SHOPPING CENTRE
COUNCIL OF AUSTRALIA

Review of SA *Retail and Commercial Leases Act 1995*

A submission by the
Shopping Centre Council of Australia

February 2015

Executive Summary

The Shopping Centre Council of Australia (**SCCA**) welcomes the opportunity to comment on the *Retail and Commercial Leases Act 1995 (SA): Issues Paper, December 2014*.

We are a member of the Retail Shop Leases Advisory Committee (**RSLAC**) established under Part 11 of the *Retail and Commercial Leases Act 1995* (SA) (**Act**), which meets on an annual basis, and is chaired by the Small Business Commissioner. We strongly believe that this group, comprising lessor and lessee representatives, should be utilised as part of the review process.

We are disappointed with the Issues Paper.

The Act works reasonably well in our view, and there is no case for major change. This has been the general view when this issue has been raised at the RSLAC meetings.

If a number of the proposals proceed, however, we believe these will be adverse for lessors. One of our members has commented that we would also be faced with an Act that would verge on removing the freedom to contract.

We respectively submit that the Issues Paper is imbalanced and appears to have a negative, or at least sceptical, tone against lessors. This includes what seems to be a number of hypothetical scenarios against lessors, which are assessed as needing a possible penalty regime. In contrast where the Issues Paper raises potential issues surrounding a lessee's obligation, it appears to be treated as if contractual arrangements should be overlooked to the detriment of a lessor (for example section 1.5 – Adjustment to Base Rent).

Similarly, the section in relation to security deposits barely acknowledges the purpose of such deposits or critical issues for lessors.

We are particularly concerned that the Issues Paper suggests the introduction of, or increase to, penalties with respect to numerous aspects of the Act. This appears to ignore the fact that lessee's have extensive statutory rights and existing and well-established recourse in respect of breaches of the Act or provisions of a lease by any lessor. This includes the rights afforded under section 68 of the Act for any party to commence an application to the Magistrates Court seeking relevant orders.

We are worried that the experience of the Office of the Small Business Commissioner **(OSBC)** with tenancy disputes has, in part, engendered a negative view of lessors. This might not be the intention, and the majority of 'enquiries' might come from lessees, but we struggle to find many issues that are presented in a positive light for lessors. While we also acknowledge that most of the issues are presented as discussion points, the reality is that they morph into being proposals. The prevalence of suggested legislative procedures and penalties against lessors is a major concern in this regard. This is particularly so given the lack of clear evidence, case studies or statistics to support the discussion points raised in the Issues Paper. Instead, the Issues Paper provides a number of references in relation to 'concerns', 'enquiries' and lessees having 'no choice'. Such references (such as those outlined below) then form the basis of various proposed changes:

> *"…the lessee may be at a substantial disadvantage…they may find themselves in a situation where they have no choice but to accept a lessor's "revised" offer of lease"* (re: 'when the lease is entered into'; page 3) [our emphasis added];
>
> *"The Small Business Commissioner fields a very high number of enquiries, from lessees in particularly…often the lessee has no choice…"* (re: 'repairs and maintenance'; page 7);

"This is often seen as a de-facto premium by many lessees, who may have no choice but to pay these fees…" (re: 'consent to assignment'; page 10);

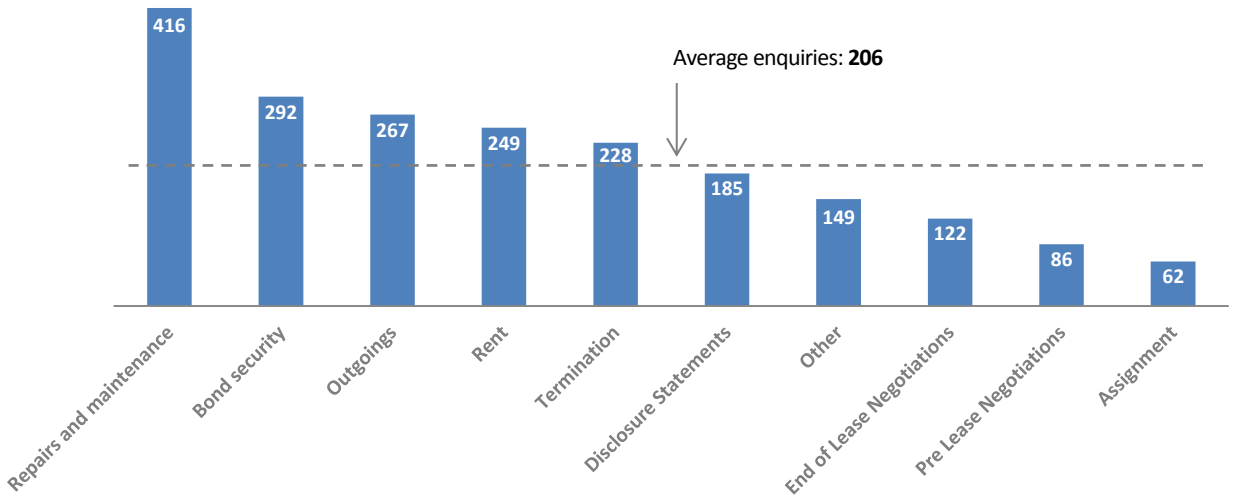
"Concern often arises from lessees…" (re: 'condition reports'; page 10) .

To try and better understand the context of such references, we analysed the latest available data in the *OSBC Annual Report 2012/2013.* While it provides a useful, albeit broad, context, it doesn't provide a complete insight on the claims or the nature of the issues. It also appears that 81% of enquiries were resolved with the provision of sensible advice from the OSBC.

The following **Chart 1** summarises the data based on the 1,755 retail tenancy enquiries (36% of all enquiries to the OSBC); 958 (55%) of which were made by lessees and 418 (25%) which related to shopping centre leases when compared with strip shop (26%) and stand-alone shop (48%) leases.

Chart 1:

No. of enquiries to OSBC (2012-13): Retail and Commercial Leases Act 1995



We are certainly also worried about one-off cases being over-stated as a case for change, where it may not be widespread and thus not require legislative change. We submit that such cases would be more appropriately dealt with through better education and trusted sources of information, such as the *Draft Retail and Commercial Lease Guide* proposed in 2013 to better inform prospective lessees.

We also do not agree that numerous matters raised in the Issues Paper are in fact real issues. We have tested a number of the claims and many of them either do not exist or are not prevalent issues for our members.

We are, however, encouraged that the review might finally correct the December 2012 Supreme Court judgement, *WST Pty Ltd v GRE Pty Ltd & Ors* [2012] SASCFC 146, which related to matters at the Buffalo Motor Inn at Glenelg, and which brought into question the $400,000 'annual rent' threshold applicable to leases entered into on, or after, 1 April 2011, along with the associated liability to pay land tax.

While we respond to the issues and questions raised in the Issues Paper in further detail later on in our submission, we believe there are certain key issues that must be addressed in this review:

1. **Threshold:** The Act should only apply to genuine small businesses and retailers that need legislative protection. This was the intention upon the introduction of the Act. Even if the current 'public company' exclusion is properly defined, transitioning to a 500m2 floorspace threshold (which we support) would still mean that massive businesses remain covered by the Act, including substantial and sophisticated private groups and international retailers. Many of these groups are far larger and more powerful than shopping centre lessors.

   We congratulate and welcome the success of these retail groups. Many of the Australian groups have even expanded their operations into overseas markets (where there is no government regulation of leases) which is a tribute to their retailing experience and entrepreneurship. However, in relation to the intended role of the Act, it needs to be acknowledged that such groups have the business experience, financial muscle, high-level advice and market power to deal with all lessors and look after themselves in negotiations. To suggest otherwise would be nonsensical.

2. **National consistency:** There should be an attempt to harmonise (at least key provisions of the Act) with other jurisdictions. We have various members that operate across multiple jurisdictions (e.g. five members operate across five jurisdictions), which forces lessors to have different detailed processes established for each State and Territory in which they operate. One of our members has systems in place to meet the requirements of eight pieces of legislation (over 650 pages). The inconsistency of retail lease legislation across the different jurisdictions is onerous for both lessors and lessees and the members of the SCCA support attempts to create greater consistency.

