SHOPPING CENTRE
COUNCIL OF AUSTRALIA

MERGER NOTIFICATION THRESHOLDS

EXECUTIVE SUMMARY

Thank you for the opportunity to provide this submission. We note that enabling legislation for the proposed reforms will be introduced to the Parliament by the end of 2024, and the thresholds will be set in subordinate legislation per section 51ABG of the (previously exhibited) *Exposure Draft of Treasury Laws Amendment Bill 2024: Acquisitions* (Draft Bill), for which we lodged a submission on 13 August 2024.

The proposed thresholds – including their de-linked nature and 'look-back' provisions – give rise to problematic and unintended issues from a competition policy and procedural perspective, largely due to the 'economy-wide' approach the Government has now taken (noting the 'fresh' objectives for the reforms), versus a more targeted approach on concentrated markets. The thresholds need to be restructured, more targeted and linked; including to ensure that market concentration is a central feature of any approach.

To understand the impact of the proposed thresholds and inform our recommendations (and continued engagement with the Government), we have undertaken **further detailed data analysis** of: (1) property acquisitions (over a 10-year period), (2) retail leasing market issues (noting commentary about the market concentration of certain retailers), (3) the ACCC's previous consideration of shopping centres and retail market issues, and (4) '*ordinary course of business*' issues such as land acquisitions (linked to development activity).

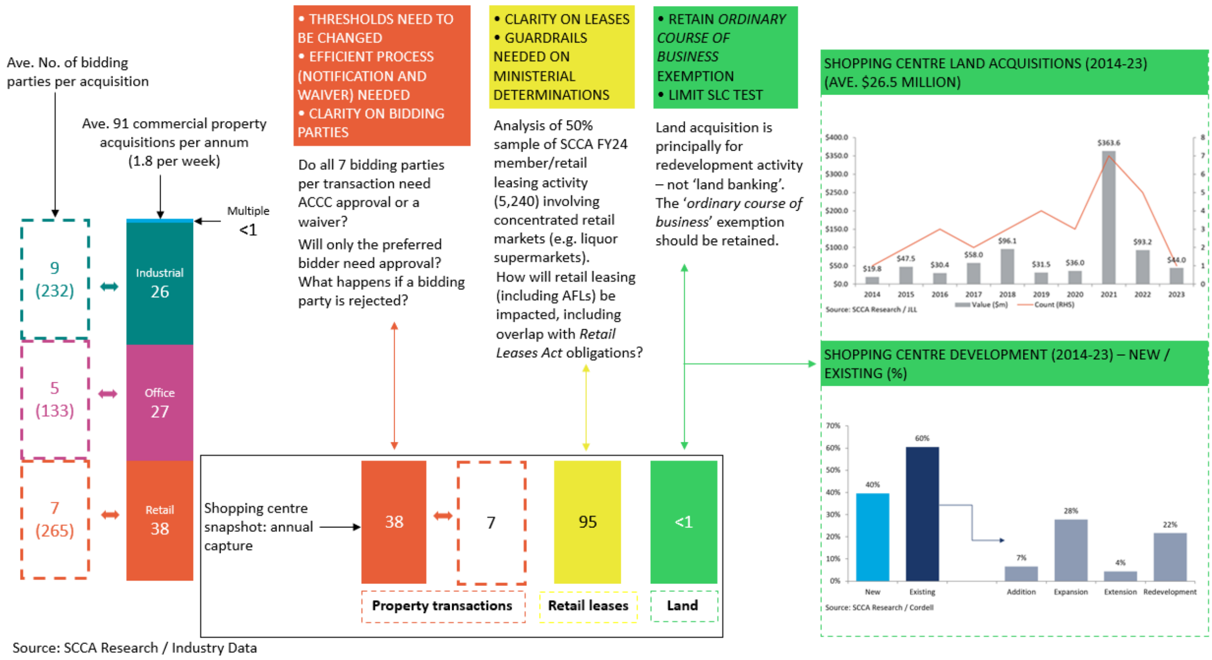
In short, we provide the following overarching findings and recommendations:

- The proposed thresholds are ill-targeted and will capture more acquisitions than warranted, so must be restructured and revised (see *Recommendations 1-3* for a more targeted and balanced approach).
- Mandatory notification for bidding parties (on average 7 per shopping centre) will further increase the ACCC's caseload and possibly stymie investment activity, and clarity is needed.
- The ACCC notification process will require unnecessary staff resources, and external costs (e.g. legal costs, market studies), even for benign acquisitions; and may exceed $100,000, in addition to the flagged ACCC application fee of $50,000 to $100,000.
- The 30-day notification waiver process timeframe is inadequate and should be reduced and/or substituted with a 'gateway' registration process (similar to other ACCC / AER processes).
- The '*ordinary course of business*' exemption for acquisitions of (or an interest in) land must be retained.
- The term 'market' must be defined, as there is no clarity provided in the 167 times it is mentioned in the *Consultation Paper*.

