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The Commissioner,
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Dear Sir or Madam,

Please find the draft Report response from Mitre 10 below for your consideration. This submission follows on from this organisation's initial submission and should be read together with that document as well as your draft Report to which it responds directly.

1. The context of the Commission's work is already skewed going into the compiling of this Report: the result is a biased outcome as evidenced on Overview Page xix which repeats the bleating of chain retailers and big business about third party rights in the planning process and flies in the face of the Victorian State Governments' Department of Planning and Sustainability which says elsewhere in this Report, in a reference at the foot of Page 227 in reference 16, that third party rights are highly valued and lead to improved planning outcomes.

The Victorian Government response undermines one of the core biases inherent in the purpose (as stated in the Overview) and the draft of the Commission's Report. In essence, Mitre 10 agrees with the Victorian State Government and proceeds from a different starting point. Much which flows in the Report from its starting position is flawed by a biased core assumption.

It should be noted that Mitre 10 developments also face the same third party review as the chain retailers complain about but respects the stakeholders' rights as an important balance and check in the process. With more than 420 stores Mitre 10 has been through the process of obtaining planning permits approximately twice as many times as Bunnings and so speaks with some authority on this subject as it has a keen and deep knowledge of the process across Australia.

2. Moreover, the Report's examination of third party involvement shows quite clearly that the major retail chain are the chief complainers about this vital part of the planning process in supermarkets developments and are not against exploring and activating the same rights when it suits them in the so called hardware sector.

3. Nowhere in the draft report is there recognition of the undermining of the hundreds of thousands of investment decisions around the nation made to invest in commercial property under the prevailing planning laws and zoning regulations nor has the potential damage to those investments by changing the laws and rules for the benefits of a handful of retailing chains been calculated and weighed in the draft.

At Mitre 10 alone there are approximately 5,000,000 square feet of trade floor space involved in this discussion. As NARGA says, the capital value of family-owned (otherwise described as independent in this submission) business in Australia far exceeds (at $4.3 trillion) that of the retailing chains. This former is the voice the Commission should be taking its cue from rather than property developers seeking to add value to land by rezoning or being exempt from zoning regulations with which the rest of the land owners in the nation must comply.

As Bunnings has only 14% of the hardware market and less of the nursery, newsagent, supermarket, outdoor furniture etc markets the Commission should be wary of recommending regulations which favour the "tail" rather than the zone-abiding "dog" (57% of the hardware sector according to the Australian Financial Review is "non-aligned").

4. The Draft Report's inattention to the soundness of existing commercial investments in appropriately planned and zoned areas and the damage to the value of those investments when the rule books are thrown away is a failure in the scope of the document. Worse still, when the de-linking occurs, the amount of commercial property held in superannuation for the old age of many Australians (and future generations through trusts) is diminished. There is consequent damage to the value of these portfolios as the retail hubs are emptied and moved out of town, as out of zone development proceeds.

5. The scope of the draft Report focuses on major cities and towns. It should be noted that the big retailers are now looking for fresh fields and moving with smaller footprints and offerings (unrecognised by the draft) to trade areas they would have ignored even five years ago. Towns with populations under 4,000 are targets for Woolworths and Coles and these often semi-rural, rural and regional towns are being turned upside down by applications to build retail on the edge or beyond the edge of the retail area in these small trade areas. That there is no land left in the retail centre masks is a complaint of chain retailers but often their real intention is to seek an away from the centre location which can operate on a destination basis and when others seek to build around them in a synergistic way, sharing traffic flows etc, the chains turn their backs on them to maintain the hegemony of their destination emporiums. ("Emporium" according to the Oxford Reference Dictionary is "a large retail store selling a wide variety of goods" which describes the operation and function of Bunnings and Woolworths "Oxygen" although this definition issue and its implications is discussed in more detail below)

The nature of Australian politics and policy is that overarching regulations have a strong tendency to trickle down to the micro situations. The policies suggested in the draft have very different effects on smaller semi-rural, regional and rural towns in Australia and there should be no straight forward adoption process at the micro level once the Commission reaches a position and Parliament and COAG review it.

