The Senate

Economics References Committee

Need for a national approach to retail leasing arrangements

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Senate Economics References Committee

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Chapter 1

1.1 On 25 June 2014, the Senate referred the matter of the need for a national approach to retail leasing arrangements to the Economics References Committee for inquiry and report by 30 October 2014.[1] On 28 October 2014, the Senate granted an extension of time to report to the eighth sitting day in 2015.[2] On 3 March 2015, the committee was granted a further extension to report by the 18 March 2015.[3]

1.2 The terms of reference are as follows:

> 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, with particular reference to:
>
> a) the first right of refusal for tenants to renew their lease;
>
> b) affordable, effective and timely dispute resolution processes;
>
> c) a fair form of rent adjustment;
>
> d) implications of statutory rent thresholds;
>
> e) bank guarantees;
>
> f) a need for a national lease register;
>
> g) full disclosure of incentives;
>
> h) provision of sales results;
>
> i) contractual obligations relating to store fit-outs and refits; and
>
> j) any related matters.[4]

Conduct of inquiry

1.3 The committee advertised the inquiry on its website and in the *Australian*. The committee also wrote directly to the Commonwealth, state and territory governments, industry groups and associations, academics and other interested parties drawing attention to the inquiry and inviting them to make written submissions.

Submissions

1.4 The committee received 28 submissions, including 3 confidential submissions. The submissions and answers to questions on notice are listed at Appendix 1. On 13 February 2015, the committee held a public hearing in Canberra. A list of witnesses is at Appendix 2. References to the committee Hansard are to the

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1 *Journals of the Senate*, No. 36, 25 June 2014, p. 993.

2 *Journals of the Senate*, No. 61, 28 October 2014, p. 1629.

3 *Journals of the Senate*, No. 80, 3 March 2015, p. 2223.

4 *Journals of the Senate*, No. 36, 25 June 2014, p. 993.

Proof Hansard and page numbers may vary between the proof and the final Hansard transcripts.

Background

1.5 Retail tenancy legislation was first introduced at the state and territory level in the 1980s. Prior to the introduction of specific retail tenancy legislation, retail leases were treated under law as standard commercial leases. The intention of the retail tenancy legislation was to address perceived imbalances in bargaining power between shopping centre landlords and small retail tenants.[5]

1.6 Retail tenancy leases are currently governed by the following legislation and regulations in each state and territory:

- Australian Capital Territory (ACT)—*Leases (Commercial and Retail) Act 2001*;
- New South Wales (NSW)—*Retail Leases Act 1994*;
- Northern Territory (NT)—*Business Tenancies (Fair Dealings) Act 2003*;
- Queensland—*Retail Shop Leases Act 1994*;
- South Australia (SA)—*Retail and Commercial Leases Act 1995*;
- Tasmania—*Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998*;
- Victoria—*Retail Leases Act 2003*; and
- Western Australia (WA)—*Commercial Tenancy (Retail Shops) Agreements Act 1985*.

1.7 At the Commonwealth level, there is no specific legislation regulating retail leases. The *Competition and Consumer Act 2010*, however, contains generic provisions for regulating trade and commerce which apply to retail industry participants.[6]

1.8 Retail tenancy legislation covers a range of matters, such as lease terms, security bonds, disclosure of information and exclusion clauses.[7] Retail tenancy dispute resolution processes exist at both state and territory level, and through the Australian Competition and Consumer Commission (ACCC) at a national level.[8]

1.9 Retail tenancy legislation was mainly intended to address the relationship between shopping centre landlords and specialty tenants. Even so, the legislation

5 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 2.

6 The Treasury, *Submission 15*, p. 5.

7 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xviii.

8 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 67.

applies more widely to all landlords (large and small) offering retail tenancies and in some cases to 'large' national tenants (depending on the size, location and ownership structure).[9]

Structure of the report

1.10 This report comprises four chapters including this introductory chapter:

- chapter 2—provides an overview of previous reviews into retail leasing arrangements; and
- chapter 3—discusses the issues and concerns raised in public submissions received by the committee;
- chapter 4—examines the issues raised in relation to the role of the Commonwealth.

Acknowledgements

1.11 The committee thanks all those who assisted with the inquiry, especially those who made written submissions.

9 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xviii.

Chapter 2

Previous inquiries and reform processes

2.1 There have been a number of reviews of retail tenancy legislation at both state and Commonwealth level, including three parliamentary inquiries:

- House Standing Committee on Industry, Science and Technology, *Small business in Australia: Challenges, problems and opportunities*, January 1990;
- House Standing Committee on Industry, Science and Resources, *Finding a Balance: Towards Fair Trading in Australia*, May 1997; and
- Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure, A review of Australia's retailing sector*, August 1999.

2.2 In the last decade, the Productivity Commission (PC) has also considered retail tenancy leases in three reports:

- *The Market for Retail Tenancy Leases in Australia* (August 2008);
- *Economic Structure and Performance of the Australian Retail Industry* (December 2011); and
- *Relative Costs of Doing Business in Australia: Retail Trade* (September 2014).

2.3 In their 2008 report, the PC described the market for retail tenancies as being 'dynamic and complex' with around 290,000 retail tenancy leases at the time, and up to 58,000 entered into each year. Around one-fifth of tenancy leases were in shopping centres.[1]

2.4 In the 2008 and 2011 PC inquiries, retailers that made submissions raised the following areas of concern about retail tenancy leases:

- large differences between rental costs of anchor tenants and smaller specialty retailers in shopping centres;
- the significant differences in the cost of retail rents in Australia compared to the United States;
- the use of turnover data in shopping centres to set rents at 'excessive' levels;
- shop fit-out requirements in leases, particularly the inability of retailers to negotiate competitive quotes for the work undertaken;
- standard lease terms, although prescribed in most state and territory legislation, do not provide sufficient security and are insufficient to gradually amortise capital costs over time;

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1 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xvi.

- the limited negotiating power of retail tenants in shopping centres when renegotiating a lease;
- landlords exploiting their bargaining power when a lease expires by seeking unreasonable and often 'excessive' rent increases;
- retailers' lack of security of tenure during 'lease hold over' periods; and
- the lack of publicly available information relating to shopping centre rents.[2]

2.5 The 2008 PC report noted, however, that 'across the economy, large and small firms in all sectors trade without special regulation detailing the terms of their business relationship'. The PC reached the following conclusion:

> The Commission did not find strong evidence that the difference in the size of market participants in the retail tenancy sector distorts the efficient operation of the market. Overall, the market is working reasonably well—hard bargaining and varying business fortunes should not be confused with market failure warranting government intervention to set lease terms and conditions. Generally:
>
> - there is no convincing evidence that systemic imbalance of bargaining position exists outside of shopping centres;
> - in larger shopping centres, there is stiff competition by tenants for high quality retail space and competition by landlords for the best tenants, reflected by relatively low vacancy rates and high rates of lease renewals;
> - the more desirable tenants and shopping locations are able to negotiate more favourable lease terms and conditions;
> - the incidence of business failure in the retail sector is not exceptional compared to other service activities; and
> - formal disputes are relatively few and widely dispersed both geographically and according to shopping formats.[3]

Recommendations of the 2008 PC report

2.6 The PC observed that the state and territory legislation 'has been continually reviewed, amended and expanded' in attempts to 'improve security of tenure and reduce the uncertainties of retail tenancy leases'. In the PC's view, this has resulted in 'complex and prescriptive, and to some extent, arbitrary rules'.[4] The 2008 report stated that the retail tenancy market 'is working reasonably well overall', and that 'further attempts to prescribe lease terms and conditions would not improve outcomes'.[5] The

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2 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 262.