The shopping centre sector is a high-transaction sector, including for asset-recycling or portfolio redistribution purposes, versus for 'serial or creeping' acquisitions (e.g. in FY14, one SCCA member had 40 shopping centres; in FY24 they have 15 centres). Our market is not concentrated, and shopping centres (unlike other property) also expand over time through the redevelopment process (60 per cent of shopping centre development relates to existing centres).

Figure 1 below provides an overview of our analysis of acquisitions that would be notifiable for SCCA members alone (applying Limb 1 of the monetary thresholds only) across retail, office, and industrial properties, and our related analysis on retail leasing and land acquisition. Based on a 10-year average, **91 commercial property acquisitions (1.8 per week)** would be notifiable to the ACCC, including **38 shopping centre acquisitions (noting also an average of 7 bidding parties per acquisition)**.

Figure 1 – SCCA Members – Annual (10-Yr Ave.) Captured Acquisitions / Transactions – Monetary Threshold (Limb 1) Only



Our analysis in **Figure 1** also reveals that the ACCC would need to consider **630 notifications from bidding parties per year (12 per week), including 265 notifications from bidding parties to shopping centre acquisitions.**

As we have detailed previously, there are an average of seven bidders for every 'on-market' shopping centre transaction. The point at which ACCC notification will be required during an acquisition process in our sector is a pertinent question that has not yet been properly contemplated or clarified in this reform process.

If all seven bidders are required to submit a notification, the ACCC caseload will increase significantly. If notification is required only during the due diligence stage, the potential for the ACCC to delay or even prevent an acquisition from proceeding will undermine the competitive sales process, affecting efficiency and competitiveness.

It should be noted that our analysis of property transactions is conservative and (1) does not apply the three-year look-back aggregation provision, or (2) include acquisitions that may be notifiable through the market concentration thresholds (highlighting the inadvertent capture of benign acquisitions). The prospective number of notifications could increase even further when accounting for these issues, along with factoring in non-SCCA members.

Noting that part of the logic for the proposed thresholds are based on international comparisons (which we don't wholly support), the proposed thresholds are set too low, even on this measure. Further, the complexity and application of the thresholds (e.g. capturing benign acquisitions), including the 3-year aggregated and merger-party-combined monetary and market concentration rules, highlights a need for the thresholds to be restructured and revised.

Given the commentary in the *Consultation Paper*, and the ACCC's previous consideration of retail market issues, we have also analysed a representative (50 per cent) sample of our members' retail leasing activity against retail markets that have been flagged as 'high-risk' or where there are concerns with market concentration issues. Our analysis indicates that approximately **95 retail leasing transactions per annum could be notifiable**.

Overall, our analysis highlights that the projected notifications in the *Consultation Paper* are underestimated and underscores the imperative for the Taskforce to undertake more detailed industry engagement and market analysis, to provide a more robust evidence base to inform any final approach and thresholds. Analysis will also enable the development of thresholds that bear a stronger correlation to market concentration risks, and by implication where markets with no structural risks aren't captured. While a 'catch-all/carve-out' approach might be effective, a more evidence-based approach would ensure a more targeted reform to begin with.

In relation to the proposed Ministerial Determinations, legislative safeguards are needed on the exercising of this power, and it is critical that the ACCC is not the sole provider of advice to enable a Minister Determination to be made, given it will ultimately be the arbiter of notifiable acquisitions. It would be more appropriate for the advice on which a Ministerial Determination is made to be **informed by evidence-based analysis and advice from relevant sectors and industry experts, including the Productivity Commission and affected parties – not solely from the ACCC.**

In relation to procedural issues, while the prospect of a notification waiver is encouraging, a 30-day waiver assessment period provides no material relief from the cost and administrative burden that would still be required. **A system more akin to the ACCC's existing *notification register* would be more appropriate, with the ACCC provided a maximum of 10 business days to decide to assess a registered acquisition**.

Regardless of how efficient the ACCC's internal processes may be, **the cost and administrative burden to businesses cannot be ignored, nor the experience of those that would be required to meet these requirements**. Businesses are likely to incur costs that may exceed $200,000 per acquisition, comprising market studies ($50,000), external legal advice ($50,000), and an application fee ($50,000 to $100,000).

We still remain concerned about the ambiguity as to how 'markets' will be defined. The *Consultation Paper* uses the term '*market'* 167 times, yet provides little detail as to how markets will be defined or applied.

In short, the proposed thresholds need to be restructured, revised, and more targeted. **The proposed merger reform thresholds do not target anti-competitive acquisitions and will not '*minimise the regulatory burden for acquisitions that do have anti-competitive effects*'**, noting a reference the ACCC Chair has previously made.