6. Recognition of the growing trend of chain retailers in hardware to be genuine old fashioned emporiums is not recognised by the planning regulators. Bunnings calls itself a trade supplier, a restricted retailer, a DIY retailer wherever it suits its cause for skipping around the fact that use issues often apply to their proposed site. It is a cynical exercise.

The fact is that Bunnings competes with the hardware stores, the timber yards, the nurseries, the cafes, the newsagents, the general merchandisers such as Big W and Target, the soft furnishing stores, the lighting stores, the kitchen retailers and trade suppliers, the

supermarkets, the outdoor and furnishing stores and more. Bunnings and even more so Woolworths "Oxygen" are emporiums and should be treated as shops. Plain shops and not lurk behind a variety of self-styled descriptions which change to suit their planning purposes.

7. The retail chains complain in the draft of "gaming" but there were no blushing violets when it came to the challenge against the set-up of Woolworths "Oxygen" and the complaints came thick and fast in an effort to challenge the competition (the very thing that the chains accuse the smaller players of now, in court and in submissions to this draft).

The power of the retail giants in Australia is such that holding almost 30 retail brands each they have flexibility to side step competitive tension by rebranding a Safeway here to a Dan Murphy there and in doing so, keep out a grocery rival from the retail area.
Example? Jackson Court, Doncaster, Victoria. The result was that the retail area then had no grocery anchor but planning was powerless to intervene and competitive issues were not refused. Mitre 10 highlights the dysfunction between competition law and planning law and makes recommendations in point 25 below. For the moment, it is sufficient to witness the power of the retail chains to influence retail areas with unplanned consequences.

The gaming issue is another side of bullying from their position of financial strength by the chains. At Council, the plans are first agreed between Council planners and developers (who have spent much time together in informal meetings beyond the scrutiny of the ratepayers, and end up generally in a simpatico relationship without the benefit of "fresh" eyes).

These fresh eyes come during the exhibition period and in nearly all cases result in improved plans. In court, the chains' SC's rattle the sabres about vexatious litigation but time and time again the plans being challenged are found to be deficient and significant amendments made to satisfy the stakeholders not including the developer and Council. In fact, VCAT reports on Page 294 of the Draft that 76% of cases before it in 2008-2009 are found in favour or partial favour of the appellant.

The inescapable conclusion is that in most cases the project outcomes are improved by the process of objection and appeal by third parties and that this is proof enough to scotch the contention that freeing up the regulations for developers is directly linked to good and efficient planning and the benefit to the community into which these developments will be built.

Stop for a minute to think of the prospect for host of inappropriate projects being developed all over Australia without the ability to rein in the profiteering ways of developers who care little or nothing for the context of their stores' environment. The Report needs to "get into the weeds" on this issue and see the scope of changes forced upon the developers by the courts after objections and appeals which seek to maintain the integrity of the current laws and regulations. Only then will the Commission see the potential damage to communities and their productivity such unfettered developments can wreak. The Commission will see the virtue of the project changes forced upon Council and developers to better the outcome. The idea that developers get the plans right first time is a nonsense. To remove the impost of thorough regulation on them will lead to unfettered design and environment calamity.

8. Self regulation? It is also a nonsense when developers are driven by maximising profit. They are not driven by maximising productivity.

9. The cloak of the push to deregulate is in this sentence above. The developers have led Parliament and the Commission to try to expand their profits: this does not seem to be an altruistic desire to generate more productivity for the nation.

10. As a preamble to this section of the response, Mitre 10 would like to make the association that comparisons to the retail grocery market and planning referred to on many occasions below is done so as this market historically easily demonstrates many parallels to the hardware planning issues faced by current independent hardware operators. The Report's emphasis on Costco is out of proportion to its impact and importance in the retail industry in Australia. As a supermarket item stockist Costco has only 750 line items. Even a small independent convenience store has around 8,000 lines.

The draft Report quotes Costco as explaining that it does not fit any planning models. Mitre 10 agrees and says this situation is analogous to the chain emporiums which now no longer fit the trade hardware or even hardware sector at all. In addition an independent local offer has the flexibility to outrange chain competitors and offer a range tailored to its local environment including stock of local product. Chain stock is a "cookie cutter" range in their stores regardless of size and they neither stock nor promote local product.

Interestingly, the recent plunge into administration of Borders and Angus Robertson Book sellers caused the likes of Costco to be looked at, in conjunction with internet purchasing, as Costco mass imports books and is accused of exhibiting underselling practices.