3. **Minimum five year term threshold:** The minimum 5-year term should be abolished to enable a more dynamic retail leasing environment to operate without the need for the additional cost and red tape caused by the requirement of a solicitors' agreement. There is no minimum term in Queensland and there has been no move by retailer associations to reinstate a minimum term in the recent review in that State. The Productivity Commission found that Queensland has a higher proportion of leases greater than five years when compared with NSW (which has a minimum 5-year term). The removal of the minimum term is being considered under the current NSW legislative review.

4. **Removal of lessee's preferential renewal rights:** There should be no further encroachment of freehold property rights through the extension of the existing preferential rights of renewal provisions in South Australia. If retailers want the benefit of free-hold property, they should take the capital and investment risk and purchase property, rather than lease property.

5. **Land tax:** The Act should enable the transparent recovery of land tax from retail lessees. Provisions imposing non-recovery of land tax is discriminatory against retail property when compared with other property asset classes (e.g. industrial) that do not have such limitations. We provided a supportive submission in 2011 on the *Draft Retail and Commercial Leases (Miscellaneous) Amendment Bill 2011*, prepared by the Hon John Darley MLC, to remove the current prohibition in section 30 (1) of the Act.

6. **Disclosure of incentives in Disclosure Statement:** We are puzzled and concerned about the reference to disclosing incentives, allowances and rent-free periods in Disclosure Statements, in that this will no doubt raise calls for a register of incentive information. We would not support a mandatory register of confidential information for various reasons described in our submission.

7. **Security:** We are deeply concerned about the proposed intervention in relation to bank guarantees, particularly if the intention is to undermine a lessor's right to legitimate security for granting a lease over its property. Our members have

confirmed that they mostly do not use the security bond scheme for various legitimate reasons, including administrative and practical burdens. There are also claims in the Issues Paper with which we disagree, particularly as they allege behaviour by lessors that appear to be in breach of the law and our members have no knowledge of any such allegations.

8. **Termination provisions:** We are concerned about the proposed termination provisions which could, potentially, result in the absurd situation where a clear breach of a lease such as a failure to pay rent, could be treated as a 'dispute'; with the effect of restraining the legitimate and long established right of a lessor to terminate the lease and instead, be required to have the matter mediated by the OSBC before the lessor is entitled to exercise its rights at law.

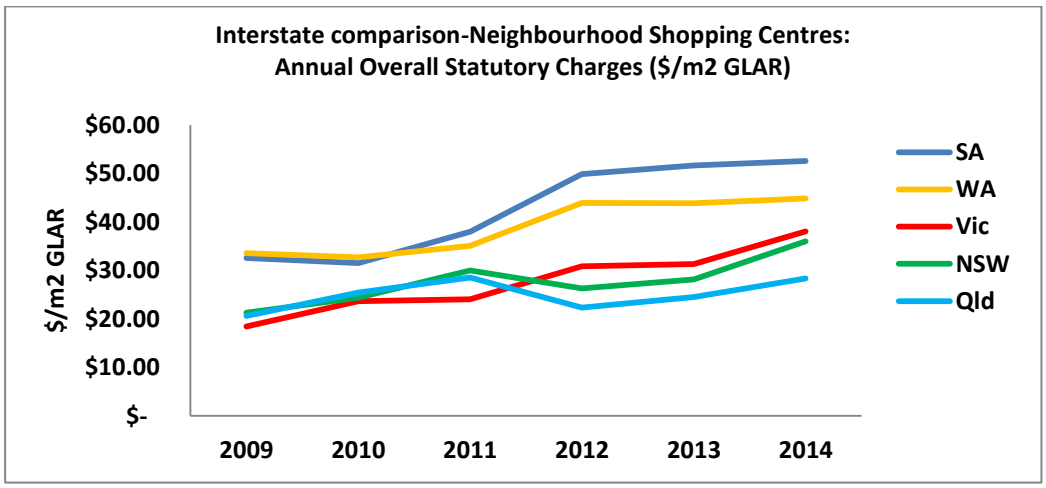
We acknowledge that reviews of the Act raise contentious issues and that in the realities of commercial dealings and negotiations, parties will not always agree. We stress that we are willing to discuss all relevant issues in a productive manner to ensure a fair, balanced and effective review of the *Retail and Commercial Leases Act* which will continue to contribute to a productive retail economy across the State.

As we noted earlier, we believe the Act works reasonably well. We estimate our members negotiate around 400 retail leases per annum in South Australia across new leases, renewals and development project leases. It has been the feedback of our members that in the majority of leasing deals, along with existing lease negotiations, the number of disputes has been minimal.

The sad reality is that the South Australian retail economy has been struggling in recent years, particularly relative to other jurisdictions. It has, in this regard, been a lessees' market. Data from the ABS confirms low retail sales growth along with poor performing indicators such as retail spending per capita. New retail capital investment also lags behind other jurisdictions. As major investors, our members are keen to ensure that the regulatory burden is not increased and that a balanced outcome can be achieved

While is it not the subject of this review, based on the invitation to identify other issues, we need to raise the fact that South Australia is also a high-taxing State for shopping centres. In fact, for smaller 'neighbourhood' centres, South Australia has the highest land tax and overall statutory charges (see **Chart 2 below**). We are therefore cautious of any moves in this review which would further discourage investment in retail property in South Australia.

Chart 2: Interstate comparison of overall statutory charges



The 20% increase to the *Emergency Services Levy* in the 2014-15 State Budget will make this situation worse. As lessors are price-takers in relation to statutory charges, there is a clear pressure on outgoings that stems directly from the South Australian Government. Since initially announcing a review of state taxes in December 2014 (which we supported), Premier Weatherill released the review Discussion Paper on 11 February 2015. The review of the Act should acknowledge these unique shopping centre taxation issues and make recommendations to help provide the impetus for reform.

We are grateful for the opportunity to discuss the review with Mr Moss, the Reviewer, and Mr Chapman, the Small Business Commissioner, during the consultation process. We would gladly discuss this submission further and provide any other relevant information that might be required.

Our comments align with the sections in the Issues Paper. In addition, we would appreciate an opportunity to respond in the event that other submissions, such as those from retailer associations or retailers, make claims against lessors or raise issues not addressed in the Issues Paper (e.g. the declaration of sales turnover information, lease register) or addressed in this submission.

Our contact details, and information identifying our members, appear at the end of this submission.

Angus Nardi

Executive Director

1. Main issues with the Act

1.1. Application of the Act

Preliminary Part 1 (4) Application of Act

We strongly agree that the current rent threshold which relates to the application of the Act, should be replaced with a floor space threshold.

A floor space threshold provides a measure that is clear and consistent in terms of determining the application of the Act to a new or existing lease. Unlike a rent threshold, floor space does not change over the term of a lease, and this would result in increased certainty for the parties to a lease as to when the Act applies. Adopting a floorspace threshold would also bring the Act a step towards harmonisation and consistency with NSW, Western Australia, Tasmania and the Northern Territory.

We support the suggested 500m2 threshold, as proposed in the Issues Paper. We would also support a 1,000m2 threshold, which is consistent with other jurisdictions and also reflect the appropriate 'exclusions' outlined below.

Floor space is an objective measure which can be easily ascertained by accepted industry standards prior to the entry into a lease.

As a matter of industry practice, both lessors and lessees use the *Property Council of Australia's Method of Measurement* for determining lettable area. This is an extensive 21-page document which was prepared by a range of specialist industry groups representing architects and surveyors. As the concept of lettable area is well-established, there would be no need for a definition of floor space in the Act.

Regardless of the threshold unit, it is critical that the application of retail tenancy legislation is limited only to genuine small retail businesses whose bargaining power is generally considered to be less than that of the lessors with whom they negotiate.

