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Dr Kathleen Dermody (Committee Secretary)
Senate Standing Committees on Economics
P O Box 6100
Parliament House
CANBERRA ACT 2600

Dear Dr Dermody

THE NEED FOR A NATIONAL APPROACH TO RETAIL LEASING ARRANGMENTS

We enclose our submission which addresses the issues outlined in the Terms of Reference. We thank you for the opportunity to make this submission and look forward to the release of the Committee's report in due course.

Yours sincerely

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1.0 INTRODUCTION

The submission is based upon comments taken from the most recent reviews of retail leasing legislation undertaken in New South Wales and Queensland, both of which considered all of these issues in a contemporary setting. We consider that to save reinventing the wheel, we should use some of their deliberations as a template for our responses.

This submission is made in relation to the Senate Standing Committee on Economics' inquiry into the need for a national approach to retail leasing arrangements to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords.

This inquiry is focused on creating a fairer system and reducing the burden on small to medium business – therefore when considering whether a national approach should be adopted, and in what form, the principles of fairness and burden reduction ought to guide the position ultimately arrived at.

While reduction of complexity and prescriptiveness is also important, perhaps the more onerous protections could remain if the application of a national legislation is reduced to provide coverage only to smaller, less sophisticated retailers.

Harmonisation of retail leasing arrangements is long overdue – time and resources are being wasted on jurisdictions playing catch up with one another. The overarching structure of state and territory legislation is very similar in its present form and absolute consistency would have the effect of reduced compliance costs for landlords, which would then, it is hoped, have a flow on effect to retailers and ultimately consumers. In undertaking this process consideration should be given to any mechanisms that could be put in place to ensure that the benefits of reduced compliance costs would have a trickle down effect?

Whilst, in principle, we would support greater standardisation of the retail leasing process, and see some requirements in respective jurisdictions concerning the same subject matter to be arbitrary and of little practical value, given that retail leasing is not a Federal matter, we cannot easily envisage the implementation of a national framework. There is no doubt that the advent of a national framework would be a significant microeconomic reform which would ultimately reduce transactional costs, and, at the other end of the spectrum, assist in dispute resolution where the courts of all jurisdictions were feeding into the process. What might be done is for the Commonwealth to offer incentives to the States and Territories who demonstrate a willingness to submit to a nationally agreed general standard. In many areas of the legislation in each state and territory, there is already agreement on some important issues. Other differences are minor at best but of nuisance value to the multi-jurisdictional shopping centre owner. The real cost is in the front end of the transaction in lease negotiation and preparation rather than dispute resolution which, despite minor differences, is relatively similar in each jurisdiction. To some extent this has been alleviated by very similar disclosure statements now being served upon prospective lessees in New South Wales, Queensland and Victoria proving that some measure of co-operation is feasible.

2.0 BACKGROUND

Retail tenancy legislation was enacted in all states and territories between 1984 and 2004. Despite this, concerns continued to be expressed by both retail tenants and landlords about the adequacy and extent of the regulatory arrangements. In 1997 the Reid Report (a report released by the House of Representatives Standing Committee on Industry, Science and Technology) made the following significant recommendations:

- The drafting of uniform retail tenancy code – to be undertaken by the ACCC and submitted to COAG for adoption across jurisdictions.[1]

[1] The House of Representatives Standing Committee on Industry, Science and Technology, *Finding a Balance – Towards Fair Trading in Australia* (1997) 25.

- The introduction of an additional layer of protection against unfair conduct in small business transactions via a new s 51AA TPA as well as the introduction of an industry code of conduct to be approved by the ACCC to which the courts may have regard in determining whether conduct is 'unfair'.[2]

The recommendations of the Reid Report were largely ignored - the code did not eventuate, and the unfairness provision 're-cloaked in the form of unconscionable conduct' (ie s 51AC TPA) did little to address the type of concerns raised in Reid.[3]

In 2007, the Australian Government requested the Productivity Commission ('PC') to undertake an inquiry into the market for retail tenancy leases. The PC released its report in August 2008. This inquiry resulted in eight recommendations (see Appendix 1) including:

"…

6. *To remove constraints on commercial decision making, state and territory governments should remove those restrictions in retail tenancy legislation that provide no improvements in operational efficiency, compared with the broader market for commercial tenancies.*

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

Following the PC's 2008 report, the Council of Australian Governments ('COAG') requested the Small Business Ministerial Council ('SBMC'- now defunct) by its National Retail Tenancy Working Group ('NRTWG') to commence work to improve transparency and consistency between state and territory retail tenancy regulation.[4] The NRTWG, in consultation with industry stakeholders, developed a model harmonsied landlord disclosure statement which was implemented in Queensland, Victoria and New South Wales from January 2011. The aim of the harmonised disclosure statement was to ensure that tenants were better informed of their rights and obligations under retail tenancy agreements to enable them to make informed business decisions about their retail shop leases.[5]

In 2011, the PC conducted a further inquiry and published its report, *Economic Structure and Performance of the Australian Retail Lease Industry* ('PC Report (2011)'), which addressed issues such as the current structure, performance and efficiency of the retail sector, the drivers of structural change in the retail industry, and issues contributing to the increase in online purchasing by Australian consumers. In relation to retail lease legislation, the concerns raised were similar to those raised in the PC Report (2008).[6]

The PC Report (2011) recommended that COAG should ensure that all current NRTWG projects are fully implemented and re-examine the outstanding recommendations from the PC Report (2008) with a view to expanding the work plan of the NRTWG.[7] The Government responded by saying that it would establish the Retail Council of Australia, chaired by the Assistant Treasurer to work alongside COAG,[8] however this Council appears to have been short-lived.

