



**Senate Economics References Committee –
Inquiry into the need for a national approach to retail
leasing arrangements**

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

28 August 2014

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1. Executive summary

A national approach to retail leasing arrangements makes eminent sense.

As an organisation that represents companies which operate in multiple jurisdictions across Australia, we would welcome the Senate Committee recommending a sensible pathway to achieve such a bold reform that would provide consistency and promote efficiency for business. The recommended pathway should be alert to, and seek to resolve, the challenges which have stymied the achievement of this outcome in the past. These include a lack of political will at all levels of government, the self-interest of the states and territories in retaining their own retail tenancy legislation and the general inability of federal, state and territory governments to successfully deliver previous harmonisation reforms, such as the largely failed attempts to harmonise retail lease disclosure statements, the abandonment of the National Occupational Licencing System and the unwillingness of all jurisdictions to adopt the *Model Work Health and Safety Act*.

In forming its recommendations we respectfully ask that the Senate Committee give due consideration to our submission. This includes taking on board our strong view that a national approach to the regulation of retail tenancies should come in place of, not in addition to, the present system of state and territory regulation. A failure on the Committee's behalf to acknowledge this will result in the potential duplication of regulation and red-tape for both landlords and tenants, thus defeating the purpose of a national approach.

Our general support is also conditional on the understanding that a national approach would not simply mirror the existing over-regulation which exists at the state and territory level and results in no greater encroachment of regulation into what should be a commercial negotiation between a landlord and tenant than currently exists. The development of a national approach should be an opportunity to wind back the scope of retail tenancy regulation which, in some jurisdictions, extends to over 100 detailed provisions. It would also be the chance to recalibrate the relationship between a landlord and a tenant as a commercial one where the terms and conditions of a retail lease are negotiated and agreed between the parties and not subject to excessive government regulation.

Despite our general support for a national approach and our willingness to urge the Senate Committee in this direction, we are sceptical that a national approach is going to be achieved. The possibility of a national approach to retail tenancy regulation has been recommended before, on no less than three occasions, and no action has been taken. This leads us to fear that the Committee's inquiry will simply be a platform to parade well-worn prejudices about retail tenancy issues and bash landlords.

In forming its finding and recommendations, the Senate Committee should be aware of the range of discussions already underway which have a bearing on the relationship between tenants and landlords. We are currently involved in two reviews of state-based retail tenancy legislation, those of NSW and Queensland, and we understand that reviews in Victoria and South Australia are imminent. The Productivity Commission is in the midst of a review into the cost of doing business with regard to retail trade, having completed a review in the market for retail tenancy leases (which comprehensively addressed many of the headings in this inquiry's terms of reference) as recently 2008. The Review of Australia's Competition Policy continues and submissions recently closed on a discussion paper seeking feedback on the Federal Government's proposal to extend unfair contract protections under the *Competition and Consumer Act* to business to business contracts.

We are pleased to provide this submission to the Senate Committee. It addresses each of the headings of the terms of reference and also provides detailed commentary on our general support for a national approach to retail leasing arrangements. The contact details of Shopping Centre Council of Australia (SCCA) staff members are available on page 28. We would be pleased to be of any assistance necessary to the Committee Secretariat or Committee members.

2. A national approach to retail leasing arrangements

2.1 General support for a national approach

The SCCA would be pleased to see the Senate Committee recommend the adoption of a national approach to retail leasing that winds back the current regulatory overreach of the states and territories and respects and promotes the primacy of commercial negotiations between a landlord and a tenant.

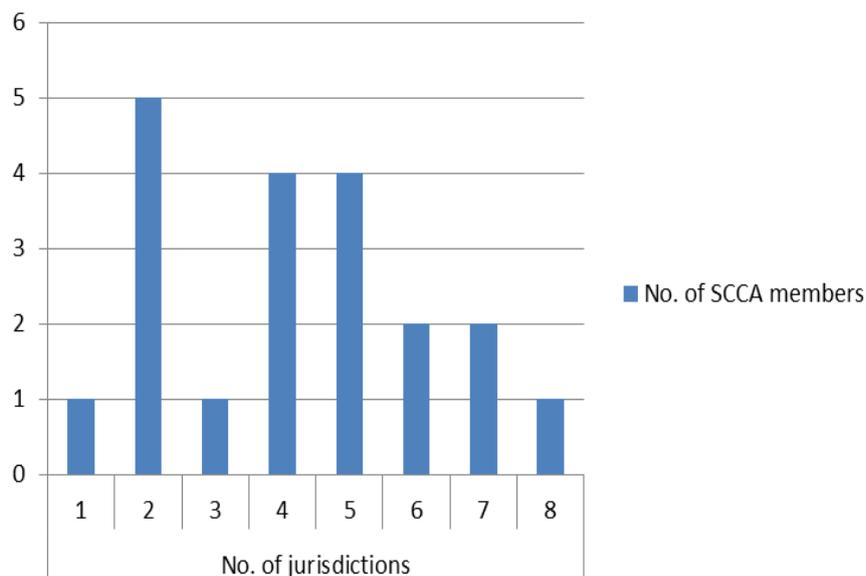
Retail leasing is now regulated by extensive state and territory legislation. Five of the six states, and both territories, have enacted specific retail tenancy legislation. The other state, Tasmania, regulates retail leasing by a compulsory code of practice adopted by regulation under the *Fair Trading Act*.

The legislation, and the date of introduction of the original retail tenancy legislation, is as follows:

- Retail Shop Leases Act (Queensland) (1984)
- Commercial Tenancy (Retail Shops) Agreements Act (Western Australia) (1985)
- Retail Leases Act (Victoria) (1986)
- Retail Leases Act (NSW) (1994)
- Retail and Commercial Leases Act (South Australia) (1995)
- Fair Trading (Code of Practice for Retail Tenancies) Regulations (Tasmania) (1998)
- Leases (Commercial and Retail) Act (ACT) (2002)
- Business Tenancies (Fair Dealings) Act (Northern Territory) (2002)

Many retail property owners operate in more than one jurisdiction, as do many major retailers. As evidenced below, 19 of 20 SCCA members are required to have systems in place to conform to two or more pieces of retail lease legislation (note that analysis excludes SCCA members which are exclusively shopping centre managers). One member has systems in place to meet the requirements of eight pieces of legislation (equivalent to over 650 pages of regulation).

Graph 1: Ownership in multiple jurisdictions – SCCA members



To provide the Senate Committee with a sense of scale, an SCCA member that has assets in seven jurisdictions has around 1,265 specialty tenants in their centres. This would be a reasonable proxy for the number of retail leases this member is managing from day to day. Although the number of leases in a single jurisdiction may be relatively small (for example, around 30 leases in one jurisdiction versus 600 in another), they still require the expertise and knowledge within their organisations to ensure conformity with the prevailing retail lease legislation. (Note that the figures used exclude large anchor tenants, including large supermarkets and discount department stores, that would not, typically, be captured retail lease legislation).

2.2 Cost of the status quo to business

The need to comply with up to eight different sets of laws, and the inability to have uniform national documentation, imposes unnecessary administrative and compliance costs on both retailers and retail property owners. These costs, experienced through business inefficiency, are above and beyond those which would be paid if there was a uniform approach to retail leasing. These additional costs are experienced through the need to (this list is not exhaustive):

- prepare and continually update different 'standard' documentation, including leases and disclosure statements, for each jurisdiction,
- provide unique staff training in each jurisdiction, and retraining of staff if they move interstate (eg. training for leasing staff and legal teams),
- adopt different processes to ensure conformity with different regulation governing, for example, the calculation of outgoings, dispute resolution processes and the timing and type of rent reviews,
- continually monitor and adopt legislative changes to avoid any unintended contravention of the prevailing Act, and
- observe regulatory requirements that only apply in some jurisdictions (eg. a retailer needing to obtain legal advice before they waive certain regulatory provisions).

2.3 Previous recommendations for a national approach have gone nowhere

Two parliamentary inquiries and the Productivity Commission have recommended a national system of retail tenancy regulation.

The Reid Report in 1997¹ recommended a uniform retail tenancy code, a recommendation which was not accepted by the then Australian Government or favoured by State and Territory Governments. This recommendation was repeated in 1999 by the Baird Report². Neither of these reports gave much consideration to how such a uniform national code would be achieved and how it would operate in practice, given the existence of state retail tenancy legislation. (Since then both the ACT and the Northern Territory have also adopted retail tenancy legislation). Indeed the Australian Government, in its official response to the Baird Report, noted it had deliberately not adopted the Reid Report's recommendation for a national code and, in doing so, retail tenants "have also been spared the additional burden of compliance that would have been delivered by an additional layer of regulation."

The Productivity Commission in 2008³ gave considerable thought to how Australia might negotiate its way out of the present disparate and inconsistent regulation of retail leasing. The Commission recommended a course of action that could ultimately lead to a more efficient operation of the retail tenancy market in Australia with considerably less, but better focused and more effective, regulation.

¹ House of Representatives Standing Committee on Industry, Science and Resources *Finding a Balance: Towards Fair Trading in Australia*, 1997.