Exclusion of public companies

We strongly support the current exclusion of publicly listed companies, and their subsidiaries, from coverage under the Act. The Act should go further and clarify that this exclusion also includes related entities.

We submit that the relevant definitions from Victoria and Western Australia legislation should be incorporated into the Act. The Victoria and Western Australian legislation does not apply to premises leased to a corporation listed on a stock exchange that is a member of the World Federation of Stock Exchanges or its substitutes (Victoria) or leases where the lease is held by a listed corporation or the subsidiary of a listed corporation or where the lease is held by a body corporate whose securities are listed on a stock exchange outside Australia that is the member of the World Federation of Exchanges.

It must be noted that other 'large' retailers, such as large private companies and international retailers, should also be excluded from the Act. It is absurd that large and powerful retailers such as Apple and Zara and are often bigger than their lessor yet remain covered by the Act.

It would be simple to introduce an automatic exemption whether based on their market capitalisation, turnover, number of stores (e.g. 5 or more) or number of employees (e.g. 20 employees or more). It would be important to ensure that any such threshold was drafted to ensure that a large retailer is not able to simply structure themselves out of the intended application of the exemption.

In addition, the definition of 'retail shop' under the Act should exclude:

- non-retail businesses in a shopping centre;
- a business that is operated on behalf of the lessor; or
- small premises such as kiosk ATMs, ATMs and vending machines.

When the lease is entered into

We do not believe that the current wording in section 6 of the Act provides uncertainty as to when a lease is entered into. Section 6 of the Act simply encapsulates the existing the common law position in layman's terms, namely that a lease becomes binding when it is signed by both parties or, alternatively, if there has been part performance, e.g. the lessee enters into possession and pays rent based on the lease terms.

In consultation with our members, this provision is not viewed as an issue that arises in practice and therefore we do not consider that any further amendments to the Act are required in this regard.

In relation to the proposed question in the Issues Paper as to whether there should be a "more effective penalty regime for the non-supply of a Disclosure Statement", we do not believe there should be a further penalty regime. If a Disclosure Statement is not provided, the lessee can simply terminate the lease so there is already an adequate and effective remedy available to a lessee.

1.2 Before the lease is entered into

Part 3 – Before the lease is entered into

Copy of lease to be provided at negotiation stage

We would not support an increased penalty (from the current maximum $500 penalty) for failing to provide a copy of a lease at the negotiation stage (Part 3 (11)), including in the form of a forfeiture of rent by the lessor. We fail to see how this would address any perceived concerns regarding the operation of the current Act provisions, which are not outlined in any detail in the Issues Paper in any event.

We do not believe that the Act needs to define the "negotiation stage". While it is referenced at section 11, we believe that this is an issue best left to industry practice. In our view, the negotiation stage is any time from exchange of non-binding letters, following an initial letter of offer, up to the issue of an agreement for lease and/or Disclosure Statement and our members confirm this is the commonly accepted industry practice.

Disclosure Statement

This section of the Issues Paper makes a number of statements in relation to when a Disclosure Statement might be required, penalties for non-compliance, prescribed information, the potential inclusion of incentives, and different forms of Disclosure Statements for different leasing circumstances. However, it does not make reference to any specific problems or issues arising from the current drafting of the Act.

We believe the Disclosure Statements work effectively to the extent they aim to provide relevant information to a potential lessee.

While the Act does not specify that a Disclosure Statement must be provided with an agreement for lease or a draft lease, or that the Disclosure Statement must be signed by the lessor or lessor's representative, we do not believe that the Act should prescribe such requirements.

A Disclosure Statement currently must be provided to the lessee before a lease is entered into or renewed. Our members have advised that the Disclosure Statement is generally provided once there is agreement on rent, and that it is always issued with the lessor's signature. While the actions of our members currently reflect good industry practice, we would not support it being prescribed in the Act.

It is worth noting that under section 12 of the Act, a lessee already has redress in circumstances where a lessor breaches their obligations in relation to the provision of, and information contained in, a Disclosure Statement. This includes a number of remedies such as avoiding parts of the lease, varying the lease, or requiring the lessor to repay money or pay compensation to the lessee.

We are, once again, cautious about the mention of penalties or remedies against lessors in relation to the provision of an incomplete Disclosure Statement. As a general point, if such penalties are being considered, they should apply equally to lessors and lessees. It is also worth noting that the lessee has the right to sue for damage as a result of false or misleading statements or representations made prior to entering a lease and this includes representations made in a Disclosure Statement. It is difficult to see why a wider range or remedies, including penalties, would be required.

In relation to the question of whether incentives should be included in Disclosure Statements, our members have advised that they generally do include incentive information. We do not, however, believe that there should be a prescriptive requirement under the Act. We are deeply concerned with this suggestion to the extent that there may be an attempt to centrally register Disclosure Statements and make them (or the information in them) publicly available.

Lease incentives are binding confidential arrangements and obligations negotiated between the lessor and lessee. Such arrangements could be in the form of a rent-free period or a lessor's contribution to a store fit-out.

Such information is commercial-in-confidence and it could be damaging to the interests of both parties and to lease negotiations if such details were to be made public. Retail tenancy legislation in other jurisdictions does not impose the requirement for such information to be included in the Disclosure Statement or otherwise made publicly available.

As the Productivity Commission 2008 report on its inquiry into the retail tenancy market provides (at page 163): "incentives are a normal part of negotiating contracts and are common in many transactions (from commercial leasing to purchasing a car"). But further (at page 164): "most incentives are negotiated on a confidential basis as neither party – lessor nor lessees – want such details to be provided to the broader market" [emphasis added]. It's worth reflecting on the principal of 'confidentiality', which generally refers to what the OECD defines as "safeguarding the privacy of sensitive information".

We certainly hope that what is being proposed in this review is not an attempt for the Act to override commercial confidentiality. We would welcome further discussion on this issue with the OSBC.

We also do not support the proposed separate Disclosure Statements for different leasing circumstances – e.g. new leases vs renewals. There should only be one form of disclosure statement, with a separate 'shopping centre' section, that is only completed for shopping centre tenants. This creates unnecessary confusion. The introduction of four different Disclosure Statements following a review of the Retail Lease Regulations in Victoria in 2013 has merely created an additional administrative burden for our members with no measurable benefit to either party to the lease. We would welcome a move towards harmonisation with other jurisdictions in line with the attempts by NSW, QLD and VIC to adopt a harmonised Disclosure Statement as part of this review process.

To address an issue not raised in the Issues Paper, we believe that a lessor should not be required to provide a Disclosure Statement in the event of a lease renewal and section 12(1) should be amended accordingly. The purpose of a Disclosure Statement is to ensure that a first-time lessee (in a shopping centre or retail premises) is aware of all relevant aspects of the operation of the shopping centre which are necessary to make a decision on whether to enter into the lease.

A sitting lessee (who is renewing its lease) has typically had a number of years of experience in the relevant shopping centre and is familiar with all aspects of the operation of the centre. It is unlikely that a new Disclosure Statement would provide the lessee with any relevant information on whether or not to renew or extend the lease. All the current requirement does is impose, on both the lessor and lessee, an unnecessary regulatory and administrative burden and create further inefficiency in the leasing process.

Similarly, we do not believe that a lessee should be entitled to request that a lessor provide a lessee with a copy of the Disclosure Statement (section 45(c)) in order to satisfy the lessee's obligation to provide a copy of the Disclosure Statement to the proposed assignee (section 45(b)). Even though the lessor is not obliged to comply with such a request (which can then extinguish the lessee's own responsibility to the assignee) we believe this provision should be removed. We do, however, believe that a lessee should be required to provide a copy of their Disclosure Statement to the assignee. This would vastly improve the current assignment provisions.

Capital expenditure

The Act currently provides limitations (Section 13 – Certain obligations to avoid) in relation to capital expenditure. While the Act does not define capital expenditure, we do not believe a definition is required. The notion of capital expenditure is a well-accepted term as it relates to, in the case of a shopping centre, expenditure on the building and structure as opposed to maintenance and repair. We are not aware of any practical uncertainty or disputes surrounding the definition of capital expenditure that would require any amendment to the Act.

