

SUBMISSION OF THE INDEPENDENT RETAILERS OF NSW AND THE ACT INC

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Regulation Benchmarking Study: Planning, Zoning and
Development Assessments
Productivity Commission
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**SUBMISSION: Performance Benchmarking of Australian Business
Regulation: Planning, Zoning and Development Assessments.**

This submission has been prepared with a primary focus on competition issues in relation to State planning systems and the grocery sector.

EXECUTIVE SUMMARY

- Dominance by the major chains is a significant feature of the Australian retail landscape, particularly grocery retailing.
- Dominance tends to lead to less competition and less competitive tension in markets.
- State planning systems do not take into account competition.
- A Centres Policy can inject an assessment of competition into State planning systems if it includes a net community benefits tests which has a floorspace dominance test in it.
- A floorspace dominance test is the appropriate method for assessing competition impacts, because domination is the main issue facing competition in the retail sector in Australia.
- A floorspace dominance test proactively encourages better competition outcomes in the planning system.

FORWARD

State planning regimes for retail zonings use a centres based hierarchy system. This approach by its very structure limits to an extent the opportunity for competitors to enter markets. However, in the grocery sector the main impediment to the entry of competitors into markets is the high level of dominance by existing players within a restricted land supply system. It is the presence of dominance in a restricted market place that results in poor competition outcomes, not simply the restriction in the supply of land.

The Issues Paper does not acknowledge in its terms the issue of dominance and the importance dominance has to the questions on competition in the planning system. For that reason, the bulk of this submission outlines what dominance is, how dominance effects competition in the grocery retail sector and what role dominance plays in the planning system.

This submission will also discuss how planning systems would benefit from the inclusion of a competition test to address dominance and how that could be done.

DOMINATION IN RETAIL

Australia has the most concentrated retail landscape in the western world. This concentration is most pronounced in the grocery, liquor, hardware and fuel sectors.

Below is a table which shows the levels of domination in the grocery retail sector by floorspace in Australia. The red figures are Wesfarmer controlled stores. The blue figures are Woolworths controlled stores.

GLAR from database for Open and Trading Stores at 20 Jan 2010

Channel	ACT	NSW	NT	QLD	SA	VIC	WA	TOTAL
4 Square		6,854		9,640				16,494
5 Star	2,238	16,371		23,313				41,922
ALDI	10,994	123,856		62,750		106,021		303,621
Bi-Lo		128,954		56,204		53,023		238,181
Coles	28,565	641,049	3,000	408,485	157,486	567,038	258,667	2,064,290
Costco						14,000		14,000
EZIMWAY							17,065	17,065
FG	3,955	32,070	2,780	18,755	15,531	21,124		94,215
Foodland IGA		3,429	5,700		177,237			186,366
Foodworks	1,822	45,043		73,302	10,886	113,643	16,182	260,878
Franklins		146,800						146,800
IGA	19,965	124,743	2,180	80,691	52,253	86,362	132,003	498,197
IGA X		4,018		15,206	150	20,481	9,034	48,889
IGAD Other	1,150	11,910		15,734	1,150	24,168	8,225	62,337
IGAD Other			3,000		1,100		100	4,200
Non IGA>D	1,605	4,885	550	4,940	1,170	15,316	6,120	34,586
SPAR		11,710	400	24,645				36,755
Supa IGA	4,800	114,350		199,101	2,544	222,682	123,585	667,062
Supabarn	9,700	5,200						14,900
Unknown								0
W/Mart		10,880						10,880
Flemings		4,699						4,699
Food 4 Less		23,584		6,921				30,505
Thomas_Dux		3,574				800		4,374
WW/Safeway	53,282	730,587	3,500	577,192	186,000	669,345	271,794	2,491,700
TOTAL	138,076	2,194,566	21,110	1,576,879	605,507	1,914,003	842,775	7,292,916

The ACCC Enquiry into the Competitiveness of Retail prices for Standard Groceries 2008, found the following;

