SHOPPING CENTRE COUNCIL OF AUSTRALIA

23 March 2022

C/O Tracey Horsfall
Productivity Inquiry
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Via email: productivity.inquiry@pc.gov.au

Submission – Inquiry into Australia's Productivity Performance

Dear Ms Horsfall,

Thank you for the opportunity to make an initial submission to the Productivity Commission's (PC) *Inquiry into Australia's Productivity Performance* (the Productivity Inquiry), noting that this is the PC's 'initial' consultation phase.

The Shopping Centre Council of Australia (SCCA) is the national industry group for major shopping centre owners, managers and developers. We have participated in several PC inquiries over the years, including: 'Shifting the Dial: 5 Year Productivity Review' (2017), 'Economic Structure and Performance of the Australian Retail Industry' (2011), and the 'Inquiry into the Market for Retail Tenancy Leases in Australia' (2008).

The purpose of this submission is to provide our initial views on where the PC should focus its efforts and recommend priority areas for reform in the coming years and the longer term. We would welcome opportunities to contribute further – for instance, through direct engagement with the PC, in the form of a supplementary submission, or at a public hearing – as the Inquiry progresses and if our concerns are examined in more depth.

Our key recommendation is that the PC investigates, as a priority area of reform, where there is excessive and unjustified government intervention into contracts which dampens productivity and leads to poor economic outcomes. This is particularly the case where there is no market failure, the policy rationale for intervention is tenuous, and such regulation merely adds constraints on commercial decision-making.

This is particularly the case in retail leasing, given recent regulatory interventions, in addition to an excessive level of ongoing reviews of retail lease legislation by State and Territory governments. To paraphrase previous observations from the PC on retail leases, there has been an increase in "unnecessarily prescriptive elements of retail tenancy legislation".

During COVID-19, shopping centres were one of the few sectors that remained open for trade to the public as an 'essential activity', recognising our role as a community hub and key area of essential economic activity. However, our sector continued to be impacted by a raft of piecemeal laws and regulations which effects overall shopping centre operations, including issues that affect labour productivity, the efficient use of new technology and data, and the allocation of capital.

Increasingly, we see a lack of 'whole of government' policy, let alone any form of national alignment or harmonisation. Different policy and regulatory proposals present as having been developed in isolation and without regard as to their overall impact. The following four examples highlight this experience:

1. The application of retail lease legislation, including the recent temporary COVID-19 SME Code of Conduct (the Code of Conduct), which started as a single national industry Code, yet ended up being requisitioned by governments and regulated separately and differently in each jurisdiction.

   The Code of Conduct directly intervened into existing contracts and saw the erosion of legal rights and the addition of unnecessary 'process', including the need to go through government mediation processes. Its regulation has been typified by a lack of industry consultation, rigorous or transparent analysis, and a disregard for sound policy-making (noting the PC's recommendation 6.6 in the 'Shifting the Dial' Review).
2. The regulation of shop trading hours by certain State and Territory governments, which often goes against consumer preferences (choice and convenience)[1] and negates the potential for positive economic impacts and flow-on benefits for tenants. The PC has made previous recommendations on this issue.
3. The requirement for our staff to hold and maintain a real estate license in some jurisdictions, which has no relevant purpose, acts as an unnecessary cost burden, and diminishes labour productivity.
4. The current Federal 'Privacy Act Review', which in our view could overlook or limit the ability of sectors to undertake sector-specific industry activities (which we have recommended on issues such as CCTV).

[1] For instance, 71% of surveyed Queenslanders and 75% of South Australians indicated their support for extended trading hours in independent polling commissioned by the SCCA and NRA in during 2021, which can be made available to PC on request.

Our recent submissions to the Queensland Parliamentary 'Inquiry into the Operation of the Trading (Allowable Hours) Act 1990' and the Federal 'Privacy Act Review' highlight our concerns with respect to examples 2. and 4. in greater detail.[2]

We see opportunity to increase productivity in each of these areas, where we continue to see the following productivity diminishing principles negate more productive outcomes, noting the scope of the Inquiry:

- Governments requisitioning industry measures for their own political purposes, and changing those purposes over time (e.g. extending regulation with no consultation or analysis; devising new reasons for the regulation).
- Policies and regulations being made without due process – often processes cited in government 'best practice regulation guidelines' – including industry consultation, and with regulated parties.
- Policies and regulations being made without any transparent analysis, including regulatory impact statements or cost-benefit analysis.
- The above two points highlight a lack of appropriate policy development and delivery, as is noted as a key principle in the PC's recommendation 6.6 in the 'Shifting the Dial' Review.
- Laws that directly intervene into existing market contracts, noting that contracts are a foundation of our economy.
- Laws that directly erode legal rights without any compensation, along with laws that simply add process and procedure; for instance having to participate in government mediation processes.
- Blunt government intervention on operational issues (e.g. COVID-19 public health orders) that are not based on any understanding of market operations; for instance density caps applying to food courts that have an average of 400 seats, but being based on small cafes and restaurants.
- Laws that actively work against modern efficient operations, such as 24/7 delivery times (often based on outdated perceptions that all truck deliveries are done by large 'noisy' semi-trailers versus smaller 'quieter' commercial vehicles), click and collect operations, and the use of digital technology (e.g. electronic bank guarantees).