The overall approach largely gives the ACCC free rein to choose its own adventure (including the definition of 'market') on a process that should instead be clear, reliable, and evidence-based. This will come at an unwarranted cost to affected business, at the expense of a more targeted and risk-based system.

Noting Hon. Dr Andrew Leigh MP's long-held focus on market concentration issues, and the Hon. Dr Jim Chalmers MP comments that these are *"the biggest reforms to merger settings in almost 50 years*", more thorough consideration is needed to ensure a properly targeted approach.

We urge Government not to rush through the proposed reforms, and to take the additional time to develop thresholds that are restructured, more targeted, and linked.

The SCCA would welcome the opportunity to discuss this submission, including our data and analysis, with Treasury and the Taskforce.

RECOMMENDATIONS

We trust that the Treasury and the Taskforce is open to adjusting the proposed merger notification thresholds and considering interrelated changes to the Draft Bill.

<u>Recommendation 1</u>: The economy-wide thresholds should be abandoned in favour of an approach whereby thresholds focus on concentrated markets.

Per previous analysis provided to the Government, shopping centres do not operate in a concentrated market when considered in the context of the proposed thresholds, the commentary associated with these reforms, or based on any other accepted characteristics of market concentration, including the ACCC's current *Merger Guidelines*.

That non-concentrated markets will be captured under the proposed economy-wide thresholds, where the only assurance and safeguard is that an unnecessary and costly ACCC notification process will be efficient, is an overall poor approach to public policy and these reforms.

While an economy-wide 'catch-all/targeted carve-out' be an effective approach, a more evidence-based approach from the outset would ensure a more targeted reform. We do note, however, international precedent for specific exemptions, such as in the United States of America where the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* provides an exemption from notification for acquisitions of "*retail rental space (including shopping centres)*".

<u>Recommendation 2</u>: Undertake further analysis, including via industry engagement and more specific market analysis, to enable a more targeted approach, including to better understand the number and nature of acquisitions that occur across the economy and may be captured by revised, more appropriate thresholds.

As the Taskforce acknowledges, its projections are "*subject to a substantial margin of error*" (e.g. citing a prospective 1,000-1,500 acquisitions per year versus there having been a 10-year average of 566 acquisitions per year in the commercial property sector alone).

The Taskforce should reduce this margin for error by undertaking further industry engagement and analysis to more reliably inform its understanding of the number and nature of acquisitions.

The SCCA would be pleased to engage in this process. As part of this engagement, we could assist the Taskforce on issues such as market transactions, retail leasing activity, and related issues (e.g. land acquisition, shopping centre development), as we have summarised in **Figure 1** and **Appendix A**.

This process could also enable the notion of 'markets' to be further considered and defined for the purpose of the reforms.

<u>Recommendation 3</u>: Noting *Recommendations 1 and* 2, restructure and revise the proposed thresholds (note Figure 2 below).

If Government is determined to maintain the broad structure of the proposed thresholds (e.g. monetary thresholds and market concentration thresholds), they should be revisited to ensure that they are inextricably linked versus being treated separately.

As it stands, the proposed thresholds are far too wide ranging. This is evidenced by:

- <u>Group turnover thresholds</u>, which are not linked to market share or concentration issues but will capture businesses that have a 'significant' turnover, including where that group operates across numerous sectors and markets, but has limited market share or power in the relevant market.
- <u>Three-year 'look-back' provisions</u>, which would be applied when there is no risk of a 'serial or creeping' acquisition.
- <u>Low monetary thresholds</u>, noting the international comparisons cited in the *Consultation Paper*, these are comparably far lower than what they should be. They should be inextricably linked to the market concentration thresholds.
- <u>Reducing the market concentration threshold</u> to a combined 25 per cent market share, instead of a single-party, post-merger 20 per cent market share that is consistent with the ACCC's *Merger Guidelines*.
- <u>Delineating Limb 1 and Limb 2 monetary thresholds</u>, factoring in the above, large businesses (to which Limb 2 would apply) would have almost no scope to make an acquisition without notifying the ACCC.
- <u>Transactions between funds</u>, acquisitions between managed funds with a common manager would seemingly be notifiable.