1. Food price inflation between 2002 – 2007 in Australia was 20.3%. In New Zealand in the same period it was 7.7%. The overall rate of inflation between Australia and New Zealand was similar over that same period. Page 33
2. In relation to market shares, the major supermarket chains (MSC's) have the following shares;
 - a) Between 70 – 80% of the total market for packaged groceries. (Page 61)
 - b) No more than 50% of fresh fruit and vegetables with Woolworths having 25% and Coles having 20%. (Page 63)

- c) 50% of the fresh meat, with Woolworths having 30% and Coles having 20%. (Page 65)
 - d) No more than 50% of bakery, with Woolworths having 25% and Coles having 20%. (Page 66)
 - e) Between 50 - 60% of Dairy. (Page 66)
 - f) Between 50 - 60% of Deli sales. (Page 67)
 - g) 50% of the fresh egg sales. (Page 68)
3. That MSC's do not seek market share through aggressive price discounting. (Page 120)
 4. More vigorous competition between the MSC's was unlikely in the future. (Page 120)
 5. The potential for greater price competition was more likely to originate from other competitors disrupting the prevailing price behaviour. (Page 123)
 6. Large independent stores add competitive price tension to grocery retailing. (Page 169)
 7. Large independent retailers can achieve the economies of scale that allow them to compete directly on price with the MSC's. (Page 176)

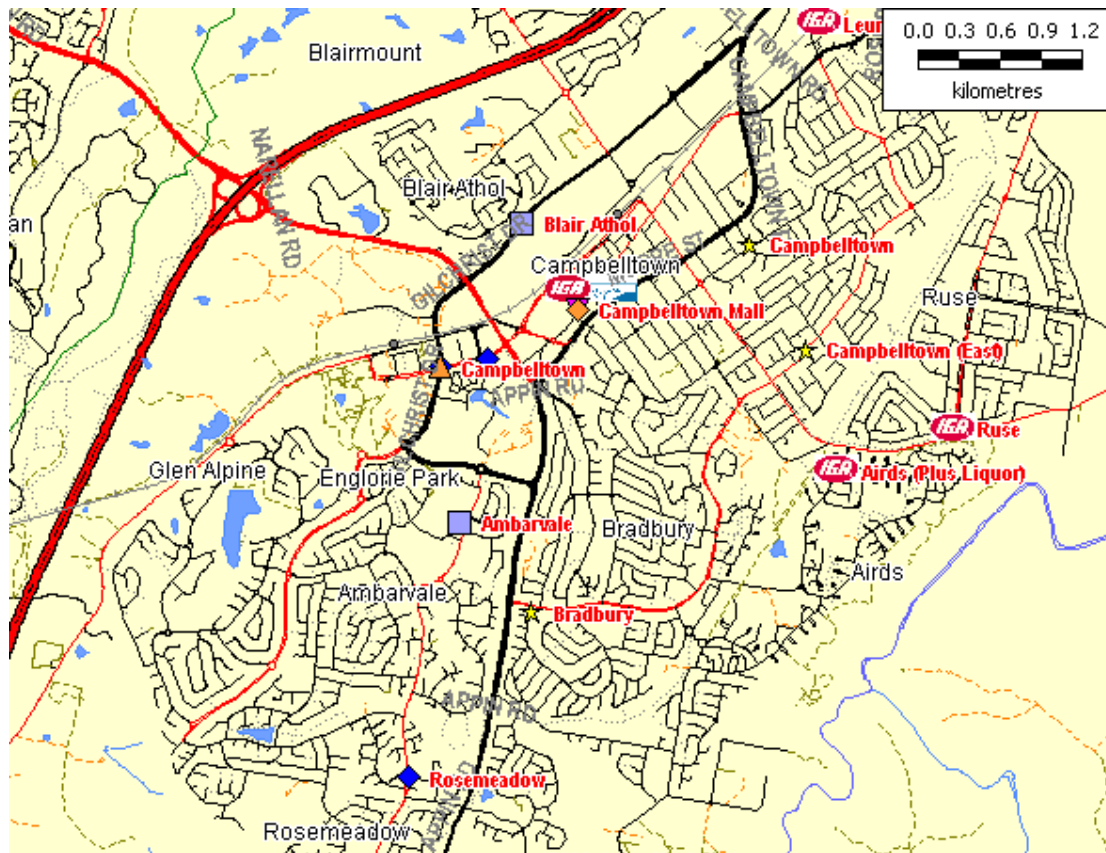
The next highest levels of domination in the retail sector are in the UK where Tesco has approximately 30% of the grocery sector. The next dominant player in the UK grocery market has less than 19% of that sector. The two most dominant players in the UK have combined levels of domination that are less than the level of domination of some markets in Australia by Woolworths. This level of domination is compounded by the fact (see ACCC findings above) that Woolworths and Coles tended not to compete against each other aggressively.

