The Market for Retail Tenancy Leases in Australia

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Westfield

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OVERVIEW

Westfield is the world's largest listed retail property group, with interests in 121 shopping centres with 22,000 retailers in Australia, New Zealand, the United States and United Kingdom. The Group's shopping centre portfolio is valued at A$60 billion. The company was founded in Sydney in 1960 and manages all aspects of the ownership, development and management of centres. It is regarded as an innovative and progressive global industry leader.

Westfield has interests in 44 shopping centres in Australia and manages 37 of those shopping centres. The Westfield managed shopping centres within the Westfield portfolio contain 9164 retail outlets of which 8,573 are "specialty" retailers, 240 are "majors" and 351 are "mini majors."

Who owns Westfield?

The Westfield Group currently has approximately 131,000 security holders. This ownership is broad when you consider that only 20 Australian listed entities have more than 100,000 shareholders on their register.

As a Group with significant operations outside of Australia, Westfield has also attracted investment from offshore investors. The current value of offshore ownership of the Group is approximately 33%.

The Group's investor base is split between Institutional Investors who own approximately 75% of the Group and Retail Investors – individuals, companies or privately managed superannuation funds, based primarily in Australia, who own approximately 25% of the Group. Institutional investors comprise both domestic and offshore fund managers who manage investment funds on behalf of many industry superannuation funds, some of which represent Westfield Group employees, the employees of our retailers and the employees of the contractors who perform various services at our shopping centres across Australia, New Zealand, the United States and the United Kingdom.

The Australian retail tenancy market

Westfield, which has been operating internationally since 1977, believes Australia has the most efficient retail tenancy market in the world. A number of factors contribute to this: a mature and competitive retail industry; a stable economic environment; sound planning laws which encourage long-term investment in public and private infrastructure; and, a wide range of different types of retail space, from large regional shopping centres like those managed by Westfield, through to sub-regional centres, neighbourhood centres, central business districts and various forms of individual and strip shopping.

While the market is relatively efficient compared with most other countries, it is also one of the most heavily regulated sectors of the Australian economy, with comprehensive retail lease legislation in each State and Territory and Federal regulation via specific provisions of the Trade Practices Act ("TPA"). This introduces a degree of inefficiency, particularly where there are discrepancies between the States in retail tenancy laws and discrepancies between those laws and Federal laws (for example in relation to unconscionable conduct).

Westfield supports the view of the Shopping Centre Council of Australia ("SCCA") that nationwide uniform retail tenancy laws are desirable, but only on the basis that the States voluntarily surrender their legislative powers to the Commonwealth in this field. It is acknowledged that this would be difficult to achieve as a matter of political reality. There is no case for an overlay of Federal regulation which, apart from questions of constitutional validity, would only exacerbate existing regulatory inefficiency and attendant administrative cost.

Shopping centres a successful business model

There is no stronger evidence of the efficiency of the shopping centre sector of the Australian tenancy market than the growth of the shopping centre industry over the past 50 years, and the large number of retailers who continue to operate highly successful businesses in major shopping centres, including those managed by Westfield.

There are several reasons for the high success rate of retailers in these types of centres. Firstly, they are among the best managed and best performing in the country, hence the historically strong demand for space. Secondly, companies like Westfield have considerable experience at identifying retailers with the requisite business acumen to operate in the highly competitive shopping centre environment. Thirdly, especially in the case of Westfield, considerable resources are invested to help new retailers, or those experiencing trading difficulties, with a range of financial, business advisory and educational initiatives. Further detail on these programs is included in this submission.

These factors, among others, result in a high "repeat business" rate for Westfield. In 2006, roughly 75% of the five-year leases for specialty shops that fell due were renewed. Westfield understands this figure is broadly consistent historically with other major shopping centre companies. Of the balance that were not renewed in many instances this occurred at the retailer's instigation. In other instances, the leases were concluded amicably. Westfield's business model is founded on striking a balance between the obligation to maximise returns over the long-term for the thousands of investors mentioned above, and the need to attract and nurture successful retailers.

"Market failure" claims not supported by fact

There is a perception in some quarters (in part promoted by media) to identify the retail tenancy market (and perceived problems within it) as synonymous with shopping centres. However, shopping centres account for only 38% of total retail space, 35% of all retail shops and only 40% of total Australian retail sales. Further, regional shopping centres represent just 6% of all shopping centres and 28% of all shopping centre retail space generating around 12% of retail sales.

The reported concerns of some small business representatives about "distorted features" of the market which gave rise to this Productivity Commission inquiry are not borne out by the performance of retail businesses (at least in shopping centres like those managed by Westfield) nor by the number of disputes which occur. Where disputes do arise, as they are bound to in any dynamic commercial context, there are adequate and effective mechanisms provided in each State and Territory via the relevant retail lease legislation.

Statistics concerning the frequency of unconscionable conduct complaints in the period since TPA Section 51AC (dealing with unconscionable conduct in business transactions) was first introduced demonstrate that this is a relatively minor issue in landlord/tenant relationships. This fact remains publicly unacknowledged by retailer representative groups, the media and

the Australian Competition and Consumer Commission ("ACCC"). These statistics point to a conclusion that:

a. Unconscionable conduct within the industry was unlikely to have been a major problem originally (despite the clamour for reform in this area that arose from the 1997 Reid Inquiry); and/or

b. In-house compliance programs targeted particularly to retail leasing executives of major landlords and the ACCC's public awareness and educational programs for small business regarding unconscionable conduct operate successfully.

Only 20 retail tenancy disputes involving Westfield shopping centres nationally were commenced by retailers by way of an application for mediation in the relevant State Government authority, or commencement of court proceedings in 2006. Measured against the number of retail outlets (about 9,000) and the number of leases negotiated that year (about 2,250) the disputes account for less than 0.25% of the total number of business relationships between Westfield and retailers.

It is worth noting that these statistics do not include claims made by Westfield for unpaid rent.

Case for reform has not been made

It is likely that this Inquiry will receive submissions advocating a number of regulatory reforms which have been promoted during previous inquiries (such as the Reid Inquiry) and as part of regular and ongoing State-based reviews of retail tenancy laws. These include end of lease issues, such as compulsory renewal options or preferential renewal rights in speciality leases, the regulation of rents and rental increases, the further reform of unconscionable conduct laws, the need for more rigorous enforcement of such laws against major landlords (a position currently promoted by the ACCC) and the alleged inequity of rental differentials between major and specialty tenants.

A proper justification of the case for these proposals has not been made out by the proponents of reform (principally tenant representative bodies and sections of the media). In fact, many of the reform measures proposed demonstrate an ignorance of, or unwillingness to acknowledge, the basic economics and supply and demand dynamics underlying the operation of the retail leasing market in general and shopping centres in particular. Further, the incidence of unconscionable conduct in the industry can be demonstrated by actual statistics to be a relatively minor problem insofar as it arises in the relationship between landlords and retailers (see particularly Section 4 of the SCCA Submission to this Inquiry ("SCCA Submission"). Far from warranting condemnation (as represented by retailer representative groups, the ACCC and sections of the media) this should be a reason for commendation of the industry.

The proponents of increased retailer rights advocate measures that distort the commercially and legally accepted concept of the landlord and tenant relationship by abrogating to retail tenants rights and privileges that an owner is normally entitled to and should expect to enjoy. Such proposals never contemplate proper compensation being given to owners for the surrender of these rights nor an acceptance by tenants of ownership risk. No case has been made to warrant such reforms.

In any fair consideration of the case for further reform measures which would hand retailers additional rights, due weight needs to be given to:

- The fact that any such reform measures further erode the rights and value of the investment of owners (including the ownership stake in shopping centres ultimately held by 9 million Australian investors through their superannuation funds and other forms of investment).