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[2] Ibid 26.
[3] Eileen Webb 'Almost a decade on – A (Reid) report case on retail leasing' (2006) 13 Australian Property Law Journal 240-241.
[4] Australian Government Productivity Commission, 'Economic Structure and Performance of the Australian Retail Industry' (Inquiry Report No 56, 4 November 2011) 265.
[5] Department of Justice and Attorney-General 'Review of the Retail Shop Leases Act 1994 (Qld)' (Discussion Paper) 7; ibid 267.
[6] Australian Government Productivity Commission, above n 4, ch 9.
[7] Australian Government Productivity Commission, above n 4, 270.
[8] David Bradbury Media Release 'Retail Council of Australia Membership' 13 July 2012 <www.ministers.treasury.gov.au>.

It has been difficult to ascertain the status of national reform in this area post-2011. Both the NRTWG and the SBMC no longer exist. The PC Report (2011) obliquely indicated that NSW would take on a leading role in promoting national consistency with regards to reporting, terminology used in leases and data collection.[9] In 2013, the NSW Small Business Commissioner instigated a review into the retail sector in NSW and published a related discussion paper.[10] The Review took submissions from the public up until February 2014 on a range of questions. In 2013, the Qld Department of Justice and Attorney-General conducted a similar review (and published an options paper) into the *Retail Shop Leases Act 1994* Qld.[11] The Qld/NSW reviews are similar in their terms (see Appendix 2) to the present Senate Standing Committee on Economics inquiry, which was referred by Senator Nick Xenophon (SA) on 25 June of this year.[12]

This submission addresses each of the terms of reference discretely by way of a synthesis of:

- The issues raised in the 2013 NSW Review (insofar as they are relevant);
- The issues raised, options proposed and grounds of support stated in the 2013 Qld Review (insofar as they are relevant);
- Commentary extracted from *Commercial and Retail Leases*[13] where relevant;
- Conclusions reached by the Commercial and Property Law Research Centre.

Additionally, this submission includes comparative tables of key legislative provisions across state and territory jurisdictions (see Appendix 3).

[9] Australian Government Productivity Commission, above n 4, 268. Information provided by DIISR – this Department no longer exists.

[10] Small Business Commissioner NSW '2013 Review of the *Retail Leases Act 1994*' (2013) <www.smallbusiness.nsw.gov.au/solving-problems/retail-leases-act-review>.

[11] Department of Justice and Attorney-General 'Review of the *Retail Shop Leases Act 1994*' (Options Paper) (2013).

[12] Parliament of Australia 'Senate Standing Committee on Economics' (2014) <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics>.

[13] Bill Duncan et al, Westlaw AU, *Commercial and Retail Leases in Australia* (at 21 July 2014).

3.0 TERMS OF REFERENCE

A. THE FIRST RIGHT OF REFUSAL FOR TENANTS TO RENEW THEIR LEASE (WHERE THE LEASE DOES NOT PROVIDE AN OPTION TO RENEW)/END OF LEASE PROVISIONS

Presently, only SA and the ACT purport to confer any preference for renewal upon the existing tenant, however in many circumstances the right of preference may be lost, such as where the lessor wishes to change the tenancy mix, where the lessee has breached the lease, and where the lessor requires vacant possession of the premises for their own purposes.[14]

These provisions are obviously aimed at giving the lessee an opportunity of ascertaining at the earliest possible date whether or not a lessor is prepared to renew a lease. However, in normal circumstances, a retail shop lessee would be quite aware that a lease would be nearing expiry and would take some action to ascertain the position from the lessor.[15]

2013 NSW Review

The Review stated that regardless of the landlord's notice, the parties frequently continue to negotiate new lease terms right up to the end of the existing lease. Tenants are concerned about the negotiations at lease expiry because of their significant investment in that location, including fit out and goodwill.

The introduction of a right of first refusal (or a right of last refusal, where a tenant has the choice to accept the best deal the landlord has negotiated with an alternative tenant) may improve security of tenure. Conversely these proposals may work in a manner that is detrimental to landlords and/or the viability of shopping centres and ultimately have a negative impact on all the other tenants.[16]

2013 Qld Options Paper

Item 6.11.3 – Landlord's obligation regarding renewal where no option under lease or other agreement for renewal.

An option was proposed to omit s 46AA which requires a lessor to inform the lessee of its intentions regarding renewal within a certain notice period or the lease will be taken to continue for a stipulated time.

Support was given to this proposal on the basis that the existing section does not appear to work well, adds complexity and gives almost nothing to the tenant. Such an omission would align Qld's legislation with Victoria's in not regulating what happens between the parties where the lease does not contain an option to renew.

Conversely, s 46AA aligns with equivalent provisions in NSW and NT and should be retained so a tenant has formal legal notice whether a lease is to be continued.[17]

Item 6.11.6 – Proposal for adoption of ACT end of lease/renewal provisions for shopping centre leases (ie preferential right given to sitting tenants).

[14] *Retail and Commercial Leases Act 1995* (SA) s 20D; *Leases (Commercial and Retail) Act 2001* (ACT) s 108.
[15] Bill Duncan et al, Westlaw AU, *Commercial and Retail Leases in Australia* (at 21 July 2014) [120.8200].

[16] Small Business Commissioner NSW, above n 10, 22.
[17] Department of Justice and Attorney-General, above n 11, 138-139.

An option was proposed that for the renewal of lease (other than under an option to renew) a landlord must not require in excess of the market rent for the premises and/or that a sitting tenant should have the right to a CMR determination at the point of lease renewal.

A further option proposed was the adoption of the equivalent ACT provision,[18] on the basis that this provision operates effectively, provides a clear end of lease dispute resolution mechanism and avoids "asset bubbles". Some retail stakeholders also proposed that a sitting tenant be afforded a right of first refusal following lease expiry in order to realise the considerable capital investment they may have made in fit-out.[19]

Conclusions

We submit that while a right of first refusal would, in theory, strengthen a sitting tenant's bargaining position at the time of lease renewal, such provisions, at least as they are presently stated in SA and ACT, allow landlords to decline renewal in so many circumstances that their utility is defeated.