3 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, pp. xxv–xxvi.

4 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 264.

5 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xvi.

PC concluded that the operation of the market and a reduction in costs could be achieved by:

- reducing information imbalances and assisting efficient decision making by further improving transparency, disclosure and dispute resolution;
- reducing the prescriptiveness of legislation and moving to a retail lease framework that is nationally consistent; and
- adopting 'a more focused approach to the shopping centre segment of the market'.[6]

2.7 The 2008 PC report recommended that:

- state and territory governments should improve transparency and accessibility of lease information in the retail tenancy market—for example, by encouraging the inclusion of a one page summary of all key lease terms and conditions in retail lease documentation;
- in addition, state and territory governments should require a standard one page lease summary is available made on a publicly accessible website;
- the consistency and administration of lease information across jurisdictions should be improved;
- a voluntary national code of conduct for shopping centre leases, enforceable by the Australian Competition and Consumer Commission (ACCC), should be introduced;[7]
- unnecessarily prescriptive elements of retail tenancy legislation should be removed and a nationally consistent model legislation for retail tenancies established; and
- state and territory governments should consider relaxing planning and zoning controls that limit competition and restrict retail space and its utilisation.[8]

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6 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xvi.

7 The PC recommended that the code should include provisions for 'standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution', although it should 'avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and availability of a new lease'.

8 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, pp. xvii–xxxv. The adoption of uniform retail tenancy legislation around Australia was earlier recommended in 1997 by the House of Representatives Standing Committee on Industry, Science and Resources in its report *Finding a Balance: Towards Fair Trading in Australia* (see p. 25 of that report), and again in 1999 by the Joint Select Committee on the Retailing Sector in its report *Fair Market or Market Failure?: A review of Australia's retailing sector* (see p. xxii of that report).

Government response to the 2008 PC report

2.8 The then government responded to the 2008 PC report in August 2008, emphasising that the Commonwealth had a limited role in the retail tenancy market. Nevertheless, their response:

- offered in-principle support to the harmonisation of state and territory retail tenancy legislation;
- recognised the merit in, and offered in-principle support for, a national code of conduct for shopping centre leases as an alternative to prescriptive legislation;[9] but
- did not support a recommendation regarding the removal of restrictions on commercial decision making in retail tenancy legislation that the PC considered did not improve operational efficiency, compared with the broader market for commercial tenancies.[10]

2011 and 2014 PC reports

2.9 The PC revisited retail tenancy leasing in a broader 2011 inquiry. The PC noted that complaints similar to those received in 2008 were again lodged. However, it concluded that planning and zoning regulation 'appears to be the root cause of many of the problems that arise in retail tenancy'. It noted that, given the distortions and constraints stemming from planning and zoning, additional refinements to retail tenancy regulations were 'unlikely to result in significant improvements to the operation of the retail tenancy market given the distortions and constraints arising from planning and zoning regulation'.[11] The PC found:

> There is scope to improve the retail tenancy market by removing unnecessary restrictions on competition and constraints on the supply and location of retail space through the reforms to planning and zoning regulation…Implementing these reforms would potentially increase competition between shopping centre landlords, and reduce the bargaining

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9 However, the response indicated that this was a matter for the states and territories and, in the then government's view, such a code 'should not be an additional layer of regulation and should only be pursued if the current legislative arrangements are to be reformed'. Australian Government, *Commonwealth Government Response to the Productivity Commission Inquiry: The Market for Retail Tenancy Leases in Australia*, August 2008, www.industry.gov.au/smallbusiness/Support/Documents/GovtResponsetoTheMarketforRetailTenancyLeasesInquiry.pdf (accessed 18 July 2014), p. 2.

10 The response argued that '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 safeguards, 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'. Australian Government, *Commonwealth Government Response to the Productivity Commission Inquiry: The Market for Retail Tenancy Leases in Australia*, August 2008, p. 2.

11 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 259.

> power of landlords vis-à-vis their tenants, by improving tenants' ability to relocate close by and preserve their business after lease expiry.[12]

2.10 In 2014, the PC again examined retail tenancy, as part of a broader inquiry into retail trade.[13] The 2014 PC report recalled the 2008 findings, stating:

> Further improvements to the operation of retail tenancy markets in line with the acknowledged best practices suggested by the Commission in its 2008 study should remain a priority for state and territory governments. The key areas for reform include improving transparency, disclosure and dispute resolution, supporting a move to less prescriptive legislation, and ensuring greater national consistency.[14]

2.11 Drawing also from its 2011 research, the 2014 PC report maintained the view that 'many of the problems in the retail tenancy market could be addressed by relaxing planning and zoning controls that limit competition and restrict the availability of retail space'.[15]

Other reviews currently underway or recently concluded

Queensland

2.12 The Queensland retail tenancy legislation was reviewed between 2011 and 2013. The statutory report on the review was tabled on 25 November 2014 during the introduction of the Retail Shop Leases Amendment Bill 2014. The bill, which gives effect to the outcomes of the review, was referred to the state's Legal Affairs and Community Safety Committee for detailed consideration.[16]

2.13 The principle objectives of the review were to:

- improve the efficiency and effectiveness of the *Retail Shop Leases Act 1994*;
- reduce red tape for tenants and landlords and leave appropriate matters to commercial negotiation or education, rather than legislating;
- continue to address imbalance in accessing information and negotiating power, while not interfering with commercial arrangements or outcomes;

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12 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 259.

13 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade, September 2014*, p. 135.

14 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade, September 2014*, p. 138.

15 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade, September 2014*, p. 138.

16 Department of Justice and Attorney-General, Queensland Government, 'Review of the *Retail Shop Leases Act 1994*', http://www.justice.qld.gov.au/corporate/community-consultation/community-consultation-activities/past-activities/review-of-the-retail-shop-leases-act-1994 (accessed 28 January 2015).

- align with the position in other jurisdictions (where this improves the Act) for enhanced operational efficiency and legal certainty for landlords and tenants operating across jurisdictions; and
- clarify the meaning of provisions in the Act, as appropriate.[17]

2.14 While the review identified areas for clarification, improvement and red tape reduction, it also found that:

> …generally the provisions of the Act remain appropriate in providing a framework for addressing imbalance in negotiating power and access to information between major shopping centre landlords and small retail tenants through mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.[18]

2.15 The Queensland Parliament was dissolved on 6 January 2015 and the bill automatically lapsed. A new bill may be introduced in the next Parliament.[19]

New South Wales

2.16 The NSW legislation is currently being reviewed by the NSW Small Business Commissioner. A discussion paper was issued in November 2013 and submissions closed in February 2014.

2.17 The discussion paper identified the following reasons for the review:

- the Registrar of Retail Tenancy Disputes and the Office of the NSW Small Business Commissioner (the OSBC) had identified a number of problems in administering provisions of the Act;
- the NSW Government had received stakeholder submissions that there were continuing or emerging problems within the retail leasing market which were not adequately addressed by the provisions of the Act;
- the commitment to reducing red tape for businesses and some changes to the Act intended to reduce unnecessary regulatory burdens and costs to businesses;
- recent changes in the retail sector including the growth of online sales and a relative decline in traditional bricks and mortar retail stores meant that certain provisions of the Act may no longer be appropriate; and

17 Queensland Government, *Report on statutory review of the Retail Shop Lease Act 1994*, November 2014, p. 2.

18 Queensland Government, *Report on statutory review of the Retail Shop Lease Act 1994*, November 2014, p. 10.

19 Legal Affairs and Community Safety Committee, 'Retail Shop Leases Amendment Bill 2014 (Lapsed)', https://www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/past-inquiries/RSLAB2014 (accessed 28 January 2015).

