

**Productivity Commission Inquiry into the Economic Structure and  
Performance of the Australian Retail Industry**

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**First submission by the  
Shopping Centre Council of Australia**

**20 May 2011**

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## 1. Executive Summary

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This is the first of two submissions which the Shopping Centre Council of Australia (SCCA) is lodging in response to the Issues Paper released by the Productivity Commission in March 2011. This submission provides the Commission with an overview of the shopping centre industry in Australia and the important role it has played in fostering the retail industry. The submission then responds to the matters raised by the Commission in section 5 of the Issues Paper 'Other issues impacting on the performance and efficiency of the industry.'

The second submission will deal specifically with the issue addressed in section 4 of the Issues Paper 'Appropriateness of current indirect tax arrangements'.

In this submission the SCCA makes the following conclusions and recommendations:

- Shopping centres have proved to be a great incubator for retailing in Australia;
- Australian shopping centres achieve very high sales productivity (sales per square metre of retail space) by world standards and nearly double the level of sales productivity of US shopping centres;
- Shopping centres reduce the capital outlay needed by retailers and remove the property risk for retailers;
- Shopping centres do not dominate the retailing industry in Australia and comprise only 38% of total retail space and contain around 35% of all retail shops;
- Retail rents are the product of market forces and there is no justification for additional regulation;
- Occupancy cost ratios, while having increased in the last few years (but only for regional and sub-regional shopping centres, not for neighbourhood centres), have generally been stable over the past 15 years;
- Current occupancy cost ratios, considered in the context of retailer profitability, are sustainable but are likely to fall when retail sales rebound;
- Occupancy cost ratios in US shopping centres are lower than in Australian shopping centres (although not by as much as is commonly claimed). This is mainly because the amount of competing retail space in the US is around twice that in Australia, on a per capita basis;
- Queensland, NSW, South Australia and Western Australia should adopt the same trading hours regulation model as Victoria and Tasmania with trading by large retailers permitted at any time except Christmas Day, Good Friday and the morning of Anzac Day;
- The Australian retail leasing industry is very highly regulated by world standards, with substantial protections established for retailers;
- The retail tenancy market is functioning as efficiently as possible given the weight of prescriptive regulation imposed on the industry;

- Substantial and unnecessary costs are imposed on retail tenants and on landlords as a result of heavy, and in many cases unnecessary, regulation;
- The Productivity Commission should recommend to State and Territory Governments that the regular reviews of retail tenancy legislation should aim to remove unnecessary and counterproductive regulation and require a thorough analysis of costs and benefits before additional regulation is imposed.
- Very few retail tenancy disputes occur in Australia and there is adequate redress to low-cost mediation and arbitration;
- Regulation of the owner-manager relationship under state and territory real estate licencing laws is unnecessary in the shopping centre industry and imposes unnecessary costs on shopping centre owners and on governments;
- The ownership of shopping centres in Australia is widely held and shopping centres compete fiercely with each other, and with other retail property formats, for retailers and for customers;
- There are no obvious barriers to entry to the industry and competitive market outcomes are likely to ensue;
- Planning and zoning rules do not unnecessarily restrict competition to shopping centres from other retail formats;
- There is no systematic failure in activity centres policies limiting retail supply and these policies deliver significant economic and social benefits;
- Time should be given for the recommendations made by the Productivity Commission in the report of its benchmarking inquiry into state and territory planning, zoning and development assessment, released on 16 May 2011, rather than this inquiry making a new set of recommendations.

## 2. Introduction

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This submission concentrates on the retail industry from a shopping centre perspective. The shopping centre industry in Australia is now half a century old, with the first modern shopping centre opening to the public in Brisbane on 30 May 1957. Since then the number of shopping centres in Australia has grown to 1,131<sup>1</sup>. The number of speciality retail shops located inside these centres now numbers around 50,000 while the number of 'major' retailers numbers around 2,400<sup>2</sup>. The shopping centre model has proved a great incubator for retailing in Australia.

Perhaps the best illustration of the growth of the shopping centre industry in Australia, and its success in fostering retailing, can be gained by looking at that first shopping centre, at Chermside in Brisbane, which opened in 1957 with 25 retailers. Now, 54 years later, the centre (now called Westfield Chermside) contains 144,351 square metres of lettable retail space and is home to 409 retailers (including three department stores; two discount department stores; two supermarkets; an entertainment and leisure precinct, including a major cinema complex; two gymnasiums; three banks; a bowling complex and two car washes). It is estimated that more than 16 million customer visits are made to the centre each year. Further, on 11 May 2011, the Westfield Group announced it was undertaking pre-development activity for Westfield Chermside, which would add a further 20,000 square metres of space to the centre.

### **Shopping centres generate less than half of all retail sales in Australia and comprise only around one-third of all retail stores**

Nevertheless, as impressive as the growth of the shopping centre industry has been in Australia and contrary to widespread belief, shopping centres do not dominate the retail landscape. Only around 35% of all retail shops in Australia are located in a shopping centre. In considering the scope of the retailing industry in Australia, it must be stressed that the bulk of retailing takes place outside shopping centres in a range of other retail property formats, including stand-alone stores in CBDs and high streets, strip shops, bulky goods and homemaker centres, and factory outlet centres. These non-shopping centre locations still comprise around 62% of all retail space and generate around 60% of all retail sales.

Nor, despite their prominence in the discussion of the retailing industry and the shopping centre industry, do regional shopping centres<sup>3</sup> (i.e. large shopping centres, such as Westfield Chermside) dominate the industry in Australia. Neighbourhood shopping centres (or supermarket-based shopping centres) comprise the largest number of shopping centres (784), and are home to more specialty shops than regional shopping centres and generate more retail sales than regional shopping centres. Regrettably, however, public policy makers tend to ignore the circumstances of neighbourhood centres (lesser demand for retail space; higher vacancy levels; and, hence, lease bargaining power more often lies with tenants) when considering retail tenancy regulation.

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<sup>1</sup> Figures supplied by Urbis May 2011. When bulky goods centres and factory outlet centres are included, the total number of shopping centres is 1,231.

<sup>2</sup> Derived from the Property Council of Australia's *Shopping Centre Directory*

<sup>3</sup> Regional shopping centres (or department store-based shopping centres) are defined as shopping centres which contain at least one department store. A sub-regional (or discount department store-based) shopping centre is one anchored by at least one discount department store; and a neighbourhood (or supermarket-based) shopping centre is one anchored by at least one supermarket. This reflects the fact that shopping centre classifications in Australia are generally based on the category of 'anchor tenant'.

## The success of shopping centres

Shopping centres have grown rapidly in Australia because they have been meeting market needs. Shopping centres offer a range of benefits for consumers, retailers and the community generally. They satisfy consumer demand for convenient shopping opportunities easily accessible by car and public transport. They provide ample, convenient and usually free car parking. They provide comfortable, undercover and air conditioned shopping. They offer a wide range of choice relevant to consumers' needs in a 'one stop' shopping experience. They provide a competitive retail offer, including discounted prices. They combine shopping with a leisure and entertainment experience and increasingly fulfil the role of a community gathering place. In an increasingly insecure world, they also provide a generally safe and secure environment for shoppers.

While much is rightly made of the role shopping centres now play as community meeting places their economic role in the community is often overlooked. Shopping centres are major generators of jobs, both directly and via the retailers who find a home in the centres. Nearly 5% of all employees work in the shopping centre industry and they make a contribution to GDP of around 3%.<sup>4</sup> At the local level, shopping centres are usually the main generator of council rates in their local government community.

Most importantly, shopping centre owners in Australia have continued to innovate, constantly 'reinventing' the shopping centre format, in a manner which is the envy of other countries. These innovations include the introduction into shopping centres of supermarkets, discount department stores, fresh food, entertainment and leisure precincts, centre courts for community activities, concierge facilities and upmarket restaurants. In addition, working co-operatively with local and state governments, shopping centres have incorporated public facilities as part of their developments and redevelopments, including bus and transport interchanges, libraries, child care, community facilities and other improvements to the public domain.

The key success of the shopping centre is to attract large numbers of shoppers to the centre and deliver them to the doors of the retailers who comprise the centre. Ten years ago it was estimated that there were 1.82 billion shopper visits to regional and sub-regional shopping centres or 35 million visits a week. Given Australia's then population of 19.2 million, this equated to everyone visiting a major shopping centre about twice a week on average<sup>5</sup>. This estimation did not include visits to the far more numerous neighbourhood shopping centres.

## Support for retailers

Well managed shopping centres also appeal to retailers. The customer traffic volumes they generate create high trading potential for retailers and relatively high turnovers are achieved. Not surprisingly, this leads to considerable competition among retailers to locate in shopping centres. In consequence rents in shopping centres are correspondingly high, reflecting the demand for space, the high cost of land zoned for commercial and retail purposes and the high cost of development, construction and maintenance. This is balanced by retailers in shopping centres generally being more profitable, based on the much higher turnovers achieved.

There is another reason why retailers seek to locate in shopping centres. It is generally accepted that the rate of failure of small retail businesses ("speciality shops") in shopping centres is much lower than for those outside shopping centres. This is not surprising. Much greater consideration is given to the selection of retailers in shopping centres, particularly to their previous retailing or business experience, and whether they are a 'good fit' for the centre. Centre owners also have some discretion to refuse assignments of leases and one of the grounds on which they can do so is insufficient business experience. The centre's promotions and advertising fund can be used to promote retail categories that may be doing it tough.

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<sup>4</sup> Jebb Holland Dimasi *Shopping Centres in Australia Vital Statistics* April 2001

<sup>5</sup> Jebb Holland Dimasi *Shopping Centres in Australia Vital Statistics* April 2001

There is also much greater control over the 'tenancy mix' of the centre and although this does not protect existing retailers from competitors, they are not subjected to the lottery of the shopping strip or the high street where there is no control at all over the tenancy mix of retailers.

Most importantly, retailers in larger shopping centres have support mechanisms which are generally not available outside such shopping centres. When a retailer gets into trading difficulties, the first response of the shopping centre is not to replace them with a new tenant. Some centre owners have sophisticated 'retailer relations' advisory services where struggling retailers are given practical advice on how they might trade out of their difficulties. Shopping centre owners regularly provide short-term incentives (such as rent reductions or promotion allowances) to help struggling retailers through difficult periods and owners are sometimes prepared to renegotiate leases for retailers in short-term trading difficulties. Significant amounts of money are spent by shopping centre owners each year in direct assistance to the retailers in their centres.

It is obviously in the interests of shopping centre owners and retailers that vacancy rates in shopping centres are kept as low as possible. An increase in vacancy rates means a reduction in the efficient use of the retail space investment; a reduction in rental income to the owner/investor; a decrease in the variety of the shopping experience being offered by the centre; and inevitably leads to a decline in customer traffic in the centre. As any visitor to a shopping centre will know, it is not an impressive shopping experience if a substantial number of the shops in the centre are empty.

### **High sales productivity of Australian shopping centres**

Australian shopping centres achieve very high sales productivity (i.e. sales per square metre of retail space) by world standards. An independent report<sup>6</sup> commissioned by the SCCA shows that specialty shops in Australian regional shopping centres are 90% more productive than specialty shops in US regional shopping centres. The report also found that specialty shops in Australian neighbourhood shopping centres achieved double the sales productivity of their US counterparts.

One of the main reasons for this superior sales productivity performance is that Australia has only around half the amount of competing retail space per capita as the US. This fact, of course, is also a major reason why occupancy cost ratios for specialty retailers (rent plus share of recoverable centre operating expenses as a percentage of retail sales) in the US are lower than they are in Australia. (This is discussed later in this submission.) While much is made of the fact that occupancy cost ratios in Australian regional shopping centres are higher than they are in the US (although not by as much as is commonly thought), little attention is drawn to the fact that sales productivity in Australian centres is so much higher than in the US. An earlier study<sup>7</sup>, incidentally, demonstrated that Australian shopping centres also had a much higher sales productivity than Canadian shopping centres.

Australian regional centres have a well-balanced mix of non-discretionary and discretionary retailers. The presence of supermarkets and specialty fresh food stores in Australian centres, in particular, boosts foot traffic and sales performance. US regional centres are significantly more dependent on discretionary retail, particularly fashion specialties and department stores. This makes the performance of US centres inherently more volatile. We have seen many examples of this in recent years in the US with many regional malls actually closing their doors and massive reinvestment is now required to revive these as shopping centres or, in some cases, for alternative uses.

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<sup>6</sup> 'US and Australian Shopping Centre Performance Comparison: Sales per square metre and occupancy costs are compared and explained using new data'. Michael Baker Independent Retail Consulting, May 2009.

<sup>7</sup> *Urbis Retail Perspectives* February 2007.

### Shopping centres reduce the capital outlay needed by retailers

There is another major reason why retailers prefer to rent premises in shopping centres rather than purchasing their own store. This is because leasehold, unlike freehold, removes the property risk from their business plan.

Intuitively a retailer would prefer to hold freehold rather than leasehold over their shop. Retailers who purchase their own shop do not have to worry about whether their lease will be renewed or worry about what level of rent they will have to pay in the renewed lease. But while a tenant retailer still has to find the capital to launch the business (or purchase the business), and also to fit out the shop, they do not have to find additional capital (or go further into debt and pay the ongoing interest on that debt) in order to purchase the shop. The tenant retailer, therefore, obviously has a much smaller capital outlay and much less capital at risk than an owner retailer.

The relative advantages of freehold and leasehold are demonstrated in the **Table 1** below, which compares the position of the owner retailer and the tenant retailer (both in a shopping strip and a shopping centre).