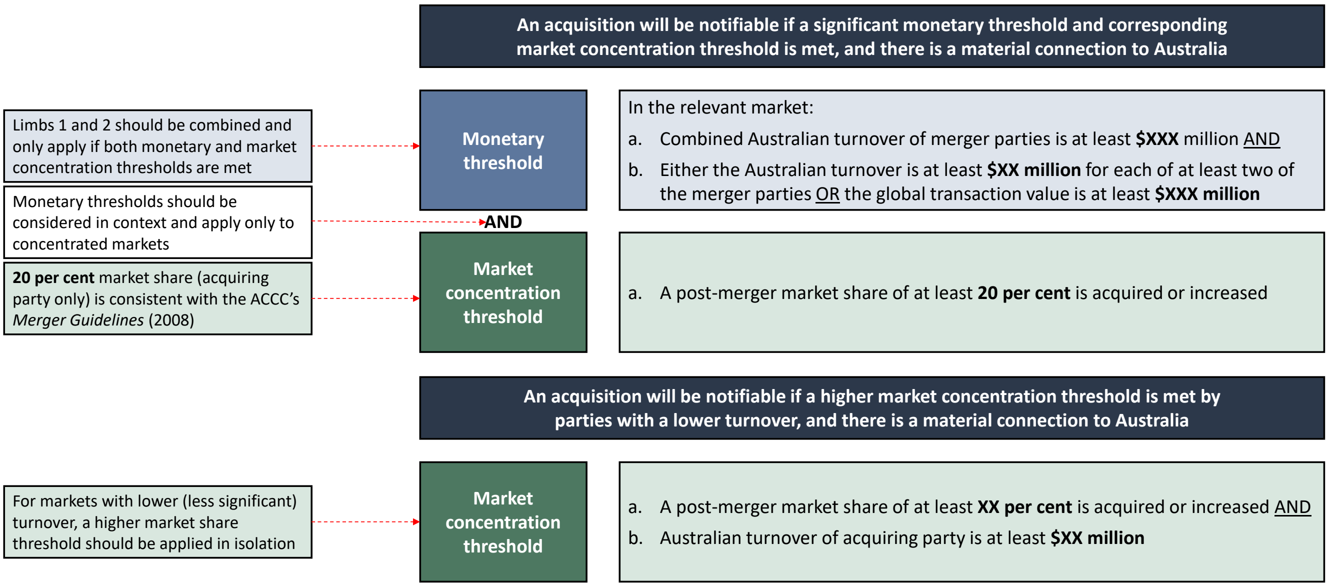
Figure 2 outlines an approach that ensures that the structure is revised and inextricably linked. This particularly ensures that market concentration is a key determining factor for any activity triggered by the reforms.

We submit that monetary thresholds should <u>only</u> be applicable in conjunction with a market concentration threshold. This would ensure that transactions with a 'significant' monetary value are only considered in context and in terms of their potential capacity to have anti-competitive impacts, including a 'substantial lessening of competition'.

Noting our *Recommendations 1 and 2* (including how the term '*market*' should be further considered and defined), any threshold should be informed by more rigorous market analysis. We have a view on what the revised monetary thresholds could look like and we would welcome and opportunity to discuss this with Taskforce.

It should be noted that our revised structure includes removing the three-year 'look-back' provisions (noting that we believe that provisions to address 'serial or creeping' acquisitions could be addressed through the Ministerial Determination process – see our *Recommendation 4*, below).

Figure 2 – Revised merger notification thresholds



<u>Recommendation 4</u>: Particularly if the current thresholds remain, the three-year 'look-back' provisions should be removed and only applied to sectors that give rise to market concentration risks through a Ministerial Determination.

As the Taskforce has indicated, three-year 'look-back' provisions have been included in the Draft Bill to safeguard against 'serial or creeping' acquisitions. As noted above, our concern is that applying these provisions on an economy-wide basis (as per the current monetary thresholds) will capture acquisitions that present no market concentration risk.

As such, section 51ABZ of the Draft Bill may need to be revised.

In our view, it may be more appropriate to capture 'serial or creeping' acquisitions through Ministerial Determinations (refer to *Recommendation 5*).

<u>Recommendation 5</u>: Ministerial Determinations should be informed by evidence-based analysis and advice from relevant sectors and industry experts, not solely from the ACCC.

Whilst the notion of evidence-based analysis is supported, experience suggests that the ACCC may not have access to sufficient market data across all sectors and markets, or sufficient knowledge in relevant markets. This could lead to analysis and advice to the Minister that is incorrect or incomplete, and not fully considerate of all relevant factors.

We believe additional 'guardrails' are needed in the form of legislatively mandated consultation with relevant sectors <u>prior</u> to the Minister making a determination to ensure that the Minister has a complete understanding of the impact of any potential determination.

Section 51ABH(2) of the Draft Bill should be amended as follows:

(2) In making a determination under subsection (1) of this section, the Minister may consider any reports or advice of the Commission, and must consider reports from other parties.

(a) Prior to making a determination, the Minister must engage with the relevant sector and provide no less than 30-days for public submissions and analysis to be provided.

Recommendation 6: Particularly if the current thresholds remain, amend the proposed *notification waiver* timeframe (reduced to 10 days) and scope so that acquisitions that meet the thresholds could be waived if they would not objectively (or demonstrably) give rise to market concentration or competition concerns.

