Submission

To

Senate Standing Committee on Economics

In reference to

National Approach to Retail Leasing Arrangements

Prepared By
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Senator Sam Dastyari
Chairperson
Senate Standing Committee on Economics
PO Box 6100
Parliament ACT 2600

Dear Senator,

Reference of National Approach To Retail Leasing Arrangements

This submission is made in response to the aforementioned Senate Inquiry seeking same from Industry Stakeholders in accordance with the Terms of Reference.

Lease1, (formerly Known as Advantage Retail Management) was formed in 1997 to represent Retailers in the area of retail tenancy leases and to tackle the inequities between Landlord and Lessee.

We have been actively involved in the reforms of retail shop lease legislation/regulations on behalf of the stakeholders of the retailer industry since 1999, and was a noted contributor to the Productivity Commission Report and Recommendations 2008.

Presently Lease1 is endorsed as a service provider to the Members of the Pharmacy Guild of Australia, Australian Retail Association and members of the Franchise Council of Australia, as well as managing retail lease portfolios for Franchisors and chains.

Lease1 has grown its business reputation on representing Retailers only, and in fact are possibly the only true Retailer Advocates in the specific field of retail (commercial) tenancy leasing.

Since the inception of specific Retail Tenancy Lease Legislation was introduced by the States and Territories (beginning in 1994) there has been numerous reviews of not only these separate pieces of legislation but also by Federal Government entitles including the Productivity and the Australian Competition and consumer Commission.

Noting that the most rigorous review completed in 2008 by the Productivity Commission into the Market for Retail Leases in Australia resulted in nine recommendations supported by the Government, to date no action has been taken to adopt these changes.

Such changes were made to improve the transparency and harmonisation of the retail lease market and subsequent legislations.

Further State and Territory reviews although starting out with honourable intentions to reduce red tape and introduce these recommendations towards a transparent market have on the whole failed.

In addressing these numerous reviews within the past decade Lease1 has provided extensive submissions and attendances seeking the outcomes that both sides of the Lessee/Lessor relationship inevitably acknowledge are necessary.

Enclosed in this submission is a sample of these submissions along with proactive recommendations to achieve the benefits the Industry needs.

However as we progress further and over time gain an understanding of the road blocks which surround these reforms a more simplistic and certainly achievable pathway has become our focus.

This approach is to introduce a National Simple form Lessor/Lessee Disclosure Statement which is lodged electronically and made available to interested parties on a pay per view basis.

Much similar to the existing lease registries in Queensland and New South Wales except this format would be more effective, more transparent and more user friendly.

The format that we have drafted encapsulates all the existing Lease Disclosure Statements from each of the States and Territories into one single format. (sample of existing Disclosures enclosed in Submission to Treasury.)

With the view to a wholesale reduction in red tape this format would be presented in a Part A (details about the parties and the lease) + Part B (details about the shopping centre, strip, building – where applicable.)

It would be proposed that such a repository maybe operated by Government or with Industry Enterprise partnership with minimal Government assistance to set up.

We note that the Terms of Reference (a.) through (J.) seek to address many areas which must remain commercial between the parties for the market to remain true.

But it is the underlining lack of transparency for not only the Small Business Retailer but also a large portion of Land Owners that in essence creates ambiguity amongst stakeholders in each of these areas.

For this Inquiry to finally bring about such overdue reforms it must present an achievable path to deliver market transparency.

Noting the groundswell from Industry Stakeholders to adopt transparency and harmonisation (as well as reductions in red tape) we seek the opportunity to present to the Inquiry a detailed pathway to introduce a National Retail Lease Disclosure Statement and benefits analysis.

Prior to completing its initial report this presentation can be facilitated in person or via video link as required, and ask that you make contact with this office to discuss further.

Yours Truly,

Phillip Chapman csma
Director
Advantage Retail Management Pty Ltd
(T/A Lease1)

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RETAIL SHOP LEASE-CODE OF CONDUCT

June 2009

Strategies to Introduce a National Code

Strategies to deliver the recommendations of the Productivity Commission Inquiry Report-The Market for Retail Tenancy Leases in Australia (March 31 2008)

Retail Shop Lease-Code of Conduct (RSLCoC)

STRATEGIES TO INTRODUCE A NATIONAL CODE

AFTER THE INQUIRY | ONE

Since Commissioner, Neil Byron, delivered Productivity Commission Inquiry Report No. 43, 31 March 2008 the Commonwealth Government responded to the key recommendations in August of the same year. (Appendix A)

In the summary the Commonwealth deemed that as the responsibility for retail tenancy legislation falls with the state and territory governments, the role of the Commonwealth is limited.

Therefore it was decided that it is appropriate for the issues to be considered under the auspices of the Council of Australian Governments (COAG) who in turn deemed that through broader context of regulatory and competitive reform is through the Business Regulation and Competition Working Group (BRCWG).

Since receiving this brief in November 2008, BRCWG has only tabled one of the eight recommendations and that being No. 8, which pertains to the relaxation of the states and territories planning and zoning controls in relation to retail property development.

Referring to the BRCWG Annual Report Card-March 2009, the Productivity Commission Report No. 43 is not listed as current on the agenda, even though a response letter received by Lease1 (correspondence to the Minister 3rd March 2009-Appendix B) from The Hon Lindsay Tanner MP (Minister for Finance and Deregulation) and The Hon Dr. Craig Emerson MP (Minister Assessing Deregulation) quotes "…..work has commenced recently and we anticipate further consideration of these matters over the course of 2009." (28 May 2009-Appendix C)

It is evident that these reforms are not high on the bureaucratic and political agenda and therefore the impetus to adopt change will be lost in the processes of inter-governmental departments.

Historically major reform needs to come from within the specific interest group or industry, Retailers and Retailer Groups have been highly proactive in contributing to Retail Tenancy/Shop Lease Legislation in the past and as there appears to be an accord in adopting a National Code from both sides of the table, being Lessees and Lessors, it is prudent that a common strategy is developed to deliver these outcomes.

Submissions to the Inquiry from both sides of the industry acknowledged benefits and efficiencies in the adoption of a national code-Retail Shop Leases-Code of Conduct and this was wholly recommended by the Commissioner and supported by the Commonwealth.

The issue now is how the industry moves forward to bring about timely outcomes of delivering a RSLCoC without the legislative shackles of state, territory and commonwealth government.

Moving Forward |two

While the Australian Government has no retail tenancy legislation, the Trade Practices Act 1974 contains provisions relevant to retail tenancy arrangements. Part IVA of the TPA contains laws prohibiting unconscionable conduct, including unconscionable conduct in business transactions (section 51AC). Part IVB enables the establishment of industry codes and prohibits the contravention of any applicable industry code.

Across all State and Territory levels, 27 reviews and amendments (including replacement acts) have occurred since the legislation was first proposed and introduced.

These reviews and initiatives were accompanied by numerous changes to retail shop lease Acts. (Appendix D). To introduce further legislation to achieve the Commissions recommendations across all these jurisdictions would take many years to be adopted by same let alone the arduous process of legislative drafting.

However even though there has been such extensive focus on each State and Territory legislations there has become common themes entwined in same, such as disclosures, minimum lease standards, rent reviews and dispute resolution.

Given that these require a library of standard forms for each, Registrars/Administrators have adopted the use of regulations as opposed to legislation to perform changes to these forms which meet the intention of the respective retail shop lease legislation.

Therefore the majority of the Commissions recommendations can be facilitated through regulation rather than legislation, allowing each State and Territory to adopt voluntary code regulation into the respective review under the current time table.

The development of a voluntary national RSLCoC for shopping centre leases should primarily be an industry initiative. For such a code to remain workable it should be adopted by (or not) in its entirety by Lessors and Lessees-without enabling market participants to be selective as to which parts to adhere to.

> *"Lease1 similarly suggest that in a market in which there are varying lease formats given the diversity of ownership, retailers and statutory bodies, a code of conduct can offer consistent and commercially prudent minimum standards across the nation."* [Productivity Commission Inquiry Report No. 43 31 March 2008 pg241]

By introducing proportionate representation from industry entities for both Lessors and Lessees under the guise of an industry working group (IWG) similar to those involved in the reviews of State and Territory legislation the development of a RSLCoC can be facilitated.

Such an IWG with the support specialist lobbyists who are independent to all the participants can focus on introducing the recommendations of the Commission to a voluntary code in the short term and the adoption of same as regulation in association with the relevant acts, over the medium term.

