Submission No 81

INQUIRY INTO NEW SOUTH WALES PLANNING FRAMEWORK

Organisation: Shopping Centre Council of Australia

Name: Mr Milton Cockburn

Position: Executive Director

Telephone: 02 9033 1907

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SHOPPING CENTRE
COUNCIL OF AUSTRALIA

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The Director
Standing Committee on State Development
Legislative Council
Parliament House
Macquarie Street
SYDNEY NSW 2000

Dear Sir/Madam

Inquiry into the NSW planning framework

In this submission, the Shopping Centre Council of Australia is responding to two of the inquiry's terms of reference, namely:

- 1(e) Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW; and

- 1(f) Regulation of land use on or adjacent to airports.

In relation to the other terms of reference, we endorse the Property Council of Australia (NSW) submission to the inquiry.

Background

The Shopping Centre Council of Australia represents shopping centre owners and managers. Our members are AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Colonial First State Property, Dexus Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, Macquarie CountryWide Trust, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland, and Westfield Group.

1(e) Appropriateness of considering competition policy issues in land use planning and development approval processes in NSW

Implicit in claims that planning laws are restricting retail competition are the following assumptions:

- that there is less retail space in Australia than there would be if there were no planning restrictions;

- that without these laws there would be a lot more retail development in Australia – more supermarkets, more shopping centres, and so on; and

- that there is no land available for new entrants to the retail market because of planning restrictions on the location of retail space.

It is hard to find evidence that supports these assumptions.

There is no evidence that Australia has experienced a shortage of retail floorspace or less competition between retailers. Australia has seen a doubling of shopping centre floorspace over the past 15 years and an increase in the amount of shopping centre floorspace per capita of nearly 60% from 0.53 square metres in 1991-92 to 0.84 sqm in 2005-06. Outside shopping centres, the amount of retail floorspace in Australia increased from 23.6 million square metres to 27.5 million square metres between 1991-92 and 2005-06. This increase in retail floorspace was much faster than the rate of growth of the population over this same 15-year period, resulting in the total retail floor space per head of population increasing from 1.88 square metres in 1991-92 to 2.18 square metres in 2005-06. Obviously the current turmoil in the world economy will have now had an impact but the point remains valid that retail development was not being constrained by a lack of available sites.

The main determinant of the availability of retail space available for lease in major shopping centres is not the planning system but the availability of major retailers to 'anchor' such shopping centres or anchor the redevelopments of shopping centres. Even with a relaxation of planning restrictions, retail development would still be dependent on the availability of anchor tenants (such as department stores and supermarkets) which, in turn, would depend on other factors such as the level of consumer demand and the size of the Australian market.

Nor is there any evidence that retailers are not entering the Australian market because they cannot find sites as a result of planning restrictions. Aldi for example, has opened more than 200 stores since arriving in Australia only 8 years ago, including 38 in 2008 alone. It is doubtful if an Australian large format retailer would be able to acquire that many new sites in similar mature markets in Europe or North America. Nor is it likely that these countries would be willing to overturn decades of planning policy to accommodate the demands of an Australian retailer who wants access to large sites in built up urban areas at low prices. Notwithstanding claims by Aldi that it would have liked to have opened more, this is a phenomenal growth rate for a mature retail market like Australia's. It should also be noted that Aldi has not sought to expand beyond the eastern states.

Toys 'R' Us is another example. It entered the Australian market in the 1990s and has been able to establish 29 stores. Franklins was able to rapidly expand in the 1990s with around 290 stores around Australia by the end of the decade. This proved unsustainable, however, and now there are only around 80 Franklins supermarkets remaining. The decline was due to a number of factors (including the size of the market) but an inability to find sites certainly wasn't one of them.

This leads to the conclusion that it is not an inability to find sites (because of planning restrictions) that limits the amount of retail development in Australia but rather, the size of the market. Similarly, it is not planning laws restricting how many shopping centres are built but the limited availability of supermarkets, discount department stores, and department stores to anchor them. The limited number of anchor tenants in Australia (Coles, Woolworths, Big W, Kmart, Target, Myer, David Jones) is the inevitable product of our (relatively) small retail market. The irrelevance of the planning system to retail competition is further demonstrated in New Zealand where, despite having more liberal planning laws, there is even greater supermarket concentration and less retail space per capita.

Centres Policy

Critics argue that by concentrating retailing in designated urban or town centres, governments have restricted the supply of available retail land, especially land suitable for large floor plate retailers, such as supermarkets and 'big box' retailers. They further claim that existing shopping centres are shielded from competition by these centres policies.

The opposite is in fact true. Planning policies that require retail developments to cluster together in urban centres actually increase competition by allowing consumers to comparison shop. Forcing shopping centres to be surrounded by their competitors, rather than having them located some distance away, is actually intensifying the competition they face. Nor is clustering retail in one place a planner's idea. For thousands of years retailers have sought to co-locate – in souks, bazaars, Roman forums, or farmer's markets. The genesis and success of the shopping centre concept itself is testament to this.

Nevertheless, the centres policy approach was not popular with many of the early shopping centre developers in Sydney. Their preference, obviously, would have been to locate in 'out of centre' areas, where land was cheaper and development sites were much easier to acquire and amalgamate. But it was a battle which the planners, backed by successive governments, eventually won and only a few major shopping centres have managed to locate away from suburban centres on railway lines in Sydney over the last 40 years. It is therefore ironic that this approach is now under attack and existing shopping centre owners – who were dragged reluctantly into centres locations in the first place – are now being painted as the villains of the piece.

A free market - costing externalities

There is no doubt that when governments intervene to regulate a market – in this case the property market – those restrictions can have an impact on price. That is true, however, whether we are talking about retail property or residential property. If planning controls were removed, and people were allowed to build shops (or houses) wherever they liked, the price of shops (and houses) would undoubtedly be lower.

There would however be significant costs to the community from such a 'laissez-faire' approach. Economists understand that these costs are not recognised in the pure operation of the market and, for this reason, refer to them as 'externalities'. The impact of a polluting factory (or a busy shopping centre) is an externality or cost that is generally not met by the factory (or the shopping centre). These costs include such things as greater car use, traffic congestion, increased pollution and less green space. While infrastructure charges and the like have been designed to recover some of these costs, the vast majority of the costs are met by the community as a public good and are not reflected in the market price. A planning system can play a valuable role in improving equity with and between generations by taking into account the full range of economic, social and environmental costs and benefits that go hand in hand with development. This can ensure that the least well off do not bear a disproportionate share of negative externalities generated by developments.