- the NSW Government had considered recent reviews and legislative changes to the equivalent retail leases legislation in other jurisdictions, including Victoria, Queensland and Western Australia.[20]

2.18 The review is currently being finalised, and the findings have not been released.[21]

South Australia

2.19 The SA Government is currently conducting a review of the *Retail and Commercial Leases Act 1995*. The Small Business Commissioner released an issues paper in December 2014, the closing date for submissions was 13 February 2015.[22]

Competition Policy Review (Harper Review)

2.20 The Australian Government's Competition Policy Review (Harper Review) was announced on 4 December 2013, and the final terms of reference were released on 27 March 2014. The Harper Review released a Draft Report in September 2014 and is due to provide its final report to government by the end of March 2015.[23]

2.21 The Harper Review is a 'root and branch' review of Australia's competition laws and policy. It is examining the competition provisions and special protection for small business in the law, and the effectiveness of the framework for industry codes of conduct protections against unfair and unconscionable conduct.[24]

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20 NSW Small Business Commissioner, *2013 Review of the Retail Leases Act 1994*, November 2013, http://www.smallbusiness.nsw.gov.au/__data/assets/pdf_file/0011/34976/Retail-Discussion-Paper-Web.pdf (accessed 29 January 2015).

21 Advice from the Office of the NSW Small Business Commissioner, 13 March 2015.

22 South Australian Small Business Commissioner, *Issues Paper – December 2014*, http://www.sasbc.sa.gov.au/files/270_sasbc-2014-058_rcla_issues_paper_final_19_december_14.pdf?v=554 (accessed 23 February 2015).

23 Australian Government, 'Competition Policy Review', http://competitionpolicyreview.gov.au/ (accessed 29 January 2015).

24 The Treasury, *Submission 15*, p. 11.

Chapter 3
Principal issues

Introduction

3.1 In this chapter, the committee considers the following matters—definition of retail premises and who should be covered by retail leasing arrangements; the first right of refusal to renew lease; minimum leases terms and fit-outs; rent adjustments; bank guarantees; provision of sales data; a national lease register; disclosure of incentives; and dispute resolution.

Definitions of 'retail premises'

3.2 Definitions of 'retail premises' vary across state and territory jurisdictions, and can be based on rent thresholds, ownership structure (i.e. public companies) and floor space. The various state and territory retail tenancy legislation contain exclusions from coverage which are included in the definitions of 'retail premises' and/or in the definition of 'retail shop' and/or in the definition of 'retail lease'.[1]

3.3 The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres and held the view that the 'coverage of retail tenancy legislation should be strictly confined to small retail businesses which may need regulatory protection.' It argued that such legislation should not extend to 'those businesses which are capable of looking after themselves in negotiations with landlords.'[2]

3.4 The Australian National Retailers Association (ANRA), representing large national retailers, supported the contention that retail leasing arrangements should only cover small/medium retailers, as retailers operating out of large stores, such as ANRA members were comfortable negotiating with landlords.[3] While recognising the merit in having a 'nationally harmonised approach' to retail leasing, ANRA suggested:

> …any such framework should exclude large retailers and instead focus on the relationship between smaller retailers and landlords as this is the area where market-failure is most likely to occur.[4]

3.5 Both SCCA and ANRA expected that limiting the coverage of retail tenancy legislation would minimise unnecessary and restrictive red tape on both lessors and lessees.[5]

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1 SCCA, answers to questions on notice no. 2, p. 10.

2 SCCA, answers to questions on notice no. 2, p. 10.

3 ANRA, *Submission 20*, p. 1.

4 ANRA, *Submission 20*, p. 1.

5 SCCA, answers to questions on notice No. 2, p. 10; ANRA, *Submission 20*, p. 1.

Floor size, rent thresholds and public listing

3.6 The Victorian Small Business Commissioner noted that the definition of 'retail premises' in the Victorian Retail Leases Act (RLA) is quite broad, as recent Tribunal and Court decisions have confirmed. He noted that:

> This broad definition has meant that many more businesses have benefited from the affordable, effective and timely [alternative dispute resolutions] services provided by my office under the RLA Vic than may have occurred if a narrower definition of retail premises applied.[6]

3.7 With regard to exemptions from a retail leasing regulatory framework, ANRA advised that its members favoured a store size limit, such as 1000 square metres used in NSW, over exclusions for publicly listed companies. It explained:

> …some jurisdictions use listing status as a proxy for size of the retailer (i.e. all publically listed companies are excluded).[7]

3.8 ANRA recommended that any public listing exemption should be in addition to, rather than in place of, a store based exemption. ANRA noted a small number of retailers, such as Best & Less, have large format stores but are privately owned.[8]

3.9 The SCCA recommended that a 'harmonised' definition of 'retail premises' should be based on the definition contained in section 3 of the NSW Retail Lease Act. The NSW Retail Lease Act excludes a range of retail premises from coverage of the Act:

- premises that have a lettable area of 1,000 square metres or more;
- premises used wholly or predominantly for the carrying on of a business on behalf of a landlord;
- cinemas, bowling alleys, skating rinks; premises in an office tower that forms part of a retail shopping centre where these are not used for retail purposes; and
- businesses exempted by regulation.[9]

3.10 In discussing the potential for nationally consist coverage of leasing laws, Mr Trevor Evans, National Retail Association (NRA), stated that 'floor space is obviously not a perfect measure to use, but the 1,000 square metre threshold that is currently used in states such as NSW and Victoria probably is our best chance of getting consistency'.[10] Mr Evans noted:

> Options that refer to things like dollars, turnover sales or FTEs to try to measure the size of businesses are particularly fraught because businesses

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6 Victorian Small Business Commissioner, *Submission 4,* p. 2.

7 ANRA, *Submission 20,* p. 2.

8 ANRA, *Submission 20,* p. 2.

9 SCCA, answers to questions on notice no. 2, p. 11.

10 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard,* 13 February 2015, p. 2.

> can change to either side of those thresholds during the term of a lease. Ownership models are also particularly fraught. If you are going to start to divide companies in terms of listed or non-listed, or maybe even whether they are private or government run service providers, you do tend to set up a two-tier system competing for the same space in a lot of instances. There are also huge flaws given the existence of very large, privately owned retailers. There are also issues around what you do with foreign owned retailers, which are increasingly a presence in the Australian retail landscape.[11]

3.11 The recent Queensland government review of retail tenancy legislation resolved to progress an amendment in the Retail Shop Leases Amendment Bill 2014 to exclude leases for floor areas of 1000 square meters or more. The statutory report stated:

> Amendment progressed on basis of predominant [reference group] view that it will significantly reduce unnecessary regulation of the Queensland retail sector, with minimal impact on small to medium business; and will align with other jurisdictions, including NSW and WA.[12]

3.12 The Queensland review also considered excluding leases where the tenant is a listed corporation/subsidiary. It noted that the exclusion of listed companies, and their subsidiaries would align with Victorian, WA, SA and NT legislation. Nonetheless, it resolved not to progress an amendment in the Retail Shop Leases Amendment Bill 2014 as it did not have predominant reference group support and there were implications for the existing entitlement of franchisees to claim compensation for business disruption from the retail landlord under section 43(1) of the Act.[13]

Statutory Rent Thresholds in South Australia

3.13 South Australian Lease Management, a professional services real estate business, noted that SA retail tenancy legislation includes a rent threshold, whereby leases are excluded from the Act where rent is greater than $400,000 per annum.[14] Both South Australian Lease Management and the Jewellers Association of Australia raised concerns that while leases may start with rent under the threshold, they can be

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11 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 2.