11. The emphasis on the importance of Aldi is overstated in the Report. The line item stocked by Aldi in supermarket products is 2,500. A full line independent supermarket will carry approximately 30,000

To regard that Costco and Aldi will supply all the supermarket items necessary for the Australian household is fanciful. They are retailers picking the eyes out of the market selling high volume products only. Often suppliers are pushed to pack specific unusual bulk or specific lines solely for Aldi: it creates an impression not of a different range but a range that looks different by virtue of size changes.

The consumer needs both full line supermarkets as well as more conveniently located supermarkets to fill out the shopping requirement. The same goes for hardware products. Pushing out the independents by a combination of passive competition regulation and allowing a free for all in planning has the potential to reduce independent retailers by 50 percent over the next twenty years and push the profitable wholesale service of them below sustainable levels according to the Centre for Independently-Owned Retail Research (CIRR).

12. The investment and value in Australian-supplied brands is at high risk from the advent of Aldi and to a much lesser degree, due to its size, Costco. The leverage over suppliers means that choice of trusted and established branded product for the consumer will diminish giving way to more house brands.

The Productivity Commission should have proper regard for the future of Australian manufacturing and processing firms and the threat to them from supply chains which feature imported processed goods compounded by and supplied to the general rise of home brands. It is no coincidence that the current "price wars of the chains" is on generics and is aimed at halting leaching of customers from their stores to Aldi on the basics. The consequential reduction in shelf space available for branded products means the future of many brand

products is threatened and the independent stores will be the natural outlet for Australian brands. (IGA has home branded products but not to the level of the big two and not growing at as fast a rate 9% pa)

13. Costco, being a destination retailer has a wide range of location opportunities available to it and it is not constrained by lack of appropriately zoned land, despite its complaints against Woolworths and Coles.

14. The Report should note that independent closures due competitive power by chain retailers include in recent years Shepparton, Yarram in Victoria and Tura Beach New South Wales, supermarkets according to the CIRR.

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CIRR also reports turnover reductions of 40-50% at supermarkets at Mission Beach, Qld, Bright, Vic, Maffra Vic as well in the face of chain supermarket power.

Independent hardware has lost 90 stores to acquisition by Woolworths supplied Danks over the past three years as a plank in the market entry of Woolworth into a hardware based emporium. With a planned 150 new stores for Woolworth "Oxygen" the growth of chains in hardware based emporiums is heading towards the dominance the Coles/Woolworths duopoly has in supermarkets, and dominance it enjoys in petrol, liquor retailing etc.

The Commission is recommended to review The DFO Homebush versus Strathfield Municipal Council decision which has been relied on in NSW courts as regards levels of competition and consequences, acceptable or otherwise.

Similarly the recent determinations in Victoria regarding Woolworth "Oxygen" are instructive as to levels of competition, this time directly in the hardware related sector.

15. The aim to organise through COAG a national set of planning and zoning regulations need extremely careful consideration because of wide ranging differences in rates of growth between States, different State government policies promoting growth (some more aggressively than others), changes to a range of manufacturing and employment issues.

The fact that different States have different emphasis on planning processes is also a feature of the system of Federation and State's rights should not be traded away for the profit of a few. More mature retailing States such as NSW and Victoria have different needs for added retail offers than FNQ and Western Australia where there is more land supply, although Victoria's population is fast growing and the previous State government ring-fenced development under its 2030 policy. All these factors are mirrored around the nation and are not necessarily a hindrance more than an appropriate response to local conditions and differing political policy. Streamlining of laws and regulations is in general helpful but should not be pursued over the recognising the benefits of differences and dynamic situations in the States. It is not always case of one size fits all.

16. The draft twice references The High Court of Australia's KFC vs Gantidis case but does not place it front and centre in the planning process as Mitre 10 cautioned it should in its original submission nor does the draft properly address the key element of its decision which relates to net community benefit. In the media, in politics, in planning, the independent sector of retailing challenges the all too often accepted maxim of big retailing that their imposition in a trade area is always a good thing: that they bring benefits in investment, creation of jobs, reduction in escape expenditure, increased range and lower prices.

