SHOPPING CENTRE COUNCIL OF AUSTRALIA

12 March 2024

Competition Taskforce
The Treasury
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Via email: CompetitionTaskforce@treasury.gov.au

Merger Reform – Supplementary Submission

The Shopping Centre Council of Australia (SCCA) appreciates the opportunity to have met with Treasury on 21 February 2024 to discuss our submission in response to the *Merger Reform Consultation Paper* (November 2023). We thank Treasury for the opportunity to make this supplementary submission, which provides the data and analysis discussed at our meeting, expands on our position, and provides further information for consideration.

Summary

This supplementary submission highlights and makes the following points:

- The shopping centre market is not a concentrated market, by any contemporary definition, and presents no structural competition concerns or risks outside the current process.
- Our market is highly competitive and diverse, comprising of >1,300 shopping centres and >800 separate owners.
- The largest participant in our market owns 9.4 per cent of shopping centre floor space (see Table 1 on Page 5), noting that shopping centre floor space is around 45 per cent of total retail floor space and that we compete with online platforms.
- Our sector is a case study as to why the Australian Competition and Consumer Commission's (ACCC) proposed reform (Option 3 in the *Consultation Paper*) should not apply economy-wide.
- Whilst this consultation occurs amidst an intense focus on 'cost of living' pressures (and food and grocery prices are highlighted as an example of why competition policy settings are important), the ACCC's proposal to significantly extend its powers and remit is not a panacea and would be an overreach.
- If it established that reforms are required, then those reforms should be limited to the specific sectors where mergers and acquisitions have the capacity to affect competitive markets (i.e. supermarkets, aviation, airports, banking, electricity etc.).
- Consideration of mergers by market participants in concentrated markets, or with a large market share, should be the focus of any public policy response.

We note that the Minister has suggested elements of a preferred (or pending) approach, which appear to pre-empt the consultation process and Treasury's advice on submissions (*The Australian Financial Review*, 10 March 2024).

Respectfully, we reiterate that we are disappointed that the publication of submissions has been deferred at this time. This influences the transparency and possibly the efficacy of the consultation process. From what we have been able to determine, other business and legal groups generally oppose the ACCC's proposed reform. As with our submission, these groups have variously maintained that the status quo:

- strikes the right balance, and
- that a mandatory and suspensory framework (including a reverse onus of proof) would be a significant administrative cost and delay to business transactions, without delivering any material benefit, and represent an economy-wide solution in search of an economy-wide problem.

The latter point cannot and should not simply be dismissed as something that businesses (in particular those that present no real risk of affecting competitive markets) will simply have to endure and adapt to, which would be incredibly poor public policy.

Recommendation

Treasury should recommend that Government:

1. Retain the status quo (the existing *merger control process* and *merger control test*).

As our initial submission put forward, our view is: (i) notification and engagement with the ACCC should remain voluntary and at the discretion of parties, and (ii) the 'merger factors' set out in section 50(3) of the *Competition and Consumer Act 2010* are appropriate. This supplementary submission does not expand on points previously made.

Additional recommendations

In determining its advice to Government, we urge Treasury to:

2. **Consider the requirement for and application of Options 1-3 to sectors where mergers and acquisitions present no real competition-related concerns or risks and are unlikely to affect competitive markets.**

   Our view is simply that the administrative cost and delay to business transactions caused by compulsory ACCC notification, review and clearance of mergers and acquisitions, would not deliver a material pro-competitive benefit when considering the shopping centre sector as a case study to be applied more broadly. We further question the capacity and capability of the ACCC if it is to consider every business transaction >$35 million.

If Treasury is minded to recommend that Government pursues merger reform then refining its scope, beyond the three options proposed, would be more considered and appropriate:

3. **Any changes to merger reform requirements should be limited to target sectors with market concentration issues or inherent risks, requiring only their engagement with the ACCC.**

   We note that the Minister has distilled the issue at hand – "…*there are worrying signs the intensity of competition has weakened over recent decades, with evidence of increased market concentration and mark-ups in several industries"* (*The Australian*, 11 February 2024).

   The options presented in Treasury's *Consultation Paper* do not need to be applied economy-wide, rather could be more focussed and targeted at specific sectors where there is heavy market concentration.