- Timeframe: Put simply, 30 working days (6 weeks) is far too long in respect of the commercial property transaction process, including that it would require a suspension in the process. Such a suspension would still disrupt and distort the process, noting that most acquisitions in our sector proceed from bidding to due diligence, and settlement well within this timeframe.
- Scope: *Notification waivers* would be of limited utility if they existed only to resolve ambiguity as to whether thresholds are met in low-risk settings. An alternative approach is to adapt the ACCC's *notifications register* for mergers and acquisitions (or similar AER processes) to act as a 'gateway', which would:
  - Provide the ACCC with requisite detail and awareness about all notifiable acquisitions,
  - Enable the ACCC to 'call in' an acquisition within 10 working days (requiring the applicant to provide additional information for a Phase I review),
  - Otherwise allow business activity to proceed unencumbered if it would not objectively (or demonstrably) give rise to market concentration or competition concerns.
- This would also mitigate the substantial administrative and cost burden of compulsory notification.

Recommendation 7: Retail leasing occurs in the '*ordinary course of business*' and should be expressly exempt from being captured by these reforms, with any markets of concern captured by Ministerial Determinations based on evidence (refer to *Recommendation 5*).

We understand that lease agreements and renewals that meet the proposed thresholds may be notifiable (section 51ABN(2) of the Draft Bill; section 4H of the CCA), which would significantly increase the activities captured by the reforms and the number of notifications received by the ACCC.

This would further disrupt and delay retail leasing discussions and should be mitigated by recognising that this activity is not a merger or acquisition, rather routine business activity in the '*ordinary course of business*'.

Section 51ABF of the Draft Bill should be amended to insert the following:

(c) that pertains to a commercial or retail lease agreement or renewal.

Recommendation 8: Noting section 51ABG of the Draft Bill, which details the factors that can be considered when determining when acquisitions are required to be notified (and the applicable thresholds), a formal mechanism should be introduced to facilitate engagement between Government and relevant sector representatives to ensure that the application of thresholds to market definitions is considered and appropriate, including through the development of guidance material.

Section 51ABG of the Draft Bill should be amended to insert the following:

(3) In making a determination that references subsection (1) or (2), the Commission must engage with relevant industry or consumer groups to remove ambiguity, or make the perspective of the Commission clear and transparent.

Recommendation 9: Noting section 51ABN(1) of the Draft Bill, the proposed changes to the 'substantial lessening of competition' (SLC) test should not be applied to other areas of competition law until they have been subject to consultation within those contexts.

Noting the previous consultation on the Draft Bill, extending the SLC test to other areas of competition law would needlessly capture a range of competitive conduct, including shopping centre redevelopments.

That the ACCC could view redevelopments as anti-competitive (i.e. organically increasing market share could be perceived as "*creating, strengthening or entrenching a substantial degree of power in the market*") is concerning. Development activity should not (but seemingly would) be notifiable and subject to compulsory notification.

Section 51ABN(1) of the Draft Bill should be deleted and subject to separate consultation.

<u>Recommendation 10</u>: Noting section 51ABN(2) of the Draft Bill, retain the exemption for acquisitions of land or an interest in land made in the '*ordinary course of business*'.

As detailed in **Figure 1** and **Appendix A**, we have outlined the nature of land acquisitions in our sector, which are principally for the redevelopment or expansion of existing shopping centres. The current approach to land acquisitions is clearly influenced by a view in relation to 'land banking' which considers all land acquisitions to be 'land banking' (which they are not).

Section 51ABN(2) of the Draft Bill should be deleted. The prospect of 'land banking' should instead be safeguarded against through a Ministerial Determination that applies to sectors that present a clear, evidence-based risk, versus an economy-wide risk.

<u>Recommendation 11</u>: The Draft Bill should expressly include a 12-month statutory review provision.

The commitment contained in the *Consultation Paper* for a statutory review after three years is inadequate, given the material impacts – including problematic / unintended consequences – of the proposed reforms. Given the likelihood that acquisitions that present no risk to market concentration will be captured by the proposed thresholds (as we have detailed in this submission), a review after 12 months will enable evidence-based amendments to be made more swiftly.

The Draft Bill should be amended to insert the following section:

Review of Bill

(1) The Minister must commission an independent review of the operation of new merger control system to evaluate the functioning of the system, including the notification thresholds, to decide whether its provisions remain appropriate.

(2) This review must be carried out within 12 months of commencement of the Act.

(3) The Minister must prepare a report and table a copy of the review in Parliament as soon as practicable after it is prepared.

<u>Recommendation 12</u>: Subject to the passage of the Bill through the Parliament and prior to commencement, there must be a 12-month period of consultation with industry and affected parties to develop clear regulations that give effect to evidence-based notification thresholds.

The *Principle of Legality* requires laws and regulations enacted by the Australian Parliament to be clear and unambiguous. Given the complexity and economy-wide impact of the proposed thresholds, it is incumbent on the Government to ensure that affected parties have adequate time to understand and prepare for the new system.