**Table 1. Owner Retailers v. Tenant Retailers**

	Capital outlay required	Risk being carried	Advantages	Disadvantages
<b>Owner retailer</b>	<ul style="list-style-type: none"> <li>• purchase of shop</li> <li>• fit out of shop</li> <li>• business set up costs</li> </ul>	<ul style="list-style-type: none"> <li>• property risk</li> <li>• retailing risk</li> </ul>	<ul style="list-style-type: none"> <li>• security of tenure</li> <li>• no rent</li> </ul>	<ul style="list-style-type: none"> <li>• greater capital outlay</li> <li>• more capital at risk</li> <li>• unable to easily change locations (less mobility)</li> </ul>
<b>Tenant retailer (shopping strip)</b>	<ul style="list-style-type: none"> <li>• fit out of shop</li> <li>• business set up costs</li> </ul>	<ul style="list-style-type: none"> <li>• retailing risk</li> </ul>	<ul style="list-style-type: none"> <li>• less capital outlay</li> <li>• less capital at risk</li> <li>• greater mobility</li> <li>• lower rent</li> </ul>	<ul style="list-style-type: none"> <li>• no security of tenure beyond term of lease</li> <li>• lower turnover</li> <li>• less control over location of competitors</li> </ul>
<b>Tenant retailer (shopping centre)</b>	<ul style="list-style-type: none"> <li>• fit out of shop</li> <li>• business set up costs</li> </ul>	<ul style="list-style-type: none"> <li>• retailing risk</li> </ul>	<ul style="list-style-type: none"> <li>• less capital outlay</li> <li>• less capital at risk</li> <li>• greater mobility</li> <li>• higher turnover and sales productivity</li> </ul>	<ul style="list-style-type: none"> <li>• no security of tenure beyond term of lease</li> <li>• higher rents</li> <li>• greater control over location of competitors</li> </ul>

Leasehold also gives the tenant retailer greater flexibility. While the tenant retailer does not have security of tenure beyond the term of the lease, they have absolute security of tenure for the term of the lease and on the conditions they have negotiated. Just as importantly, they do not find themselves anchored to that location (for longer than the period of the lease) and if the location turns out to be a poor one for their retail offer they can relocate to another centre or to another retail location at greater convenience.

By purchasing a shop the owner retailer is anchored to that location or at least is exposed to the risk that, if they decide to move, any attempt to sell the shop will be (during poor trading periods) difficult to do. If the location turns out to be unsuitable, it is not easy to move locations. They have to find a buyer for the retail business (not an easy task if it is in a poor retail location) or, if they can't sell the business as a going concern, they have to find a buyer for the shop (which also might not be easy if it is a poor location for retail). Even if they find a buyer for the business, or just the shop, it is unlikely that they will be able to recoup the money they spent in fixtures and fittings setting up the retail business.

### **Shopping centres remove the property risk from retailers**

The tenant retailer also carries no property risk. Like an owner retailer they still carry the risk that their business plan will not be successful. If it is not successful, however, that is the limit of the tenant retailer's loss. They do not also carry the risk that property values will decline. That risk is being carried entirely by the owner of the shop or by the owners of the shopping centre. In the case of a shopping centre, the owner of the centre has to find the capital to develop, build and refurbish the centre.

Property risk is a very real risk. In the late 1980s and early 1990s, for example, shopping centre values were savagely slashed by the market and investment returns plummeted. Many owners went broke and shopping centres were sold off in a fire sale. The retailers in those shopping centres, however, generally survived. They did so largely because they were not carrying the property risk and did not have to service the debt on heavily mortgaged property that had now declined substantially in value.

Property values fell again in the wake of the global financial crisis in 2008 and 2009 and many investors in shopping centres suffered significant losses. While retailers have struggled following the cycling of the financial and monetary stimulus, most have survived the downturn. Once again they have not had to service debt on mortgaged property that had declined in value.

For the owner of the shop or shopping centre to accept the property risk they have to anticipate that they will get a reasonable return on their invested capital. One person's rent is another person's income. So often in the consideration of public policy issues in the retailing industry the interests of the owner of the rented shop or the investor in the shopping centre are completely overlooked.

Another example of the property risk carried by shopping centre owners and investors is the recent collapse of the Red Group (which includes Borders and Angus and Robertson) and the Colorado chain of retail stores. Both chains collapsed largely because they were carrying significant debt following their acquisition by private equity concerns. Macquarie Securities reported in March that there were 495 Borders, Angus and Robertson and Colorado stores located in shopping centres<sup>8</sup> and that most major shopping centre owners were significantly exposed to these two chains. Since then it has been announced that 16 Borders stores and 37 Angus and Robertson stores have closed. Receivers have called for expressions of interest for the sale of the Colorado chain - 181 of Colorado's 434 stores are located in shopping centres – and it is expected that many of these will also close. This means a substantial amount of space which will need to be re-let in order to maintain rental income. This will not be an easy task for owners in the present retail sales climate.

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<sup>8</sup> Our own calculations from the PCA Directory of Shopping Centres does not tally with this number but, nevertheless, the number is in the hundreds and is still a significant number.

In the case of most shopping centres the capital to buy or build the centre, and to regularly refurbish and redevelop the centre, is usually provided by superannuation funds, life insurance funds, real estate investment trusts, property syndicates, and other property investment vehicles. These owners are generally ordinary investors who are saving for (or living out) their retirement and need to receive a reasonable rate of return on their capital. If they don't then they (or more likely their financial advisers) will seek to invest their money where the returns are better, such as in other forms of property, equities, fixed interest or private capital. Reduced investment in shopping centres would obviously not be in the interests of shopping centre owners, managers, retailers or customers. For retailers and customers, costs and prices would rise.

### **Australia's export achievement**

The shopping centre industry has not only expanded significantly in Australia. Australian shopping centre owners and managers are now exporting their capital, knowledge and management expertise to other parts of the world, including the USA, New Zealand, the UK, Europe and Asia. Regrettably this phenomenal export achievement, which makes a significant contribution to Australia's balance of payments, remains largely unacknowledged by governments in Australia.

Despite the USA being regarded as the 'home' of the modern shopping centre industry, Australian companies are praised in America for the management expertise and the innovations they are bringing to the industry in that country. As noted earlier Australian regional shopping centres generate substantially higher sales per square metre than those in the United States and Canada. While there are a number of factors that explain this difference, one of the reasons is that Australian management expertise has resulted in a much broader range of merchandise in Australian shopping centres and this has ensured that they play a much more central role in the day-to-day shopping needs of households than do their US and Canadian counterparts.

### 3. Other issues impacting on the performance and efficiency of the industry (Section 5 of the Issues Paper)

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#### 3.1 Planning and zoning regulation (Issues Paper pp.25-27)

##### The risk of never-ending inquiry

The Issues Paper (at pages 25-27) highlights planning and zoning regulation as another 'issue' impacting on the performance and efficiency of the retail industry. We are concerned that retail planning issues run the risk of being subjected to a never-ending round of inquiries, with little chance for reforms to be pursued, measured and refined. There is an opportunity cost of re-hashing the same issues (often raised by a minority of retail industry participants seeking special treatment), and not pursuing actual reforms that seem to have widespread support.

The Issues Paper also notes the previous coverage of planning and zoning issues in the Commission's 2008 inquiry, as well as the ACCC's Grocery Inquiry finalised in August 2008. Both of these inquiries recommended that the potential to relax planning controls that unnecessarily restrict retail space and competition should be investigated. We have never opposed such investigations, and have participated in the subsequent policy process in various jurisdictions. The various state and territory planning systems under which our members operate have continued to impose restrictions and delays to the fair and efficient delivery of retail space to the market.

Much has happened since the set of 2008 recommendations, and a case in point is the Commission's own recently completed final report (released on 16 May 2011) of its *Benchmarking Study into Planning, Zoning and Development Assessment* (initiated through COAG and announced by then Assistant Treasurer, the Hon Nick Sherry MP on 12 April 2010), which commenced with the release of an Issues Paper in May 2010, followed by a Draft Report in February 2011. We were an active participant in the Benchmarking Study, which included meeting with the Commission on two occasions and providing two substantial submissions, which were complemented by separate pieces of original, independent analysis prepared by respected consultants (and noted experts in the retail sector) Urbis and SGS Economics and Planning.

The final report has a specific section (Chapter 8) focussed on competition and retail market issues, and includes five sensible and pragmatic findings to improve retail competition under land-use planning. We substantially support the Commission's key findings and believe that, broadly, they provide the following advantages:

- A comprehensive response to the 2008 inquiry recommendations.
- Ensure that retail is maintained as a critical issue for the planning system and considered with broader aspects of the planning system.
- Highlighted the multiple benefits from the long-standing activity centres policy approach to land-use planning, including greater retail competition, so long as local level zoning is flexible to enable a broad range of retail types.
- Alignment of traditional 'planning' issues with other government priorities, such as the recently released Urban Policy (released on 18 May 2011) and current transport infrastructure investment program.
- Ensure that retail and competition issues, and reforms, can be progressed under a uniform national framework.
- Be implemented via the COAG reform process, including through the Business Regulation and Working Group (BRCWG), Local Government and Planning Ministers' Council (LGPMC) and COAG Reform Council Capital Cities program, including the current review of capital city strategic planning systems against national criteria (a final report will be submitted to COAG in December 2011).

The final report of the Benchmarking Study should provide the basis for planning and zoning issues for this current inquiry, and should be given time to be considered through the COAG

Business Regulation and Competition Working Group (BRCWG) process. In particular, this should include the five 'leading practices' which were developed to specifically overcome the main planning issues and barriers for the retail sector. Given that the study emerged from the COAG BRCWG framework, the leading practices should immediately be progressed through that forum for the relevant state and territory jurisdictions to use as a platform for further reform, specifically through the Local Government and Planning Ministers' Council (LGPMC), currently chaired by the Hon. Simon Crean MP, Minister for Regional Australia, Regional Development and Local Government.

We also believe that time should be given to progress the reforms outlined in the Benchmarking Study, rather than this inquiry providing another set of recommendations and reform areas. As the Commission has recognised, some states have already made progress that are consistent with the Commission's leading practices. This includes the proposed NSW Competition SEPP (which followed a Competition and Planning Discussion Paper process in mid-2009); the WA Government's removal of floor space caps from its activity centres policy in September 2010; and the Victorian Government's recent commitment to enable a broader range of 'as of right' development.

It must also be noted that the Benchmarking Study findings, particularly the endorsement of the activity centres policy approach, is strongly aligned with the Commonwealth's *National Urban Policy* released by the Hon Anthony Albanese MP, Minister for Infrastructure and Transport, on 18 May 2011. Aside from the Commission's specific findings, the alignment with the Urban Policy – including its objectives such as improving labour productivity, integrating land-use and infrastructure, improving infrastructure efficiency, and reduced greenhouse gas emissions (**refer to full list at Attachment 5**) – is of critical importance. We note that these are the very same issues that *SGS Economics and Planning* identified as the main benefits of activity centres policies in its report which we provided to the Commission as part of our second submission on the Benchmarking Study (**refer to Executive Summary at Attachment 6**). As the Commission has noted, the critical issue to ensure that activity centres policies are working in an optimal manner is ensuring that planning at the local level, such as reduced zoning restrictions, is strategic and flexible to enable increased development within the hierarchy and network of activity centres.

### Issues Paper 'issues'

In relation to the Issues Paper itself, we are concerned that, despite the fact that planning and zoning regulation impacts *all* areas of the retail sector, the opening statement at Section 5 suggests that only "*some* retailers and retailer organisations are concerned that state (and local) planning and zoning laws act as a barrier to entry of new retail establishments". This statement seems to suggest that planning and zoning laws only act as a barrier for *some* retailers (i.e. *new* retail establishments, rather than *old* retail establishments). The planning system presents a barrier for all retail establishments, whether in the form of use restrictions, height restrictions, floor space restrictions, development conditions or infrastructure charges. Consequently, the provision of all retail space is impacted where it requires approval through the planning process, including zoning and development approval.

The presence of planning barriers is not unique to new entrants, and the Commission has acknowledged this point well in its Benchmarking Study. Mr Matthew Quinn, the Chief Executive Officer of Stockland (a member of the SCCA), stated last year that Stockland had stopped all work in brownfield sites nationally due to major problems with the planning approval processes. He said: "The fact is that it just takes too long to go through the planning process and because of the capital invested, it just kills us. It's the planning approval process" (SMH, 25 June 2010). In many cases, so-called 'incumbent' retailers face a much more significant regime of restrictions than new retailers.

Just recently, Westfield (a member of the SCCA) had its initial plans to expand Westfield Whitford in Perth, under mechanisms under the new *Activity Centres Policy for Perth and Peel*, rejected by

Joondalup City Council. This is the first test case under the new policy. Until this balance across the whole retail sector is recognised, arguments that only some retail formats face planning and zoning barriers are merely presenting the problem as a one-sided affair, where new retailers continue to seek to manipulate the planning system to their own commercial advantage under the guise of retail competition or consumer benefit, with little net community planning benefit. The Commission has noted the relationship between “affording competitive advantage” to certain retail operators “with no apparent improvement in planning outcomes” at page 300 of its Benchmarking Study.

Much of this concern is a perception problem and is fuelled by self-interested claims by companies seeking special treatment under the planning system, for their own commercial advantage. The Commission’s Benchmarking Study noted that, based on its own surveys, the consideration of competition issues (i.e. consideration of whether or not a development will have an impact on competitors) is extremely limited at the local government level. Despite this, some retail organisations would have people believe that anti-competitive conduct is rife. Also, despite the various reviews noted in the previous section, the Commission has also highlighted that a strategic and properly implemented activity centres policy approach is, on balance, the best framework for land-use planning.

Further, some activity centres policies highlight the need for existing centres to grow (either upwards and/or outwards), and for new centres to be identified. Again, the failure of a centre to grow, or a new one from being identified is not a failure of activity centres policies but the failure of a Government to actively ensure that such a growth agenda is being pursued, and that this is being reflected through the relevant zoning instrument.