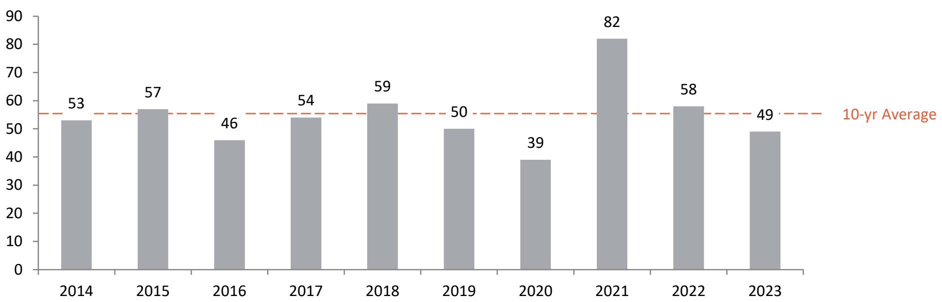
   The ACCC's focus should be on dealing with these types of transactions, and mergers and acquisitions within heavily concentrated markets, instead of seeking an economy-wide focus and remit.

An overview of the shopping centre market and transaction characteristics is provided below.

Nature of transactions

Shopping centre transactions occur frequently. Figure 1 provides an overview of all transactions >$35 million for the past 10-years (2014 to 2023). Industry data shows that there were approximately 547 shopping centre transactions over this timeframe. On average, there were 55 shopping centre transactions per year (one a week), with a peak of 82 in 2021.

Figure 1: Shopping Centre Transactions >$35m (2014-2023)



Source: SCCA Research / JLL

While an average of 55 transactions occur per year, 3-4 times this number may participate in negotiations, including through a stage where buyers and vendors would notionally be required to engage with the ACCC (based on the ACCC's proposed reforms). If every potential buyer had to notify the ACCC prior to an acquisition of any shopping centre in Australia taking place this would represent a massive impost on the ACCC.

According to the ACCC's *Annual Report 2022-23* (October 2023), in 2022-23 the ACCC assessed just 305 mergers across all industries. Assuming 2 potential buyers for each shopping centre sale across Australia, then with the proposed reforms the ACCC would have to undertake 110 assessments each year in just the shopping centre sector.

Currently the typical sales process for a shopping centre in Australia involves the vendor marketing the property and calling for expressions of interest (EOIs) over say a 30-day period. Potential purchasers are obliged to undertake a preliminary due diligence of the property, to assess within this period whether they want to buy the property, to decide what price they are prepared to offer for the property, and to put in their bids. The bids that are then made are made on a confidential basis.

The EOI that must be submitted to make a bid typically needs to identify the name and provide details of the interested party (including its holding company, corporate group, trust status, financial status, and capacity to raise the finance required to complete the transaction). The EOI typically also needs to identify any conditions that need to be satisfied or approvals required for the interested party to proceed with the acquisition (such as Foreign Investment Review Board (FIRB), board, or trustee approval etc.). The vendor typically reserves the right to accept or reject any bid or withdraw from the sale process.

As a consequence of each interested party's bids being kept confidential, the potential purchasers do not know the number, identities, or bids of other bidders. As a result, even a sole interested party is likely to put in a competitive bid for a property. From the bids that are received, the winning bid is selected (assuming it is high enough to satisfy the vendor and by a purchaser who is considered acceptable/reliable) and/or there is a short period of negotiation between the vendor and the highest bidder or bidders.

Once a price is, in principle, agreed then the selected purchaser typically has say a 30 day due diligence period, to further check that the property being offered sale is as it was marketed/understood to be and that the vendor has title to the property so as to be able to complete the sale. Assuming that the due diligence proceeds satisfactorily then contracts are typically exchanged at the end of the 30 day due diligence period. Completion of the sale most often occurs shortly after exchange (with it being common for completion and exchange to occur simultaneously where the vendor has ready access to finance).

Currently, as highlighted in our previous submission, notifying the ACCC is not done as a matter of course as vendors/buyers will have sought their own legal and professional advice to make their own determination as to their own compliance with the *Competition and Consumer Act 2010*.

Our view is that this is entirely appropriate. Given the typical fast paced competitive sales process outlined above, and the fact that industry participants (and not the ACCC), have the relevant industry experience and expertise to make a quick assessment as to whether a given acquisition is likely to lead to a substantial lessening of competition in a relevant market, it makes sense for the vendors and buyers of a shopping centre to seek and follow their own advice, rather than wait for informal clearance by the ACCC.