We are also concerned with the suggestion in the Issues Paper that the Act does not provide any remedy for lessees when a lessor does not undertake capital expenditure. Capital expenditure on a retail property by a property owner should not be an obligation imposed by any government, let alone under the Act, and it is already open to the lessee and lessor to commercially agree matters such as future building and premises upgrades etc, under the terms of the lease.

Further, contrary to the assertion made in the Issues Paper that "*the Act does not provide any remedy for lessees when a lessor does not undertake capital expenditure",* section 38 of the Act (in particular, sections 38 (1d-s)) entitles to lessee to be compensated for any loss and damage it suffers of a consequence of, amongst other things, the lessor failing to: (1) rectify a breakdown of plant and equipment and, (2) clean, maintain or repair the shopping centre. We consider, therefore, that the Act currently provides appropriate remedies for a lessee in this regard.

An issue not addressed in the Issues Paper is the ability of a lessor to recover capital expenditure for environmental initiatives. We raised in our submissions to the South Australian Government on the Environmental Upgrade Finance scheme that the Act should enable the recovery of capital expenditure if it is for the purpose of environmental initiatives, including energy and water efficiency, given they can reduce consumption and consequently outgoings for lessees. Under the NSW *Retail Leases Act*, capital expenditure for such purposes (under the equivalent NSW Environmental Upgrade Agreements) can be recovered from lessees and hence overrides the prohibition on recovering capital costs from lessees.

Lease preparation costs

We believe that current Act provisions work well in relation to lease preparation costs, where a lessor in South Australia can recover legal and other costs (e.g. preparation, stamping and registration). This section of the Issues Paper does, however, raise the issue that there is potential uncertainty as to whether a lessor can recover costs in relation to renewals or extensions. We support the current provision being extended to make it clear that costs can be recovered in these circumstances.

It is important that lessors can recover their lease preparation costs. In recent years, there has been a rise in lessees during the course of negotiations for a lease seeking the inclusion of special conditions in the lease documentation. This means that lessors are incurring increased legal costs in connection with the preparation of lease documents that are not in their standard form as they are required to be amended on a case by case basis to reflect the specific commercial terms negotiated by the lessee.

We also oppose any attempt to limit or cap lease preparation costs as raised in the Issues Paper. The costs associated with the negotiation and preparation of a retail lease varies significantly based on the terms and conditions requested by the lessee, the extent of negotiations and the detail and complexity of the drafting. To limit or cap the lease preparation costs would invariably push the burden of these costs to the lessor.

It is also worth noting that if a lessee withdraws from the leasing transaction and doesn't sign a lease, the lessor can be left to pay the legal costs without having the benefit of a lease.

Lease documentation

There is currently no mandatory requirement to register leases in South Australia.

However, pursuant to the *Real Property Act 1886* (SA), leases with a term of less than 12 months are deemed to be registered and benefit from the security of being registered. Further, pursuant to the same legislation, lessees can currently request that lessors register leases with a term of greater than 12 months if the lessee elects to do so. The effect of registration means that a lessee has the benefit of indefeasibility of title under the *Real Property Act 1886* (SA). Importantly, the purpose of registration of leases was never intended to make information that would otherwise be commercial in confidence, publically available.

Further, our members advise that, in practice, very few lessees request registration of leases. This is because before a lease can be registered a survey plan of the premises must be prepared and deposited with the Land Titles Office in South Australia. This is a costly exercise involving surveyor's fees, bank fees and registration fees which can cost up to $2,000 and lessees are generally not willing to pay such third party costs for little perceived benefit.

Accordingly, we do not believe that any changes should be made to the existing lease registration process and registration certainly should not be mandatory under the Act.

We also consider that the current requirement for a lessor to provide the lessee with an executed copy of the stamped lease within 1 month is unreasonable and overlooks the practicalities of the lease negotiation and documentation process. This time limit should be extended to 3 months. There are legitimate reasons why the execution and return of a lease by the lessor may take longer than one month, including the need for multiple lessors to execute lease documentation, often in different states, in the case of assets owned by joint-venture structures, and often in large numbers in the case of shopping centre lessors dealing with multiple properties and lessees.

Where a lease is registered, the current 1 month period should also be extended to 3 months, subject to conditions concerning limitations imposed by actions of third parties include mortgage holders and planning regulation.

The Issues Paper states that there is no remedy for either party in the event of non-compliance. This seemingly overlooks the fact that the lessee can always seek a judicial order to enforce the signing and returning of the lease by the lessor. There is no need to provide further protection for the lessee under the Act. In any event we consider that any form of penalty is not appropriate as it is very unlikely to achieve the outcome sought.

Warranty of Fitness for Purpose

We find this paragraph of the Issues Paper incomprehensible.

It is correct that the Act allows a lessor to exclude the warranty of fitness for purpose under the lease. However the Issues Paper incorrectly goes on to state:

"Thus the premises no longer caries a warranty of fitness for purpose ***and the lessor is not responsible for any structural repairs and maintenance***." [emphasis added]

Invariably the warranty is excluded in every lease by every lessor however, in the experience of our members, such a warranty will typically relate to a peculiar and infrequent aspect of the lessee's use of the retail premises. Before entering into a lease, it is appropriate that the lessee views the premises and satisfy itself the premises are suitable for the intended use. Further, it is impossible to be prescriptive about the works required by a lessee for a particular use determined by the lessee, and the lessor cannot be required by the Act to bring premises to a condition suitable to a lessee's need. These are more properly treated as matters for commercial negotiation between the parties.

We further consider that the Issues Paper is confusing the warranty for fitness for purpose with the general obligation on a lessor to undertake suitable structural repairs and maintenance under the terms of a lease. The exclusion of the warranty does not necessarily mean that the lessor is not responsible for structural repairs or maintenance. The lessor will still be obliged to provide quiet enjoyment and observe repair and maintenance provisions under the terms of the lease, or otherwise the lessor will be in breach of its obligations under the lease.

We also do not understand the issue raised in the Issues Paper in relation to the option to establish a scope of works required to the lessor's property and include an estimate of costs and a description of "make good" within the Disclosure Statement. As noted above, such matters must be dealt with on a case by case basis by a commercial negotiation between the parties, and are not a matter for the Act to prescribe.

1.3 Security

Section 19 of the Act allows a lessor to secure performance of the lessee's obligations under the lease by requiring a security bond of not more than four weeks rent.

Given the practical limitations of a security bond our members instead generally require bank guarantees as security for a lessee's performance of its obligations under a lease. A bank guarantee is a common form of lease security provided by retail lessees across the country. We are therefore concerned about what is potentially being proposed in relation to limiting a lessor's ability to obtain such bank guarantees as security. Specifically, the Issues Paper states "***If the scope of the bond was expanded to allow up to three months' rent held only by the small business commissioner, this could eliminate the need to offer a guarantee"***.

There should be no limitation on the nature of the security a lessor wants to use (either a security bond or bank guarantee). Our fundamental concern is that the commentary in the

Issues Paper overlooks the fundamental fact that security relates to a lessee's obligations under the lease. In the case of bank guarantees, the guarantee is released when the lessee meets their lease obligations, and that the guarantee is only drawn upon when a lessee fails to meet their obligations under the lease.

We are deeply concerned with the statement in the Issues Paper that "this results in the lessee having a considerable sum of money tied up for the duration of the tenancy". This assumes that the form of security of the lessee is cash deposited with the bank that issued the bank guarantee. This is also making a judgment that the lessor's right to security for their own property is somehow less important than the lessee's need for cash.

We also question the claim that lessors can "unnecessarily delay the release of the guarantee or make unreasonable claims against it". Dealing with the latter, this would be a breach of the lease. The term 'unnecessarily' is also a loaded term. Not one of our members queried on this issue said they 'unnecessarily' delay the release of a guarantee. Any delay is due to legitimate reasons, which principally relates to a lessee having not fulfilled all of the obligations that they agreed to under the lease. This could be the completion of defit or payment of final charges in relation to outgoings.