It should be noted that those groups which continually criticise activity centres policies generally argue for the need to be able to develop in out-of-centre locations (often on much cheaper land). However, what is generally required in such locations is, firstly, an acquisition and then, secondly, a rezoning (for example, from industrial to retail). This is exactly what they could do within, or on the edge of, an activity centre. If market forces don’t permit them to acquire sites within an activity centre, this is hardly the fault of an activity centres policy (or foreign investment policy – see our comments below). Further, such market forces should not be used as the reason to automatically change planning policy for the commercial advantage of one group over another.

We often hear arguments such as “all of the sites are taken up” within an activity centre as a justification for proceeding with out-of-centre development. As we noted in our second submission to the Benchmarking Study, these companies should be prepared to pay market price, amalgamate sites (and pay the transaction taxes), and rezone the land, as others (including shopping centres) have to do in order to develop or expand their assets and businesses.

We urge the Commission to interrogate these claims for special treatment. This will often be based on arguments such as the market power of ‘incumbent retail landlords’; or that their format (on its own) justifies special planning treatment; or that there is a market need; or that an existing centre location is congested. The claim for special treatment might be in the form of a need for a unique ‘definition’, enabling that (or another) definition in certain zones (treating that zone in a one-dimensional aspect, as if real location factors don’t matter), or imposing some ‘competition test’ that benefits them.

***How do the different ways that states and territories determine the size and number of activity centres impact on retailing? Are the definitions of centres unnecessarily constraining different types of retailers?***

We believe the Commission’s Final Report of its Benchmarking Study deals with this issue, however we happy to address the issue that has been raised.

There are various ways in which the size and number of activity centres impact on retailing, however the Commission noted in its Benchmarking Study (at page 327) that (in relation to supermarkets) “the expansion activities of the supermarket groups, combined with estimates of retail grocery floorspace per person that are within ranges generally considered to be adequate

are, on the whole, not indicative of an unduly limited supply of sites for retail activity within centres. That said, there may be particular local markets which are more constrained than others". We strongly believe that this acknowledgement, along with other comments, highlights there is no systematic failure of activity centres policies in unduly limiting retail supply. We do, however, support the Commission's key finding (number one) in relation to activity centres, to ensure that land use zones and overlays are less prescriptive and exclusionary within activity centres.

It is simplistic to suggest that the mere restriction of a retail type or format is an unnecessary constraint without a proper critique of the hierarchy of activity centres and what is the actual barrier, if indeed there is one. It would also be simplistic to ignore the role of activity centres in broader land-use planning and infrastructure, along with their broad community benefits, which is closely aligned with the recently released *National Urban Policy*. As an example, it is easy to say that a small village centre, with a zoning regime that only permits small shops, restricts the provision of a supermarket and therefore has a negative impact on retailing. It might be the case that the infrastructure cannot cope with a larger format or that a local council is holding on to a small centre definition (e.g. 'village') as a means of protecting it from being a larger one ('neighbourhood'). In the latter case, this is a classic misunderstanding of activity centres policies. The hierarchy and network of centres which most states have established (mainly under either stand-alone policies and/or major city strategic plans) are there to guide land use and infrastructure planning. The notion and actuality of activity centres is neither static nor inflexible. In the case of a local council trying to prevent a small centre from becoming a larger one (i.e. physically growing) is not the failure of an activity centres policy or of any definition. It is the failure of a local council for whatever reason (such as a fear of community opposition or a claimed lack of infrastructure), not of the activity centres policy. This issue is certainly not confined to retail sector. Similar issues have often arisen in relation to residential development.

As the Commission has noted in its Benchmarking Study, it is not just the size and number of centres, or definitions, that impact on retailing. Other elements of the planning system, whether part of centres policies or otherwise, also can have a major impact.

One critical issue is retail caps which, until late last year, were still a feature of the WA Activity Centres Policy. These retail caps specifically prevented the growth of a number of retail centres. Other aspects include development conditions. As an example, under the South East Queensland Regional Plan (section 8.7), retail development expansions within activity centres that are greater than 10,000m<sup>2</sup> must provide "sufficient land with street frontage to accommodate non-retail business premises" – at least 15% of the proposed retail floor space increase. This means that, despite the fact that only some developments would be caught, while others would not be (e.g. a standard ALDI stand-alone store format would not be), there is an additional cost to deliver the retail space. Similarly, section 8.8 of the Plan discourages enclosed mall formats, and encourages 'main street' formats. This preference for picking a winner in terms of design theory adds cost and severely limits a developer's ability to have the required flexibility to design a centre to its optimal performance.

As the Commission has also noted (at page 287), most governments have provisions for out-of-centre development. These provisions specifically impact on retailing, in that they provide a specific benefit to certain retail formats over others. To this extent, such provisions should be ruled out over the active expansion of actual activity centres. As an example, under the proposed NSW Activity Centres Policy, there is the discriminatory provision that for out-of-centre development, all formats except shopping centres can locate in out of centre locations. As proposed, this means that so-called bulky goods outlets, warehouse retailers and big box retailers can locate on cheaper out-of-centre land at the expense of other competitors.

This is, of course, anti-competitive, let alone being out of synch with broader policy outcomes as outlined in key cities policies such as the National Urban Policy. It also means that consumers will not be able to comparison shop with a variety of outlets within an activity centre, further limiting retail competition.

***Which retail activities would be most/least likely to benefit from a broadening of zone definitions, as suggested by the Productivity Commission (2011), which expands the ranges of sites available for commercial activity?***

We believe the Commission's Final Report of its Benchmarking Study effectively deals with this issue. The specific leading practice on activity centres policies provides as follows:

*Land use zones (and overlays) in activity centres which are less prescriptive and exclusionary to businesses and industrial zones which are available only to industry would enable planning and zoning systems to facilitate improvement in the competitiveness of city land use.*

We generally support the proposed leading practice, including the remark that "a reduction in the prescriptiveness of zones and allowable uses (particularly those relating to business definitions and/or processes) would facilitate new retail and business formats to locate in existing zones without necessitating rezonings and other changes to council plans to accommodate various business models". We have always supported a broader range of retail uses to be included in genuine activity centres through less prescriptive zones and permissible uses. This would remove a key barrier.

The objective of this leading practice should be that all retail businesses have equal access through zoning, within the broader land-use planning framework, to enter a market and that no business or format should have an advantage over another. In relation to enabling a broader range of retail activities within activity centres, this could include:

- Bulky goods outlets
- Big box formats
- Direct factory outlets
- Retail warehouses
- Homeware supplies
- Retail showrooms
- Cash and carry outlets

As we have raised before, we would be concerned if some retail formats are given a commercial advantage through the zoning system over others, particularly where there is, in the Commission's words "no apparent improvement in planning outcomes". (The Commission has noted this issue at page 300 of its Benchmarking Study). This obviously relates to what retail formats are permitted in out-of-centre locations, and which ones aren't. It is highly discriminatory, and makes no planning (or common) sense, if retail formats such as the above can be permitted within an activity centre environment, under a 'business' zoning, but these same formats are given a monopoly in say industrial areas. It is important, therefore, that retail formats are not able to define themselves as 'industry' (such as a 'retail warehouse'), which, through the use of the term 'warehouse', would be an attempt to imply an industrial use. Under the NSW Standard Instrument, a 'warehouse or distribution centre' is a standard permissible use in certain industrial zones. As we have raised before, this is a major flaw of the current proposed NSW Activity Centres Policy.

The Policy (as it was last exhibited) contains a provision for out-of-centre development that permits all retail formats except shopping centres to locate in out of centre locations. As proposed, this means that bulky goods outlets, warehouse retailers and big box retailers can locate on cheaper out-of-centre land at the expense of other competitors.

This is again a point we have raised before, but the Commission should acknowledge that the so-called new retail formats and entrants have created a rod for their own back. These companies effectively argue for their own planning system, based on spurious claims that they are 'different' and therefore need 'special treatment'. When they receive such treatment, such as in the form of a certain land-use definition or rezoning, they then complain that this isn't extended across the board through all land-use zones. If these companies, and the planning agencies they seek to influence, accepted the reality that they are no different to traditional retail formats, they wouldn't experience the zoning problems they seem to be having. As the Commission notes at page 300 of its Benchmarking Study, "overly prescriptive requirements on business location are usually accompanied by detailed definitions of activities based on factors such as the type of goods sold or the customer base targeted. Such definitions in plans render plans inflexible to changing business models".

To illustrate this point, we point to comments made by Costco's Managing Director (Australia), Patrick Noone, last year (which the Commission has also noted at page 329 of its Benchmarking Study):

*"We're a new type of retailer, we don't fit into most planning laws... You have to be a supermarket or department store. We're none of that, but we're all of that".*

*"The Costco business model...is that of a 'retail warehouse' which is not recognised as an individual form of development under the Standard Instrument definitions... Whilst Costco cannot be properly characterised as 'Bulky Goods Retailing' the Costco wholesale and retail warehouse shares many structural and operational characteristics with bulky goods retailing but equally cannot be considered to solely be a traditional retail centre development".*

It is difficult to conclude what this means other than a desire by Costco wanting an advantageous position over all retail competitors by picking and choosing his preferred definition. Mr Noone acknowledges in this comment that Costco's operations and retail offer are barely distinguishable from that of any other supermarket or discount department store. If this is the case there can therefore be no justification for receiving special treatment under the planning system? We acknowledge that Mr Noone would no doubt be responding to inconsistent provisions within planning schemes, however this argument is hardly a reason to undermine the broader land-use planning and infrastructure goals and objectives. As the Commission notes at page 326 of its Benchmarking Study "while it may be advantageous to have a planning system which facilitates a range of business models, it could also be expected that there is a point at which business models should be somewhat adaptable to local conditions".

***To what degree does the Foreign Investment Review Board requirement for land that is purchased by a foreign company to be developed within 12 months (which is sometimes impractical given zoning problems and planning delays) act as a further barrier to entry for foreign retailers?***

It is no longer a Foreign Investment Review Board (FIRB) requirement that land purchased by a foreign company be developed within 12 months. The timeframe is 5 years. This policy was changed by the former Assistant Treasurer and Minister for Competition Policy and Consumer Affairs, the Hon. Chris Bowen MP, on 23 April 2008. This decision came before the ACCC's Final Report on its Grocery Price Inquiry, released on 5 August 2008. The Final Report at section 9.4.4 ('Foreign Investment Rules') (pages 242-243) noted this policy change.

Minister Bowen's statement (available on the Treasury website, including through the FIRB website) highlights as follows:

*"The change recognises the reality facing commercial land purchasers that 12 months is simply not enough time for completing all the statutory and commercial processes required to enable development to commence.*

*The Rudd Government believes that a 5 year limit strikes the right balance between encouraging competition while preventing foreign investors from land banking and speculating".*

The Foreign Investment Review Board's (FIRB) website – [www.firb.gov.au](http://www.firb.gov.au) - confirms this change, and its section on commercial real estate states (refer to 'Fact Sheet – Commercial Real Estate for Development'):

*Proposed acquisitions of real estate for commercial development (not to be used for residential purposes) are normally approved subject to development conditions imposed under the Foreign Acquisitions and Takeovers Act 1975:*

- *Continuous construction commencing within 5 years; and*
- *A minimum amount equivalent to 50 per cent of the acquisition cost or current market value of the land (whichever is higher) being spent on development.*

We contacted the FIRB on 5 May 2011, and an officer confirmed that the timeframe is 5 years, consistent with former Minister Bowen's 23 April 2008 announcement. It was also confirmed that the ministerial statement serves as the policy statement on this issue, making it effective from that date. The ACCC's Final Report (at page 243) specifically noted that "this proposed change to foreign investment rules to allow foreign companies five years to develop acquired vacant land appears to address the concerns raised by ALDI".

We also find the suggested issue, which refers to a "further barrier to entry for foreign retailers", to be one-sided. All foreign companies have investment conditions and processes, as administered by FIRB, to which they must adhere when investing in Australia, regardless of whether they are retailers or not. In fact, real estate investment under certain thresholds does not require notification to the FIRB.

### 3.2 Retail trading restrictions (Issues Paper pp. 27-30)

The Issues Paper (Table 5, p.28) details the range of retail trading hours restrictions for large retail stores in the eight capital cities in Australia. The various States and Territories can effectively be divided into four categories of regulation.

The first category is the 'totally deregulated' jurisdictions – the Australian Capital Territory and the Northern Territory - where there are no legislative requirements as to when large shops must be closed. The second category is the 'effectively deregulated' jurisdictions – Victoria and Tasmania – where shops are only required to close on 2½ days a year (Christmas Day, Good Friday and the morning of Anzac Day. (This is 'effective deregulation' since large shops in the 'totally deregulated' jurisdictions usually, voluntarily, close on these days.) The third category is the 'lightly regulated' jurisdictions – now only NSW – where large shops are only restricted from trading on 4½ days a year (the same 2½ days above plus Boxing Day and Easter Sunday). The fourth category is the 'heavily regulated' jurisdictions (Queensland, South Australia and Western Australia) where restrictions still exist on the times large retail stores can open each day of the week, including on Sundays, as well as having only limited public holiday trading.

It can be seen from this categorisation of jurisdictions that trading hours restrictions are no longer an issue in half of the eight jurisdictions in Australia. Even in the other four jurisdictions (NSW, Queensland, SA and WA), there is now a gradual movement towards the lifting of restrictions on trading hours. Public opinion polls throughout Australia have confirmed that customers want longer and more flexible trading hours. The gradual move towards liberalised trading hours also reflects the fact that the predictions that the extension of trading hours would lead to a loss of retail jobs – predictions made at each stage of liberalisation - have proved to be false.

#### Mid-week and weekend trading restrictions

Only three jurisdictions (Queensland, South Australia and Western Australia) still maintain restrictions on mid-week trading by large retail stores, with each permitting trading until 9pm. There will be areas, and occasions, when supermarkets (in particular) wish to trade later than 9pm because they find there is consumer demand to be satisfied. Shops should have the freedom to open their doors if it is economic to do so. Irrespective of what these governments continue to do in relation to weekend and public holiday trading restrictions, there is certainly no policy justification for continuing to regulate mid-week trading hours.