The independent retailers such as Mitre 10 challenge each of these supposed virtues:

Big retailing tenders nationally for its construction so there is usually no benefit to a decision-maker local council to approve a development saying, as many do, that it will bring investment to town. The cost of the development is almost exclusively benefitting builders and contractors based out of the Council or Shire. It is reported that for a recent Aldi expansion, tile layers were flown from Europe to lay specific porcelain tiles in-store.

The creation of jobs receives disgraceful treatment at the hands of so-called expert witnesses before Councils and courts. On most occasions, the review of job creation does not even consider, let alone mention, loss of jobs caused by the new development. No effort is made by these friends of the court who are supposed to be giving expert evidence to the court in an unbiased way to deal with negative impacts of new developments.
The High Court instructs all that there is a net sum to be arrived at and the creation of jobs is very much a case by case issue and needs to be weighted against the loss of jobs elsewhere in the community caused as a direct result of that new development. As a Productivity Commission your draft Report should not be silent on this issue particularly and the implication of your review that streamlining the planning process which could do away with this type of scrutiny.

That the jobs involved above are not simply transferable is another truism. The losers of jobs can not take up employment in the new development due to the time lag in the process. The type and quality of jobs is also an issue, with PwC research (referenced in Mitre 10 original submission) showing that independent supermarkets and our Mitre 10 anecdotal evidence confirm this is relevant for independent hardware employment also, employ more staff per square metre of floor space than do the chain retailers.

So, advancing the cause of the chains with regard to jobs as positive as many do, is unfounded, if it enforces closures and lay-offs, and is compounded even more so as a net loss as the chains do not have the same high level of employment that the independents do. The research sponsor NARGA has made this jobs-related point also to the Commission.

In addition, in supermarkets and soon to be in hardware-styled emporiums, are the self serve checkouts which reduce the number of jobs available at chain retailers and this trend will continue and so continue to undermine the claim to create more jobs and to sustain the argument that there will automatically be net generation of jobs from new chain development.

With regard to reducing escape expenditure, this criterion is sharply focussed in semi-rural, regional and rural towns. However, it is true that chains import (truck) their product into and export the revenue out of the Council area or Shire. There is almost no added value in their operations within a trade area except for wages and rates. The wages may not be a net improvement (due to job losses and net job losses: see above) so their claims to keep escape expenditure in a council area, or reduce it, are also unsound.

With regard to range, the increasing development of home brands and stock which does not directly compete with the competition is tending the chain retailers away from direct competition on range. The general practice of increasing home brands or controlled brands mitigates against the argument that there is a growing benefit in the chain offer of range. This will trend will continue. The emporiums may offer new sections but will be shrinking their offer in other sections to accommodate it.

The lower prices claim by the chain hardware emporiums have been under severe scrutiny and according to users do not match the general perception in the advertising. Pleases reference http://forums.whirlpool.net.au/archive/1381103 for a first person, independent review of Bunnings and others pricing.

Therefore meeting the test of the High Court of Australia is not as simple as it reads from your draft and Mitre 10 recommends that the effects on all of the (disparate) competitors of the Bunnings emporiums, or Woolworths "Oxygen's" for that matter, need to be considered before a judgement concerning net community benefit is determined on a case by case basis.

17. The issue of whether the hardware-styled emporiums are bulky goods retailers is also on the agenda. The definitions cut across State laws, in WA, for instance. What the definitions problem highlight is that these so-called hardware stores are not hardware stores. They are shops and they want to sell whatever the can out of their box to the DIY demographic. That includes bulky goods. Page 152 of the draft report defines bulky goods incorrectly in Mitre 10's view. Attention is drawn to the WA State Government's review of trading times and bulky goods to refer to a range of definitions available to the Commission for its Report and to certainly not accept the one outlined on Page 152 Note 53.

18. This does highlight however the difficulties confronting the Commission in this Report and the planning and legal communities in the day to day application of law. So the complexity of regulations and zones turns out to be fertile ground for the growth demands of the emporiums: as they continue to push the definition boundaries to their own ends.

19. Mitre 10's original submission highlighted the nexus between the economic and social policy considerations which forms an integral part of the Commission's remit. The draft largely ignores this aspect of its core remit and Mitre 10 recommends that the sections on the benefits of unfettered (streamlined) planning without attention to retail hierarchies enforced by zoning regulations, that the social side of the commission's remit is being buried under the supposed need to encourage new profit-takers: potentially often at the expense of investors who have abided by the regulations.

