

Senate Economics Reference Committee Retail Leasing Arrangements

Questions on Notice and Supplementary Matters

- **National Retail Tenancy Working Group**

The first Working Group was established by COAG in the third quarter of 2008 in response to the first Productivity Commission's Report on Retail Leasing. It had a broad representation from federal and state governments, various retail industry associations, small business, the property sector and legal groups. Its first task was to address the Disclosure Statement that all jurisdictions. It had one meeting of all stakeholders. The meeting was facilitated by one of the major accounting firms.

Following the meeting the late Michael Redfern from the Melbourne legal firm Russell and Kennedy was given the task of producing a draft for further discussion. The draft was produced in December 2008 and circulated. A copy of the Draft is attached. The rigid format of the statement meant that the majority of the larger landlords could not integrate it with their systems without substantial costs.

The Group did not meet again.

Following the second report by the Productivity Commission, the government through Minister Bradbury in 2012 established another Working Group to look at retail issues including retail leasing. It had three meetings with a concentration on the GST threshold on imported retail goods. It did discuss retail leasing issues without any real recommendations as the discussions largely came from the various entrenched views on the various issues without any solutions being provided that may have resolved the issue.

There was a change of government and there have been no further meetings. The NRA is unaware of the status of the Group.

- **Alternate Dispute Resolution – Mediation**

The National Retail Association supports the alternate dispute resolution process as does the COAG members. It has proved highly successful in the majority of jurisdictions. However the resolution of the dispute in mediation often includes a "Without Prejudice" offer known as Calderbank letters. This means that the resolution offer cannot be used except as to costs if the dispute is taken further.

Courts treat Calderbank letters seriously but many of jurisdictions have tribunals as the next stage on the basis that it provides quick and low cost dispute resolutions. These tribunals have a different structure for cost recovery and any offers made in the mediation process cannot be disclosed in the tribunal hearing.

If there was a penalty associated with the mediation process being taken to the next stage it could see more realistic offers being made in the mediation and provide a quicker resolution to the dispute.

- **Uniform limit on the amount of claim under the Act**

The limit should be set at \$750,000 across all jurisdictions. That limit is for one dispute.

- **National Lease Register**

The Law Council in its submission indicated that a Uniform Torrens Titles Act is currently being worked up and this would provide a consistent approach across all jurisdictions for the registrations of all leases whilst respecting the rights of each state to maintain their own Torrens register. New

South Wales would provide the best model where all leases for more than three years must be registered.

- First Right of Refusal for lease renewal

The Tasmanian Regulations that have been mentioned during the hearings and in some submissions have the following provisions for renewal.

“29. Termination and renewal of leases

(2) In the absence of any agreement, and subject to subclause (3), not less than 3 months’ notice before the expiry of a lease the property owner is to give the tenant in writing stating-

(a) the conditions on which he or she is prepared to renew the lease; or

(b) that the lease will not be renewed: or

(c) that the tenant will be able to remain as a periodical tenant under the terms of the lease; or

(d) that the tenant will be able to remain as a periodical tenant under the terms of the lease; or

(3) Within 30 days of receiving a notice under subclause (2)(a), the tenant is to give the property owner notice that he or she-

(a) accepts the conditions for the renewal; or

(b) wishes to negotiate the conditions. Stating the alterations to the conditions the tenant seeks;
or

(c) does not wish to renew.

(4) If the tenant fails to give notice under subclause (3), the lease is not renewed.

(5) Within 30 days of receiving a notice under subclause (2)(c) or (d), the tenant is to give the property owner notice in writing stating whether he or she agrees to the continuation of the lease as proposed

(6) If the property owner fails to provide the information set out in subclause (2), the term of the lease, at the tenant’s election, may be extended so that, before being required to vacate the premises, the tenant has the information for the period required under that subclause.

(7) The tenant’s election is exercisable by notice given in writing to the owner within 2 weeks after the last date on which notice under subclause (2) may be given.

(8) If the tenant fails to give the notice required under subclause (5) or (7), the tenant is taken to not wish to renew.

(9) If the property owner offers to renew a lease, the rent under the renewed lease is to be market value for those premises determined in accordance with clause 21 unless agreement to the contrary.”