12 Queensland Government, 'Appendix 4- Statutory Report', *Report on statutory review of the Retail Shop Leases Act 1994*, p.1 ; see also 'Attachment 2; Statutory Review: Retail Shop Leases Act 1994 Queensland, Reference Group Report, Table of Recommendations and Outcomes', pp. 8–9. The ACT and NT legislation also includes a floor area exclusion.

13 Queensland Government, 'Appendix 4- Statutory Report', *Report on statutory review of the Retail Shop Leases Act 1994*, pp. 4–5 ; see also 'Attachment 2; Statutory Review: Retail Shop Leases Act 1994 Queensland, Reference Group Report, Table of Recommendations and Outcomes', pp. 10–11.

14 South Australian Lease Management, answers to questions on notice no. 4, p. 4.

outside of the threshold at the end of the lease and lose all the benefits of preferential rights at the end of the lease.[15]

3.14 South Australian Lease Management explained that it has 'many situations now where our clients entered into leases several years ago with rights of renewal with commencing rent under $400,000 but as result of rent reviews are now in excess of $400,000'.[16] This was of particular concern as tenants were no longer covered by the SA Act at the time of lease renewal, and were no longer covered by preferential rights of renewal.[17]

3.15 Jewellers Association of Australia proposed that either the rent threshold should be increased, or a ruling be made that if a lease, when negotiated, was under the Act, it should remain under the Act and vice versa.[18]

3.16 The Law Institute of Victoria noted that in Victoria, under the *Retail Tenancies Act 1986* (Vic) and the *Retail Tenancies Reform Act 1998* (Vic), premises that exceeded 1000 square metres were not regulated. It suggested, however, that this threshold 'proved difficult to apply and interpret and gave rise to a significant amount of litigation'. The Law Institute of Victoria advised that the current Victorian Act:

> …limits its application to retail premises with an annual rent not exceeding $1 million (exclusive of GST) (see: s 4(2) of the Victorian Act and its regulations). This ceiling has not created difficulties or confusion in its application and is generally regarded as infinitely preferable to the floor area limit that applied under the earlier legislation.[19]

Committee view

3.17 The committee is of the view that harmonisation of retail leasing would be of great benefit to both landlords and lessees but appreciates that this is a matter for the states and territories.

3.18 With regard to how to determine which retailers should fall within the regulatory framework, the committee notes the various definitions and arguments on whether floor space or rent threshold should be one of the main determinants. It also notes concerns about the possibility of a lease coming under the legislation at the commencement of the lease but falling outside the regulatory framework due to rent rises during the term of the lease. The committee supports the contention that should a lease be covered by legislation on being entered into, it should remain covered by that legislation until the lease is terminated.

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15 South Australian Lease Management, answers to questions on notice no. 4, p. 4; Jewellers Association of Australia, *Submission 6*, p.5.

16 South Australian Lease Management, answers to questions on notice no. 4, p. 4.

17 South Australian Lease Management, *Submission 3*, p. 5.

18 Jewellers Association of Australia, *Submission 6*, p. 5.

19 Law Institute of Victoria, *Submission 7*, p. 2.

First right of refusal for tenants to renew leases

3.19 Retail tenancy legislation in South Australia and the Australian Capital Territory includes provisions for preferential rights for tenants to renew or extend a shopping centre lease.[20] Preferential rights provisions are intended to increase security of tenure of sitting tenants while balancing the rights of the owner. As such, the provisions contain exemptions on providing preferential rights for a number of reasons. For example, if the landlord wishes to change the tenancy mix or if renewal of the lease would substantially disadvantage the landlord.[21]

3.20 The Restaurant and Catering Industry Association explained the imbalance in the bargaining position between tenants and landlords when renewing leases. It stated:

> The imbalance often results from the additional investment restaurant owners make above and beyond rent paid, including funds contributed to fit out, marketing, and the generation of goodwill. This means that at the time of lease renegotiation, it can sometimes be more critical for the operator to re-secure the lease than the landlord.[22]

3.21 The 2008 PC report took the view that preferential rights provisions were an example of overly prescriptive legislation. The report stated that:

> …the provisions are highly qualified so as not to reduce the rights of a landlord over leased premises. They are therefore likely to be ineffective in adding to tenant's security of tenure. To the extent that the provisions have had an impact, they may hinder a landlord in choosing a tenant who (in the landlord's commercial judgement) would make best use of the retail space. This would potentially lower productivity.[23]

3.22 Tribe, Conway & Company Solicitors argued that granting first right of refusal should be the result of negotiations between landlords and tenants, and that:

> A lease is a contract between a landlord and tenant for the use of the landlord's property for a fixed period, and on fixed conditions. The lease does not, and should not, create a right or expectancy of occupation by the tenant after the end of the fixed period.[24]

3.23 The Property Law Committee of the Law Society of New South Wales stated:

> A right of first refusal is often premised on the basis that it provides a tenant with a greater security of tenure. However, in the [Property Law]

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20 Minter Ellison, *Retail Tenancy Legislation Compendium*, ed. 6, 17 April 2014, p. 32, www.minterellison.com/files/Uploads/Documents/Publications/Reports%20Guides/RG_2013_RetailLeasingCompendium_[BNE130050].pdf (accessed 16 July 2014).

21 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 50.

22 Restaurant and Catering Industry Association, *Submission 2*, p. 2.

23 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 234.

24 Tribe, Conway & Company Solicitors, *Submission 1*, p. 1.

> Committee's view, security of tenure is better assisted by requirements for both parties to the lease to give adequate notice to each other of their future intentions such that appropriate negotiations can begin well prior to the end of the current lease.[25]

3.24 The Law Institute of Victoria stated that they were neither in favour nor opposed to the creation of statutory rights to renew leases. Even so, they noted that:

> …the *Retail and Commercial Leases Act 1995* of South Australia, which gives shopping centre tenants a statutory first right of refusal, also allows for the parties to exclude the right where the lease contains a 'certified exclusionary clause'. Where there is an ability to exclude the statutory right, it seems likely that many landlords would wish to do so. The difficulty in drafting a clause giving effect to the statutory right is to ensure that the right does not operate unfairly against the landlord's fundamental right to determine the use to which its property is put.[26]

3.25 In its submission to the inquiry, the Commercial and Property Law Research Centre, Queensland University of Technology stated:

> 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'.[27]

3.26 The Law Council of Australia did not support an automatic first right of refusal. They argued that first right of refusal should not be the subject of national legislation, rather it is a matter that should be negotiated between parties. The Law Council also noted:

> In some jurisdictions there are already requirements in the legislation for a landlord to notify the tenant of their intentions at the end of the lease term, with an automatic extension of the lease being available in certain circumstances.[28]

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25 Law Society of New South Wales, *Submission 9*, pp. 2–3.

26 Law Institute of Victoria, *Submission 7*, p. 1.

27 Commercial and Property Law Research Centre, Queensland University of Technology, *Submission 12*, p. 6.

28 *Submission 25*, p. 4; see ss 44 and 44A of the *Retail Leases Act 1994* (NSW).