² Joint Select Committee on the Retail Sector, *Fair Market or Market Failure*, 1999

³ Ibid pp.239-242

As a first step, the Commission suggested an industry-developed national code of practice for shopping centres in recognition that “retail tenancy within shopping centres often involves quite different arrangements to retail tenancy in other settings”. The Commission suggested this should be a voluntary code (in the sense that any retail landlord or tenant could agree to adhere to its provisions) although for those who ‘sign up’ to the code it would be enforceable under the *Competition and Consumer Act*, as is the case with the Franchising Code of Practice.

The Productivity Commission envisaged the code of practice as a means of *reducing* the amount of detailed regulation that currently governs the relationship between landlords and tenants in shopping centres and, ultimately, *removing* much of the prescription in state and territory retail tenancy regulation. The code of practice, according to the Commission, “should not include measures that prescribe possible outcomes of commercial negotiations, such as minimum lease terms. That is, it should act to improve the cost-effectiveness of practices of both landlords and tenants in shopping centres, but avoid undue interference in normal commercial relationships and associated bargaining between parties.”

The Productivity Commission also noted that a code of practice for shopping centres “would also potentially benefit the broader community by enabling the more prescriptive aspects of the current state and territory regulation to become redundant and be repealed and by reducing the need for legislative reviews.” In other words, for shopping centres the code of practice would ultimately be a *replacement* for retail tenancy legislation; it would not become an *additional* piece of regulation.

The Australian Government, in endorsing this recommendation, also made clear that its support was conditional upon the code “not [being] an additional layer of regulation” and that the code should only be pursued “if the current legislative arrangements can be reformed appropriately to avoid any increases in complexity, regulation and compliance costs for business, especially for small business.”

The Productivity Commission proposed a three-step process leading ultimately to harmonisation of regulation around Australia. First, the code would be negotiated and come into operation; then, the states and territories “should remove those key restrictions in retail tenancy legislation that provide no improvement in operational efficiency”; and, finally, as these are removed, the states and territories “should seek . . . to establish nationally consistent model legislation for retail tenancies, available to be adopted in each jurisdiction.”

The Commission did not specifically address whether shopping centres would immediately be released from the coverage of state and territory retail tenancy legislation once the code of practice had been negotiated and mandated under the *Competition and Consumer Act*. It would seem, however, that it envisaged that those who signed up for the code – and were then subject to Federal law – would cease to be covered by state and territory retail tenancy legislation.

This recommendation was referred for consideration to the Council of Australian Government’s Better Regulation and Competition Working Group. We are not aware of what action, if any, has resulted from this referral. We believe, as a result of discussions with some state government officials, the matter has not progressed further.

While the idea of a shopping centre code of practice was immediately endorsed by some retailer associations, once these associations read the fine print and realised this would be a replacement for coverage by retail tenancy legislation, their support waned.

The notion of a code of practice, as envisaged by the Productivity Commission, holds some attractions for the shopping centre industry, both for owners/managers and for national retailers. It would be one way of achieving a common set of rules for shopping centre tenancy transactions throughout Australia, something that is clearly impossible while regulatory power rests solely in the hands of state and territory governments.

The code would also be a means of reducing the current level of prescription that is imposed on the retail tenancy relationship and, most importantly, a means of escaping the massive growth in the volume of regulation that occurs with each retail tenancy legislation review.

2.4 How a national approach could work

The SCCA supports a system of national regulation of retail tenancies but with an important proviso: only if such regulation is *in place of*, not *in addition to*, the present system of state and territory regulation. Further, as per the comments of the Productivity Commission in 2008, we would advise against a national approach that mirrors the jurisdictional penchant for regulating what should be commercial contractual negotiations between a landlord and a tenant, such as lease terms. We also wouldn't support a national approach which saw any greater encroachment of regulation than currently exists, for example, to require the disclosure of incentives or side agreements.

For this reason we would not support a uniform code of practice, as recommended by the Reid Inquiry, unless the states agreed to repeal their legislation. We doubt this would be satisfactory to retailer associations, which have always opposed the repeal of state legislation⁴. We also doubt that the states and territories could be convinced to repeal their existing legislation. A national code is therefore more likely to create an additional layer of regulation, not a uniform system. If so it is also likely to lead to 'jurisdiction shopping' and legal disputes over inconsistencies between the national code and state/territory legislation.

Similarly we doubt whether the Australian Government has the constitutional power to effectively legislate in this area to the exclusion of the states. Although the High Court decision in relation to Work Choices⁵ would seem to pave the way for the Federal Government to again use the corporations power to legislate in this area, there are a very large number of unincorporated bodies involved in the retail tenancy market. In such circumstances, there would be little incentive for the states to repeal their legislation (and, indeed, strong arguments for them to retain the legislation). Once again, we would be more likely to find ourselves with another layer of regulation being added.

The sequence of implementation envisaged by the Productivity Commission would also pose difficulties for the SCCA in embracing the code. Without a specific commitment from the states and territories that shopping centres would be released from retail tenancy legislation upon adoption of the code, we doubt that any shopping centre owner would be prepared to take the plunge. Otherwise they might find themselves subject to the *Competition and Consumer Act*, for matters that are the subject of the code of practice, but still subject to state/territory retail tenancy legislation for matters not specifically covered by the code. This is not a situation that could be tolerated.

There are probably only three ways in which a national approach to retail leasing regulation can be achieved. These are:

- first, if the states and territories agreed to bring their legislation into conformity with each other (although, this is an approach that the national 'harmonisation' of the work health and safety (WHS) legislation has shown to be challenging);
- second, if the states and territories surrendered their powers in this area to the Federal Government; or
- third, retail property owners are offered the opportunity to 'opt-in' to a national code, backed by the *Competition and Consumer Act*, at which time the applicability of the relevant state or territory regulation falls away.

⁴ The National Retail Association, in its submission in September 2003 to the Senate Inquiry into 'the effectiveness of the Trade Practices Act in protecting small business', stated it "would not support any industry code that derailed state-based tenancy legislation."

⁵ *New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia* [2006] HCA 52 (14 November 2006).

We doubt that the *first approach* would ever be achieved. This would require state and territory government administrations to apply critical analysis to each provision where retail tenancy legislation differs from state to state (and that is most) and adopt a consensus approach, rather than simply adopting 'lowest common denominator' provisions or the most 'tenant friendly' provisions. The experience of the states and territories in seeking to achieve a uniform or common lessee's disclosure statement around Australia is not encouraging. Ultimately only Queensland, NSW and Victoria agreed on a harmonised disclosure statement (to operate from 1 January 2011) and, even after that was achieved, Victoria in 2013, unilaterally made changes to its disclosure statement and NSW is also currently considering making changes to the 'harmonised' disclosure statement.

This highlights another major barrier to achieving harmonised retail tenancy legislation. Even if the states and territories agreed upon, and ultimately achieved, uniform retail tenancy legislation, there would have to be continuing political will to ensure that this uniformity was maintained. The constant rounds of state reviews of retail tenancy legislation, which have seen states amend legislation without any regard for the need for harmonisation, would have to end. We doubt the ability of the states and territories to resist pressure from state-based retailer associations to pursue individual legislative solutions within their jurisdictions.

The *second approach* would require the states and territories to agree to surrender their powers in this area to the Australian Government. This is the approach that resulted in a uniform corporations law and uniform Australian Consumer Law around Australia. If a national system of retail tenancy regulation is to be achieved we believe the Australian Government would need to be the driver, probably through the Council of Australian Governments (COAG) process. A Commonwealth Bill would need to be drafted which would form the basis for negotiations with the states and territories, in consultation with relevant retailer associations and retail property owners' associations.

This would be an opportunity to critically scrutinise the existing legislation and to remove unnecessary regulation. As the Productivity Commission has noted⁶, much of the regulation now being applied to the retail tenancy market has had the effect of imposing costs on landlords and tenants, without any real benefit for those it is supposed to protect. However, we do question whether the states and territories would agree to surrender their powers to the Australian Government.

The *third approach* is more akin to the model suggested by the Productivity Commission but would be backed by Federal legislation (the *Competition and Consumer Act*), would place the decision as to whether to observe the national code with the landlord and would guarantee that a landlord's decision to adopt the code is met with the 'switching off' of prevailing retail lease legislation. Placing the decision to participate with business, rather than having it imposed by Government, means that only those businesses which would find a benefit in adopting the code could do so. However, this approach presents the potential challenge of the variable application of rules within, as well as between, jurisdictions. For example, two different dispute resolution systems could be operative. This approach would create a national system, but not necessarily a uniform system.

We are sceptical that any of the above, or any similar, approaches could be achieved. There is a lack of political will at all levels of government to drive the reform, the states and territories, which includes some independent statutory officials (eg. various Small Business Commissioners) have given no signal that they are willing to give up their role as regulators, advisors and mediators of retail leasing arrangements and there is general inability of federal, state and territory governments to successfully deliver harmonisation reforms.

⁶ Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, pp.219-222 and p.234

3. Response to terms of reference

This section provides detailed responses to each of the headings in the terms of reference.