- The fact that such measures create a protected class of tenancy with rights and privileges not enjoyed by retail tenants in other developed markets, such as the United States and New Zealand, and not enjoyed by other categories of commercial tenants or, for that matter, any other business sector within the Australian economy.

- The fact that such regulation of itself creates an additional distortion within the retail tenancy market and is antithetical to competition. As such it represents bad policy.

Although a case has not been made for reform which would make the details of individual leases publicly available, Westfield supports the view of the SCCA that it would not oppose legislatively imposed disclosure (through the mechanism of registration of leases) in States and Territories other than NSW, Queensland and the Australian Capital Territory where leases for terms over three years are already generally registered.

Media reporting of isolated incidents

The relatively small number of disputes which occur in shopping centres are usually reported in a sensational and inaccurate way in the media, creating the thoroughly false impression that these isolated incidents occur routinely across the industry.

It is in the interests of the retailer involved, and retail lobby groups, to encourage this by providing media and politicians with an incomplete, and sometimes dishonest, account.

It is also not unusual for some media to refer repeatedly to isolated incidents, or recycle them, to promote the suggestion that there is a "war going on in shopping centres." In the face of this, where media demonstrate a clear bias and an unwillingness to consider both sides of the story in good faith, companies like Westfield have no real opportunity to respond effectively. This is not a naïve complaint about media bias, but a statement of fact about the often hysterical antics of some media commentators.

Westfield is also constrained in responding in full to inaccurate claims in the media because the reasons for business failure often involve highly sensitive commercial material, such as the retailer's personal financial situation, or equally sensitive private information. For example, it is not surprising that divorce, family feuds, poor health and other changes in circumstances can impact dramatically on a retailer's ability to operate a successful business.

It has not been Westfield's policy to make such details public, even when to do so would help to respond more effectively to inaccurate and damaging allegations and media reports critical of the company. In the past it has been Westfield's view that to air such private matters could undermine the very strong and co-operative relationship the Group has with the vast majority of retailers.

However, we believe it would assist the Productivity Commission ("Commission") to provide a number of case studies which demonstrate that the version of events reported in the media is usually at odds with what actually occurred, and that these reports never contain

references to poor judgement, lack of experience, or private matters which impact on the retailer's performance. We are able to provide these examples to the Commission on a confidential basis.

Efforts by Westfield to encourage lawful and professional lease negotiations

Over the past 10-15 years Westfield has devoted considerable resources to training and compliance programs which encourage its leasing executives and shopping centre managers to be aware of their obligations under the law.

Westfield maintains a comprehensive Compliance Program covering the TPA (unconscionable conduct, misleading and deceptive conduct and restrictive trade practices) and the detailed requirements of the State and Territory based retail tenancy legislation.

The program consists of two parts.

The first is a detailed written compliance manual that is made available to all staff through Westfield's intraportal. The content of the manual is reviewed regularly and is updated following changes in law.

The second consists of regular compulsory compliance seminars attended by leasing, shopping centre management, marketing, construction and development executives. These seminars are designed to reinforce and emphasise the key messages from the compliance manual, and to give practical examples of the type of conduct that is not permissible or is inappropriate.

These executives must attend a compliance seminar at least once a year. Westfield holds additional compliance seminars when there are significant changes in the relevant legislation or when senior Westfield management identifies a particular need for the seminar to take place.

In the past 12 months Westfield has conducted nine compliance seminars in Australia attended by over 400 Westfield staff.

The Compliance Program has the backing of the senior Westfield management and is an important part of Westfield's overall risk management, staff education and corporate governance practices.

The balance of this Submission responds in greater detail to the Commission's Circular and Issues Paper, and provides information on Westfield's efforts to improve retailers' knowledge about retail tenancy issues and business generally. It also includes case studies which are representative of Westfield's approach to assisting retailers.

As noted above Westfield is also prepared to provide to the Commission separately and on a confidential basis examples of cases concerning retailers in its shopping centres which have been the subject of media publicity and where the facts have been misrepresented.

PRODUCTIVITY COMMISSION CIRCULAR AND ISSUES PAPER

SPECIFIC ISSUES FOR CONSIDERATION

SECTION 1:

What are the strengths and weaknesses of the current structure and functioning of the retail tenancy market? What are the effects (both positive and negative) on your business, and the wider community?

General Comments

Westfield considers that the retail tenancy market in Australia, although encumbered with excessive regulation, does operate relatively efficiently. As evidenced by its rapid growth over the last 50 years this market has been generally successful for all of its stakeholders – investors, owners, retailers and consumers. The retail tenancy market is estimated to comprise up to 200,000 retail leases throughout Australia. Of these, some 35% relate to shopping centres which account for approximately 38% of total retail space and generate 40% of total retail sales in Australia. A popular misconception is that the retail tenancy market is dominated by regional and sub-regional shopping centres. In fact, whilst there are estimated to be over 1,200 shopping centres in Australia, the majority of the market for retail tenancies is located outside such shopping centres in other retail formats including bulky goods, homemaker centres, shops in the High Street, strip shops and factory outlet centres. These other retail locations comprise 62% of retail space and generate 60% of retail sales.

Australia has a strong retail tenancy market that is characterised by a highly competitive retail industry, a stable economic, political and regulatory environment, strong consumer support and confidence, a generally sound and responsible planning law framework that is conducive to long term investment in public and private infrastructure and, as noted above, a diversity of retail formats. The Westfield Group's involvement in this market is as an owner and operator of shopping centres. The Westfield Group is well placed to assess the relative merits, efficiencies and structural aspects of the shopping centre segment of the retail tenancy market in Australia in comparison with the other jurisdictions in which it has substantial operations (the United States, United Kingdom and New Zealand). Based upon that comparison, it is noteworthy that excessive regulation, characterised by State and Territory based retail tenancy laws together with an overlay of Commonwealth laws such as the TPA, is a unique structural aspect of the Australian retail tenancy market. In other countries in which the Westfield Group operates, the retail tenancy market is substantially unregulated (United States and New Zealand) or partially regulated, such as in the United Kingdom, but not in any sense to the same degree as in Australia in relation to retail tenancies specifically.

The Australian regulatory framework within which the retail tenancy market operates comprises statute law which is, in the main, directed to the protection of retail tenants. As such, this regulatory framework necessarily operates as a structural limitation to the operation of free market principles, including freedom of contract. However, apart from

particular inefficiencies that arise through lack of uniformity among State and Territory retail tenancy laws (see our comments in Section 3 of this Submission), Westfield regards the existing excessive regulatory framework, the need for compliance with it and associated costs as a business reality rather than viewing the entirety of those laws and their operation in a negative way.

Does the functioning of the market for retail tenancies enable your business to operate effectively and efficiently, including in lease negotiation?

