SHOPPING CENTRE

COUNCIL OF AUSTRALIA

22 August 2003

Ms Sarah Bachelard
Secretary
Senate Economics References Committee
Room SG64
Parliament House
Canberra ACT 2600

Dear Ms Bachelard,

Submission to Inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business

1. Executive Summary

This is a submission by the Shopping Centre Council of Australia, which represents the interests of shopping centre owners and managers.

We confine our submission to item 1(b) of the Inquiry's terms of reference: "whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions".

There is throughout Australia extensive State and Territory legislation regulating retail tenancies. This legislation is industry specific and contains detailed provisions regulating retail leasing. The general approach in the State and Territory legislation is to lay down detailed rules on all aspects of the retail tenancy relationship and to seek to resolve retail tenancy disputes by easily accessible and cost efficient mediation. If mediation is not successful either party is able to refer the matter to experienced tribunals for a prompt and cost efficient determination.

This State and Territory legislation has either 'drawn down' the provisions of section 51AC of Part IVA of the Trade Practices Act or is in the process of doing so.

There is, therefore, already in existence an extensive body of rules about acceptable behaviour by owners and managers in transactions with tenants. Where a tenant claims an owner or manager has breached one of the rules there is adequate redress by easily accessible and cost efficient mediation and, as a last resort, legal proceedings.

We strongly support this approach. In our view the present system is an effective one for regulating retail tenancy issues.

Level 26, Australia Square, 264-278 George Street, Sydney NSW 2000
Telephone: 02 9336 6902, Facsimile: 02 9336 6976, www.propertyoz.com.au/scca

We consider the introduction as legislative requirements of vague and uncertain concepts, such as "unfair" or "harsh", would be counterproductive. These concepts are subjective, unworkable in business-to-business transactions and unnecessary in the existing system for regulating retail tenancy issues.

Business cannot wait several years for an arbitrator or judge to determine on a case-by-case basis whether in his or her subjective judgment one business has acted unfairly to another business.

The introduction of such concepts as legislative requirements into the existing retail tenancy relationship would be, in our view, a "cop out" or "sop" for failing to think out a sensible rule on a particular point of concern.

We **recommend** that section 51AC should not be amended by the introduction of the words "unfair" or "harsh". Instead, in order to add value to the present retail tenancy regulatory system, both tenants and owners should be encouraged to bring forward matters of concern and reach a balanced solution. The solution could then be the subject of a voluntary code or a statutory requirement.

We consider that the Committee should give support for this approach.

2. State and Territory Regulation of Retail Tenancies

Discussion about Part IVA sometimes proceeds as if this is the only law governing retail tenancies. That is certainly not the case.

There is throughout Australia extensive State and Territory legislation regulating retail leases. Five of the six States and the Australian Capital Territory have enacted specific retail tenancy legislation. Tasmania regulates retail tenancies by a Code of Practice adopted by regulation under the Fair Trading Act and the Tasmanian Government announced in June 2002 its intention to introduce specific retail tenancy legislation. The Northern Territory does not presently regulate retail tenancies but in April 2003 the Northern Territory Government released a draft Bill which it intends to introduce to Parliament in the present session.

The industry specific legislation is as follows:
Retail Leases Act 1994 (NSW)
Retail Leases Act 2003 (Victoria)
Retail Shop Leases Act 1994 (Qld)
Retail and Commercial Leases Act 1995 (SA)
Commercial Tenancy (Retail Shops) Agreements Act 1985 (WA)
Leases (Commercial and Retail) Act 2001 (ACT)

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[We attach the table of provisions of the Retail Leases Act 1994 (NSW) to give an example of the comprehensive regulation of all aspects of the retail tenancy relationship in that State. The complete Act can be accessed at: http://bar.austlii.edu.au/au/legis/nsw/consol_act/rla1994135. Other State and Territory retail tenancy legislation is just as comprehensive.]

This State and Territory legislation, as well as containing extensive provisions for regulating retail leasing, also provides mechanisms to resolve retail tenancy disputes by easily accessible and low-cost mediation. In the event mediation is not successful the legislation usually allows the party to refer the matter to experienced retail tenancy tribunals for a prompt and efficient determination.

This retail tenancy legislation is constantly being reviewed by the States and Territories. In 2003, for example, new retail tenancy legislation was passed in Victoria, following a review that lasted over two years. Western Australia and New South Wales are presently conducting reviews of their legislation and Queensland has announced it will begin a review in September 2003.