Industry Working Group | three

Any IWG needs to be proportionate to the representation of both sides of the industry, Lessors and Lessees, to be meaningful and effective and to further gather support across all boundaries of the retail property industry.

Further there are the internal issues of the each parties corporate profile and representations, for example the Australian National Retailers Association boasts its membership as exclusive to such publicly listed companies as Wesfarmers (Coles), Woolworths, Harvey Norman and JB Hi Fi. Who in the media represent themselves as a national retailers association is in fact a lobby group for such monopolies, and are not covered by the retail shop lease legislations.

Another example is the National Retailers Association whose members are mainly national chains again a good portion are public companies and are also outside the retail shop lease legislations. The NRA has strong ties to Lessor groups such as Westfield, AMP and the Shopping Centre Council of Australia which is evidenced through the prolific sponsorship of its flagship event The NRA Fashion Design Awards presented by AMP Capital (2009).

The Australian Retailers Association has suffered over the past few years in losing a good part of its members from the retail property industry and at present is in direct competition with the NRA and RA for rebuilding its member base and has notable political ties that may become questionable as to impartiality.

The Retailers Association commonly known as the Queensland Retail Traders and Shopkeepers Association is in fact representative of a broad cross section of the retailer industry, but does have a strong skew in its membership towards the independent/convenience grocery channel, which are covered by the RSL legislations but for which are commonly in small neighborhood and strip shopping centres.

With reference to the cross section of professed retailer groups, (Appendix E) there is numerous groups, federations and small business associations and as such a focus needs to be made on the higher end shopping centre retailers where the majority of legislative scrutiny is based on the inequities between Lessor and Lessee.

Therefore the opinion is that a fair representation of Lessees for an IWG would be through Retail Channels such as Franchises, Pharmacies and Newsagents. Balance this with the Retailers Association and there would be a comprehensive cross section to penetrate the adoption of a voluntary code for RSLCoC.

The Franchise Council of Australia is by far the largest representative of Retailers in shopping centres with some 14,000 touch points nationally in all forms of retail property and situations and is a national body with resources to partake in the process and has a strong education program.

The Pharmacy Guild of Australia is the largest single channel national retailer group with 5500 touch points again across all facets of the retail property industry with a recognised lobbying success record as well as strong policy and education programs.

The Newsagents Channel is represented by a national federation as well as state associations with varying membership numbers as low as 500 up to 4500, which unfortunately have amongst themselves growing conflicts on several fronts and may prove difficult in aligning an accord on a common subject.

To put forward the case for Lessees a balanced representation with the resources and depth of membership without default to conflicts of same the following groups are the logical participants of the IWG:

- Franchise Council of Australia
- Pharmacy Guild of Australia
- Retailers Association (QRTSA)

Presently Lease1 has held preemptive discussions with the FCA and PG to establish the willingness of such representation prior to promoting a retailer association.

These discussions have proved highly positive and reassured by executives from both of their willingness to "be at the table" with full knowledge of each others participation and understanding of the common outcomes.

For the other side of the equation representing Lessor's are such industry groups as:

- Property Council of Australia
- Shopping Centre Council of Australia
- Institutional Owners (Westfield, AMP Capital, Centro, Stockland etc)
- Law Society
- Certified Practicing Accountants Association
- Valuers Association
- Retail Property Managers/Agencies etc

Historically when IWG's have been formed to review state and territory legislations representation on behalf of the retail property industry has come from the above mentioned cross section.

The most proactive members have been the PCA (and SCCA), Law Society and Retail Property Managers/Agencies which in this case provides a group of 3 to balance the representation of Lessees.

Proposed Industry Working Group

Lessees	Lessors
Franchise Council of Australia	Property Council of Australia
Pharmacy Guild of Australia	Law Society
Retailers Association	Retail Property Managers/Agencies

The Process | four

Recommendations to Reform

- Establish Industry Working Group (IWG)-comprising 3 to 4 industry representatives from both the Retailer representatives and Retail Property representatives. (I.e. FCA, Pharmacy Guild, Retailers Association and SCC, PCA, Law Society)
- COAG to facilitate IWG its meeting and resulting outcomes through Business Regulation and Competition Working Group (BRCWG) and to include representatives from the ACCC and each state/territories regulatory body (i.e. Registrars RSL).
- IWG to formulate Retail Lease Code of Conduct through adoption of Commissions recommendations as follows:

1. National use plain English Disclosure Statements and Procedures.

2. Uniform single page lease (commercial terms) summary

3. Code to adopt TPA, FCC, Community Title and Management legislations.

4. Produce draft code with minimum lease standards on such points as rent review, end of lease provisions, relocation/demolition and compensation etc for review by ACCC as proposed administrator.

5. Lobby states/territories to adopt code of conduct and changes to disclosure and transparency issues of lease summary as regulations under current legislations.

6. Lobby state/territories to adopt a user friendly registration process for disclosure and/or lease summary documents to complete transparency of commercial terms.

7. Further Lobby states/territories to adopt wholesale uniform changes to legislation at scheduled review dates to achieve recommended harmonisation of statutory regulations and common commercial minimum standards nationally.

8. Further facilitate education programs for existing and new retailers, retailer property owners and managers.

Implementation | five

The first step to implementation is to establish the Lessee representatives to the IWG and have an understanding of the desired outcomes in keeping with the Commissioner's recommendations as well as ensuring that such results are focused solely on a whole of industry basis and is not diluted by internal political agendas.

Once this is established then an approach to the Shopping Centre Council proposing they formulate a similar representative group to form the balance of the IWG.

To facilitate the process and gain acceptance from within all levels of Government it is strongly recommended that an independent specialist lobbyist be engaged by the IWG and funded across both sectors of the retail property industry.

A review of the different parties recommended to the formation of the IWG and the identified interests of same and the various government issues each has addressed in the past a recommendation on a completely independent and highly capable lobbyist has been assessed and Enhance Corporate fits the bill. (Corporate Profile-Appendix F)

The then complete and recognized IWG prepare submissions to the process specific to each of the recommendations with the objective of providing a draft code for review and approval of the collective IWG for presentation to COAG via the BRCWG and the respective Ministries for adoption.

It would not be unreasonable to expect that given both sides of the industry share an underlining willingness to these reforms that the processes of the IWG can be finalised within several months.

The adoption initially of a Voluntary Code by industry will provide the platform for adoption of the RSLCoC into the respective State and Territory legislative reviews and over the medium term become a mandatory code achieving the reforms beneficial to meeting the Commissions recommendations.

Next Step | six

It is proposed that the next move is for executives of the Franchise Council and Pharmacy Guild meet, facilitated by Lease1, to discuss the aligning of the third member of the Lessee's IWG contingent.

From there a preliminary meeting with the executive of the Shopping Centre Council be held, again facilitated by Lease1, to convey the proposal and seek for the formation of the Lessor's IWG respective contingent.

At this point the formalisation of a time table and appointment of an independent lobbyist be adopted and presented to Government and invite representatives from same to participate in the already formed Industry Working Group-Retail Shop Leases Code of Conduct.

Naturally there will be strong impetuous from Government to be seen to the facilitation of the process and administration of the IWG, however these issues will need to be addressed by the independent lobbyist to ensure that the direction maintains a whole of industry outcome.

Lease1 is pleased to work closely with the FCA and PG in moving this process forward, as specialist Retail Leasing Advocates there is only one agenda, and that is to improve the equity and transparency in retail shop lease negotiations and market conditions towards a better informed and more efficient industry for all parties. (Lease1 Corporate Profile-Appendix G)

Appendices | seven

A. Commonwealth Government Response To The Productivity Commission Inquiry: The Market For Retail Tenancy Leases in Australia (August 2008)

B. Lease1 Correspondence to the Minister (3rd March 2009)

C. Ministerial Response to Lease1 (28th May 2009)

Reference: Productivity Commission Inquiry Report No.43, 31st March 2008 - www.pc.gov.au

A: Commonwealth Government Response To The Productivity Commission Inquiry: The Market For Retail Tenancy Leases in Australia (August 2008)

COMMONWEALTH GOVERNMENT RESPONSE TO THE PRODUCTIVITY COMMISSION INQUIRY:

THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA

August 2008

SUMMARY

1. The former Treasurer asked the Productivity Commission (PC) to examine the market for retail tenancy leases in Australia on 19 June 2007. The Inquiry involved wide industry consultation and stakeholders were invited to make either public or confidential submissions. The PC also held public hearings in Canberra, Sydney, Brisbane, Melbourne, Perth and Adelaide.