CAMPBELLTOWN EXAMPLE

Campbelltown is a typical metropolitan suburban area which has been developed over the last 30 year into a city of 350,000 people. The main retail centre is in Campbelltown where there are large areas appropriately zoned for retail development.

Over the past 30 years, Woolworths has developed 4 supermarkets in the central Campbelltown area. The development of multiple stores in the same market is a strategy designed to ensure that no competitor enters the market. Apart from Woolworths and two Aldi stores, no new full line competitor has opened in Campbelltown for 20 years. A number of independent grocery retailers have ceased to trade in Campbelltown during this time.

Below is a map of Campbelltown which has marked on it the position of the supermarkets. Woolworths is the blue diamond. One of the Woolworths stores is in the Campbelltown Mall and not shown on the map.



Location	Store Type	Address	Store Area Total	Retail Sales
Campbelltown	IGA X	251 Queen St	350	35,000
Campbelltown	Franklins	271 Queen St	1270	132,925
AMBARVALE	ALDI	45 Woodhouse Dr	1650	200,000
Campbelltown	WW/Safeway	Gilchrist Dr && Kellicar Rd	4185	940,000
Campbelltown	WW/Safeway	271 Queen St	2725	450,000
Blair Athol	ALDI	Blaxland Rd && The Kraal Dr	1714	200,000
ROSEMEADOW	WW/Safeway	Copperfield Dr	3677	550,000
Bradbury	5 Star	The Parkway	841	30,000
Campbelltown	Coles	271 Queen St	3825	500,000
Campbelltown	WW/Safeway	Tindall St && Kellicar Rd	3000	500,000
Campbelltown	Bi-Lo	Gilchrist Dr && Kellicar Rd	4114	350,000
TOTAL			27351	3,887,925

In Campbelltown, Woolworths has 13,587sqm of the retail space in a total market of 27,351sqm, which is 49.7% of the total market by floorspace. Please note the total market includes convenience stores and Aldi stores both of which are not full line supermarkets.

By market share Woolworths has an estimated \$2,440,000 per week turnover which is 62.8% of the total weekly expenditure in that market. Significant areas remain zoned for retail, which could accommodate large floor plate retail ventures like a supermarket.

Campbelltown is typical of growing suburban areas around the cities in Australia. It has a centres based planning environment, with large amounts of land zoned for retail which would enable numerous competitors to enter. Notwithstanding the high level of supply of appropriately zoned land competitors are not entering this market in the grocery sector. The only competitor to enter this market is Aldi who are not a full line supermarket operator.

The key factor influencing the entry of new competitors into the Campbelltown market place is the level of or possibility for increased levels of domination by existing operators. Creating more retail zoned land will not change this business reality.