The Tasmanian provisions do not provide for the first right of refusal. However it does provide that if the landlord chooses to offer a renewed lease to the tenant, it should be at a rent that reflects the market rent for the premises for the permitted use.

In the event that the tenant believes the rent is in excess of a market rent, the rent can be determined by a specialist valuer in accordance with clause 21 that outlines how the rent will be determined.

Such a provision would see the landlord act in good faith and not put an ambit claim on the rent expectations for the premises and would prevent the "highest and best use" being used instead of the market rent for the permitted use as stated in the lease.

The NRA has put this to all the recent reviews of state legislation but it has not been accepted. It was a solution that Association believed would give both parties a solution to the issue of the sitting tenant renewing the lease. It would also mean the landlord would be more realistic in their claim on rent knowing that there was a dispute procedure.

This solution could be rolled out nationally.

- Gross leases or semi gross leases

The Association maintains that as a part of red tape reduction and regulation reform that by adopting either gross leases or semi gross leases all the provisions relating to the recovery of outgoings and marketing funds charges would be taken out of the various Acts and Regulation.

In the Proposal for a Harmonised Landlord's Disclosure Statement the details relating to outgoings takes up two pages. In addition to this, the landlord is required to provide annually a written annual statement of the budget estimate plus and audited statement.

The tenant would prefer on charge for occupying the property and that includes rent, outgoings and marketing funds. A semi-gross lease would include rent plus the statutory charges of municipal rates and taxes.

- Term of lease

There should be no restriction on the term of lease and should be subject to negotiation. The mention of the five year minimum term has meant the landlord will only offer that as the only term available for the tenant.

**Senate Economics Reference Committee
Retail Leasing Arrangements**

- Occupancy Cost Growth of tenants in shopping centres

The committee indicated that they would be interested in the growth of occupancy costs in regional shopping centres. The following information is from the Westfield's presentation of their 2007 financial report for the year ending 31 December 2007 and SCentre's half yearly report given in August 2014. Their full year report will be given on 24 February 2014.

	2014	2007
Number of Centres	38	44
Number of retail outlets	11,075	11,430
Portfolio leased %	99.5%	99.5%
Specialty Occupancy Cost %	19.0%	16.6%
Lease deals	1,436	3,377
Area of lease deals	183,651	565,414sqm
Average specialty store rent	\$1,547psm	\$1,249psm
Average specialty store rent growth	1.7%	4.7%
Specialty stores sales growth	2.7%	7.1%

The half year 2014 presentation shows that specialty outlet occupancy costs have risen from 16.6% to 19.0% which is a level that for many specialty stores especially the individual trader is unsustainable if the trader is not vertical not able to do their own importing. The increase in occupancy is the result of the annual rent increase of CPI +2%.

It should be pointed that the occupancy cost reported is an average which means there will be specialty retail shops with occupancy costs in excess of 20%. At these levels these costs exceed the wages bill for most retail specialty shops that top out at 15% including oncosts.

The new lease deals in 2014, with a growth of 1.7%, reflect the poor economic state of retail trade.

Private & Confidential

Proposal for a Harmonised Landlord's Disclosure Statement

Draft for Confidential Consultation with Selected Stakeholders

LANDLORD

TENANT

PREMISES

DATE

- ① The base rent under this lease in the first year is
- ② Turnover rent IS/IS NOT payable in year 1
- ③ Total estimated outgoings and promotion and marketing costs for the tenant in year 1
- ④ The term of this lease is
- ⑤ There IS/IS NOT an option for the tenant to renew the lease on expiry
- ⑥ The commencement date is
- ⑦ Estimated handover date is
- ⑧ This lease DOES/DOES NOT provide the tenant with exclusivity in relation to permitted use of premises

Private & Confidential

Proposal for a Harmonised Landlord's Disclosure Statement

Draft for Confidential Consultation with Selected Stakeholders

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Part 1 Premises

1 Premises details

1.1 Street address of premises

[Insert street address of premises, shop number (if applicable), name of the building/centre in which the premises is located (if applicable), street address of the building/centre (if applicable)]

1.2 Plan of premises (if available)

[Insert description of the premises by reference to a prepared plan. Attach the plan to this disclosure statement at item 33.1 if available]

1.3 Lettable area of the premises (in m²)

m² Actual Estimate

Will a survey be conducted?

