SHOPPING CENTRE
COUNCIL OF AUSTRALIA

11 April 2014

Water and Climate Change Branch
Department for Environment and Natural Resources
GPO Box 1047
ADELAIDE SA 5001

By email: climatechange@sa.gov.au

Dear Sir or Madam

Building Upgrade Agreements Bill 2014

The Shopping Centre Council of Australia (SCCA) represents major owners, managers and developers of shopping centres. In South Australia, this includes groups such as the Precision Group, ISPT, Federation Centres, Colonial First State Retail Property Trust and the Westfield Group.

We are pleased to comment on the *Local Government (Building Upgrade Agreements) Amendment Bill 2014*. We commented on the *Establishing Environmental Upgrade Finance in South Australia* consultation paper in 2012.

We support the development of the Building Upgrade Agreements (BUA) scheme and commend the SA Government for proceeding with this initiative.

In the interest of ensuring the scheme is both an appealing and effective funding mechanism for building owners, the SA Government should consult with the property industry.

In addition, we urge the SA Government to consult with the NSW Government on the implementation of its Environmental Upgrade Agreement (EUA) scheme to ensure any equivalent legislative or operational issues can be addressed.

While the Bill will form the foundation of the scheme, subordinate instruments such as regulations and guidelines will be critical to ensure optimal outcomes. As an example, the NSW Template Agreement prescribes certain onerous and unnecessary information and undertakings from building owners. These have presented barriers to the scheme's uptake. We understand the Template is currently being reviewed by the NSW Government, with the benefit of industry and legal advice.

We note that the development of an equivalent 'standard building upgrade agreement template' will occur subject to the passage of the draft Bill.

As an example of issues under the NSW template, councils are provided with certain protections even though a council has no risk in relation to EUAs; including a lack of payment by an owner.

There are absurd provisions, including mandatory provisions, which favour a council (and financier) which have a direct impact on an owner's ability to manage its property, including the sale of property. This includes the requirement for consent from the council and financier, and related issues such as covenants and undertakings (e.g. access to the building). These should not be a feature of the SA scheme. We are worried with the proposed content of the 'standing building upgrade agreement template' (as provided in the *Overview of amendments* document) which relates to the sale of property.

There are also reporting requirements, which go beyond the EUA legislation, which gives rise to confidential information being disclosed as part of the broader reporting requirements. We note that yet to be detailed "periodic" reporting requirements forms part of 'further provisions' to the draft Bill.

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Affiliate of the International Council of Shopping Centers

The SA Government should also be aware that under the current review of the *NSW Retail Leases Act 1994*, EUAs have been raised as an issue for review. The excerpt from the Discussion Paper is outlined at **Attachment A**. This may affect the current EUA framework, however it should be noted that at this stage no final decision has been made as a result of the review.

We are pleased to provide the following comments on the Bill:

- We support the intention of the Bill to establish a BUA scheme.
- We support that the scheme is voluntary for building owners and managers.
- We support having an appropriate methodology in place to ensure 'tenant protections' such as the requirement for the increased rate contribution not to exceed a reasonable estimate of the cost savings (in accordance with an approved methodology as outlined at section 1 *Interpretation*).
- We argued in our 2012 submission that the scheme should be unequivocal that investment under a BAU by a shopping centre owner, paid back in the form of a council rate, can be recovered as an outgoing from retail tenants under new and existing leases (given it is struck as council rate), which relates to section 26 *Retail and Commercial Leases Act 1995*.

  We note that the *Overview of amendments* fact sheet provides that "the draft Bill provides for a building owner to recover contributions towards a building upgrade charge from a lessee occupying the building. This section would apply despite the provisions of the *Retail and Commercial Leases Act 1995*". On our assessment, however, the draft Bill does not appear to provide such certainty and an amendment should therefore be considered.

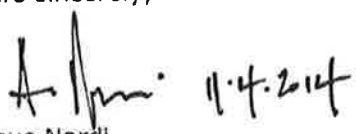
  Providing certainty under the Bill could potentially reflect section 54N of the NSW Act (which relates to section 23 of the *NSW Retail Leases Act 1994*) in relation to the recovery of capital expenditure. The Government should also investigate whether equivalent provisions of the NSW Regulation are required including section 136L which relates to sections 12 (Lessee not required to pay undisclosed outgoings) and 24A (Interest and charges incurred by lessor on borrowings not recoverable from lessee) of the NSW RLA.

As some of our comments relate to the interaction of the BAU scheme with the *Retail and Commercial Leases Act 1995*, we recommend the Department seeks advice from the SA Small Business Commissioner.

We would be pleased to discuss this submission further with the Government.

Please do not hesitate to contact me on 0408 079 184 or anardi@scca.org.au.

Yours sincerely,



Angus Nardi
Deputy Director

Attachment A

2.5 Outgoings – Environmental Upgrade Agreements

Now:

The NSW Government introduced Environmental Upgrade Agreements (EUAs)[11] in 2011 to encourage the energy efficiency upgrade of buildings. EUAs were designed to make it easier for building owners to access finance to make environmental improvements of existing commercial, industrial or other non-residential buildings. Under an EUA, a finance provider offers a low-risk loan for the upgrade of a building that is repaid through a local council charge on the land. The legislation limits the cost to a reasonable estimate of the savings to be made by a tenant from the environmental upgrade works.

Most retail leases require the tenant to pay local council rates and charges. Most tenants would not anticipate they would pay for an EUA through their rates, yet the charges are expected to be offset by estimated energy savings made by the tenant in the form of reduced energy and water bills.

Issue: *This issue appears to relate only to shopping centre leases*

To date, only a very small number of EUAs have been implemented throughout the State. Few tenants know to consider the impact of an EUA and there is no requirement for the Landlord's Disclosure Statement to disclose the contributions payable by the tenant.

Concerns are that the estimate of the savings under an EUA is an estimate and not actual savings. While the savings are intended to flow to the tenant who pays the charge, the legislation does not make this clear. Therefore an anchor tenant or landlord could receive the benefit of the EUA savings and the costs could be borne by speciality tenants, with little or no reduction in their energy costs.

Unintentionally allowing landlords to pass through surprise charges to tenants can have potentially significant impact on small businesses. Preventing environmental upgrades could have a potentially significant impact on all parties over the long term.

Question:

2.5.a. What are the views of stakeholders on how best to manage the payment of an EUA levy under a retail lease?

[11] Section 54N, *Local Government Act 1993* and Regulation 136L, *Local Government (General) Regulation* 2005.