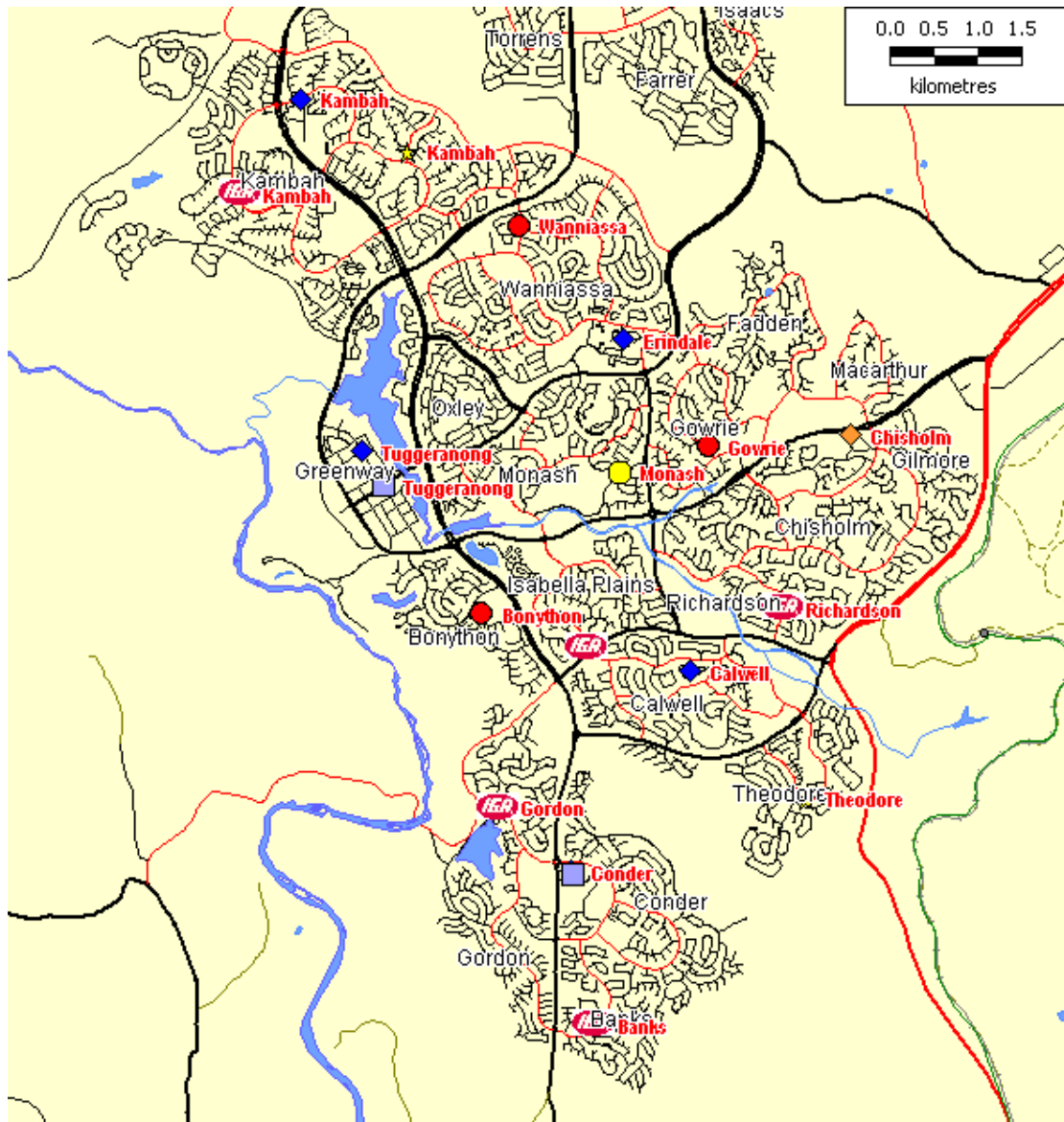
The levels of domination in the grocery sector in the Campbelltown market place are common place throughout Australia.

SUPERMARKET POLICY IN THE AUSTRALIAN CAPITAL TERRITORY

The ACT planning regime is based on the Territory Plan. The Territory Plan adopts a rigorous centres based philosophy. Uniquely in the ACT new land releases are made by the ACT Government. This enables a greater degree of intervention in the allocation of sites for new grocery retailers.

Notwithstanding the high degree of control in the release of land for retail in the ACT the supermarket sector has higher than average levels of domination by the major chains compared to national levels of domination. This is particularly so in the southern part of Canberra.

The Tuggeranong area comprises one third of the total population of the ACT. Below is a map with market on it with blue diamonds all the Woolworths stores for the Tuggeranong area.