Even if those provisions were to be more tightly drafted and included in nationally consistent regulatory framework to enhance protection for sitting tenants, for the reasons stated in the PC (2008), these are matters better left to commercial negotiation. Those reasons include:

- Government intervention would reduce the ability of both parties to negotiate a mutually beneficial outcome;
- Prescribing additional provisions in an attempt to enhance security of tenure provisions for retail tenants creates additional complexity and frustrates lease negotiations;
- Limiting rent increases on a subsequent lease would reduce the efficient operation of the market by maintaining under-performing tenants longer than would otherwise be the case; and
- Such provisions would introduce inefficiencies to the market that would raise costs for landlords and tenants and lower benefits to consumers and also constrain the efficient operation of the market through reduced flexibility in allocating retail space to its best possible use. [20]

We see no point in purporting to give a preference to sitting tenants if ultimately, as is the case, the lessor has the final say about whether to renew the lease. There is marginal benefit in a lessee notifying a lessor that the lessee desire a further term (in the absence of an option to renew) but it is doubtful whether there is any benefit in legislating for this to occur. The Queensland position (s 46AA) reduces a lessor's ability to negotiate a new lease with an alternative prospective lessee once notification to an existing lessee is given. Conversely, we see benefit in a lessee knowing as soon as practicable that they are not going to be preferred as a lessee for a further term. It would seem that these practices would be regulated by the marketplace in all events as it would be without any statutory regulation. These types of provisions in all jurisdictions are 'toothless tigers'.

B. AFFORDABLE, EFFECTIVE AND TIMELY DISPUTE RESOLUTION PROCESSES

The objective behind dispute resolution procedures is to enable disputing parties access to specialist mediators, conciliators or tribunal members (as the case may be) and to encourage alternative dispute resolution outside the normal court system.[21]

[18] *Leases (Commercial and Retail) Act 2001* (ACT) s 108.
[19] Department of Justice and Attorney-General, above n 11, 140-141.
[20] Australian Government Productivity Commission, 'The Market for Retail Leases in Australia' (Inquiry Report No 43, 31 March 2008) 124-125.
[21] Duncan et al, above n 13, [130.8200].

2013 NSW Review

The review suggested that monetary limit for retail tenancy disputes in the NCAT may no longer be appropriate because the costs of fit-outs for shops have significantly increased and can exceed the monetary limit for the NCAT. Claims can therefore fall outside the jurisdiction of the tribunal, even before the business starts trading.[22]

2013 Qld Options Paper

Item 7.1 Compulsory mediation

An option proposed was that disputes (except for proceedings in the nature of an injunction) should only be referred to QCAT following certification that the mediation process has failed and outstanding issues are unlikely to be resolved, as is required in NSW and Vic.

Most tenant and landlord submitters expressed in-principle support for compulsory mediation on the basis that it encourages parties to make the best use of mediation. Conversely, some landlord submitters expressed the view that the current approach in Qld (ie. referral by mediator under section 63) is preferable to requiring additional certification of failed mediation which delays the dispute resolution process.

A further option was proposed to remove the mediation provisions under the Act so that where a retail tenancy dispute is lodged with QCAT, it will go straight to a compulsory conference under the QCAT Act and there would not be a separate mediation process.

Some stakeholders supported this proposal on the basis that the mediation process under the Act is an unnecessary step and possible source of confusion for disputing parties. This option would reduce administrative costs of the QCAT Registry associated with managing the mediator panel. It would streamline the dispute resolution process and reduce the regulatory burden on, and costs to, the disputing parties and government.[23]

Item 7.2 Timeframe for mediation

An option was proposed that where a mediation process is in place, a party to a dispute should be able to apply to QCAT where such mediation is 'unduly delayed' so as to prevent mediation being used to delay the resolution of the dispute.[24]

Item 7.5 Jurisdiction of mediators and QCAT for retail shop lease disputes

An option was proposed to empower QCAT to hear and determine a landlord's claim for rent arrears up to the monetary jurisdiction limit.[25] This proposal was supported because there is no compelling reason why a landlord is required to prosecute his/her claim for rent arrears in a court when QCAT has a monetary jurisdiction of up to $750,000 in retail shop lease disputes.

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[22] Small Business Commissioner NSW, above n 10, 37.
[23] Department of Justice and Attorney-General, above n 11, 163-164.
[24] Ibid.
[25] This would require amendment to s 103 of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld).

The alternative view is that the jurisdiction of the courts should not be eroded, except for matters for which the Act specifically provides. Rent arrears as a debt should be pursued in the relevant court as QCAT only has jurisdiction for debts up to $25,000. [26]

Conclusions

We submit that the present dispute resolution process is generally accessible and effective. However, should a national regulatory framework be adopted, the dispute resolution process would need to be harmonised as to tribunals' jurisdiction (in terms of monetary threshold and disputes regarding rent arrears) and whether or not mediation prior to hearing before a tribunal is mandatory. We would support less prescription here than otherwise. Perhaps a compulsory conference might be mandated as a precursor to Tribunal action although the Reviews mentioned do not seem to have any information upon the success of mediation in resolving disputes. We are not sure of the extent to which a common process might be mandated and suspect this may not be easily implemented given the jurisdictional differences in relation to threshold amounts and notwithstanding the allegedly Uniform Civil Procedure Rules.

C. A FAIR FORM OF RENT ADJUSTMENT

2013 Qld Options Paper

Item 6.2.2 Single basis of rent review formed by combination of methods

It was proposed that rent reviews be limited to one review basis only rather than a combination of methods, for example CPI + 2%. In circumstances where inflation exceeds the Reserve Bank and Treasury inflation rate target for monetary policy, this review method places an unreasonable financial burden on the tenant, especially where retail conditions are challenging.