Bank guarantees are an unconditional undertaking from a bank to a lessor. Bank guarantees are a common mechanism to provide the lessor with the security that funds are available in the event a lessee breaks one or more of their lease conditions. Bank guarantees are generally preferred by lessors over other forms of security available under legislation as they are a trusted and widely used and accepted form of security. Provisions regarding the draw down and return of the guarantee should be matters for lease negotiation and for agreement with the relevant bank providing the guarantee. There is no need for such arrangements to be regulated by the Act.

Our members generally do not use the security bond scheme for various legitimate reasons, including the increased administrative burden and uncertainty. While the Act does not limit the value of a guarantee (and nor should it), feedback suggests that the value ranges from 1 month to 6 months of gross rent across our member's portfolios, depending on the individual circumstances. It should be noted that the use of bank guarantees as a preferred form of security has arisen as a result of the over-regulation of cash security deposits now dealt with in some retail leasing legislation. While, historically, a lessor was able to hold a lessee's cash deposit relatively unencumbered, regulation is increasingly seeing lessors being required to deposit a security deposit into a government operated account or scheme, such as the Retail Bond Scheme in NSW, as well as the SA Retail Bond Management Scheme.

In addition to taking time and resources to implement (e.g. for a lessor to collect, lodge and discharge security bonds), lessees can also challenge a lessor's legitimate attempt to draw on funds from the security deposit in the event a lessee breaks their lease conditions. This can result in the initiation of dispute resolution proceedings, including mediation, before the matter can be determined and the money received by the lessor. This introduces uncertainty and potential delay into a process whereby a lessor is seeking to access funds to remedy an action taken by a lessee in contravention of their lease agreement. Similar regulations must not be put around the use of bank guarantees, particularly considering that the terms of the bank guarantee are able to be negotiated and agreed when negotiating the lease.

For this reason, we would also oppose any cap, such as the suggested 3—month period for cash security bonds being extended to bank guarantees.

If a timeframe or finite date was to be implemented, we would recommend a period of at least 6 months after the expiry of the lease, assuming the lessee has not exercised any option of renewal, is no longer in possession of the shop and has complied with all obligations under the lease. Any timeframe must be a sensible and realistic one that will

ensure that any breaches of the lease have been notified and rectified. We certainly would not support a 30-day period (which is currently prescribed in the ACT).

In addition, any regulation of the return of a bank guarantee must clearly articulate that such a provision does not apply (ie. the bank guarantee would not be returned) until the lessee has performed all obligations secured by the guarantee. For example, a lessor should not be required to return a bank guarantee after an arbitrary timeframe if the lessee has delayed completion of the removal of fit-out and any other 'make good' obligation required at the end of the lease.

1.4 Term of lease and renewal

Minimum 5 year term

We believe that the minimum 5 year term should be abolished. The nature of retail leasing has changed and the minimum term requirement is no longer relevant. One member we discussed this issue with noted the prevalence of 2 - 3 year leases in their portfolio which are created at the request of lessees and reflect the state of the market and lessees wanting to test new concepts.

The Productivity Commission's 2008 report concluded (at page 107) that "regulation on lease terms are having little or no sustained effects and that lease terms are primarily determined by commercial negotiation".

The existing minimum term can be reduced through the provision of a certificate signed by a solicitor. We believe this current procedure is unnecessary and therefore do not support the proposed option of alternative certification being provided by the Small Business Commissioner.

We understand the initial intention of a minimum term requirement was to provide security of tenure to lessees, as well as providing a reasonable period to amortise business and fit-out costs. However, there is no evidence that the inclusion of the minimum term, or the so-called 'protection' of certification, is necessary to protect lessees. Rather, it can result in an unnecessary cost burden and delay where the parties mutually agree to a term of less than five years.

There is also evidence to suggest that the absence of minimum term provisions does not lead to shorter rental periods. There is no minimum term in Queensland and there are indications that standard leases in that State run up to seven years. As noted above, feedback from our members also suggests that in light of recent retail trends, lessees are requesting shorter rental periods, including shorter terms on renewal (e.g. 2 - 3 years). This is a result of the emergence of 'pop up' stores which are principally designed for short lease periods to trial a new product or style or clear excess and out of season stock.

To the extent that there is any concern that the removal of a minimum term (with no certification) would remove protections for lessees that are required to incur fit-out costs, we believe that this should be a matter for commercial negotiation.

Rules of conduct at end of term

We have always had a fundamental issue with section 20D of the Act insofar as it provides a preferential right of renewal to sitting lessees. Along with the ACT, South Australia is the only jurisdiction to operate such a provision.

From the outset, we would have significant opposition if this provision was to further encroach the lessor's freehold property rights. Consequently, our response is an unequivocal "no" to the question raised in the Issues Paper as to whether this provision balances the interests of the lessee and lessor effectively.

While our members have advised there have been no significant disputes in this area and that commercial negotiations can often be agreed, the suggestion in the Issues Paper is that the capital invested by the lessor in the lessor's property, and the lessor's rights, are less significant than those of the lessee. It is for this reason that we do not support the claim that lessees have the choice to sign a new "unreasonable" agreement or to leave the premises and forfeit any capital that had previously invested in their business. This claim effectively assumes that the lessor should be prepared to accept a lower income for the sake of the sitting lessee, or that their capital investment is less significant.

It would be strongly welcomed if the review re-considered the fundamentals of this approach and acknowledged the benefits that lessors provide for lessees.

This includes the fact that a lease is an agreement between the owner of a property (lessor) and a lessee for the use of the property for an agreed purpose, on agreed conditions, at an agreed price and, importantly, for an agreed term. Like any other contract, a lease has a finite life and imparts no continuing right of occupancy when the lease ends.

The law of property in Australia dates back centuries and provides the critical framework for a stable economy and society. Fundamental to property law is the different forms of land ownership – freehold, leasehold, strata, company title and so on – each distinguished by the rights that accrue to that title. While governments have sometimes legislated to marginally alter these rights and principles, they have been very wary of undermining the stability and certainty of property laws and titles because of their importance to the effective functioning of society as a whole.

Freehold title provides a property owner with much greater rights over the use and disposal of their property than a leasehold title does, including providing security of tenure. For this reason, freehold title comes at a greater cost and with greater responsibilities than a leasehold title. Providing retail lessees with an automatic or preferential right to renew their lease undermines these principles. On one hand, it erodes the owner's freehold right to use their property as they wish; on the other, it provides lessees with a freehold right to continued occupancy when the lease ends.

This issue has been a matter which has been considered during the introduction of retail tenancy legislation around Australia in the 1980s and 1990s and during the many reviews of retail tenancy legislation that has occurred over the last 20 years. In every case the Government of the State or Territory has declined to impose a continued right of occupancy when the lease has expired. South Australia and the ACT are the only exceptions, where the preferential rights of renewal of retail leases were imposed by Opposition and minor parties in the Parliaments of that State and Territory against the express wishes of the Government of the day.

Rights of first refusal or last refusal both envisage restrictions on lessor's freedom to deal with their own property as they wish after the lease has ended. These restrictions raise a number of fundamental concerns. The main concerns are that these restrictions:

- provide lessees with the benefits of freehold title but without the cost and risk of freehold title, which is fundamentally unfair and undermines long accepted principles of property ownership;
- are based on the misconception that it is always the lessee who is in a disadvantageous bargaining position at the end of the lease;
- seriously impede a shopping centre manager's ability to successfully manage the centre, to the detriment of all stakeholders, including the lessees, the lessor, its shareholders and the local community;
- limits competition by restricting the entry of new retail lessees to the market which will inevitably discriminate against small retail lessees;

- restricts redevelopment of shopping centres to improve the appearance of the centre and create the optimal tenancy mix for the success of the centre and its lessees;

- reduces the value of property assets and therefore of property investments, putting South Australia at a significant disadvantage in comparison to other States and Territories.