(a) The first right of refusal for tenants to renew their lease

As stated earlier in this submission, the SCCA would be pleased to see the Senate Committee recommend a national approach to retail leasing under certain conditions. One of which was that a national approach would not result in any greater encroachment of regulation than currently exists at the state and territory level. Allowing a 'first right of refusal' would extend the reach of regulation and should not be considered by the Senate Committee as part of its deliberations on a national approach.

A lease is an agreement by the owner of a property (lessor) and a tenant (lessee) for the use of the property for an agreed purpose, on agreed conditions, for an agreed term, at an agreed price. 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 in any way 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 tenants with an automatic or preferential right to renew their lease undermines these principles. On one hand, it would erode the owner's freehold right to use their property as they wish; on the other, it would provide leaseholders with a freehold right to continued occupancy when the lease ends.

Retail tenancy legislation in Australia has generally recognised that principle. This 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 this legislation that have 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. (Preferential rights of renewal of retail leases in South Australia and the ACT 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.)

Any proposal that may restrict a lessors' freedom to deal with their own property as they wish after the lease has ended, either by imposing a 'right' or 'preference' to the tenant to renew the lease or through the imposition of 'third party' rent-setting for a renewed lease raise a number of fundamental concerns. The main concerns are that these restrictions:

- would provide tenants 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 tenant 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 the owner/investor and the tenants;
- limits competition by restricting the entry of new retail tenants to the market which will inevitably discriminate against small retail tenants;
- reduces the value of property assets and therefore of property investments.

The benefits of leasehold for retailers

It is important for the Senate Committee to understand the benefits that leasehold brings to retailers and the reason why retailers prefer to rent shops rather than purchasing their own properties. This is because leasehold, unlike freehold, removes the property risk from retailers' business plans; means they have a smaller capital outlay (or a lower debt); and greater flexibility in locating their businesses.

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

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

Table 1. Owner Retailers v. Tenant Retailers

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

By definition, the security of tenure under a leasehold agreement is only provided for the term of the lease. However, leasehold is inherently more flexible than freehold as a tenant is not anchored to their current premises for any longer than the period of the lease. This is particularly important if the location turns out to be a poor one for their retail offer. It means that they can relocate to another centre or to another retail location at greater convenience at the end of the lease.

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

Leasehold removes the property risk from retailers

Although owner retailers and tenant retailers both carry the risk that their business plans will not be successful, a tenant retailer carries no property risk. As such, if a tenant retailer's business fails, that is the extent of their loss. They do not also carry the risk that property values will decline. That risk is being carried entirely by the owner of the shop or by the owners of the shopping centre.

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

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

For the owner of the shop or shopping centre to accept the property risk they have to anticipate that they will get a reasonable return on their invested capital. One person's rent is another person's income. So often in the consideration of public policy issues in the retailing industry the interests of the owner of the rented shop or the investor in the shopping centre are completely overlooked. This means that public policy overlooks the interests of the members of the superannuation funds, life insurance funds, real estate investment trusts, property syndicates and other property investment vehicles which invest in property, including shopping centres. If the return to these investors is not compelling, they will take their money elsewhere.

End-of-lease restrictions are fundamentally unfair

The imposition of restrictions on the freedom of lessors to deal with their own property, at the end of the lease, by the inclusion of a 'right' or 'preference' to the tenant to renew the lease, are fundamentally unfair. The argument for 'security of tenure' is essentially an argument for having it both ways: gaining the relative security that comes from property ownership without taking on the cost or risks of property ownership. Such measures also increase the property risk for the owner because they can diminish the return to the owner for carrying the property risk or they increase the risk of having to retain under-performing retailers.

Such measures also place retail property at an unfair disadvantage compared to other property classes. Why should a small retailer (not to mention the large businesses, including listed retailers, which also have the protection of the retail lease legislation) gain the advantage of security of tenure beyond the period of the lease when this advantage is not available to other small businesses, such as an accountant or solicitor in sole practice in an office building?

End-of lease restrictions are unnecessary

Measures designed to increase a retail tenant's security of tenure are also unnecessary because the vast majority of tenants who have observed the terms and conditions of their lease and whose retail offer is still relevant to the customer base of that centre, do gain a new lease. Further, in circumstances where a lease is not renewed, in the vast majority of cases they are not renewed at the instigation of the tenant.

This was a clear 'finding' of the Productivity Commission's inquiry into the *Market for Retail Tenancy Leases in Australia*. Making particular reference to the renewal of leases in shopping centres, the Commission found that "the majority of retailers in centres are offered subsequent leases". This highlights the absolute lack of evidence of a market failure that needs to be resolved through further regulation because, as the Commission states, the majority of retailers are offered a renewed lease.

At the heart of arguments for measures such as first right of refusal for sitting tenants is the idea that landlords capriciously refuse to renew leases. This is nonsense. It would be an irrational act for a landlord to drive out of his shopping centre a well-performing tenant whose retail offer is still relevant and attractive to customers and who has observed his obligations under the lease. This is because there is always a real risk that that retail space cannot be re-leased or be re-leased quickly. Automatic rights of renewal and similar measures become, almost by definition, protections for poorly performing or poorly managed tenants.

End-of-lease restrictions threaten viability

Measures designed to prolong a retail tenant's security of tenure beyond the term of their lease cannot be imposed without a cost to the shop or centre owner. They would be destructive to the vitality of shopping centres and are therefore harmful to the ongoing viability of those centres.

While, as noted above, the majority of leases are renewed, it is vital that landlords retain the discretion and flexibility not to renew leases. Shopping centres are vibrant and complex places. They must remain relevant to the constantly changing tastes of their customers. They must have broad cross-sectional appeal for all customers from young people to mature aged persons. They also have to constantly adapt to demographic changes in their catchment areas.

If a shopping centre doesn't maintain an appeal to all of its customers (i.e. have the right 'tenancy mix') it will lose customers and stagnate. That will be to the detriment of its tenants as much as its owners. Occasional changes to the tenancy mix of shopping centres, as well as fairly regular redevelopments, are therefore a very necessary fact of life in a shopping centre.

Management of the tenancy mix is a constant and evolving process designed to maximise the customer pulling power of the centre for the benefit of all retailers. An automatic or preferential right of refusal undermines the capacity of centre management to undertake this necessary fine-tuning of a shopping centre. Retailers who choose to locate in a shopping centre because of its attractiveness to customers must accept this fact.

There is no consistent position from retailers

Good retailers and good retailer associations distance themselves from calls for end-of-lease restrictions. They know that the retention of poorly-performing tenants drives down the overall quality of a shopping centre causing it to lose drawing power among its customers. This will directly affect their own sales performance and could do so even more directly if customer traffic flow to their part of the centre is reduced.

When prompted by the Presiding Commissioner during a public hearing in 2008 to inform its inquiry into the market for retail tenancy leases, the retail tenancy consultant representing the National Retail Association, Malcolm Macrae, stated: *'I think it may be going a step too far. I think the automatic right of lease - no, I don't support that at all. That perpetuates privilege and perhaps reduces capacity to change.'*

End-of-lease restrictions discriminate against small retailers

Such measures also, in the longer term, discriminate against small tenants. Security of tenure measures are likely to mean a greater propensity for owners to “play safe” and give preference to established or proven retailers or state or national retail chains when seeking new tenants. Faced with a choice between an established retailer and someone seeking to set up in business for the first time, the lessor will be less likely to take a risk on the small retailer or would-be retailer.

Because these measures increase the property risk for owners they would then have to compensate by seeking to lower their overall risk when they take on a new tenant. They do this by seeking a higher rent at the outset and/or greater requirements for bank guarantees or personal guarantees from tenants. It is the small retailer, or would-be retailer, who ultimately suffers from the adoption of so-called ‘security of tenure’ measures. This perverse outcome is frequently the consequence of regulatory approaches seeking to reduce risks faced by one party. This is because those risks are not eliminated by the regulation; they are simply shifted elsewhere.

End-of-lease restrictions are anti-competitive

National competition policy requires that legislation not restrict competition unless the public benefits outweigh the costs. There is no doubt that security of tenure measures are anti-competitive because they restrict the entry of new retailers into the market. In terms of the costs and benefits of security of tenure proposals, any benefits would obviously only accrue to those retail tenants who would not otherwise be offered a new lease by their shopping centre. The costs however, would be imposed on centre owners and managers, potential new retail tenants and, most importantly, shopping centre customers.

The costs imposed on centre managers and owners are significant. Essentially they are the restrictions on the owner/manager’s ability to successfully manage a centre and the reduction in the value of the property as a result of the limitations on its use. The costs are particularly high for potential new entrants to the retail market. If existing tenants are, effectively, given a lease in perpetuity, opportunities for new entrants to the industry are severely restricted. Competition is therefore diminished.

Shopping centre customers would also bear the cost because competition between retailers would be reduced. For example, there may be a potential new retail tenant who would be able to offer the same goods as an existing retailer in a centre but at a reduced price. However, the customer would not be able to take advantage of this lower price unless the existing tenant decided to terminate the lease and leave the centre, allowing a lease to be granted to the new tenant.