1. COVID-19 SME Code of Conduct

By way of example, an examination of the application of the Code of Conduct highlights how government policies and regulations have had a detrimental impact on shopping centre operations.

As the PC may be aware, the Code of Conduct was conceived by the SCCA and developed as an industry Code with key retailer groups, such as the National Retail Association (NRA), Pharmacy Guild of Australia, and the Australian Retailers Association. The Code of Conduct was modelled off our sectors' successful cooperation with respect to the Casual Mall Licensing (CML) Code of Practice, which is authorised by the Australian Competition and Consumer Commission (ACCC).

The initial drafting of the Code of Conduct was agreed to by key sector stakeholders, including on the basis that it would be a temporary measure to allow businesses to 'hibernate', and received interim ACCC authorisation (to collectively discuss rent issues) before ultimately being submitted to National Cabinet. An amended Code of Conduct was announced by the Prime Minister on 7 April 2020 and enacted progressively by State and Territory governments.

SCCA members have provided in excess of $3 billion in rent relief under the Code of Conduct; a level of support to SME retailers far in excess of any other sector. Many thousands of retailers would not have survived or performed as well as they have without landlord support, which has provided a strong platform for continuity and recovery.

However, our experience with government and certain stakeholder groups to date has been deeply disappointing, and warrants closer examination within the context of the Productivity Inquiry. What started as a 6-page Code of Conduct, comprising 11 agreed provisions and 2,500 words – modelled on our ACCC-authorised CML Code of Practice – ended up being regulated separately by State and Territory governments a total of 28 separate times; comprising 200+ pages, 200+ provisions and 50,000+ words.

The scale and complexity of this is illustrated below:

[2] SCCA Submission, Inquiry into the Operation of the Trading (Allowable Hours) Act 1990; SCCA Submission, Privacy Act Review.

Evolution of the Code of Conduct

In effect, our industry devised and agreed Code of Conduct has turned into a public policy failure, which has had direct adverse impacts on productivity.

The Code of Conduct has been revised and reimagined in each jurisdiction. Where it was initially conceived to enable businesses to go into hibernation it has since been utilised unilaterally by governments to supplement their own financial support for SMEs, which extends to the detrimental effects of government-imposed restrictions and was often rationalised as being necessary after successive lockdowns, despite retail trade performing very well overall.

The Code of Conduct has become overly complicated and completely deferential to SMEs, often without consultation or sound reasoning. We are deeply concerned that governments have so freely expanded our initiative well beyond its initial scope and sector-wide consensus, directly intervened in existing commercial contracts and regulatory arrangements, while eroding and removing landlord rights without any compensation.

The Code of Conduct has utilised by governments for political purposes and without any means of recourse for our sector. This has contributed to poor behaviour by some tenants (i.e. non-payment of rent, including by large retailers appealing to the 'spirit of the Code', refusal to open etc.) and a single-minded focus on SMEs that disregards our sectors intent and focus on supporting tenants, regardless of government intervention.

It is critical to note that the Code of Conduct never became an effective 'partnership' with government, owing to governments' inflexibility and lack of engagement with our sector, unresponsiveness to prevailing economic conditions, the absence of any detailed analysis of our capability or consideration and discussion following our own feedback and advice, separate analysis of the opportunity costs of rent relief versus other private sector funding (i.e. regulating suppliers) etc.

This scenario is without precedent and warrants an examination of governments' intervention into commercial arrangements. Our concern is that any extension of like arrangements to future public health or environmental disasters would use this precedent, or the model of the Code of Conduct, as a basis and example of best/accepted practice.

The Productivity Inquiry is ideally positioned to provide an in-depth, objective assessment of the application of the Code of Conduct. Similarly, trading hours deregulation, the applicability of real estate licensing to our sector, and opportunities inherent (but may be dismissed) in the 'Privacy Act Review' are further examples of government intervention and prospective productivity efficiencies and reform that we would seek to expand on in further discussions with the PC.

Thank you in advance for your consideration of these matters. If this can be arranged, or if you have any other questions, please don't hesitate to contact James Newton (Manager, Policy and Regulatory Affairs)

Yours sincerely,

Angus Nardi
Executive Director