1.4 Existing structures, fixtures, plant and equipment in the premises provided by the landlord (excluding any works, fitout and refurbishment at Part 3). Select as appropriate

- | | | |
|---|---|---|
| <input type="checkbox"/> air conditioning | <input type="checkbox"/> plastered walls | <input type="checkbox"/> suspended ceilings |
| <input type="checkbox"/> electrical distribution load | <input type="checkbox"/> lighting | <input type="checkbox"/> telephone |
| <input type="checkbox"/> floor coverings | <input type="checkbox"/> shop front | <input type="checkbox"/> water supply |
| <input type="checkbox"/> painted walls | <input type="checkbox"/> sink | <input type="checkbox"/> sprinklers |
| <input type="checkbox"/> waste | <input type="checkbox"/> mechanical exhaust | <input type="checkbox"/> cool room |
| <input type="checkbox"/> grease trap | <input type="checkbox"/> other | <input type="checkbox"/> hot water service |

1.5 Services and facilities provided by the landlord (for example security services cleaning etc)

2 Permitted use

2.1 Description of permitted use

[Note: the tenant should investigate whether the proposed use of the premises is permitted under planning laws]

2.2 Is the permitted use at item 2.1 exclusive to the tenant?

Yes No

3 Number of car parking spaces

- 3.1 Approximate total spaces spaces
- 3.2 Available spaces for customers of the building/centre spaces
- 3.3 Reserved spaces for use of the tenant only spaces

4 Head lease

- 4.1 Is the premises under a head lease or crown lease?
[Select one of the following] Yes No
- 4.2 Has the landlord provided a copy of the head lease or crown lease to the tenant?
[Select one of the following] Yes – attached at item 33.2 No
- 4.3 Current term under the head lease or crown lease and option/s to renew
[Insert a list of the current term and any options for further terms held by the landlord under the head lease. If there is no head lease, state "Not applicable"]
- Current term: years, / / 20 to / / 20
- Options to renew years, / / 20 to / / 20
- 4.4 Is the head landlord's consent to the lease required? Yes No

Part 2 Lease Term And Option/s To Renew Lease

5 Lease term

- 5.1 Date of lease commencement (see also date of handover at item 7) / / 20
 Actual Estimate
- 5.2 Length of term Years Months
- 5.3 Date of lease expiry (based on the date of lease commencement at item 5.1) / / 20

6 Option/s to renew lease

- 6.1 Option/s details (length of option/s term/s, period of option/s, dates between which option/s must be exercised)
[Insert a list of all options to renew lease. If there are no options to renew lease, insert "Not applicable"]
- | Length of option/s | Period of option/s | Exercise dates |
|----------------------------|--|--|
| <input type="text"/> years | <input type="text"/> / <input type="text"/> / 20 <input type="text"/> to <input type="text"/> / <input type="text"/> / 20 <input type="text"/> | <input type="text"/> / <input type="text"/> / 20 <input type="text"/> to <input type="text"/> / <input type="text"/> / 20 <input type="text"/> |
| <input type="text"/> years | <input type="text"/> / <input type="text"/> / 20 <input type="text"/> to <input type="text"/> / <input type="text"/> / 20 <input type="text"/> | <input type="text"/> / <input type="text"/> / 20 <input type="text"/> to <input type="text"/> / <input type="text"/> / 20 <input type="text"/> |
- Actual Estimate

Part 3 Works, Fitout And Refurbishment

7 Date of handover

- 7.1 Date of handover (if different to the date of lease commencement at item 5.1) / / 20
 Actual Estimate

8 Landlord's works

- 8.1 Description of works to be carried out by the landlord before the date of lease commencement (excluding any works that form part of the tenant's fitout at item 9)

- 8.2 Estimate of expected contribution by the tenant to the landlord's works

[Note: see also outgoings (item 14) in relation to any maintenance and repair outgoings]

9 Tenant's fitout works

- 9.1 Fitout works to be carried out by the tenant (excluding the landlord's works at item 8)

- 9.2 Is the landlord providing any contribution towards the cost of the tenant's fitout?

Yes

No

If yes please provide details of landlords contribution

Does this fitout need to be agreed by the landlord?