Within shopping centres, the main functional driver of the market for retail tenancies is the demand for retail space. The demand for retail space will fluctuate from time to time and will be influenced at any given time by such factors as the location of a shopping centre and of the specific premises to be leased within it; the availability to a retailer of substitute retail space; the state of the economy from time to time and its impact upon retail sales and the rate of growth of these sales at the relevant time. It is true that as a specific segment of the retail leasing market shopping centres over time have been particularly successful. The reasons for this are well summarised in the Introduction to the SCCA Submission. An obvious corollary of this success is that demand for retail space in shopping centres is higher than it is in other retail formats and thus higher sales are able to be achieved by retailers, just as higher rents are able to be achieved by owners. In turn, the great majority of retailers in such centres by achieving higher sales and higher sales growth are able to operate more profitably than they would in other locations. From time to time vocal retailer representative groups and sections of the media will attract publicity to retailer claims of instances of abuse by shopping centre landlords of supposed superior market or bargaining power, particularly in relation to rental negotiations. These claims are said to demonstrate that there are significant market distortions and inefficiencies operating to the disadvantage of retailers (an already excessively protected class) which should be rectified by urgent law enforcement and reform measures. We comment on some of those proposals in more detail below. The following general observations, however, can be made:

(a) Isolated claims concerning malpractice by landlords' (even in the infrequent instance where those claims are substantiated) do not create a case for substantive reform. In the SCCA Submission there is a telling analysis of the number of retail tenancy disputes and the number of unconscionable conduct complaints as a percentage of the number of retail leases on foot (see Section 4 of the SCCA Submission). Westfield's own experience is consistent with that analysis. Those statistics which are based on reliable and hard data indicate such claims represent a miniscule proportion (less than 1 in 1,000) of the total number of retail leases in place. This, in turn, is a compelling indication that there are no systemic inefficiencies or distortions within the market for retail tenancies of the kind advocated by the proponents for reform and more rigorous enforcement. This is perhaps the inconvenient truth which is never publicly acknowledged by those proponents.

(b) Where claims of landlord malpractice are given publicity, more often than not a one-sided perspective of the facts of the particular claim is put forward or not all the facts are revealed.

(c) If there were truly systemic issues affecting the current structure and functioning of the retail tenancy market (for example, in relation to lease negotiations) one would expect a decline in demand for retail space and consequently in the ongoing growth of that market together with a decline in the profitability of retailers within the market and in the rents that they pay. The opposite has occurred.

(d) There is a substantial, indeed excessively, retailer friendly regulatory framework within which the retail tenancy market operates. This framework incorporates a low cost and generally efficient dispute resolution process which is able to be accessed by retailers to obtain appropriate redress where genuine instances of landlord malpractice occur. Such a framework is unique to Australia and is not available to other business sectors within Australia. Again the SCCA Submission provides a useful overview of this legislative framework and of the dispute resolution processes (see Sections 1 and 4 of the SCCA Submission).

No evidence of failure in the efficient operation of the market for retail tenancy leases

For the reasons above, it is Westfield's view that whilst room for improvement exists, for example through the harmonisation of retail tenancy laws (see Introduction and Section 9 of this Submission) there is no evidence of any significant failure or for that matter of any significant shortcomings in the efficient operation of the market for retail tenancy leases of the kind claimed by the proponents for reform.

Factors influencing retail leasing arrangements

The factors that influence retail leasing arrangements in shopping centres will differ depending upon whether a lease is to be granted to an anchor tenant (such as a department store, discount department store, supermarket or discount supermarket) or whether a lease is to be granted to a specialty retailer and, as such, is a regulated lease for the purposes of applicable State or Territory retail leasing legislation.

Factors affecting retail leasing arrangements with anchor tenants

Anchor tenants are critical to the viability of a shopping centre as they are:

(a) A major point of distinction between the shopping centre format and other retail formats.

(b) The primary drivers of consumer foot traffic in a shopping centre. Specialty retailers in a shopping centre are able to directly 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.

(c) Generally commit to a long term lease which often is 20 or more years.

(d) Usually occupy substantial areas within a shopping centre of up to 25,000 or more square metres as opposed to specialty retail shops which occupy an average area of 100 square metres.

In addition, anchor tenants may also have the available alternative of locating outside a shopping centre on a stand alone basis. For all those reasons anchor tenants have greater leverage in leasing negotiations with shopping centre landlords than specialty retailers. This is an economic reality of the retail leasing market within shopping centres and it is a clear example of the application of supply and demand dynamics. It is therefore curious that publicity has recently been generated by certain sections of the media making an issue of the fact that speciality retailers pay higher rents on a dollar per square metre basis than anchor tenants.

It should be a self evident commercial principle that an anchor tenant whose presence is vital to the establishment and ongoing stability and viability of a shopping centre, who is a primary driver of foot traffic within a shopping centre from which other tenants directly benefit, who is prepared to commit for a substantial lease term and who is prepared to take up a substantial amount of space in the centre is able to secure a better rental deal than a specialty retailer which does not have those characteristics. There is nothing unusual or remarkable about this. Commercial tenants that lease large areas of space (for example, in office buildings) and/or who commit to longer lease terms are able to negotiate significantly better rental arrangements than tenants occupying smaller areas of space or committing to shorter terms. It is nonsense to argue for the removal of such rental differentials. If that was to occur, existing shopping centres would not survive and new shopping centres would not be built.

Factors affecting leasing arrangements with specialty retailers

Factors that will impact upon the leasing arrangements entered into with specialty retailers in a shopping centre will include the location within a shopping centre of the particular premises to be leased; the suitability of the particular retailer's business to the desired tenancy mix for the shopping centre; the retail track record and experience of the retailer; the degree of demand for retail space at the time of the negotiation; the availability of an alternative location for the retailer's business; the general economic conditions at the time when the negotiation takes place and the need for a landlord to comply with applicable regulatory requirements including with respect to disclosure and the highly prescriptive requirements in relation to the provisions of the lease.

An aspect of the recent debate about rents paid by speciality retailers is the assertion that there is no justification for higher specialty rents being paid (on a per square metre basis) in Australia than in the United States. Again, that debate ignores the different market dynamics at play in these two countries. For example, for historical reasons (including a lack of orderly planning regulation) there is a much greater availability of retail space for lease in the United States than in Australia. Further speciality retailers in the United States as a general rule occupy significantly more space than their Australian counterparts. At the opposite end of the spectrum is Hong Kong where there is little available space and where speciality rents can often reach $10,000 per square metre per annum. Once again these rental differences do no more than reflect the different market conditions. This issue is also analysed in more detail in Section 5 of the SCCA Submission. Westfield endorses the views expressed by the SCCA in this regard.

What do tenants and landlords look for in lease arrangements?

In leasing arrangements within shopping centres the landlord will be looking for a good quality tenant with a business that is compatible with the shopping centre profile and, in particular, with the desired tenancy mix, having an established, successful track record and who is assessed as being likely to be able to operate a successful business which will benefit not only the particular retailer but surrounding retailers and the shopping centre as a whole. In turn, a retailer will be seeking a desirable location which is exposed to high customer foot traffic conducive to achieving the highest possible level of sales. In addition, the retailer will be looking to achieve business leverage from the landlords shopping centre management expertise and will be seeking to secure an acceptable level of occupancy costs (rent and contribution to shopping centre outgoings) consistent with the prevailing market and with the retailer's expectations for its business and the sales that it expects that business to generate. In Westfield shopping centres retailers will also be looking to achieve leverage for their business from the Westfield brand.

The relationship between the market for retail tenancies and the broader market for commercial tenancies

Whilst there are obviously similarities between features of these two markets (for example, in the operation of basic supply and demand dynamics including the influence of specific factors (such as length of lease term and total area occupied)) there are clearly significant differences. For example, tenancy mix and the location of the premises to be leased are principal drivers within the market for retail tenancies whereas those factors are of lesser importance in the general market for commercial tenancies. A notable point of dissimilarity between the two markets is the highly regulated nature of the retail tenancy market in Australia with specific State and Territory based legislation governing the landlord and retail tenant relationship. As noted above, this regulatory framework which is, in the main, directed to the protection of retail tenants is unique to Australia. Further, there is no similar regulatory framework that provides similar protection to other business sectors (including non retail tenants) applying generally within the Australian economy

SECTION 2:

What are the implications, if any, for the market in retail tenancy leases, of trends in urban and regional development, and changes in consumer preferences, in technology and in ways of working? How might such changes affect retail tenants, landlords and investors?