3.27 ANRA were opposed to provisions for a minimum requirement included in agreements for a first right of refusal. In its view if a tenant wants to have a first right of refusal, this can be negotiated in the initial contract period.[29]

3.28 The Australian Retailers Association (ARA), representing a wide variety of retailers, argued that there should be a first and last right of refusal by a sitting tenant on any rental offering, stating:

> We believe that such a mechanism will force the landlord to meet the real market value for the demised premises and not take advantage of a veiled threat or misrepresentation of the true facts as to an alternative tenant for the tenancy. We also believe this mechanism will create an environment conducive to bargaining in good faith, fair disclosure and transparent undertakings.[30]
>
> The ARA also see this mechanism as being a solution to the problem experienced by a retailer whereby a sitting tenant effectively gives up a large percentage of goodwill of the business to the landlord (via increased rent) as a defence to the threat that a third party will take over the lease at a higher rent without having to purchase the goodwill of the existing business.[31]

Minimum lease terms and store fit-outs

3.29 South Australian Lease Management noted that a typical fit-out in a retail shop with an area of about 100 square metres costs in the range of $200,000 to $300,000. It noted:

> If the lease term is only five years that investment in fitout must be written off over the five year term. If the fitout costs $250,000 and interest is 8% the annual expense to the retailer will be approximately $60,000.[32]

3.30 Both the SCCA and the NRA supported the removal of the five-year minimum term for retail leases. They noted that when the five-year minimum lease term was introduced, five-year terms increasingly became the only lease term available to tenants.[33]

3.31 Mr Michael Lonie, NRA, explained that there was a minimum five-year lease period across most jurisdictions. Since Queensland removed the minimum term in 1994,[34] the NRA has observed that it is far easier to get a seven-year or an eight-year

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29 ANRA, *Submission 20*, p. 2.

30 ARA, *Submission 24*, p. 4.

31 ARA, *Submission 24*, p. 5.

32 South Australian Lease Management, *Submission 3*, p.7.

33 SCCA, answers to questions on notice no. 2, p. 2; NRA, answers to questions on notice no. 1, p. 3.

34 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. 49.

lease, which enables the tenant to amortise a large investment and have a minimum left at the end of the lease term.[35]

3.32 Mr Brian Scarborough, South Australian Lease Management, commented that he was unaware of 'any jurisdiction anywhere that provides an out for a tenant who is trapped in a long-term lease and cannot afford the rent'.[36] The SCCA noted that small neighbourhood shopping centres commonly offer options leases, for example a three year lease with two three year options. It noted that options leases are less common in large regional shopping centres because:

> …the vacancy rates that exist in neighbourhood centres are usually much greater than exist in regional shopping centres. The most recent figures for 2014 published by JLL [Jones Lang LaSalle], for example, show vacancies in regional shopping centres were only 1.4% while in neighbourhood centres they were 4.2%. It follows that the market bargaining position of prospective tenants in neighbourhood centres is much stronger than those in regional centres.[37]

Rent adjustment

3.33 The Restaurant and Catering Industry Association advised that the results from its benchmarking surveying indicated that:

> In determining lease arrangements, a majority of businesses indicate rent reviews are based on CPI increases (57.9 per cent), market review (19.8 per cent) or a mix of both (13.2 per cent). However, 9.1 per cent of businesses indicated rent reviews are determined based on turnover data.[38]

3.34 The National Footwear Retailers' Association put forward the view that initial rent arrangements should be based on fair market value per square metre with annual rent increases based on CPI.[39]

3.35 The Law Council of Australia submitted that the NSW legislation could provide a desirable model for national harmonisation with regards to rent reviews. It noted that the NSW legislation provides for market rent reviews both during the term of the lease and upon renewal, and also allows valuers access to information regarding incentives.[40]

3.36 Tribe, Conway & Company Solicitors expressed the view that landlords and tenants should be free to negotiate their own commercial arrangements with prescriptive regulations. They maintained that market rent reviews, CPI (consumer

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35 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 3.

36 Mr Brian Scarborough, South Australian Lease Management, *Committee Hansard*, 13 February 2015, p. 14.

37 SCCA, responses to questions on notice no. 2, p. 2;

38 Restaurant and Catering Industry Association, *Submis*sion 2, p. 2.

39 National Footwear Retailers' Association, *Submission 10*, p. 1.

40 Law Council of Australia, *Submission 25*, p. 5.

price index) adjustments and similar adjustments in annual rent were fair methods for keeping pace with inflation.[41]

Bank guarantees

3.37 Most tenants provide their landlord with some form of security in case the tenant fails to meet the requirements of the lease. According to SCCA:

> It is entirely appropriate for a landlord to be provided with some form of security from a tenant in the event lease terms are broken.[42]

3.38 Landlords and tenants usually agree to either a cash bond or a bank guarantee as a form of security. Indeed, a bank guarantee, which is issued by a bank and held by the landlord, is a common tool that provides the landlord with security against the tenant defaulting under the lease.[43]

3.39 A number of submitters argued that there should be some regulation surrounding bank guarantees. For example, the Restaurant and Catering Industry Association argued that there should be explicit guidelines about when bank guarantees can be drawn down, including requirements for informing tenants. It proposed 30 days as the reasonable timeframe for return of funds.[44]

3.40 The SCCA was not aware of any administrative issues that have arisen as a result of the use of bank guarantees as a form of security, but noted that although it did not agree with the view that bank guarantees need to be regulated, it would not object to a timeframe being included in regulation. The SCCA recommended that bank guarantees be paid by the lessor within 90 days of the expiry of the lease assuming, that the tenant has not exercised an option to renew and has complied with all make good obligations.[45]

Provision of sales data

3.41 The Restaurant and Catering Industry Association argued that given the cyclical nature of the hospitality industry, the use of turnover data when determining rent reviews could make it more difficult for operators to balance leasing costs over the life of the lease.[46] It was concerned about the lack of transparency in how this information was used across multiple tenant arrangements, particularly in shopping centres. It also noted:

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41 Tribe, Conway & Company Solicitors, *Submission 1*, p. 2.

42 SCCA, *Submission 17*, p. 19.

43 SCCA, *Submission 17*, p. 19.

44 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

45 SCCA, *Submission 17*, p. 20.

46 Restaurant and Catering Industry Association, *Submission 2*, p. 2.

> Rarely do landlords grant struggling tenants rent concessions following a review of turnover data, yet rents are revised upwards based on favourable earnings recorded.[47]

3.42 The SCCA advised the committee that a code of practice governing the provision of sales information by retailers was being developed by the Shopping Council of Australia, the National Retail Association, the Australian Retailers Association and the Pharmacy Guild, which would ensure that the use of sales information would no longer be a contentious issue within the industry.[48]

3.43 At the public hearing on 13 February 2015, however, the committee heard from witnesses that the process had stalled.[49] The SCCA explained:

> A series of meetings were held during 2014 and a Draft Code of Practice on the Reporting of Sales and Occupancy Costs in Australian Shopping Centres has been prepared. This Draft Code has been endorsed in principle by the SCCA and the National Retail Association. The Australian Retailers Association wishes to hold further discussions and to include some of its members. That meeting is currently being arranged.[50]

Improving transparency, disclosure and dispute resolution

National lease register

3.44 The Restaurant and Catering Industry Association supported the findings of the PC 2008 report recommendation that a register summarising the financial arrangements of a lease(s) should be made publically available (and in a downloadable format).[51] National Footwear Retailers' Association also supported a national register.[52]

3.45 Leasing Information Services (LIS) uses publicly available registers to provide tenants and industry representatives with leasing information. It advised that it was able to provide extensive data on the states with legal requirements to register leases entered into for over three years. However, as WA, SA Victoria and Tasmania did not currently require lease registration, LIS were unable to provide a national service.[53]

3.46 LIS argued there was an information asymmetry that benefited landlords, particularly in shopping centres, and decreased the bargaining power of tenants.

