SUBMISSION OF INDEPENDENT HARDWARE RETAILERS
under the Mitre 10 banner

31st August 2010

Regulation Benchmarking Study: Planning, Zoning and Development Assessments
Productivity Commission
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Submission on behalf of Australian independent Mitre 10 and True Value hardware retailers

Background and provenance of submission

Formed in 1959, Mitre 10 is the leading Australian independent hardware retail format, comprising 430 stores across Australia. Our network of Mitre 10 and True Value Hardware stores are privately owned, passionately operated and committed to helping every customer with expert advice. These stores have been providing millions of homeowners with solutions to their home improvement projects and the building trade for over 50 years.

Retail turnover of the Mitre 10 group is approximately $1.5billion, around one quarter of the market leader Bunnings. Mitre 10 stores are run by independent owners, with more than 300 distinct owners across the store base, employing around 10,000 individual staff members.

Mitre 10 stores are a vibrant part of local communities throughout the country with 70 percent of these stores located in regional Australia. Mitre 10 retailers support community initiatives large and small, especially local projects that make a real difference to communities.

This submission has been prepared with a primary focus on planning and competition issues within the Australian hardware retailing industry.

Terms of reference - Issues

The Commission has been asked to benchmark the states and territories' planning and zoning systems and land development assessments (DAs) with reference to business compliance costs and competition impacts.

The implicit logic in many of the questions raised in the Issues Paper appears to be that planning systems by their very nature restrict competition, and that more deregulated planning systems are good for competition and therefore productivity. Our submission contends the contrary position: that market power in an oligarchical structure is bad for promoting and enhancing competition. Further, reducing planning structures can, in fact, lead to even higher concentration of market power in fewer players' hands leading to reduced competition, poor environmental outcomes and community dis-benefits.

Market Power

The Australian retail landscape is dominated by two large corporations – Wesfarmers and Woolworths. In the dry goods grocery industry, Coles and Woolworths own almost 80% of the market – and they now seek to replicate this model in the hardware industry. Bunnings already enjoys close to 50% market share, and Woolworths – through both its purchase of Danks and its planned launch of 150 big-box stores – will not be far behind Bunnings.

Woolworths has already received abnormally favourable planning treatment in Victoria whereby the State Planning Minister has circumvented existing local government planning systems and approved at least 12 sites for new big-box hardware operations. The result of this action means a complete lack of community consultation about the impact of the new stores on local retailers, amenities, traffic flows and other regional considerations. This 'free ride' which other new operators do not enjoy will inevitably lead to a lessening of competition in the retail hardware industry as more independent operators fall by the wayside and the Wesfarmers-Woolworths duopoly further extends its dominance.

Woolworths has recently been given the green light by the ACCC to purchase both Mitre 10 and Danks independent stores in northern Tasmania, leading to a significant lessening of independent market share in this region. Further deregulation of existing planning systems will very likely lead to more of these scenarios – a greater opportunity for the dominant retailers to further increase their retail space and market share.

Government responses to counter the global financial crisis with a supermarket-and-hardware-chain-led revival of the State and country's financial prosperity cannot be allowed to have the added impact of a further reduction in competition. Already this GFC response policy is out of date and its rationale moribund, indeed, if it ever was relevant, on balance an apt response to difficult economic periods should seek to enhance net community benefits. This should be the criteria on which to rely regarding the general issue of this Paper.

Dominance of the large chains has become part of the Australian business landscape – be it in banking, supermarkets, fuel, poker machines or liquor. The effect on the market is a distortion which drives double-digit annual growth and a lack of competitive pressure. For all the talk of new international competition in Australia, the reality is there are simply a couple of new entrants and we are far from the multi-branded competitive landscape enjoyed by consumers in Europe, the United Kingdom and North America.

Role of the Productivity Commission

We note that the Productivity Commission's remit focuses on economic, social and environmental aspects for development of better policies in the long term interests of Australia. It achieves this through examination of regulatory issues.

We submit that the economic, social and environmental aspects are intertwined and are not mutually exclusive. As a result, examination of one aspect should have regard to the effects on the other aspects. They should not be viewed in isolation from one another.

In regard to this performance benchmarking of Australia's regulation with respect to planning, zoning and land development, we say that the issues raised are fundamentally flawed by the narrow focus of the blinkered terms of reference.

Mitre 10 does not think the issues can be properly considered without regard to all the context the Commission's remit canvasses. This is not to say Mitre 10 disagrees with all the propositions under review in the Issues Paper, but Mitre 10 provides the following analysis below for consideration.

Mitre 10's "*Weltenschauung"* is not incompatible with the Commission's remit and holds strong to the belief that economic and social policy cannot be separated and viewed separately.

Issues Paper

The Issues Paper put forward by the Commission posits that the development assessment proposals will lead to reduced costs for development. This narrow view leads the observer to regard the policy proposal in the Paper that promotes profit (greed?) as being more important to Australia than the contextual community benefit.

