

30 September 2024

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### **Revitalising National Competition Policy**

The Shopping Centre Council of Australia (SCCA) appreciates the opportunity to make a submission on the *Revitalising National Competition Policy Consultation Paper* (the *Consultation Paper*).

The SCCA understands that the *National Competition Policy* was developed following recommendations of the *National Competition Policy Review* in 1993, chaired by Professor Frederick Hilmer AO (the *Hilmer Review*). It is comprised of intergovernmental agreements that set out the Nation Competition Principles, as well as reform agendas and governance arrangements, which together aim to shape microeconomic government policy in a way that supports competitive markets.

The National Competition Principles underpin the reform agendas and largely focus on how government, whether through legislation or Government Business Enterprises, should take care not to unnecessarily impact on competition.

The Council on Federal Financial Relations' agreement to revitalise the *National Competition Policy* provides an opportunity to reflect on the effectiveness of the *National Competition Policy*, noting that it was most recently reviewed in 2015 by Professor Ian Harper AO (the *Harper Review*).

Our experience of the effectiveness of the *National Competition Policy* is that it has been overlooked by governments at state, territory, and Commonwealth-levels for much of the past decade, with policies seemingly never considered in the context of the *National Competition Policy*. Further, the concept of 'competition' is often misappropriated to pursue policies that at best have no impact on competition and at worst negatively impact it.

The issue of retail trading hours illustrates the disconnect between the *National Competition Policy* and government actions. Deregulating retail trading hours is fundamentally pro-competition, as it enables consumers to choose from a greater variety of retailers and enables traditional retailers to compete with online shopping, which is available to consumers at all hours. The deregulation of retail trading hours was a recommendation of the *Harper Review*<sup>1</sup>, yet since that recommendation was provided, there has been little movement by governments to expand retail trading hours, and states such as New South Wales have implemented restrictions.

To improve the effectiveness of the *National Competition Policy*, we provide recommendations that industry engagement forms part of the National Competition Principles and that the Productivity Commission takes on the role of 'steward' to ensure that the impact of policies affecting competition are fully considered, particularly through a productivity lens in addition to consumer protection.

Improved principles and governance of the *National Competition Policy* should then enable governments to address specific policy areas that hamper competition. We outline some of these policies that are long overdue for reform and recommend them for inclusion on the proposed National Competition Reform Program, as well as identify issues that are mischaracterised as competition issues.

#### **Our Market**

Shopping centres operate in a highly competitive and diverse market, in which there are more than 1,300 shopping centres and more than 800 separate owners. Shopping centres comprise approximately 45 per cent of total retail floor space, and compete with other retail leasing formats, such as high streets, bulky goods and homemaker centres, and brand outlet centres.

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<sup>1</sup> The Treasury, [Competition Policy Review – Final Report](#).

There are low barriers to entry into the retail leasing market, with a diverse range of opportunities available for ‘specialty’ and ‘mini-major’ tenants to lease space from shopping centre landlords.

Whilst our market is competitive, it is also highly-regulated. Regulation is advanced across a variety of policy areas where the pro-competitive effects of change are overlooked, or where competition issues are misappropriated to advance other policy objectives.

### National Competition Principles

Our recent experience is that government regulation is increasingly aimed at creating change, rather than doing no harm.

This contrasts with the existing National Competition Principles, which largely focus on limiting government activity that restricts competition, such as ensuring that Government Business Enterprises do not have unfair advantages over other market participants. The existing National Competition Principles are:

- Prices Oversight of Government Business Enterprises.
- Competitive Neutrality.
- Structural Reform of Public Monopolies.
- Legislation Review.
- Access to Significant Monopoly Infrastructure Facilities.

The *Consultation Paper* advances an agenda that encourages greater government interference in the economy under the guise of ‘boosting competition’.

We are sceptical of government interference as regulation is frustratingly and regularly made without knowledge of how sectors and markets operate in practice. This leads to siloed views about the impact of regulation that does not consider the broader impact.

Genuine engagement with industry during the development of policy proposals will support governments to fully appreciate the impact of their decisions, rather than relying solely on a theoretical viewpoint that is disconnected from market realities.

It is critical that an updated *National Competition Policy* emphasises the importance of engagement with industry before embarking down the path of regulation.

**Recommendation 1      An additional National Competition Principle of *engagement* should be adopted. This would underscore the need for governments to engage with industry before determining that a regulation may be ‘pro-competition’.**

We have a general concern about proactive government involvement in market dynamics (the prospective new principles of *promoting competition*, *consumer empowerment* and *market design and stewardship* are indicative of this). This can lead to increased regulatory burden and increased government intervention where there is an indirect link to competition, i.e. to address ‘cost of living’ issues.