The relative advantages of freehold and leasehold are demonstrated in **Table 1** below, which compares the position of the owner retailer and the lessee retailer (both in a shopping strip and a shopping centre). We would respectively urge the reviewer to consider this information.

Table 1. 'Owner' Retailers v. 'Lessee' Retailers

	Capital outlay required	***Risk being carried***	***Advantages***	***Disadvantages***
Owner retailer	• *purchase of shop, including financing costs* • *fit out of shop* • *business set up costs*	• *property risk* • *retailing risk*	• *security of tenure* • *no rent*	• *greater capital outlay* • *more capital at risk* • *unable to easily change locations (less mobility)* • *generally subject to mortgage*
Lessee retailer (shopping strip)	• *fit out of shop* • *business set up costs*	• *retailing risk*	• *less capital outlay* • *less capital at risk* • *greater mobility* • *lower rent (than a shopping centre)*	• *no security of tenure beyond term of lease* • *lower turnover* • *less control over location of competitors*
Lessee retailer (shopping centre)	• *fit out of shop* • *business set up costs*	• *retailing risk*	• *less capital outlay* • *less capital at risk* • *greater mobility* • *higher turnover and sales productivity* • *greater control over location of competitors*	• *no security of tenure beyond term of lease* • *higher rents (than a shopping strip)*

Leasehold also gives the lessee retailer greater flexibility. While the lessee retailer does not have security of tenure beyond the term of the lease, they have absolute security of tenure for the term of the lease and on the conditions they have negotiated. Just as importantly, they do not find themselves anchored to that location (for longer than the period of the lease) and if the location turns out to be a poor one for their retail offer they can relocate to another centre or to another retail location at greater convenience. In the current retail market, which is quickly evolving and influenced by factors such as changing demographics and online sales, it could be argued that the lack of security of tenure arising from a lease is less of an issue now than it has ever been.

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

1.5 Rent and outgoings

Fitout

Our members have not experienced any problems with payment of rent in relation to the lessor's fit-out obligations. It is in the lessor's interest to get the premises ready for possession to ensure rental income is received.

While there is no definition of fitout in the Act, or what constitutes 'substantially complied', these requirements are generally outlined in a lessor's fitout guidelines and there is no need to amend the Act.

The Issues Paper states that there is no remedy for the lessee in instances where the fitout is inadequate. This is not the case. If the lessor fails to provide the premises to the lessee in accordance with the lessor's fitout obligations set out in the leasing documentation (which is a matter of fact in each case), the lessor would be a breach of the lease entitling the lessee to pursue the lessor for contractual breach.

Adjustment to base rent

This section of the Issues Paper is astonishing.

Our members have not experienced any problems with section 22 of the Act. This section of the Issues Paper is inappropriately seeking to protect the lowest common denominator, a lessee who overlooks the most basic terms of the lease, including rent. At the end of the day, a retail lease is a contract between two commercial parties. The rent provisions and obligations are clearly set out in a lease and are commercially negotiated and agreed at the commencement of the term. The agreed rental obligation includes annual adjustments (whether annually or otherwise), generally on the anniversary of the lease and typically based on the Consumer Price Index (CPI) or a fixed percentage increase. Rent increases are also outlined in the Disclosure Statement. That the failure by a lessee to pay an increased rent that was outlined in the lease from lease commencement should result in a restriction on a lessor's right to enforce its rights which are openly disclosed in the lease is a seriously concerning proposition. Further, the comparison between rent and outgoings in this section is absurd, as if to suggest that a lessor should have to give annual reminders to the lessee of one of its fundamental obligations disclosed in the lease from the commencement date. The arrangements around outgoings are in place because of the nature of outgoings (including the provisions of estimates, wash-ups and regular auditing), a concept which is not applicable to the calculation of rent during the term of a lease.

If there is a problem that the Commissioner is seeking to address, we strongly believe it would be achieved through better information and education for lessees, along with engagement through business services and relevant industry associations, local councils and chambers of commerce.

An alternative option may be to require lessees to obtain financial and legal advice ahead of signing a lease to ensure they are properly informed, particularly in relation to the base rent and annual rental increases.

Land tax

The Act currently limits the recovery of land tax and we believe section 30 should be amended to enable full recovery of land tax from lessees through outgoings. Rather than it being recovered transparently, the Act currently allows for land tax to be recovered as part of the rent. This approach, and in particular the lack of transparency, is different to the approach in the majority of other jurisdictions – NSW, Western Australia, Tasmania, and Australian Capital Territory and the Northern Territory – which have no such discriminatory provisions in retail tenancy legislation.

The potential uncertainty mentioned in the Paper, whereby a lease that was previously outside the Act's rent threshold but then falls into the Act's coverage, will be addressed if the rent threshold is changed to a floor space threshold.

A number of Government-commissioned inquiries have concluded there is no benefit to lessees in prohibiting the recovery of land tax from lessees. The Government-commissioned Review of State Business Taxes in Western Australia in 2002, for example, rejected a proposal to prohibit the passing on of land tax. The report found: "Such a prohibition would result in land owners incorporating land tax in the base commercial lease rates, rather than as part of outgoings to be directly paid by lessees. The net result would still be a passing on of all or part of the burden of land tax from land owners to lessees, but in a less transparent manner." This finding was echoed the following year in the Report of the Review of the WA *Commercial Tenancy (Retail Shops) Agreements Act* which considered and rejected a proposal to prohibit land tax as a recoverable outgoing under that Act.

In 2005, a tri-partite working party reviewing the *Retail Leases Act* in NSW rejected a similar proposal.

We also supported the Bill, sponsored by the Hon. John Darley MLC, an Independent and a former Valuer-General, to allow lessors to recover land tax from lessees in South Australia. Mr Darley noted "there is not a lessor in the state who is not passing on land tax indirectly to their tenants". Mr Darley said his Bill was designed to ensure that "the costs associated with running a business are presented in an open and transparent manner." The Bill was consistent with a recommendation of the interim report in November 2013 of the Economic and Finance Committee of the South Australian Parliament, conducting an inquiry into the SA taxation system, which noted that "ultimately the cost [of land tax] is built into the rental agreement, albeit hidden, and often at a higher value to avoid any lag in recovering land tax increases".

The findings of these independent inquiries that there would be no benefit to lessees, and there would be a detriment in the form of a lack of transparency, should be accepted by this Review. It is puzzling that the recovery of land tax isn't noted as an issue for lessors in the Issues Paper. A further detriment caused by the current section 30 comes from the fact that this reduced transparency makes it easier for governments to defend land tax, and therefore much easier to raise the rates of land tax, because lessees remain under the mistaken belief that land tax does not affect them.

The potential uncertainty mentioned in the Issues Paper, whereby a lease that was previously outside the Act's rent threshold but then falls into the Act's coverage, would be addressed if the rent threshold is changed to a floorspace threshold. Nevertheless, for the

purposes of land tax, the lease should be deemed to fall under (or not fall under) the ambit of the Act depending on its status at the commencement of the lease. It would be an administrative and legal burden on both parties to a lease if a lease which is currently on foot was to be considered a retail shop lease at some point after the lease was entered into.

Outgoings

This section almost seems to be arguing for change for change's sake.

The Act already provides for a range of protections for lessees in relation to outgoings.

As the Issues Paper notes, within 3-months after the end of the accounting period, the lessor must provide the lessee with a report that enables the lessee to readily compare the actual expenditure with the original estimate. The Issues Paper then implies that there is a problem which would be remedied by providing a definition of accounting period or introducing a penalty for non-compliance. The Act defines the accounting period as "a period fixed as an accounting period in a retail shop lease". It is quite appropriate that the accounting period is whatever is stipulated in the lease.

It is worth noting that that Act contains a wide range of protections for lessees in relation to outgoings. The lessor is required to provide as much certainty as possible, even though there is no immediate certainty given that lessors are generally price-takers, not price-setters, for much of the operating expenditures. Statutory charges (influenced by statutory land valuation and taxation thresholds and rates) and insurances, for example, are determined by other bodies. Only where a lessor has been able to negotiate fixed price contracts can there be any reasonable 'certainty' in relation to outgoings.