Location	Store Type	Address	Store Area Total	Retail Sales
Isabella Plains	IGA	Ellerston Av	575	92,000
Wanniassa	Supabarn	7 Sangster Pl	2000	210,000
Kambah	5 Star	48 Manheim St	185	22,000
Theodore	5 Star	116 Lawrence Wackett Cr	250	18,000
Chisholm	Coles	Chisholm S/C Halley St	2571	300,000
Tuggeranong	Coles	Pittman St && Ankertell St	3000	425,000
Richardson	IGA	Clift Cr	1150	119,000
Banks	IGA	Pockett Av && Brockway St	550	61,000
Calwell	WW/Safeway	Shopping Centre, Johnson Dr	3714	475,008
Conder	WW/Safeway	4 Sidney Norlan St	3500	803,109
Wanniassa	WW/Safeway	50 Comrie St	2930	892,275
Kambah	WW/Safeway	Marconi Cr && Kett St	2000	402,242
Tuggeranong	WW/Safeway	Pittman St && Ankertell St	5674	761,510
Tuggeranong	ALDI	Ankertell St && Soward Wy	1380	320,000
Gowrie	FG	1 Jeffries St	900	55,000
KAMBAH	IGA	2 Castley Circuit	1300	58,000
MONASH	Non IGA>D	25 Barraclough Cr	620	55,000
Gordon	IGA	114 Lewis Luxton St	570	75,000
Bonython	FG	70 Hurtle St	220	32,000
Conder	ALDI	9 Sidney Nolan St	1500	250,000
TOTAL			34589	5,426,144

In Tuggeranong Woolworths has 17,818 sqm of the retail space in a total market of 34,589 sqm, which is 51.5% of the total market by floorspace. Please note the total market includes convenience stores and Aldi stores both of which are not full line supermarkets.

By market share Woolworths has an estimated \$3,334,144 per week turnover which is 61.4% of the total weekly expenditure in Tuggeranong

MARTIN REPORT (September 2009)

In 2009, the ACT Government undertook a review of the supermarket industry which culminated in the Martin Report called the "Review of ACT Supermarket Competition Policy" dated September 2009.

The Martin report clearly identified the levels of dominance described above and made a series of recommendations to address this issue. The key philosophy of those recommendations was to improve the competitive environment in the grocery sector.

The ACT Government adopted the Martin Report recommendations. The key policy changes were as follows:

1. To actively pick supermarket operators for new sites and in so doing exclude Woolworths in certain areas, and
2. To allow existing independent operators to increase the size of their stores to a maximum of 1,500 sqm in local centres. (Stores sizes were limited under the terms of their ACT Lease to less than 1,000 sqm).

Whilst the aims of the Martin Report are supported, it is expected its recommendations will fail to arrest the domination of the grocery sector by the chains in the ACT for two reasons. Firstly the ACT Government has failed to implement the recommendations. At Kingston, the ACT Government announced a release of land for a new supermarket without entering any tender process. This action was the opposite of what was recommended by the Martin Report. This gift by the Government to one operator and exclusion of all other potential competitors is clearly anti- competitive and indefensible on any basis.

More fundamentally, nothing in the Martin Report recommendations prevents the major chains from purchasing existing local centre supermarkets and enlarging them to 1,500sqm. This is currently being sort at Giralang, where an application for a Woolworths has been made in a defunct local centre for a 2,750sqm supermarket. The existing ACT lease terms limited the supermarket to 950sqm. If the Martin Report recommendations are implemented it is expected that a 1,500sqm Woolworths supermarket will be approved at Giralang. Giralang is in the Belconnen region in Canberra. Woolworths is the dominant supermarket retailer in the Belconnen region.

TRADE PRACTICES ACT

The Trade Practices Act does not seek to encourage more competition as suggested at page 17 of the Issues Paper. It only prevents gross reductions in competition. To suggest that the Trade Practices Act proactively seeks to increase competition is to misinterpret its provisions.

Since 1974, the Trade Practices Act has only prevented one acquisition of a supermarket on the basis that it would reduce competition in the grocery sector. That was at the proposed Woolworths acquisition of the Karabar supermarket in Queanbeyan. The facts at Karabar were that Woolworths with 2 supermarkets in the Queanbeyan area would have had 60% of the total turnover in the grocery market after the Karabar acquisition.

Subsequent to that decision the ACCC has refused halt a number of acquisitions where the levels of market domination have exceeded 60%, most recently in Tura Beach.