The most notable trend in urban and regional development impacting upon the market for retail leases is the ever increasing supply of retail shops.

This trend is being partly driven by the development of new shopping centres. Recent examples of this in the Westfield portfolio are Westfield Helensvale in South East Queensland and Plenty Valley in Victoria). This trend is also driven by the expansion of existing shopping centres (a current example being Westfield Doncaster in Victoria).

However the construction of new shopping centres and the expansion of existing shopping centres is only part of the picture.

A more widespread trend is the transformation of former industrial sites (known as brownfield sites) into high density mixed use residential and retail developments.

A typical example of this is the construction of multi-storey residential apartment buildings sitting above new retail premises such as supermarkets, convenience stores, pharmacies, restaurants and cafes.

These shops, restaurants and cafes cater for the increasing number of single and double occupant households that are particularly evident in these new developments.

The revitalisation of former industrial areas by these new developments has led to the construction of neighbouring mixed use redevelopments (some recent examples in the Sydney metropolitan area being Dank Street, Waterloo; King Street, Newtown; Canada Bay, Rhodes; Jacksons Landing and Moore Park).

Other retail uses of brownfields sites include the introduction of discount factory outlet style developments (for example, DFO in Homebush, New South Wales and Brisbane Airport) and Bulky Goods super centres (for example, Auburn and Moore Park,
New South Wales).

The increasing use of the internet to browse for and purchase goods and services on-line provides another alternative to traditional retail formats.

These changes drive not only an increasing supply of retail premises across a wide area but also an increasing diversity of retail formats.

The owners of the types of retail space described above tend not to be the owners of existing shopping centres.

Over time these trends could be expected to operate as a moderating influence on rent increases for retail premises generally, although this currently is and will continue to be balanced by the ongoing demand for retail space.

The additional supply of retail space from a variety of new ownership sources is also an influence over time for increasing diversity in the overall ownership of retail premises and other retail formats.

SECTION 3:

Are there any competition, regulatory and access constraints on the effective and efficient operation of the retail tenancy market?

Market Factors

In Section 1 of this Submission we comment on the nature of the main market factors that operate within and influence the retail tenancy market.

That these factors are major drivers in relation to the shopping centre segment of the retail tenancy market is demonstrated in Sections 1 and 5 of the SCCA Submission. Further, as we demonstrate in Section 2 of this Submission concerning trends in urban and regional development and in consumer preferences, technology and ways of working the increase in the variety of retail space formats that has occurred and which shows no signs of abating has been an important contributor to an increase in the supply of retail space as well as being an additional impetus for increased ownership diversity. Whilst these factors enable the retail tenancy market to be generally characterised as dynamic and highly competitive, there are some structural features of the market which, although in some cases necessary, will operate as constraints.

Planning laws

Planning laws in place throughout Australia which limit the location of retail development (as they do for commercial, industrial and residential development) obviously have a constraining impact on the supply of retail space, particularly when one compares the Australian retail space landscape with other countries, such as the United States, where planning is far less regulated. That is a factor that has driven the greater supply of retail space on a per capita basis in the United States. Australian planning laws which, by agreement between the various States, support a "centres policies" approach (concentrating commercial and retail activities in designated urban centres served by public transport) are designed to create an orderly and sustainable system of urban development which is environmentally sound and which minimises unnecessary car use and traffic congestion whilst optimising the conditions for sound investment in private and public infrastructure.

This approach to planning benefits the community as a whole and is to be preferred to an unregulated approach to planning which is less restrictive regarding the location of retail development. In any event, the orderly urban planning framework in place within Australia has not posed any significant or undue impediment to the growth of the supply of retail space and the increased variety of retail formats (see Section 2 of this Submission).

Anchor tenants

An obvious constraint which affects the supply of shopping centre space is the relatively small number of anchor tenant businesses within the Australian retail leasing market such as department stores and discount department stores. This contrasts with the greater diversity that exists at the shopping centre ownership level and at the non-anchor specialty tenant level of the market. As we note in Section 1 of this Submission, the existence of anchor tenants is a vital factor in the establishment and ongoing viability of a shopping centre because of their unique ability to drive customer traffic, this being a significant factor that distinguishes the shopping centre model from other retail formats. Anchor tenants, in turn, are able to negotiate more favourable lease arrangements with landlords because of this value add that they are able to contribute to a shopping centre. They will generally have long term leases and will occupy significantly greater space and pay comparably lower rental on a per square metre basis than other tenants. Thus by definition anchor tenants have significant market power in the market for retail space. Further, the limited number of anchor tenant participants within the Australian market serves to increase that market power.

Over the years there has been a significant concentration at this end of the market. Currently there are only two significant department store operators, Myer and David Jones and only two significant discount department store operators, Big W and K-mart, the latter being currently under common ownership with and complemented by the more specialised Target business. Whilst the Woolworths and Coles owned businesses obviously compete against each other and their comparative strength and performance varies, the limited number of these businesses could be considered to be a constraint which has an impact not only upon the location but also the availability of new retail space in Australia (as the commitment of anchor tenants is critical to the development of new shopping centres and the expansion of existing shopping centres). The fact that anchor tenants generally have long term leases of a significant amount of space in existing shopping centres is, of itself, a factor that serves to create a significant barrier of entry to potential new entrants at this end of the market. It is therefore apparent that any further concentration of ownership at this end of the market will only serve to raise those barriers of entry further by adding to the already substantial market power of the remaining participants. That said, the recent revitalisation of the Myer business as a stronger competitor to David Jones is a welcome development within this market segment.

Excessive regulation

As we have noted elsewhere in our Submission there is, uniquely within Australia, excessive regulation of the retail tenancy lease market through the operation of State and Territory retail tenancy laws which are, in the main, designed to protect retail tenants as a class. Those laws regulate all aspects of the landlord and tenant relationship. In addition, they are supplemented by Commonwealth law principally in the form of the TPA. In particular, TPA S.51AA and S.51AC regulating unconscionable conduct and TPA S.52 prohibiting misleading and deceptive conduct are laws that are pertinent to the day to day operations of the retail leasing market, particularly in their potential application to negotiations and communications between landlords and tenants. State and Territory Retail Tenancy and associated legislation, such as Fair Trading Laws, also provide remedies for unconscionable conduct and misleading and deceptive conduct. It is apparent that the existence of this regulatory framework embeds a significant level of cost within the market for retail tenancies. This cost includes not only the cost of compliance, principally borne by landlords, but also the cost to the taxpayer of the bureaucracy and administrative infrastructure required to oversee and administer these laws.

A degree of further cost and inefficiency which nationally operating landlords, such as Westfield, need to contend with arises from inconsistencies between retail tenancy laws in the various States and Territories (which gives rise among other things to a lack of uniformity between States and Territories in the provisions of retail leases in use within different jurisdictions) and inconsistencies between State and Federal laws (for example, in some States the drawn down unconscionable conduct provisions of retail lease laws do not replicate TPA S.51AC as they specify a more extensive list of specific matters to which regard is to be given in determining whether unconscionable conduct has occurred).

Other aspects of the regulatory framework serve a useful purpose and operate relatively efficiently and cost effectively (despite procedural differences between the various jurisdictions) such as the State and Territory based dispute resolution procedures for retail tenancy disputes (see Section 8 of this Submission). Whilst Westfield considers that there is a case for improvement in the operation of this regulatory framework, particularly by achieving a uniform national law governing retail tenancies in the manner proposed in Section 9 of this Submission, our general view is that these laws which require ongoing compliance constitute a necessary business reality within Australia to which shopping centre owners are required to adapt.