Protections provided in state retail tenancy legislation

It should be noted that state retail tenancy legislation does provide protections to sitting tenants even where there isn’t a preferential right of renewal. As an example, s. 44 of the NSW *Retail Leases Act* already provides that not less than 6 months and not more than 12 months before the expiry of a lease the landlord must by written notice to the tenant either:

- (a) offer the tenant a renewal or extension of lease on terms specified in the notice; or
- (b) inform the tenant that it does not propose to offer a renewal or extension.

An offer of renewal or extension is not capable of revocation for 1 month after it is made.

Whilst the landlord cannot revoke the offer for 1 month, if the tenant accepts the offer, the tenant may then delay negotiating, finalising and executing the new lease. If the tenant delays in executing the new lease and then decides not to execute and vacate, the landlord is disadvantaged as the landlord has not been in the market place seeking a replacement tenant because it had thought it had an “agreement” for a new lease with the tenant.

(b) Affordable, effective and timely dispute resolution processes

Each jurisdiction provides for relatively affordable, effective and timely dispute resolution processes that, typically, seek to have disputes resolved informally or mediated between parties before it can proceed to the relevant tribunal or court for deliberation. Indeed, in its 2008 report following its inquiry into The Market for Retail Tenancy Leases in Australia, the Productivity Commission summarised that “as a result of developments over the last two decades, retail tenants and landlords now have access to low-cost alternative arrangements for dispute resolution in each jurisdiction⁷”. The Productivity Commission goes on to say “this is intended to be of particular value to small retail tenants and small landlords⁸”.

In this regard, it is not clear what aspect of the existing dispute resolution processes the Senate Committee is seeking to investigate. Indeed, in many jurisdictions there are dedicated statutory officials, whose positions are enshrined in legislation separate to the prevailing retail lease legislation, charged with providing support to small businesses, including dispute resolution assistance.

For the benefit of the Senate Committee, following is a brief summary of the dispute resolution processes which currently operate in each jurisdiction. In line with the reference heading, we have, where readily available, provided an indication of the cost of the application fee and/or mediation process to provide an indication of the affordability of the process.

- In **NSW**, the *Retail Leases Act* outlines that a retail tenancy dispute may not be the subject of proceedings before any court until the Registrar who, in this case, is the NSW Small Business Commissioner, certifies in writing that the mediation was unsuccessful. There is no application fee for mediation and it costs \$152 per hour (shared equally between parties). If unsuccessful, a dispute claim can be lodged with the NSW Civil and Administrative Tribunal (NCAT, formerly the Retail Leases Division of the Administrative Decisions Tribunal) for decision. The NCAT can also hear unconscionable conduct claims under the provisions of the *Retail Leases Act*.
- In **Queensland**, the *Retail Shop Leases Act* outlines that a party to a dispute is to lodge a ‘notice of dispute’ with the Queensland Civil and Administrative Tribunal, following which a mediation conference can be held. Parties cannot be compelled to attend mediation (although, in our submission to the current review of the Act, we have recommended that disputes should not be referred onwards until a mediator has certified that the mediation process has failed, or is unlikely to be resolved as per the process in NSW and Vic). If mediation did not take place or was unsuccessful, the mediator will refer the dispute to the Queensland Civil and Administrative Tribunal (QCAT). The fee for lodging a dispute notice is \$295. The QCAT can also hear unconscionable conduct claims under the provisions of the *Retail Shop Leases Act*.
- In **Victoria**, the *Retail Leases Act* outlines that the Small Business Commissioner is to make arrangements for mediation (or alternative dispute resolution) of retail tenancy disputes. A dispute can only be referred to the Victorian Civil and Administrative Tribunal (VCAT) if the Small Business Commissioner has confirmed in writing that the dispute resolution has failed, or that the matter is unlikely to be resolved. The cost of mediation is \$195 per party, per mediation session. (The website of the Victorian Small Business Commissioner notes that they subsidise the majority of costs and it is only “if the stakes are high” that a greater contribution may be sought from the parties⁹.) The VCAT can also hear unconscionable conduct claims under the provisions of the *Retail Leases Act*.

⁷ Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 80

⁸ *ibid*

⁹ We don’t know what this reference means.

- In **Western Australia**, the *Commercial Tenancy (Retail Shops) Agreements Act* allows for parties to a lease to refer a 'question' to the State Administrative Tribunal (SAT), but only following the receipt of a certificate from the Western Australian Small Business Commissioner which details that the matter is unlikely to be resolved through alternative dispute resolution, including mediation. Mediation costs \$125 per party. The SAT can also hear unconscionable conduct claims under the provisions of the *Commercial Tenancy (Retail Shops) Agreements Act*.
- In **South Australia**, the *Retail and Commercial Leases Act* outlines that a party to a lease can apply to the South Australian Small Business Commissioner to mediate a dispute. A court may also refer a dispute to the Commissioner for mediation. Mediation costs \$195 per party per day. Depending on the value of the claim, the Magistrates Court and / or the District Court can also hear retail lease disputes.
- In **Tasmania**, the *Code of Practice for Retail Tenancies* outlines parties to a lease must first attempt to resolve their dispute through direct negotiation. If unsuccessful, the Office of Consumer Affairs can be asked to investigate and negotiate a solution. If still unresolved, a party can refer the matter to a court for decision.
- In the **ACT**, the *Leases (Commercial and Retail) Act* outlines that the Magistrates Court must hold a case meeting and determine whether it is likely the dispute could be resolved before a hearing. The Magistrates Court can refer the matter for other dispute resolution mechanisms, including mediation. The Magistrates Court also hear claims of unconscionable conduct under provisions of the *Leases (Commercial and Retail) Act*.
- In the **NT**, the *Business Tenancies (Fair Dealings) Act* outlines that a party to a retail shop lease can apply to the Commissioner for Business Tenancies for the determination of a retail tenancy claim. Following a conciliation conference, if the Commissioner is satisfied that the dispute is unlikely to be resolved, including if a party did not participate in a conference, the Commissioner may issue a certificate following which time the dispute can proceed to court. A court can also hear unconscionable conduct claims under the provisions of the *Business Tenancies (Fair Dealing) Act*.

As evidenced above, every jurisdiction provides parties the opportunity to undertake alternative dispute resolution prior to seeking a decision from a tribunal or court. Our members advise that these processes work relatively well and, as outlined above with respect to the review of the Queensland retail tenancy legislation, we have no concern about jurisdictions mandating that parties attempt to mediate a dispute prior to a matter being progressed to a tribunal or court.

We note that mediation fees are absorbed into the relevant application fee, subsidised by the mediating party or split equally between by the participating parties. The cost of mediation (several hundred dollars at the maximum) are hardly cost prohibitive in the context of claims which can reach into the hundreds of thousands of dollars (eg. \$400,000 in NSW) and, in relevant instances where a small business is seeking mediation with a landlord, including a shopping centre owner, the landlord must equally contribute to the cost of the mediation. It is also important to note that many jurisdictions champion their dispute resolution processes as being 'low-cost'.

With respect to effectiveness of dispute resolution processes, based on a review of various websites and Annual Reports across jurisdictions, we can say that (1) the number of disputes brought forward is extremely small relative to the number of leases on foot across Australia, (2) many disputes are able to be resolved prior to mediation, and (3) the majority of disputes which are mediated are able to be resolved successfully. It is also important to note that the low number of disputes brought forward doesn't reflect dissatisfaction with the process or service, but that the retail tenancy market is functioning well with, by and large, little need for disputes to be resolved with third party assistance.

- The NSW Small Business Commissioner reported that in 2012-13¹⁰ they “managed a high volume of applications for the mediation of disputes”, without detailing how many applications were received, nor the number that were progressed to mediation. The Commission’s website also notes that “mediation is so successful that about 94% of all matters referred to us for mediation are resolved prior to having a court decide the matter¹¹”.
- The QCAT reports that in 2012-13¹² there were 130 claims lodged relating to retail shop lease matters, with a 115% clearance rate for the reporting period (presumably having also cleared cases from the previous reporting period). Although not broken down by area of claim, the QCAT also notes that there was a 44% mediation settlement rate in minor civil disputes in the reporting period.
- The Victorian Small Business Commissioner reported that in 2012-13¹³ that they received 1,103 applications for dispute resolution related to the *Retail Leases Act*. Of these, only 594 progressed to mediation and the success rate was 80.3%. These numbers are consistent with information provided earlier in the report which details that about 42% of all applications received by the VSBC are resolved prior to mediation¹⁴.
- The Western Australian Small Business Development Corporation reported that, in 2012-13¹⁵, 132 cases were resolved through alternative dispute resolution that related to retail tenancy disputes, noting that 80% of these were “resolved directly, therefore removing the need to the disputing parties to seek a determination through the SAT”.
- The South Australian Small Business Commissioner reported¹⁶ that only 27% of formal cases received related to the *Retail and Commercial Leases Act* and that 88% of all formal cases are successfully resolved. Further, they report that 98% of disputes are resolved prior to mediation.
- The Tasmanian Government reported that in 2012-13¹⁷ there was only one complaint received under the *Code of Practice for Retail Tenancies*.
- There is no readily available data from the ACT.
- The Commissioner of Consumer Affairs in the Northern Territory¹⁸ reported that there were only four applications submitted in 2012-13.