These three jurisdictions also continue to regulate weekend trading hours with trading usually not permitted after 5pm on Saturday or Sunday. On Sunday, South Australia only permits trading for six hours. In Western Australia, Sunday trading is not permitted in most areas of Perth and in those areas where it is permitted, trading is limited to six hours.

There is no contemporary justification for intervention by governments in relation to the times when people can shop or when retailers can trade. The social and cultural institutions which historically underpinned a restrictive policy are no longer relevant to modern society, which requires flexibility, convenience and choice.

#### Public holiday trading restrictions

Prohibitions still apply to shop trading on public holidays in four States. In South Australia, shop trading is not permitted on any public holiday while in Western Australia, shop trading is not permitted on the vast majority of public holidays. In Queensland (the populous South East Queensland) shop trading is not permitted on five public holidays and in NSW shop trading is not permitted on four-and-a-half days. (See Table 2).

In regional Queensland – in those areas where Sunday trading is still not permitted – trading is also not permitted on public holidays. However a process is in place – through applications made to the Queensland Industrial Relations Commission – to grant Sunday trading (and limited public holiday trading) although this procedure is costly and cumbersome.

Table 2: Public Holiday Trading Restrictions Across Australia

	Christmas Day	Good Friday	Anzac Day	Boxing Day	Easter Sunday	Labour Day	New Year's Day	Australia Day	Easter Monday	Easter <sup>7</sup> Tuesday	Queen's Birthday	Other	Total Compulsory Closed Days
ACT	Open <sup>1</sup>	Open <sup>1</sup>	Open <sup>1</sup>	Open	Open	Open	Open	Open	Open	Open	Open	Open	Nil
NT	Open <sup>1</sup>	Open <sup>1</sup>	Open <sup>1</sup>	Open	Open	Open	Open	Open	Open	Open	Open	Open	Nil
TAS	Closed	Closed	Closed <sup>2</sup> Open	Open	Open	Open	Open	Open	Open	Open	Open	Open	2½ Days
VIC	Closed	Closed	Closed <sup>2</sup> Open	Open	Open	Open	Open	Open	Open	Open	Open	Open	2½ Days
NSW	Closed	Closed	Closed <sup>2</sup> Open	Closed <sup>3</sup>	Closed <sup>4</sup>	Open	Open	Open	Open	Open	Open	Open	4½ Days
South-East QLD	Closed	Closed	Closed	Open	Closed	Closed	Open	Open	Open	Open	Open	Open	5 Days
WA	Closed	Closed	Closed	Open <sup>5</sup>	Closed	Closed	Closed	Closed	Closed	Open	Closed	Closed Foundation Day	10 Days
SA	Closed	Closed	Closed	Closed <sup>6</sup>	Closed	Closed	Closed	Closed	Closed	Closed <sup>8</sup>	Closed	Closed Adelaide Cup Day	12 Days

KEY:

1. Trading hours are not regulated in the Territories but large shops close voluntarily on these days and on the morning of Anzac Day
2. Trading permitted on the afternoon of Anzac Day
3. Except for Sydney CBD, Newcastle CBD, Cabramatta and tourist areas. Shops in other areas can apply for exemptions but these are rarely granted
4. Except for a small number of retailers with 'grandfathered' exemption certificates. Shops in other areas can apply for exemptions but these are rarely granted
5. WA Government permitted trading on this day in 2010
6. Proclamation Day in SA
7. Special holiday gazetted for 2011 only
8. Limited trading permitted in Adelaide CBD only

Shopping Centre Council of Australia: May 2011

It is archaic that shopping, an activity that many families regard as leisure, is banned on some days of leisure for these families. As noted above, intervention by governments in relation to the times when people can shop or when retailers can trade can no longer be justified in public policy terms. As noted earlier, laws restricting the hours when people can shop are no longer relevant to modern society, which requires flexibility, convenience and choice.

This has been recognised by successive governments in the ACT and the Northern Territory which have declined to regulate trading hours and by governments in Victoria and Tasmania, which prohibit trading only on Christmas Day, Good Friday and the morning of Anzac Day.

Removing public holiday trading restrictions in the other four States will boost productivity in the retail industry (measured in sales per square metre of retail space). Retailers effectively pay rent on these closed days – rents are not calculated on a daily basis – but are denied the opportunity to make sales on days that fall during traditionally popular shopping seasons.

Removing the restrictions will also create jobs in retailing since retailers who chose to open on these days have to staff their shops. Permanent retail staff, who opt not to work on these days, will be replaced on that day by casual staff eager for work.

This reform would also save costs for Governments since they would no longer need to maintain extensive administrative and compliance staff and these staff could be redeployed to other more productive activities.

Maintaining restrictions on shop trading on public holidays discriminates against the retailing industry. Nearly all other forms of industry and commerce are permitted to conduct business on these public holidays. This means that there is a significant 'leakage' in household expenditure from retailing, to these other forms of economic activity, which is not recovered.

***How do retail trading restrictions impact on the flexibility of retailers to respond to changing consumer preferences?***

A major damage of trading hours restrictions is that they prevent the retail industry responding to changing consumer preferences. For example, the rise of the two-income family substantially restricted the ability of families to do their shopping during the week. Only gradually were restrictions lifted on, first, Saturday afternoon trading and, next, Sunday trading, to accommodate the fact that families were critically time-poor during the week and needed the weekends to be able to do family shopping. Similarly the limit of 6pm on weekday trading (now lifted in all States) damaged the food, fast food and grocery industries, in particular, because it limited the ability of working parents to do convenience shopping after work during the week. Retailers need the flexibility to respond quickly to changing consumer preferences and social trends.

***Given the recent growth of online retailing, do the benefits to some parts of the community of the current retail restrictions continue to justify the costs to the broader community?***

The need for greater flexibility in retailing is particularly apparent now that traditional retailing faces increasing competition from on-line retailing. On-line retailers experience no restrictions on when they can do business. At present, as the Issues Paper notes, it is estimated that between 5-6% of total retail sales occur over the internet but this is forecast to grow substantially over the next 10 years. In some areas of retailing, such as bookselling and sporting goods, the proportion of internet sales is already much higher. Maintaining trading hours restrictions forces the traditional retailers to fight the new competition with one hand tied behind their backs.

***Do current retail trading hours restrictions reduce or redistribute expenditure in the retail industry? In other words, does the 'retail dollar' remain in the retail industry or is it spent in other industries?***

An enduring myth of opponents of liberalised trading hours is that 'there is only so much money to go around and longer hours simply redistribute spending over more days of the week.' A variation of this myth is that 'it does not matter if shops are closed on public holidays, people will simply defer their spending until the shops reopen.'

The practical answer to these claims is that progressive retailers would not campaign so hard to extend trading hours, or to allow trading on public holidays, if it was simply a case of redistributing expenditure in the retail industry. Experience in all States that have liberalised or deregulated trading hours has shown that household spending that previously 'escaped' to other forms of economic activity (which were not restricted in when they could operate) returns to retailing.

We recently demonstrated to the South Australian Government the folly of its claim that retail sales are simply deferred, not lost, when shops are forced to close on public holidays. We provided sales data for two shopping centres of roughly the same lettable area, both owned by the same company, one in Adelaide and one in Melbourne - for two two-monthly periods, (July-August 2010 and December 2009-January 2010). July-August was chosen because these two months are unaffected by public holidays while December-January was chosen because it is a sufficient period to 'catch' any deferred sales from the public holidays over Christmas-New Year.

The sales of the Melbourne centre in July-August 2010 were 24% higher than the sales of the Adelaide centre. In December 2009-January 2010, however, the variance in sales between the two centres was 39%. The much better sales performance of the Melbourne centre in the December-January period, compared to the Adelaide centre, is directly related to the fact that Victoria had three more trading days in these months than South Australia.

If it were the case that retail sales are simply deferred when shops are forced to close on public holidays, we would expect these sales to be made once the shops reopen (or soon after the shops reopen.) The comparisons between these two centres shows that this did not occur and that a substantial portion of retail sales were actually 'lost' for retailers at the Adelaide centre.

To ensure this was not an aberration we also supplied sales data for a different shopping centre company and this time the comparison was between a regional shopping centre in Adelaide and a similar-sized regional centre in Brisbane, over the same periods. In this case, sales at the Brisbane centre in the July-August period were 3% higher than at the Adelaide centre. Over the December 2009-January 2010 period, however, the Brisbane centre's sales were 14% higher. Once again this increase in sales in the Brisbane centre is directly related to the fact that Brisbane had three more trading days during this period than Adelaide and demonstrates these sales are actually lost when shops are forced to close, and not simply deferred until the shops reopen.

***What have been the effects of longer opening hours in those jurisdictions that have relaxed restrictions (for example, on retail sales and employment within different retail sectors)? Was there any redistribution of retail sales between small and large retail businesses following longer opening hours?***

The SCCA commissioned ACIL Tasman to prepare an independent report on the economic impact of extended trading hours on the retail sector as part of its submission to the *Review of Retail Trading Hours* in South Australia in August 2006. The conclusions of this report are still timely and valid. This report has already been provided to the Productivity Commission.

***Given the experience of the ACT and the Northern Territory with fully deregulated trading hours, what would be the implications of removing all retail trading hours restrictions in the other Australian jurisdictions?***

As noted above, there is little practical difference between the 'totally deregulated' jurisdictions of the ACT and the NT and the 'effectively deregulated' jurisdictions of Victoria and Tasmania. Large shops in the Territories tend to voluntarily close on the 2½ days they are legally required to close in Victoria and Tasmania.

As the ACIL Tasman Report concluded: "States and Territories that have liberalised trading hours have typically experienced higher overall retail sales" (p.2). The Report also found: "Experiences in other States also shows that retail employment usually increases following expansion of trading hours" (p.4).

Deregulating shop trading hours, or 'effectively deregulating' trading hours, is therefore not a radical move; nor is it a step in the dark. It would be a major micro-economic reform in Australia.

***If some jurisdictions retain restrictions on retail trading on public holidays, are there any community benefits in standardising the number of restricted trading days across Australia (that is, for those jurisdictions that are not fully deregulated)?***

No. Any move to standardisation of the non-fully deregulated jurisdictions will simply be used by the opponents of trading hours reform as an opportunity to 'roll back' the number of trading days in the 'effectively deregulated states' of Victoria and Tasmania. This must be strongly opposed.

***What problems are created by different processes in different states (and in some cases different regions within states) for retailers to seek exemptions to restricted trading laws?***

One of the major inequities in the jurisdictions that still regulate trading hours is the discrimination against some retailers on the basis of geographic location and even on the basis of their retail offer. Apart from the inequity that 'small retailers' (variously defined) can trade whenever they like – and many who gain this exemption are not small retailers – similar sized or similar types of retailers are permitted to trade in some regions (or in some suburbs) but are not permitted to trade in others.

For example, in regional Queensland, large shops and shopping centres are able to trade on Sundays in Toowoomba but are not permitted to do so in Warwick, 80 kilometres away. Similar inequities occur all over Queensland where the State has around 20 geographic regions (for trading hours regulation purposes) and many of these regions vary in the times and days that large shops can open.

In Perth, to take another example, large shops and shopping centres in some areas (Perth city, Joondalup, Midland and Armadale) can trade on Sundays and many public holidays but large shops and shopping centres outside these areas (and some fall just outside) are unable to trade. This discrimination on geographic grounds will be exacerbated later this year by discrimination on the basis of retail offer: the Government (with the Opposition's agreement) has announced it intends to legislate to allow bulky goods retailers, but not other large retailers, to trade on Sundays.

In South Australia, over the recent Easter period, the Government allowed large shops and shopping centres in the Adelaide CBD to trade on the special public holiday on Easter Tuesday but would not allow other large retailers throughout the Adelaide metropolitan area to trade. Bulky goods retailers in Adelaide have more advantageous trading hours on Sundays than other large retailers.

Where governments continue to choose to intervene in the marketplace, they must be guided by considerations of equity amongst those subject to intervention and ensure policy consistency. Governments (and Parliaments) should not confer a privilege on one group of consumers, retailers and retail property owners but deny that privilege to another (and much larger) group of consumers, retailers and retail property owners. Governments should, wherever possible, create level playing fields for businesses. Governments should not be in the business of restricting competition on the basis of geographic location or type of retail offer.

***Is there evidence from the use and times of usage of online retailers in states with more restrictive shopping hours – particularly in Western Australia – of consumer demand unable to be satisfied through bricks and mortar retailers?***

We do not have access to such data.

### 3.3 Retail tenancy leases (Issues Paper pp.30-31)

#### Highly regulated industry

The retail tenancy industry operates according to an extensive body of legislated rules. These include rules as to what constitutes acceptable behaviour by owners and managers in transactions with tenants. Where a tenant claims an owner or manager has breached one of these rules there is adequate redress by easily-accessible and low-cost mediation and, as a last resort, legal proceedings.

This body of legislated rules is only one part of the significant assistance and protection provided by governments to retail tenants. It is difficult to think of another area of business-to-business relationships where governments have intervened so substantially in order to protect small businesses or where they spend so much of taxpayers' money on providing advice and support.

As a result of this intervention the market for retail tenancy leases in Australia is now heavily regulated. We are unaware of any other country in the world with such a highly regulated retail tenancy market and the Productivity Commission has noted<sup>9</sup> that "Australia is unique in its specific regulation of retail tenancies." In all States and Territories there is very detailed and prescriptive legislation regulating all aspects of the retail tenancy relationship, beginning even before a tenant signs a lease. The legislation also seeks to resolve retail tenancy disputes by easily-accessible and cost-efficient mediation.