Clearly as a market cost input, the costs generated by regulation are ultimately borne by investors at one end of the market and/or by consumers at the other.

SECTION 4:

Are there restrictions on the availability of information to landlords or tenants that impact on business decisions and operations?

General

Westfield does not consider that there are significant restrictions on access to information which relevantly impact on business decisions and operations within the market for retail leases.

Insofar as retail leases in shopping centres are concerned, there are detailed and prescriptive statutory based disclosure obligations applicable to landlords both in the pre-lease negotiation period, during the currency of the lease and at the end of the lease. A useful summary and analysis of these requirements is provided in Section 3 of the SCCA Submission).

At the investor level – at least in relation to the ownership of shopping centres, the Westfield Group like other publicly owned and listed landlords is required to operate within a rigorous continuous disclosure regime under the Corporations Act. This operates to ensure that information of the kind required to ensure that there is an informed market for the investment decisions of investors is made publicly available.

Symmetry of information on sales and rentals

At the retailer level, there has been some public controversy about the lack of symmetry in the availability of information to landlords on the one hand (regarding turnover figures and rents) and tenants on the other hand on the basis that such information is not generally available to retail tenants. This is said to place retail tenants at a disadvantage to landlords in rental negotiations, particularly in relation to the renewal of retail leases. This has underpinned calls by retailer representative bodies for regulation preventing landlords from obtaining turnover data – this being a current requirement of typical retail leases.

The provision of such sales data is a vital ingredient in the efficient operation of shopping centres as it enables informed ongoing analysis of the performance and market positioning of the shopping centre and an efficient monitoring of the appropriateness of the tenancy mix of the centre. Further, this information provides a data base for industry researchers as well as a general data base for benchmarking purposes for individual retailers who, in practice, will generally be given access to it.

Westfield does not accept that the so called imbalance of information regarding turnover data is a relevant factor that materially impacts upon negotiations between landlord and tenant for the grant or renewal of specialty leases. Firstly, retailers have ready access to their own representative organisations and retail consultants who, given the growth within the industry that has occurred, have significantly grown in numbers over the years. These bodies have a solid data base of information (including information concerning the trading performance of the centre, centre sales and growth in sales as well as the sales performance of particular retailer categories). Notably there are no confidentiality restrictions in Westfield's specialty leases preventing retailers supplying this information to their representative bodies.

Secondly, the major driver of rentals determined through lease negotiations are normal supply and demand factors. The balance of advantage will fluctuate between landlord and retailer depending upon the range of market factors that apply at the time when the relevant negotiation takes place. Again, Westfield supports the comments made by the SCCA in relation to this issue (see SCCA Submission, Section 5).

Information concerning rentals is generally available in New South Wales, the Australian Capital Territory and Queensland because of the need in practice for registration of leases in excess of three years in those States.

Although the registration of leases with terms in excess of three years is not mandatory in those jurisdictions, it is necessary that such leases be registered in order to ensure that the lease is enforceable in law against a landlord and its successors in title (as opposed to mere enforceability against a landlord in equity). This is done as a matter of commercial necessity and practicality by most retail tenants in shopping centres in those jurisdictions.

Westfield, as a matter of principle, is not opposed to retailers having general access to rental information, although notes that this may not be considered to be in the interests of some retailers who would prefer that such information be kept confidential. It is for that reason that Westfield considers that any voluntary disclosure regime in relation to rentals (for example, by way of a voluntary code) in relation to States and Territories other than New South Wales, Queensland and the Australian Capital Territory would be likely to be deficient. Westfield would not, however, be opposed to the States and Territories concerned adopting lease registration requirements similar to those applicable in New South Wales, Queensland or the Australian Capital Territory and views this as a measure that would address any perceived shortcoming arising from the lack of general availability of rental information. Westfield notes, however, that such a measure would involve additional costs in the nature of registration and search fees to be incurred by retailers located in the States and Territories concerned although, based upon the level of similar changes applicable in New South Wales, Queensland and the Australian Capital Territory those costs could be expected to be relatively minor.

SECTION 5:

Are the main factors influencing the level of rents and associated tenancy conditions appropriate and transparent to the landlords and prospective tenants?

The main factors influencing the level of rents and associated tenancy conditions are the state of supply and demand for retail space from time to time and the factors that affect and influence those dynamics (see Section 1 of this Submission). Tenancy conditions are also influenced by the highly prescriptive disclosure and lease content requirements which are imposed by State and Territory retail leasing laws. These requirements are analysed in some detail in Sections 1 and 3 of the SCCA Submission.

A significant majority of retailers located in regional and sub-regional shopping centres tend to be members of a larger retail chain with an established brand name or otherwise multi outlet owners. As such, they have a number of retail outlets (often significant), located in other shopping centres and other retail locations. These retailers will have a highly sophisticated knowledge of their own market, of the trading position, performance and potential of the shopping centre in which they are seeking to obtain space and of rental levels generally applicable at the time when the relevant leasing negotiation takes place. They will

often have available alternatives for the location of the premises which they intend to open. Similarly, the majority of retailers who do not fall within this description will also have established business expertise and a trading history, a good knowledge of the business that they intend to operate and of prevailing market conditions and rents. All retail tenants in shopping centres have access to extensive information concerning rentals, centre trading performance and general market conditions through access to the extensive information data bases held by retailer representative bodies and retail consultants as well as through their interchange of information with other retailers.

We have enclosed as Appendix 1 to this Submission the package of information which is provided to specialty retail tenants in Westfield shopping centres in New South Wales at the commencement of negotiations for a particular lease. This includes the disclosure statement required to be given by the landlord to the retailer and includes a copy of the specialty lease typically in place within Westfield shopping centres. The terms of this specialty lease reflect provisions required by applicable law as well as the usual commercial terms that one would expect to characterise a specialty store lease arrangement. Those lease terms are both transparent and unremarkable.

We have commented previously in this Submission in relation to the contention that there is an imbalance between landlord and retailer access to current rental information and that this may give rise to a lack of transparency in lease negotiations. For the reasons given above and in Section 4 of our Submission, we do not consider this to be a significant issue. Considering the factors above, we are of the view that the level of rents and associated tenancy conditions are appropriate and transparent to both landlords and prospective tenants and we do not consider that concerns which have been publicly agitated in this regard can be substantiated.

SECTION 6:

Are the provisions of leases establishing the rights of landlords and tenants when leases end, appropriate and transparent?

The nature of end of lease provisions.

There are provisions in most State and Territory retail lease legislation which regulate aspects of the landlord and tenant relationship at lease end.

Generally there is an obligation upon the landlord to give notice to the tenant at least six months but not more than twelve months before the expiry of the lease advising the tenant of the landlord's intention with respect to the renewal of the lease.

If the landlord wishes to renew the lease, the notice is required to contain detailed advice about the terms of the renewal lease offered.

By imposing an obligation on the landlord to provide adequate and timely notice of its end of lease intentions, the statutory provisions ensure that the retail tenant has adequate time within which to conclude its own business arrangements. For example, in circumstances where the landlord wishes to renew the lease, the retailer can then decide whether it wishes to accept the landlord's offer and/or enter into a period of negotiation with the landlord with respect to the renewal terms offered. Where the retailer does not wish to continue with the lease, either upon receipt of the landlord's offer or after negotiating further with the landlord, the retailer is then able to make alternative arrangements to locate alternative premises for its business in a timely manner.