2. The Draft Report was released on 13 December 2007, and the Final Report was presented to the Commonwealth Government on 31 March 2008.

3. In formulating the Commonwealth Government's response (Government response), further consultation was undertaken by the Commonwealth with all state and territory governments and a range of industry associations and stakeholders.

4. As responsibility for retail tenancy legislation falls with state and territory governments, the role of the Commonwealth is limited.

5. The Commonwealth notes the PC's overall assessment that the market is working relatively well, and that some change is warranted. The Commonwealth supports improving efficiency in the market in a way that does not increase the regulatory burden for business, particularly for small business.

6. The Commonwealth supports, in principle, the harmonisation of state and territory retail tenancy legislation and, as part of that process, improvements to information flow, transparency and disclosure. The Commonwealth considers this approach will improve information and knowledge gaps, and improve the effectiveness of decision-making and the overall operation of the market, without increasing the regulatory burden or compliance costs for business.

7. In a recent meeting of the Small Business Ministerial Council, state and territory governments committed to achieving greater national consistency and harmonisation in retail tenancy markets across jurisdictions, while maintaining the effectiveness of fundamental tenancy protections.

8. The Commonwealth does not support the recommendation that state and territory governments remove restrictions that provide no improvement in operational efficiency, compared with the broader market for commercial tenancies. The Commonwealth considers there is a need to distinguish between retail and commercial tenancies given the importance of location for retailers. However any provisions, apart from those that offer location safe-guards, that detract from operational efficiency generally or unduly apply compliance costs for small business should be reviewed as part of the harmonisation of state and territory laws.

9. The Commonwealth offers in-principle support for state and territory governments to consider options for a code of conduct that would be appropriate for the retail tenancy market. The Commonwealth sees merit in a code of conduct as an alternative to prescriptive legislation if it can improve the operation and efficiency of the market. However, the Commonwealth also cautions that a code should not be an additional layer of regulation and should only be pursued if the current legislative arrangements are to be reformed.

10. To ensure a holistic approach by the Commonwealth and state and territory governments, the Commonwealth considers it appropriate for these issues to be considered under the auspices of the Council of Australian Governments (COAG). The most appropriate mechanism for considering and progressing these issues under COAG, and in the broader context of regulatory and competition reform, is through COAG's Business Regulation and Competition Working Group (BRCWG).

11. The Commonwealth's formal response to the PC Report is set out below

COMMONWEALTH GOVERNMENT RESPONSE TO THE PRODUCTIVITY COMMISSION INQUIRY: *THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA*

Recommendation 1

State and territory governments should take early actions to further improve transparency and accessibility in the retail tenancy market. They should:

- Encourage the use of simple (plain English) language in all tenancy documentation.
- Provide clear and obvious contact points for information on lease negotiation, lease registration and dispute resolution.
- Encourage a one page summary of all key lease terms and conditions to be included in retail lease documentation.

Recommendation 1.1

- Encourage the use of simple (plain English) language in all tenancy documentation.

Government Response

Agreed. The Commonwealth Government supports the use of simple (plain English) language in all tenancy documentation as it will improve understanding of contractual obligations by parties to a lease and contribute to more effective decision-making by a tenant or prospective tenant. The Commonwealth supports state and territory governments reviewing the application of the use of simple language in tenancy documentation within the process of harmonisation of retail tenancy legislation across jurisdictions.

Recommendation 1.2

- Provide clear and obvious contact points for information on lease negotiation, lease registration and dispute resolution.

Government Response

Agreed. As part of the process of harmonisation, the Commonwealth supports state and territory governments investigating the availability and provision of clear and obvious contact points for information on lease negotiation, lease registration and dispute resolution. Improved access to this information will enhance the effectiveness of decision-making, improve understanding of contractual obligations and may reduce the incidence of disputes.

Recommendation 1.3

- Encourage a one page summary of all key lease terms and conditions to be included in retail lease documentation.

Government Response

Agreed. The Commonwealth considers that a one page summary of all key lease terms to be included in retail lease documentation is a measure that may improve awareness of lease requirements to a prospective tenant. However, the Commonwealth has concerns that tenants may solely rely on information contained in this one page summary and

therefore may not fully understand their contractual obligations under the terms of the lease. This may lead to reduced due diligence, particularly in relation to potential and less-experienced tenants, when considering business options and may lead to increased levels of disputes.

The Commonwealth supports state and territory governments examining the appropriateness of a one page summary of all key lease terms and conditions to be included in retail lease documentation, taking into account the above concerns. The role of education may also be considered in addressing these concerns.

Recommendation 2

To increase the transparency of the market, state and territory governments should, as soon as practicable, facilitate the lodgement by market participants of a standard one page lease summary at a publicly accessible site.

Government Response

Agreed in principle. The Commonwealth recognises that access to information relating to market conditions improves understanding by market participants, thereby improving the ability of tenants to make informed decisions about their lease. This, in turn, may reduce power imbalances between landlords and tenants, and improve the efficient operation of the market.

However, the Commonwealth has concerns that the information contained in the standard one page summary may not always be current and may not contain information that fully reflects the terms and value of a lease. The Commonwealth also has concerns that reliance on this information, particularly by new and less-experienced tenants may potentially increase disputes and business failures. Reliance on this information may also reduce due diligence and reduce the propensity for appropriate legal and financial advice to be sought.

If this recommendation is to be implemented, the Commonwealth would want to be assured that it offers net benefits to retail tenancy participants. If that assurance could not be provided then the Commonwealth would not support proceeding with the measure.

Recommendation 3

State and territory governments, in conjunction with the Commonwealth, should seek to improve the consistency and administration of lease information across jurisdictions in order to lower compliance and administration costs. They should:

- Encourage the development of a national reference lease with a set of items (and terminology) to be included in all retail tenancy leases and in tenant and landlord disclosure statements.
- Institute nationally consistent reporting by administering authorities on the incidence of tenancy enquiries, complaints and dispute resolution.

Recommendation 3.1

- Encourage the development of a national reference lease with a set of items (and terminology) to be included in all retail tenancy leases and in tenant and landlord disclosure statements.

Government Response

Agreed. The Commonwealth supports harmonisation of retail tenancy legislation across jurisdictions as a means of improving information and transparency, and reducing the cost of doing business for retailers and landlords who operate across borders.

While the Commonwealth considers it appropriate for state and territory governments to determine the most effective mechanism to ensure consistency in legislation across jurisdictions as part of the process of harmonisation, the Commonwealth would encourage state and territory governments to consider the merits of developing a key set of items (and terminology) to be included in all retail tenancy leases and in disclosure statements that might improve the transparency of lease obligations, particularly for new entrants to the market.

Recommendation 3.2

- Institute nationally consistent reporting by administering authorities on the incidence of tenancy enquiries, complaints and dispute resolution.

Government Response

Agreed. The Commonwealth supports state and territory governments, in the process of harmonisation, to investigate the merits of nationally consistent reporting on the incidence of tenancy enquiries, complaints and dispute resolution. This would enable comparisons across jurisdictions and aid evaluation of the operation of dispute resolution processes and the nature and causes of disputes which, in turn, may lead to further improvements to transparency in the market.

Recommendation 4

The significance of jurisdictional differences in the provision for unconscionable conduct, as applying to retail tenancies, should be detailed by state and territory governments in conjunction with the Commonwealth, and aligned, where practicable.

Government Response

Agreed. Within the framework of harmonisation of retail tenancy legislation, the Commonwealth supports state and territory governments examining the merits of aligning unconscionable conduct provisions, in the context of lowering the incidence and cost of disputation, and therefore improving the efficient operation of the tenancy market. Alignment across jurisdictions will also reduce compliance costs for retailers that operate, or intend to operate, across borders.

Recommendation 5

State and territory governments in conjunction with the Commonwealth, should facilitate the introduction, by landlords and tenant organisations in the industry, of a voluntary national code of conduct for shopping centre leases that is enforceable by the ACCC. The code should:

- include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution; and
- avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and the availability of a new lease.

Government Response

Agreed. The Commonwealth sees merit in a code of conduct as an alternative to prescriptive legislation. A code may effectively address information asymmetries that distort the power balance between landlords and tenants in the retail tenancy market, improving the operation and efficiency of the market. The Commonwealth offers in- principle support for state and territory governments to consider options for a code that would be appropriate for the retail tenancy market. However, the Commonwealth cautions that a code should not be an additional layer of regulation and 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.