Those calling for a free market are happy to draw attention to the negative side of planning regulation (a less efficient market which boosts the price of some land) but totally ignore the costs that would be borne (by everyone) as a result of the removal of regulation. When these critics argue for fair competition they

don't really mean 'fair'. What they want is unfair competition. They want the opportunity to develop less expensive land with the knowledge that the necessary public infrastructure required for the development and the environmental impact of the extra traffic generated by these 'out of centre' locations will be paid for by someone else.

For example, the environmental impact of trips to shops are generally externalised and yet their cost is substantial. Data from the NSW Department of Transport comparing 'average travel to shop' distances in Sydney with those in the United States shows that in 2005 the average distance of a trip in a car for shopping was 6.8km in Sydney and in 2001 in the US (nationally) it was 10.8km. Moving towards the US average would result in an estimated 500,000 tonnes of extra greenhouse gas emissions annually and increased travel costs of $1.9 billion each year[1]. These costs would not be borne by the developer of course. They would be borne by the entire community.

Therefore, when developers say there is no land available inside the urban centres what they really mean is that there is no *cheap* land available. Of course they don't say that. They dress their self interest in the soothing colours of 'greater competition' and 'lower prices.' The truth is that if an out-of-centre developer had to meet all of the economic and environmental costs of their development the attraction of out-of-centre locations would disappear.

Economic impact assessments

It has been claimed that planning laws protect existing retailers and shopping centres by requiring planning authorities to consider the impact on other retail development when making zoning decisions or assessing development applications for other retail development. This claim misunderstands the intent and practical operation of NSW planning laws. The law, as interpreted by various courts, has made it clear that competition to existing businesses, or the threat of competition to those businesses, is *not* a relevant planning consideration for consent authorities.

Fabcot Pty Ltd v Hawkesbury City Council [1997] NSWLEC 27 (14 March 1997) established that economic competition between individual trade competitors is *not* a valid planning consideration, although the overall economic impact of a development *on the wider locality* is a valid planning consideration. Justice Lloyd's principal finding (which has since been widely cited by courts and local councils when adjudicating on competing commercial developments) was that:

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

[1] *Gillespie, R. (2004) Economic Analysis of Urban Form (App 2) for TEC Sustainability Report (Sydney)*

relevance of the economic impact of a development is its effect "in the locality"; that is to say, in the wider sense described in Kentucky Fried Chicken Pty Limited v Gantidis."

In a subsequent speech elaborating on his decision in *Fabcot*, Justice Lloyd noted that *KFC v Gantidis* provided a "*limited sense in which the economic impact of a development on businesses in the surrounding area may be considered."* (Paper presented at the University of NSW: Planning Law and Practice Short Course 26 November 1997.) In this speech he quoted from Justice Stephen's judgment in *KFC v Gantidis* as follows:

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

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

It is clear therefore that competition, or the threat of competition, to existing businesses, is *not* a relevant planning consideration for consent authorities in NSW. The economic impact that a planned development may have on a local community is relevant only if it will result in an overall reduction in the level of facilities and amenities presently enjoyed by that local community. That law applies equally to existing shopping centre owners as it does to other developers. The shopping centre industry is not a static industry and new shopping centres are constantly being developed and existing centres expanded. Each such development and re-development by an existing shopping centre owner requires observance of the same planning rules and processes as every other developer.

A competition test in the planning system?

It has been suggested that a competition test should be introduced into the planning system. The United Kingdom Competition Commission recently recommended introduction of a competition test and the referral of development applications for a competition assessment. The Commission recommended that all planning applications for large grocery retailers (over 1,000 square metres) should have to be referred to the Office of Fair Trading for advice as to whether a particular retailer has passed or failed a 'competition test'.

Under the UK proposals, applications would pass the test if within the area bounded by a 10-minute drive-time of the development site:

- the grocery retailer that would operate the new store was a new entrant to that area; or
- the total number of competing stores in that area was four or more; or

- the total number of competing stores in that area was three or fewer and the relevant grocery retailer would operate less than 60 per cent of groceries sales in the area, including the new store.

While the SCCA has no objection to such competition assessments in principle we do question the wisdom of adding more complexity to the planning system when, as noted above, there is no evidence that competition is being restricted by planning policies in the first place. We also have reservations about whether such referrals or tests would be workable in the Australian context and we note that their workability in the United Kingdom has not yet been established either.

Such a proposal would add further complexity, cost and delay to state and local planning systems which are already imposing significant costs and delays on businesses. Reform of development assessment has been identified by COAG as one of its top 27 regulatory reform priorities. In this context, adding a further layer to already overloaded systems is unlikely to pass a cost/benefit analysis. At a practical level, we also question whether the ACCC would have the capacity or resources to assess every supermarket development proposal, and every supermarket lease, that is submitted or signed across the country every week.

It should also be noted that the ACCC last year notified supermarket operators and shopping centre owners that it would examine all new leases, lease assignments and lease renewals to establish whether or not they would lead to a substantial diminution of competition under section 50 of the Trade Practices Act. It is obviously more appropriate for competition among grocery retailers to be dealt with by the ACCC and the Trade Practices Act than under the planning system.

It must also be recognised that the retail environment in the United Kingdom is vastly different to that in Australia. There is a much larger consumer market and consequently much more diversity in retail in the UK. Shopping centres in the UK also have a much greater choice of supermarkets and other anchor tenants, compared to Australia. In addition the shopping centre industry is in its infancy in the UK with high street retail still the predominant retail format.

A key concern therefore would be that such a competition test in the Australian context could undermine the economics of shopping centre developments and redevelopments in Australia. If a particular supermarket brand is rejected as an anchor tenant on competition grounds, there is every likelihood in the limited Australian market that there would be no other suitable supermarket anchor tenant available and the shopping centre development or redevelopment would not proceed. This of course would be to the detriment of consumers. If there *were* an alternative supermarket available then this supermarket would obviously be able to drive a much harder bargain on rent and other lease conditions, knowing that they have been given a virtual monopsony (i.e. they would be the only buyer). This in turn could mean that rents paid by speciality retailers would have to be higher in order to make the development/redevelopment viable.