In its five years of existence the SCCA has participated in **nine reviews** of retail tenancy legislation.

Consideration of amending the Trade Practices Act can only be done by taking into account the existing State, Territory and Federal system and addressing in a meaningful way any real deficiency.

3. Amendment of Party IVA to prohibit unfairness in dealings between businesses is unworkable and unnecessary

We consider the introduction as legislative requirements of vague and uncertain concepts, such as “unfair” or “harsh” would be counterproductive. These concepts are unworkable in business-to-business transactions and unnecessary in the existing system for regulating retail tenancy issues.

The concept of unfairness is subjective. It provides no meaningful guideline as to how one business is to act in a particular transaction with another business.

The concept of unfairness has to be worked out on a case-by-case basis. Business cannot wait for years for an arbitrator or judge to form another subjective judgment on the facts before him or her.

This would be poor public policy. In our view it would be a “cop out” or a “sop” to tell small business that this is a meaningful protection.

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What is required to add value to the existing system of regulation is the raising of particular issues of concern to small business. These should then be addressed and, if of substance, could be made the subject of a voluntary code or legislative provision.

[One example of this is the recent voluntary Code of Practice on Casual Mall Leasing, negotiated between the Shopping Centre Council of Australia and the Australian Retailers Association, which will come into operation as soon as it is authorised by the Australian Competition and Consumer Commission (ACCC)]

The requirement that business act fairly to the public (Contracts Review Act (NSW)), or that an employer act fairly to its employee (Industrial Relations Act (NSW)), provide no sound basis for seeking to impose the requirement in business-to-business transactions. The relationship between business and the public and employer and employee is quite different to that between business and business.

4. Introduction of Section 51AC of the Trade Practices Act

Section 51AC was included in the Trade Practices Act in 1997 and became operative in July 1998. It was introduced following a Report in May 1997 by the House of Representatives Standing Committee on Industry, Science and Technology "*Finding a balance: towards fair trading in Australia*" (known as the Reid Report).

The Australian Government said section 51AC would "provide a new avenue for small and specialist retailers to pursue remedies against unconscionable conduct in the retail tenancy relationship." (Hon. Peter Reith MP, Minister for Workplace Relations and Small Business, House of Representatives, 30 September 1997).

Following the introduction of section 51AC into the Trade Practices Act some States and Territories have incorporated similar provisions in their retail tenancy legislation and others have indicated an intention to do so. This was done, according to these governments, to provide retail tenants with a lower cost and more easily accessible tribunal to deal with allegations of unconscionable conduct. The operation of these State and Territory provisions was delayed pending the Australian Parliament passing the Trade Practices Amendment (Operation of State and Territory Laws) Act 2001. This Act enabled the States and Territories to extend the jurisdiction of the retail tenancy tribunals to consider matters involving unconscionable conduct.

New South Wales, Queensland, Victoria and the Australian Capital Territory have all 'drawn down' the provisions of section 51AC into their retail tenancy legislation. Western Australia and the Northern Territory have publicly announced an intention to do so. In NSW, the ACT and Queensland these

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laws have only been operating for two years and in Victoria it has been in operation for only six months.

5. Litigation under section 51AC

Since July 1998 the ACCC has launched five actions for breaches of section 51AC involving retail tenancy issues. These have mainly been in relation to franchising disputes. Only one action relates to a shopping centre and the substance of this case is still to come before the Federal Court. The ACCC has also launched two cases under section 51AA, including one against a shopping centre owner, since the behaviour complained about occurred prior to July 1998. (This case, popularly known as the Farrington Fayre Case, is addressed below.)

Some small business groups have argued these relatively few prosecutions is evidence that the ACCC has been lax in its administration of this section or that section 51AC is inadequate in controlling unconscionable conduct. Neither argument is valid.

The ACCC has received special funding, and a ministerial direction, to mount test cases under this section. In July 1999 the then chairman of the ACCC, Professor Fels, said: "There has been some anxiety about a ministerial direction, and special funding, for cases relevant to section 51AC and small business. But the ministerial direction does not force the commission to run a section 51AC case to conclusion even though it could be better settled administratively. Nor does it require a case with little merit to be run by the commission. This would be totally against the commission's method of operation. We do wish to clarify the law and will do so **where the facts have legal merit** and a positive outcome may be achieved by litigation." (ACCC media release, 9 July 1999, emphasis added by the ACCC).