The notion that the planning regulations unjustifiably restrict competition and diminish efficiency and effectiveness in cities does not link back to people, to their quality of life or to communities. This decoupling of economic from social aspects is inappropriate and a stunted consideration is the outcome.

The Paper seeks comment on the proposal of removing any unnecessary protections for existing businesses to encourage new and innovative competitors. The inference is that the existing small retailers are inferior to large chain big box retailing and in particular, in terms of innovation, their growth being one stop away from greater efficiency and productivity.

Mitre 10 submits that the underlying assumption that large chain retailing is the home of innovation is wrong. It does not rest in facts, indeed there are no facts put forward to underpin the assumption. Retail geographer and international retail expert Dr John Byrom, currently a senior academic at the University of Tasmania with a distinguished career including consulting to the European Union on retail matters, in a DVD published by the Centre for Independently-Owned Retail Research (**www.cirr.com.au**) in 2008 confirms:

> ... small shops are the real innovators when it comes to retail and that the big chain merely adopt and adapt once the risk has been taken. Innovation is developed by small shops.

So to take away the assertion that innovation is the product of big retailing and more big retailing (by virtue of eliminating any restrictions to their expansion through planning controls) will lead to more benefits through innovation, and the proposition put forward in this Paper, is baseless. Mitre 10 submits this is a false premise and a failed argument which does not stand scrutiny. Mitre 10 offers an international expert to support its view versus a bald assertion without support.

Therein lie the deficiencies in the Issues Paper in general. It is founded on untested assumptions – which we contest.

Zoning

The Paper presumes that the proposed change in ease of zoning will be more efficient and effective than the current system. It asserts that developers are faced with high costs incurred in complying with the process rather than maximising their profits. This again is a complex issue. It implies the system is somehow unfair on developers and a hindrance to the economic well being of the community.

There are balances and checks in place throughout existing planning law. Mitre 10 submits that removing the rights which stem from zoning laws that reinforce existing and future land owners rights asnd investment decsions (affecting superanniation and investment levels and decisions of generations) in favour of the short term profit of developers is inequitable, unhelpful and short-sighted.

In response to the zoning assertions made on Page 10, Mitre 10 cites the economic asset bubbles of nations such as Malaysia in the 1990s which widely applied changes of agriculturally zoned land to commercial and industrial purposes. The impact was to increase the value of the newly-zoned land fourfold at the stroke of a pen, creating not only a financial bubble in an overheated economy but also a distortion of the real estate market, and the general economy. It also created an unhealthy, substantial and lasting divide between rich (farmers and developers) and the poor "unlanded" sections of the community.

Role of Local Government

In response to Page 13 regarding zoning rights, Mitre 10 submits these stem from local government. It may be easy to take a swipe at local government but to erode their powers and push them to the bleachers as spectators in regard to zoning matters is inappropriate. Local government's authority comes from its election by the local community who are aware of the local issues. This authority should not be usurped by States, COAG, and/or the Commonwealth without a complete revision of local government roles in Australia. To slice away at the edges of local government authority without putting the whole of the patient on the operating table and examining the patient *in toto* is inappropriate, fraught with the potential for creating other unconsidered problems and bound to open the door for many further slices without proper testing by the deciding authority.

In response to Page 15 regarding complexity, there is another untested presumption that implies that complexity of planning leads to loss of profits. Mitre 10 does support a straight line to fix a problem and to abolish unnecessary planning hindrances. However, there is no evidence put forward to show that planning matters are always complex. Mitre 10 suggests that balancing the rights of the rest of the community (other than the developers) may be useful and valuable, and may even exceed the virtue of the profit-taking developers. But the Paper simply takes the straight line without discussion. This presumption is just that, a presumption, and should be examined and tested before any hypothesis is put based on facts and before any outcomes are drawn.

Net Community Benefit

The Net Community Benefit/Disbenefit is the ultimate test which should be front and centre in planning and zone changing considerations and in a much wider context than is canvassed in the Issues Paper. Mitre 10 submits that this discussion should be heavily influenced by informed economic and social examination. It also should have planning involvement which may for instance hinge on floor space domination in a trade area. Ultimately the multiplier effects in its contextual community of a planning decision should be central when making planning decisions which have long term consequences.

The appreciation at the Land and Environment Court of NSW and VCAT in Victoria of these issues is often limited and narrow but the *Gantidis v KFC* decision of the High Court of Australia should be a dominant consideration underlying all the policy decisions of this Paper. Nowhere in this considered view handed down by the High Court are the interests of the developers' profits noted and elevated above others. The social issues raised in this High Court decision can be decided on economic grounds but they apply to the values of the community, not the developers' profits. Mitre 10 warns the Commission and COAG to tread very carefully when considering a departure from the law created by the highest court in Australia when the impact will flows down through a hierarchy of planning controls from top to bottom. The tort involved is a key element which could unwisely be circumvented by the provisions of this Paper.