This is in contrast to other countries with which Australia generally likes to compare itself. New Zealand, for example, does not have retail tenancy legislation. The only regulation of leases is contained in the *Property Law Act* which applies to all property classes, not just to retail property. There is no retail tenancy legislation in the USA. Even in the United Kingdom (UK), where the *Landlord and Tenant Act 1954* applies to all commercial property, there is no specific retail tenancy legislation to protect retail tenants.

Unfortunately the existence of this detailed regulation has led to a 'protectionist' mentality on the part of a small but vocal group of retailers in Australia. Unlike retailers in countries such as the USA and New Zealand, the response of these retailers and some retailer associations in Australia to the inevitable risks and uncertainties of retailing is to call for even more government intervention and regulation.

#### Few retail tenancy disputes

Retail tenancy disputes, although they sometimes receive media prominence, are actually few in number and, when considered as a proportion of the number of retail leases on foot, are very small. Each year, fewer than 2,000 retail tenancy disputes<sup>10</sup> occur in Australia which require referral to mechanisms established to settle such disputes. This represents fewer than 1% of all retail leases<sup>11</sup> or, in other words, fewer than 7 leases in every 1,000. The vast majority of these disputes are satisfactorily resolved by mediation.

Fewer than half of these retail tenancy disputes occur in shopping centres. This demonstrates the absurdity of the claim by the Reid Inquiry<sup>12</sup>, which is often repeated: "The idea there is a war going on in shopping centres around Australia, between retail tenants and property owners and managers, conveys accurately the tenor of evidence given to the Fair Trading inquiry on retail tenancy issues."

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<sup>9</sup> "The Market for Retail Tenancy Leases in Australia" Productivity Commission Inquiry Report No 43 31 March 2008 p.88

<sup>10</sup> Ibid. p.189

<sup>11</sup> There are no official statistics of the number of retail leases in Australia. However the Productivity Commission calculated in 2008 that there were around 290,000 retail leases. This means that fewer than 7 leases in every 1,000 result in a dispute requiring mediation or arbitration. Given that leases are on foot seven days a week, 52 weeks a year, usually for around five years, this is a phenomenally low number.

<sup>12</sup> House of Representatives Standing Committee on Industry, Science and Resources, *Finding a Balance: Towards Fair Trading in Australia*, 1997

Unfortunately, however, this is an industry where anecdote, not evidence, quite often informs public policy. The Productivity Commission, in its 2008 Report<sup>13</sup>, stated: "In the Commission's assessment, the term 'war' is not representative of the balance of evidence provided in this inquiry – a few skirmishes, some lingering resentment, hard bargaining and some disappointments, but not 'war'."

### The determination of retail rents

Retail rents are the product of market forces. They are the result of a good faith negotiation between a willing seller (of retail space) and a willing buyer (of retail space). The outcome of that negotiation is determined by the forces of supply (of retail space) and demand (for retail space). Developments on both the supply side and the demand side of this equation have an impact on rents.

Looking first at the *supply (of retail space)*, for most of the last decade there was a constant addition of retail floorspace each year in Australia, both inside and outside shopping centres. Between 2000 and 2006, the total amount of floorspace in regional, sub-regional and neighbourhood shopping centres increased by 3,407,000 square metres (sqm), or on average by 568,000 sqm each year<sup>14</sup>. The amount of floorspace in regional shopping centres increased by 381,000 sqm over this period; the amount of floorspace in sub-regional shopping centres increased by 1,613,000 sqm; and the amount of floorspace in neighbourhood shopping centres increased by 1,413,000 sqm. This is the equivalent of adding 5,680 speciality retail tenants to Australian shopping centres *each year* for six years.

This does not take into account the retail space that was added outside shopping centres in strips centres, retail outlet centres, city centres, high streets and bulky goods centres. Since only around one-third of retail shops are located in shopping centres, we can reasonably assume that the equivalent of another 10,000 specialty retail tenants were added each year outside shopping centres. This gives an idea of the leasing challenge facing shopping centre owners over this period as they sought to entice tenants for this new retail space, competing with other shopping centres as well as other retail property formats, as well as holding on to their existing tenants whose leases had expired (and who were being chased by leasing agents for other shopping centres.) The constant increase in the supply of retail floor space for lease, and the intense competition for tenants between individual shopping centres and between shopping centres and other retail formats, delivered significant bargaining strength to retail tenants and placed downward pressure on rents. As a result new space is often leased at lower rentals than existing space in keeping with market forces which determine sustainable rental levels.

We do not have similar figures available for the period after 2006 but we do know that the supply of retail floor space tended to dry up after the global financial crisis as many planned retail developments and redevelopments were put on hold. The amount of new floorspace which came on stream over this period was significantly less than was the case before the financial crisis. The downturn in new supply has undoubtedly placed upward pressure on rents.

It is not only the supply side of the equation that impacts on rents. The *demand (for retail space)* is also a significant factor. In times of downturns in the retail industry there is obviously downward pressure on rents as landlords confront the spectre of empty shops in their shopping centre. Retailers seeking to renew their leases at such times are often in a position to demand lower rents or seek incentives which lowers the effective rent. Similarly, when retail sales are booming, retailers are more optimistic and look to open additional stores or to franchise their stores, while other retailers seek to enter the market for the first time. This increases the demand for retail space and helps to bid up rents. The consistently strong growth in retail sales over the first half of the last decade obviously led to upward pressures on market rents while the slump in retail sales over the last few years has had the opposite effect.

<sup>13</sup> "The Market for Retail Tenancy Leases in Australia" op.cit. p. 83.

<sup>14</sup> *Shopping Centres in Australia Vital Statistics* April 2001 Jebb Holland Dimasi; *Australian Shopping Centre Industry Information Update* March 2007 Urbis JHD.

The Productivity Commission examined occupancy costs in its 2008 Inquiry<sup>15</sup> and concluded that “creating legislative limits or controls on occupancy costs would impede the efficiency of the market.” It also found: “There appears to be little evidence that the current process of negotiating occupancy costs is constraining the efficient operation of the market for retail tenancies. It is unlikely there would be net community benefits from attempts to further regulate occupancy costs. The conditions that govern business operations, in particular the cost of tenancy within shopping centres and other retail formats, should remain a matter negotiated between tenants and landlords.”

### Vacancy rates in shopping centres

The interactions of these developments in the supply of, and demand for, retail space manifests itself in vacancy rates of shopping centres and in prevailing rents. **Table 3** below measures average vacancy rates across the three centre types based on a sample of shopping centres. Not surprisingly these vacancy rates vary from year to year, mainly reflecting the immediate impact of additional space coming on stream following redevelopments of existing shopping centres and openings of new shopping centres.

Nevertheless, over this 15-year period, the average vacancy rate in 2010 for all shopping centres is only half the level that it was in 1996. This is true for all types of shopping centres but is particularly the case for regional shopping centres where, even though the vacancy rate increased following the onset of the global financial crisis, average vacancy rates did not get much over 1%. This reflects the continuing growth in popularity of shopping centres by retailers attracted by the relatively high turnover, high pedestrian traffic rates and the other advantages of shopping centres. Despite the substantial growth in shopping centres floorspace over most of this period, an increasing proportion of retailers is seeking to locate in shopping centres.

**Table 3. Retail Vacancy Rates<sup>16</sup>**

Year	All Centres	Regional Centres	Sub-Regional Centres	Supermarket Centres
1996	3.7%	2.6%	3.4%	7.6%
1997	4.3%	4.4%	2.8%	10.6%
1998	1.5%	1.2%	1.5%	3.7%
1999	2.0%	1.6%	2.0%	3.3%
2000	1.4%	0.8%	1.6%	3.6%
2001	1.8%	0.8%	2.2%	4.4%
2002	2.6%	1.5%	3.0%	7.0%
2003	2.3%	1.7%	2.3%	4.9%
2004	1.5%	0.5%	2.1%	3.3%
2005	1.0%	0.4%	1.4%	2.7%
2006	1.2%	0.9%	1.0%	3.1%
2007	1.4%	0.6%	1.5%	3.6%
2008	1.8%	1.3%	1.7%	4.4%
2009	1.7%	1.0%	1.9%	3.8%
2010	1.7%	1.1%	1.6%	3.4%

<sup>15</sup> *The Market for Retail Tenancy Leases in Australia*, op.cit, pp. 151-152.

<sup>16</sup> Source Urbis. Based on a sample of shopping centres. Calculated, as at 30 June each year, as the gross lettable area of vacant shops as a percentage of the gross lettable area retail of the shopping centre.

## Occupancy costs over time

Despite this compression of vacancy rates, over most of this 15-year period the growth in rents for specialty shops in shopping centres has generally been in line with the growth of retailers' turnover. This has meant that over most of this period average occupancy cost ratios in shopping centres, although varying from year to year, have generally been fairly stable and have moved within a very narrow band. This can be seen from **Table 4** on the following page. This table was supplied by Urbis and is based on data contained in the annual Urbis Retail Averages.

Because of breaks in the series, the data in this table needs to be considered in three discrete time periods – 1996/97 to 1999/2000 (blue); 2000/01 to 2003/04 (yellow); and 2004/05 to 2009/10 (green). The reasons for the breaks in the series are explained in the *Notes for Occupancy Costs by Urbis* on the next page after Table 4. The table also includes, for completeness, a table providing the same data but also including the marketing levy but this table is not relevant for analytical purposes since the measure of occupancy costs generally exclude the marketing levy paid by tenants since this is not a property cost but a marketing/advertising expense (an expense which all retailers incur whether or not they are located in shopping centres.)

If we examine regional shopping centres, for example, occupancy cost ratios between 1996/97 and 1999/2000 (when there was a break in the series caused by the introduction of the GST), the ratio hovered around 14.4%. Between 2000/01 and 2003/04 (when there was also a break in the series as a result of changes in reporting methodology), the ratio hovered around 15.4%.

The relative stability of occupancy cost ratios over most of this 15-year period demonstrates that rent increases have generally been in line with sales increases and in some years sales increases have outstripped rent increases. It is only in the past few years (and only for regional and sub-regional shopping centres, not for neighbourhood centres) that occupancy cost ratios have increased. This reflects the fact that most retail leases provide for annual fixed rent increases and these have occurred during periods when retail sales increases have been static or smaller than previous years. While this operates to the disadvantage of retailers during these periods, this operates to their advantage at other periods when retail sales are booming. (Many years over the past 15-year period have seen sales increasing by double digits each year while rent increases have been limited to a much lesser percentage.) There is also a correction mechanism which applies during such periods since rents on renewal, when leases expire, are often negative or stable as landlords seek to retain tenants in their centres. If we look back over the periods 1996/97 to 1999/2000 and 2000/01 to 2003/04, history suggests that this increase in the average occupancy cost ratio will not prove to be permanent.

## Stability of tenants in shopping centres

There is occasionally argument that shopping centre owners have been able to sustain significant rent increases in shopping centres by 'churning' their tenants (i.e. by replacing those tenants who can't or won't pay higher rents on renewal by those retailers keen to find tenancies in these centres). Quire apart from the commonsense objection to this argument that no shopping centre would deliberately seek to have a continual series of closures and empty shops, this argument assumes that there is always a ready supply of retailers willing to pay rents 'on hope' i.e. who are prepared to ignore their business plans and projections when negotiating initial rents in shopping centres.

**Table 5** on page 30 demonstrates that this has not been the case. The table shows, in any given year, the proportion of retailers who were in the same centre the previous year. This demonstrates that, in most years, 85% or more of the retailers in the shopping centre were also in the centre the previous year. Unfortunately, as explained in footnote 17, this data is only available until 2003 but the table shows churn rates over a seven-year period.

If owners were churning their tenants, then we would expect this would be more likely in regional shopping centres where vacancy rates are generally always low, reflecting the high demand for tenancies. In fact, the table shows that the stability rate in regional shopping centres has generally been higher each year than in the other categories of shopping centres.