The combination of review methods allowed in Qld[27] has the potential to impose unsustainable rental increases upon tenants which will exceed turnover growth for the same period. This has a multiplier effect which renders a retail business unviable during the later part of the lease term.[28]

Item 6.3.4 – Formula for CMR determination

An option was proposed that the formula for determining CMR should be narrowed by:

(i) deleting the words *or a substantially similar use*;

(ii) inserting a clarifying note to the following effect:

"While the determined CMR must reflect the permitted use under the lease, the evidence utilised by the SRV is not limited to that use. However, valuation practice dictates that the SRV should strive to obtain evidence as near as possible, in all respects, to the shop which is the subject of the determination. The greater the variation the greater the adjustments required and hence the greater the level of risk in the accuracy of determined rental."

Some valuation stakeholders supported this proposal on the basis that the words *or a substantially similar use* cause confusion, including scope for overvaluation of current market rent for retail shop leases through determinations based on highest and best legal use. These stakeholders have indicated that, while there is

[26] Department of Justice and Attorney-General, above n 11, 168.
[27] *Retail Shop Leases Act 1994* (Qld) s 27(5)(g).
[28] Department of Justice and Attorney-General, above n 11, 75-76.

no limitation on the evidence that should be considered by a SRV in determining CMR under the Act, it is the permitted use under the lease that is material and will achieve the desirable result.

One stakeholder noted that while it is intended to remove semantic differences in "permitted use", the provision is sometimes used by SRVs to substantially expand the valuation comparison criteria into unrelated uses, producing irrelevant and "sometimes ruinous" financial outcomes.

An alternative position was that the words *same or similar use*, are appropriate and a core standard in assessing CMR in other jurisdictions including NSW, Victoria, WA and the NT and should be retained in Qld.

A valuation stakeholder has noted that a CMR determination is recognised by the courts as a complex and extremely difficult exercise and the same or substantially similar use formula affords protection to all parties (landlord, tenant and SRV) in relation to the CMR determination, including minimising SRV exposure to professional indemnity claims.

Conclusions

If a rent review process is to remain regulated, it should be as uniform as possible within each jurisdiction as seems now to be the case. The rental valuation process is common throughout Australia, and should, as far as possible, remain standardised. This is one area where there may indeed be a national approach.

D. IMPLICATIONS OF STATUTORY RENT THRESHOLDS (APPLICATION OF THE ACT)

In all the legislation, there are specific exclusions from the operation of the legislation. It was never the intention of the legislation to apply to the major shopping chains and therefore the Acts do not generally apply to retail shops that have a lettable area of 1000m^2 or more or by rent threshold as is the case in SA. There are other exclusions which cover public corporations, and premises where the business is effectively owned by the lessor and carried on the lessor's behalf.[29]

2013 Qld Options Paper

Item 4.2 Application of the act to particular leases

In Qld the only issues surrounding application were clarification of the current provisions. It was proposed these provisions be redrafted so that their application to individual leases is clear. General stakeholder feedback was that, while the application provisions remain relevant, they are not "user-friendly" in their present form. How the Act, former Act and related legislative amendments apply to individual leases (in particular older leases) needs to be ascertainable readily and with certainty.

This would benefit both landlords and tenants by reducing legal costs and timeframes for legal and associated advice on leases.[30]

Conclusions

We submit that should a national approach be adopted the coverage of retail tenancy legislation should be carefully considered. As suggested by the PC Report (2008) arbitrary distinctions as to what does and does not constitute a retail tenancy can lead to market inefficiencies such as landlords preferring certain types of businesses because they face fewer tenancy regulations in dealing with them, or tenants selecting certain

[29] Duncan et al, above n 13, [20.4000].
[30] Department of Justice and Attorney-General, above n 11, 46-47.

business formats for similar reasons.[31] We agree that there should not be a situation where, because of the threshold issue of the application of retail leasing legislation, one jurisdiction as an investment destination should not be preferred against another because of the over regulation of a sector of a what effectively is a common market. Given this, there should obviously be some standardisation of the definition of the type of business regulated. As alluded to above, arbitrary differences in the descriptors of the subjects of regulation only lead to costly (and pointless) differentiation at the operational stage, particularly for the multi-jurisdictional lessor.

E. BANK GUARANTEES

2013 NSW Review

The review noted that tenants usually provide some form of surety to the landlord to guarantee they meet their obligations under the lease, such as a security bond lodged under the Retail Bond Scheme or a bank guarantee issued in favour of the landlord. Bank guarantees normally require the tenant to provide the bank with a personal guarantee (for example, over personal property or a cash deposit). Unlike security bonds, the Act does not address the landlord's rights and obligations in relation to the handling, drawing down and return of a bank guarantee.

Stakeholders have complained that landlords can draw down bank guarantees when there is no breach of the lease. In some cases, bank guarantees are held by the landlord for a significant amount of time after the end of a lease.[32]

2013 Qld Options Paper

Item 6.12.5 Monetary caps on personal guarantees

It was proposed that the Act should cap the amount(s) that can be sought by a landlord by way of personal guarantee in support of tenant's obligations under a retail shop lease, on the basis that some landlords seek excessive personal guarantees from tenants.

A contrary view was that regulation of commercial matters between landlord and tenant regarding the financial viability of tenant or the tenant's business, including monetary caps on personal guarantees, is not appropriate.[33]

Conclusions

We submit that a national framework should provide guidance for how bank guarantees are dealt with. This is in keeping with key recommendations in the PC Report (2008) to encourage transparency in dealings between landlords and tenant.[34] Establishing clear requirements for bank guarantees improves transparency and certainty in retail lease relationships which in turn reduces the likelihood of disputes arising. We submit that the provisions for dealing with bank guarantees as presently stated in the ACT, that a guarantee document must be returned with 30 days of the end of the lease or when a tenant vacates the premises, could be adopted nationally.[35]

[31] Australian Government Productivity Commission, above n 20, 91.
[32] Small Business Commissioner NSW, above n 10, 29.
[33] Department of Justice and Attorney-General, above n 11, 146.
[34] Australian Government Productivity Commission, above n 20, 252.
[35] *Leases (Commercial and Retail) Act 2001* (ACT) s 45.