In conclusion, the SCCA does not believe that there is any evidence that planning laws are restricting retail competition or the amount of retail space generally and certainly no evidence that would warrant the imposition of more red tape in the planning process in the form of competition tests. (The impact of planning laws on retail competition was also an issue the SCCA covered in some depth in one of our submissions to the Productivity Commission's 2008 Inquiry

into the market for retail tenancy leases and a copy of the relevant sections of that submission are **attached** for the Committee's information.)

1(f) Regulation of land use on or adjacent to airports.

The SCCA has been raising concerns about the inadequacies of airport planning for many years now. Our members have a clear interest in ensuring there is a level playing field between retail developments on airport land and those on non-airport land. Over the past six years, the SCCA has lodged a number of submissions on individual airport master plans and major development plans (MDPs) as well as to the 2003 review of the Airports Act and the recent Aviation Policy Statement.

Commercial non-aviation development on airport land should be subject to the same level of scrutiny, community consultation, planning assessment and developer contributions as similar developments under state or local planning laws. We can see no public interest justification for exempting non-aviation development on airport land from the state and local planning laws that apply to every other development. While Commonwealth control of aviation development at airports may be warranted, given their national significance, there is no similar justification for exempting non-aviation development from local planning laws.

We suggest that the Committee, in its deliberations, could pose the following questions:

- *Is it in the public interest that development of large tracts of land in our major cities is exempt from the planning laws that apply to every other development in those cities?*
- *Is it in the public interest that tax payers and rate payers must meet the cost of any extra infrastructure required as a result of these developments because state and local governments cannot force airports to pay rates or infrastructure contributions?*
- *Is it in the public interest that major new retail and commercial centres can be imposed on local communities without their say so?*

The SCCA certainly does not think so, especially given that the Federal Government requires its own government businesses to comply with local planning laws and yet exempts private businesses from these laws simply because they *lease* Commonwealth land.

In the two years 2003 to 2005 we are aware of at least 20 master plans and major development plans approved by the Federal Minister for Transport. Many of these developments involved hundreds of thousands of square metres of retail and commercial floor space – the equivalent of several major shopping centres. If the airports were subject to state and local planning laws, detailed investigations would have been required for the development of such large areas of additional retail floor space in an out-of-centre location. Yet airports can sidestep this process regardless of the impact on the local community.

Perhaps one of the greatest shortcomings in airport regulation is the absence of any obligation on airports to meet the infrastructure costs of their commercial developments. At present an airport can develop a large retail centre that generates a lot of extra traffic but, unlike any other development, taxpayers and ratepayers, not the developer, have to meet the cost of road and traffic upgrades. This is clearly not in the public interest. It is also a matter of great

concern to members of the SCCA because it delivers a windfall advantage to airport lessees over other developers who are required to pay developer contributions.

We are pleased to see that the Federal Government, in its Aviation Green Paper, is proposing a number of measures to improve the oversight of airport development. These include ensuring that development on airport land is not approved in isolation from state and local planning laws and is better integrated with surrounding transport and community infrastructure; establishing expert panels to independently assess Master Plans and Major Development Plans; and requiring airports to publicly disclose more information as part of the five year review of their master plans, including significant details about their development proposals.

Nevertheless, a number of inequities remain including the absence of any developer contributions regime to ensure that airports contribute to the infrastructure costs of their developments. The SCCA believes that the exemptions the airports currently enjoy should be abolished for non-aviation development so that these developments have to comply with the same laws as everyone else.

We emphasise that we are not saying there should be no commercial or retail development on airport land. We are simply saying that if there is to be commercial or retail development on land that has previously been set aside for aviation purposes, it should be subject to the same level of public scrutiny, community consultation, planning assessment, and developer contributions as similar developments under state or local planning laws.

Other Issues

The Department of Planning is currently preparing an exempt and complying development code for retail, office and industrial buildings. The SCCA is hoping that completion of this code will mean that development applications are no longer required for shop fitouts and minor changes of use in shopping centres. New fitouts are a regular fact of life in major shopping centres and are undertaken at least every five years when a leases is renewed or a new lease is signed. Regular new fitouts are necessary to ensure that the shops and the shopping centre as a whole do not become 'dated' but remain attractive to a wide range of customers. The need to lodge a development application for each and every fitout and for minor changes of use is therefore a significant burden on retailers and can take from two to three months. Completion of the exempt and complying development code for commercial buildings would therefore represent a very welcome reduction in red tape for the retail industry.

We look forward to elaborating on these issues at the public hearings.

Yours sincerely,

Milton Cockburn
Executive Director

5. DRAFT RECOMMENDATION 5

While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

5.1 Background

This recommendation appears to be predicated on a series of assumptions:

- there is a shortage of retail space in aggregate in Australia;
- planning and zoning controls have restricted the amount of retail space in aggregate;
- planning and zoning controls have restricted the location and use of retail space; and
- planning and zoning controls have limited competition for retail space.

It is important to critically examine each of these assumptions.

In making this recommendation, the Commission appears to have taken at face value complaints about planning laws leading to lower competition in retail tenancy without assessing whether in fact there is a link between the supply of land for retail purposes and the level of competition in the market for retail tenancies. Even if planning rules do lead to a smaller supply of retail space than would otherwise be the case, that does not necessarily translate into greater concentration of shopping centre ownership or into less competitive outcomes for retail tenants. Without even an abstract link between planning controls and competition in the market for retail tenancies, it is hard to know how the states and territories would go about examining "the potential to relax those controls that limit competition".

One implication of these assumptions is that retailers, as a group, are suffering because planning and zoning controls have effectively limited their number and their ability to compete. That is, these controls have restricted competition amongst retailers themselves. If this were correct, one would expect to find that retailers themselves were making above-normal profits. We are not aware that this is a claim that retailers would support.