Recommendation 6

State and territory governments should remove those key restrictions in retail tenancy legislation that provide no improvement in operational efficiency, compared with the broader market for commercial tenancies.

Government Response

Not agreed. The Commonwealth understands that the key differentiation between retail and commercial tenancies is the importance of location for retailers, and that current legislation provides important protections in this respect. However, in the process of harmonisation, the Commonwealth would encourage state and territory governments to examine the relevance and effectiveness of highly prescriptive aspects of retail tenancy legislation that do not improve operational efficiency and increase compliance costs for small business.

Recommendation 7

As unnecessarily prescriptive elements of retail tenancy legislation are removed, state and territory governments should seek, where practicable over the medium term, to establish nationally consistent model legislation for retail tenancies, available to be adopted in each jurisdiction.

Government Response

Agreed. At the Small Business Ministerial Council meeting on 23 May 2008, state and territory governments gave preliminary support for achieving greater national consistency and harmonisation in retail markets across states and territories, whilst maintaining the effectiveness of fundamental tenancy protections. It established a working group of officials, co-chaired by Victoria and New South Wales, to examine the issues involved in achieving harmonisation.

As part of this process, the Commonwealth encourages state and territory governments to examine the appropriateness of establishing nationally consistent model legislation, including consistency in processes for lease negotiation, operation, dispute resolution and information disclosure as part of the harmonisation process.

Recommendation 8

While recognising the merits of planning and zoning controls in preserving public amenity, states and territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

Government Response
Agreed. The Commonwealth considers that unwarranted restrictions resulting from some planning and zoning regulations can influence the quantity and location of retail space available and therefore competition in the retail market, particularly for shopping centre tenants. The Commonwealth therefore encourages state and territory governments, where practicable in the context of urban design and preserving public amenity, to consider relaxing restrictions that limit competition. Improvements to competition will not only improve the landlord-tenant relationship in shopping centres, but may have positive flow-on effects for consumers through greater choice and lower product prices.

B. Lease1 Correspondence to the Minister (3rd March 2009).

The Minister for Small Business Independent Contractors and the Service Economy
The Honourable
Dr. Craig Emerson Member of Parliament
PO Box 6022
House of Representatives
Parliament House
Canberra ACT 2600 **3rd March 2009**

Re: The Market for Retail Tenancy Leases in Australia - Industry Working Group for a National Code of Conduct

Dear Minister,

In relation to Commissioner, Neil Byron's, Report on The Market for Retail Tenancy Leases in Australia, No.43 31st March 2008 and the Commonwealth Government's response of August 2008 and your subsequent media release of 27th August same.

The Government's commitment to work with State & Territory governments through the Council of Australian Governments (COAG) Business Competition and Regulatory Working Group (BCRWG) has been welcomed by both industry stakeholder's and retail channels Lease1 represents.

However, there is a perception that the time table for the process is unclear and may prove protracted, which in these times does not parallel the Rudd governments strive to streamline red tape and legislative processes for small business including Retailers in shopping centres.

Recently at the BCRWG Development Assessment, 29 November 2008 on the issues associated with planning and zoning related to the reports recommendation no.8, a response was called for by early 2009.

There is the view that the current process does not refer to the more pressing issues raised in recommendations 1 through 7 in the harmonisation of State & Territory retail lease/tenancy legislation through the introduction of a National Code of Conduct, *"Retail Leases Code of Conduct".(RLCOC)*

Given the current and projected economic difficulties being experienced by small, medium enterprises including Retailing, the adoption of the RLCOC is a positive position for the entire market and will provide cost savings and business confidence to invest.

Although COAG and more so BCRWG is the administrative facilitator for implementing the Reports recommendations a RLCOC has specific operational issues and a more intense industry consultative process is required.

States & Territories in the past have recognised this need and adopted Industry Working Groups (IWG) for their respective Retail Lease/Tenancy legislative reviews. I have been representative of the Queensland RSL IWG for the past 9 years and can evidence the equity in such progressive legislative reforms.

Such IWG's have predominately been balanced with both Lessor and Lessee representatives nominated from within their respective industry and with government facilitation.

Suggested representatives of such an IWG can be called from the following by way of example:

- Property Council of Australia
- Shopping Centre Council
- Law Society
- CPA's/ Valuers
- Franchise Council of Australia
- Pharmacy Guild
- Retailer Groups/Channels
- Retailer Advocates

To bring the recommendations of the Productivity Commission to a timely reality for industry stakeholders and in keeping with the government's policy of streamlining legislative processes for small business we would like to propose that an IWG be formed and facilitated by COAG & BRCWG.

To ensure there is no increased burden on government each of these representatives would be funded/supported by the respective industry stakeholder they represent.

I trust this proposal will provide a way forward resulting in these timely reforms for the retail property industry nationally and respectively ask your office to make contact with the view to discussing this proposal further.

Yours truly,
LEASE1

Phillip A. Chapman CSMA

C. Ministerial Response to Lease1 (28th May 2009)

THE HON LINDSAY TANNER MP
Minister for Finance and Deregulation
Member for Melbourne

THE HON DR CRAIG EMERSON MP
Minister Assisting on Deregulation
Member for Rankin

Mr Phillip A. Chapman CSMA
Director Lease1
PO Box 130
Arana Hills QLD 4054

Dear Mr Chapman,

Thank you for your letter of 3 March 2009 concerning Retail Tenancy Leases. We apologise for the delay in responding.

We note your support for the national implementation of a code of conduct for retail tenancy leases and your suggestion that an industry working group be established.

At COAG's request, the Business Competition and Regulation Working Group is progressing a number of reforms related to retail tenancy issues, in close cooperation with the Small Business Ministerial Council. That work has commenced recently and we anticipate further consideration of these matters over the course of 2009. As you would appreciate, any proposed reforms related to retail tenancy will require consideration across all governments.

Thank you for bringing your views to our attention.

Yours sincerely

Lindsay Tanner
28 MAY 2009

Craig Emerson

Parliament House, Canberra ACT – Telephone: (02) 6277 7400 – Facsimile: (02) 6273 4110

"Serving Tenants Australia Wide"

COMMERCIAL TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985

OPTIONS FOR IMPROVING ACCESS TO LEASE INFORMATION IN THE RETAIL TENANCY MARKET IN WESTERN AUSTRALIA

RESPONSE

FCA
FRANCHISE COUNCIL OF AUSTRALIA

United Retail Federation
Serving Members Australia Wide

Lease1, (formerly Known as Advantage Retail Management) was formed in 1997 to represent Retailers in the area of retail tenancy leases and to tackle the inequities between Landlord and Lessee.

We have been actively involved in the reforms of retail shop lease legislation/regulations on behalf of the stakeholders of the retailer industry since 1999, and was a noted contributor to the Productivity Commission Report and Recommendations 2008.

Presently Lease1 is endorsed as a service provider to the Members of the Pharmacy Guild of Australia, United Retail Federation and members of the Franchise Council of Australia, as well as managing retail lease portfolios for Franchisors and chains.

Lease1 has grown its business reputation on representing Retailers only, and in fact are possibly the only true Retailer Advocates in the specific field of retail (commercial) tenancy leasing.

The WA Regulatory Impact Statement provides a timely opportunity to bring about the major stepping stones to introducing transparency into the retail tenancy market, not only in this state but nationally.

In any business venture, research is mandatory to producing commercially prudent and well informed decisions.

The complexities and dynamics of leasing retail premises has grown exponentially over the past 20 years, mainly through the application of computerisation and sophisticated software utilised by Landlords in the collating of lease and sales data.

The Productivity Commission Report 43, recognised this fact in volumes and as the core to the recommendations for immediate action, is the introduction of transparency through readily accessible lease information and data.

The WA Government should be commended in again being proactive in this highly contentious area and trust that the outcomes will reflect the responsibility such reforms will have on the entire retail tenancy market.

Lease1 would be pleased to further address the Department of Commerce in person to provide case evidence in support of a fully transparent and functioning retail tenancy market.

The following responses are listed as per the Regulatory Impact Statement and are to be read in conjunction with same.

5.3.1 *Option one: extend valuer access to information*

Your feedback is sought in relation to this option for reform. Specific issues you may want to consider and comment on include:

(a) Do you support this option? Why?