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47 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

48 SCCA, *Submission 17*, p. 26.

49 Mr Angus Nardi, Executive Director, SCCA, *Committee Hansard*, 13 February 2015, p. 13; Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, pp. 3, 9.

50 SCCA, answers to questions on notice no. 2, p. 9.

51 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

52 National Footwear Retailers' Association, *Submission 10*, p. 2. See also Australian Lease & Property Consultants Pty Ltd, *Submission 26*, p. 8.

53 LIS, *Submission 8*, p. 4.

Because landlords have all sales and rental information for all tenants, and tenants only have their own sales and leasing data, tenants generally lack vital information to make informed and enabling decisions. This asymmetry was a serious economic issue, leading to 'price distortions due to the fact that one party possesses more or better information than the other.'[54]

3.47 Transworld Enterprises, a family owned jewellery retailer, expressed the view that the lease registers that exist in Queensland and NSW were of 'no value from a retailer's point of view'. It argued:

> They fail to include incentives, or any ancillary benefits and by their very nature are misleading. They are at odds with the governments mandate to provide clear and honest data when the reality is quite the opposite.[55]

3.48 The Law Institute of Victoria did not believe mandatory registration of leases would achieve the results desired by its proponents 'because the information relating to 'real' (as opposed to 'effective') rent, rent holidays, landlord incentives and the like, will not be contained in the registered instrument but would be contained in a collateral document.' Put succinctly, 'landlords do not like disclosing this information'.[56]

3.49 It also observed that until 2012, the Victorian Act contained a provision that required the landlord to provide prescribed information to the Small Business Commissioner. However, this provision was repealed as it 'increased compliance costs without serving any purpose as the Act did not specify the purpose or purposes to which the information might be put'.[57]

3.50 The Law Society of New South Wales commented that given the Victorian experience, the adoption of a national lease register would be unnecessary.[58]

3.51 The Australian Registrars National Electronic Conveyancing Council (ARNEC), the Law Council of Australia, and the Property Law Reform Alliance all submitted that a separate national lease register was neither desirable nor warranted. Instead, it expressed the view that the existing 'Torrens Land Title System' was the most appropriate register and that the system had worked effectively in Australia for more than 150 years.[59]

3.52 The Torrens title system is a long standing, proven and well regarded method of recording and registering land ownership and interests. Established in the 1850s in

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54 LIS, *Submission 8*, pp. 8–9.

55 Transworld Enterprises, *Submission 27*, p. 2.

56 Law Institute of Victoria, *Submission 7*, p. 3; see also Law Society of New South Wales, *Submission 9*, p. 4.

57 Law Institute of Victoria, *Submission 7*, p. 3.

58 Law Society of New South Wales, *Submission 9*, p. 4.

59 ARNEC, *Submission 22*, p. 2; Law Council of Australia, *Submission 25*, p. 5; Property Law Reform Alliance, *Submission 21*, p. 12.

South Australia, it has since been adopted throughout Australia and overseas in countries such as England, Ireland, Malaysia, Singapore, and Canada.[60]

3.53 The Law Council of Australia submitted:

> The adoption of a Uniform Torrens Title Act, would allow for a uniform and consistent approach for registering leases, whilst respecting the rights of each state and territory to maintain their own Torrens register.[61]

3.54 The Property Law Reform Council argued further that best practice outcomes could be achieved through a Uniform Torrens Title Act which included an emphasis on registration of retail leases in existing land titles registries.[62]

3.55 The NRA supported the development of a Uniform Torrens Title Act, which was outlined in the Law Council of Australia's submission.[63] It agreed that this would achieve a uniform and consistent approach across all jurisdictions for the registrations of leases while at the same time, respecting the right of each state to maintain their own Torrens register.[64]

3.56 Both the NRA and the Law Council of Australia recommended the NSW Land Titles Office Register as the best model for any national lease register, where all leases with a term greater than three years must be registered.[65]

3.57 The SCCA was opposed to the establishment of any separate state government sponsored lease register, beyond those required under property law, as this would inevitably involve an administrative burden and cost to landlords.[66]

3.58 The NRA raised concerns about who would be responsible for maintaining and updating a separate national register. It stated:

> Retail leases are the domain of the states which oversee property rights with no national body operating in that jurisdiction, therefore the creation of such a register would not only be costly but would quickly become outdated due to the speed at which leases expire or are dissolved.[67]

Full disclosure of incentives

3.59 The most common form of incentive is for the landlord to contribute to the expense of a fit out, or allowing a period where the rent is free or discounted.

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60 Victorian Department of Transport, Planning and Local Infrastructure, 'Torren Title', http://www.dtpli.vic.gov.au/property-and-land-titles/land-titles/torrens-titles (accessed 2 March 2015)

61 Law Council of Australia, *Submission 25*, p. 5.

62 Property Law Reform Council, *Submission 21*, p. 2.

63 NRA, answers to questions on notice, p. 2; Law Council of Australia, *Submission 25*, p. 5.

64 NRA, answers to questions on notice, p. 2.

65 NRA, answers to questions on notice, p. 2; Law Council of Australia, *Submission 25*, p. 5.

66 SCCA, *Submission 17*, p. 21.

67 NRA, *Submission 11*, p. 6.

3.60 Mr Scarborough, South Australian Lease Management, gave an example of how substantial such incentives could be. He recalled being present at a board meeting of a group he was representing during a discussion on market rents and the sharing of information on the rents being paid. He explained:

> One question was asked of a party who had just finished negotiating a lease as to what level of rent they were paying. Tt said between $2,000 and $2,100 per square metre. They said that seems relatively expensive and asked if there was an incentive involved. There was a very large incentive. It was about $150,000. We said, 'If we had not asked you that question and you were not required to give that out, we would be believing that the market rent was in the range of $2,000 to 2,100 when it is actually not.' The incentive of $150,000 offset the cost of the fit-out enormously; instead of having to fund a $200,000 fit-out over five years, they only have to fund $50,000. Amortising at seven or eight per cent...it changes dramatically the actual market value of the rent.[68]

3.61 South Australian Lease Management argued that it 'should be illegal for incentives to be hidden from public view to deceive the market and everyone involved in it'.[69] Mr Scarborough stated:

> It blindsides the entire market in terms of capital value of the investment property for the investors and the amount of market rent the tenants pay for it when they are competing for the space.[70]

3.62 The Jewellers Association of Australia agreed with this contention that incentives should be publically available. Mr Colin Pocklington elaborated on the Association's concerns:

> ...let's say there is a lease for $100,000 and the landlord says, 'Let's make it $120,000 but we'll give you a few months rent free. The net result for that tenant is the same, but the supposed market value is revalued by 20 per cent.[71]

3.63 The Jewellers Association of Australia noted that publishing such arrangements would be a distortion of the real market figure, and that governments providing this data on lease registers in NSW and Queensland and were 'therefore providing inaccurate information to the market.[72]

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68 Mr Brian Scarborough, South Australian Lease Management, *Committee Hansard*, 13 February 2015, p. 17.