Rhetoric about competition is also being used to justify reforms/regulation in policy areas that do not have a direct link to competition issues (e.g. CBD Program).

**Recommendation 2      The existing National Competition Principles do not need additional, interventionist aspects added, which would likely be used to justify additional regulation.**

### Institutions and Governance

The ACCC has an important role in safeguarding competition in the Australian economy. However, its expanding remit is incrementally distorting its role, particularly if it becomes the final arbiter of decisions, in place of the courts.

This issue is best highlighted by the current merger reform process, which has been driven by advocacy from the ACCC and will result in the removal of important judicial oversight of ACCC decisions. We submit that the ACCC should be preserved as a competition and consumer body that enforces aspects of competition law, and that its decisions and determinations should be contestable through the judicial system.

The approach of the ACCC in advancing ‘competition’ policy has seen competition de-linked from productivity. Rather than considering how competition improvements can enhance productivity, whilst protecting consumers and small businesses from genuinely anti-competitive practices, the ACCC tends to focus solely on consumer protection.

The ACCC is not an appropriate institutional ‘steward’ to support the implementation of and adherence to the *National Competition Policy*. Given its primary role is enforcing the *Competition and Consumer Act 2010* (Cth) (CCA), the potential for a conflict of interest is concerning. The National Competition Council (NCC) is also not an appropriate institutional steward, being interlinked with the ACCC and focused on the regulation of third-party access to services provided by monopoly infrastructure.

Rather than the ACCC or the NCC, we propose that the Productivity Commission take on the role of institutional steward. This would restore the link between competition and productivity. It would also reinvigorate the *National Competition Policy*, which has been largely dormant and ineffectual for much of last decade.

The Productivity Commission is well-placed to provide impartial and transparent oversight of jurisdictions’ adherence to the *National Competition Policy*. This could take place through the Productivity Commissions’ annual *Report on Government Services*, which would also enable the Productivity Commission to identify trends of concern that require further specific analysis.

Similarly, the Productivity Commission’s research and advisory functions should be utilised to conduct policy impact assessments of jurisdictions. This would enable policy proposals to be subject to an impartial, rigorous, and evidence-based assessment as to their impact on competition.

In providing advice to jurisdictions on the impact of policies on competition, jurisdictions should be required to refer policy proposals to the Productivity Commission when competition concerns have been raised by stakeholders during consultation.

**Recommendation 3**      **The Productivity Commission should be responsible for monitoring jurisdictions’ adherence to the *National Competition Policy* on an annual basis (as part of its *Report on Government Services*) and should provide advice on the competition impacts of proposed reforms.**

### National Competition Reform Program

The SCCA supports in principle the five provisional reform themes, with the following three the most pertinent to our sector:

1. Promoting a more dynamic business environment,
2. Harnessing the benefits of competition in the net zero transformation, and
5. Leveraging the economic opportunities of data and digital technology.

We provide below an outline of specific actions that the Reform Program should encompass and, accordingly, that governments either should or should not pursue under its guidance and auspices.

#### 1. Promoting a more dynamic business environment

At the outset, we recommend that this reform theme be revised, so as to explicitly provide oversight and capture the regulatory burden of competition-specific policy. This is consistent with the *legislation review* principle and complements our *recommendation 3*, that competition policy settings (within the context of a broader *National Competition Policy*) should be actively reviewed, including at arm’s length of government.

**Recommendation 4**      ***Promoting a more dynamic business environment* should be revised to explicitly provide oversight and capture the regulatory burden of competition-specific policy. *Objective 2* should be revised as follows:**

- **Objective 2: Ensure businesses do not face excessive or unnecessary regulatory burden and/or compliance costs to participate in markets, including for smaller and nascent businesses.**
  - **Design regulation and compliance processes that promote public policy objectives such as safety and environmental protection in a way that minimises unnecessary administrative costs.**

- Ensure competition policy settings are targeted, efficient, and do not impose an unnecessary and/or unwarranted burden on affected parties.

The proposed actions below denote where and how a revised/broadened *promoting a more dynamic business environment* reform theme would be pertinent, notably where there are references to *objective 2*.

#### *Merger reform*<sup>2</sup>

The Taskforce is separately advancing Government's merger reform agenda, which ultimately seeks to improve competition settings by preventing market concentration and dominance. However, the merger control process and thresholds being pursued are (demonstrably) poorly targeted and will have a range of anti-competitive outcomes (whilst simultaneously endeavouring to safeguard against anti-competitive conduct), including for parties that demonstrably should not (but would) be regulated.