This is also hardly a major issue. Lessees know at the beginning of the financial year how much they will be paying each month in outgoings and prudent lessees budget for the fact that they may have to pay a further amount at the end of the year when the reconciliation takes place. Alternatively they may in fact receive a refund.

In practice, lessees also have the opportunity to, and generally will, proactively engage with lessors on any concerns and ask questions relating to outgoings throughout the term of the lease. The commercial relationship between the lessor and lessee means that these concerns and questions are more often than not addressed promptly by the lessor to the satisfaction of both parties.

Repairs and maintenance

Sinking funds are extremely rare in the shopping centre industry.

In relation to repairs and maintenance of the premises, we are reasonably confused about the commentary in this section. It is in our members' interest to seek to ensure that their centres are in adequate condition, including repairs and maintenance with adequate professional services and suppliers to prevent damage. A well-maintained and attractive shopping centre is an important part of bring customers into the centre, for the benefit of all retailers.

This section of the Issues Paper has not proposed any recommendations; however we would have concerns if additional obligations were placed on lessors.

It has been suggested by one of our members that a provision similar to that in section 52 of the *Retail Leases Act 2003* (Vic) could be incorporated into the Act. Section 52 of the Victorian legislation deals with the lessor's liability for repairs in relation to, amongst other things, fixtures and fittings relating to services that are provided under the lease by the lessor. However, importantly, section 52 also provides very clearly that the lessor is not responsible for maintaining those things if the need for repair arose out of misuse by the tenant, or where the tenant is entitled or required to remove the thing at the end of the

lease (in which case such repairs and maintenance are rightly the responsibility of the lessee).

There have been examples where the Victorian provision has been useful in negotiating leases and settling disputes with lessees regarding the appropriate scope of lessor repairs and maintenance obligations. We would not be opposed if the government gave consideration to this clause as part of its review, provided that there were appropriate provisions setting out that a lessor is not responsible for repairs and maintenance of lessee's fixtures and fittings or where the requirement of repair and maintenance is as a result of the tenants use or misuse of lessors property, and ensuring that any provision does not have the effect of extending the scope of the Act to impose some form of prescribed "minimum standard" on the lessor in relation to its repair and maintenance obligations, which we believe are obligations more appropriately dealt with in the lease provisions agreed between the lessor and lessee.

1.6 Alterations and other interference with the shop

Lessee to be given notice

We believe that the current notification requirement of one-month should remain.

We do not, however, believe that there needs to be a penalty regime put in place, or further remedies for the lessee because as noted in the above section of our submission the lessee is already entitled to enforce its rights upon application at the Magistrates Court pursuant to section 68 of the Act.

Demolition

Our members have not experienced any significant issues with the current demolition clause at section 39 of the Act. We believe the current section is appropriately structured to provide a balance between the lessor's and lessee's interests. This includes a legislative certainty that there needs to be a genuine proposal (with sufficient details provided), at least six months written notice of termination, and an ability for the lessee to terminate at an earlier period. Subsection (3) also prescribes the requirement for the lessor to provide reasonable compensation.

While there is no mention as to whether 'reasonable compensation' includes any of the lessees relocation or fitout costs, our members have advised that they do include these costs, on the legitimate basis that there is evidence provided in relation to these costs. There are some issues which need to be considered when assessing compensation, such as that the fitout is provided to the same standard as that which existed prior to the relocation, and the lessor does not (and should not be expected to) pay for improvement on that standard. We do not believe there could feasibly be a reference to these costs in a Disclosure Statement as it would be difficult to ascertain at the time of completing a Disclosure Statement. These matters should be a matter for negotiation between the parties to the lease at the relevant point in time. The costs of relocation of a lessee should not be covered since these are indirect costs and the lessee was aware at the time of entering into the lease that a lease may be terminated if the lessor enlivens its rights under the demolition clause.

Ultimately, it is the view of our members that it is clear what constitutes 'reasonable compensation' and it is neither necessary, nor appropriate, for the Act to attempt to define these terms. If a dispute arises between parties, they can always seek clarity from the Courts on a case-by-case basis.

It has however been suggested that section 56(4) of the *Retail Leases Act* 2003 (Vic) could be considered for incorporation into the Act, which provides that the lessor will be required to pay "reasonable compensation" for the fit out of the premises to the extent the fitout was not provided by the lessor.

Damaged premises

We truly find this section bizarre, in terms of the circumstances that are described whereby a lessor would create an opportunity to terminate a lease by avoiding repairs and maintenance and running down the premises over the term of the lease.

It is in our members' interest to seek to ensure that their centres are in good condition, including maintenance and management with adequate professional services and suppliers to prevent and repair damage. A well-maintained and attractive shopping centre is an important part of attracting customers into the centre, for the benefit of all retailers. However, like with all buildings and structures, shopping centres are not immune from occasional damage and repair including from natural weather events. For instance, some of our members' centres are located within townships that can be subject to flood or bush-fire events.

We also believe that section 40 already provides adequate remedies for a lessee in relation to damaged premises, such as relief on rent and outgoings. We think the current approach provides a fair balance.

Further, prudent lessors and lessees will have appropriate insurances to deal with circumstances where the premises are damaged by no fault of a party, which should adequately protect parties in such circumstances. The Act should not alter the allocation of responsibility for maintenance and repair of the premises as agreed by the parties under the terms of the lease.

1.7 Assignment and termination

Consent to assignment

There should be no further limitations on a lessor's rights in relation to providing consent to an assignment. We believe that the current provisions relating to assignment are appropriate as they provide an appropriate balance between the interests of lessors and lessees, if not more weighted in favour of the lessee.

The lessor should maintain the right to determine whether an assignee is adequately skilled to take on a business in their shopping centre, with no recourse to the lessee for the lessor's exercise of that discretion. It should be a lessor's right to do due diligence on an assignee to determine if they are, for example, going to have the necessary experience and ability to meet their critical obligations (such as rent obligations) over the term of the lease.

It is also entirely reasonable for a lessor to be able to recover costs (under section 44) for legal and other expenses in connection with the assignment, particularly given the lessor did not anticipate these costs when signing a lease with the initial lessee. It is important to remember that an assignment occurs at the sole election of the lessee/assignor. As such, a lease assignment is not instigated by the lessor, it is a situation that the lessor is responding to. If our members are unable to recover their costs incurred in this situation, it would be very unreasonable.

The fees that our members seek to recover include third party legal fees. We do not accept that such fees are a "de-facto" premium, and we believe it is worth noting that these are costs that are brought about entirely by the lessee's request to assign the lease.

It is also worth noting that there are stringent requirements in place under the *Legal Practitioners Act 1981* which are applicable to lawyers acting for lessors when dealing with leasing transactions including assignment. Those requirements are in place for the protection of third parties such as lessees.

In relation to a lessor's other costs, our members advise that there is a significant amount of administrative work involved in consenting to dealings with the lease and that lessor's

costs are reflective of that work and are determined having regard to the size and sophistication of the lessor. There is no 'one size fits all' solution. To the extent that there is any dispute as to the lessor's other costs, we understand that most lessors resolve them promptly and commercially. We therefore do not see the benefit or need to prescribe or limit the amount. This would be unnecessarily prescriptive legislation.

We would support the incorporation of a general provision similar to section 60(1)(c) of the *Retail Leases Act* 2003 (Vic) which provides that a lessor is entitled to withhold consent to the assignment if a lessee has not complied with the assignment provisions of a lease. For example, where a lessee has not provided sufficient information to the lessor in respect of the proposed assignee.

Liability of lessee following assignment

This section raises the issue that there is no reference in the Act as to whether the liability of the assignor continues if the assignee sublets with the lessor's permission. Subleasing and assignment are not analogous. If premises are assigned, the assignee is still primarily liable and the assignor stands behind the assignee.