In Tura Beach, Woolworths proposed to build a 3,000sqm supermarket. Woolworths has the largest supermarket in the market with a 2,171 sqm store in Merimbula. The only other store in the market which would remain after the new Woolworths store opens is a 650sqm Coles. Post acquisition at Tura Beach, Woolworths will have 89% of the floorspace and 83% of the turnover in the grocery sector.

The ACCC reasons for refusing to prevent the Woolworths acquisition at Tura beach was based on the assertion that appropriately zoned land existed in Merimbula which could at some latter stage be developed by another competitor. No basis was given by the ACCC for believing that there was any supermarket operator prepared to take the commercial risk of opening a new store in Merimbula. There was no evidence that any potential competitors had, could or would open a new store in Merimbula.

Tura Beach demonstrates that the Trade Practices Act will not protect competition in market places in the way described in the Issues Paper.

Tura Beach is also a good example of the major chain supermarket operators practice of domination in markets they already have a presence. This is done to exclude the possibility of competition. There are many examples in Australia of the major chain practice of opening multiple stores in the same market. Examples of this practice are;

1. Raymond Terrace: 2 Woolworths stores opposite each other in the main retail shopping precinct. The only other grocery store in this market is an Aldi which is not in the main retail precinct. Appropriately zoned land exists in large amounts in the main shopping precinct for other operators to open new stores.
2. Neutral Bay: 2 Woolworths and 1 Coles in the main retail precinct. The second Woolworths store was a Franklins store and was bought and redeveloped by Woolworths. No other sites exist in this very disaggregated market place.
3. Manly: 2 Coles within 100 metres of each other. No other sites exist in this very disaggregated market place.

The Trade Practices Act cannot be relied upon to prevent domination in the grocery sector. It is during the life of the Trade Practices Act, that the level of domination in the grocery retail sector has increased from less than 60% to 80% by the two major chains.

COMPETITION AND THE PLANNING SYSTEM

The questions put by the Issues Paper at page 18, suggest that Planning Systems restrict in themselves competition. As explained above, it is the presence of dominance in a restricted planning environment that results in poor competition outcomes, not simply the restriction of the supply of land. To increase competition in the grocery sector one must first deal with the problem of dominance. The problem of dominance has not been caused by the planning system, but the planning system does aid the entrenchment of dominance in the grocery sector.

Deregulating the planning system in itself will not address the issue of dominance in the grocery sector. In a market where dominance is so great, deregulation will only deliver greater opportunity to the dominant players to increase further their floorspace and market share.

The UK Competition Commissions recognised this fact in its most recent grocery inquiry report dated October 2009. (Refer attached Press release dated 2nd October 2009. In that report, the Commission found that without the inclusion of a competition test in the planning system, domination would increase and competition outcomes would not improve in the grocery sector. The Commission recommend that new stores above a certain size be referred for greater scrutiny as to their impact on competition where they are close to existing stores. This recommendation was made in an environment where the levels of domination were significantly less than in Australia.

NET COMMUNITY BENEFIT TESTS AND ECONOMIC IMPACT ASSESSMENT

State planning systems do not actively seek to encourage competition because the relevant legislation in the States do not require consent authorities or planning bodies to take into account competition other than in the following circumstances.

State Planning systems in the assessment of development proposals and rezonings for retail development, require an assessment of the net community benefit. The assessment of the net community benefit includes an assessment of the economic impact of the proposal.

The main matters looked at in an economic impact assessment are;

1. The demand for the proposal, the current supply and the market for the proposal. This assessment involves an analysis of the demography for the area and the financial habits of the residents based on social studies; and
2. The Impact on existing business centre if the proposal is of a scale which would require such an assessment; and
3. A net employment impact assessment.

The practice developed in the Courts and implemented by consent authorities is that the impact of a proposal on any competitor is not treated as relevant. The impact of a proposal on the existing retail landscape is relevant. Specifically, if a proposal would so negatively impact the existing retail centre as to jeopardise its continued viability, it should be refused. This is the essence of a centres based planning regime. This practice seeks to maintain community demands for existing centres to remain viable and support communities.

Except as described above, economic impact assessments do not assess the competition impacts of proposals.

Economic impact assessments do not apply a competition test to deal with issues arising from dominance.

Strategic planning and the preparation of local plans adhere to a centres hierarchy model which does not take into account issues of competition or dominance except as described above.