Merger reform will have massive impact on competition policy. That our feedback and advice is routinely being overlooked suggests that competition principles are applied selectively. A revised/broader *objective 2* would ensure that the introduction and regulatory burden of these reforms would be impartially informed and proactively monitored as a key policy setting.

#### *Unfair trading practices (UTP)*<sup>3</sup>

The proposal to introduce a UTP prohibition to the CCA would introduce unnecessary regulatory duplication, is poorly targeted, incredibly open-ended, and would result in significant uncertainty for industry. In addition to there already being provisions in the CAA which would capture the behaviour being targeted, the proposal is based on issues identified in one specific sector. As the SCCA has outlined to Treasury:

"...the problems identified in the Consultation RIS primarily arise from the Digital Platforms Inquiry and relate to one specific sector. There is no economy wide problem that requires an economy wide solution. Instead, a more targeted and focused response is warranted..."<sup>4</sup>

As of 30 September 2024, this prospective reform has not progressed – nor should it. As with merger reform, this policy proposal was predominantly informed by the ACCC and advanced by Government without a broader, impartial assessment, linked to oversight of competition policy settings. This highlights the shortcomings of governance processes with respect to the competition policy.

Although UTP is relevant to a revised *objective 2*, it should be abandoned as an economy-wide reform and pertain to *digital platforms* only.

#### *Business insolvency*

Post-pandemic reviews of retail leasing legislation and a Parliamentary *Inquiry into Corporate Insolvency in Australia* have examined the role of landlords with respect to business insolvencies.<sup>5</sup> Our concern has been that the *National Code of Conduct for Commercial Tenancies* has given rise to an expectation that landlords (already disadvantaged as unsecured creditors) could and should 'do more' to ward-off potential tenant insolvencies by assuming more of their tenant's risk.<sup>6</sup>

It is not reasonable that our sector might be expected to subsidise or protect tenants from economic and market forces, the impact of government policies, staffing issues, supplier costs etc. Noting *objective 1* and its focus on 'business exits', any corresponding actions should not extend to retail leasing and/or the insolvency framework as a system or process to mitigate the prospect or impact of business insolvencies.

#### *Trading hours*

Deregulation of trading hours must not fall off the reform agenda because of state and territory governments' unwillingness to act. In recent years, the Queensland and South Australian Governments have introduced very limited

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<sup>2</sup> The Treasury, [Merger Reform](#).

<sup>3</sup> The Treasury and Shopping Centre Council of Australia (Submission), [Unfair Trading Practices – Consultation Regulation Impact Statement](#).

<sup>4</sup> Australian Competition and Consumer Commission, [Digital Platform Services Inquiry 2020-25](#).

<sup>5</sup> Department of Energy, Mines, Industry Regulation and Safety, [Review of commercial tenancy laws for retail shops](#); Parliamentary Joint Committee on Corporations and Financial Services, [Corporate Insolvency in Australia](#).

<sup>6</sup> NSW Small Business Commissioner, [National Code of Conduct for commercial tenancies](#).

trading hours reforms, declining to pursue more substantive reform.<sup>7</sup> The New South Wales Government has reintroduced trading hours restrictions, such is the continued influence of the union movement and the independent supermarket lobby; the latter successfully arguing in favour of reduced competition and (as a result) preferential trading conditions.<sup>8</sup>

The pro-competitive impact of trading hours deregulation has been acknowledged by the *Harper Review* and the Productivity Commission; it has been a longstanding ambition of competition policy reform, but routinely ignored.<sup>9</sup> This should be reflected on.

Noting *objective 2*, the regulation and compliance costs to participate in the retail leasing market is adversely affected by the continuance of trading hours restrictions. Complete deregulation of trading hours restrictions should remain as a reform action.

#### *Planning and zoning*

Land use policy, such as limiting certain business activities to certain zones, has long been considered – through the lens of ‘competition’ – to be inherently anti-competitive. This is a narrow perspective, as there are well founded reasons for maintaining the status quo of allowing jurisdictions to maintain the integrity of their planning systems and hierarchy. This was in part supported by the *Harper Review*, which recommended that state/territory governments “*should subject restrictions on competition in planning and zoning rules to the public interest test*”.<sup>10</sup>

Whilst there may be merit in streamlining lengthy and administratively burdensome planning approval processes, state/territory planning systems should not be eroded under the guise of enabling ‘competition’; a case in point being efforts to undermine an ‘activity centres-based’ approach to planning (itself a widely adopted and accepted approach) to enable retail development in light industrial zones.

When applying the principles of *public interest* and *competitive neutrality*, planning and zoning is not pertinent to *objective 1* and should not be re-interrogated in the context of the Reform Program.