Impact on Employment

Governments (and the dominant retailers) are fond of quoting numbers of 'new jobs' being created in the development of new big-box retail operations. The facts which don't receive the same public airing and media attention are the accompanying subsequent loss of jobs in previously-existing independent retailers and the closing of these small businesses after a new chain development opens its doors.

It is an undisputed fact that independent retailers support a significantly higher number of full-time equivalent staff than large chains per dollar of turnover and floor space. The positive community impact of this cannot be overstated. And as the chains and big-box operators create 'new', often part-time and casual, jobs local independents shed permanent jobs in response. A thorough reading of Pricewaterhouse Coopers research into retail employment in Western Australia in 2008 is instructive and should be absorbed before making blithe judgements about claimed employment benefits from more and more chain retailers.

And what of a review process to hold large chains accountable for claims they make in terms of numbers of jobs supposedly created? To date, no such review process appears to exist, meaning the claims go untested and the chains remain unaccountable for these claims.

Competition

Mitre 10 submits that this section of the Issues Paper (Pages 16-19) demonstrates a narrow focus of the impact on competition of existing planning systems. Mitre 10 suggests that such authorities need to consider more; much more than simply the developers' interests. This

concern for developers' pockets undermines what should be an impartial Paper and prohibits the impartial and equitable policy initiatives which should arise from it.

The Paper takes the aggressive stance that even if there is a monopoly in a trade area, it is not a monopoly if there is access for a competitor to enter the market. The evidence in numerous areas in Australian supermarket trade areas undermines this position. Such is the strength of the big chains in the supermarket sector that on many occasions there may be opportunities for entering the market but no financial pay-off which means the solo offer remains unthreatened and the community is served by a monopolistic operator in the trade area.

The Commission should examine and seek to understand the Trade Hardware (wholesale) market in Australia. This is one of the very few markets in this country to contain literally hundreds of competitors. Could this model be used to illustrate an opportunity we *could* have if we planned for competition accordingly?

Market domination is a growing trend in the hardware sector and is a critical issue to review. Regulations which ensured the Baby Bells break-out in the US telecoms market and the Productivity Commission active implementation in the UK supermarket sector have worked to ensure that market domination (at such a very high level and growing) as is enjoyed by the big box retailers in Australia under the eye of the ACCC, is not allowed to flourish in these jurisdictions.

"At issue" says the Paper, "is whether competition is restricted by more than that necessary to achieve optimal community allocation and uses." This is reasonable phrasing but the Paper generally takes too narrow a view to these issues. Community-wide perspective and values are often in conflict with individual developers' interests. Often, and across the nation, there are conflicts between widely-held community views and the rather more singular but financial interests of developers and big retail chains. Whose values should be recognised as being the more important? Whose values are being proposed to have their rights diminished without a vote by the responsible authority, local government? Which State or Federal Government or Party has campaigned on this set of issues to obtain a mandate? Several Federal independents have and we can expect more national debate on this issue. This Paper is just one of the elements of debate and examination of this issue in the nation today.

The answers to these rhetorical questions are central to the policy development being considered. The focus on extra profit for a small contingent of developers calls for social as well as economic review.

<u>Existing Regulatory Processes</u>

Page 20 lists a series of sources of "unnecessary regulatory burdens". These assertions overlook the vastly improved (and more costly) planning outcomes resulting from a community or interested party challenging local council decisions at VCAT and L&E Court. The sloppy plans often submitted by developers are all too often rubber stamped by Councils and it befalls the community and interested parties to wave the flag of reasonableness and have the plans amended to conform to the regulations and laws. There is absolutely nothing unreasonable about that. Indeed, the intervention may be a financial pain for the developer but a developer's

unfettered run through the planning process can impose very poorly built or ill-considered structures on a community for a lifetime. The unambiguous consequences of a diminishing planning review will be poor planning outcomes.

Mitre 10 asserts that the Issues Paper takes an overly-positive view as to the social conscience of the developer to meet some perceived need in the community.

In the north-east Victorian town of Bright some 4,000 residents and concerned citizens did not want the entrance to their beautiful and distinctive tourism-driven town desecrated by a chain supermarket with an appearance straight out of the suburban playbook of chain designs. After eight days of a VCAT hearing and substantial cost for all, the design went ahead in a significantly improved look which addressed the issues of the community. This outcome would not have been achieved without the substantial and costly input of the local community seeking to protect its environment from a big box disaster.

Many believe the planning was flawed because it failed to take into account the net community disbenefit being wrought upon the town by the new development and those figures are being borne out today as the new supermarket has diminished the financial health of the town (as was predicted in the planning process).