Table 4: Occupancy Costs Ratios for Specialty Shops 1996/97 to 2009/10



Occupancy Costs of Retail Specialty Shops

EXCLUDING MARKETING LEVY, INCLUDING GST

TABLE 1

Centre Type <sup>1</sup>	Financial Year													
	96/97	97/98	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10
<b>Regional Centres</b>														
All Regional Centres (n=59)	14.7%	14.6%	14.4%	13.9%	15.4%	15.6%	15.5%	15.1%	15.2%	15.6%	16.3%	16.4%	16.5%	17.2%
Top 10 Regional Centres (n=10)	15.3%	14.7%	14.8%	14.6%	16.2%	16.4%	16.2%	15.8%	16.1%	16.4%	17.3%	17.2%	17.1%	17.7%
Other Regional Centres (n=49)	-	-	-	-	-	-	-	14.8%	14.9%	15.3%	15.9%	16.1%	16.2%	17.0%
<b>DDS Based Centres</b>														
All DDS Based Centres (n=167)	11.9%	11.7%	11.6%	11.4%	12.0%	11.8%	11.8%	11.5%	11.5%	11.7%	11.8%	12.0%	12.1%	13.1%
Double DDS Based Centres (n=41)	13.0%	12.6%	13.0%	12.6%	13.3%	13.1%	12.8%	12.5%	12.4%	12.4%	12.8%	13.3%	13.6%	14.5%
Single DDS Based Centres (n=126)	-	-	10.8%	10.7%	11.3%	11.1%	11.0%	10.9%	10.8%	11.3%	11.3%	11.2%	11.1%	12.0%
<b>Supermarket Centres</b>														
All Supermarket Centres (n=121)	10.5%	10.2%	10.7%	10.3%	10.4%	10.3%	10.6%	11.0%	10.9%	11.4%	11.2%	10.5%	10.8%	10.4%
Double Supermarket Centres (n=17)	-	-	-	10.3%	10.1%	10.1%	10.1%	11.1%	11.4%	11.6%	12.1%	11.3%	11.5%	11.4%
Single Supermarket Centres (n=104)	-	-	-	10.3%	10.6%	10.4%	10.9%	10.9%	10.7%	11.3%	10.9%	10.1%	10.5%	10.0%

<sup>1</sup> Sample size is based on Urbis Retail Averages 2009/10  
Source : Urbis Retail Averages

Occupancy Costs of Retail Specialty Shops - including marketing levy

INCLUDING MARKETING LEVY, INCLUDING GST

TABLE 2

Centre Type <sup>1</sup>	Financial Year													
	96/97	97/98	98/99	99/00	00/01	01/02	02/03	03/04	04/05	05/06	06/07	07/08	08/09	09/10
<b>Regional Centres</b>														
All Regional Centres (n=59)	-	14.9%	14.9%	14.4%	16.0%	16.1%	16.1%	15.6%	15.9%	16.2%	16.9%	17.1%	17.1%	17.9%
Top 10 Regional Centres (n=10)	-	15.2%	15.3%	15.0%	16.8%	16.9%	16.8%	16.3%	16.7%	16.9%	17.9%	17.9%	17.8%	18.4%
Other Regional Centres (n=49)	-	-	-	-	-	-	-	15.3%	15.6%	15.8%	16.5%	16.7%	16.8%	17.7%
<b>DDS Based Centres</b>														
All DDS Based Centres (n=167)	-	12.1%	12.0%	11.8%	12.4%	12.2%	12.2%	11.9%	11.9%	12.1%	12.3%	12.5%	12.6%	13.6%
Double DDS Based Centres (n=41)	-	13.0%	13.4%	12.9%	13.9%	13.6%	13.4%	13.0%	12.9%	12.8%	13.3%	13.9%	14.1%	15.1%
Single DDS Based Centres (n=126)	-	-	11.1%	11.1%	11.7%	11.5%	11.4%	11.3%	11.2%	11.7%	11.7%	11.7%	11.6%	12.3%
<b>Supermarket Centres</b>														
All Supermarket Centres (n=121)	-	10.7%	11.4%	10.9%	11.0%	10.9%	11.0%	11.4%	11.3%	11.8%	11.6%	10.9%	11.2%	10.7%
Double Supermarket Centres (n=17)	-	-	-	10.6%	10.5%	10.8%	10.5%	11.5%	11.8%	12.0%	12.5%	11.6%	11.9%	11.7%
Single Supermarket Centres (n=104)	-	-	-	10.7%	11.1%	10.8%	11.2%	11.3%	11.1%	11.6%	11.3%	10.5%	10.9%	10.4%

<sup>1</sup> Sample size is based on Urbis Retail Averages 2009/10  
Source : Urbis Retail Averages



## Notes for Occupancy Costs

The published figures in JHD Retail Averages 1999/00 and previous years are inclusive of the wholesale tax (WST). Therefore, the figures have been adjusted to be inclusive of GST, to bring it inline with the new reporting guidelines and reporting categories introduced by the Shopping Centre Council of Australia, which have been used since the Urbis Retail Averages 2004/05 and onwards.

In producing the Urbis Retail Averages 2004/05, Urbis performs a comparative analysis between the published 2003/04 figures with the 2003/04 figures under the new reporting guidelines and reporting categories introduced by the Shopping Centre Council of Australia. This comparative analysis is applied to bring the published 2000/01 to 2003/04 figures inline with the new SCCA reporting guidelines and categories, in order to represent, with caution, comparative trend in the Retail Averages series between pre 2004/05 series with post 2004/05 series.

Note that 1999/00 to 2000/01 still represents a break in the Retail Averages series resulting from the transition from WST to GST and significant sample variations within Regional and Sub-Regional set.

Since Urbis Retail Averages 2004/05, Urbis has adopted new reporting guidelines and reporting categories introduced by the Shopping Centre Council of Australia. It is important that readers, especially those who have used previous Urbis Retail Averages reports, understand the reporting changes that have occurred as a result, particularly in relation to the Occupancy Costs:

- Some smaller pad sites external to the centre may be included in specialty reporting categories; although the effect is unlikely to be significant.
- No annualisation of turnover has occurred. In previous years, a small number of tenants were annualised where full year results were not available.
- Occupancy Cost Ratio is calculated based on actual occupancy cost charges (exclusive of GST) for the year, divided by actual retail sales data (inclusive of GST) for the year.

Therefore, the 2004/05 survey represents a break in the Retail Averages series and the results cannot be directly compared with the previous years.

**Table 5. Stability of Tenants in Shopping Centres<sup>17</sup>**

From Year	To Year	All Centres	Regional Centres	Sub-Regional Centres	Supermarket Centres
1996	1997	88.8%	89.6%	88.9%	85.3%
1997	1998	90.0%	91.0%	88.4%	83.4%
1998	1999	89.3%	91.2%	87.1%	85.3%
1999	2000	82.2%	85.6%	80.8%	69.3%
2000	2001	87.4%	88.4%	88.5%	81.6%
2001	2002	85.9%	87.1%	85.0%	85.3%
2002	2003	88.0%	88.4%	88.1%	87.8%
2003	2004	86.5%	89.7%	85.5%	81.7%

The Productivity Commission observed in 2008<sup>18</sup>: "At a broad level then, it is not apparent that the survival of Australian retailers, and hence churning of retail tenancies, is not significantly different in shopping centres compared with elsewhere."

### Occupancy cost ratios in Australia compared to the United States

The Issues Paper notes that "evidence to date suggests that, compared to their overseas counterparts, many retailers in Australia pay higher rental and occupancy costs as a percentage of their turnover." The paper notes that "the reasons for this may be quite complex, including the relative cost of land, labour and construction in Australia and the location of retail centres."

It is difficult to place Australia in an international context because very few countries collect detailed and comprehensive data on sales and occupancy cost ratios, such as is reported in Australia in the annual Retail Averages. One of countries with which comparison is possible is the US and it is usually comparisons with the US which crop up in commentary. In 2009, in order to provide an objective assessment of Australian and US occupancy cost ratios and sales productivity, the SCCA commissioned Michael Baker, an independent retail consultant and former Head of Research for the International Council of Shopping Centers (ICSC), to analyse this issue<sup>19</sup>. We have referred to his conclusions in relation to sales productivity earlier in this submission (see p.7).

This report found that for regional shopping centres average occupancy cost ratios are around 3.5 percentage points higher in Australia than in the US. For neighbourhood shopping centres, the average occupancy cost ratios are about 3 percentage points higher than in Australia. The major explanation for this discrepancy between the two countries is the much higher retail space per capita in the US compared to Australia. The report noted: "The imbalance between supply and demand (historically tilting towards oversupply) causes shopping centres to operate at lower average occupancy rates than in Australia. This creates an environment where owners need to trade off more in rent to keep centres at acceptable occupancy levels."

A more focused comparison of relative occupancy cost ratios is provided by figures released by the Westfield Group on 11 May 2011 in its update for the first quarter of 2011<sup>20</sup>. Westfield owns a portfolio of 55 regional shopping centres in the US and 52 in Australia and New Zealand.

<sup>17</sup> Table supplied by Urbis. This data is only available until 2003. Prior to then the Retail Averages were calculated by Urbis based on tenant lists supplied by companies. After this year a new method of collection was adopted, in order to reduce administrative costs, and tenant lists were no longer supplied.

<sup>18</sup> *The Market for Retail Tenancy Leases in Australia*, op.cit. p.34

<sup>19</sup> 'US and Australian Shopping Centres Performance Comparison', Michael Baker, op.cit.

<sup>20</sup> Available on the website at <http://www.westfield.com/corporate/>

The update showed the average specialty occupancy cost ratio in Australia and New Zealand, at 31 March 2011, was 18.3% and in the United States it was 16.0%. (Retail occupancy rates in Australia were around 99.5% and in the US occupancy rates averaged 92.3%). It should be noted, however, that this is not a like-for-like comparison since specialty stores in Australia generally average only around 100 square metres while in the US such stores can comprise up to around 1,000 square metres and include what in Australia are categorised as 'mini-major' stores. Westfield has advised that when these are removed from the US sample, the gap in occupancy cost ratios between the two countries narrows to around 1.5 percentage points.

As noted previously, attention is often focused on the differential between the two countries in occupancy costs despite the fact that the general differential is only around 3-3.5 percentage points and, in the Westfield comparison, is much lower. Little attention is given to the other side of the coin – that the sales productivity of Australian shopping centres is nearly double that of US centres (as noted on page 7 of this submission).

The Productivity Commission examined the issue of occupancy costs in Australia and the US in 2008. It found<sup>21</sup>: “Despite the arguments on either side, if occupancy costs are found to be different or the same in Australia and the United States, it does not provide any direct evidence of market failings. For example, the demand for and supply of retail space is likely to differ significantly and a number of external factors influence what returns landlords would expect (such as construction costs, geography, market risks, and the return earned on alternative investments) and as such what level of rent is paid. Also if rents were found to be different, or the same, it would not provide evidence of a problem in the retail tenancy market in either Australia or the United States.”

### **Retailer profitability**

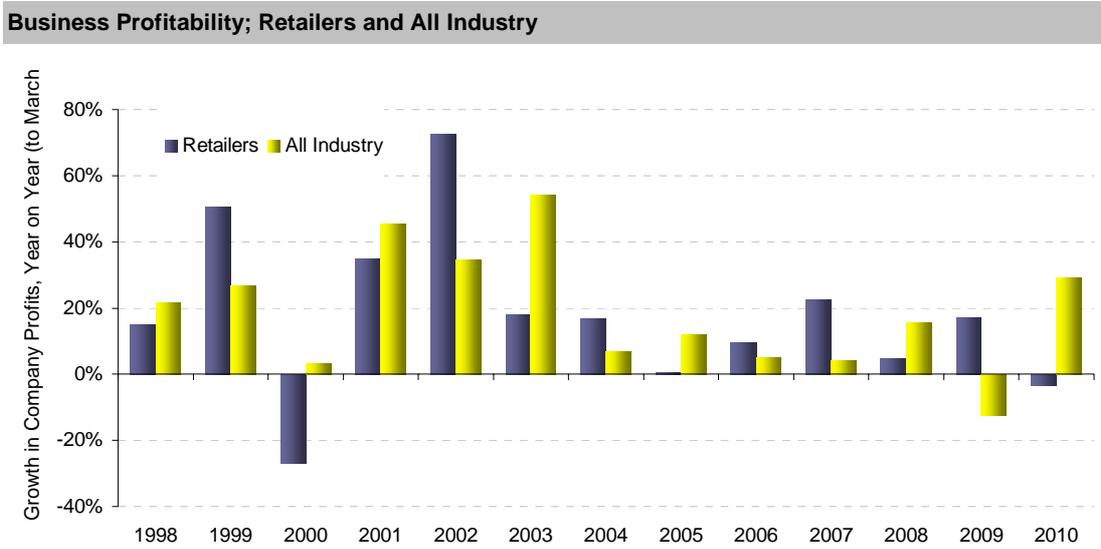
Occupancy cost ratios must also be considered in the context of overall retailer profitability. The Issues Paper notes that in 2008-09 the profit margin on sales revenue in the retail sector was 3.9 per cent, lower than the majority of other sectors. This is not surprising given that this was a relatively poor year for retail sales.

A much longer perspective is provided in **Table 6**. This shows, according to ABS figures, the growth in retailer profitability year on year (to March each year). Since 2000 (a poor year for retailer profitability) profitability of the retailer sector has grown most years by double digit figures. Note, particularly, that after poor years for profitability, profits have tended to rebound substantially. For example, after 2000 (when profitability fell by more than 20%), profits rebounded in 2001 by 30% and in 2002 by 70%; and after 2005, when profits increased only marginally, they rebounded in 2006 by 21%. The table shows that in one year in every two the average growth in retailer profitability outstrips the average growth in all industry profitability.

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<sup>21</sup> *The Market for Retail Tenancy Leases in Australia*, op. cit. p. 130

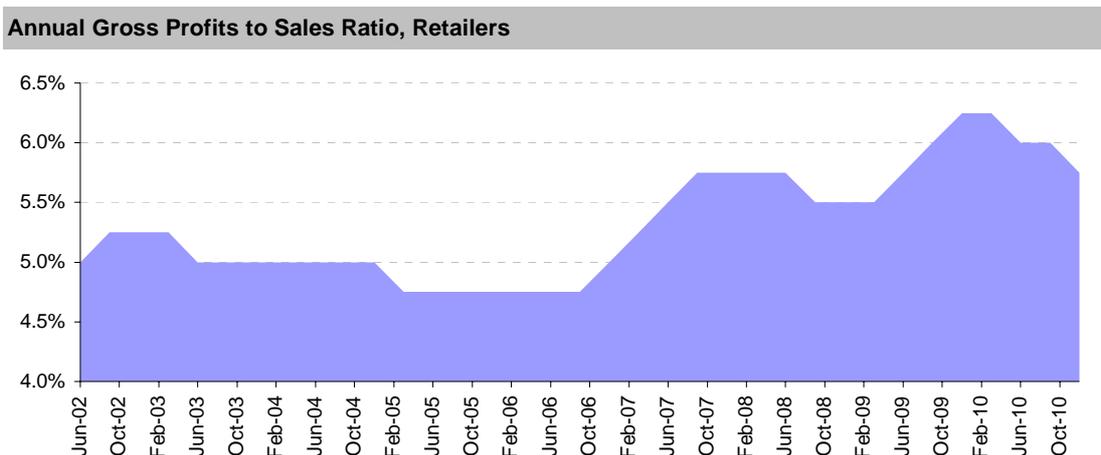
**Table 6 Business Profitability, Retailers and All Industries<sup>22</sup>**



Source : ABS Cat 5676. Business Indicators December (Year to Dec); Urbis

Annual retailer profitability is demonstrated in a different form in **Table 7**. This shows the annual gross profits to sales ratio since June 2002. In most years this ratio is above 5%, although in recent years this has averaged between 5.5% and 6%.