Lessor's right to refuse sublease or mortgage

Again, subleasing and assignment are not analogous. Nevertheless, there should be no limitations on a lessor's rights in relation to providing consent to a sublease. As discussed above with regards to assignment, the lessor should maintain the right, with no recourse, to determine that whether a sublessee is adequately skilled to take on a business in their shopping centre, with no recourse to the lessee for the lessor's exercise of that discretion. It should be the right of the lessor their right and ability to do due diligence on a prospective sublessee to determine if they are, for instance, going to have the necessary experience and ability to meet their rent obligations over the term of the lease.

1.8 Additional requirements for retail shopping centres

Relocation

In relation to relocation requirements, while there is no clarification as to what constitutes reasonable costs of relocation and whether the cost of the fitout is included, the reality is that there is no black and white answer. In our member's experience, commercial agreements have been easily reached where a better location is offered. Our members also generally pay all costs which include the relocation and fitout.

With respect to clarification of what constitutes an "alternative shop", it would be impossible to define this as this can only be determined on a case-by-case basis.

1.9 Miscellaneous

Abandoned goods

The Issues Paper is too simplistic in its summary of the provisions relating to abandoned goods. The two day requirement referred to in the Issues Paper is a requirement of section 76(1)(a) of the Act, and relates only to circumstances where the goods are perishable foodstuffs or where the value of the goods is less than a fair estimate of the cost of their removal, storage and sale. If this is not the case, section 76(1)(b) goes on to provide that the goods must be stored in a safe place and manner for at least 60 days.

There is a valid distinction between when the two day provision prescribed by the Act applies, and when distraint provisions under the *Landlord and Tenant Act 1936* apply.

Notwithstanding the above, we believe section 76 of the Act is a perfect example of over regulation which in turn creates confusion. We recommend this provision be abolished

because it is cumbersome, expensive to comply with (given that the value of abandoned goods, in our member's experience, is usually minimal) and can otherwise be and generally is dealt with by agreement in lease documents.

2.Main issues not covered by the Act

2.1 Termination

The commentary in this section of the Issues Paper correctly states that the Act does not cover how a lease can be terminated for a breach by either the lessor or lessee.

The commentary goes on to state that the *Landlord and Tenant Act 1936* (**LTA**) "*does cover the issues of re-entry and distress for rent"*. This statement is incorrect. To the contrary, section 10 of the *LTA* deals with a right of re-entry for any breach and provides that such right shall not be enforceable unless and until the lessor serves a breach notice.

Clause 12(5) of the LTA specifically sets out that the *"said sections **shall not** … affect the law relating to re-entry and forfeiture for non-payment of rent."*

It should have been noted in the commentary that a lease is a contract, and that common law still applies insofar that a lessor can terminate a contract without notice (subject to any expressly agreed terms in the contract) if the lessee has failed to meet their principal obligation to pay the rent.

This section of the Issues Paper then notes that *"it is desirable to have a process that clearly sets out what constitutes a breach, what notice should be given and what redress is available for non-compliance"*. Again, such provisions are already contained in section 10 as follows:

> **10—No re-entry till notice to tenant to remedy breach**
>
> A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforceable by action or otherwise, unless and until—
>
> (a) the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach; and
>
> (b) the lessee fails within a reasonable time thereafter to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

We do not agree that the process prescribed by the LTA *"is very complex and costly"*, nor do we support the proposal for the Act to prescribe any further process in relation to breach, notices and redress for non-compliance. There should not be a notice requirement in relation to arrears of rent. The current rights for a lessor should not, as proposed, be eroded by a process whereby a lessee's failure to meet their contractual obligations can be diverted to a process *"which may include conciliation with connection to bond disbursement to cover further costs to either party"*. When combined with the proposed amendments to security provisions earlier in this submission, this is a worrying move in relation to the review of the Act.

While we generally support the OSBC's dispute resolution role in relation to genuine disputes, the proposal would send an inappropriate signal to the retail leasing market that even a lessee's breach for failure to pay rent will not give rise to a right for the lessor to exercise its legal rights, but will instead be mediated by the OSBC before a lessor is entitled to act on its legitimate rights.

2.2 Condition reports

We do not support the incorporation of the proposed 'photographic condition report' as part of the Disclosure Statement, along with "a description of the scope of works required upon vacating the premises".

If such a proposal proceeds, the obligation should be on the lessee to undertake a condition report to form the basis of 'clear comparisons' with the condition of the premises at the start of the lease and after make good works have been undertaken at the end of the lease. We believe such a requirement would be burdensome.

Our members include make good provisions in their leases to ensure that the premises can be rented to a replacement lessee. This generally includes a full de-fit which takes the premises back to the structural shell, including bare floor, walls and ceilings and the connections of essential services (e.g. electricity, water, gas, telecommunications). This is a legitimate requirement by a lessor. The only time that our members have experienced any problems is where a lessee is provided with a partial fit-out (which benefit them, and they agree to as part of their lease), but they then dispute its removal at the end of the lease even though the lease states that a full de-fit needs to take place. However, these issues were ultimately resolved.

2.3 Lease documentation

This section describes concerns that an 'agreement for lease' has no standing under the Act, but that under contract law, the lessee can be tied to a tenancy without having received the proposed lease. It is then proposed that "consideration be given to providing a pro-forma lease, if not for shopping centre tenancies, then certainly for strip and stand-alone tenancies".

We do not believe there is a problem in relation to 'agreements for lease', and do not believe they should be regulated under the Act. In particularly, this is due to the extensive 'pre-lease' provisions and other protections (e.g. misrepresentation) already available to lessees under the Act. This includes the comprehensive information provided as part of a Disclosure Statement.

We would not support the introduction of a pro-forma lease or standard lease for shopping centres, to the extent that it would be mandatory for lessors.

Our members, who deal with relatively large properties and a relatively large number of retail leases, have made a significant investment over time in developing their leases based on their commercial arrangements. This is often used as a point of different between lessors.

The phrase in the Issues Paper that "many leases are voluminous, contain legalistic terms and jargon, and are not user friendly" is simplifying the issue. A lease is a legal contract made in accordance with a law passed by the South Australian Parliament (i.e. the legislature) and administered and enforced by the executive and judicial arms of government; of course it contains legalistic terms. Leases can also be voluminous by necessity, particularly to avoid any opportunity for a vexatious claim by a lessee in relation to (for instance) misleading and deceptive information.

While there might be an aim for simplification, this should not come at the expense of necessary information or leases that have been developed by larger lessors (unless lessors are afforded appropriate rights and recourse). The aim of simplification might also be in conflict with the need to disclose all relevant information to retail lessees, so a standard lease could place a limit on such information or lead to complex variations or a departure from standard conditions and potentially reduce competition between lessors who often use their own standard lease as a point of difference and a reason why a retailer should choose a particular centre over another.

Further, many of our members operate properties in multiple jurisdictions and attempt to use a standard lease for those centres to create efficiencies which already minimises costs and time when dealing with the same lessee across multiple jurisdictions.

2.4 Dispute monetary limits

We believe that mediation is very useful in the resolution of disputes. We support the need for there to be a monetary limit set in terms of the Small Business Commissioner facilitating negotiation in the case of a dispute. We would support a limit$400,000 as suggest in the Issues Paper.

Shopping Centre Council of Australia

The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres. Our members include family businesses, private companies, industry superannuation funds and Australian Real Estate Investments Trusts (A-REITS) listed on the Australian Stock Exchange (ASX).

Our members are AMP Capital Investors, Blackstone Group (Australia), Brookfield Office Properties, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, Jones Lang LaSalle, Lancini Group, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Novion Property Group, Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group, Stockland.

Our members have interests across South Australia's metropolitan, regional and rural areas, covering around 55 shopping centres, 900,000 square metres of retail floor space and 2,500 retailers. Our members' interests includes the state's largest centres such as Westfield Marion, Westfield Tea Tree, Elizabeth Shopping Centre and Federation Collonades; CBD or 'city centre' assets such as the Myer Centre, as well as smaller, neighbourhood centres.

Contacts

The SCCA would be happy to discuss any aspect of this submission. Please do not hesitate to contact:

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