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Dr Kathleen Dermody
Committee Secretary
Senate Economics References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

and via email: economics.sen@aph.gov.au

Dear Dr Dermody

Need for a national approach to retail leasing arrangements

1. I refer to your email of 11 July 2014 inviting the Society to consider the Inquiry into the need for a national approach to retail leasing arrangements. Thank you for the opportunity to consider this matter.

2. The matter was referred to the Society's Property Committee.

3. The Society is of the view that a "national approach to retail leasing arrangements" is unnecessary, would be of little benefit and would more likely create additional red tape and costs for small and medium businesses.

4. The Society draws to the Senate Committee's attention that the inherent inequality of bargaining power and perceptions of unfairness were specifically considered and addressed by the South Australian Parliament in the 1990s. At the time the same issues were also considered by the parliaments of most, if not all, of the other States and territories. In 1995 the *Retail and Commercial Leases Act 1995* (SA) (**RACLA**) (originally known as the *Retail Shop Leases Act*) came into effect. This legislation and its regulations have been the subject of ongoing review and update since their passing. The legislation specifically seeks to protect tenants while remaining fair to landlords in a number of ways including:

   a) imposing mandatory disclosure requirements,

   b) prohibiting certain unscrupulous/unreasonable conduct,

   c) implying particular "tenant friendly" clauses into leases,

d) rendering certain other provisions in leases void and/or unenforceable,

e) providing the Small Business Commissioner with certain functions and powers, and

f) establishing dispute resolution mechanisms.

5. The RACLA is specifically aimed at benefitting small to medium businesses and their interests generally, in that it:

   a) is not limited in its application to "retail" type tenancies but also applies to many commercial, office, licensed premises and industrial leases; and

   b) does not apply to leases where the tenant is the government, an an approved authorised deposit-taking institution (ADI), an insurance company or a public company or a subsidiary thereof, nor does it apply to leases where the rent exceeds $400,000 pa.

6. Accordingly, the majority of small to medium businesses that operate from leased premises in South Australia have the benefit of the RACLA, with only the "big players" excluded. We question why harmonisation of "retail" leasing would be pursued, when the current South Australian legislation benefits not only retail tenants but also tenants that operate in different industries (industrial, office etc).

7. Accordingly, as a matter of policy, the Society does not see the need for tenant protection type legislation to be introduced at a national level to benefit or protect South Australian small to medium businesses. The Society also notes that the other States and Territories generally already have similar legislative regimes in place as well.

8. Furthermore, the Society does not see any significant benefit in endeavouring to "harmonise" legislation at a national level or between the States. Major retail chains and major landlords (Westfield, Colonial etc) that operate nationally may have their own interests and agendas served by such an approach. However, many of the intended beneficiaries of such legislation (small to medium businesses) do not operate at a national level and have nothing to gain from a national approach being taken. If anything, changes in the existing regime established by the RACLA are more likely to result in increased costs and red tape to such small and medium business through:

   a) the introduction of a new system, meaning different policies and procedures being put into place requiring operators within the industry having to change existing paperwork and practices; and

   b) in all likelihood, leasing documentation for South Australian operators being centrally prepared by Eastern States' lawyers at higher cost.

9. Furthermore, legislation and policies that may be suitable for businesses in New South Wales and Sydney may not be suitable for businesses in South Australia. In the Society's view the interests of South Australian small to medium enterprises are best served by the South Australian State Government being able to determine its own policies as it sees fit, rather than being beholden to a national scheme. By way of example:

   a) South Australia's economy is of a different size and operates to a different scale than, say, the economy of New South Wales. Accordingly, the rent threshold which is set for determining the application or otherwise of retail leasing legislation is more appropriately set on a State by State basis, rather than one threshold to apply across Australia.

   b) Each jurisdiction has its own particular property rates, taxes and expenses and, hence, is best placed to regulate the recovery of such rates, taxes and expenses. For example, in South Australia, as a matter of policy, it has been decided that land tax may not be recovered from tenants but other rates and taxes may be. Other States may have different policies in respect of particular rates, taxes and expenses.