Consideration should also be given to whether the quantum of bank guarantees ought to be limited in value to an amount equivalent to a specified period of rent. If such a recommendation is to be adopted, then any level set should be realistic, and perhaps expressed in terms of percentage of an annual rent, given the vast disparities in actual rent charged in different location throughout the nation. We hasten to add that this is one area where the market sets its own level balancing capacity to pay against the realities of losing a prospective lessee because of an excessive demand for security. We understand from market sources that the median rent guarantee is about 3 months rent equivalent.

F. THE NEED FOR A NATIONAL LEASE REGISTER/G. FULL DISCLOSURE OF INCENTIVES

2013 NSW Review

The review stated that information available to prospective tenants on the register is limited to dealings registered on the folio title of the land and registration is voluntary (although parties may opt to make it a requirement of the lease).

When leases are registered, 'side deals' agreed between the parties are frequently not reflected in the registered lease. 'Side deals' are incentives, allowances and reductions negotiated between the parties such as rent free periods, up front incentives, lessor contributions and ancillary payments in favour of the tenant. Side deals are likely to vary significantly between retail leases.

This means that prospective tenants will not be able to understand the competitive environment for a shop by calculating the "whole of the financial deal"[36] from information available from the register. It also means that investors and mortgagors may not be able to determine the financial viability of a property.[37]

2013 Qld Options Paper

Item 6.14.1 Mandatory registration of leases, including lease incentives

One option proposed was the mandatory registration of leases (including any options) over one year. Advocates of compulsory registration suggested that this measure would overcome a lack of information available to shopping centre tenants in relation to effective rents (including costs and contributions and incentives by shopping centre landlords) so that accurate rental comparisons can be made by tenants.

Conversely, this proposal was opposed on the basis that the purpose of registration of an interest in land is to obtain the benefits of indefeasibility, backed by a state guarantee rather than for individuals to glean information for use in commercial negotiations. Furthermore, incentives provided to tenants that are not included in the lease are generally confidential ancillary agreements which would not be made available through registration of lease in any case.

While the PC Report (2008) recognised that market problems are associated with the lack of information available in the retail leasing industry and recommended that lease information should be lodged in a publically accessible location, we do not support this measure. In our view, it is not appropriate for a national regulatory framework to override commercial confidentiality.

Conclusions

[36] Where the 'whole of the financial deal' refers to the sum of the face rent with adjustments (additions or subtractions) for any side deals agreed under the retail lease.
[37] Small Business Commissioner NSW, above n 10, 10.

We find the need for a 'lease register' to be overly bureaucratic and is probably only necessary in Victoria where somewhat idiosyncratically compared with other major jurisdictions, leases are not usually registered but protected by s 42 of the *Transfer of Land Act 1958* (Vic). We are unsure how the establishment of a lease register either in Victoria or elsewhere adds value to the rent review (or any other) process. The disclosure of lease incentives has long been a thorn in rental valuers' sides. However, having said that, given the relatively small pool of retail lease valuers in any one place, there are few valuers who do not understand their jurisdiction sufficiently to appreciate the extent of general incentives given to lessees of a certain geographical location. We consider that the disclosure of incentives would remove a valuable negotiating tool from the armory of the retail complex owner and unnecessarily place restrictions upon what is left of freedom of contract within the sector. There is no plausible evidence that we have seen to prove that the non-disclosure of incentives publically hinders the valuation process. On the contrary, such disclosure may lead to disputation which does not now exist between lessee and lessee and lessor and lessees.

We are firmly against either proposal.

H. PROVISION OF SALES RESULTS (TURNOVER RENT – INCLUDING ISSUES SURROUNDING ONLINE SALES)

2013 NSW Review

The review noted that some retail leases include turnover rent provisions, which require increased rent to be paid once turnover exceeds a particular threshold. In order to calculate turnover rent, tenants must provide landlords with turnover data.

Landlords have reported they also use turnover data to effectively manage the performance of the shopping centre. This information enables them to determine the appropriate tenancy mix and assess future development plans for the centre. Also, landlords may grant struggling tenants rent concessions following a review of the tenant's turnover data.[38]

2013 Qld Options Paper

6.1.1 – Regulation of turnover statements given to a landlord

Shopping centre retail leases typically include provisions for the centre manager to collect turnover information from the tenant for centre as a management tool for landlords to assess performance of the centre overall. Turnover reporting enables benchmarking to maximise the centre income and the value of the asset (for example, by altering tenancy mix, not renewing leases of poor performing tenants and replacing them with tenants that generate greater turnover, for developing targeted marketing/promotion strategies or assessing future development of centre). These measures arguably also benefit retailers and consumers.

Tenants proposed that lease clauses requiring rent to be calculated by reference to turnover (and the associated provision of turnover figures) be prohibited where a base rent has been negotiated. Furthermore, tenants suggested that they should not be obliged to provide monthly certificates and annual statements of turnover to landlord, except where turnover is the sole basis for determination of rent under the lease.

Tenants viewed that the reporting of retailers' turnover data to shopping centre management disadvantages them in subsequent lease negotiations as landlords use the turnover data to set base rents

[38] Small Business Commissioner NSW, above n 10, 12.

at what tenants can afford to pay rather than market rent. Furthermore, retailers suggested that turnover rent is rarely payable under standard large centre leases where a base rent is set because the turnover thresholds are set at unreachable levels and a turnover component is only included in leases to enable landlord to collect turnover figures. That data is then used by landlords for commercial advantage at the point of lease renewal.

Tenant stakeholders further opposed provision of turnover information to landlords on the basis that action for breach of confidentiality is difficult and tenants are normally reluctant to commence legal action against a landlord.

While the reporting of turnover data was one of the most contentious issues raised during the PC 2008 inquiry, the report ultimately found that it is very unlikely that any means to prohibit the collection of turnover figures would materially ameliorate the expressed concerns, and that the mix of pre-determined and turnover rent is a matter for commercial negotiation between the lease parties. Government intervention would reduce the flexibility of retail tenants and landlords to negotiate a mutually beneficial lease under prevailing commercial conditions.[39]

Conclusions

While we support the findings of the PC in principle, we note the discrepancy between the paramount importance afforded to landlords' confidentiality where it relates to issues of registration of leases and full disclosure of incentives vis-à-vis the willingness to circumvent considerations of tenants' confidentiality in relation to the provision of turnover information. We therefore submit that, if a national framework is implemented, any measures adopted to deal with issues such as access to information and confidentiality should apply to landlords and tenants equitably.