The current usual course of vendors and buyers of shopping centres not notifying the ACCC upfront and in advance of a proposed transaction is not an issue for the ACCC (nor for the state of competition in markets in Australia) because shopping centre transactions involve the sale of a physical asset, which almost invariably remains fully intact as a discrete asset post the relevant sale (unlike perhaps a business which might disappear and not be capable of being adequately reinstated post a merger with another business). As such, should the ACCC subsequently be justifiably concerned about the sale and acquisition of a particular shopping centre then the ACCC is meaningfully able to apply for the divestiture of the asset under section 81 of the Act.

The substantial penalties that may already be imposed on the acquisitions of assets that breach section 50 of the Act, together with the potential for divestiture orders to be made (and the costs, included stamp duty costs, associated with divestiture), already strongly encourage shopping centre owners (and aspiring shopping centre owners) to obtain their own careful and considered legal and professional advice as to whether any proposed acquisition will comply with the Act.

Where there is any material doubt, the cautious and prudent course – that has from time to time been followed in our sector – is for the proposed acquirer to voluntarily notify the ACCC and to wait for the ACCC's informal clearance to the transaction. Having available, as an option, the voluntary notification to the ACCC of a proposed asset sale and the informal review by the ACCC of that transaction works well. We are unaware of any instances where the ACCC has been obliged to seek divestiture orders in our sector by reason of an acquiring party not having voluntarily upfront sought informal clearance for the acquisition.

Whilst it works well to have the option of voluntarily notifying the ACCC and having an informal review by the ACCC, it is our member's experience that voluntary notification and subsequent engagement with the ACCC takes many months and is a significant administrative impost. And it is likely only to take longer if say all assets sales >$35 million are required to be notified to and cleared by the ACCC (as the resources of the ACCC are correspondingly stretched).

We question the capacity of the ACCC to consider any information requirements and provide clearance within a reasonable timeframe, particularly considering the significant number of notifications it may receive, including beyond our sector. Further, if the test for clearance is changed to require the ACCC to be positively satisfied that the "merger is not likely to substantially lessen competition", it is anticipated that the ACCC's review process will, in any event, likely take considerably more time and be more expensive than it has in the past.

If a new compulsory notification regime were introduced, in line with the suggestions of the ACCC, then it is anticipated that this would undermine the process by which the sale of shopping centres currently typically takes in Australia place (as discussed above). If, for instance, notification to the ACCC and approval by the ACCC is required before EOIs are lodged and bids are made, then potential purchasers will be put to considerable additional expense and effort in circumstances where it will not be known by them whether they will be the highest bidder (or, even if they are, whether the vendor will accept that bid).

Significant costs and resources (including within the ACCC) will likely then be wasted. This will inevitably result in there being less entities interested in speculating these costs on the chance of being the winning bidder. Less bidders means less competition. The delays in seeking and securing ACCC approval will also likely blow out the typical say 30 day period for marketing and receiving EOIs (to the likely detriment of the vendor). By reason of potential purchasers having to notify and seek clearance of the ACCC, these prospective purchasers will get to know whether they are the only bidder and may adjust their bids accordingly (again to the likely detriment of the vendor).

Further, with the ACCC likely needing to make its own enquiries and seek industry feedback, there is the risk of other prospective purchases seeking to influence the ACCC with a view to knocking out their competing bidders (with that influence likely not being transparent because the ACCC typically keeps the information provided to it by market participants confidential). As such, the whole sales process would become more costly, more unwieldy, and more uncertain for no tangible gains. For listed companies, such a regime may cause complex ASX disclosure issues as potential rather than completed sales are likely to become known in the market place.

If a new compulsory notification regime were to only require notification after a successful bidder is selected and a price has been agreed (but before say the 30-day further due diligence period), this would still create significant problems. Having to seek and obtain ACCC approval at this stage is likely to cause the 30 day due diligence period to blow out. This creates potential problems because the vendor will have already spent considerable sums on marketing the property and such expenditure is likely to be lost the longer the due diligence period takes (should for some reason the sale fail to proceed).

It is well known in our sector that "time kills deals". The longer the delays in reaching completion the more likely it is that the purchaser will pull out (irrespective of whether this is because of the ACCC having reservations or not) – again to the detriment of the vendor. Cap rates might change, access to finance might become more difficult etc. No vendor wants to be in the position of having to revive a completed marketing campaign.

The above concerns themselves are likely to distort the market and make it preferrable for vendors to say sell to foreign investors, with no current footprint in the market, rather than suffer a likely long due diligence period and the risks associated with these delays to the detriment of Australian investors (including Australian superannuation funds).