This Option does go part of the way to providing some limited increase in data in shopping centres, it does not however address the issue of comparable leases in similar centres for the purposes of making sound rental determinations.

Further this option will invariably disenfranchise approximately 80% of retail shop leases in WA.

The market for retail shop leases is far broader than just the Sub Regional and Regional Shopping Centres.

(b) Would the information available under this model be broad enough to improve tenants' decision making ability?

No, as it cannot take into account the comparable lease data from other similar centres and is only specific to the one property which will narrow research data availability and in the long term only favour the Shopping Centres.

(c) Should there be a requirement for persons to prove they are bona fide prospective tenants? If so, what criteria/test do you think should be used for determining whether a person is bona fide?

As this option can in no way be supported, further regulating to place the onus on the under resourced Lessee to qualify themselves before under taking such research as to make a very serious business and financial decision is most alarming.

Again this will only resolve to reduce transparency.

(d) Should landlords be entitled to charge the tenant for their administrative costs incurred in providing the information to the valuer?

Again a rhetorical question, put it must be noted that Lessor's do not provide any remuneration to Lessee's for providing such specific data as sales performance.

This data is the most valuable to Lessor's and is utilised across portfolios, other shopping centres and even collated and manipulated to produce sophisticated sales performance reports to drive property yields-rents.

(e) Is the requirement to disclose only through a valuer appropriate?

This immediately places a reliance on Valuers also being retail experts as to the economic, demographical and consumer driven outcomes of any specific retail channel.

Further there are not enough Valuers to service such a change to the industry and would further place Valuers' responsibilities and their commercial liability into question when a wrong decision is made- the response to this would be for less experienced Valuers entering the Specialist Retail Valuer sector and naturally professional indemnities would escalate driving the cost of these services outside the capacity of the very people this legislation is meant to protect.

(f) Should valuers be able to access information about leases from any landlord of a retail shop (even if the shop is not located in the relevant shopping centre)?

The short answer is Yes, but the issues raised in response (e) cover the reasons why this option cannot function.

(g) What would be the likely costs to landlords and/or tenants if this option were implemented?

The Lessor's already have this data in digital format hence the costs would not be seen to be significant.

However for Lessee's this option will introduce another level of costs as a barrier to not only entering the market but also to existing within it. And at the same time fail to provide the level of transparency that would be meaningful to achieving adequate research.

(h) As a tenant, would you be likely to hire a valuer if it was the only way of accessing lease information?

The obvious answer is reluctantly Yes.

But again surely this option cannot succeed to adopted the flaws are far too numerous.

(i) Would the benefits of this option outweigh any potential disadvantages for landlords and tenants or the retail tenancy market?

Absolutely Not, this option provides nothing but disadvantages and sets out to provide such a minimal if not misconstrued and limited set of benefits that if adopted the industry would surely be worse off.

(j) Can you provide an estimate of the paperwork (time taken), nonpaperwork, financial and other costs of complying with this option?

As probably Australia's largest Retail Shop Lease advocates our recommendation to Client's will be at avoid this process and continue to conduct research on shop leases as it is done in WA currently.

Therefore through no participation we will not impose these further costs for such limited result and hence do not see any increase or decrease in administrative process and costs.

May 2012 Submission Review RSL Act QLD

Turnover rent:

Pharmacies:

- ***4.5.2A -*** can you please clarify the basis for this submission in light of s.139I of the *Pharmacies Registration Act 2001* (Qld), which has the effect that a landlord cannot charge a pharmacy tenant rent calculated as a percentage of turnover (the PRA provision). I understand that the PGA (Qld Branch) made a submission to the last statutory review of the RSLA (2003-2005) seeking to duplicate the PRA provision in the RSLA. This was not supported on the basis that the RSLA is intended to cater for the full cross section of businesses in the retail sector and it is not within the objective of the Act to provide specific provisions for specialty retail trades/professions.

For the current submission, please provide any other available details in support, including qualitative/quantitative evidence (ie. relevant extracts from the 2011 Pharmacy Guild Paper to which you referred to at our meeting). Any information about the position of other Australian jurisdictions which the PGA has approached in relation to this issue would also be helpful if available.

(Attached is the DRAFT PGA Sales Reporting Guidelines which once adopted will be presented industry stakeholders including of course Lessor's and Managing Agents.)

It should be noted here that it is widely understood that rent cannot be calculated based on turnover for Pharmacies, however the reporting of sales figures is not clear as to how these should be reported as Lessor's are utilising these results to derive occupancy cost ratios used as a tool to drive rental reviews.

Hence sales results are being used to present a case for higher rentals without using a set mechanism; therefore as in section 9 Meaning of turnover, of the RSL Act, we propose a further clause (m) with words to the effect:

(m) amounts received from the sales of prescription pharmaceuticals and professional fees including patient co payments associated with the practice of Pharmacy dispensing under the Health Act.

The result here is that Lessor's will only be privy to the retail front of shop sales and that a common calculation of occupancy costs ratios will become consistent and relevant.

Please note that currently other such similar practices the likes of medical centres, dentistry, physiotherapy, and optometry do not report their Medicare receipts or associated sales.

Timing for provision of turnover statements by tenant to landlord:

- DJAG has received stakeholder submissions advocating specific timeframes within which tenants are to provide turnover certificates/statements to landlords, in particular that s.25(3) be amended "in accord with industry practice, being 7 days after end month; 60 days after end year". Any comment Lease 1 has regarding this proposal would be appreciated.

Such an amendment is supported as to provide clarity between the parties and allow sufficient time for such reporting to take place.

Financial advice reports:

4.4.5A - it would be useful if you could please provide a more detailed explanation as to why Lease 1 considers that sub-sections 7(e)&(f) of the *Retail Shop Leases Regulation 2006* do not sufficiently address matters relating to sales projections/occupancy costs benchmarks.

Financial advice should be expanded to include questions related to sales projections, occupancy cost / benchmarks. It would be prohibitive for those to be quantities but needs to acknowledge independent advice has been sought in these critical areas as a basic knowledge of the performance of expected performance of the real estate under lease.

Too often we come across situations where an inexperienced and under resourced Retailer has entered into a lease with no knowledge the industry bench marks acceptable for their permitted use, further it is widely prevalent that advisors such as Accountants and Lawyers are even further removed from providing such advice.

To be better informed Retailers need to understand these ratios in conjunction with rental rates per square metre.

Rent review provisions:

Timing/basis:

- **4.5.4B** - I understand that Lease 1 proposes that there should be no exemption from the rent review provisions in s.27 for major tenant's (ie. that s. 27(8) should be omitted) because:

(a) a tenant with 5 or more retail outlets needs to be protected by minimum lease standards, in particular those pertaining to the timing and basis of rent reviews; and

(b) more importantly, the application of the relevant rent review provisions to all tenants benefits smaller tenants in that the market effect of major tenants entering into rental conditions/review outside of minimum standards will result in higher expectations for small tenants in relation to rent and review conditions.

It would be useful if you could please provide any detail in support of (a) and (b) above.

In particular, for (b) please provide any qualitative or quantitative evidence as to the relevant impacts/detriments for small shopping centre tenants in Qld since April 2006 (being the date the major tenant exemption in section 27(8) took effect). Any available comparison with other interstate jurisdictions (which do not exempt major tenants from the minimum standards for timing/basis for rent reviews provisions, but the majority of which exclude leases by listed corporations from the operation of their legislation) would also be useful.

Any supporting information for the above may also relate to the Lease 1 submission at 4.2B that publicly listed corporations should not be excluded from the operation of the RSLA.

SRV process for determination of current market rent:

- **4.5.5D** - I understand from the written submission and meeting discussion that Lease 1 supports:

(a) a response period of not less than 14 days for the parties' right of apply following exchange of submissions; and

(b) an amendment to s.32 of the RSLA to require the valuer's determination to be given within 6 weeks (cf. 1 month).

Can you please confirm that this is correct or otherwise clarify. Also, for completeness, does Lease 1 consider that the RSLA should prescribe the initial timeframe within which the parties are required to provide their primary submissions to the valuer (or retain the status quo - ie. a reasonable period determined by the valuer)?

Lease1 confirms that it supports these amendments in (a) providing a reasonable time for the parties to exchange and respond to information relied upon within the other parties submission to the Valuer and further have sufficient time to make such enquiries as the accuracy of same.

With regard to (b) this allows the time frame to adopt (a) and allow the parties to proceed to comply within the period as set down.