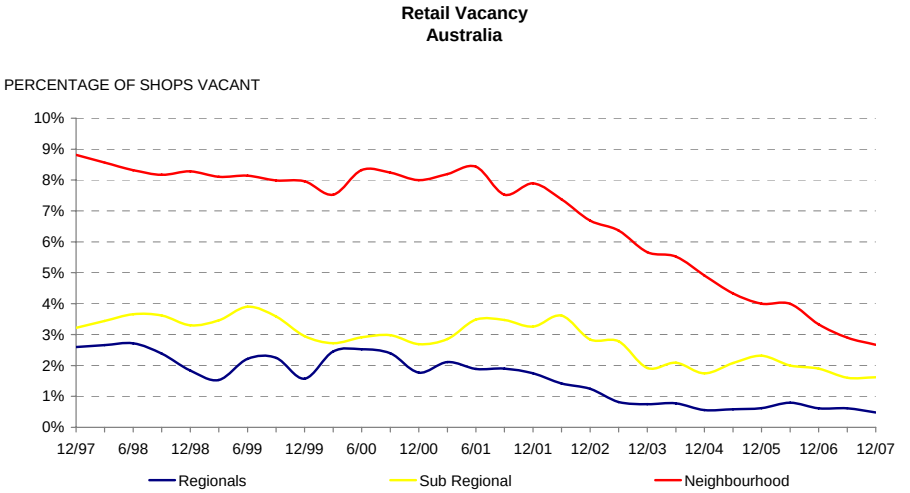
The key point is that the aggregate supply of retail space inevitably comprises a mix of outlets, from neighbourhood shopping centres through strip shopping to various types of sub-regional and regional shopping centres and other retail formats. If the Commission's recommendation is suggesting that there should be an increase in the aggregate supply of retail space, how should this be effected? If the answer is that only major shopping centre space should be increased, what are the implications for other types of retail outlets? If the recommendation applies to all types of outlets, what are the implications (a) for retailers in aggregate, and (b) for efficient use of the economy's scarce resources?

The SCCA believes that the precise meaning of this recommendation, and its full implications, including for existing retailers themselves, needs to be carefully thought through and made transparent. This exhortation extends to the costs and benefits of deviating from the 'centres policy' approach. Accurately assessing the net benefits of planning and zoning regulations is difficult, for, while there are good *in principle* reasons for government intervention to control land use at particular locations, it is difficult to present conclusive *empirical* evidence to support arguments for particular land use restrictions. These practical difficulties arise from being unable to quantify the external costs and benefits of the restrictions with any degree of certainty.

5.2 Is there a shortage of retail space in Australia?

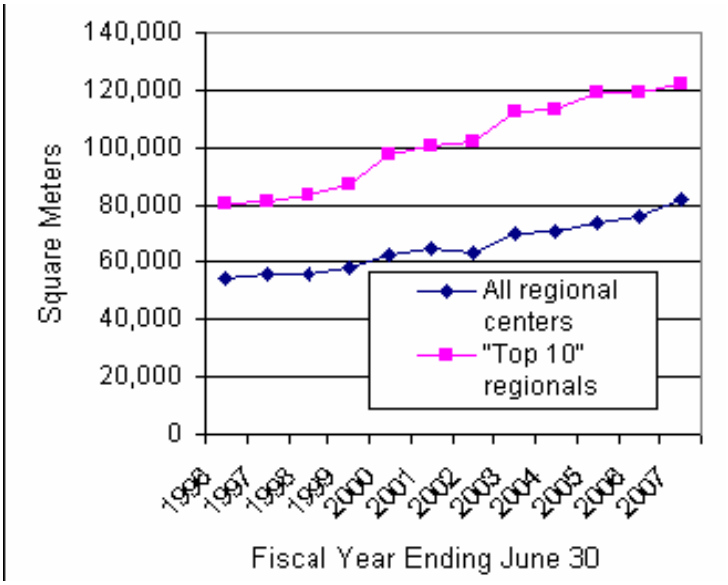
The SCCA believes there is no evidence of a chronic (as opposed to a cyclical) shortage of retail space in Australia. Nor does the draft report establish that there is a shortage of retail space in Australia.

As the Commission itself has noted, there is no evidence of a shortage of retail space in retail strips and local shopping areas (p.192). Nor is there any evidence of a significant shortage of space in neighbourhood centres (see the Jones Lang LaSalle study below which shows vacancy rates in neighbourhood shopping centres are consistently well above those in other centres – ranging from 9% to 2.7%). Certainly the vacancy rates in major regional shopping centres are low at the present time but this does not in itself demonstrate a lack of supply of regional shopping centre floor space. If the vacancy rate never changed it might, but vacancy rates in shopping centres, as in all property markets, rise and fall depending on the state of the economy, retail sales, and the number of new retail developments completed at any one time. (Moreover, relatively low vacancy rates in major regional shopping centres reflects their preferred status as retail outlets within an inevitably differentiated retail space spectrum.)



As the graph demonstrates, the retail boom of the last seven years has driven down vacancy rates across all types of shopping centres. As a result, the vacancy rate for neighbourhood shopping centres has fallen from nearly 9% in 1997 to 2.7% in 2007. The rate for regional shopping centres was almost 3% in 1997, fell to 1.6% in 1999, rose to 2.5% in 2000 and in 2007 had fallen to 0.5%. As the economy slows and more retail developments are completed, these vacancy rates can be expected to rise again.

The average gross lettable area (GLA) of Australia's regional centres, including anchors, increased by almost 6,000 sqm, from 75,798 sqm to 81,787 sqm in the financial year ending 30 June 2007. During 2006/07, regional shopping centre space has grown across the various store formats, with small specialty stores, large specialty stores and discount department stores getting the lion's share of the increase. While the supply of retail space has fallen, demand for retail space has increased as a result of booming retail sales. Average sales in regional shopping centres over 2006/07 grew by 8.6% leading to the conclusion: "Regional centers are among the best places for retailers in Australia. The regionals' +8.6% sales growth outperformed the overall retail sales increase of +6.4%, which shows the benefits of retail clustering, strong management and high-growth locations".[2]



Average GLA of All Australian Regional Centres and the Top Ten Leading Regional Centres. Source: Urbis

If this inquiry had been conducted in 1997, for example, the Productivity Commission may well have come to the conclusion that there was an (aggregate) over-supply of retail space in Australia. Indeed the Reid Inquiry in 1997 believed there was excess supply of major shopping centre floorspace as a result of overdevelopment.

[2] *ICSC Research Review Vol. 14, NO. 3, 2007, Michael Baker, Urbis,*

This suggests that what we are experiencing at present is a cyclical shortage of retail space, but a shortage that is largely concentrated in regional and sub-regional shopping centres. If retail sales growth slows (which presumably is part of the objective of the Reserve Bank's current monetary policy setting in slowing demand growth), and given the large amount of retail space coming on stream (see below), we may well be moving into another (cyclical) period of oversupply of retail space.