If notification and ACCC review are only to be required before exchange and completion, prospective purchasers will still then face the competing bidder influence and ASX issues referred to above – again where no case for such disclosure and ACCC review has been established and no tangible gain is likely to be achieved.

Our concern is then that a departure from the status quo would introduce an unnecessary administrative and compliance burden that may disrupt and delay sales, possibly disincentivising non-institutional buyers from engaging in the sale process.

Market composition

By virtue of its size and diversity of ownership, geographic dispersion, and alternative and competing options available to tenants and consumers in the broader retail market, our sector clearly does not present any market concentration issues, or as an inherent risk in terms of the substantial lessening of competition.

Our sector is comprised of >1,300 shopping centres, with >800 separate owners. Per Table 1, no one company controls an untenably significant market share in terms of Gross Lettable Area (Retail) (GLAR) of retail space in shopping centres in Australia.

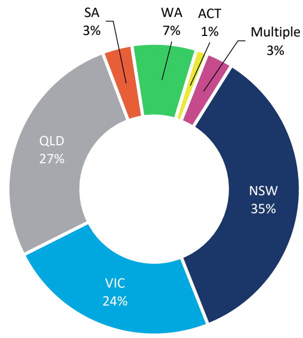
Figure 2 shows that geographic spread that is commensurate with population density.

Table 1: Top 20 Owners (As at June 2023)

Owner	% of GLAR	HHI
Scentre Group	9.4%	88
Vicinity Centres	8.0%	64
QICGRE	4.2%	18
Dexus	4.1%	17
GPT Group	3.9%	15
Stockland	3.5%	12
ISPT	3.3%	11
Region Group	3.3%	11
Private Investor	3.0%	9
Charter Hall	2.5%	6
Lendlease	2.4%	6
Aventus	2.1%	4
Perron	1.7%	3
Primewest	1.6%	3
Elanor Investors	1.5%	2
YFG (Retail First)	1.5%	2
Harvey Norman	1.3%	2
Mirvac	1.1%	1
Strata Plan	0.9%	1
Leda Holdings	0.8%	1

Source: Shopping Centre Directory / SCCA Research

Figure 2: Geographic Breakdown



Source: SCCA Research / JLL

Currently, as stated in the ACCC's *Merger Guidelines 2008, Updated 2017*, the ACCC only encourages notification where the merged firm will have a post-merger share of greater than 20 per cent in the relevant markets. Further, when assessing the impacts of a proposed acquisition or merger and market concentration, the ACCC looks at the market shares of the merging partners and their competitors with reference to the Herfindahl-Hirschman Index (HHI). The ACCC states that it will be less likely to identify horizontal competition concerns when the post-merger HHI is less than 2000.

Across the Australian-wide market, the HHI score for our sector is the sum of the HHI numbers listed in Table 1, being 276 – nowhere near 2,000, which is the ACCC's "*preliminary indicator of the likelihood that the merger will raise competition concerns requiring more extensive analysis*" (*Merger Guidelines 2008, Updated 2017*, Page 35). This number of 276 is, in any event, inflated because it does not take into account the amount of retail space available in the Australian market found outside of shopping centres.

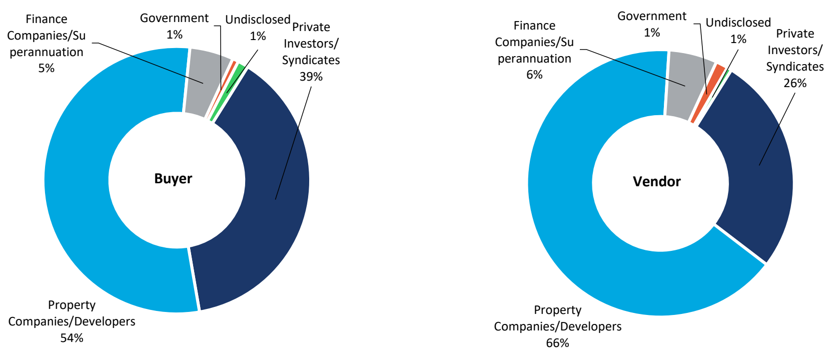
Broadly, shopping centres comprise approximately 45 per cent of GLAR nationally, the remainder made up of high-street and large format retailing (Baker Consulting). Online retail accounts for around 10.6 per cent of total retail turnover nationally (Australian Bureau of Statistics, *Retail Trade, Australia*, 30 January 2024).