69 South Australian Lease Management, *Submission 3*, p. 7.

70 Mr Brain Scarborough, South Australian Lease Management, *Committee Hansard*, 13 February 2015, p. 17.

71 Mr Colin Pocklington, Jewellers Association of Australia, *Committee Hansard*, 13 February 2015, p. 20.

72 Mr Toby Bensimon, Jewellers Association of Australia, *Committee Hansard*, 13 February 2015, p. 18.

3.64 Likewise, Transworld Enterprises argued that the state sanctioned NSW and Queensland lease registers were of no value from a retailer's point of view:

> They fail to include incentives, or any ancillary benefits and by their very nature are misleading. They are at odds with the governments' mandate to provide clear and honest data when the reality is quite the opposite.[73]

3.65 Interestingly, the Law Council of Australia informed the committee that it recognised that the negotiation of the terms of any retail tenancy requires 'confidential discussions as to the financial arrangements'. Even so, its Property Law Group Executive Committee had not yet reached a consensus view as to whether it was 'practical and enforceable to require "full" disclosure of incentives'. The Committee was interested, however, in 'debating and considering the matter further'.[74]

3.66 The Law Society of New South Wales noted that market reviews may not reflect the true market rent without access to information relating to incentives. However, it did not believe that any legislative attempts to mandate the full disclosure of incentives would succeed as they would be difficult to enforce and most likely 'give rise to onerous prescriptive requirements'.[75]

3.67 Similarly, the NRA, while supporting the full disclosure of incentives to a prospective tenant, it did not support full disclosure to third parties. It stated:

> Due to the confidential nature of incentives as agreed between parties, it is not in the best interests of either landlords or tenants to be obliged to fully disclose incentives. Such incentives should be protected from public accessibility.[76]

3.68 SCCA opposed any requirement for the disclosure of information that was considered to be 'commercial-in-confidence'. It agreed with the view of the Productivity Commission that:

> …lodged lease information should not necessarily include information on incentives and 'side deals'. Such a requirement would be difficult to enforce and would not significantly add to market information.[77]

Dispute resolution processes

3.69 As noted in chapter 2, retail tenancy dispute resolution processes exist at both state and territory level, and through the Australian Competition and Consumer Commission (ACCC) at a national level.

3.70 The period following the 2008 PC report saw the proliferation of small business commissioners who can, among other things, assist with retail tenancy

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73 Transworld Enterprises, *Submission 27*, p. 2.

74 Law Council of Australia, *Submission 25*, p. 6.

75 Law Society of New South Wales, *Submission 9*, p. 4.

76 NRA, *Submission 11*, p. 6.

77 Shopping Centre Council of Australia, Submission 17, p. 21; Productivity Commission, *Inquiry Report: The Market for Retail Tenancy Leases in Australia*, No.43, 31 March 2008, p. 253.

disputes. NSW appointed a small business commissioner in July 2011, followed by Western Australia in December 2011 and South Australia in 2012. These states joined Victoria as jurisdictions with a dedicated office for promoting a fair operating environment for small business (Victoria's commissioner was established in 2003).[78]

3.71 The NRA argued that while the various state dispute resolution processes can generally be followed in an affordable, effective and timely manner, the processes still vary from state to state. The NRA observed that:

> Some states are providing better service than others, and achieving a better success rate with either the formal mediation process or intervention between the parties by the relevant authority at an early stage.[79]

3.72 The NRA explained further:

> On the difference in some of the mediation processes, some states have tribunals which work very effectively. Others basically operate with a magistrate's court. These have a different style of evidence that is led. It is often more costly and more time-consuming.[80]

3.73 Mr Angus Nardi asserted that the SCCA was a strong supporter of mediation and expressed the view that the growth of small business commissioners across the county has been very positive.[81]

3.74 Mr Paul Giugni, SCCA, noted that since the role of the Small Business Commissioner was established, South Australia had embraced mediation: He noted:

> It is different now, and what is happening with the Small Business Commissioner is that they are trying to tackle many matters, before even mediation. Actually, a lot of matters are not even going to mediation at the moment. The Small Business Commissioner is trying to get people on the phone and resolve things there, and they quote very high levels [of success].[82]

3.75 The Council of Small Business Australia explained that the services of small business commissioners add good faith to the areas of retail leasing. In its view:

> These commissioners are being given more and more power to bring businesses together to resolve disputes. This then removes the capacity for bigger businesses to stall legal processes and stone wall activities until the smaller business can no longer participate. The small business commissioners will bring the issue under their jurisdiction and create an environment of openness and transparency.[83]

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78 Senate Economics Legislation Committee, *Small Business Commissioner Bill 2013*, April 2013, pp. 13–15.

79 NRA, *Submission 11*, p. 3.

80 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 3.

81 Mr Angus Nardi, Executive Director, SCCA, *Committee Hansard*, 13 February 2015, p. 8.

82 Mr Paul Giugni, SCCA, *Committee Hansard*, 13 February 2015, p. 10.

83 Council of Small Business Australia, *Submission 5*, p. 2.

3.76 The SCCA highlighted the success of small business commissioners with regards to dispute resolution:

- NSW—the website for the office of the Small Business Commissioner notes that 'mediation is so successful that about 94 per cent of all matters referred to us for mediation are resolved prior to having a court decide the matter';
- Victoria—the Victorian Small Business Commissioner reported that in 2012-13 that they received 1,103 applications for dispute resolution related to the Retail Leases Act. Of these, only 594 progressed to mediation and the success rate was 80.3 per cent; and
- South Australia—the SA Small Business Commissioner reported that only 27 per cent of formal cases received related to the Retail and Commercial Leases Act and that 88 per cent of all formal cases are successfully resolved. Further, they report that 98 per cent of disputes are resolved prior to mediation.[84]

3.77 The Victorian Small Business Commissioner noted that since 2003 it had consistently achieved a mediation settlement rate across all legislative areas of around 80 per cent. He stated:

> The successful and efficient provision of these services is unaffected by the specific provisions of that law, or whether it is the same as, or different from, other State laws.[85]

3.78 Further, the Victorian Small Business Commissioner has the power under the Victorian Act to appoint Specialist Retail Valuers where parties cannot agree on market rent. Victorian Small Business Commissioner stated:

> In 2013-14, 103 appointments were made, similar to the previous year. Similar to our [alternative dispute resolution] service, this process provides a means by which parties can gain independent resolution of their rental dispute without the need to litigate. The valuer does charge the parties its market based fee, on a 50%- 50% basis, compared with the subsidised fee charged for mediation.[86]

3.79 According to the Victorian Small Business Commissioner, its success and the success of other Small Business Commissioners 'in resolving retail tenancy disputes and keeping businesses out of litigation suggests similar alternative dispute resolution services would be of benefit to landlords and tenants in States and Territories which do not currently offer similar services'.[87]

3.80 The Law Institute of Victoria submitted that the Victorian provisions for dispute resolution should be considered as a model for any national regulation. From its perspective:

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84 SCCA, answers to questions on notice no. 2, p. 11.