GAMING APPEALS

It is the experience that in the last 5 years the major chains do not appeal zoning and development applications except on proper grounds. It is now observed that the practice of gaming appeals is in fact very rare. It has been observed that businesses do not regularly oppose competitor development except where it is proper to do so. It is appropriate to oppose a development where a proper ground for opposing exists. That could include an economic impact argument as described above. However, it is to be noted that in NSW objections based on economic impact have only succeeded in 2 cases in Land and Environment Court proceedings in the last decade. In those two cases, the community's net benefit was found not to be improved so the proposals were refused quite properly.

STATE OWNED LAND

Recent experience is that State owned land development proposals are considered with no reference to competition impacts. The most recent example of this is a proposal by Pittwater Council to redevelop a carpark at Newport shops into a Woolworths supermarket. Woolworths has more than 30% of the existing floorspace and turnover in the area. Local community groups opposed to this development have raised the issue of dominance with the Council. The Council has ignored this argument which as a matter of law they are entitled to do.

NSW DRAFT ACTIVITIES CENTRES POLICY

In NSW, the Department of Planning has prepared the Draft Activities Centres Policy. That document (still in draft) is designed to guide consent authorities and the department in the preparation of new Local Environment Plans and development proposals including rezonings, in the retail sector. A primary aim of the policy is to deregulate the retail sector so that centres are able to grow and new centres form.

Whilst not departing from a centres based hierarchy system, the Draft Activities Centres Policy does seek to make the planning system more responsive to market demands for more retail space

The Draft Activities Centres Policy makes for the first time in Australia, competition a relevant matter to be taken into account in the preparation of new Local Environmental Plans. The latest draft states at page 4;

“LEPs should not create or perpetuate anti-competitive or monopolistic market conditions where there is demonstrated demand to warrant commercial expansion.”

The above phrase should be adopted in a COAG communiqué for State planning policies.

However, in the absence of anything more than this phrase State planning authorities will not increase competition in the retail sector. Planners and consent authorities need specific direction on how to implement this policy statement.

There is anecdotal evidence that the development community is already preparing new proposals relying upon the Draft Activities Centres Policy. The majority of those proposals are for out of centre developments not the intensification of uses within existing centres. This is what you would expect to see in a deregulated planning environment which does not take into account competition. That is development proposals by major chains or developers for the major chains which will seek to build new stores out of centre. There will be no increase in competition from this type of activity only an increase in the levels of domination in markets by the major chains.

Without a competition test in the planning system, deregulation of the planning system will only increase their levels of domination because the major chains will gain the majority of the benefit of that deregulation.

COMPETITION TESTS IN THE DEVELOPMENT ASSESSMENT PROCESS

Economic impact assessments do assess impacts of proposals on competitive tension in markets. Competitive tension impacts are a relevant matter to be assessed as part of economic impact assessments because they indicate what the competitive environment is likely to be post development. The more competitive the environment, the more likely prices will be lower. Lower prices deliver a positive net community benefit.

FLOORSPACE DOMINANCE TEST

In NSW, the Independent Retailers of NSW and the ACT Inc have developed a Net Community Benefits Test that assesses competitive tension impacts from new retail proposals. The test is based on a Floorspace Dominance trigger in the assessment process. The Test was developed as part of a submission to the NSW Draft Activities Centres Policy. The Test can be summarised as follows;

- Where a retailer has 25% of the existing floorspace in a retail sector (i.e. Grocery, Liquor, Hardware, Fuel) in a market, then new proposals for that retailer would be required to undertake a more thorough economic impact assessment.
- That higher level of economic impact assessment to include an assessment of whether the proposal would tend to exclude other competitive entrants and or lead to less competitive tension in pricing in that retail sector in that market.
- The market proposed was a driving distance of 15 minutes in metropolitan areas and 45 minutes in rural areas. The economic impact assessment to include;

A copy of the Competition Test is annexed hereto.

The planning system can increase competition in the grocery sector. To do this it must focus on assessing dominance and consider the economic impact that flows from dominance where it is found to exist. A floorspace dominance test proactively encourages a proper assessment of the issue of dominance.