Yes

No

Part 4 Rent

10 Annual base rent

10.1 Starting annual base rent (when the lease commences) \$ Including GST Excluding GST

10.2 Rent free period

Describe any rent free period

10.3 Date of rent commencement

10.4 How rent payments are to be made

[Insert description of how rent is paid, eg by equal monthly instalments in advance on the first day of each month, other than the first and last payments which is calculated on a pro-rata basis]

11 Rent adjustment (rent review)

11.1 Rent adjustment date/s and adjustment method

[Insert a list of all rent adjustment dates and adjustment methods, for example: fixed increase by ###%, fixed increase by \$###, current market rent, indexed to CPI]

Dates

Method of rent adjustment

12 Turnover rent

12.1 Is turnover rent payable by the tenant?

[Select one of the following and provide details]

Yes
 No

If yes, describe the method of calculation for turnover rent

12.2 Does the landlord require the tenant to provide turnover details (where turnover rent is not payable)?

Yes No

Part 5 Outgoings

13 Tenant contribution to landlord's outgoings

13.1 Is the tenant required to pay or contribute to the landlord's outgoings?

Yes No

13.2 Describe any outgoings free period

13 Tenant contribution to landlord's outgoings (cont)

13.3 Date on which payment of outgoings is to commence

/ / 20

13.4 Describe the formulae for apportioning outgoings

[Insert formulae of how the outgoings payable by the tenant are to be apportioned]

14 Outgoings estimates (annual)

[State whether any of the following outgoings are payable by the tenant. The landlord may be prevented by the retail leasing laws from claiming certain costs.]

14.1 Administration	<i>Estimate (including GST) per annum for the building/centre</i>
Administration costs (excluding management fees but including wages)	\$ <input type="text"/>
Audit fees	\$ <input type="text"/>
Management fees	\$ <input type="text"/>
14.2 Advertising and promotion	\$ <input type="text"/>
<i>[Note: The landlord may be prevented by the retail leasing laws from claiming certain advertising and promotion costs]</i>	
14.3 Air conditioning/temperature control	
Air conditioning maintenance	\$ <input type="text"/>
Air conditioning operating costs	\$ <input type="text"/>
14.4 Building/centre management	
<i>[Note: The landlord may be prevented by the retail leasing laws from claiming certain capital costs]</i>	
Body corporate/strata levies	\$ <input type="text"/>
Building intelligence services	\$ <input type="text"/>
Customer traffic flow services	\$ <input type="text"/>
Energy management services	\$ <input type="text"/>
Gardening and landscaping	\$ <input type="text"/>
Insurance	\$ <input type="text"/>
Pest control	\$ <input type="text"/>
Ventilation	\$ <input type="text"/>
14.5 Building/centre security	
Caretaking	\$ <input type="text"/>
Emergency systems	\$ <input type="text"/>
Fire levy	
Fire protection	\$ <input type="text"/>
Security services	\$ <input type="text"/>
14.6 Cleaning	
Cleaning consumables	\$ <input type="text"/>
Cleaning costs (excluding consumables)	\$ <input type="text"/>
14.7 Communications	
Post boxes	\$ <input type="text"/>
Public telephones	\$ <input type="text"/>

14 Outgoings estimates

14.8 Customer facilities	
Car parking	\$ <input type="text"/>
Child minding	\$ <input type="text"/>
Escalators	\$ <input type="text"/>
Lifts	\$ <input type="text"/>
Uniforms	\$ <input type="text"/>
14.9 Customer information services	
Information directories	\$ <input type="text"/>
Public address/music	\$ <input type="text"/>
Signage	\$ <input type="text"/>
14.10 Government rates and charges	
<i>[Note: The landlord may be prevented by the retail leasing laws from claiming land tax]</i>	
Land tax	\$ <input type="text"/>
Local government rates and charges	\$ <input type="text"/>
Water, sewerage and drainage rates and charges	\$ <input type="text"/>
14.11 Repairs	
<i>[Note: The landlord may be prevented by the retail leasing laws from claiming certain capital costs]</i>	
Repairs and maintenance	\$ <input type="text"/>
Sinking fund for repairs and maintenance	\$ <input type="text"/>
14.12 Utility services	
Electricity	\$ <input type="text"/>
Gas	\$ <input type="text"/>
Oil	\$ <input type="text"/>
Water	\$ <input type="text"/>
14.13 Waste management	
Sewerage disposal	\$ <input type="text"/>
Waste collection and disposal	\$ <input type="text"/>
14.14 Other outgoings	\$ <input type="text"/>
	\$ <input type="text"/>
	\$ <input type="text"/>
14.15 Total outgoings for the building/centre	\$ <input type="text"/>
14.16 Formula for determining tenant's share of the total outgoings for the building/centre	
<input type="text"/>	
14.17 Estimated tenant contribution to outgoings	\$ <input type="text"/>