10. In relation to the specific items referred to in your letter of 11 July 2014, we comment as follows.

(a) The first right of refusal for Tenants to renew their leases

The RACLA already provides a first right of refusal for tenants of retail shopping centres (refer Division 3 of Part 4A of the RACLA) and provides end-of-lease rights to tenants in other circumstances (refer sections 20I and 20J).

(b) Affordable, effective and timely dispute resolution processes

Dispute resolution processes are already contemplated by Part 9 of the RACLA and are specific to the South Australian Courts and the Small Business Commissioner (a South Australian statutory office holder). Endeavouring to establish a "national" or "harmonised" dispute resolution procedure will require significant time and financial investment of each of the States, significant change in legislation and structural reform and a significant education process.

(c) a fair form of rent adjustment

Certain unfair/unscrupulous rent review mechanisms are already outlawed in the RACLA - Refer sections 22 and 23.

(d) implications of statutory rent thresholds

The RACLA has a statutory rent threshold that is specified in the regulations and is determined as a matter of policy by the executive from time to time. For example, with effect from 4 April 2011 the previously existing rent threshold of $250,000 per annum was increased to $400,000 per annum.

(e) Bank guarantees

The RACLA currently regulates the practice of landlords collecting security bonds under leases. The RACLA currently does not regulate the practice of Landlords and Tenants agreeing that a bank guarantee is to be provided. The Society does not see a need for regulation in this area.

(f) A national lease register

The Society does not consider that a national lease register is required. Leases can presently be registered at the Lands Titles Office in South Australia, or at the equivalent offices in other jurisdictions. Creating a national lease register serves no obvious purpose and would only create additional bureaucracy, expense and red tape.

(g) Full disclosure of incentives

The Society agrees that there is some merit in considering this issue further, as it is aware that some Landlords require lease incentives (fitout contributions, rent free periods etc) be kept confidential, which can distort objective assessments of what is the correct current "fair market rent" for particular premises. This is an area not currently addressed by the RACLA. However the Society considers this is a matter for the State Government to consider/address, rather than a national or harmonised approach being required.

(h) Provision of sales results

Tenants in retail shopping centres already have the benefit of a requirement that the landlord must keep turnover information confidential. Refer to section 51 of the RACLA.

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

The RACLA currently prohibits landlords from requiring tenants to incur capital expenditure generally. An exception to this rule is that tenants can be required to fit or refit the shop or to provide fixtures, fittings, plant and equipment if the obligation is disclosed to the tenant before the lease is

entered into and the disclosure is in sufficient detail to enable the tenant to ascertain the likely cost of complying with the requirement (refer section 13).

(j) any related matters

The Society has considered the comments made by the New South Wales Committee and noted:

i. their suggestion that the NSW equivalent legislation may be desirable as the model for harmonisation; and

ii. their complaint as to the onerous disclosure requirements prescribed by the NSW legislation.

These observations are relevant from a South Australian perspective.

First, we suspect the policies and legislation of the more populous States (NSW/VIC) would be likely to form the basis of any national law and any subsequent revisions of such law, hence limiting the ability of South Australia to determine its own policies and laws suitable for South Australian business.

Secondly, the disclosure requirements under the RACLA are relatively short and to the point, while still being comprehensive. Although some landlords complain at the obligations to disclose, the actual preparation of the requisite disclosure statements is generally not considered onerous in itself. This is an example where adopting a national or harmonised approach may lead to South Australia becoming burdened with inefficient, unnecessary and onerous obligations as a consequence of the policy makers of another jurisdiction determining what is appropriate for all States.

Please do not hesitate to contact us should you wish to discuss any aspect of this submission further.

I trust these comments are of assistance.

Yours sincerely

Morry Bailes
PRESIDENT