Ultimately, across Australia, no one owner has a share or influence that would impact competitive retail leasing markets and diversity of choice for consumers.

Buyer and vendor characteristics

Figure 3 categorises buyers and vendors that have been party to the 547 transactions detailed above.

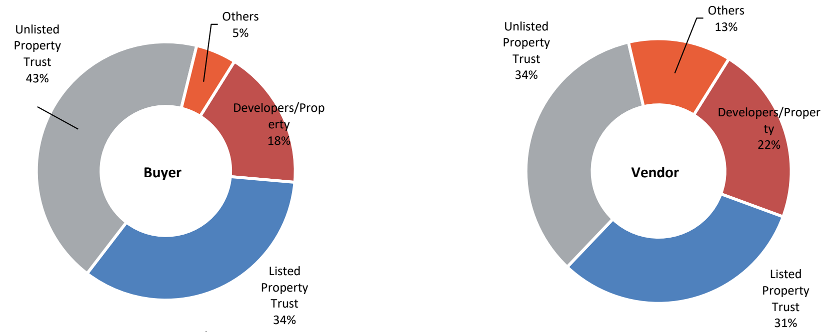
Figure 3: Buyer and Vendor Profiles



Source: SCCA Research / JLL

Figure 4 breaks down the 'Property Companies/Developers' buyer (54 per cent) and vendor (66 per cent) categories shown above, which is delineable further by type (Table 2).

Figure 4: Buyer and Vendor Profiles – Breakdown of Property Companies / Developers



Source: SCCA Research / JLL

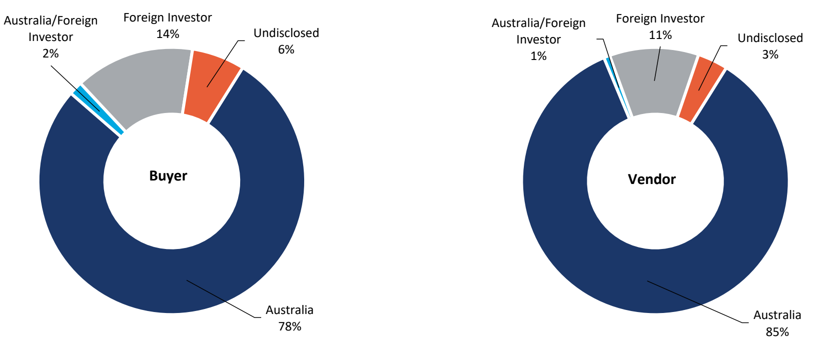
Table 2: Property Companies / Developers – Further Breakdown of Buyer and Vendor Type

Property Companies/Developers (incl. joint ventures)	Buyer (359)	Vendor (297)
Corporates	43	14
Developers/Property Companies	72	48
Developers/Property Companies / Developers/Property Companies	3	
Developers/Property Companies / Finance Companies		1
Developers/Property Companies / Private Companies & Investors	1	1
Developers/Property Companies / Superannuation Funds	1	
Developers/Property Companies / Unlisted Property Trust	1	2
Institution	2	
Listed Property Trust	104	92
Listed Property Trust / Listed Property Trust		1
Listed Property Trust / Corporates	1	
Listed Property Trust / Developers/Property Companies	1	
Listed Property Trust / Finance Companies		1
Listed Property Trust / Listed Property Trust / Unlisted Property Trust		1
Listed Property Trust / Private Companies / Investors	1	1
Listed Property Trust / Superannuation Funds	2	
Listed Property Trust / Unlisted Property Trust	4	5
Unlisted Property Trust	116	125
Unlisted Property Trust / Developers/Property Companies	2	
Unlisted Property Trust / Government	1	1
Unlisted Property Trust / Listed Property Trust	2	
Unlisted Property Trust / Unlisted Property Trust	2	3
Property Trusts		1

Source: SCCA Research / JLL

Figure 5 highlights the portion of buyers (14 per cent) and vendors (11 per cent) that are foreign investors.

Figure 5: Buyer and Vendor Profiles – Nationality



Source: SCCA Research / JLL

The above provides an indication of the diverse ownership interests across the sector.

The diversity of buyers and vendors – including many with only limited retail exposure, and with this varying motivations and reasons for investing in retail assets – highlights and emphasises the lack of market concentration in our sector.

Follow up

Please do not hesitate to contact me if a follow up discussion or additional data and analysis would be beneficial. We look forward to engaging with Treasury (and Government) as consideration of this matter continues.

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