11 June 2008

Mr Graeme Samuel AO
Chairman
Australian Competition and Consumer Commission
PO Box 3131
Canberra City ACT 2601

Dear Mr Samuel,

Inquiry into the competitiveness of retail prices for standard groceries

I refer to the letter of 2 June 2008 from Mr Aaron Gadiel, Chief Executive of the Urban Taskforce Australia, commenting on the submission made by the Shopping Centre Council of Australia.

The Urban Taskforce misrepresents the decision in *Fabcot Pty Ltd v Hawkesbury City Council No.10592 of 1996 [1997] NSWLEC 27 (14 March 1997),* which, incidentally, was a decision by the Land and Environment Court of NSW, not the High Court as the Taskforce asserts.

This case established that economic competition between individual trade competitors is *not* a valid planning consideration, although the overall economic impact of a development *on the wider locality* is a valid planning consideration. Justice Lloyd's principal finding (which has since been widely cited by courts and local governments when adjudicating on competing commercial developments, not only retail developments) was that:

> *"economic competition between individual trade competitors is not an environmental or planning consideration to which the economic effect described in s 90(1)(d) [of the Environmental Planning and Assessment Act] is directed. The Trade Practices Act 1974 (Cth) and the Fair Trading Act 1987 are the appropriate vehicles for regulating economic competition. Neither the Council nor this Court is concerned with the mere threat of economic competition between competing businesses. In an economy such as ours that is a matter to be resolved by market forces, subject to the Trade Practices Act and the Fair Trading Act. It is not part of the assessment of a proposal under the Environmental Planning and Assessment Act for a consent authority to examine or determine the economic viability of a particular proposal or the effect of any such proposal on the economic viability of a trade competitor. Moreover, it is at least arguable from the fact that the Trade Practices Act now applies to local government councils, that if a local council were to refuse or to limit a proposal for development on the ground of competition with a trade competitor, it could be guilty of anti-competitive conduct contrary to Pt 4 of that Act. It seems to me that the only relevance of the economic impact of a development is its effect "in the locality"; that is to say, in the wider sense described in Kentucky Fried Chicken Pty Limited v Gantidis."*

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Kentucky Fried Chicken Pty v Gantidis (1979) 140 CLR 675 was a decision of the High Court and it is this decision which the Urban Taskforce appears to confuse with *Fabcot*. Mr Gadiel quotes selectively from this High Court decision. In a subsequent speech elaborating on his decision in *Fabcot*, Justice Lloyd noted that *KFC v Gantidis* provided a *"limited sense in which the economic impact of a development on businesses in the surrounding area may be considered."* (Paper presented at the University of NSW: Planning Law and Practice Short Course 26 November 1997.) In this speech he quoted from Justice Stephen's judgment in *KFC v Gantidis* (and I have given the full version of this quotation below):

> *"If the shopping facilities presently enjoyed by a community or planned for it in the future are put in jeopardy by some proposed development, . . . and if the resultant community detriment will not be made good by the proposed development itself, that seems to me to be a consideration proper to be taken into account as a matter of town planning. It does not cease to be so because the profitability of individual existing businesses are at one and the same time also threatened by the new competition afforded by that new development. However the mere threat of competition to existing businesses, if not accompanied by a prospect of a resultant overall adverse effect upon the extent and adequacy of facilities available to the local community if the development be proceeded with, will not be a relevant town planning consideration."*

This was also the view of other High Court judges in this case. Chief Justice Barwick, for example, said *"it is my opinion that economic competition feared or expected from a proposed use is not a planning consideration within the terms of the planning ordinance governing this matter."*

(Incidentally it should be noted that the *Fabcot* case was determined under section 90(1)(d) of the Environmental Planning and Assessment Act which was a predecessor to the present section 79C of the Act. In *Cartier Holdings Pty Ltd v Newcastle City Council* the Court has found that there is no material difference between the consideration required by section 79C(1)(b) of the Act, as amended, and the consideration required by the former section 90(1)(d).)

The Taskforce's assertion that planning authorities "make decisions in order to protect existing shopping centres from competition" is plainly wrong. The law cannot be clearer. Competition, or the threat of competition, to existing businesses, is *not* a relevant planning consideration for consent authorities in NSW. The economic impact that a planned development may have on a local community is relevant only if it will result in an overall reduction in the level of facilities and amenities presently enjoyed by that local community.

This law applies equally to shopping centre owners, including those who are members of the Shopping Centre Council of Australia, just as it applies to other developers, including members of the Urban Taskforce. The shopping centre industry is not a static industry. New shopping centres are constantly being developed and existing shopping centres are constantly being redeveloped and expanded. Each such development and re-development requires the lodgement of a development application and observance of the same planning processes as every other developer. How can it be claimed, therefore, that these laws 'protect' shopping centre owners when they are subject to the very same laws themselves?

While Justice Lloyd, applying the test he set for himself in the *Fabcot* case and guided by the High Court's comments, rejected the proposed supermarket, there are many other examples where the decision has gone the other way. Only recently, for example, Bathurst Regional Council approved a proposal by a private developer for a major new shopping centre, anchored by a large supermarket, over the objections of others, including a shopping centre owner (incidentally, a member of the SCCA) who had demonstrated the adverse effect it would have on retail sales. The Council did so after thoroughly considering the principles laid down in *Fabcot v Hawkesbury City Council* and *KFC v Gantidis* (see section 7.7 Economic Impact Assessment in the report to Council at its meeting on 12/12/07 available at www.bathurstregion.com.au).

The Urban Taskforce, which represents land developers, may consider that the wider consideration of urban amenity should not be a legitimate function for planning authorities. Successive Australian governments at all levels have taken a different view.

There are other errors in the Urban Taskforce's letter. It cites, for example, the report *Choice Free Zone* by Concept Economics (which was commissioned by the Urban Taskforce) as evidence that shopping centre occupancy costs are higher in Australia than in some European cities and suggests this is a result of planning constraints. The Concept Economics report, in turn, sourced its material from a submission to the Productivity Commission by Mr Craig Kelly who describes himself as the Southern Sydney Retailers Association. The credibility of this organisation as a representative body of retailers has already been questioned in the hearings of the Grocery Inquiry (transcript 7 April 2008). More significantly Mr Kelly's comparison of Australian and overseas occupancy costs has been debunked by an independent consultant, Mr Michael Baker, (a former Research Director of the International Council of Shopping Centers.) Mr Baker noted Mr Kelly's submission *"contains a number of factual errors and misconceptions . . . caused by misuse of statistics, selective use of statistics, and either deliberate or inadvertent confusion of concepts in a manner that misleads the reader."* (Submission No. 138 to Productivity Commission's inquiry into the market for retail tenancy leases in Australia.) It is curious that Concept Economics would quote from Mr Kelly's submission without making any reference to Mr Baker's commentary on that same submission.

I have no objection to this letter being posted on the ACCC website with other submissions.

Yours sincerely,

Milton Cockburn
Executive Director