The number of cases launched by the ACCC must also be put into the context of the number of complaints received by the ACCC. In September 2002 the ACCC released, for the first time, figures for the number of "complaints" it had received on unconscionable conduct. (It had previously only published statistics for "complaints and inquiries" and it was impossible to distinguish between the two.) The ACCC has only released figures for complaints in 2001 and for the first eight months of 2002. In 2001 the number of complaints numbered 162 and in the first eight months of 2002 the number of complaints was 107. Assuming the same pattern over the remaining four months of 2002 this would give a total for 2002 of 161, virtually the same as the previous year, suggesting the number of complaints is static and not increasing. (These figures were contained in correspondence from the ACCC to the SCCA, and other parties, dated 10 September 2002).

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This figure of 162 complaints must be put in perspective. We estimate that there are (conservatively) around 120,000 retail tenancies in Australia. This means the number of complaints about unconscionable conduct last year represented only 0.14% of retail leases. In other words, on the most generous of interpretations, fewer than two in every 1,000 retail tenancies results in a complaint of unconscionable conduct.

When it is considered that leases run for a minimum of five years, day in and day out, the number of complaints between the parties in such a continuous relationship is very small. Imagine if it could be said of Australia's 6 million married couples, that only 0.14% had one serious complaint a year about the other partner!

It must be stressed that a complaint of unconscionable conduct is not evidence of unconscionable conduct. This has been acknowledged by the ACCC. The Report of the Joint Select Committee on the Retailing Sector, in August 1999 *("Fair Market or Fair Failure")* noted: "Professor Fels believes that the ACCC is liasing more actively with small business, which he believes is one of the reasons why more complaints are coming forward. However, Professor Fels said many of the complaints do not raise Trade Practices Act issues, and therefore the ACCC does not take them further." (p 102).

This very small number of complaints of unconscionable conduct has occurred despite the ACCC, as part of its functions, conducting in recent years a very substantial publicity and education campaign to make retailers aware of the provisions of section 51AC. This has included producing a joint information bulletin with the Australian Retailers Association and holding its Competing Fairly Forum (which had a major emphasis on unconscionable conduct) throughout regional Australia.

[Incidentally it should be noted that Professor Fels was in error in the reference cited above in suggesting there had been an increase in complaints. As noted above, in those years the ACCC did not distinguish between "complaints" and "inquiries" and included both in the same category. Commissioner John Martin of the ACCC, in a speech in 2001, acknowledged: "Complaints and inquiries relevant to the new section 51AC were almost the same as the previous year." (*ACCC Journal* No.32 April 2001.) Mr Martin was referring to the figures for "complaints and inquiries" that had just been released for 2000.]

These figures confirm that the incidence of unconscionable conduct in retail tenancy matters represents a very small proportion of transactions between owners and retailers. It is not the case that the ACCC has been lax in bringing prosecutions under this section.

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6. The Farrington Fayre Case

It was noted above that only one case under section 51AC has been brought against the owner of a shopping centre and the substance of that case has not yet come before the courts. The ACCC has also brought one action against the owners of a shopping centre under section 51AA because the behaviour complained about occurred prior to July 1998. A judge of the Federal Court upheld a finding of unconscionable conduct but this was overturned on appeal to the Full Federal Court. In April 2003 the High Court dismissed an appeal by the ACCC against the decision of the Full Federal Court (Australian Competition and Consumer Commission V CG Berbatis Holdings Pty Ltd.).

Much of the legal commentary on this case (widely known as the Farrington Fayre Case) has suggested that the outcome of this case may have been different if the action had been brought under section 51AC and not section 51AA.

Despite the fact that the Farrington Fayre Case was an action under section 51AA, and not under section 51AC, the High Court's decision in that case has been lumped together with small business concerns about section 46, following the Boral Case, and the outcome of the Dawson Inquiry, as "evidence" that the Trade Practices Act does not provide sufficient protection for small business. This is not correct. As noted above this case was brought under section 51AA and no conclusions about section 51AC should necessarily be drawn from it.