Lease1 is satisfied that the status quo remain noting a reasonable period determined by the Valuer is sufficient to the process.

- **4.5.5F** - please clarify this submission having regard to the ss.27A(2) and (6), and noting 27A(1)(a). Section 27A took effect on 6 April 2006 following the last Act review. The explanatory notes for the Retail Shop Leases Amendment Bill 2005 state:

"This amendment will allow (when the lessor and lessee have not already made an agreement regarding the market rent) for the lessee to request that the market rent determination be undertaken prior to exercising their option for a further term of the lease. This will allow a lessee to make an informed decision and assessment regarding the option."

Having reviewed the explanatory notes further and recent case examples Lease1 is satisfied that there may not be a case to make any further amendment to this clause and will continue to monitor same. However it is widely understood that more information as to the Lessee's rights and required actions is needed to further inform Lessees.

Outgoings:
At the meeting you noted that (aside from management fees) the outgoings provisions of the RSLA were working well.

***Management fees*:**

- **4.5.7A** - Lease 1 proposes that provision for management fees should be in line with the position in WA. In particular, the final paragraph of Lease 1's submission states: "*Outside of the general staffing for the purposes of the operational requirements of the shopping centre* other management costs related to the managing of the asset, collecting of income, reporting and leasing on behalf of the lessor should be removed as a recoverable outgoing under the Act."

Section 12(1f) of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (WA Act) states that if there is a provision in a retail shop lease in respect of any premises to the effect that the tenant is obliged to make a payment to or for the benefit of the landlord for management fees, the landlord is not entitled to recover, and the tenant is not obliged to make, that payment.

Section 3 of the WA Act defines "management fees" to mean fees in respect of costs incidental to the collection of rent or other moneys or the *management of premises*, including but not limited to such of those costs in respect of management offices; plant and equipment and staff.

Please clarify the final paragraph of the Lease 1 submission with regard to operational staffing - ie. is this reference only to services such as cleaning, security etc from which tenants receive a direct benefit and for which the landlord can obtain quotes/tenders from a competitive market?

In this instance Lease1 was attempting to acknowledge that in shopping centres there is call for site maintenance/operational personal perculiar the efficient running of the complex and that it would appear prudent that such direct costs may be recoverable.

However for the sake of consistent and transparent legislation as identified in past Productivity Commission recommendations, Lease1 would be satisfied with adopting similar wording and interpretation as found in the WA Act.

Itemisation of outgoings in landlord's annual estimate and statement:

- DJAG has received a stakeholder submission that the long-standing requirement in s.37(3) of the RSLA that outgoings shown in annual estimate and statement must be itemised so that the amount shown for each item is not more than 5% of total outgoings be repealed on the basis that it is an artificial breakdown of outgoings to comply with an arbitrary number. It would be appreciated if you could please provide any specific response or background Lease 1 has in respect of this submission. My recollection from the meeting is that you considered s.37(3) to be a beneficial provision intended to enable the tenant to benchmark outgoings payable by reference to the market and to assist from an operational perspective - please clarify as appropriate.

  There are several examples in the area of Repairs and Maintenance where the Lessor group together such cost centre as: Painting, Electrical, Plumbing, General Maintenance. This has caused from investigations and enquires under s37(3) incidences where Lessor's have included maintenance of a capital and non recoverable nature.

  The opportunity for Lessee's to have some mechanism for enquiry and to be able to satisfy themselves to such expenditure is a right that needs to be strongly preserved.

  To remove this provision would only invite practices that seek to offend the intentions of section 37 and the Act in general and would remove a level of transparency.

Sinking Fund:

- **4.5.8B** - DJAG has received a submission that it is preferable not to legislate for this scenario as the situation rarely arises and where it does the lease will deal with the issue (sinking fund is in effect part of operating expenses and all well drawn leases will deal with adjustment of operating expenses at end each accounting period). Any comment Lease 1 has regarding this proposal would be appreciated.

Section 40 of the Act clearly states the way in which a Lessor may act with regards to a sinking fund. Although this area may not come up often it is in place so as to address situations where a complex is operated under a Body Corporate or other such similar arrangement and usually arising in smaller properties with multiple uses (i.e. retail with office above, retail with residential above etc)

Promotion and advertising:

- **4.5.8C -** can you please clarify the parameters of Lease 1's submission in relation to these matters, including:

a) I understand that Lease 1 supports a provision in terms of s.53(a) of the *Retail Leases Act 1994* (NSW ACT). If so, is it sufficient for the marketing plan to be "made available" (which includes the landlord uploading the plan onto its website cf. providing plan directly to each tenant - I understand this is the general industry practice in other states)?. Does Lease 1 support a provision in line with s.53(b) of the NSW Act - ie re opening promotions?

Lease1 supports the adoption of section 53 (a) and (b) of the NSW RSL Act to ensure the Lessee is informed as to the benefits of the promotions fund contribution and to provide further transparency for such payments to coincide with the requirement to provide annual buget and audited statements of such funds.

b) is there a need for any additional regulation regarding advertising/promotion expenditure statements in the RSLA other than the auditing and accounting requirements for landlords' outgoings in s.37 of the RSLA? If so, on what basis? Does Lease 1 agree that it is sufficient for a landlord to "make available" the annual estimate and audited statement of outgoings on a website as opposed to "giving" same directly to each tenant?

Given the adoption of s53 above the current provisions for providing budgets and audited statements of the promotions fund seems sufficient.

(c] is there a need for an express provision addressing circumstances where the marketing plan and (if appropriate) expenditure statements are not made available within the required timeframe? See for example s.55A NSW Act

These should be similar to the requirements and conditions for providing statements on outgoings.

(d) is there need for an express provision in the RSLA in line with those in s. 56 NSW Act and s. 72(1) *Retail Leases Act 2003* (Vic Act)) re carry forward of unexpended contributions?

(e) is there a need for an express provision in the RSLA regarding end of lease (refer s.72(2)&(3) of the *Retail Leases Act 2003* (Vic)), or does Lease 1 accept that there are "swings and roundabouts" with promotional funds - ie. that (if there are unspent promotional monies at the end of any given period) new tenants will receive the benefit of a credit in the fund to which they have not contributed, while a those who's leases have ended will not?

With (d) and (e) it is commonly accepted that there will be varying situations here and that in almost every case the “swings and roundabouts” philosophy is adopted.

Implied compensation provisions:

- **4.5.9B(a)** - please confirm that Lease 1 does not support this proposal. Please also clarify the basis upon which Lease 1 states that such limitation will remove the expectation of transparency on an inexperienced and uninformed party (including by example if appropriate).

  Such an amendment cannot be supported as it will lead to the practice of Lessors making wholesale representations for likely future scenarios which may or may not happen with the view to always limiting the Lessor’s exposure to reasonable compensation.

  For example a sophisticated Shopping Centre Owner may when entering into a lease represent to the prospective Lessee that they have intentions to expand the shopping centre and therefore seek to limit via this proposed amendment the rights of the Lessee to reasonable compensation for disruption to this business.

- **4.5.9B9(b)** - please confirm that Lease 1 supports this proposal in principle. For the reference to a need to discuss rent abatement in circumstances where landlord/authorities deny access to a centre in an emergency situation but the centre is not physically affected, any additional information or views that Lease 1 considers may warrant and support legislative intervention (as opposed to a commercial matter dealt with in the lease or between the parties) would be useful.

  We confirm that Lease1 supports changes that allows the Lessor to close a complex in an actual or pending emergency such as was experienced in the 2011 floods

- **4.5.9B(c] -** is it the case that Lease 1 supports in principle the proposal that the landlord is only liable to compensate the tenant under ss43(1)(a)-(c) where the landlord has acted unreasonably but that any provision that "recognised shopping centre practices" are to be considered in determining whether the landlord has acted reasonably needs to include an objectively understood definition of what those practices are?

This is supported as long as recognised shopping centre practices are defined as to been seen to protect the building its occupants and visitors before, during and after an emergency situation and at all times the Lessor is seen to have acted reasonably if so directed by relevant authorities.

- **4.5.9C** - please clarify the rationale for the suggested amendment to 43(1)(f) and the cross-reference at 4.5.12A.

  The rationale here is to expand the compensation to a Lessee to include further the demolition clauses and increase the compensation to the costs of not only the fitout of the premises but the likely costs to re-establish the business.