We have commented previously in this Submission about proposals to address claims that in retail lease negotiations (for example, in relation to the renewal of a lease) there is an information imbalance between landlord and tenant, particularly in relation to the market rent for the relevant retail space or for comparable retail space.

Other provisions of specialty leases which relate to the end of the lease include provisions regarding the removal of fit out and holding over arrangements after the expiry date of the lease. These provisions are addressed in the typical Westfield specialty lease (see Appendix 1).

Westfield considers that the existing statutory provisions which relate to end of lease aspects of the landlord/tenant relationship and the relevant terms of the lease documentation that Westfield uses (which are generally typical of specialty lease documentation adopted by other major shopping centre landlords) are both appropriate and transparent from the perspective of both owner and retailer and meet the business needs of both parties for business certainty and future business planning.

Security of tenure proposals

Historically there has been agitation from retailer representative bodies to secure through further statutory reform various additional rights for retailers within the context of end of lease negotiations. These may be loosely grouped under the heading "security of tenure proposals".

These proposals have included the tenant being granted a preferential right of renewal or right of first refusal in respect of any new lease of the relevant premises that is to be granted; the tenant having an option to renew the lease and the parties being obliged to observe a statutorily imposed third party rent setting mechanism to determine rentals to be paid upon renewal where they are unable to agree. They also include proposals for the tenant to obtain compensation for the failure by the landlord to renew the tenant's lease.

There has already been some statutory recognition of a preferential renewal right for tenants. This is reflected in retail leasing legislation applicable in the Australian Capital Territory and South Australia.

Underpinning the security of tenure proposals has been the argument that the existing regime does not give adequate recognition to the loss of a tenant's capital investment (in the form of fit out and set up costs that the tenant has invested in order to take up the initial lease) when that lease is not renewed. Further, it has been argued that a tenant whose lease is not renewed should be compensated by the landlord for the goodwill that a tenant has developed through the operation of its business at the leased premises.

These arguments are misplaced. Insofar as they relate to retail space located in shopping centres, they reflect a fundamental misunderstanding of the nature of the landlord and tenant relationship, the respective rights that arise from that relationship and the nature of the shopping centre business.

The fundamental point needs to be made that retail tenants are not owners. Whilst they are required to invest fit out and start up capital in order to operate the premises which they lease, they are not required to invest the substantial capital that the owners of shopping centres are required to provide. Whilst retail tenants are exposed to the normal trading risks associated with the operation of their own businesses, they are not exposed to the substantial capital risk that is attendant upon property ownership. Rather that risk is borne by owners, and in the case of many major shopping centre owners such as Westfield,

ultimately by the millions of small investors whose savings (often retirement savings) are through superannuation managed funds and other forms of investment ultimately invested in these assets.

When a retail tenant enters into a lease of premises within a shopping centre the terms of the lease arrangement are clear, including the period of tenure which will meet at least the statutory five year minimum period and may be longer depending on what has been negotiated. Before entering into the lease the retail tenant will be aware of the rent that is required to be paid, the terms and conditions of the lease and the fact that at the end of the lease term the lease may not be renewed or if renewed may be for a higher rent (subject of course to the retail tenant being willing to renew the lease on that basis). Of course the majority of retail leases in shopping centres are renewed and this is demonstrative of the success of the shopping centre format as a retail lease model. This is borne out by the reviews commissioned by the SCCA which are summarised in section 6 of the SCCA Submission.

In committing to a retail tenancy lease for a fixed term, the great majority of retail tenants will, as a result of both enforced disclosure by landlords and normal business practice, not only be clear as to the nature and term of the commitment that they are required to undertake but, for the reasons given previously, will usually have sufficient business expertise and knowledge as well as available information regarding their business and general market conditions, through access to both retailer representative associations and retail consultants. The amount of fit out and start up capital that the retail tenant is required to invest and that will be at risk will also be clear. As available statistics indicate, the great majority of tenants in shopping centres do have their leases renewed. To the extent that a particular tenant has generated goodwill from the operation of its business within a shopping centre, this would normally be a pointer to the business success of that tenant and would typify a tenant that the owner wished to keep within the centre thus creating an incentive for the owner to negotiate mutually acceptable renewable terms.

Proposals that a tenant be compensated for loss of goodwill and/or loss of business capital invested by the tenant merely because its lease is not renewed are no more than proposals to relieve the tenant from the business risk that it is quite understandably required to assume when it undertakes a retail tenancy commitment and to pass that risk onto the shopping centre owner. Of course, the exception will be cases where a tenant is legitimately entitled to damages or compensation where there has been misleading and deceptive conduct or unconscionable conduct on the part of a landlord or otherwise a failure by the landlord to comply with applicable tenancy laws.

In Westfield's view the existing regulatory framework already provides appropriate avenues of redress to retail tenants where these circumstances arise through the application of the TPA, applicable State and Territory Retail Lease Laws and applicable State and Territory Fair Trading Legislation. Westfield also observes that without denying that a successful tenant may be able to generate goodwill at particular shopping centre premises (reflected in the level of return customers to the tenant's premises) much of the goodwill that is often claimed by a tenant can just as easily be said to be attributable to the drivers of customer traffic created by the location of the tenant's premises within the shopping centre and the tenancy mix and ambience of the shopping centre as a whole and not to factors attributable to the particular retailer's business.

The viability of the shopping centre format as a successful retail mode is critically dependent upon the intensive management that goes into ensuring that the tenancy mix of the shopping centre is adjusted and adapted from time to time. This is necessary to enable the shopping centre to be kept contemporary to its customer base – that is to be able to constantly adapt

to changing consumer demands and tastes as well as meeting the challenges posed by ongoing and new competition that will arise within the catchment area of the shopping centre.

It is therefore not only in the interests of shopping centre owners but also the body of retailers as a whole who occupy a shopping centre that the very elements that make the shopping centre an attractive and profitable location to undertake retail business are not undermined or destroyed. Measures such as compulsory or preferential renewal rights have the propensity to do just that.

Such measures:

(a) Entrench underperforming and failing business; and

(b) create a barrier to the entry of new businesses more adapted to the desired tenancy mix and more likely to be successful, both in their own right and in their ability to attract additional customers to the centre from which all other tenants benefit; and

(c) are anti-competitive.

The proponents of these measures do not advocate that the owners of centres be compensated for the reduction of their ownership rights which the implementation of the proposals would necessarily involve.

In any fair consideration of such proposals, the rights of owners including the millions of Australians whose capital is represented in shopping centres must be taken into account. Proposals of this kind, if adopted, serve to create a further bias or distortion in the market for retail tenancies which is neither warranted nor desirable.

Such proposals confer upon an already excessively protected class of tenancy further privileges at the expense of the rights of owners (without due recognition of or compensation for the abrogation of those rights) and are inimical to the ongoing success that all stakeholders generally enjoy in the economically successful shopping centre model.

Westfield supports the views of the SCCA in relation to these proposals (see Section 6 of the SCCA Submission).

SECTION 7:

Is the notion of unconscionable conduct sufficiently clear?

History of unconscionable conduct.

The adoption of an additional statutory based remedy for unconscionable conduct in business transactions through amendments to the TPA made in 1998 was an outcome of the Reid Inquiry and its subsequent report in 1997. Much of the clamour for reform in this area was led by retail tenant representative bodies. Since that time there have been calls for further amendment to these laws. Parallel remedies to those provided by TPA S.51AC have now been drawn down into State and Territory retail leasing legislation. In some jurisdictions the drawn down unconscionable conduct provisions of the relevant State or Territory leasing legislation have been amended further to include additional matters to which regard is to be had in determining whether unconscionable conduct has occurred.