Australia has around 2.1 sqm of retail space per capita. This is a significantly greater amount of retailing space per capita than is available in the United Kingdom (1.3 sqm); slightly greater than New Zealand (2.0 sqm); but much less than is available in the United States (3.7 sqm). On these comparisons, there is no compelling case to suggest that our level of retail space is not about right. A recent study conducted as part of a review of retail planning policy in Victoria noted: "An important influence on the level of retail floorspace supply in Australia is the limited domestic market, coupled with high levels of economic concentration in key retail sectors. These factors largely explain the relatively restrained supply of retail floorspace in Australia in comparison to the United States."[3]

5.3 Is there a chronic shortage of space in regional shopping centres?

According to data presented in the submission by the Australian Retailers Association (No. 119), in the 12 years from 1995 to 2007 the retail floorspace in 79 regional shopping centres grew by 61.29% (from 3.9 million sqm to 6.3 million sqm). (We note that this figure of 79 must include some large sub-regional centres.) This is a graphic demonstration of the continuing growth in regional shopping centre floor-space. This is the equivalent of 34 regional shopping centres coming on stream over this period, or an average of around three new regional centres each year. This is the equivalent of 2,000 new specialty stores being created in regional shopping centres each year.

The ARA submission also claims that the fact that the vast majority of this extra regional shopping centre floor space occurred in existing retail zones and only 14% in greenfield sites is evidence of barriers to potential competitors entering the regional shopping centre market.

The fact that most additional regional shopping centre floor space occurs in existing retail zones is hardly surprising. Large shopping centres evolve over time. Very few regional shopping centres are built from scratch. Even in new land release areas, shopping centres are invariably built in stages. They may start as a supermarket based centre and then, if consumer demand warrants and there is a discount department store available to anchor it, the centre will be redeveloped as a sub-regional centre. Subsequently, if there is sufficient customer demand and a department store available as an anchor tenant, the centre may be redeveloped as a regional shopping centre. Rarely does this process occur in one go. It certainly does not

[3] *Retail Policy Background Paper No.3, The Changing Retail Scene in Australia, Ratio Consultants for the Department of Sustainability & Environment, September 2006, p.6*

indicate that there are no new competitors entering the regional shopping centre market as neighbourhood and sub-regional shopping centres are very widely held.

It must be also be recognised that regional, major regional and super regional shopping centres are the premium end of the market. As such, there will inevitably be a limited number of them. It is the same in any industry – you would not expect to find 5-star hotels on every corner or premium grade office buildings in every suburb. This does not mean there is a 'shortage' of supply of these centres, it is just a reflection of the level of demand for them. If you cannot afford to rent office space in the only premium office building in your area, it does not mean the office market is not working or that there is a shortage of supply. It simply means you must cut your cloth accordingly. There is no fundamental 'right' for a retailer to be able to open a shop in the most popular shopping centre anymore than there is a 'right' for someone to own a house in the most popular suburb.

Finally, even if the supply of retail space is constrained by planning laws, there is no direct connection to the level of competition or contestability of the market for retail tenancies. That market allocates the existing stock of retail space and there are no obvious barriers to entry to the ownership or management of retail property.

5.4 What determines the number of regional shopping centres?

With the exception of Perth (see below), the main determinant of the availability of retail space available for lease in major shopping centres is not the planning system but the availability of major retailers to 'anchor' such shopping centres or anchor the redevelopments of shopping centres. Anchor tenants are critical to the viability of a shopping centre as they are the primary drivers of consumer foot traffic in a shopping centre. Specialty retailers in a shopping centre are able directly to leverage their own businesses off that customer foot traffic as this, in turn, directly drives the sales that such specialty businesses are able to generate.

If you abolished all planning restrictions tomorrow you would not see new regional shopping centres sprouting up everywhere. For example, bilateral or multilateral agreements for a given amount of aviation capacity flown between countries does not guarantee that the full capacity will be used. Indeed, the contrary is the case. What capacity is used depends on the economic viability of the flights. In a sense, abolishing planning restrictions might raise the prospect of wasteful (excessive) use of scarce investment resources. More realistically, however, such a relaxation is likely to lead to a gap between potential investments permitted and those actually taken up – plus, possibly, sub-optimal investments where they are made (from a 'centres policy' perspective).

Even with a relaxation of planning restrictions, development would still be dependent on the availability of anchor tenants which, in turn, would depend on the level of consumer demand. Only last year, for example, Myer decided to open a department store in Townsville. Its location was the subject of fierce competition from the existing sub-

regional shopping centres and from the CBD. Myer's final decision to agree to be part of Stockland Townsville will see a substantial redevelopment of that centre as a regional shopping centre.

While Australia is limited in the number of department store chains (two), and the number of discount department store chains (three, in the ownership of only two companies) there will be a limit imposed on the growth in the number of shopping centres which is unrelated to planning considerations. It is the population constraints (reflected in the strength of retail sales in an area), and the availability of department stores (which is also tied to the strength of retail sales), which are the major constraints on the availability of regional shopping centres. In this context, it may be that the resurgence of Myer as a separate company will now see the establishment of more regional shopping centres.

5.5 Is there a concentration of shopping centre ownership?

It has also been claimed that there is a lack of competition among shopping centres because of the concentration of ownership within the sector. We would dispute that there is a concentration of ownership of shopping centres in Australia. As we noted in our first submission there are[4]:

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

This spectrum of ownership, ranging from many small owners to a relatively smaller number of larger owners, is typical of many industries, especially in a relatively small, dispersed market such as Australia.

Over 450 owners own only one shopping centre and 85 owners own only two shopping centres[5]. All these shopping centre owners compete fiercely with each other and with other retail property formats for retailers and for customers. Even the regional shopping centre market, with 16 different owners, has a much lesser degree of ownership concentration than many other industries in Australia such as media, petrol or supermarket retailing. It certainly does not constitute a monopoly, duopoly or oligopoly.

Moreover, for most retailers, locating in a regional shopping centre is only one option alongside a sub-regional centre or a high street location. As noted previously just because a retailer cannot find a tenancy in the shopping centre *of their choice* at the rent they would like to pay does not mean there is no competition or that that shopping centre has a 'monopoly' in the retail tenancy market. On the contrary, if a shopping centre is popular and successful, it is to be expected that there would be high demand for tenancies there and therefore low vacancy rates and higher rents. This is the market

[4] Property Council of Australia, *Directory of Shopping Centres in Australia*, 2007
[5] Urbis, *Concentration of Ownership*, 2005

at work. These market realities for retail space have close parallels in property markets generally. 'Location, location, location' manifests itself in various ways in various markets but all translate into a degree of market segmentation across a spectrum from 'prime space' to 'cheap and cheerful'. No amount of regulation can really change these market realities, although they may (differentially) add to costs faced by landlords, tenants and ultimately consumers.