Throughout the draft the text focuses on the profit of the developers while the losses of the current investors are firmly in the shadow. This is not so much an operators issue but a landlord's/property investor issue out of the limelight in the draft.

20. The issue of turning industrial land into retail zoned land is core to hardware sector unabated growth. The flip side of it is the damage to retail hierarchy already in place, the making of a doughnut effect so that the core of the retail centre is hollowed out as has happened in general retail circumstances in Maitland, NSW and is well evidenced throughout the United Kingdom. Aside from one note, the international experience is missing from the draft and overseas experience should inform and provide excellent reference to the Commission in considering its task. Many reference documents which might assist the Commission are to be found at CIRR website: www,cirr.com.au. with references to the USA, UK, Netherlands, Finland, Malaysia, Canada and others.

21. The Draft at Page 251 references circumstances with an outcome the opposite of the Maitland experience. The Commission is referred to Maitland as a microcosm of unintended effects of promoting out of town, out of zone retail development and is now a well known and

well understood planning failure. This type of circumstance is completely understood in the UK where the Competition Commission is vastly more active in protecting diversity and employing planning controls in retail than the Australian experience. This point illuminates the comment also on Page 243 Points 6-7. The point is also made by NARGA in its submissions and responses to the Draft Report and while that body's focus is supermarkets the general point is increasingly relevant to the hardware and related sector.

22. The draft report advises that sometimes up to hundreds of objections are received to planning DA's. Mitre 10 can confirm that the level of objection can on occasions reach well over 1000 and even up to approximately 4000 for a single DA in a town of 4,000. The point of such mass objection is to show how out of touch a development and even a Council can be with their community and other stakeholders.

23. On Page 294 of the Draft at bullet point three on the page delays in the planning the process are landed at the feet of third party objectors when for the most and overwhelming part they should be landed at the feet of poor planning

24. Page 298 of the Draft under point 2 refers to use of as of rights use being a key plank in freeing up the system. The concern here is that developments seek to hide behind as of use rights to load up the community and other stakeholders with over development, eyesores and a multitude a failure to comply issues. The "as of rights" ticket is a free pass to developers that simply does not measure up to best practice in planning outcomes. According to reports from the Victorian Government and the data from its VCAT, as set out above.

25. Four more points need to be addressed in the Report in the view of Mitre 10. The first is the Commonwealth competition watchdog, the ACCC does not involve itself at a State or local level of planning schemes and operation. Competition is an integral factor in the Report but there is a disconnect with the operation of planning from the Councils up and the activities of the ACCC. An overhaul of the planning regime should involve the co-ordination of involvement of the ACCC, competition law and the monitoring and strength to use that law.

Secondly the planning implementation process needs a better model of engagement throughout for all. The Commissionaire for Small Business has a role to play for small business, big business has numerous forums to engage as well as direct access to decision-makers as was demonstrated in Victoria with a number of "call-ins" in the recent previous government. Mitre 10 members are not small businesses but neither do they have the access to a structure of engagement with planning decision-makers equal to big business.

Thirdly, the need for on-going professional development for Councillors in regards to planning decision making is startlingly apparent and should be a vital part of any review of the planning system. Having due regard for the appropriateness of the existing planning scheme and being able to decline changes to it clearly based on sound grounds in the face of profit-takers needs thorough education and continual updating at Councillor level as well as all professionals in the sector.

Finally in this section, Mitre 10 recommends review of the provisions of the recent previous State Government of Victoria Planning policy review which took a three pillar approach to assessment and asked for consideration in the areas of Sustainability, Environment and

Community. Even the sound of the approach seems to be more inclusive than the thrust of the Commission's task here as outlined above.

26. As previously acknowledged, Mitre 10 is a frequent user of the planning system for the growth of its own branded stores across Australia. As such its self-interest supports improved planning processes but not change which does not continue to protect the rights of land owners, orderly and sustainable retail hierarchies and a transparent system of checks and balances right up to the High Court of Australia.

If you require further details concerning the issues above please contact the undersigned,

Yours sincerely,

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