ONLINE SALES AND TURNOVER DATA

2013 NSW Review

The review noted that rapid growth of online retail is changing the retail sector such that the traditional concept of retail revenue might now be derived from a combination of a physical retail store and from online sales, or separately from either.

Some tenants are reporting changes to retail leases where online revenue is captured by the turnover rent clauses. These tenants claim the attempt to include online revenue in the retail lease is inappropriate because there are two separate and distinct revenue streams. Conversely, it may be considered that many online sales are earned, at least in part, because there is a physical retail store, particularly where the customer visits the retail store at some stage.

The Act does not explicitly address the issue of online revenue and how or if revenue streams could be differentiated. It is expected that as online retail grows it may be appropriate to amend the definition of terms such as revenue and turnover and otherwise provide better clarity in the Act.[40]

The PC Report (2011) noted that flexibility was required by both tenants and landlords to adjust to economic conditions and consumer demands.[41]

[39] Australian Government Productivity Commission, above n 20, 147.
[40] Small Business Commissioner NSW, above n 10, 39.
[41] Australian Government Productivity Commission, above n 4, 262.

2013 Qld Options Paper

Item 3.5 Definition of turnover – online sales

It was proposed that the definition of 'turnover' be amended to clarify whether or not online sales are included as turnover for the purposes of the Act.

An alternative view was that the reference to 'business carried on in a leased shop' at s 9(1) is sufficiently broad to cover online sales if the leased shop is involved in some way in the sale (ie. the shop is the point from where goods are collected, delivered, or provided). Particular treatment of online sales is a matter for commercial negotiation and attempting to more precisely define 'turnover' could be too limiting, particularly given the pace of change in the areas of e-commerce and m-commerce.[42]

We submit that while clarification is not urgently required, the implementation of national framework should take the opportunity to amend legislation so it reflects the current retail climate. The PC Report (2008) recommended that retail leasing legislation should not be unnecessarily prescriptive, however we suggest that a change such as this would not greatly increase the prescriptiveness of the legislation and could ultimately reduce the incidence of disputes.

Conclusions

At present there is no specific provision regarding online sales in the other state/territories' retail leasing legislation and we consider that this matter should be left to agreement between the parties based upon the current definition of turnover given the variety of methods by which sales are conducted as technology advances.

I. CONTRACTUAL OBLIGATIONS RELATING TO STORE FIT-OUT AND REFIT

Aside from the NSW and WA Acts requiring a landlord to disclose to a tenant any requirements relating to fit (such as timing or particular standards), this is not a matter that is, or should be, dealt with by legislation. No cogent case has been put forward to regulate this aspect of the retail leasing transaction.

[42] Department of Justice and Attorney-General, above n 11, 40-41.

APPENDIX 1 - PRODUCTIVITY COMMISSION'S RECOMMENDATIONS 2008

1. To improve transparency and accessibility of lease information in the retail tenancy market, state and territory governments should:

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

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

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

2. To improve tenancy market information, state and territory government should facilitate the lodgement by market participants of a standard one page lease summary at a publicly accessible site.

3. To improve harmonisation of lease information, 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 costs and administration costs by:

    a) Encouraging 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.

    b) Instituting nationally consistent reporting by administering authorities on the incidence of tenancy enquiries, complaints and dispute resolution.

4. To lower the cost of retail tenancy disputation, the significance of jurisdictional differences in the provisions for unconscionable conduct, should be detailed by state and territory governments in conjunction with the Commonwealth, and aligned, where practicable.

5. To moderate the adversarial nature of relationships and more extreme negotiating tactics, state and territory governments in conjunction with the Commonwealth should facilitate the introduction of a voluntary national code of conduct for shopping centre leases that is enforceable by the ACCC. The code should:

    a) include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution

    b) avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and availability of a new lease.

6. To remove constraints on commercial decision making, state and territory governments should remove those restrictions in retail tenancy legislation that provide no improvements in operational efficiency, compared with the broader market for commercial tenancies.

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

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.[43]

[43] Australian Government Productivity Commission, 'The Market For Retail Tenancy Leases in Australia' (Inquiry Report No 43, 31 March 2008) 252-260.

APPENDIX 1 – ISSUES ADDRESSED IN 2013 NSW REVIEW/2013 QLD REVIEW

2013 NSW Review:

2013 Qld Review:

APPENDIX 3 – LEGISLATION ACROSS JURISDICTIONS

A. THE FIRST RIGHT OF REFUSAL FOR TENANTS TO RENEW THEIR LEASE (IE WHERE THE LEASE DOES NOT PROVIDE AN OPTION TO RENEW)/END OF LEASE PROVISIONS

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
	Retail Leases Act 1994	*Retail Leases Act 2003*	*Retail Shop Leases Act 1994*	*Retail and Commercial Leases Act 1995*	*Commercial Tenancy (Retail Shops) Agreements Act 1985*	*Leases (Commercial and Retail) Act 2001*	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*	*Business Tenancies (Fair Dealings) Act 2003*
PROVISION	s 44	s 64	s 46AA	s 20D	s 13B	s 108	Sch 1, cl 29	s 60
SUMMARY	The lessor must inform the lessee whether or not it intends to renew the lease within a defined notice period. If the lessor does not give notice of its intention the lease may continue until notice has been given and the notice period has elapsed, but the lessee must request this extension in writing.	The lessor must inform the lessee whether or not it intends to renew the lease within a defined notice period. If the lessor does not give notice of its intention the lease may be taken to continue until notice is given and the notice period has elapsed.	The lessor must inform the lessee whether or not it intends to renew the lease within a defined notice period. If the lessor does not give notice of its intention the lease may be taken to continue for a stipulated time.	Where a lease is due to expire there is a statutory right of preference for renewal in favour of the existing lessee, except in certain circumstances.	The lessor must inform the lessee whether or not it intends renew the lease within a defined notice period. If the lessor does not give notice of its intention the lease may be taken to continue for a stipulated time.	The lessor must assume that the tenant wishes to renew the lease unless the tenant has given notice to the contrary: s 108. As in SA, many exceptions apply.	The lessor is required to inform the lessee whether or not it intends to renew the lease within a defined notice period. The lessee is required to respond to the lessor's intentions within 30 days. If the lessor does not notify the lessee of its intentions the lease is taken to continue until notice is given and the notice period has elapsed. If the lessor gives	Mirrors NSW s 44.