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. They do not *have* to be there but they *want* to be there. Given the opportunity they will pay to be there.

For example, we note the comments by Hype DC Pty Ltd in the hearings on 4 February:

> *"there is no competition between lessors for tenants . . . . even in a strip centre there's only one shop usually available at one point in time, so there is only one landlord you can negotiate with, and the case is even worse in the large regional shopping centres where, as I said, if you wish to have a shop in Doncaster and you wish to have a shop in Chadstone, which we do, there is just one landlord you can negotiate with . . . unless there are simultaneous shops on offer which are by and large similar, then there is no competition between the landlords for our space".*

It is not clear what Hype DC expects. They seem to be arguing that a permanent state of oversupply of retail shopping space, or premium retail shopping space, should exist whenever they want to sign a lease. If they want to locate in one particular shopping centre, or be in a premium shipping centre in one particular location, then obviously there is only one landlord to negotiate with and surely they do not expect there to be ten different shops available for them to choose from at the one time. That would potentially be a waste of scarce resources. More realistically, investment providing an excess supply of retail space would not be viable over time, and investors doing their sums would recognise this and (not) act accordingly.

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 major shopping centres competing with each other, and with other retail formats, for tenants – Bondi Junction and Chatswood are just two examples in NSW.
- the catchment areas of shopping centres overlap considerably and also overlap with other retail property formats so each of these retail formats is constantly battling to maintain and expand its market share;

- 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.

To take one example of the competition faced by regional shopping centres and the choices facing tenants and potential tenants - the Chatswood region in the northern suburbs of Sydney. Here there are two regional shopping centres (Chatswood Chase and Westfield Chatswood), each under different ownership and management, only a few hundred metres apart, with a very lively retail plaza and high street between them. In addition, there will be a new retail precinct when the new Chatswood transport interchange opens and Precision Group announced this week that its first Sydney shopping centre, Metro Chatswood, will be anchored by a Woolworths supermarket.

There are four other shopping centres, under different ownership, within a one kilometre radius of these centres and if we go out to a radius of five kilometres, which is still within the primary trade area of the two regional centres, we find another nine shopping centres. There are around 1,850 individual shops within a radius of five kilometres of Chatswood. Of these only around 400 or so are located within Westfield Chatswood and Chatswood Chase. In other words, the shops within those two centres represent only 22% of individual shops within the Chatswood region.

Head west to, say, Mt Druitt, which has one regional shopping centre (Westfield Mt Druitt) and another two regional centres (Westpoint and Penrith Plaza), both under different ownership, overlapping its trade area There are a further 30 competing retail formats within Westfield Mt Druitt's trade area. These centres are also about to get another competitor in the form of the new Rouse Hill Town Centre, a regional shopping centre, which opens next month.

5.6 Do planning and zoning controls restrict the amount of retail space?

Planning controls obviously have an influence on the total amount of retail space, just as they have an influence on the total amount of office space, industrial space, hotel space and so on. With the exception of planning laws in Perth, however, Australian planning laws do not impose a numerical limit on the amount of retail floor space. Nor do they impose greater restrictions on the supply of retail space than they do on the supply of other property classes.

Australia has seen a massive increase in shopping centre floorspace over the past 25 years. In the year 1981, 300,000 sqm was added to shopping centre stock - an increase of almost 3% of existing stock. In 1991, almost 400,000 sqm of shopping centre retail space was created (a 3.5% increase), in 1998 there was an extra 800,000 sqm built (a 7% increase) and in 2005 an additional 700,000 sqm of shopping centre floorspace.[6]

The amount of retail space per head of population has also grown substantially over the last 15 years. If we examine, first, the supply of shopping centre space, the amount of shopping centre floorspace

[6] *Australian Shopping Centre Industry Development History, Centro Properties, 2007, sourced from JLL and CFS Research*

almost doubled in Australia between 1991-92 and 2005-06, from 9.2 million sqm to 17.3 million sqm, an increase of 88% in 14 years. This was much faster than the rate of growth of the population, resulting in an increase in the amount of shopping centre floorspace per head of population from 0.53 sqm in 1991-92 to 0.84 sqm in 2005-06 (up nearly 60%).

If we look at the supply of non-shopping centre space over this same period, this also increased, although not at the same rate of growth as shopping centre floorspace. Retail floorspace other than in shopping centres (i.e. strip retailing, CBD retailing etc.) grew from 23.6 million sqm in 1991-92 to 27.5 million sqm in 2005-06. This was less than the rate of growth of the population over the same period, resulting in a slight fall in the amount of non-shopping centre floorspace from 1.35 sqm in 1991-92 to 1.34 sqm in 2005-06. Overall, however, the total floorspace per head of population increased from 1.88 sqm in 1991-92 to 2.18 sqm in 2005-06. There is no evidence that this amount of floorspace per capita has stabilised or has begun to decline.

A recent survey[7] by Landmark White in NSW, Queensland and Victoria, has shown there is substantial new retail development in the pipeline (that is, in the planning stage, the development approval stage or under construction). In Queensland for example, there is an estimated 1.5 million sqm of retail space at various development stages (an increase of 44% in the last 12 months.) There is around 730,000 sqm awaiting development approval (of which 100,000 sqm is sub-regional shopping centre floorspace and 50,000 sqm is regional floorspace). There is another 320,000 sqm under construction including about 60,000 sqm of subregional and 30,000 sqm of regional shopping centre floorspace. Over 610,000 sqm of bulky goods retail is in the pipeline including 26 projects awaiting development approval and 17 under construction. In NSW, there is over 2 million sqm in the development pipeline and in Victoria, some 840,000 sqm of new retail supply. (Landmark White did not survey the other states or the territories.)