Further, the community voiced major concerns about the built form's bulk and size and their concerns were heightened literally when the supermarket was built higher than provided for by either Council or VCAT conditions. This flouting of the permit and the threat to the community when they sought to complain to VCAT affords little credit to the developers. The community was led to believe that if their VCAT challenge failed regarding the issue of building walls too high in contravention of the permit, they could have to stump up $20,000 a day for each day of the delay caused by the VCAT process. This cynical twisting of the regulations and brutal extinguishing of rights through depth of the corporate pocket highlight the need for rigorous provisions of planning laws and their review process. In fact, <u>there is a major case for adding burden onto developers</u> to ensure that they do implement the 'right thing'.

In the NSW L&E Court in 2009 the Griffith community was asked to provide security against costs of approximately $100,000 for another chapter in a case against a developer for a chain supermarket in which they had previously won in the same court. The community case was dropped through lack of funds and it is hard to see where justice was served by the power, or lopsided power, of the chequebook in delivering judgements in planning. These issues of edge of town development appear time and again around Australia and Mitre 10 contends that <u>stronger</u> tests are required to get the balance right, not less.

<u>Environment</u>

In Churchill, Victoria, a supermarket proposal sited on the edge of the town was rejected at VCAT. At Bright another one passed. A massive hardware development at the very beginning of the tourist icon, Great Ocean Road in Victoria has been defeated by Council (Surf Coast Shire) this month. At Mission Beach in Far North Queensland, the most prominent vision on the road from Tully when you drive past the road sign that extols the natural beauty of the region, is a huge suburban supermarket!

These are some examples of how the intertwined issue of the environment intrudes on the economic remit of the Paper's policies. The planning laws today continue to foster these environmental disasters. Any reduction in their provisions, or their applications, any centralising of them to a State Government whose drive for new investment overshadows a balanced approach to growth will exacerbate the incidence of these problems. The Net Community Disbenefit again should be the fulcrum for the review of these issues, not expediency for profit.

Financial Costs of Regulation

The issues listed on Page 20/21 are pejorative in their framing and their assumptions represent an active shaping of the outcome by their tenor. The costs should not just focus on the developer. The community context obliges all to look further than the interests of the few developers. Mitre 10 submits that the assumption that the nation needs 10-12% more supermarkets a year to stave off financial downturn is a dangerous, incorrect and naive way to plan.

Like grocery, hardware retailing is moving down a path of incessant big-box growth and consequent negative impact on independent and other surrounding businesses. This situation is exacerbated when such developments are actively fast-tracked by government to bypass existing planning laws.

The devaluing of the non-financial considerations falling under the Commission's remit is perilous for good policy outcomes in retailing generally.

Economic Benefits?

That there is an economic benefit to the new buildings for retail is also coming under the financial sector scrutiny. Independent investment analysts from the Commonwealth Bank and Merrill Lynch have recently been quoted in the Australian Financial Review asserting that we have already reached tipping point where we have too much supermarket floor space and returns on supermarket investment will be dependent on cannibalising one supermarket over another.

The link between more big-box retail and economic growth and benefits is not proven; sometimes it will not be true; and at all times it must be tested. The community deserves no less.

The issues on Page 24 are supported in general principles and Mitre 10 agrees to work with policy framers to advance them if required.

Ease of Doing Business

Where it has occurred, what effect has the removal of local government from decision making processes (and replacement by state agencies or regional planning panels) had on the efficiency and effectiveness of the functioning of your city?

This question is particularly pertinent to the hardware industry, given the actions of the Victorian Planning Minister to fast-track the planning assessments of twelve proposed Woolworths big-box home improvement outlets. The councils concerned have been removed from their usual roles as planning authorities regarding retail development applications. The first of these stores is not due to open until late 2011; however some clear issues have already emerged.

In Geelong, the proposed Woolworths development appears at odds with the existing planning scheme and councillors have been urged to oppose the proposal. (**http://www.geelongadvertiser.com.au/article/2010/05/24/176191_news.html**)

Proposed Woolworths big-boxes in urban areas such as Hawthorn East and Oakleigh South are adjacent to large residential catchments. The submitted plans in each of these cases allow for significantly lower numbers of car parks than would normally be the case in developments of this size; there will undoubtedly be some spillage into residential streets, as well as the increased congestion associated with large-format shopping formats. Aesthetic problems such as shadows from four-metre-high wall abutting adjacent back yards area clearly not going to be supported by local residents. However, these very residents have been rendered impotent by the removal of the relevant local government authorities from the planning process. To the extent that any ability to object to these developments exists at all, it is not via the normal channels or timeframes provided by councils.

The role of local government in development planning is crucial to maintaining well-functioning communities. Centralisation of planning approvals effectively neuters local councils and moves the decision-making process further away from the community – this cannot be a positive development for local business or residents.

For further comments or questions please contact:

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