B. AFFORDABLE, EFFECTIVE AND TIMELY DISPUTE RESOLUTION PROCESSES

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
	Retail Leases Act 1994	*Retail Leases Act 2003*	*Retail Shop Leases Act 1994*	*Retail and Commercial Leases Act 1995*	*Commercial Tenancy (Retail Shops) Agreements Act 1985*	*Leases (Commercial and Retail) Act 2001*	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*	*Business Tenancies (Fair Dealings) Act 2003*
PROVISION	Pt 8	Pt 10	Pt 8	Pt 9	Pt III	Pt 14	Pt 4	Pt 11
Jurisdiction of Tribunal/Court: Monetary Threshold	$400,000: s 73.	n/a	$750,000	Up to $100,000 in the Magistrates Court – greater than this may be referred to the DC.	n/a	n/a	n/a	The Commissioner can only refer a dispute to the court if the amount exceeds $10,000.
Certification of failed mediation needed for dispute to proceed to tribunal/Court.	Disputes cannot be the subject of any court proceedings unless the Act appointed Registrar has certified that mediation has failed: s 68. An exception is where the court is otherwise satisfied that mediation would be unlikely to solve the dispute: s 67.	Similar to NSW – before a dispute goes to the tribunal the Small Business Commissioner must certify in writing that mediation has failed or is likely to fail. (Does not apply to injunctions),	Where a dispute has not been resolved through mediation, a mediator or party may refer the matter to QCAT and QCAT may then direct the parties to compulsory mediation: QCAT Act ss 67, 75.	Parties may refer a dispute to the SBC for mediation before the matter proceeds to a court.	A matter cannot be brought before the WA SAT unless the SBC has issued a certificate that medication has or would be likely to fail: s 25C	Magistrates court must hold a case management meeting to determine whether resolution is likely: ss 147-149. If it is, the court will facilitate settlement or refer to another dispute resolution mechanism. If no, the court must give directions about how the proceeding should be conducted.	Cl 39 – parties must first attempt direct negotiation. If this fails, either party may request the office of Consumer Affairs and Fair Trading to assist with negotiation. If the dispute remains unresolved either party may refer the dispute to the Retail Tenancies Code of Practice Monitoring for conciliation. If all else fails, either party may refer the matter to the court.	Retail tenancy disputes can only be the subject of court proceedings where injunction is sought or if the Comissioner of Business Tenancies certifies that the parties have failed to resolve the claim.
Jurisdiction of Tribunal: rent in arrears.	Able to deal with all matters.	Able to deal with all matters.	QCAT does not have the jurisdiction to a dispute regarding rent in arrears unless the dispute is also about the payment of compensation: 103 *QCAT Act*.	Not addressed.	Able to deal with all matters.	Not addressed (but everything is dealt with by the Magistrates court in one way or another).	Not addressed.	Not addressed.

C. A FAIR FORM OF RENT ADJUSTMENT

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
	Retail Leases Act 1994	*Retail Leases Act 2003*	*Retail Shop Leases Act 1994*	*Retail and Commercial Leases Act 1995*	*Commercial Tenancy (Retail Shops) Agreements Act 1985*	*Leases (Commercial and Retail) Act 2001*	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*	*Business Tenancies (Fair Dealings) Act 2003*
Basis for rent review	A provision of a lease is void if it reserves to one party a discretion as to method, whether or not the rent is to be reviewed on a review date, or for the rent to be changed to the higher of two or more specified methods: s 18.	Only one of a fixed number of methods of review may be used. Any rent review provision is void to the extent that it purports to preclude, prevents or enables the prevention/limitation of the reduction of rent: s 35.	Similar to NSW in that electing the higher of two bases for rent review is not permitted. NB. Under s 27(g) a 'single basis' can be a combination of two or more other bases.	Similar to NSW: s 22. Any purported rent change is void if the lease does not state the date each rent review is due or provide a mechanism for rental review: s 50.	A rent review provision in a retail shop lease is void unless the lease specifies for each date of review the method that will be used – if the review does not provide this the Act does not provide replacement provisions: s 11.	A lease provision is void if it allows a change in rent more than once a year, except in certain circumstances: s 47.	Rent reviews not permitted more than once a year. Lease must specify date for review and method of adjustment to be used: cl 12. Does not allow a combination of methods to be used.	Leases must state when reviews are to take place and the bases upon which those reviews are to be made. If method not specified or if choice is left to landlord the provision is void: s 28.
Formula for CMR determination	CMR is rent that would be reasonably expected to be paid between a willing landlord and a willing tenant at arms length having regard to, inter alia, 'if the shop were unoccupied and offered for renting for the same or similar use': ss 19, 19A, 31A.	Same as NSW except the words used are "same or substantially similar use": s 37.	'…substantially similar use': s 29.	Same as NSW: s 23.	'…let on similar terms': s 11(2)(a).	'…the use to which the premises may be put under the lease is taken into consideration': sch 1.	'…the highest and best use value, having regard to the probable and realistic possible use of the premises': Sch 1, Appendix A. If the parties cannot agree on the market value rent, the either party may initiate an independent valuation by the appointment of a valuer: cll 13, 14 and 21.	'…same or substantially similar use': s 29.