Much of the push for further reform of unconscionable conduct law (insofar as it applies to retail tenancies) and for the enforcement of that law has been premised upon claimed instances of unconscionable conduct on the part of landlords, particularly within the shopping centre segment of the market for retail leases. This theme has been taken up by certain sections of the media who create the impression that the matter is a significant issue and that such complaints are rampant and widespread. More recent impetus has been given to this view by public statements of the Chairman of the Australian Competition and Consumer Commission (ACCC), Mr. Graeme Samuel.

Unfortunately, the inconvenient truth for the proponents of these views is that:

(a) The incidents that have occurred are isolated and in many cases represent claims or allegations as opposed to proven instances of unconscionable conduct.

(b) Many of such claims represent a selective and one-sided view of the facts of the particular case.

(c) Reputable industry statistics show that the instances, not only of proven cases of unconscionable conduct but also including unproven claims and allegations, represent a miniscule proportion of the total number of retail tenancies. A useful and telling analysis of these statistics is provided in the SCCA Submission (see Section 4 of the SCCA Submission).

In Westfield's view these facts illustrate that:

(i) despite the Reid reforms, unconscionable conduct was unlikely to have been the significant issue within this industry that the vocal agitators for reform represented it to be; and/or

(ii) the compliance programs that most large landlords have in place for their operational executives (particularly leasing executives) together with the retailer awareness and publicity campaigns undertaken by the ACCC in relation to TPA S.51AC have been successful.

Contrary to the misleading public impression that the agitators in relation to this issue create, far from being condemned the industry should be commended for its track record in this area.

Clarity of the notion of unconscionable conduct

Unconscionable conduct is by its nature a somewhat subjective concept, although the traditional equitable doctrine of unconscionable conduct (given statutory force prior to the introduction of TPA S51AC through TPA S51AA) as well as having a long history had a more certain and established meaning. Not surprisingly, that doctrine was (and is) limited in its application, being confined by the courts to circumstances and situations where the will or the freedom of choice of one party entering into a transaction is effectively overborne by the other party who then seeks to unconscionably take advantage of that fact. The statutory concept of unconscionable conduct introduced by TPA S.51AC is not, by its terms, constrained by the limits of the traditional law of unconscionable conduct, although at the present time the precise ambit of its operation has not been determined by Australia's superior courts. Until such time as there is a substantive body of case law developed by Australia's superior courts in relation to TPA S.51AC there will necessarily be uncertainty as to the range of circumstances and situations in which unconscionable conduct within the meaning of TPA S.51AC can be said to apply. That, however, is not, of itself, a reason for

the ACCC to seek to develop the law in this area by bringing test cases based upon landlord/tenant relationships within the retail leasing industry on the false presumption that this industry in particular exhibits an unusually high degree of unconscionable conduct. As the analysis of this matter in the SCCA Submission demonstrates such a proposition is not supportable.

Cost effectiveness of pursuing unconscionable conduct claims

As noted above, there are some differences between States and Territories in the drawn down unconscionable conduct provisions reflected in their respective retail leasing laws. Our views concerning the desirability of having uniformity in the application of State retail leasing laws are given in the Introduction and Section 9 of this Submission.

Both the Federal Court and State courts have jurisdiction to deal with allegations of unconscionable conduct under TPA S.51AC. That said, it is apparent that the costs of undertaking such litigation for those retail tenants who operate relatively small businesses are significant and will often outweigh the benefits of litigating even where the litigation is successful. Under the TPA, however, the ACCC is empowered to instigate such actions on behalf of small business and has a budget for this purpose. In Westfield's view these representative actions should only be commenced by the ACCC in genuine cases after proper consultation with the "offending" landlord and with a proper appreciation of both sides of the dispute.

Nonetheless retail tenants can and do litigate claims of unconscionable conduct in a timely and cost effective manner through the dispute resolution procedures established under State and Territory retail leasing laws. Our comments in support of the efficacy of those dispute resolution systems are provided in Section 8 of this Submission.

SECTION 8:

What regulatory and other avenues are available for dispute resolution between landlords and retail tenants?

A useful summary of the dispute resolution provisions that operate in relation to retail tenancy disputes in the States and Territories is provided in Section 4 of the SCCA Submission. In all cases (other than Tasmania) the relevant dispute resolution procedures enable unconscionable conduct claims to be agitated. Most State and Territory regimes provide for preliminary mediation of disputes with tribunal hearings occurring only where mediation has been unsuccessful.

These State and Territory statutory based processes for the resolution of disputes concerning retail tenancy issues are designed to and do operate at low cost. By and large they provide a useful and, in Westfield's view, successful regime for the prompt and efficient resolution of most disputes.

Accordingly, in Westfield's submission, the available dispute resolution systems do operate in an efficient, timely and cost effective manner and do not impact adversely on the economic efficiency of the retail tenancy market. In fact, by providing a cost effective, generally timely and independent mediation and dispute resolution process, they work to promote economic efficiency in the retail tenancy market.

In commenting on the efficacy of this State and Territory statutory based dispute resolution regime, it is noteworthy to observe the analysis of the number of retail tenancy disputes that arise within the industry that is provided in Section 4 of the SCCA Submission. The relevant statistics provided enable proper perspective to be given to many of the perennial issues that are agitated by retailer representative groups and sections of the media. Those statistics indicate that the number of complaints registered with these generally retailer friendly low cost tribunals constitute an insignificant proportion of the total number of tenancies on foot. More than anything else these statistics demonstrate that the proponents of further regulation and enforcement on the basis of perceived issues within the industry claimed to be demonstrated by alleged frequency of complaints are unable to sustain a case for their proposals.

SECTION 9:

What is the scope of regulatory or policy change to improve the effectiveness, operation and economic efficiency of the retail tenancy market in Australia?

It will be apparent from Westfield's previous comments in this Submission that it considers there is little scope for further regulatory or policy change within an already excessively regulated system to improve the effectiveness, operation and economic efficiency of the retail tenancy market in Australia. For the reasons given previously in this submission, Westfield considers that the proponents of specific changes to existing policy and regulation have failed to substantiate a case that the regulatory reform or policy change measures they advocate are warranted. In fact, it is Westfield's submission that the adoption of such proposals would be likely to result in additional distortions in a relatively competitive market which would be likely to benefit a small group of inefficient retailers at the expense of other market participants and stakeholders, not the least being the Australian public as investors and owners.

That said, whilst Westfield does not consider that there is any significant issue which arises because of a claimed imbalance in the transparency and availability of information to landlords and tenants, as noted previously, we are not averse to those States and Territories which do not currently impose any legislative requirement for the registration of leases in excess of three years to adopt a lease registration regime similar to that currently applicable in New South Wales, the Australian Capital Territory and Queensland. We believe that the additional costs (in the form of registration charges) that would attend such a measure would be relatively insubstantial, based upon registration fees currently applicable in New South Wales, the Australian Capital Territory and Queensland.

As noted previously in this Submission, Westfield also believes that there is a case for increased efficiency of administration (with attendant cost savings to industry participants) to be achieved through uniform national retail tenancy legislation. However, for the reasons given previously, we believe that this can only be effectively achieved by the States and Territories surrendering their legislative rights in this field to the Commonwealth with a process then adopted (such as that which led to the adoption of uniform Corporations law throughout Australia) under the auspices of the Council of Australian Governments (COAG) to develop draft uniform legislation through negotiations with the States and Territories and after proper consultation with owners, retailers and their representative bodies. The process of developing such uniform legislation could also incorporate a review of existing State and Territory retail lease legislation to identify those aspects that are unnecessary, unduly

complex or give rise to cost inefficiencies which outweigh any benefit they confer in order to ensure that such provisions were not replicated in the Commonwealth model adopted.