There is only one State Government which currently imposes a numerical limit on the amount of retail floor space and that is the Western Australian Government. Under *Statement of Planning Policy 4.2 – Metropolitan Centres Policy*, the WA Government imposes retail floorspace limits on shopping centres in Perth. This has had significant implications for the supply of retail space in WA. In Perth, for example, the largest shopping centre is limited to 80,000 sqm of retail floorspace which is significantly less than the size of some regional shopping centres in other states. The largest shopping centre in WA, by lettable floor area, ranks number 34 nationally. This month the retailer David Jones was reported[8] as saying that its planned expansion of stores in WA was being hampered by these restrictions. The SCCA has been seeking the abolition of these limits for some time and has recommended this be an outcome of the Government's current review of the metropolitan centres policy. If

[7] *Landmark White, Landmark Byte, Retail Market Updates, November 2007 and January 2008*
[8] *West Australian, 12 February 2008, p.37*

the Commission is suggesting that numerical limits like this on retail space be lifted, then the SCCA would strongly agree.

5.7 Do planning laws restrict the location and use of retail space?

The Commission is correct in its draft finding 12 that zoning and planning controls restrict the *location* and *usage* of retail space. In restricting the location of retail space, however, it must be recognised that planning laws impose no greater constraints on the retail property market than they do on other commercial property markets. Planning laws dictate where retail development can and cannot occur, just as they dictate where office, industrial, or residential development can occur. You cannot build a shopping centre anywhere you want anymore than you can build an office block or a factory, or indeed a house, anywhere you want.

So why have governments intervened in the market to stipulate where retail developments should occur?

In general terms, planning laws have been introduced to maximise positive externalities (by increasing the use of Government funded public goods such as public transport infrastructure, for example) and to minimise negative externalities (such as excessive traffic congestion or adverse effects on public health where housing is too close to a hazardous industry). It should be noted that national competition policy reviews of state and territory planning legislation have all acknowledged that there are sound public policy reasons for regulating land use and none have resulted in the abolition of planning controls in any significant way. For example, Victoria completed a review of its Planning and Environment Act 1987 in 2001 and found that the legislation "achieved its objective in an effective and efficient manner, and that *the competition restrictions identified were in the public interest*"[9].

In the case of retail development, governments in Australia (and in the UK and elsewhere) have for many years required major 'trip-generating' activities like retail and commercial development to co-locate in 'urban centres' (or 'activity centres'), with established public transport services and infrastructure, and prohibited them from locating outside such centres.

Governments have intervened in the market in this way in order to minimise the environmental and economic costs to the community of dispersed retail and commercial development and to maximise the public benefits. The potential costs include greater traffic congestion and air pollution as people make multiple car trips to dispersed shops and offices; greater demands on scarce public resources for duplicated infrastructure; and the 'blight' caused by half empty and run down town centres and shopping centres (which inevitably lead to calls for taxpayer funding of urban regeneration and 'main street' programs).

The public benefits of centres policies include greater use of public transport (and therefore more efficient use of the public investment in this infrastructure); more vibrant urban centres; and more

[9] *National Competition Council, 2003 NCP Assessment, page 10.6*

convenience, choice and competition for consumers because retail and commercial services are located close together. These 'centres policies' also give confidence to governments in terms of their own investment decision-making. Concentrating retail, commercial and public facilities in designated 'centres' optimises the investment of taxpayers' funds in public infrastructure such as public transport, roads and utilities.

As the ACCC noted in its submission (no. 128):

> *"The creation of dedicated shopping districts or centres effectively reduces transport and time costs for consumers who wish to engage in comparison and multi-purpose shopping, making such areas an attractive destination. Consequently, retailers catering for these types of consumer categories choose to co-locate to minimise costs and maximise people traffic and profits. In particular, multi-purpose shopping by consumers means that the co-location of retailers selling dissimilar goods reduces consumer search costs. Similarly, comparison shopping by consumers means that the co-location of retailers selling similar goods reduces consumer search costs."*

In this context we noted comments by Professor Zumbo during the Commission hearings in Sydney (p.331) that if "people cannot build a shopping centre next to you or very close to you because of zoning laws, that's a very high barrier to entry, . . .". Professor Zumbo does not seem to realise that current planning restrictions on shopping centres actually *require* them to locate next to each other or close to each other in urban centres – thereby enhancing, not diminishing, competition.

All Australian Planning and Transport Ministers have committed to this 'centres policy' approach through the *National Charter of Integrated Land Use and Transport Planning,* which "seeks to ensure that the bulk of goods and services are located at hubs and linked effectively by an efficient transport system" which "allows for the optimisation of investment decisions and better use to be made of existing infrastructure and services". This objective seeks to ensure that provision of public goods is efficient and that social and environmental externalities are minimised.

Retail developments that are permitted outside these urban centres generate their own demand for road and transport infrastructure and, in a constant climate of scarce public resources, this will inevitably be at the expense of continuing public investment in designated urban centres. Out-of-centre developments which generate significant transport demand (such as major retail developments) are therefore to be discouraged because of their significant community and environmental cost.

In NSW, for example, the concentration of commercial and retail activities in urban centres has been the basis of planning laws for over 40 years. During this period, many shopping centre developers (like some retail outlet centre developers today) wanted to locate in stand alone, out-of-centre locations, as developers were able to do in the United States. They were, however, largely prevented from doing so and instead were required to locate in existing centres. That is

why, today, the vast majority of major Sydney shopping centres are located in urban centres, with obvious community and environmental benefits. Some other states which did not impose such requirements decades ago, such as some parts of Queensland, are now confronting the problems that dispersed retail development has generated.

Of course, the alternative to the Australian and UK approach would be the planning free-for-all that has occurred in many parts of the United States. As a result of this 'laissez-faire' approach to the location of retail development, the United States not surprisingly has more retail space per person than Australia – both outside and inside shopping centres. In shopping centres, there is around 1.8 sqm per capita in the US compared to 0.8 sqm per capita in Australia. Total retail space in the US is 3.7 sqm per capita compared to 2.1 sqm per capita in Australia. Not surprisingly, with a much greater supply of leasing space, rents will be lower – both inside and outside shopping centres. This has come, however, at a significant social and environmental cost including the spectre of 'urban blight' in some of the United States' major cities.

Some of these cities, such as Sacramento in California[10], faced with declining CBDs and urban centres, are now rethinking their approach and instituting restrictions on out-of-centre developments As a general observation, it is interesting to note that New Zealand, which has less rigorous planning rules than Australia, actually has less retail space per capita than Australia.

5.8 Do planning laws restrict competition for retail space?

The Commission appears to be under the misapprehension that allowing other retail formats to locate on non-retail land (such as airports, industrial land or other out-of-centre locations) is one way of providing 'competition' for traditional shopping centres. The draft report states: "A number of retail developments have also emerged outside of current planning regulations, that potentially offer competition to existing retail centres" and that the distinction between bulky goods zoning and general retailing "appears arbitrary, especially if sufficient public infrastructure exists to support retailing at the bulky goods sites" (p.192).

