary of the Shop Distributive and Allied Employees Association (SDA) South Australia rejected "any calls to completely deregulate trading hours" the day after the Draft Report was released – *Peter Malinauskas Facebook, September 23, 2014*).

Similar examples of such 'retail apartheid' abound throughout NSW, Western Australia, South Australia and Queensland. The National Retail Association has calculated that there are around 50 separate trading hours zones throughout Queensland (determined by the Queensland Industrial Relations Commission, which has authority for setting trading hours in that State) and around 30 of these are in South-East Queensland.

This offends the notion of competitive neutrality. Where Parliaments intervene in the marketplace, they must be guided by considerations of equity amongst those subject to intervention and ensure policy consistency. Parliaments should not confer a privilege on one group of consumers, retailers and retail property owners but deny that privilege to another (and much larger) group of consumers, retailers and retail property owners. Parliaments should, wherever possible, create level playing fields for businesses. They should not be in the business of restricting competition on the basis of geographic location.

Unfortunately some State Governments have already rejected the Panel's recommendation in the Draft Report, as they have also rejected similar recommendations by the Productivity Commission. As noted above, so has the Secretary of the SDA.

The Federal Government needs to utilise its powers of persuasion over the States, including through COAG, to ensure this recommendation is implemented.

5. **We support the Panel's recommendation on retail trading hours and the suggestion, if any restrictions are to be retained, "these should be strictly limited to Christmas Day, Good Friday and the morning of ANZAC Day".**

2.5 Draft Recommendation 52 - Pharmacy

We accept that there are many anti-competitive aspects about the current regulation of community pharmacies, at both the state and national level. In particular, state and territory legislation limiting ownership of pharmacies to pharmacists, and limiting the number of pharmacies that can be owned, are difficult to justify. This obviously limits the potential for competition and restricts the injection of much needed capital and professional business expertise in the running of pharmacies. Similar restrictions on pharmacy locations obviously limit competition between pharmacies and this is not to the benefit of the consumers of health services.

The regulation of pharmacies needs to be addressed in a holistic manner, however. The Panel has noted that the renegotiation of the Community Pharmacy Agreement, due to begin soon, "provides an opportunity for the Australian Government to remove the location rules, with appropriate transition arrangements". With the co-operation of the states and territories, this could go further and address matters such as pharmacy ownership.

6. **We support the Panel's recommendation that the renegotiation of the Community Pharmacy Agreement provides an opportunity to address anti-competitive elements of the current regulation of pharmacies.**

3.0 Other issues

3.1 Occupational Licensing

We note that the Panel has not made a specific recommendation on occupational licensing, although it has noted that "licensing requirements can raise barriers to entry in markets that create more costs than benefits to the community. Further, the competitive impacts of licensing are not adequately considered either in frameworks or during decision- making (p.100)".

We believe this is a very important area for competition reform and urge the Panel to include a recommendation in its final report to Government that would set a path towards the elimination or liberalisation of unnecessary occupational licensing standards and requirements. This path would enable Governments to harmonise laws and regulations to a standard of 'best practise', reducing costs for business, large and small, across Australia.

We raised in our submission of 6 June 2014 a peculiar barrier to entry to commercial property management, leasing and transactions which is the requirement of acquiring a real estate agents licence in the relevant state/territory. This is despite the fact that the license is exclusively oriented to residential property management and transactions and residential agency work and teaches the holder nothing about managing, leasing and selling commercial property. We indicated we are seeking an exemption (in each state and territory) from licensing for those managing on behalf of large commercial property owners, who do not need or want legislative protection in their dealings with real estate agents. This includes situations where the management and leasing is actually conducted by an entity which is related to the large commercial property owner.

A recent decision by the Victorian Government to remove licensing requirements only for large commercial property owners (i.e. those who own in excess of 10,000 square metres of commercial space or who transact commercial property in excess of $15 million) and related entities has been met with opposition from the Real Estate Institute of Victoria (REIV). One such headline read "Napthine faces real estate agent backlash" (The Age, 29 0ctober 2014). The REIV has reported its intention to campaign in the lead up to the election on 29 November. The reform, incidentally, was recommended by the independent Red Tape Commissioner. This shows the difficulty of implementing even a minor reform of occupational licensing requirements.

The Panel has noted the review of licensing standards which is being carried out by the NSW Independent Pricing and Regulatory Tribunal (IPART) in order to reduce regulatory burdens for business and the community. A similar approach should be adopted in all states and territories.

7. **We recommend that the Panel recommend that similar reviews be carried out in all states and territories with a view to eliminating or liberalising unnecessary occupational licensing standards and requirements in order to reduce regulatory burdens and reducing barriers to entry to industries.**

3.2 Unconscionable conduct

We support the Panel's view (on page 219) that "there is not a strong case that the current unconscionable conduct provisions are not working as intended to meet their policy goals". These provisions have been under constant and active review by the Federal Parliament since their introduction. These are likely to again be under review after the finalisation of the present court action taken by the ACCC against Coles over alleged behaviour in dealing with suppliers.

8. **We agree with the Panel that "active and ongoing review of these (unconscionable conduct) provisions should occur as matters progress through the courts to ensure the provisions meet their policy goals. If deficiencies become evident, they should be promptly remedied."**

3.3 Acquisition of supermarket leases

We refer to our submission of 6 June 2014 in relation to the acquisition of supermarket sites and the change in approach by the ACCC. This relates to the ACCC's decision to regard renewal of a lease, including renewal by way of an option, as being caught by section 50 (see pages 23-24 of our submission of 6 June 2014).

9. **We repeat our previous recommendation that 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.**

3.4 Liquor licensing

In addition to the sale of packaged liquor, the food and beverage offer (ie. restaurants and cafés) within shopping centres is become increasingly important and prevalent. Licensing requirements, which rest with the tenant, do present barriers to entry which, as the Review Panel explains, are intended to reflect the "risk of harm to individuals, families and communities". We support the Panel's view (on page 109) that "there is no case to exempt regulations in these areas (liquor retailing and gambling) from ongoing review to ensure that they are meeting their stated objectives at least cost to consumers".

10. **We agree with the Panel that the "ongoing review" of liquor retailing regulations should occur to "ensure that they are meeting their stated objectives at least cost to consumers".**

4.0 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, Blackstone Group, Brookfield Office Properties, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, Ipoh Management Services, ISPT, Jen Retail Properties, Lancini Group, JLL, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Novion Property Group (formerly CFS Retail Property Trust Group), Perron Group, Precision Group, QIC, Savills, Scentre Group (formerly Westfield Group and Westfield Retail Trust) and Stockland.

Contact

The Shopping Centre Council would be happy to discuss any aspect of this submission.

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