**Table 7. Annual Gross Profit to Sales Ratio, Retailers<sup>23</sup>**



Source : ABS Cat 5676. Business Indicators Dec 2010; Urbis

<sup>22</sup> Supplied by Urbis, ABS Cat. 5676 Business Indicators (Year to December)

<sup>23</sup> Supplied by Urbis, ABS Cat. 5676 Business Indicators December 2010

The Issues Paper also notes (p.7) that an IBIS World survey of the top 1350 businesses across all sectors ranked retail trade companies second highest in returns on shareholders funds (after tax) over the five years 2009-10, with a total return of 22% compared to the industry average of 12%. The Issues Paper also notes (pp. 7-8) that Citi International, based on an international survey, found many of Australia's larger retail firms "also enjoy higher profit margins than their overseas peers."

Similarly, an analysis by Moelis and Company<sup>24</sup> in October 2010, concluded: "In the context of shopping centres, despite the benign sales environment and pressure on prices through continuous sales campaigns, the retailers trading within retail malls remained generally profitable. Well positioned centres continue to be the location of choice for specialty tenants (evidenced by solid occupancy requests) due to high consumer exposure. The continued success of most major retailers and the emergence of new brands and formats should ensure the good malls have continued strong occupancy." This analysis also found that a survey of both major retailers and speciality retailers, between 2006 and 2010, showed that "annual EBIT margins generally trended higher."

It is clear from these surveys of retailer profitability that occupancy cost ratios in shopping centres, although they have trended higher over the past few years (except for neighbourhood shopping centres) are sustainable. Nevertheless, as we noted earlier, the history of occupancy cost ratios over the last 15 years suggests these will fall once retail sales rebound.

The Productivity Commission has previously examined<sup>25</sup> the rate of market entry and exit for the retailing industry. "Data on the number of businesses and exit and entry rates show that for retail businesses, entry and exit rates are in line with the relative share of retail businesses in the Australian economy. This is the case for all industry categories examined. This suggests that there is no systematic industry-wide feature of retailing that consistently leads to higher than average business failures." The Commission concluded: "Entry and exit of retail businesses is not exceptional compared to other service activities. The survival of retail businesses in shopping centres is in line with survival rates of retail businesses elsewhere."

The Productivity Commission also examined industry profitability and noted: "While information on retail business performance within shopping centres is not available, aggregate information on profitability in the retail sector does not reveal substantial profit gaps. Indeed, the proportion of retail businesses operating at a loss is close to the industry-wide average over the period 2001-02 to 2005-06."<sup>26</sup>

***Are the retail tenancy reforms being implemented in an appropriate and timely manner?***

No. It has taken the various jurisdictions over two years to agree on the content of a common lessor's disclosure statement and, so far, only NSW, Victoria and Queensland have agreed to adopt a common disclosure statement. That agreed disclosure statement, which took effect in these States on 1 January 2011, is still deficient because of peculiar state legislative requirements and a single disclosure statement, which can operate each of these states has still not been achieved. A single disclosure statement, which can operate in all jurisdictions in Australia, must be achieved.

<sup>24</sup> *The Australian Retail Mall Sector: Time to Buy for an Upturn*, Moelis and Company, October 27, 2010, p.28

<sup>25</sup> *The Market for Retail Tenancy Leases in Australia*, op.cit, p. 32 and p.35

<sup>26</sup> Ibid, p.167

***Once implemented, will the reforms deliver better outcomes for the community? Are any further reforms required? If so, why?***

Yes, greater harmonisation of retail tenancy legislation will reduce administrative and compliance costs for retailers and shopping centre owners and managers which operate in more than one jurisdiction.

***Is there any evidence that owners of major retail complexes in Australia exert market power to command higher rental and occupancy costs than are experienced in many overseas markets?***

This has been addressed above - see pages 25 to 33. It was noted earlier that the determination of market rents is largely the product of market forces. Sometimes those market forces gives bargaining strength to lessors and, at other times, bargaining strength rests with lessees. As observed later (pages 35 to 36), there is considerable diversity of ownership and control in the shopping centre industry, and considerable competition with other retail property formats, and this militates against any owners having significant market power. The Australian Competition and Consumer Commission has never expressed concern about market power in the shopping centre industry.

***Is it inevitable that Australian retailers must pay higher rental and occupancy costs as a proportion of sales than offshore counterparts? If so, why and what factors cause this? Does this mean that Australian retailers will have to charge higher prices to maintain reasonable levels of profitability?***

This has been addressed above. See pages 30 to 33.

### 3.4 Other competition issues: Market structure and conduct (Issues Paper pp.31-34)

As noted earlier, the bulk of the retail industry exists outside shopping centres in a range of other retail property formats, including high streets and strip shops, food courts, arcades, bulky goods and homemaker centres, and retail (or factory) outlet centres. These non-shopping centre locations comprise 62% of retail space and generate 60% of retail sales<sup>27</sup>.

By contrast, shopping centres comprise only 38% of total retail space; make up only 19% of all retail locations and around 35% of all retail shops; and generate 40% of total retail sales in Australia.<sup>28</sup>

#### Shopping centre ownership and management

The Productivity Commission noted in 2008<sup>29</sup>: “Concentration of ownership [of shopping centres] is not especially high at a State, Territory or regional level, although localised dominance of particularly owners and managers may be more apparent in smaller communities.”

The ownership of shopping centres in Australia is widely held. In 2007, according to the Property Council of Australia’s Directory of Shopping Centres in Australia<sup>30</sup>, there were:

- 16 different owners (some are in co-ownership) of Australia’s regional shopping centres;
- at least 100 different owners of sub-regional shopping centres; and
- at least 500 different owners of neighbourhood shopping centres.

Over 450 owners owned only one shopping centre and 85 owners owned only two shopping centres<sup>31</sup>. It is clear, therefore, that there is considerable diversity of ownership and control across the shopping centre industry (and, as noted above, shopping centres account for less than 40% of retail floorspace). Smaller centres are owned by a range of entities ranging from institutional investors to proprietary companies and individuals, while the owners of the larger regional shopping centres are usually major institutions such as superannuation funds and real estate investment trusts (REITS). These owners are in fact managers of the investments made in retail property by more than nine million Australians through their superannuation funds and life insurance policies and through direct investments in property syndicates, REITS and other property investment vehicles.

All these shopping centre owners compete fiercely with each other and with other retail property formats for retailers and for customers. They also take different approaches to the management and leasing of their shopping centres. Some are managed internally or by related entities while other owners engage real estate agencies, such as Jones Lang LaSalle and Savills, to manage their centres.

While there is a diversity of specialty tenants and ‘mini-majors’<sup>32</sup> in the Australian retail market, there is a limited number of ‘anchor tenants’ for larger shopping centres due to the limited size of the consumer market. There are only two major chains of department stores and only three major chains in the hands of only two owners of discount department stores. This has been made more difficult by the fact that over the last decade both of these department store chains have, at various times, been struggling for profitability and the present economic environment for both department stores and discount department stores is challenging.

<sup>27</sup> Derived from material supplied by Urbis.

<sup>28</sup> Derived from material supplied by Urbis.

<sup>29</sup> *The Market for Retail Tenancy Leases in Australia* p. 28

<sup>30</sup> Property Council of Australia, *Directory of Shopping Centres in Australia*

<sup>31</sup> Urbis, *Concentration of Ownership*, 2005

<sup>32</sup> This is defined in the SCCA Sales Reporting Guidelines as any tenant occupying more than 400 sqm which is not defined as ‘major’, ‘other retail’ or ‘non-retail’.

By definition, regional and sub-regional shopping centres cannot be developed without securing either a department store or a discount department store, respectively, as an anchor tenant. This of course increases the bargaining power of these tenants in negotiations with shopping centre owners.

Barriers to entry are an important aspect of evaluating the competitiveness or otherwise of any market. Provided that barriers to entry are absent or low, and that there is either actual or potential contestability in the markets concerned, then competitive market outcomes are likely to ensue. This is not to suggest that markets cannot exhibit segmentation into 'prime' and 'sub-prime' elements - they do, both in retail markets and other markets – but it should be recognised that competitive tensions between segments exert market discipline on both. The market structure of the shopping centre industry does not exhibit any obvious barriers to entry.

### **Competition among shopping centres and with other retail formats**

The claim is sometimes made that shopping centres are protected from competition by the operation of planning schemes and that retailers do not have a choice of whether or not to locate in a shopping centre (and accept its lease terms) or do not have a choice about *which* shopping centre they locate in (and accept its lease terms). The claim that retailers do not have a choice of location is simply not supported by the facts. For example:

- only around one third of shops are in shopping centres;
- only 40% of retail sales occur in shopping centres;
- many suburban centres and regional towns have two or more shopping centres competing with each other, and with other retail formats, for tenants;
- the catchment areas of shopping centres overlap considerably and also overlap with other retail property formats;
- unlike more concentrated industries, such as grocery retailing and department store retailing, there are 10 or more large shopping centre owners in Australia; at least 10 medium size owners; and hundreds of smaller owners, all of whom are competing against each other for retailers and shoppers;
- retailers can, and do, move out of shopping centres, or move to different shopping centres, if they regard the terms of a new lease as being too onerous.

Generally what retailers mean when they say they have no choice but to be in a certain shopping centre, or certain type of shopping centre, is that they want the benefits of the high turnover, high foot traffic and retail prominence that comes from these locations but they resent the associated high rents that come from the competition with other retailers for these same advantages – even though, in net terms, they recognise that they will be better off.

We noted earlier in this submission that one of the advantages of leasehold, over freehold, is that it gives retailers mobility in location. Admittedly moving locations may not be cost free – fitouts, for example, may not be completely amortised by the time of the move – but the retailer is not anchored to the location by having made a substantial capital outlay for the freehold of the shop.

From time to time publicity is given to retailers who decide to move out of a shopping centre, to an alternative location, claiming that rents were too high. This is an example of the competitive nature of the retail property industry. Generally these retailers decide to accept the lower turnover and lower pedestrian traffic as a trade off for the associated lower occupancy costs.

### **Functioning of the retail tenancy market**

We consider that the retail tenancy market is currently functioning as efficiently as possible given the weight of prescriptive regulation that is imposed on the industry. The Productivity Commission in 2008 found the market for retail tenancies “is a dynamic and complex amalgam of small and large businesses participating in the market as landlords and tenants”<sup>33</sup> and concluded there was not a strong case for further detailed regulation of the market.

In the shopping centre market, success depends on being able to attract large numbers of shoppers to the centre and deliver them to the doors of the retailers who comprise the centre. This is achieved through:

- the customer ‘pulling power’ of the major anchor tenants (including department stores, discount department stores and supermarkets);
- carefully managing the overall tenancy mix to offer a wide range of attractive, relevant and contemporary retail shops, restaurants and entertainment;
- the strategic siting of the shopping centre in relation to population and transport networks;
- providing convenient parking;
- developing an attractive and inviting ambience; and
- promoting the centre to customers through advertising, special events and other attractions.

Shopping centres, in order to maintain their success, are involved in what a former senior US shopping centre executive has described as the “relentless pursuit of relevance.”<sup>34</sup> This can require (in the interests of all parties - owners, tenants and customers) constant adjustments to the centre’s ‘tenancy mix’. Occasionally a new lease may not be offered because the retailer’s offering is no longer meeting customer preferences and is dragging down the performance of other retailers. Good retailers don’t oppose measures to update the tenancy mix. They want to be part of a successful shopping centre so that they can benefit from the synergies created by equally good retailers, working with centre management, to maximise the centre’s customer pulling power and sales performance.

The Productivity Commission concluded in 2008<sup>35</sup>: “The Commission did not find strong evidence that the difference in the size of market participants in the retail tenancy sector distorts the efficient operation of the market of the market. Overall, the market is working reasonably well – hard bargaining and varying business fortunes should not be confused with market failure warranting government intervention to set lease terms and conditions to set lease terms and conditions. Generally,

- there is no convincing evidence that systemic imbalance of bargaining position exists outside of shopping centres;
- inside shopping centres, there is stiff competition by tenants for high quality retail space and competition by landlords for the best tenants, reflected by relatively low vacancy rates and high rates of lease renewals;
- the more desirable tenants and shopping locations are able to negotiate more favourable lease terms and conditions;

<sup>33</sup> *The Market for Retail Tenancy Leases in Australia*, op.cit. p. xviii

<sup>34</sup> *The Relentless Pursuit of Relevance: A Discussion with Kenneth Wong*, International Council of Shopping Centers Research Review Vol 14, No. 2, 2007

<sup>35</sup> *The Market for Retail Tenancy Leases in Australia*, op. cit. pp.xxv and xxvi

- the incidence of business failure in the retail sector is not exceptional compared to other service activities; and
- formal disputes are relatively few and widely dispersed both geographically and according to shopping formats.

In this environment, it is unlikely that market tensions will be resolved or eliminated by government intervention into contracts through retail tenancy or other regulation." Indeed the Productivity Commission concluded<sup>36</sup>: "The case for greater prescriptiveness of lease terms and conditions in tenancy legislation is weak."

***Are there any important competition issues or specific aspects of the enforcement of competition laws, that have not been considered by recent reviews that need to be addressed?***

No. The Productivity Commission has conducted two major inquiries in the past four years which deal with competition issues in the shopping centre industry. The first was the inquiry into the market for retail tenancy leases in Australia in 2007-2008. We have quoted from the Productivity Commission's conclusions about the market for retail tenancy leases above.

The second was the inquiry into planning, zoning and development assessment in 2010-11, which also considered whether the planning and zoning system hindered retail competition. The recommendations of the first inquiry are still with governments for consideration and the recommendations of the second will soon be before COAG. There is certainly no need for any further inquiries.