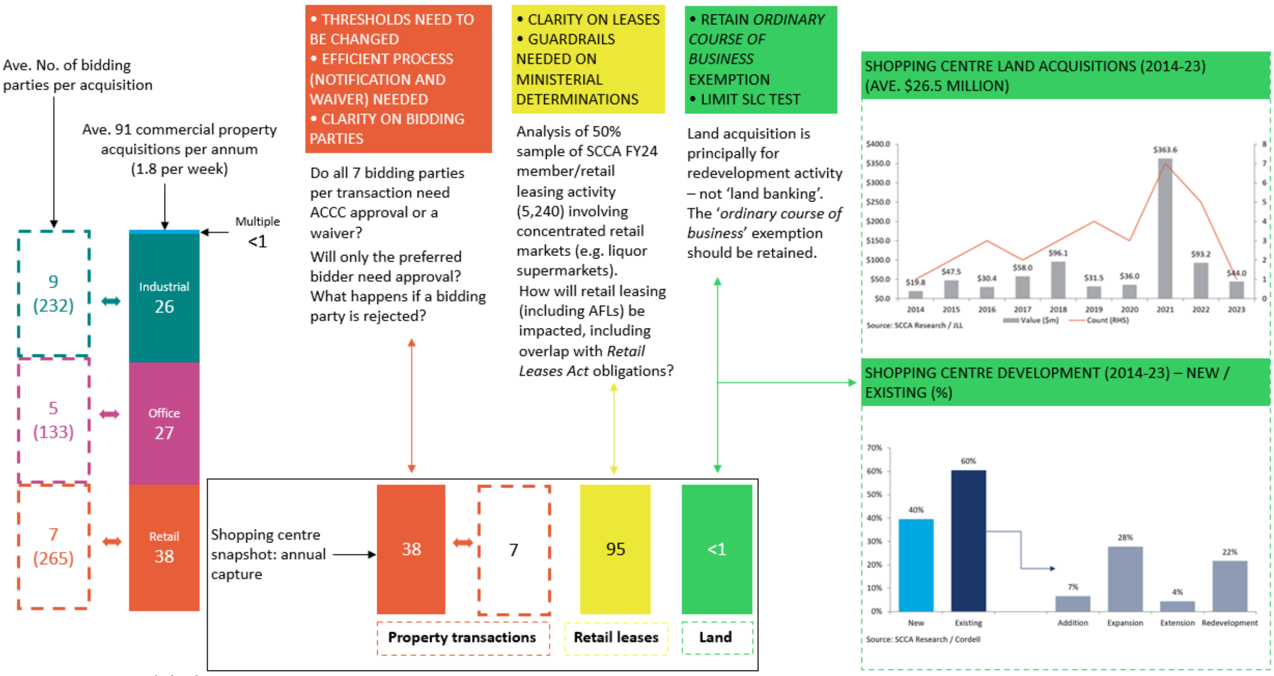
APPENDIX A: SUMMARY OF DATA ANALYSIS

Appendix A provides a summary of our analysis which has underpinned our assessment of the proposed merger reform thresholds, and our recommendations for change (noting also, our previous submission on *Exposure Draft: Treasury Laws Amendment Bill 2024: (Acquisitions)* (13 August 2024).

In addition to broader contextual issues (e.g. shopping centres can have public transports hubs on their land; shopping centre acquisitions are often part of 'asset-recycling' versus being 'serial or creeping' acquisitions), we would be pleased to discuss this further. In short:

- On the proposed monetary and market concentration thresholds (i.e. Limb 1a, 1b), on a 10-year average, 91 transactions per annum will be captured and require mandatory notification across SCCA members – ahead of any 3-year 'look back' aggregation or combined merger-party market share positions.
- In the current market, each shopping centre 'on-market' transaction (noting not all get completed – and noting there are also 'off-market' transactions) has, on average of 7 bidding parties (9 for industrial, 5 for office), which raises questions as to when and how will the notification process work (i.e. does each bidder need to notify the ACCC, or is it when a preferred party is selected to undertake due diligence?). Even if a party applies for a waiver, the current process is inefficient and would need improvement.
- In addition, noting the thresholds, commentary (e.g. market share, 'high-risk' sectors) and proposed Ministerial Determination – and noting the ACCC's historical activities (e.g. on supermarket issues) – our analysis of the retail leases (including noting issues such as lease profile, lease expiry and tenant retention) and retail market highlights that at least 95 retail leases (and Agreements for Lease – or AFLs) per annum could be captured by mandatory notification, based on sectors such as supermarkets, liquor and fuel. This analysis is based on a representative sample of SCCA that cover 50 per cent of ownership of retail floor space, and leasing activity in FY24 covering 5,240 leases entered into (new and renewal).
- In relation to land acquisitions, this is relatively minor (0.6 transactions per annum – or 1 per cent of total shopping centre acquisitions, with an average transaction value of $26.5 million), and are undertaken principally to enable shopping centre development (noting 60 per cent of developments were to improve existing centres – versus 'new' shopping centres).
- Unlike other commercial property (e.g. office towers), shopping centres can expand over a period of time (see over-page). Land acquisition for this purpose is part of the '*ordinary course of business*' – and is not 'land-banking', or a 'serial or creeping acquisition' – and the '*ordinary course of business*' exemption needs to exclude land or an interest in land (section 51ABN(2); section 4(4) and sections 45-47 of the CCA) as this will otherwise stymie procompetitive development.