The timeliness of dispute resolution would be dictated by the demand on the dispute resolution bodies, such as the various Small Business Commissions and tribunals. It should be noted that the jurisdiction of the courts and tribunals, in particular, extend past the prevailing retail lease legislation, and some Small Business Commissioners also perform dispute resolution functions under other Acts. For example, the Victorian Small Business Commissioner has a role with regard to the *Owner Drivers and Forestry Contractors Act* and the *Farm Debt Mediation Act*. The timeliness of resolution would also depend on whether the matter is resolved prior to mediation, following mediation or if it is necessary to seek resolution at court or a tribunal. Generally speaking, we understand that accessing mediation can take several weeks to a few months, while the mediation session itself should take no longer than a few hours.

¹⁰ NSW Trade and Investment Annual Report 2012-13, p. 83

¹¹ NSW Small Business Commissioner website, 14 August

¹² QCAT Annual Report 2012-13, p.12-13

¹³ Victorian Small Business Commissioner Annual Report 2012-13, p. 17

¹⁴ Victorian Small Business Commissioner Annual Report 2013-14, p. 11

¹⁵ Small Business Development Corporation Annual Report 2012-13, p. 22

¹⁶ South Australian Small Business Commissioner Annual Report 2012-13, p. 12-13

¹⁷ Department of Justice Annual Report 2012-13, p. 61

¹⁸ Annual Report of the Commissioner of Consumer Affairs 2012-13, p. 27

Reflecting comments and recommendations earlier in this submission, considering the various bureaucratic power bases through which dispute resolution processes are provided in each jurisdiction, we doubt that the states and territories could be convinced to repeal their existing legislation to see the implementation of a national system of dispute resolution, remembering, of course, that the legislative tentacles of dispute resolution extend past retail lease legislation (eg. the *Small Business Commissioner Act* in NSW). This would make the challenge even harder.

(c) A fair form of rent adjustment

The inference of this heading is that the rent adjustment processes currently detailed in retail lease legislation across Australia are, in some way, 'unfair', presumably to tenants. If this is the case, we do not agree that the processes are 'unfair' to tenants and we are not aware of any evidence, beyond anecdotes, to suggest otherwise.

Every piece of retail lease legislation in Australia allows for rent adjustment during the term of a lease. This is evidence that rent adjustment provisions are a tool of flexibility both for the landlord and the tenant in the negotiation of other related lease terms, such as the base rent (for example, a low base rent may be provided in year one of a lease to allow the tenant to establish themselves in a new centre on the agreement that the negotiated rent adjustment would kick in in year two and beyond), or a side agreement (such as a fit-out contribution).

Rent adjustment provisions need to be considered in the context of the lease as a whole, not just in the context of an annual percentage or annual dollar figure increase. If viewed in isolation, the Senate Committee will receive a misleading view of the nature and role of rent adjustment provisions and be blind to the benefits that a tenant may be receiving under other terms of a lease or related side-agreement.

The applicable method and timing of rent adjustment is specified in a lease. This means that a lease spells out which of the acceptable forms of rent adjustment, whether it be fixed percentage, a fixed dollar amount, a market rent review, or other, will be used and when it is to occur. Generally speaking, rent adjustments are only to be undertaken annually unless there is, for example, an agreed provision for a bi-annual percentage or dollar increase in rent.

The need to specify the terms of rent adjustment in the lease is not a whim of landlords to lock tenants down, but is required by legislation. This means that rent adjustment is subject to negotiation and agreement between the landlord and tenant prior to a lease being entered into. A tenant has full visibility of this process and equal opportunity to direct the terms of the rent adjustment clause/s contained in their lease. Further, leases generally cannot contain a provision which prohibits reductions in rent as a result of a market rent review (eg. *SA Retail and Commercial Leases Act* s. 22(4)), but they can contain provisions which limit the amount of a rental increase as a result of a rent adjustment (eg. *Qld Retail Shop Leases Act* s. 27(10)).

The legislative parameters that sit around rent adjustment are very stringent. In the case of a market rent review, for example, if agreement cannot be reached between a landlord and a tenant on the prevailing market rent for a tenancy, an independent 'specialist retail valuer' can be brought into the negotiations. This valuer can effectively direct parties as to the 'fair' market rent for a tenancy. Failure on a landlords behalf to provide information to this 'specialist' can result in a financial penalty (for example, a landlord can be fined 50 'penalty units' under the *Victorian Retail Leases Act* for failure to provide information to the specialist within 14 days – s. 37(4)). There is even regulation in some jurisdictions that outlines how an individual is to be identified as a 'specialist'. In Victoria, for example, the required breadth of experience of a 'specialist' changes depending on whether the lease in question is inside or outside a shopping centre.

This legislative framework does not speak to a process that is 'unfair' to tenants. Rather, it speaks to a process that has been made incredibly cumbersome for a landlord in its attempt to make the process as 'fair' as possible for tenants.

The terms of rent adjustment are for negotiation and agreement between the parties of a lease. No further regulation is required, nationally or through state and territory based legislation. Indeed, as we recommended in our recent submission to the review of Queensland's *Retail Shop Leases Act*, there should be greater flexibility, not less, for parties to negotiate and agree on the terms of rent adjustment and that consideration be given to extending exemptions which currently exist in Queensland which see 'major lessees' exempt from the legislative constraints which exist around the negotiation of rent adjustment terms.

(d) Implications for statutory rent thresholds

We assume this refers to the use of the annual amount of rent paid by a retailer (or the retailer's total occupancy cost) as the threshold for deciding whether or not retail premises are covered by retail tenancy legislation. South Australia has a rent threshold (\$400,000 per annum) and Victoria has an occupancy cost threshold (\$1 million per annum) while all other states and the territories use a floor space threshold (1,000 square metres).

A threshold is necessary to ensure that the protection of retail tenancy legislation is limited only to small retailers whose bargaining power is generally considered to be less than that of the landlords with whom they negotiate. Large retailers and retail chains have a bargaining power that exceeds that of any individual landlord and should not have the protection of legislation. Providing large retailers with the coverage of retail tenancy legislation simply adds unnecessary business red tape for both the landlord and the retailer.

Floor space is a sensible threshold since it provides reasonable certainty, even though in our view the amount of 1,000 m² (which is the equivalent of two standard suburban housing blocks) is excessive in delineating 'small' and 'large' retailers. To put this amount in context, the average floor space of most speciality retailers in shopping centres in Australia is only around 100 square metres. Shops with a floor space in excess of 400 square metres are classified as mini-majors (such as JB HiFi and Harvey Norman) and since these retailers have substantial bargaining power they do not need the protection of retail tenancy legislation¹⁹.

Since rents and occupancy costs vary over time, a rent threshold can never deliver the relative certainty of a floor space threshold. Floor space or lettable area is an objective matter which can be easily ascertained by accepted industry standards (in this case, the Property Council of Australia's *Method of Measurement – Commercial*) prior to entry into a lease. Another major difficulty with a rent or occupancy cost threshold is that a premise can be below the threshold at the commencement of the lease but could exceed this threshold during and by the end of the lease. The problem of premises moving into or out of coverage rarely occurs with a fixed threshold such as the 1,000 square metre rule.

Victoria changed from a floor space threshold to an occupancy cost threshold when the current *Retail Leases Act* was passed in 2003. This is widely considered, including by retailer associations, to have been a foolish change. No justification was provided for the change. The then Labor Government had come to office in 2000 with an election pledge, made in the dying days of the election campaign, to abolish the floor space threshold. This had been pushed by Coles Ltd which wanted access to the benefits of retail tenancy legislation, despite Coles having vastly more bargaining power than any landlord with whom it negotiates over leases²⁰. There had been no discussion or consultation with other stakeholders before this election undertaking was made. Once the then Minister for Small Business realised that the implications of her determination to abolish the floor space threshold could be to give the protection of retail tenancy legislation to the most powerful retailers in Australia, she had to put in place an alternative threshold which would allow her to 'save face'.

¹⁹ Despite their considerable bargaining clout mini-majors in some states, such as NSW, still have the benefit of retail tenancy legislation.

²⁰ The push by Coles (which was not supported by Woolworths) made little sense since public companies in Victoria (unlike NSW) are excluded from the coverage of retail tenancy legislation. The change in threshold, however, means we now have the anomalous situation in Victoria where many Aldi stores are covered by retail tenancy legislation, despite having bargaining superiority over landlords.

The result was a radical change in retail tenancy regulation with absolutely no public policy justification. The result was a waste of time of government officials (and industry bodies) in seeking to determine an appropriate occupancy cost threshold, an exercise that was repeated in 2013 when the relevant regulation had to be reviewed.

It makes no sense for states and territories to have different thresholds for coverage by retail tenancy legislation. Given the floor space threshold is the most common around Australia, and given the difficulties posed by rent or occupancy cost thresholds, it would make sense for South Australia and Victoria to bring their legislation into line with the other states and the territories.