- **4.5.10A** - DJAG has received a submission from another stakeholder that it is not necessary to legislate in this regard as most leases contain relevant provisions re rent abatement; tenant's right to terminate if landlord fails to repair etc (ie. in terms of s.36 NSW Act). Any comment Lease 1 has on this proposal would be useful.

  Here we propose that Lessees be afforded reasonable rental abatement for instances where the Lessor is required or it is deemed necessary to close the complex due to an emergency situation.

  It is seen as reasonable that this would be an insurable event for the Lessor, however as was the case during the 2011 floods the Lessor closes the complex as a precaution, there is no resulting damage however the Lessee is still required to pay rent.

Relocation provisions:

- 4.5.11B - please explain why (and provide supporting evidence/examples) as to why the landlord and tenant respective notice periods need to be expanded.

  The issue for change here to 6 months is the lead time required to attain suitable design approval and fitout/trades quotations as well as be satisified that the works to relocate and in most instances refit can be physically carried out.

  Currently in the example of Pharmacies there is a lead time required of up to 20 weeks for design, approvals and fitouts, further these may be compounded by statutory authority approval and the relevant licensing authorities (in the case of Pharmacies the ACPA Location Board)

- **4.5.12A** - DJAG has received a submission from another stakeholder that the demolition provisions are clear and appropriate, except that

(a) the period within which lessee's termination notice must be given (for earlier termination than lessor has stated) should be at least 1 month (cf. 7 days) before earlier termination day; and

(b) 46(1)(k) should specify that landlord liable only to compensate tenant for written down value of fit out.

Any comment Lease 1 has regarding these proposals would be useful.

Refurbishment/refitting:

- **4.5.13B** - please explain why Lease 1 proposes a 3 month notice period, including an outline of what steps a tenant may take in practice within that period to mitigate the affect on their business or otherwise. Is it arguably sufficient that the landlord is required to pay compensation under s.43(1) irrespective of whether the tenant has been given notice of the potential disturbance?

The intention here is through increased notice periods and planning that potential losses and subsequent compensation can be reduced.

For example there have been instances where the complex is replacing/upgrading the flooring surface and the Lessee is not provided with suitable notice to inform customers, prepare marketing strategies and/or seek alternative arrangements such as casual mall leasing to mitigate any effect to the business.

Lease dealings:

- **4.5.15A** - any additional clarification on, or information in support of paragraphs 2 and 4 of this section of Lease 1's submission would be useful. For example, what proportion of leases are landlords insisting on an opt out of s45(1) and what are the sorts of issues/losses etc for the tenants in those cases. Examples of such clauses being used in leases would be useful.

  Lease1 would estimate that there is 30% of leases where the Lessor seeks to opt out of section 45 limiting the Lessees right to deal with the lease or any such security over same.

  This can cause issue when Lessees seek to finance the fixtures and fittings and as such Banks then seek to have executed by Lessors Right of Entry Waivers so as they can protect the asset under finance.

  Recent changes to the Personal Property Securities register need to be reviewed to identify the effect on retail tenancy leases.

  Lease term needs to have regard for fitout depreciation and amortisation.

Please explain for basis for the proposal that the lease term needs to have regard for fit out and amortisation, including having regard to the findings of the Productivity Commission regarding security of tenure in Part 6 of its 2008 report into the Market for Retail Leases in Australia (PC Report).

- **4.5.15B** - any additional information/background/comment Lease 1 has in this regard would be useful, including having regard to relevant findings of the PC Report

1 August 2014

Unfair Contract Terms Consultation Paper
Small Businesses, Competition and Consumer Policy Divison
The Treasury
Langton Crescent
Parkes ACT 2600

SUBMISSION

Extending Unfair Contract Term Protections to Small Business – Retail Shop Leases

Lease1 is Australia's leading Retail Shop Lease specialist, providing a unique tenant-only representation service to ensure retailers achieve the best commercial outcomes on their leases.

We are the only national firm of our kind that works exclusively on behalf of tenants in their lease negotiations with centre managers and retail landlords.

From individual stores, to large retail groups and franchise systems – we always put tenants first.

Our business was established in 1997 to specifically address the inequalities that exist between Lessees and Lessors in Retail Shop Lease negotiations.

This year represents the twentieth year since specific and extensive retail lease legislation began to be introduced by State & Territory Governments. These included development of dispute resolution systems specific to the Retail Shop (Retail Commercial) Property industry.

However there remains significant imbalance in the bargaining power between small retailers and large landlords (portfolio managers).

And even after an in-depth and substantial Productivity Commission Report – The MARKET for Retail Tenancy Leases in Australia" (2008) which proposed 9 specific recommendations to promote transparency towards a more informed market with the view to addressing directly these imbalances no positive action nor steps have taken place to date.

Although the Government openly supported the Productivity Commission Report recommendations and noting a reasonably high level of bipartisan support from Industry Stakeholders here we are 5 years past with no improvements of the problem(s) to hand. Therefore the opportunity to address same specifically for Retail Small Business is openly welcomed.

Although the Industry Supply Stakeholders - the Landlords will vehemently oppose any further legislation and/or regulative intervention into what maybe currently described as an overly subscriptive legislative sector certain areas of the contractual relationships between Landlord (Lessor) and Tenant (Lessee) need to be explored under the Australian Consumer Law.

Specifically the areas of imbalance under a Retail Tenancy (Shop) Lease Contract that need addressing are:-

- **i.** Procedural unfairness
- **ii.** Unconscionable conduct
- **iii.** False, misleading and deceptive Conduct
- **iv.** Information disclosure arrangements

Due largely to the nature, structure and resources of Small (Retail) Business in these transactions there remains a potential for under reporting of the problem as most feel powerless in the face of a contract (lease) they see as non-negotiable particularly in light of the huge resource advantage of the Landlord.

i. Procedural Unfairness

In either entering into a new lease for the first time or the renewing of an existing lease the most contentious issue will always be the amount of rent the supplier (Landlord) seeks under the lease (Contract).
We must clearly note that it would be offensive to the process and the market to suggest promoting a legislative outcome to what must remain market forces.

But there is evidence to suggest that there remains concern the circumstances surrounding or the processes leading up to the formation of a retail lease (which includes the amount of rent) contract.

The huge amount of data available to the resources (personel) of the larger Landlords has since the inception of Shopping Centres created an enormous imbalance in these circumstances.

Noting that the majority of this information is in fact provided to the Landlord by the Lessee (in the form of sales/performance outcomes) under the guise of “turnover rental” or other such contractual clauses contained in the lease, has grossly compounded the significance of this imbalance.

Any active industry operative will confess to the reliance upon “Portfolio Averages”, “Category Occupancy Costs” or such third party resources as ‘URBIS Industry Averages”, when seeking to set the terms and conditions of a lease contract.

(Examples and a fuller understanding of these circumstances and processes will be presented at the Stakeholders Meeting as some content is commercially sensitive).

A further area which may be described best under substantive unfairness is the issues surrounding the level or standard of fitout (or rather capital required) a Landlord will insist upon within the contract which does not fairly relate to the type of business, the reasonable and fair return on investment nor the commercially acceptable allocation and amortisation of the capital required to meet the Landlords fitout standard.

This is more pronounced at the end of a lease where the Lessee has not realised the investment of the capital applied to the fitout and where the Landlord either:

- **A.** Does not seek to renew the lease; or
- **B.** Seeks to renew the lease with a substantial rental increase; or
- **C.** Seeks to renew the lease with further onerous and substantive fitout requirement by the Landlord.

The compelling case is the end of lease where the Lessee was unfairly contracted to install a fitout (usually in the $100,000's) and the Landlord promotes a rental level to renew the term with the full knowledge the Lessee is in no financial position to walk away.

(Again specific case examples can be provided at a stakeholders meeting on the basis of the possible ramifications upon Lessees providing such evidence.)

ii. Unconscionable Conduct

Although unconscionable conduct is noted in most States & Territory Retail Tenancy Legislation and referred to the Australian Competition and Consumer Commission as the applicable industry code.

As the meaning of unfair and the test for unfairness under Schedule 2, 5.24(1) of the Act and
Schedule 128G of the ASIC Act are in essence similar and is more clearly set out in plain English in the "A guide to the unfair contract terms law" than the varying provisions about unconscionable conduct.

It is our view that encompassing small business via extending the Unfair Contract Term Protections to Small Business will provide a better understanding to small Retailers when seeking to interpret such terms as 'significant imbalance', 'not reasonably necessary', 'detriment' and 'a transparent term'.