7. Justification for section 51AC

As noted above section 51AC was inserted in the Trade Practices Act following the Reid Report in 1997. Unfortunately this Report made no attempt to independently evaluate the submissions put before it alleging unfair treatment by retail landlords. This failure is summed up in the emotive and erroneous sentence which began the Reid Report's chapter on retail tenancy: "The idea that there is a 'war' going on in shopping centres around Australia, between retail tenants and property owners and managers, conveys accurately the tenor of evidence given to the Fair Trading inquiry on retail tenancy issues." (p.15). The Reid Report was heavily influenced by claims by a group called the United Retailers Association (URA), which the report said "had representatives in all major shopping centres in Melbourne and membership of the association was increasing". The report further noted "the URA (had) announced plans to 'go national'". (p.16). In fact, the URA announced in May 2001 that it was disbanding, apparently because of a lack of support among retailers. It was the then president of the URA, Ms Lisa Michael, who inspired much of the Reid Report, by claiming in her evidence: "...it is a war out there

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between the retailers and the owners and managers." (p.15). The report gave emphasis to this comment.

There is not, and has never been, such a war. This can be demonstrated by reference to official figures of retail tenancy disputes. In NSW, for example, independent retail consultants, Jebb Holland Dimasi (now JHD Advisors) calculated that that there were 12,721 retail tenancies in NSW shopping centres in 2000. According to statistics released by the NSW Retail Tenancy Unit, which is the body in NSW established under the Retail Leases Act to resolve retail tenancy disputes, it has dealt with only 1,272 applications for mediation of disputes in the eight-year period until 30 September 2002. This is an average of 159 applications for mediation each year. In relation to NSW shopping centres, the average number of applications for mediation was 92 per year. In other words, only 0.7% of retail tenancies in NSW shopping centres – or 7 in every 1,000 retail tenancies – results in a dispute requiring formal mediation. Of these formal mediations, the Retail Tenancy Unit advises that more than 80% are successfully resolved by mediation. (Those that are not resolved are referred to the Retail Leases Division of the Administrative Decisions Tribunal for resolution.) These statistics relate only to NSW but there is no reason to believe the situation is different in other States.

These statistics show that the idea of a war occurring in Australian shopping centres was nonsense. Yet the recommendations of the Reid Report led to the Federal Government introducing section 51AC of the Trade Practices Act, which the then Minister said was specifically directed at the retail tenancy relationship.

In recommending this legislative change the Reid Report, and the Federal Government in its response, ignored the recommendation of the Federal Department of Industry, Science and Tourism, in its submission to the inquiry: "There is no denying that many small businesses believe there are systemic problems in the commercial environment which restrict their growth and leave them open to 'exploitive' conduct by other firms. It is this perception of unfair disadvantage that has resulted in this inquiry and the calls from many firms for legislative protections against 'harsh or oppressive' conduct. **However, an examination of the issues raised by small business to the inquiry and its many predecessors, and the particular circumstances of problems raised with the Government, does not necessarily support the case for legislative amendment. Many of the problems can be actioned under existing Federal or State law while others are consequent of certain characteristics of small business that cannot be effectively addressed by legislation."** (Emphasis added.)

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8. Conclusion and Recommendation

Businesses, large and small, require certainty in their dealings with other businesses. This is provided by the extensive laws already imposed on owners, managers and tenants under existing State and Territory retail tenancy laws.

We **recommend** that section 51AC should not be amended by the introduction of the words “unfair” or “harsh”. Instead, in order to add value to the present retail tenancy regulatory system, both tenants and owners should be encouraged to bring forward matters of concern and reach a balanced solution. The solution could then be the subject of a voluntary code or statutory requirement.

We consider that the Committee should give support for this approach.

9. The Shopping Centre Council of Australia

The Shopping Centre Council of Australia is the retail property policy arm of the Property Council of Australia. It represents owners and managers of shopping centres in all States and Territories of Australia. The council’s 18 members are: AMP Henderson Global Investors, Centro Properties Group, CFS Gandel Retail Trust, Deutsche Asset Management, FPD Savills/Byvan, Intro International, Jones Lang LaSalle, Leda Holdings, Lend Lease Retail Group, Macquarie CountryWide Trust, McConaghy Holdings, MCS Property, Mirvac, Perron Group, Queensland Investment Corporation, Stockland, Westfield Holdings, Yu Feng Group.

We would be happy to meet with the Committee to discuss any aspect of this submission.

Yours sincerely,

Milton Cockburn
Executive Director

Level 26, Australia Square, 264-278 George Street, Sydney NSW 2000
Telephone: 02 9336 6902, Facsimile: 02 9336 6976, www.propertyoz.com.au/scca