Figure 1 – SCCA Members – Annual (10-Yr Ave.) Captured Acquisitions / Transactions – Monetary Threshold (Limb 1) Only

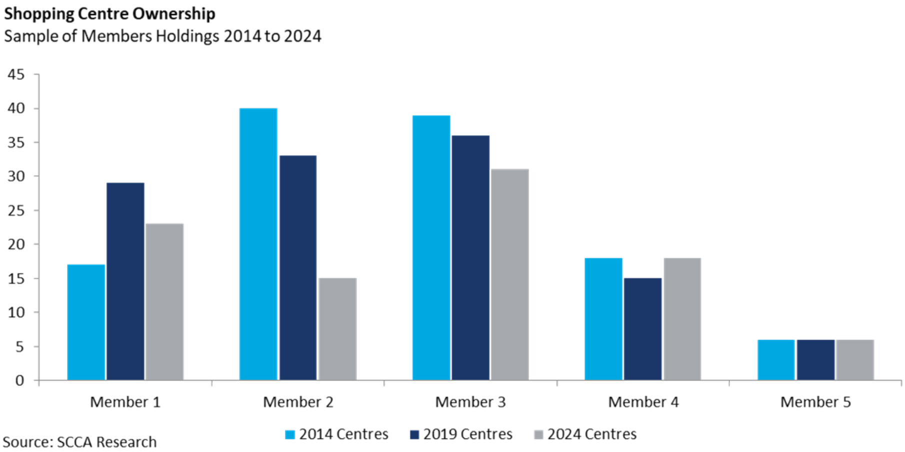


Source: SCCA Research / Industry Data

TRANSACTIONS DRIVEN BY ASSET-RECYCLING / PORTFOLIO REDISTRIBUTION

Shopping centre transactions are largely driven by asset-recycling / portfolio redistribution, versus for 'serial or creeping' acquisitions noting commentary in relation to this issue. **Figure 3** provides a 10-year snapshot of shopping centres owned by a sample of SCCA members (ASX-listed; industry fund; private), across the FY14, FY 19 and FY24 periods, noting that in a number of cases the number of centres owned has substantially reduced (i.e. their focus has been more on disposals, versus acquisitions).

Figure 3 – Shopping Centre Ownership – Sample of Members Holdings 2014 to 2024



Source: SCCA Research

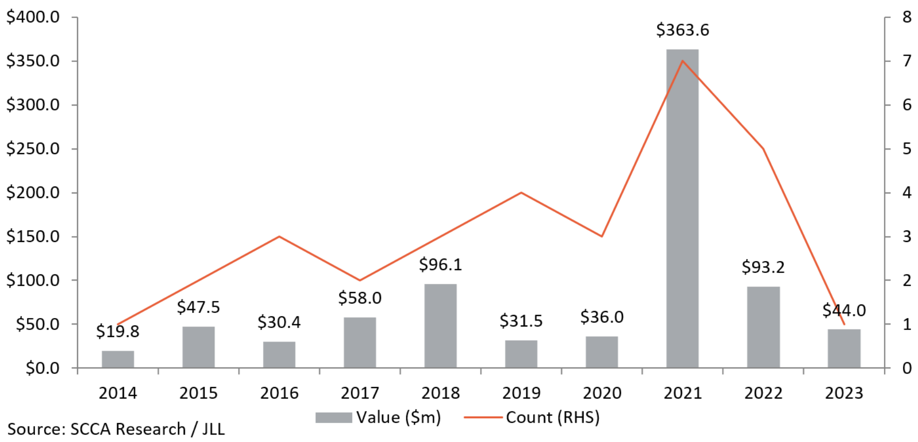
LAND ACQUISITIONS / LINK TO DEVELOPMENT ACTIVITY

Further to the above, the following analysis is provided for some context in relation to shopping centre redevelopment. Shopping centres are different to other commercial properties in that they continually evolve and expand. For instance:

- Chadstone Shopping Centre (owned by an SCCA member) in Melbourne has been redeveloped 40 times since 1960 and has additional stages planned.
- Cockburn Gateway (owned by an SCCA member) in Perth has development approval for a four stage redevelopment over 20 years.

Our analysis highlights (**Figure 4**) that 31 acquisitions of retail land have occurred between 2014-2023, with an average sale price of $26.5 million (range: $6 million to $155 million).