Part 6 Other Costs

15 Promotion and marketing costs

- 15.1 Is the tenant required to contribute towards advertising and promotional costs (including marketing fund contributions) for the building/centre? Yes No

15 Promotion and marketing costs

15.2 Tenant's contribution to advertising and promotional costs per annum

[Select one of the following and provide details]

- Not applicable
- Yes – contribution per annum is \$ Actual Estimate
- Yes – contribution per annum is % of the rent (excluding GST) payable from time to time
- Yes – [insert details of tenant's contribution per annum and how this is determined]

16 Other monetary obligations and charges

16.1 Any other initial up-front costs in relation to the issue of the lease

[Insert details of any initial up-front monetary obligations or charges under the lease which are not referred to elsewhere in this disclosure statement]

Part 7 Alteration Works (Including Renovations, Extensions, Redevelopment, Demolition)

17 Alteration works

17.1 Are there any alteration works, planned or known to the landlord at this point in time, to the premises or building/centre including surrounding roads during the term or any further term/s?

[Select one of the following and provide details]

- Yes
- No

If yes please provide details

18 Clause/s in lease dealing with relocation and demolition works

18.1 Clause/s in lease which provide/s for relocation of the tenant

Clause/s of the lease Not applicable

18.2 Clause/s in lease which provide/s for the demolition of the premises or building/centre

Clause/s of the lease Not applicable

Part 8 Trading Hours

19 Core trading hours relevant to the tenant

Monday	<input type="text"/>	am to	<input type="text"/>	pm
Tuesday	<input type="text"/>	am to	<input type="text"/>	pm
Wednesday	<input type="text"/>	am to	<input type="text"/>	pm
Thursday	<input type="text"/>	am to	<input type="text"/>	pm
Friday	<input type="text"/>	am to	<input type="text"/>	pm
Saturday	<input type="text"/>	am to	<input type="text"/>	pm
Sunday	<input type="text"/>	am to	<input type="text"/>	pm
Public holidays	<input type="text"/>	am to	<input type="text"/>	pm

20 Tenants access to premises outside core trading hours

20.1 Is the tenant permitted to access the premises and building/centre outside the core trading hours?

[Select one of the following and provide details]

Yes

No

If yes please provide details including costs

Part 9 Retail Shopping Centre Details

[Note: this Part must be completed only if the premises are in a retail shopping centre as defined by the retail tenancy laws]

21 Retail shopping centre details

21.1 Total number of shops No

21.2 Gross lettable area of the centre (in m²) m² Actual Estimate

22 Annual turnover of the centre

22.1 Annual estimated turnover (where collected) \$ Including GST Excluding GST

22.2 Annual estimated turnover by specialty shops per m² (where collected)

<input type="checkbox"/> Food	\$	<input type="text"/>	m ²	Including GST / Excluding GST
<input type="checkbox"/> Non food	\$	<input type="text"/>	m ²	Including GST / Excluding GST
<input type="checkbox"/> Services	\$	<input type="text"/>	m ²	Including GST / Excluding GST

23 Major/anchor tenants

23.1 Major/anchor tenants and lease expiry dates (Department store, discount department store supermarkets)

[Insert list of all major and anchor tenants, and the dates on which leases held by those tenants expire]

Major/anchor tenant	Lease expiry date
<input type="text"/>	<input type="text"/> / <input type="text"/> / 20 <input type="text"/>
<input type="text"/>	<input type="text"/> / <input type="text"/> / 20 <input type="text"/>
<input type="text"/>	<input type="text"/> / <input type="text"/> / 20 <input type="text"/>