There have also been several inquiries by parliamentary committees and an expert panel into the operation of section 51AC of the *Trade Practices Act* (now section 22 of Schedule 2 of the *Competition and Consumer Act*). The recommendations of the expert panel are now being implemented by a *Competition and Consumer Legislation Amendment Bill*, which is to be introduced in the current Federal parliamentary session. It is important, once this amendment is passed, that there be no further inquiries or legislative amendments for the foreseeable future. A period of legislative stability is desperately needed in this area.

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<sup>36</sup> Ibid. p. xxviii

### 3.5 Other regulatory burdens imposed on the retail industry (Issues Paper pp. 36-37)

#### Retail tenancy regulation

Shopping centres, and the retailers within them, are essentially a distribution channel between producers of goods and services at one end and consumers at the other. Although some of the costs imposed on a distribution channel will fall on retailers and others will fall on shopping centre owners, the majority of costs are ultimately passed on in retail prices and will therefore fall largely on consumers.

Regulations which artificially direct which costs must be borne by which party in the retail distribution channel cannot change their ultimate imposition on consumers and may serve only to increase the overall costs of a particular retail channel. Therefore it is very important any regulation also provides an efficiency gain in order to offset its costs.

State and Territory retail lease legislation regulates almost every aspect of the retail tenancy relationship and as such imposes significant constraints on the efficient operation of the retail tenancy market. The level of intrusion in the market ranges from requiring landlords to renew leases; to dictating how rent is reviewed; to prohibiting landlords from directly passing on some tenancy costs to tenants. In some states legislation bans certain methods of rent review that are permissible and common in other states. In other states, shopping centre owners are prohibited from directly passing on to tenants their proportion of the cost of land tax or the costs associated with the preparation of the lease but this is permitted in other states. By contrast, we are unaware of any legislative restrictions on the costs which retail tenants can pass on to their customers.

Both landlords and tenants are, of course, subject to the forces of supply and demand in relation to their capacity to pass on costs in rents or in retail prices. Nevertheless all of these rules and restrictions impose costs on the shopping centre distribution channel that are not imposed on other retail distribution channels, such as internet shopping, (or, for that matter, other property classes) and are ultimately borne by consumers in the retail prices they pay.

#### Costs imposed by retail tenancy regulation

Costs imposed on the retail tenancy market by retail tenancy regulation include:

- the cost to shopping centre owners and managers of providing ongoing training to their centre management and leasing staff to ensure they comply with the eight different sets of retail tenancy regulation around the country plus the unconscionable conduct provisions of the *Competition and Consumer Act*. For national companies operating in a number of states, the cost of compliance training is obviously considerable;
- the cost to shopping centre owners and managers of providing all the required disclosure documentation to prospective tenants within the required time frame;
- the cost to shopping centres of preparing and auditing outgoing statements;
- the cost to shopping centres of preparing and distributing marketing and promotions statements;
- the administrative cost of meeting procedural requirements for rent reviews, rent renewals and lease terminations;
- the delays and cost to shopping centres of complying with relocation and demolition requirements when redeveloping a shopping centre;

- costs such as land tax or lease preparation costs that shopping centres owners are prohibited from passing directly on to tenants;
- the ongoing cost to taxpayers of the government bureaucracies established in each state and territory to administer retail tenancy regulation;
- the ongoing cost to taxpayers of information publications for retail tenants at the Commonwealth level and in each state and territory; and the ongoing cost to taxpayers of the retail tenancy dispute resolution mechanisms.

We acknowledge that a proportion of these costs would be incurred even without retail tenancy regulation. Shopping centre owners and managers would still want to provide training for their leasing staff for example and would still have to pay for the preparation of leases but the administrative complexity and therefore compliance costs would undoubtedly be much less.

The majority of these costs are ultimately borne by consumers but if the costs continue to increase to the point where the returns to retail property investors are well below the returns from other property investments (or indeed from other investments generally) then retail property will become less attractive to investors and retail property investment will decline. This would, of course, reduce the supply of retail property and therefore, assuming the demand for retail space remained the same, result in increased rents for retail property.

Unfortunately it has been our experience that the costs imposed by retail tenancy regulation receive little consideration by governments before regulation is imposed. Although most governments require the preparation of some form of regulatory impact statement (RIS) to assess the costs and the benefits of proposed new regulations, it has been our experience in the regular reviews of retail tenancy legislation, including national competition policy reviews, that these cost assessments, if they occur at all, are perfunctory at best. Little real attempt is made to properly consider what new costs are being imposed on the retail tenancy market (both property owners and tenants and ultimately consumers as well) by the latest expansion of retail tenancy regulation, or whether the goals could be achieved by less intrusive means.

In order to provide some indication of the sort of costs that can be imposed (on landlords and tenants), we have previously provided the Productivity Commission<sup>37</sup> with examples of two particular retail tenancy provisions, in Victoria and in NSW, which have imposed significant costs on landlords and tenants. Both were imposed without any assessment of the likely benefits for retail tenants and those costs have inevitably found their way into rents and prices. Since both pieces of unnecessary regulation still exist, despite our constant advocacy to have them removed, we thought it useful to also include them in this submission.

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<sup>37</sup> SCCA Submission to Productivity Commission Inquiry into the Market for Retail Tenancy Leases in Australia July 2007.

#### Case Study 1 - Section 25, *Victorian Retail Leases Act*

In 2003, a provision was introduced in the Victorian *Retail Leases Act* (section 25) which requires, after a lease is signed, that certain details are to be notified to the Small Business Commissioner. These details are: the address of the premises; the landlord's name and address; the tenant's name and address; and the date the lease was signed or renewed. It should be noted that details such as rent and other lease conditions do not have to be notified.

The justification for this regulation was a belief that such information would be necessary if the Commissioner needed to communicate directly with tenants and landlords. Thus the Act also requires (section 84) the Commissioner "for the purposes only of the Commissioner performing his or her functions under [the *Retail Leases Act*] to create and maintain a register of the information provided under section 25."

In the eight years the Act has been in operation the Commissioner has had no reason to use this information in performing his functions and apparently has no plans to do so. Even if the Commissioner wanted to communicate directly with landlords and tenants, it is doubtful the information in the register would enable him to do so. The Commissioner has commented that "concerns about currency [of the information] serve to restrict use of the lease register".<sup>38</sup>

This is because retail is a dynamic industry and leases are regularly surrendered and assigned. When either occurs, the information previously notified to the Commissioner becomes useless. Also, and despite a penalty for non-compliance, there is no guarantee the register is complete since the Commissioner does not have the resources to monitor compliance. Small landlords and small agents, for example, are sometimes not as well informed as they should be of all their requirements under the *Retail Leases Act* and many may be unaware of their obligations under section 25.

In other words, landlords are complying with this requirement for no public policy reason, and without any benefits to landlords and tenants, and at a significant cost.

The number of lease notifications under section 25 is now running at more than 14,000 each year. Assuming each notification costs a landlord, conservatively, \$50 (either by way of a charge by the solicitor handling the preparation of the lease or an internal administrative cost) then this unnecessary regulation is costing Victorian landlords over \$700,000 each year. This estimate of \$50 a lease is undoubtedly conservative and it is more likely the actual cost burden for landlords is at least \$1 million a year.

This regulation is not only a cost burden to Victorian landlords. There is obviously a significant administrative cost to the Small Business Commissioner's Office – and therefore to the Victorian taxpayer - in receiving and registering the details of around 1,200 retail leases each month and in maintaining a register, the utility of which is very doubtful.

This is an example of unnecessary regulation which is a cost to landlords but there are also examples of regulation which are a cost to tenants. The case study below refers to the system for security deposits introduced by the NSW Government in amendments to the NSW *Retail Leases Act*, which began operation in January 2006.

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<sup>38</sup> Annual Report of the Victorian Small Business Commissioner 2004-05, p.11.

### Case Study 2 - Part 2A NSW Retail Leases Act

Retail property landlords in NSW who enter into a new lease can no longer hold cash security bonds on behalf of tenants but, instead, must lodge those security bonds with the Rental Bond Board. Cash security bonds which were already held by retail property landlords under existing leases have now also been required to be transferred, together with the interest earned on those bonds, to the Rental Bond Board.

The Government justified these new arrangements on the grounds that there were too many instances where landlords had unreasonably refused to repay security bonds at the end of a lease. No attempt was made to quantify the extent of this problem.

It also promoted the new scheme as an administrative blessing for landlords who would now "save time and money" by no longer having to manage an individual bond account for each tenant. It is difficult to see how forcing landlords to go through the new procedures for lodging security bonds is less of an administrative burden for them than opening a bank account on behalf of a tenant.

Not surprisingly, many major landlords have looked at the administrative complexity of the new scheme, and the possible long delay and additional expense in gaining access to the bond in the event of non-performance of lease obligations, and have decided they will no longer accept cash security bonds. Instead they now require prospective tenants to provide a bank guarantee.

Bank guarantees, because of their administrative convenience, were already becoming more popular than cash as security for a lease and the new administrative scheme has undoubtedly accelerated their use.

One of the consequences of regulating security bonds in this way, therefore, is that fewer and fewer tenants are now able to use cash as security under their leases. This means it is now the tenant who has to spend the "time and money" in arranging the necessary lease security, rather than the landlord. This is a commonsense response to over-regulation.

There are even more substantial costs for tenants under the new arrangements, however. The amount of interest paid by the Rental Bond Board on security bonds is virtually negligible and certainly significantly less than the bank interest (minus fees) they were previously paid when these were held in bank accounts arranged by the landlord. Even taking into account the bank fees for a tenant who now has to arrange a bank guarantee, at the end of the lease such a tenant will still be financially better off than a tenant who had the same amount of money tied up in a cash deposit under the new rental bond scheme.

The justification for this new regulation was to protect tenants against unscrupulous landlords who refused, without good reason, to release the security bond at the end of the lease or were tardy in doing so. But the cost of the new scheme (in terms of interest foregone on the security bond or the administrative cost of arranging a bank guarantee) is now being carried by *all* retail tenants, including the vast majority who were never at risk of losing their deposits.

Even if we assume, generously, that 10% of tenants are now better off – in the sense that their security deposits are now more secure – all tenants (including this 10%) are now worse off because of lost interest or the higher cost of arranging lease security.

In the light of this over-regulation of the retail leasing industry, and the evidence of unnecessary regulation, the Productivity Commission should recommend to State and Territory Governments that the regular reviews of retail tenancy legislation should aim to remove unnecessary and counterproductive regulation and require a thorough analysis of costs and benefits before additional regulation is imposed. The Productivity Commission in 2008 did recommend: "State and Territory governments should remove those key restrictions in retail tenancy legislation that provide no improvement in operational efficiency, compared with the broader market for commercial tenancies."<sup>39</sup>

<sup>39</sup> The Market for Retail Tenancy Leases in Australia p. 258.

## Real estate regulation

By an accident of history, shopping centre owners and managers are also subject to real estate agent regulation which varies from state to state and imposes significant extra costs on the industry. This legislation (known as the *Estate Agents Act* in Victoria and by different names in other states) was originally introduced in order to protect the ordinary 'consumer' (i.e. property owner) in their dealings with real estate agents. This legislation pre-dated the rise of the sophisticated property owning companies and institutions but such companies are now 'caught' by the legislation. This means if those companies employ a manager to buy, sell, manage or lease the property then that agency relationship is now regulated by the *Estate Agents Act* and its equivalents. This is despite the fact that the 'consumers' being protected by this regulation are generally large sophisticated companies which do not need, or want, this legislative protection. Even more absurdly the regulation applies to the agency relationship even when the manager is a related-party entity to the property owner. Thus, for example, Westfield Shopping Centre Management must comply with the provisions of the Act even when it is managing centres owned by Westfield Retail Trust and AMP Capital Shopping Centres must comply with the Act when managing centres owned by AMP Capital Investors. This is nonsensical.

The only reason governments regulate real estate agents/managers is to protect consumers in their dealings with them. This is valid for residential property where the consumers are households with limited knowledge of real estate practices. It is not valid in the commercial property industry where the 'consumers' being protected are often large national and multinational entities which do not need consumer protection and which have detailed and legally enforceable agreements with their managers. Nor do they need a statutory fund to compensate them if their arrangements with an agent fail.

All that regulation does for these owners is impose unnecessary costs and restrict their ability to negotiate efficient arrangements with their agent. Commercial office and shopping centre managers must comply with a plethora of rules on the signing of cheques, receipts, and the collection and banking of rents. Separate trust accounts must be maintained in each state and investors cannot receive full interest on rents because it must be paid into the statutory compensation fund. Managers must also complete education courses in residential real estate operations even though they are irrelevant to their work. We have estimated that the additional cost imposed by this regulation is around \$11 million a year in NSW alone. This is a cost that is passed back to the owner of the centre and, to the extent that it cannot be recovered in rent, will reduce income to the owner.

Most of the owners of large shopping centres are major institutions such as superannuation funds and property trusts who manage the investments of more than nine million Australians. Regulation that reduces the returns to owners of shopping centres therefore adversely impacts on the retirement savings and retirement incomes of these millions of Australians.

Since large commercial property owners do not need consumer protection under the Act, the Act should no longer apply to them. For more than 10 years we have argued this should be done by taking the same approach as the *Corporations Act* which defines certain investors as "sophisticated investors" who do not need certain statutory protection. It is also consistent with retail tenancy legislation which does not apply to large retail tenants because they are big enough to look after themselves.

We are now attempting to address this issue through the proposed new national licence for property agents, under the National Occupational Licensing System, which is being considered as part of the 'seamless economy' initiative of the Council of Australian Governments.

## 4. Shopping Centre Council of Australia

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The Shopping Centre Council of Australia represents Australia's major shopping centre owners and managers. Our owners own and manage more than 11 million square metres of retail space. Our members are AMP Capital Investors, Brookfield Office Properties, Centro Properties Group, Charter Hall Retail REIT, Colonial First State Property, DEXUS Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and Westfield Group.

### Contact

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