(Actual case examples of Landlord/ Lessors Agent(s) acting unconscionably can be made available at a stakeholders Meeting.)

iii. False Misleading and Deceptive Conduct

The issues here can vary significantly and from our experiences grossly under reported noting again the feeling of powerless when faced with the non-negotiable and resource rich advantage of the Landlord.

Many examples of false, misleading or deceptive conduct can be described as unconscionable conduct in whole or at least in part.

The basis of the majority of instances are derived from the significant imbalance in resources and information between Landlord and Lessee when addressing a lease contract event.

The common result is an unfair negotiation leveraged by the relatively superior strength of the Landlord.

The outcomes can further be described across these process as representing Substantive and Procedural unfairness.

(Case examples available at Stakeholder Meeting)

iv. Information disclosure arrangements

Although there remains in place varying formats of Lease (contract) disclosure arrangements between the parties to the lease contract.

These do vary between the States and Territories, a copy of comparable matrix across these jurisdictions is attached for reference.

It would be ideal to seek a standard form contract for all retail tenancy leases, however given the nature, structure and commercial diversification of the Landlord stakeholders and the legislative road blocks the States and Territories have evidenced in the past, achieving such a standardisation is not realistic.

However the promotion of a National Standard Form Lease Disclosure Document has the very real potential to resolve a major portion of the issues covered in this submission.

Having such a single format disclosure to the lease contract publicly accessible would transform the significant imbalances over time and would result in a major reduction in red tape.

The concept of a National Standard Form Lease Disclosure has bipartisan support from Industry Stakeholders including Landlords and Retailers Associations.

A draft example has been prepared in readiness for presenting to the Small Business Commissioner and the Stakeholder Meeting for consideration of adoption in lieu of a standard form lease contract.

Further we see that the introduction of a National Standard Form Lease Disclosure as being the catalyst to the harmonisation of minimum retail tenancy lease standards nationally.

There has been some interim discussion amongst stakeholders as to the costs and benefits of the Standard Form Disclosure being publicly accessible and such submissions on this subject should best be addressed more specifically under separate cover.

Summary

This submission does not seek to introduce more proscriptive retail lease legislation as the current separate State and Territory legislations are already a mine field of red tape.

But this submission does seek to address the failures or lack of action (willingness) to address the inherent imbalance in the contractual arrangement between the parties when processing a retail tenancy lease negotiation.

We have deliberately sought not to seek government input into the quantum of the rent, this must remain commercial between the parties but there must be adopted more transparent and open processes in the negotiation of such commercial considerations.

Otherwise there will remain the current culture of unfair contractual (lease) outcomes.

Conclusion

Within this submission, we have offered to provide case examples of conduct and outcomes in support of extending the Australian Consumer Law to encompass Small Business in this case Small Retail Lessee's. It would represent not only a breach of confidence to our Retailer Clients but may result in placing such businesses at risk to publish same.

We do however look forward to presenting cases at a Stakeholder Meeting in conjunction with our endorsing Retailer/ Lessee Association representatives.

We invite you to contact our offices on 1300 766 369 e: info@lease1.com.au to discuss this submission further.

Yours Truly
Lease1

Phillip Chapman
Director

Lease1 – Supplimental Submission

A. How to capture small business operating under a Retail Lease Contract?

The most common definition to identify small (retail) business Lessees is to exclude those Lessees who:

i. Operates a retail shop with a floor area of more than 1000m^2 and,
ii. The Lessee is a listed corporation or subsidiary of a listed corporation.

B. Deficiencies in Retail Lease Legislation

Relocation:

The definition of reasonably comparable alternative retail shop is not clearly defined under the majority of State and Territory legislation.

The notice period to a relocation is not consisted and in the whole is not sufficient for a small business to effect and access suitable advice and research.

(Small (retail) business are normally provided 30 days to accept or reject a Lessors notice to relocation of their business, this does not reasonably afford the small business to perform its research and seek suitable financial and legal advice in accepting the Lessors Notice)

Disclosure Statements:

The varying Lessor Lease (contract) Disclosure Statements, to which a small (retail) business is required to acknowledge a rely upon as full disclosure to a lease contracts essential terms and conditions do not identify what may constitute a breach of the contract.

Although it is understood commercially that the failure to remit rent will be seen as a breach of the lease, other conditions are loosely interpreted as a breach of the contract i.e. failure to provide certificate of currency (insurances), failure to provide audited statement of gross sales, failure to update bank guarantee annually, not performing refurbishment works, not adhering to core trading hours etc.

These and similar items noted throughout the lease may be identified as a performance criteria and usually never noted that a lack of performance may constitute a breach of the lease.

A small business whilst remitting its rental and other key performance clauses during the term are refused a renewal or acceptance of an option notice because of these minor clauses being treated as an essential breach of the lease contract.

There are regular examples of this where a Lessor seeks to refuse a Lessee's option for a new term as they want control back over their property.

Provisions under Unfair Contract Term Protections to include the obligation for the contract (or Disclosure Statement to the Lease contract) to identify those provisions under the instrument which constitute a breach of same.

Core Trading Hours:

Although core trading hours are intended to promote a minimum trading period expectations for all businesses within a shopping centre, the enforcement and/or lack of flexibility from Lessors can become a major cost impost under the Lease contract.

For example food court pizza operators are expected to open at 9:00am under the core trading hours clauses of the lease when there is no likelihood of sufficient customers seeking to purchase pizzas before the normal lunch trade period.

This example creates unfair wage and product waste costs on this business sector. (of course there are numerous other examples that can be drawn upon.)

Further there is evidence of penalty clauses within lease contracts setting fines (for want of a better phrase) for each hour a small business does not trade with core trading hours.

A common issue currently under core trading hours is Thursday night trade where retailers are forced to remain open until 9:00pm where there has been no customers nor sales conducted in this small business for several months/years after a certain time (for example 7:30pm).
(Examples of this can be evidenced across the nation and in varying permitted usages.)

Lessors right to deal with Common Areas:

It is our experience that virtually all shopping centre leases include clauses that the Lessor may deal with and make changes and within the common areas of their property at any time.

State and Territory legislations do not adequately identify what these dealings may constitute and in some cases where retailers business has been significantly affected.

For example in a Melbourne Regional Shopping Centre a food court operator who sold coffee and cakes where the premises had common area seating directly adjacent to the premises which was readily utilised by its customers (but exclusively). The Lessor removed the seating directly in front of these premises and installed a new kiosk.

The Retailers business immediately began to reduce and in a few shorts months was no longer profitable.

The Retailer sought to make application to the respective Tribunal however this application failed due to the Lease contract including such a “catch all” clause noting its right to deal with common areas regardless of the effect on this small business.

Mid-Term Refurbishment

There remains a reasonable sample of leases which contain clauses which seek that the Lessee will perform a refurbishment or to expend capital during the term of the contract.

These may be where a lease is for an extended term i.e. 10 years and the clause seeks for a refurbishment at the beginning of the 6th year.

Also there are quite onerous leases which seek for such refurbishment to be performed at the beginning of the final year of the contract term. (Naturally this places the small business at a disadvantage at the then pending lease renewal/expiry having expanded capital it either cannot realise a return on or cannot afford to walk away from.

The major deficiency in all refurbishment clauses mid-term which do not specify the actual extent or reasonable expectation of works is that the Lessor can set out and decide of its own accord what works it will or will not accept.

Lease Renewal – Fitout Works

A major deficiency in small (retail) businesses is where a lease is renewed in the same premises for the exact permitted use and the Lessor seeks to have a complete new fitout installed.

We note that these negotiations are commercial between the parties however with the Lessor's superior leverage, small (retail) businesses are being forced into investing capital via performing works which have no regard to the Lessees reasonable return on investment and retail/merchandising model.

Quite often fixtures and fittings are being scraped will before the expiry of their reasonable and serviceable life noting that such fixtures and fittings usually only require a refurbishment due to fair wear and tear.

There are numerous examples of Lessors (via their Retail Designers) evoking their own interpretation of a Lessees corporate fitout/look and onerously insisting on changes to same without regard to the Lessees return on investment.

General

All of these deficiencies promote under a retail lease contract terms which may be unfair where such terms allow the leveraged party (the Lessor) to reserve the right to deaden the meaning or interpretation of a contractual term.

Therefore the inclusion of retail lease contracts under the Unfair Contract Terms Law of the Australian Consumer Law is strongly promoted to address these deficiencies and inconsistencies that presently exist under retail/tenancy legislations.