#### *Occupational licensing (real estate)*

This is an outstanding issue that should be revisited by the Reform Agenda. In short, shopping centre owners and managers remain subject to estate agent regulation under state/territory legislation. This is intended to protect ‘consumers’ (property owners) in their dealings with property agents (property managers).

However, this is not applicable with respect to the sophisticated segment of the commercial property industry, where the ‘consumers’ being protected are large (often national and even multinational) professional property-owning entities that are more than capable of looking after their own interests and which do not need consumer protection. Our sector clearly has no need for this.

Noting *objective 3*, those remaining jurisdictions (Western Australia, Victoria, and the Australian Capital Territory) should exempt property agents who are managing property on behalf of ‘related entities’, and for ‘sophisticated or large property owners’, from real estate licensing requirements.

## **2. Harnessing the benefits of competition in the net zero transformation**

#### *Commercial Building Disclosure (CBD) Program*<sup>11</sup>

This is a stark example of Government breaching the principles of *competitive neutrality*, *structural reform of public monopolies* and *market design and stewardship* by mandating the use of its own sustainability indicator, at significant cost, despite other more reliable measurements existing in the marketplace.

NABERS is a demonstrably imperfect measurement for shopping centres, yet Government has misleadingly justified its scheme as having positive competition effects for prospective buyers and tenants (both reject this assertion in respect

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<sup>7</sup> Queensland Government, [New laws streamline and simplify Queensland retail trading hours](#); Government of South Australia, [Sunday 9am trading commences and Midnight Christmas trading dates confirmed](#).

<sup>8</sup> NSW Government, [Respecting our Veterans: ANZAC Day trading hour restrictions to be extended](#).

<sup>9</sup> The Treasury, [Competition Policy Review – Final Report](#); Productivity Commission, [Economic structure and performance of the Australian retail industry](#).

<sup>10</sup> The Treasury, [Competition Policy Review – Final Report](#).

<sup>11</sup> Department of Climate Change, Energy, the Environment and Water, [Commercial Building Disclosure \(CBD\) Expansion Consultation](#).



of shopping centres) and in terms of addressing information asymmetry (there is none in the retail leasing market; again, the supposed beneficiaries reject this).

It is misleading that Government has sought to justify its monopoly of the market and interventionist policy on false competition claims, when it simply props up a captured market, creating a barrier to new market participants, giving effect to 'anti-competitive consolidation'.

Noting both the above principles and *objective 3*, the prospective expansion of the CBD Program to shopping centres should be abandoned.

## **5. Leveraging the economic opportunities of data and digital technology**

### *Privacy Act Review*<sup>12</sup>

The *Privacy Act Review* contemplates additional protections for the personal information of individuals that may be gathered by businesses through the use of data and digital technology. Whilst the use of data and digital enablers by businesses can improve their capacity to compete, we understand there are legitimate privacy concerns. Balancing this tension will be important to ensure that privacy protections do not unnecessarily limit the productivity gains from data a digital technology.

We await the next tranche of consultation and will engage with government to ensure the tension between improved productivity and privacy protections is balanced and appropriate.

Noting the *objectives 1-4 of leveraging the economic opportunities of data and digital technology*, the outcomes of the *Privacy Act Review* should be considered in the context of their impact on competition.

Of the above issues, the SCCA recommends that four should become actions items under the Reform Program. The remainder should not, and/or should not be linked to overriding 'competition' justifications.

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| <b>Recommendation 5</b> | <b>The following issues <u>should</u> be considered as part of the Reform Program:</b> <ul style="list-style-type: none"><li>• trading hours deregulation,</li><li>• oversight of the implementation and impacts of merger reform,</li><li>• oversight of the implementation and impacts of reforms to the <i>Privacy Act 1988</i>, and</li><li>• real estate licensing exemption for property agents who are managing property on behalf of 'related entities', and for 'sophisticated or large property owners'.</li></ul>  |
| <b>Recommendation 6</b> | <b>The following issues <u>should not</u> be considered in the context of the Reform Program, or linked with overriding 'competition' justifications:</b> <ul style="list-style-type: none"><li>• mitigating the prospect or impact of business insolvencies by placing additional expectations on landlords, through retail leasing legislation or the insolvency framework,</li><li>• introducing an unfair trading practices prohibition to the CCA,</li><li>• land use (planning and industrial zoning), and</li><li>• expanding the CBD Program (mandatory disclosure of NABERS ratings vs. alternative measurements).</li></ul> |

## **Contact**

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<sup>12</sup> Attorney-General's Department, [Privacy Reforms](#).