D. IMPLICATIONS OF STATUTORY RENT THRESHOLDS (APPLICATION OF THE ACT)

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
	Retail Leases Act 1994	*Retail Leases Act 2003*	*Retail Shop Leases Act 1994*	*Retail and Commercial Leases Act 1995*	*Commercial Tenancy (Retail Shops) Agreements Act 1985*	*Leases (Commercial and Retail) Act 2001*	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*	*Business Tenancies (Fair Dealings) Act 2003*
Application of the Act.	The Act does not apply to businesses of a prescribed type or where the lettable is greater than $1000m^2$: s 5.	The Act does not apply to premises where the occupancy costs exceed $1M p.a. or to other prescribed types of businesses including publicly listed corporations: s 4.	The Act does not apply to particular types of businesses or where the lettable area is more than $1000m^2$ and the tenant is a public company or more than $10,000m^2$: s 13, Sch.	The Act does not apply where annual rent exceeds a prescribed amount (presently $400,000): s 4. This is the only jurisdiction where application is determined by reference to rent paid, but note VIC refers to 'occupancy costs'.	The Act does not apply to businesses where the lettable area is greater than $1000m^2$ or the tenant is a listed corporation: s 3.	The Act does not apply to premises where the lettable area is greater than $1000m^2$: s 12.	The Act does not apply to premises with a lettable area of greater than $1000m^2$ or to other prescribed types of businesses. Leases entered into prior to the commencement of the code are also expressly excluded: Sch 1, cl 2.	The Act does not apply to prescribed types of businesses or those with a lease term of less than 6 months or more than 25 years: s 7.

E. BANK GUARANTEES

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
	Retail Leases Act 1994	*Retail Leases Act 2003*	*Retail Shop Leases Act 1994*	*Retail and Commercial Leases Act 1995*	*Commercial Tenancy (Retail Shops) Agreements Act 1985*	*Leases (Commercial and Retail) Act 2001*	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*	*Business Tenancies (Fair Dealings) Act 2003*
	A landlord is not entitled to unreasonably refuse a tenant's choice to use a bank guarantee. The Director-General may pay out the security money 14 days after an order or judgment has been made in relation to the security bond: ss 16A-16ZC.	The landlord must keep a security deposit in an interest-bearing account and account to the tenant for any interest earned: s 24. (Bank guarantees not mentioned).	Not mentioned in the Act.	A person cannot require more than one security bond for the same shop or require the payment of an amount by way of security bond exceeding the value of four weeks' rent: ss 19, 20. (Bank guarantees not mentioned).	Not mentioned in the Act.	The landlord must not unreasonably refuse to accept a bank guarantee instead of a bond: s 41. The landlord must deposit any bonds in an interest bearing account and account to the tenant for any interest earned: s 42. A guarantee document must be returned to the tenant within 30 days of the end of a lease or when the tenant vacates the premises: s 45.	A landlord must not unreasonably refuse to accept a bank guarantee instead of a security deposit. Security deposit limited to 3 months' rent. There are similar deposit and accounting requirements as for VIC and ACT: Sch 1, cl 30.	Identical provisions to the ACT ss 41 and 42: s 63.

F. THE NEED FOR A NATIONAL LEASE REGISTER & G. FULL DISCLOSURE OF INCENTIVES

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
LEGISLATION	*Real Property Act 1900*	*Transfer of Land Act 1958*	*Land Title Act 1994*	*Real Property Act 1886*	*Transfer of Land Act 1893*	*Land Titles Act 1925*	*Land Titles Act 1980*	*Land Title Act*
	Voluntary for leases longer than 3 years: s 53.	Voluntary for leases longer than 3 years: s 66.	Voluntary for leases longer than 3 years: ss 64, 65.	Voluntary for leases longer than 1 year: ss 116, 117.	Voluntary for leases longer than 3 years: ss 82, 91.	Voluntary for all leases: s 82.	Voluntary for leases over 3 years: ss 60, 64(1).	Voluntary for all leases: s 65.

H. PROVISION OF SALES RESULTS (TURNOVER RENT)

JURISDICTION	NSW	VIC	QLD	SA	WA	ACT	TAS	NT
Look at 6.1.1 of the Qld review → contains lots of details.	*Retail Leases Act 1994*	*Retail Leases Act 2003*	*Retail Shop Leases Act 1994*	*Retail and Commercial Leases Act 1995*	*Commercial Tenancy (Retail Shops) Agreements Act 1985*	*Leases (Commercial and Retail) Act 2001*	*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*	*Business Tenancies (Fair Dealings) Act 2003*
Confidentiality	Turnover information must be kept confidential by lessor except for under prescribed circumstances: S 50	Mirrors NSW provision: s 67.	A lessor must not disclose to anyone else information obtained about the turnover of the lessee's business without the lessee's agreement (subject to a limited number of exceptions): S 26	Lessor must keep turnover information confidential, except for under prescribed circumstances: s 51.	Confidentiality not expressly required in the Act.	Lessor must not divulge/communicate turnover information except under prescribed circumstances: s 129 (2).	*Property owners must not disclose to any person any turnover information provided by the tenant, except under certain circumstances: Sch 1, cl 10.*	*Landlord must not disclose or communicate turnover information to another, except under certain circumstances: S 66*
Definition	'Turnover' includes gross takings, gross receipts, gross income and similar concepts (excluding specified amounts): s 20.	Turnover negatively defined (ie. by reference to list of exclusions): s 33(4).	'Turnover' is the gross sales of the business for any particular periods (excludes specified amounts): s 9.	Mirrors NSW provision: s 24.	Turnover negatively defined (ie. by reference to list of exclusions): s 7(4).	Turnover negatively defined (ie. by reference to list of exclusions): s 64.	'Turnover' means the amount of gross sales derived from the retail premises defined in the lease: Sch 1 cl 1. Exclusions listed Sch 1, cl 15.	Mirrors NSW provision: s 32(1)