At the same time, however, those states (NSW, Queensland and South Australia) that do not exclude public companies from coverage of retail tenancy legislation should likewise exclude them. This would be a major step towards removal of the regulatory burden on businesses, and therefore the promotion of efficiency. It makes no sense that powerful listed retailers, such as the Premier Group, with over 800 stores among its major brands (Just Jeans, Jacqui E, Peter Alexander, Smiggles etc.), and whose market power and bargaining power exceeds that of landlords, should gain the benefits of the Act's provisions. Many of these Australian listed retailers also operate in countries in which there is no retail tenancy legislation. Leases to listed companies, and subsidiaries of listed companies, should be excluded from regulation by retail tenancy legislation in every state and territory.

(e) Bank guarantees

The provision of a security deposit is a common tool in most retail lease legislation across the country. This security can take a number of forms, including the provision of a bank guarantee drawn in favour of the landlord. It is entirely appropriate for a landlord to be provided with some form of security from a tenant in the event lease terms are broken (residential landlords would be up in arms if it was no longer a requirement for tenants to pay a bond as security; retail landlords should expect no less).

Bank guarantees are a common tool to provide the landlord with the security that funds are available in the event a tenant breaks one or more of their lease conditions. Bank guarantees are generally preferred by landlords over other forms of security available under legislation as they are a trusted and widely used form of security. We are not aware of any administrative issues that have arisen as a result of the use of bank guarantees as a form of security. Provisions regarding the draw down and return of a bank guarantee are matters for lease negotiation and for agreement with the relevant bank. Insolvency legislation already addresses key points in relation to when such guarantees may be called upon.

Security deposits, including bank guarantees, are there for the benefit of the landlord, and landlords don't want the additional regulation. There is no evidence of a policy failing regarding the use of bank guarantees, or the provision of security deposits more generally, has been provided through recent reviews of various retail tenancy legislation (namely NSW and Qld), either by Government or, as far as we are aware, retailer associations. In the absence of a problem there is no need to regulate the use of bank guarantees, nationally or otherwise, and we are not sure why the terms of reference for this inquiry specifically seek feedback on their use.

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 defined in some retail leasing legislation. While, historically, a landlord was able to hold a tenant's cash deposit relatively unencumbered, regulation is increasingly seeing landlords being required to deposit a security deposit into a government operated account or scheme, such as the Retail Bond Scheme in NSW. This has had the disadvantage that tenants now receive very little interest on their cash security deposit.

In addition to taking time and resources to implement (eg. for a landlord to collect, lodge and discharge security deposits) lessees can also challenge a landlord'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 and appearances before a tribunal, before the matter can be determined and the money received by the landlord. This introduces uncertainty and potential delay into a process whereby a landlord is seeking to access funds to remedy an action taken by a tenant in contravention of their lease agreement. Similar regulations should not be put around the use of bank guarantees, particularly considering the terms of the bank guarantee are able to be agreed through the negotiation of the lease.

An issue raised in the recent review of the *Queensland Retail Shop Leases Act* is the time period following which a bank guarantee must be paid by the lessor to the lessee following the end of a lease. Although we don't think that bank guarantees need to be regulated, and stress that there has been no evidence to suggest there is problem in this regard, we have no objection to a timeframe being included in regulation provided it is sensible and realistic and will ensure that any breaches of the lease have been notified and rectified. We consider the 30 day period currently provided for in the *ACT Leases (Commercial and Retail) Act* is not sufficient. We would recommend a period of at least 90 days after expiry of the lease, assuming the tenant has not exercised any option of renewal, is no longer in possession of the shop and has complied with all 'make good' obligations. In addition, any regulation of the return of a bank guarantee must be clear that such a provision does not apply (ie. the bank guarantee would not be returned) until the tenant has performed all obligations secured by the guarantee. For example, a landlord should not be required to return a bank guarantee after an arbitrary timeframe if the tenant has delayed completion of the removal of fit-out and any other 'make good' obligation required at the end of the lease.

(f) Need for a national lease register

The premise of lease registration and, indeed, the Senate Committee's interest in the need for national lease register, is an issue that is raised consistently in reviews of retail lease legislation. The Senate Committee needs to be cautious not to confuse the premise of lease registration, which relates to 'indefeasibility of title' under prevailing property laws, with the premise of a perceived information imbalance (or 'information asymmetry') between a landlord and a tenant. The perception of an information imbalance has led to some retailers seeking the full disclosure of all confidential, commercial terms or agreements between a landlord and tenant, including any side deals or incentive packages that have been struck. These are issues which are often mistakenly (and, occasionally, deliberately) conflated. For further information, please see the response to (g) full disclosure of incentives in page 22.

The establishment of a national lease register which would be in addition to existing land and property registers (explained further below) would extend the reach of regulation beyond what currently exists and should not be considered by the Senate Committee as part of its deliberations on a national approach to retail lease arrangements.

It is already outlined in some state and territory based legislation (both retail tenancy legislation and the prevailing Acts governing land and property tenure) including that of NSW and Queensland, that retail leases are able to be registered with the relevant land title office to ensure 'indefeasibility of title', (generally, a legal interest in the property). In jurisdictions where the legislation is silent about the registration of retail leases, we are not aware of anything precluding leases in other jurisdictions also being registered voluntarily, although registration is likely to be less common. Even though in NSW, for example, legislation outlines that leases greater than 3 years are to be registered, we are also not aware of any requirement which prohibits leases of a shorter duration from also being registered.

Registration of a lease effectively puts it in the public domain. This enables interested parties the ability to access and review retail leases (but not the confidential side deals or incentive agreements) for a small fee. We note that there are now sophisticated businesses that can be engaged by a prospective tenant to access and review leases on their behalf and then provide assistance during the lease negotiation process.

We agree with the Productivity Commission's 2008²¹ observation that the information in the leases which is, upon registration, made public, is a "by-product" of lease registration, not the reason for lease registration, and that "it would not be appropriate to mandate the registration of leases" to, in effect, facilitate information sharing between prospective tenants.

However, the Productivity Commission left open the proposition of the lodgement of "lease information" with an "independent agency"²² as an alternative to mandating the registration of leases through existing mechanisms. Although its reasoning is flimsy (it could 'boost the confidence' of smaller tenants in lease negotiations), and the Commission says elsewhere that "it does not appear that the lack of information has placed significant efficiency constraints on the market", this has fuelled an ongoing debate about the establishment of retail lease registers or databases separate to those which already exist in the context of jurisdictional property law.

We have consistently opposed requests by retailer associations to establish state-government sponsored retail lease registers (beyond those under property law which perform a specific purpose) as this would inevitably involve a cost to, and a huge administrative burden on, landlords.

The establishment of any new retail lease register or database should be the responsibility of retailer associations to compile. If they are convinced that their members want the service and the information, the retailer association should take on-board the risk, including the cost, associated with its establishment. If done well, they could also receive the benefit of, for example, selling the product (ie. access to the information) to their members. Leaving a register to the responsibility of a retailer association would also ensure that the specific needs of a particular retailer market could be satisfied in terms of how the information is gathered, maintained and presented. Governments should also find this to be an attractive proposition as it would mean the costs of establishment and maintenance of a register (eg. staff costs, office space, IT capacity etc) would be borne by a non-Government party.

In this regard, the Jewellers Association of Australia (JAA) has recently sought authorisation by the Australian Competition and Consumer Commission under the *Competition and Consumer Act* to establish a retail tenancy database for its members. This database is to include information about the terms and conditions associated with retail tenancies. We understand that the lease information would be sought from JAA members, de-identified, aggregated and added to the database that is able to be accessed by members through a secure website. When consulted by the ACCC about the JAA's proposal, we advised that we had no objection to the application for authorisation provided our members are not required to be involved in the provision of this information or are not required to be involved in verifying information supplied by JAA members.

Importantly, in 2008, the Productivity Commission also stated that "lodged lease information should not necessarily include information on incentives and 'side deals'. Such a requirement would be difficult to enforce and would not significantly add to market information"²³. We agree with the Commission's view and oppose any requirement for the disclosure of information that is considered to be 'commercial-in-confidence'. More information on the full disclosure of incentives is provided under heading (g) (over page).

²¹ Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 175, p. 253

²² Ibid, p.253, p 181

²³ Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 253

(g) Full disclosure of incentives

Side deals and incentive packages are binding, confidential arrangements and obligations between the landlord and tenant. Such arrangements could be in the form of rent free periods, outgoings payable and provision of financial contribution to fit-outs. As the Productivity Commission noted in 2008²⁴, "incentives are a normal part of negotiating contracts and are common in many transactions (from commercial leasing to purchasing a car)". The Commission goes on to say that "most incentives are negotiated on a confidential basis as neither party – landlord nor tenant – want such details to be provided to the broader market".

The confidential nature of side deals and incentive packages benefits **both** parties to the agreement, not just the landlord.

Requiring the full disclosure of incentives would extend the reach of regulation well beyond what currently exists in the states and territories and would further encroach into the commercial negotiations and agreements that are struck between a landlord and tenant. Full disclosure of incentives should not be considered by the Senate Committee as part of its deliberations on a national approach to retail lease arrangements.