This argument misunderstands the way the planning laws operate. As noted above, these laws (or centres policies) require retail development to locate in urban centres and restrict retail development in dispersed 'out-of-centre' locations. These policies recognise, however, the special needs of bulky goods retailers (such as furniture showrooms, homemaker centres, hardware and white goods retailers) which need large floor spaces for the display and handling of bulky stock. When these large floorspaces are not available inside or adjacent to urban centres, governments have allowed these retailers to locate outside centres in light industrial zones or in clusters in special 'bulky goods zones' beside main roads (although many bulky goods stores are in fact located in or adjacent to urban centres). Being allowed to locate on less expensive land

[10] *The Council of the City of Sacramento has adopted a "Power Centre and Big Box Retail Policy" which encourages these shopping centres to locate "in the Downtown or within a revitalization or redevelopment area".*

outside centres obviously gives bulky goods retailers a significant cost advantage in terms of rents but this is arguably justified by the much larger floor spaces they require.

Given the cost advantages of locating in industrial or bulky goods zones, however, all retailers would seek to locate in these zones if they could - which would of course completely undermine the whole aim of the centres policy in the first place. It would also have adverse consequences for the bulky goods retailers themselves because it would drive up the price of this land.

Governments have therefore prohibited traditional shopping centres and general retailers from locating in these zones and strictly limited this cost advantage to genuine bulky goods retailers (who are the only ones who warrant it due to their large floor space requirements). This in turn has required a clear definition of bulky goods retailing to ensure that general retailers cannot locate on this land too.

Clearly the distinction between general retailing and bulky goods retailing is far from 'arbitrary' but rather a critical part of a successful centres policy and a distinction that can mean millions of dollars difference in the value of land (This was highlighted in the Epicentre auction in the ACT a few years ago where a parcel of land zoned for bulky goods retailing with pre-auction valuations of $12-13 million actually sold for $39 million because of a loophole in the planning controls which arguably allowed the site to be developed for general retailing (a retail outlet centre)).

As the NSW Government states in its centres policy - *The Right Place for Business and Services*- "Regulation of the (bulky goods) format is often required to stop bulky goods outlets selling non-bulky goods……Where such concerns exist, councils are encouraged to apply floor space limits or restrictions on the type of goods for sale. *This is a fair restriction in return for the cost and locational advantages not available to other retail outlets*." (p.11).

5.9 Retail outlet centres

If there is no clear definition of bulky goods retailing, it creates a loophole which general retail developers can use to locate in cheaper industrial or bulky goods zones even though their retail offer is not bulky. Such loopholes were exploited by some (but not all) retail outlet centres and 'warehouse retailers' who sought to get around planning restrictions by claiming they were similar to bulky goods retailing, and therefore required special planning treatment. Retail outlet centres, however, are simply shopping centres by a different name, albeit centres with a much lower standard of finish, presentation and fitout than most traditional shopping centres. The average tenancies in outlet centres are usually of a similar size to tenancies in shopping centres and the centres don't need the larger spaces required for the handling of bulky goods.

There is no reason why they should have special and more advantageous planning rules applied to them. This was recognised by Justice Lloyd in the NSW Land and Environment Court decision on the Orange Grove Road outlet centre (which had located itself in a bulky goods zone) when he stated that "*the use in the present case*

is that of a retail shopping centre." The NSW planning policy *The Right Place for Business and Services* also states (p.12) that factory outlets that are not ancillary to on-site manufacturing "*are simply shops seeking low rents."*

The attempts by some general retailers (such as some retail outlet centres) to locate in bulky goods zones led to a number of court cases all of which found that the uses in question were general retailing and were not permitted in industrial or bulky goods zones. The draft report refers to these court cases and suggests that they are evidence of the commercial advantage enjoyed by some shopping centre landlords. This is not the case. These court cases were about shopping centres acting to protect their shareholders interests against competing shopping centres who were seeking to evade the law and locate on less expensive land where shopping centres are not permitted.

Allowing these retailers to locate outside retail zones in areas where traditional shopping centres are prohibited and where land is much cheaper than in retail/commercial zones, provides them with an unfair advantage in terms of the rents on offer. This is not fair to retailers in shopping centres, and in other retail locations, who are prohibited from locating on this land, and who pay rents that reflect the higher cost of land in commercial and retail zones. By contrast, forcing competing retail developments and competing retailers to co-locate in urban centres actually provides greater competition not less. Among other things, co-location facilitates comparison shopping by consumers which helps to keep prices competitive.

The majority of retail outlet centres in Australia are in fact operating in the proper retail and commercial zones and the SCCA has never been involved in legal action against outlet centres located in commercial and retail zones (and where they, arguably, provide closer, and therefore greater, competition to established shopping centres). There was no legal action, for example, associated with the development of the Brand Smart outlet centre in a retail zone in Parramatta CBD just down the road from Westfield Parramatta.

We would also point out that existing shopping centre owners paid the prevailing market price when they bought their retail zoned land or shopping centre. The centres were not a free land grant. Either someone bought the land decades ago and took the risk of developing a shopping centre on it (and is now enjoying a capital gain) or it was bought recently at the prevailing market price. This is not evidence of a lack of competition, anymore than capital gains in the residential property market are evidence of a lack of competition.

It is one thing to say "lift restrictions on where *all* retailing can occur" and "lift restrictions on where all retailers, *except traditional shopping centres*, can occur". While both would have a significant environmental impact, the former would provide a level playing field for competing retail development whereas the latter would provide a substantial windfall to every retail format except traditional shopping centres. It is not competition when one party is given a significant cost advantage over another.

In economic terms, the retail property market is regulated as it is considered good public policy to do so. That is, the negative impact caused by the loss of market efficiency is lower than the positive impacts derived from:

- more efficient use of public goods;
- the positive social externalities that flow from centres policy; and
- the reduction in negative externalities that would arise if the market had no regulation.

Treating retail outlet centres differently from traditional shopping centres undermines this policy because:

- the market remains regulated and actually gives one market participant an advantage over another without consideration of which market participant has the more productive use of the resource; and
- the goals in terms of externalities and provision of public goods that justify the market regulation are not achieved by this policy.