In supporting the adoption of uniform retail tenancy legislation on this basis, Westfield acknowledges the significant political obstacles that stand in the way of implementation of such a proposal. However, we consider that if such a result can be achieved this will be a more practical solution than the adoption, with State and Territory support, of a uniform national retail tenancy code – an exercise also likely to be significantly impeded by political considerations.

In summary, we consider that the existing regulatory framework in relation to the retail leasing market, whilst not perfect, works effectively and does not contain major systemic flaws. Whilst acknowledging the difficulties of implementation (given political considerations) there is scope to reduce "red tape" through the adoption of uniform retail tenancy laws throughout Australia in the manner described above.

SECTION 10:

If participants see a need to reform current arrangements, what should those reforms be and what are the likely benefits and costs of such reforms to retail tenants, landlords and investors?

We have outlined our views on the limited scope for reform measures previously in our Submission indicating the particular proposals that we would support.

We consider that the implementation of those proposals, particularly achieving uniform retail tenancy legislation through Australia, would have a positive impact on industry stakeholders to the extent that there would be a reduction of administration costs (particularly legal and compliance costs) and other administrative and cost inefficiencies in the areas of lease preparation arising from the ability to have consistent lease documentation in use throughout Australia and a common set of rules. All such costs of doing business ultimately impact on rents charged to retailers and that in turn ultimately impacts on the cost that consumers pay for the goods and services supplied by those retailers. Accordingly the impact of these measures could be expected to be positive for all industry stakeholders and, in particular, consumers.

SUPPORT FOR RETAILERS

Westfield has developed a range of programs to support its 9,164 retail outlets across Australia. The Group's strong focus on education and support flows from its experience over 50 years which shows that time and resources devoted to helping businesses succeed is a better investment that vacant shops and unfulfilled lease arrangements.

From the outset, careful consideration is given to the selection of retailers in a particular shopping centre and specifically, to their location *within* the centre. The cornerstone of Westfield's leasing approach is to ensure the tenant is in the best possible location for it to perform well. 'Remixing' and relocation of retailers in a centre to meet consumer demand and preference is also a common feature of successful centres.

The various support initiatives are collectively known as Westfield's **Retail Relations Program** and are available to retailers to help maximize their performance, or to provide a safety net in the first instance if they are experiencing trading difficulties.

The key elements of the Program are:

Category meetings

Westfield assesses the performance of its centres continually and weekly category reviews ensure the company is aware of how retailers are performing in a given category trade (fashion, footwear, fresh food etc.)

Category meetings between senior Westfield managers and retailers are held quarterly, allowing centre management and retailers to address any relevant issues as a group.

Retail Consultants

Westfield provides a team of independent retail consultants, all of whom have a background in retailing and can provide advice to new retailers; those who are expanding or changing strategic direction; or assistance for retailers who are trading poorly. The consultants provide individual assistance on a centre or category basis. It is important to note that while Westfield arranges and funds this service advice is given independently and is wholly in the interest of the retailer in question.

Retail Seminars

Westfield's retail consultants host workshops where presentations can range from basic principles to the latest global trends. Routine topics include: product planning; buying margins; stock turns; space management; business equity; visual dynamics; and, profit and loss assessment. Seminars are generally held on a centre or category basis, and usually up to 40 retailers attend.

CEO Lunches

Lunches with Westfield's managing director and other key senior executives are held quarterly on a national basis. The forum gives retailers an opportunity to meet with Westfield management in an informal setting to discuss general issues. Participating retailers are selected rotationally on the basis of their trading performance.

Global Study Tour

Westfield leads an intensive 2-week working study tour each year, escorting Australian retailers to relevant retail locations around the world. Now in its 11th year the study tour has become a key event for many retailers and is well-subscribed. The tour makes use of Westfield's international network and facilitates introductions between Australian retailers and global leaders in the retail industry, providing valuable exposure to international retail trends and developments. In 2007 the tour includes presentations from Wal-Mart, JC Penney and Neiman Marcus stores in the US; and BT and the John Lewis Group in the UK.

In addition to these specific programs, Westfield retailers benefit from other services, including:

- marketing programs: these can run by category, by centre, and nationally – and are aimed at driving shopper traffic and sales. A centre-specific version could give customers incentives to shop in the fresh food precinct, for example, while a national campaign may be supported by extensive television and/or print advertising promoting shopping at Westfield centres.

- brand recognition: consumers know what the Westfield brand represents, and in the first instance that is a strong retailer offer. The strength of the brand also contributes to the high participation rates in national marketing programs, and represents customer service and security.

- customer service: all Westfield centres offer a customer service program that is continually updated with new initiatives added regularly. This program supplements individual customer service programs provided by retailers

- security: every Westfield centre has a range of security measures including security guards which contributes greatly to providing a safer business and shopping environment.

Retailer Education Initiative – "Seed"

A ground-breaking retailer education program will be launched by Westfield in late 2007/early 2008. It will be run in conjunction with the Australian Retailers' Association and a recognised tertiary institution and available to the retail market generally, and not just Westfield retailers.

The program has been developed against the background that, in Westfield's experience, many business failures are in large part due to a lack of knowledge and experience on the part of new retailers and is specifically designed to be "user-friendly" for busy retailers and staff who often find it difficult to participate in existing traditional education programs. It will

offer flexible training options including a suite of online courses, in-centre workshops and a diploma course for retailers.

The new program is to be known as *"Seed: Growing Retailers' Knowledge, Growing Retail"* (see Appendix 2).

The program will also be used by Westfield centre management staff to improve their understanding of retailers' needs, and it is hoped other shopping centre managers will take advantage of the service.

The system will operate via an online portal developed by Westfield, allowing users to access the online learning modules and to access information about the workshops and diploma.

The flexibility of the system will accommodate users who are new to the retail industry and seek the most basic qualifications, through to more experienced retail managers and business owners who are seeking a higher level of study. The highest Seed levels are proposed to allow participants to transfer credit to other education qualifications.

Learning modules will include:

- visual merchandising
- buying for retail
- customer service and selling
- Recruiting effectively
- Conflict management
- Leading the team effectively
- Performance management
- Reference checking

A presentation about the Seed program is attached.

Helping retailers improve their business

Westfield's retains a number of independent retail consultants to work directly with individual businesses. All aspects of the store can form part of the consultation program, with experts able to provide direction on such topics as stock controls, merchandise planning, store layout, visual merchandising and staff rosters.

Examples of retail outlets which have benefited through close consultation in the Westfield Retailer Relations Program are included in the case studies attached.

Direct financial support for retailers experiencing difficulties

In addition to the Retailer Relations Program providing professional assistance Westfield also provides, in special circumstances, rent relief (promotional allowance) to retailers experiencing difficulties.

In 2005, Westfield provided $7.5m worth of rent relief, and $7.6m in 2006. In 2007, Westfield has so far provided $3.5m.

Case studies demonstrating how this type of relief has been critical in helping retailers stay in business are attached.

A retailer issue is misrepresented in media or other external source

In a number of circumstances isolated incidents are reported in the media, usually in a sensational or incomplete manner, and often the facts reported are just plain wrong.

It may serve the interests of a retailer in question to gain media exposure and it can be difficult for Westfield to correct the facts or allegations particularly if the matter is still under mediation or in a more extreme circumstance, the subject of legal dispute.

It has been the practice of Westfield not to provide comment on such situations for a variety of reasons including confidentiality. Westfield is however prepared to provide to the Inquiry on a confidential basis, examples of such cases involving its own shopping centres should it be necessary and appropriate to do so.