It is our understanding that there is no single, united voice from retailers calling for the disclosure of such confidential agreements with landlords. Indeed we have over many years held discussions with retailers who have advised us that they do not want their incentive information disclosed to other retailers. The public availability of side deals and incentives could expose the vulnerability of a retail tenant as it may, for example, bring to the attention of competitors and others that they are having financial difficulties. This is unlikely to be publicity which the retailer would wish to have generated. We also understand that some more sophisticated national retailers, and some franchisors, also consider the nature of their agreements with their landlords in various locations to be commercial-in-confidence, and the strength of this confidentiality would outweigh access to any information on the deals struck by their competitors.

It is also worth noting that some landlords also already provide broad information on lease incentives during market updates, investor briefings and annual general meetings. Also, any retail leasing agent worth their salt would have a good sense of the market and would be able to advise prospective tenants on the nature of current incentives in the market, without divulging commercially sensitive information.

Any requirement for the confidential terms of agreements reached between a landlord and a tenant to be made public would also impair an owner's ability to manage a centre in the most effective way for shoppers and the most profitable way for other retailers. For example, a particular incentive package may have been offered to a specific retailer for a specific tenancy in order to optimise the tenant mix and retail offering available in a shopping centre. Maximising these outcomes would have flow on benefits to retailers in the near-by tenancies by attracting new customers, creating additional 'through-traffic' and, hopefully, generating more retail spend. It would not be appropriate, or commercially sensible, for a landlord to offer the same incentive package to a retailer that may act to simply replicate the existing tenant mix and retail offering in a centre. Shopping centre managers need the flexibility to make deals and, as such, attract new and different tenants that create the most profitable and attractive destination for shoppers.

Incentives can also be provided at the beginning of a redevelopment where a developer/landlord is seeking to lock in tenants at an early stage. These tenants, being the first to take space and at a greater level of risk, can commonly be offered an incentive. The final tenants to take up space, which have greater security knowing which other retailers have committed to the project, may not be provided with similar incentives.

²⁴ Productivity Commission Inquiry Report *The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 163-4

Requiring disclosure of the side deals or incentives would curtail this flexibility as it would set an (unrealistic) expectation in the tenancy market for that centre that every prospective tenant 'deserves' or 'has the right' to the same incentive package or deal. In other words, the disclosure of incentives would just set in motion a 'race to the biggest incentive'. This isn't commercially viable or, for that matter, a fair proposition for the landlord, and clear demonstration of why the terms of the agreements need to be confidential.

There also isn't consensus between the states and territories on the need for, or appropriateness of, the requirement to disclose currently confidential agreements between a tenant and a landlord. While the Queensland Government's recent Options Paper on the review of the *Retail Shop Leases Act* acknowledged that "it is not appropriate for the Act to override commercial confidentiality²⁵", the sentiment in the NSW Government's recent discussion paper on the review of its retail lease legislation is almost the opposite. In this paper the author blatantly sought feedback on whether the disclosure of confidential financial arrangements between parties is "more important" than the public provision of the information²⁶. It is concerning that this question is even being asked by a state government agency - an agency that would on occasion observe the requirement for confidentiality, whether it be through the Cabinet process or the contracting of third party to perform work on their behalf.

In the event that it is determined there is merit in having a national lease register with all financial arrangements made publically accessible, to the extent that this relates to the disclosure of incentives, there needs to be appropriate consideration given to the process for collection and release of information including safeguards for confidential information. We are specifically mindful of some of the Productivity Commission's comments on the provision of information "at a publicly accessible site" which should be considered. The following full suite of issues should be considered:

1. Non-mandatory

The first test to safeguard confidentiality is that it should not be mandatory. The Productivity Commission made a 'judgement' in its 2008 report referenced earlier that "it would not be appropriate to mandate the registration of leases" in the context of information provision. We agree with this statement. To overcome critical issues and concerns relating to commercial confidentiality, the provision of information for a public register should be voluntary so that parties who want to register their information can do so, and those who do not want to do so are not required.

There should be little concern with voluntary registration if, as some retailer representatives claim, there is widespread support from retailers in wanting to have such information accessible. Further, we assume there is broad support in voluntarily providing such commercial information through a copy of a signed lease and other side documentation to the relevant agency. If there is no such support in this regard, then the arrangements should not be disclosed as the proposal to make the information is primarily for the benefit of retailers.

2. Responsibility to disclose

Any new requirement must not place the responsibility to provide information on landlords. Given that the main group pushing for the availability of such information are retailer representatives and lease negotiators, we believe the administrative burden should be placed on retailers in providing such information to a register.

3. Restrictions on the release of information

If a voluntary approach is adopted as described above, we would support the removal of lease provisions which restrict the release of such confidential information on the condition it is only provided to the agency for registration purposes and may only be used in an aggregated form (see point 4 below).

²⁵ Review of the *Retail Shop Leases Act 1994* Options Paper, p. 152

²⁶ 2013 Review of the *Retail Leases Act 1994* Discussion Paper, p. 11

4. *Aggregation of data*

It is critically important that commercial confidential information made publicly available is in an aggregated format, which does not enable the identification of an individual shop or tenant, or identify a category where there is a single shop or tenant. This would be similar to the summary of shopping centre turnover information which is broken down into broader categories.

5. *Who runs the register?*

We are mindful of the Productivity Commission's comments (at page 253) that lodgement should be with an "independent agency".

The Australian Small Business Commissioner, which is soon to be the Office of the Small Business and Family Enterprise Ombudsman (OSBFEO), could be an appropriate agency, so long as the register operates at arms-length from other activities.

However, a preferred option could be a public register run by one of, or a joint venture of, the retailer associations. This would have multiple benefits over a register within the OSBFEO.

It would prevent the Government from having to take on the cost of establishing and maintaining such a register (including staff, office space, IT equipment and operating procedures). The retailer associations are also 'not-for-profit' industry associations and therefore have a capacity to maintain an independent position for the benefit of the industry they serve. Similarly, it would have the benefit of the retailer associations directly being able to encourage their members to voluntarily submit information for the benefit of the broader industry. It would also have the benefit that if retailers are required to provide the information, they can have the advantage of subsidised access to that information as members of their association. The associations could also set a market value for accessing such information.

This approach would be no different to other critical industry research and benchmarks, all of which are based on voluntary disclosure of market information and undertaken by non-government entities.

This includes the Property Council of Australia's *Shopping Centre Benchmarks of Operating Expenses* (which includes itemised statutory and non-statutory expenses); the PCA/IPD Investment Performance Indexes which provides information on capital and rental returns; the *Shopping Centre News* Big Guns/Little Guns/Mini Guns editions which provides turnover information; the *Urbis Retail Averages* and *Retail Benchmarks* which provides information such as occupancy costs broken down into shopping centre type and retailer categories and; even the Westpac-Melbourne *Institute Survey of Consumer Sentiment*.

6. *Establishment costs*

If the OSBFEO was considered as the most appropriate agency to establish the register, there should be consideration given to the establishment and operational costs. It is our view that establishing such an independent register would be a costly exercise based on the resources we are aware of within Urbis, the PCA, and IPD that go into their research products (e.g. staff, desks, computers, other operating costs). It is worth noting these research products also have relatively smaller sample sizes than the retail tenancy market.

7. *Context*

The context of side deals and incentives would also need to be clarified to ensure that such information is not misinterpreted and reduces the potential for misinformed expectations. As an example, incentives can be provided at the beginning of a redevelopment where a developer/landlord is seeking to lock in tenants at an early stage. These tenants, being the first to take space and at a greater level of risk, can commonly be offered an incentive. The final tenants to take up space, which have greater security of knowing what other retailers have committed to the project, may not be provided similar incentives. If a shopping centre was identified on a register, there arguably should be a clarification such as whether the lease was entered into at the beginning of a redevelopment.

(h) Provision of sales results

The issue of the provision of retailers' sales results to landlords has been raised on many occasions during retail tenancy reviews and all state and territory governments have accepted that the continuing collection of this information is necessary for an efficient shopping centre industry.

This issue was also raised before the Productivity Commission in its inquiry into the market for retail tenancy leases in 2007-08. The Commission found: *"Prohibiting the collection of turnover data, or mandating that it be provided at a store category level, could limit shopping centre owners' managing their assets optimally. This could limit the performance of centres, ultimately disadvantaging centre tenants and consumers. Also, while the reporting of turnover data was one of the most contentious issues raised during this inquiry, it is very unlikely that any means to prohibit the collection of turnover figures would materially ameliorate the expressed concerns. Given information on vacancy rates, and that it is likely shopping centre managers could gauge a tenant's performance and turnover through other means, it is not clear that prohibiting the provision of turnover data (or legislating the fashion in which it is provided) would materially affect occupancy costs. The Commission's assessment is that the provision of turnover data, and its use by landlords should be the subject of commercial negotiations between the parties to a lease."*²⁷

The SCCA has recognised that this is a contentious issue with some retailers and has therefore begun discussions with major retailer associations on a code of practice to govern the reporting of such information. We have addressed this further below. At the outset, however, it is important that the Committee understands the reasons why landlords require the disclosure of sales information and why this information is vital for both shopping centre landlords and for the retailers in those shopping centres.