24 Floor plan of the centre

24.1 Floor plan showing tenancy mix, common areas, and common area trading and major tenants

Attached at item 34.1

24.2 Is the tenancy mix likely to change during the term of the lease?

[Select one of the following and provide details]

- Yes – [Insert details of changes to the tenancy mix, process for changing the tenancy mix even if no changes are presently known or likely]
- No

24.3 Assurance as to current tenant mix

[Select one of the following]

- The tenant is assured that the current tenant mix will not be altered by the introduction of a competitor.
- The landlord is not prepared to give the tenant an assurance that the current tenant mix will not be altered by the introduction of a competitor.

25 Customer traffic flow information

25.1 Does the landlord collect customer traffic flow information?

[Select one of the following and provide details]

- Yes – attached at item 34.2
- No

26 Casual mall licensing for common areas

26.1 Is there a casual mall licensing policy?

[Select one of the following and provide details]

- Yes – attached at item 34.3
- Not applicable

Part 10 Other Disclosures

27 Other disclosures

27.1 Current legal proceeding in relation to the lawful use of the premises or building/centre

28 Representations by landlord

28.1 Any other representations by the landlord or the landlord's agent

[Landlord to insert details of any other oral or written representations made by the landlord or the landlord's agent]

Part 11 Landlord Acknowledgements and Signing

29 Acknowledgement by landlord

By signing this disclosure statement, the landlord confirms and acknowledges that:

- this disclosure statement contains all representations in relation to the proposed lease by the landlord and the landlord's agents;
- this disclosure statement reflects all agreements that have been made by the parties; and
- the landlord has not knowingly withheld information which is likely to have an impact on the tenant's proposed business.

Warnings to landlord when completing this disclosure statement

- The tenant may have remedies including termination of a lease if the information in this statement is misleading, false or materially incomplete.

30 Landlord's signature

30.1 Name of landlord

[Insert name of the landlord]

30.2 Signed by the landlord or the landlord's agent for and on behalf of the landlord

X

30.3 Name of landlord's authorised representative or landlord's agent

[Insert name of the person signing with the authority of the landlord]

30.4 Date / / 20



Part 12 Tenant Acknowledgements and Signing

31 Acknowledgements by tenant

By signing this disclosure statement, the tenant confirms and acknowledges that the tenant received this disclosure statement.

Before entering into a lease, tenants should consider these key questions:

- Have you sought independent legal and financial advice?
- Does the planning authority allow your proposed use for the premises under planning laws?
- Is the security of your occupancy right affected by:
 - mortgages, charges or encumbrances granted by the landlord?
 - rights and obligations under a head lease?
- Does the premises comply with building and safety regulations? Is the premises affected by outstanding notices by any authority?
- Could your trading be affected by disturbances or changes to the building/centre?
- Does the landlord require you to refurbish the premises regularly or at the end of the lease?
- Can the landlord end the lease early even if you comply with the lease?
- Are all the existing structures, fixtures, plant and equipment in good working order?
- Is the tenant required to make good the premises at the end of the lease?
- Is the tenancy mix of the shopping centre (if applicable) likely to change during the course of the lease?
 - see question 24.2

32 Tenant's signature

32.1 Name of Tenant

[Insert name of the tenant]

32.2 Signed by the tenant or for and on behalf of the tenant

32.3 Name of tenant's authorised representative

[Insert name of the person signing with the authority of the tenant]

32.4 Date / / 20

Part 13 Attachments

33 List of attachments

33.1 Plan of premises (see item 1.2) Yes Not applicable

33.2 Head lease or crown lease (see item 4.2) Yes Not applicable

33.3 Additional attachments

[Insert list of any additional attachments]

34 List of attachments – retail shopping centre

Attached? [Note: this item must be completed only if the premises are in a retail shopping centre as defined by the retail tenancy laws]

34.1 Floor plan (see item 24.1) Yes Not applicable

34.2 Customer traffic flow statistics (see item 25.1) Yes Not applicable

34.3 Casual mall licensing policy (see item 26.1) Yes Not applicable

34.4 Additional attachments relating to the retail shopping centre

[Insert list of any additional attachments relating to the retail shopping centre]