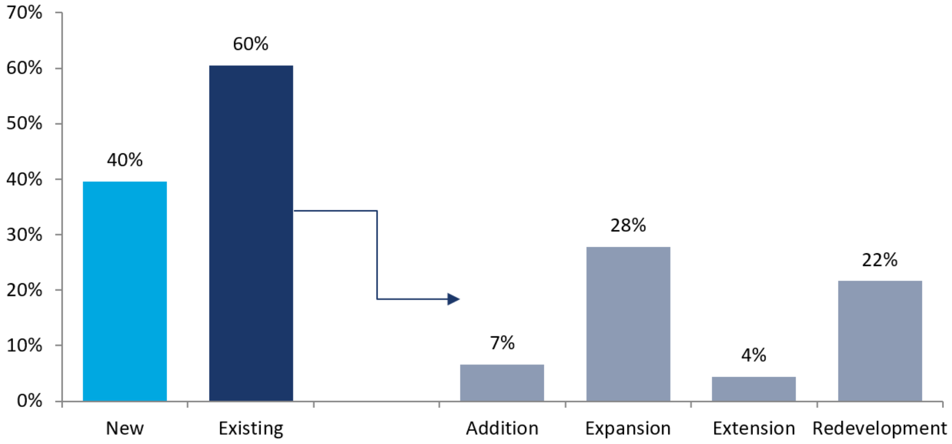
Figure 4 – Shopping Centre Transactions of Land – 2014 to 2023 – Value and Number



Source: SCCA Research / JLL

Noting that land acquisition principally relates to shopping centre development, the **Figure 5** outlines the breakdown of shopping centre development over the 2014-2023 period, noting that 60 per cent are developments of existing centres, and in some cases, there is no 'expansion of floor space but instead a consolidation / renewal of existing space.

Figure 5 – Shopping Centre Developments – 2014 to 2023 – New and Existing

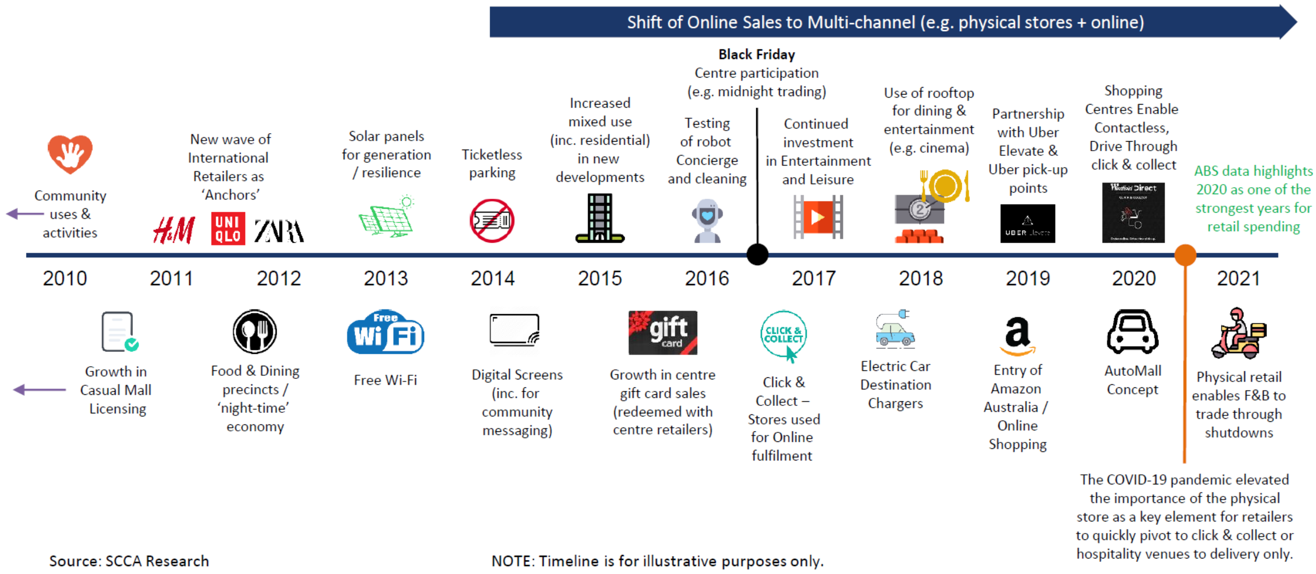


Source: SCCA Research / Cordell

The purpose of shopping centre redevelopment is often to introduce new concepts and offerings for customers, and/or to improve customer experiences (e.g. WiFi, ticketless parking, EV chargers).

This can include the introduction of 'night-time' dining precincts, leisure and entertainment uses (e.g. for one of our members, 'consumption on site' (e.g. restaurants, gyms, health and well-being) uses have increased as a proportion of tenants over the past decade). **Figure 6** outlines a general evolution of shopping centres since 2010.

Figure 6 – Shopping Centre Innovation Timeline



Source: SCCA Research

NOTE: Timeline is for illustrative purposes only.