Market share analysis

Turnover information is necessary for proper market share analysis – to determine the overall financial performance of a shopping centre; the strengths and weaknesses of the centre's retail offer according to various retail categories; and if it is losing sales to a competitor. This information is critical for decisions on expansions and refurbishments of the centre. Decisions on refurbishments and expansions are always major risks and to embark on these projects without proper market share analysis would be a case of 'flying blind'. To expect shopping centre companies to undertake such major capital expenditures without knowledge of the turnover of particular centres would be like expecting, say, David Jones to make similar decisions about its chain of department stores without knowing the turnover of individual stores or of individual departments within those stores.

Tenancy mix

If a shopping centre doesn't maintain an appeal to all of its customers (i.e. have the right 'tenancy mix') it will lose customers and stagnate. That will be to the detriment of its tenants as much as its owners. Occasional changes to the tenancy mix of shopping centres, as well as fairly regular redevelopments, are therefore a very necessary fact of life. Management of the tenancy mix is a constant and evolving process designed to maximise the customer pulling power of the centre for the benefit of all retailers. Sales results are therefore necessary to ensure a centre has a successful tenancy mix strategy to enable it to adapt to a constantly changing market place. Without turnover information it would not be possible to monitor the retail performance of individual shops and categories. Over time the tenancy mix strategy would become largely 'hit and miss' and ultimately detrimental to the customers' needs; to retailer turnover levels; and to the centre's retail profitability.

Marketing and promotional strategies

Turnover information is also vital to most effectively target shopping centre marketing and promotional strategies in order to ensure a centre gets maximum value for its marketing and promotional expenditure. A detailed assessment of turnover information enables the centre to direct its marketing funds to where they are needed most; to evaluate the success of marketing strategies; and, particularly, to boost those categories of retail experiencing difficult trading periods.

²⁷ Report, op cit. p. 148

Independent industry researchers

Turnover information is vital to industry researchers to, among other things, compare the relative performance of shopping centres. For example, the independent magazine *Shopping Centre News* publishes each year comparative performance tables based on turnover for shopping centres, which are important for investors, retailers and owners. Retailers use the tables to decide in which centres they will seek premises. The magazine relies on this information to compile its comparative lists (what it calls 'Big Guns', 'Middle Guns' and 'Little Guns') and this would not be possible if turnover figures were not disclosed. Leading retail research firms, such as Urbis and Macroplan, rely on turnover figures to prepare important industry data, including sales and occupancy cost analysis, which are used by both owners and retailers for benchmarking and location decisions.

Retailer benchmarking purposes

Turnover information is vital to individual retailers for benchmarking purposes. It enables the retailer to compare the performance of their store to the trend of that particular retail category and to the trend of all speciality shops in that centre. This can alert them to the need for corrective action. Major chain retailers now regularly request this information to enable them to benchmark the performance of their stores in various centres against the performance of other stores in the same category so they can make better business decisions. Major landlords, as a matter of course, now make this information available to retailers who request it, provided it can be aggregated so that it does not identify the sales performance of individual retailers.

Most major landlords now provide sales information to retailers for benchmarking purposes. This allows them to pinpoint the stores that are doing comparatively well and those that are doing comparatively poorly and enables them to take any necessary corrective action quickly. Armed with such information throughout the industry these retailers can also make informed decisions about states, locations and centres in which they wish to be located (or from which they wish to withdraw) and this is obviously valuable information for them at lease renewal time. Sales reports are particularly important to retailers who are making changes to their businesses or are operating in a changing industry or environment. In times of change the reports help retailers understand how quickly they are improving or declining and enables them to act at the earliest opportunity.

Code of Practice

The SCCA is currently in negotiations with the National Retail Association, the Australian Retailers Association and the Pharmacy Guild of Australia about a possible code of practice governing the provision of sales information by retailers which will ensure this is no longer a contentious issue within the industry²⁸.

The code, when finalised, will impose mutual obligations upon the parties. For landlords, this will include accepting that where shopping centres collect sales information they will be obliged to provide that information to retailers who request it. This information will be in a form which enables individual retailers to benchmark their performance against other retailers within their particular sales category, both within the shopping centre (if this can be done without identifying the individual sales performance of those other retailers) and within the owner's portfolio.

The draft code also recognises that sales information should be only one aspect of the provision of information within shopping centres. Where possible and available, other information collected by landlords (such as consumer spend and demographic analysis) should also be made available to retailers to assist retail performance.

This is an example of co-operative self-regulation within the shopping centre industry which should be applauded and encouraged by the Senate Committee.

²⁸ A similar code of practice governing the practice known as casual mall leasing has been negotiated between the SCCA and major retailer associations and has been authorised by the ACCC. This code has removed controversy over this practice inside shopping centres. Indeed, nearly seven years after this code of practice began operation, no disputes have been registered under the code.

(i) Contractual obligations relating to store fit-outs and refits

Once again it is not clear what aspect the Senate Committee is examining. As the heading makes clear this is a "contractual obligation", one which is freely negotiated between a landlord and a tenant. A landlord cannot impose upon a tenant a requirement for a store fit-out and refit which is not provided for in the lease. If such a provision is included in the lease, it means the landlord and the tenant have agreed to these provisions.

It is important that the Senate Committee understands why store fit-outs and refits are conditions of a lease since there is a misconception in some quarters that lessors impose excessive requirements for fit-outs and therefore impose excessive costs on tenants. A requirement to fit-out a tenancy to a certain standard is not a tax imposed by the landlord; it is an investment required of the tenant in order to take complete advantage of the retail custom the shopping centre will generate for the tenant. Good retailers know that making their shop attractive to prospective customers, and keeping it fresh and appealing to customers, is part and parcel of a successful retail business. That has never been more important than it is today when physical retailing is under challenge from new forms of retailing. Good retailers also know that an attractive fit-out is an investment that must be undertaken by them irrespective of whether they rent premises or own premises.

Lessors also know that excessive fit-out costs will retard rental growth so it makes no sense for a lessor to be imposing ridiculous costs on a tenant if that is going to jeopardise their ability to pay rent. It must also be recognised that fit-out standards vary significantly depending upon the location of premises. In strip centres and small shopping centres, fit-out standards are often non-existent or minimal. In high-end shopping centres, however, they are a factor contributing to the centre being classified as 'high-end' and retailers know, if they seek premises in such centres, they must expect to pay higher fit-out costs and that new fit-outs will almost certainly be a requirement of a new lease.

Even though fit-out requirements are part of the negotiations which occur over a lease, regulation has still been imposed by state governments in retail tenancy legislation. For example, the NSW *Retail Leases Act* (section 38) provides that a "*provision in a retail shop lease requiring the lessee to refurbish or refit the shop is void unless it gives such details of the required refurbishment or refitting as may be necessary to indicate generally the nature, extent and timing of the required refurbishment or refitting.*"

In addition, section 12 of the *Retail Leases Act* provides that a "*a provision of a retail shop lease that requires the lessee to pay or contribute towards the cost of any finishes, fixtures, fittings, equipment or services is void unless the liability to make the payment or contribution was disclosed in a disclosure statement given to the lessee.*"

Similarly sections 13 and 13A provide further protections for tenants in requiring details in advance of any necessary works to be carried out by the lessor in order to enable the lessee's fit-out (often known as 'category 1 works') and requiring a lessor's fit-out guide to be included with the lessor's disclosure statement or the agreement for lease.

The lessor's disclosure statement in NSW (and similar provisions apply in other states) requires the lessor to advise the lessee, prior to the lease being entered into, of details of fit-out requirements, including whether the lessor has requirements as to the quality and standard of shop front and fit-out (see Part 3 'Works, fit-out and refurbishment' of the NSW Lessors Disclosure Statement).

(j) Any related matters

We have addressed all the items listed in the Committee's terms of reference. We do not believe it necessary to add further matters, given these are issues which are considered in every review of state and territory retail tenancy legislation. However, we respectfully request the opportunity to respond, via a supplementary submission if necessary, to any relevant 'related matters' which might be raised by other submitters to this inquiry. We also request the opportunity to present evidence to the Committee in the likely event public hearings are held.

Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major owners, managers and developers of shopping centres. Our members are major owners, managers and developers of retail property across Australia. 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, Brookfield Office Properties, Charter Hall Retail REIT, CFS Retail Property Trust Group, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, ISPT, Ipoh Management Services, Jen Retail Properties, JLL, Lend Lease, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and Scentre Group (formerly the Westfield Group and Westfield Retail Trust).

Contacts

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

Angus Nardi

Executive Director
T: 02 9033 1930
M: 0408 079 184
anardi@scca.org.au

Milton Cockburn

Special Adviser
T: 02 9033 1912
M: 0419 750 299
mcockburn@scca.org.au

Kristin Pryce

Senior Adviser
T: 02 9033 1941
M: 0417 042 516
kpryce@scca.org.au