Urban Taskforce
AUSTRALIA

2 June 2008

Grocery prices inquiry - Submissions
Australian Competition and Consumer Commission
GPO Box 520
MELBOURNE VIC 3001

E-mail: grocerypricesinquiry@accc.gov.au

Dear Sir/Madam

Public Submission to the Grocery Prices Inquiry by the Urban Taskforce Australia

Further to our public submissions made on 19 May 2008 and 11 March 2008 we wish to make a further submission, and in doing so, comment on the submission of the Shopping Centre Council of Australia dated 2 May 2008.

Shopping Centre Council's submission

The Shopping Centre Council represents the organisations that benefit most from the existing systems of State sponsored protection for shopping centre owners.

Like all groups enjoying a degree of monopoly power courtesy of government regulation, they will fiercely defend the status-quo.

There are a number of misleading and incorrect statements in the Shopping Centre Council's submission.

1. Retail property market *is* more heavily regulated than other property markets

The Shopping Centre Council says that

> [w]hile planning controls restrict the location of and usage of retail space, they do not impose any greater constraint on the retail property market than they do on other property markets.

This is very wrong – no ifs, no buts.

In *Fabcot Pty Ltd v Hawkesbury Shire Council* (1997) 93 LGERA 373, the High Court held that planning laws do not concern themselves with "the mere threat of economic competition between competing businesses" except when it can detract from the provision of "shopping facilities."

That's why the planning system does not consider the impact on competitors for residential development, industrial development or heavy industry. Retail developments are treated more harshly because of the exception laid out in *Fabcot Pty Ltd v Hawkesbury Shire Council*. The current exception is an anomaly. It can be fixed by a stroke of the parliamentary pen. Importantly, as we discuss below, it can be fixed at a federal level.

Without reform we will continue to have anti-competitive rules that regulate retail development far more rigorously that any other form of development – with more controls than even mines, brothels and factories.

2. There mere fact that the amount of retail floor space has increased does not demonstrate that a free market is operating

The Shopping Centre Council says that

> [t]here is no evidence, however, that as a result of these planning laws Australia has experience a shortage of retail floor space. As we outlined in our submission, Australia has seen a doubling of shopping centre floorspace over the past 15 years and an increase in the amount of shopping centre floorspace per capita of nearly 60% from 0.563 square metres in 1991-92 to 0.84 square metres in 2005-06.

The mere fact that the amount of retail floor space has increased does not demonstrate that an efficient free market is operating.

The growth in retail floor space can be explained by reference to the growth affluence of Australian society. The fact that growth has occurred does not mean that the additional retail floor space is being made available at the most efficient (competitive) price. Nor does it tell us how much additional retail floor space would have been made available if the market had been a free one. As table 5 shows in *Choice Free Zone* (page 101) per capita retail floor space in Australia is nearly half the levels of the United States.

3. The absence of anchors for major shopping centres should <u>not</u> be an issue

The Shopping Centre Council says that

> [t]he main determinant of the availability of retail space available for lease in major shopping centres is not the planning system but the availability of major retailers to 'anchor' such shopping centres or anchor the redevelopments of shopping centres.

This statement almost proves our point on its own. The Shopping Centre Council admits there are constraints on the amount of retail floor space shopping centres can provide, because of the limited number of major retailers. They then highlight that a constraint on the business of shopping centres constrains the whole retail market.

This begs the question – why should retail growth be constrained by the commercial inability of shopping centres to provide a viable model beyond current levels? Why isn't the constraint on shopping centres (admitted to above) leading to a proliferation of independent or new entrant supermarkets to fill the gap? The answer is simple – the planning system confers a monopoly on the shopping centres. If they are unable to expand further because of commercial considerations (such as the absence of an additional major retailer) the whole community loses out.

The planning system should allow the supermarkets to set up with and compete with established shopping centres.

4. The beneficiaries of the current anti-competitive planning laws are the retail landlords, not the retailers

The Shopping Centre Council says that if controls have effectively limited the number of retailers and their ability to compete

> one would expect to find that retailers themselves were making above-normal profits.

This statement would only be true if the retailers were in a position to enjoy the monopoly profits. However, the retailers, as tenants, don't have the whip hand - retail landlords do. The planning system gives the leverage to monopoly profits to the retail landlords

Table 1 of *Choice Free Zone* (page 75) shows that in Australia some retail landlords charge between 17 and 21 per cent of retail turnover as rent. This compares with 9 to 12 per cent in other countries.

5. A more market based system is the best way to secure a more efficient allocation of the economy's scarce resources

The Shopping Centre Council's submission echoes the central planners of Eastern Europe in the 1970s when it queries whether an increase in the aggregate supply of retail space would be positive

> for the efficient use of the economy's scarce resources.

6. Vacancy rates in the existing shopping centres are not evidence that the market is competitive

The Shopping Centre Council cites vacancy rates in existing shopping centres as evidence that there is no shortage of retail space.

The fact that there are vacancies in existing shopping centre premises merely reflect the fact that, at a given point in time, supply exceeds demand. The costs of retail floor space are made artificially high in these shopping centres by the regulatory straight jacket imposed by planning laws. However, if a freer market were operating, the costs of retail floor space may be lower, and therefore the volume demanded by and supplied to retailers may be higher.

Impact of subregional strategies

To assist the commission, we have prepared a table showing how the NSW Government's draft subregional strategies impose a quota system on the provision of supermarkets in Sydney between now and 2031. These draft subregional strategies are already being applied by local councils. Similar documents exist for other urban areas across Australia.

Our table (which is attached) shows how the NSW Government's subregional strategies have classified and placed rules capping retail in 725 suburbs. In 564 suburbs supermarkets are banned altogether until 2031. In 79 suburbs only one small supermarket is permitted (these suburbs generally already have at least one supermarket). In 40 suburbs only two supermarkets are permitted (these suburbs generally already have at least two supermarkets). Only in 42 localities is there no express limitation on new supermarkets. Of course, in these locations, the key shopping centre sites have already been secured by the dominant retail landlords. Many of these areas are already heavily congested and there is little capacity for new shopping centres to be built.

A federal solution

We have noted with interest suggestions during the public hearings of the Commission that one solution to the planning issues might be to introduce a ban or restriction on competitors objecting to each other's developments.

We do not believe such a course of action, alone, will deal with the anti-competitive issues in the planning system.

Restrictions on who can object are easily circumvented through co-operation between shopping centre owners and local chambers of commerce, action groups, or affiliated businesses.

The issue is not who objects, but what matters can be legitimately raised and considered both in the zoning process and in the development assessment process.

So long as it is acceptable for planning authorities to make decisions in order to protect existing shopping centres from competition, the planning system will frustrate any efforts to encourage lower prices.

It should not be permissible for a planning authority to consider the impact on other retail businesses either when making zoning decisions, or when assessing individual developments. A "planning authority" should include both State governments and local councils. The Federal Parliament can take action on this front by enacting a new federal law.

A state planning law that prohibits a corporation from building a retail development should be declared **void** by federal law, unless the state planning law prohibits any direct or indirect consideration (by a planning authority) of any possible loss of trade that might be suffered by any other existing or future retail business or businesses.

This reform will force State governments to amend their planning laws to bring them into line with the new federal requirements. Planning authorities will remain free to make zoning and development assessment decisions based on issues such as traffic, visual amenity, noise, etc.

As always, we remain available to meet with officers of the ACCC and/or answer any requests you may have for additional information.

Yours sincerely
Urban Taskforce Australia

Aaron Gadiel
Chief Executive Officer

Encl.