85 Victorian Small Business Commissioner, *Submission 4*, p. 2.

86 Victorian Small Business Commissioner, *Submission 4*, p. 2.

87 Victorian Small Business Commissioner, *Submission 4*, p. 2.

> The Retail Leases Act 2003 (Vic) (Victorian Act) provides for disputes to be the subject of alternative dispute resolution through the Office of the Small Business Commissioner before the issue of a proceeding, and this process is considered in Victoria to be a very efficient and cost-effective approach to early dispute resolution (see: Part 10 of the Victorian Act and in particular ss 86 and 87).[88]

3.81 The Law Society of New South Wales argued that the importance of affordable, effective and timely retail lease dispute resolutions processes cannot be underestimated. The Law Society of NSW noted the jurisdictional limit set for a claim may be too low:

> Jurisdiction for retail lease disputes is shared between the New South Wales Civil and Administrative Tribunal ("NCAT") and the New South Wales Supreme Court. Whether or not NCAT's current jurisdictional monetary limit of $400,000 should be increased is one of the issues raised in the NSW Discussion Paper…the Law Society's Dispute Resolution Committee is concerned that the jurisdictional limit of $400,000 for hearing retail leasing disputes in NCAT is too low given the typical quantum of claim and considers that the jurisdiction should be increased to $750,000, so that parties may avoid commencing proceedings in the Supreme Court.[89]

3.82 The NRA also submitted that the limit on the amount of claim under the Act should be set at $750,000 across all jurisdictions.[90]

Committee view

3.83 Evidence indicated strongly that the establishment of a small business commissioner is a positive move toward achieving an effective dispute resolution system that is affordable, less onerous for small retailers and less time consuming. Indeed, the results being achieved through the work of these commissioners show that many disputes are being settled in some cases even before mediation begins and definitely before a dispute proceeds to the courts.

Recommendation 1

3.84 **The committee recommends that the Australian Government give due recognition to, and wherever possible support, the work of the small business commissioners with the aim of strengthening of their role and encouraging the establishment of small business commissioners in all states and territories.**

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88 Law Institute of Victoria, *Submission 7*, p. 2.

89 Law Society of New South Wales, *Submission 9*, p. 3.

90 NRA, answers to questions on notice no.1, p. 1.

Chapter 4
National Approach

Introduction

4.1 A number of submissions supported the transition to a national regulatory framework governing retail tenancy in Australia—some strongly; some in-principle; and some with qualifications. In this chapter, the committee considers the scope and potential for introducing national retail leasing arrangements.

Support for a national regulatory framework for retail tenancy

4.2 The Law Council of Australia broadly supported a transition to a national approach to the regulation of retail leasing. It recognised, however, that under the Constitution, responsibility for retail leasing laws resides with the states and territories.[1]

4.3 Likewise, the Law Society of New South Wales supported the transition to a national approach to retail leasing. It noted that such a move would benefit landlords and tenants who operate in more than one jurisdiction.[2] The Property Law Reform Alliance drew attention to the inefficiencies, delays, frustrations, and cost to trade and commerce caused by discrepancies in property laws between jurisdictions, which 'needlessly complicate the leasing of property'. The result, according to the Alliance, is 'money and time being wasted'.[3]

4.4 The Commercial and Property Law Research Centre gave in-principle support to greater standardisation of the retail leasing process. Indeed, it was of the view that harmonisation of retail leasing arrangements was 'long overdue'. It suggested that time and resources were 'being wasted on jurisdictions playing catch-up with one another'.[4]

4.5 NRA supported a national approach,[5] as did ARNEC which agreed with the view that favoured having a consistent approach to retail leasing across Australia.[6] ARA wanted government to assist retailers facing a difficult operating environment through a more standardised national retail leasing system. It suggested that the cost benefits from standardisation to national retailers were significant.[7] ANRA on the other hand supported a nationally harmonised approach to retail leasing for small

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1 Law Council of Australia, *Submission 25*, pp. 3–4.

2 Law Society of New South Wales, *Submission 9*, p. 1.

3 Property Law Reform Alliance, *Submission 21*, p. 1.

4 Commercial and Property Law Research Centre, Queensland University of Technology, *Submission 12*, p. 2.

5 NRA, *Submission 11*, p. 1.

6 ARNEC, *Submission 22*, p. 1.

7 ARA, *Submission 24*, p. 3.

retailers but not large retailers.[8] SCCA also supported a system of national regulation of retail tenancies but with an important proviso—'only if such regulation was in place of, and not in addition to the present system of state and territory regulation'.[9] Indeed, it wanted to see a winding 'back of the current regulatory overreach of the state and territories'.[10]

4.6 Transworld Enterprises, argued that a consistent national approach to leasing would reduce legal requirements and cost, as well as ensuring a level playing field, noting they 'currently have to seek legal advice from multiple law firms located within the states in which we operate because the law is so confusing and contradictory across state lines'.[11]

4.7 Mr Evans, NRA, also noted that there were a number of places where small businesses operated across different jurisdictions, such as Canberra, the Victoria–New South Wales border and the Queensland–New South Wales border.[12]

Resistance to change

4.8 Ms Anna McPhee, ANRA, noted a number of these issues have already been 'prosecuted in numerous inquiries and reviews over many years. Recommendations to support changes have been made, yet change has not been forthcoming quickly.'[13] Mr Lonie, NRA, made the point that:

> …in all of the reviews, any changes that have been made—and I am talking about across all jurisdictions—have always been on those subjects that have been agreed. There has always been outstanding issues that have been left in abeyance, and they just continue to roll on. It is largely because the various stakeholders had—I do not say opposing views—varying views.[14]

4.9 The Restaurant and Catering Industry Association also expressed concerns regarding likelihood of a slow policy process to nationalise retail leasing arrangements, noting the recent example of changes relating to menu surcharges in the consumer law and consumer regulations, which took three years to complete because of the processes of the Ministerial Council and secretariat.[15]

4.10 The Restaurant and Catering Industry Association questioned whether a national approach to retail leasing arrangements would necessarily create a fairer system and reduce the burden on small to medium businesses, contending that several

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8 ANRA, *Submission 20*, p. 1.

9 SCCA, *Submission 17*, p. 7.

10 SCCA, *Submission 17*, p. 4.

11 Transworld Enterprises, *Submission 27*, p. 1.

12 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 4.

13 Ms Anna McPhee, Chief Executive Officer, ANRA, *Committee Hansard*, 13 February 2015, p. 3.

14 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 3.

15 Restaurant and Catering Industry Association, *Submission 2*, p. 2.

attempts to harmonise state-based regulation in the past had led to more onerous outcomes for individual small business.[16]

4.11 The Law Society of South Australia argued that a national approach to retail leasing arrangements was unnecessary, would be of little benefit and 'would more likely create additional red tape and costs for small and medium businesses'.[17] It was also concerned that:

> …the policies and legislation of the more populous States (NSW/VIC) would be likely to form the basis of any national law and any subsequent revisions of such law, hence limiting the ability of South Australia to determine its own policies and laws suitable for South Australian business.[18]

4.12 Dr Matt Harvey, noted that under the Constitution, property law is a state rather than a Commonwealth matter. As such Dr Harvey suggested:

> …a co-ordinated approach between the States in this area…with the assistance of the Commonwealth, rather than trying to graft a Commonwealth scheme on top of the State systems.[19]

4.13 The Queensland Government advised the committee that its review of retail tenancy laws had considered 'opportunities to align with key eastern seaboard states where appropriate to enhance operational efficiency and legal certainty for stakeholders operating across jurisdictions'.[20]

4.14 Treasury noted that there was an economic argument for the harmonisation of retail tenancy legislation to reduce compliance costs and red tape for landlords and tenants that operate across borders.[21]

Commonwealth legislation

4.15 As retail tenancy legislation is primarily a state and territory matter, there is no Commonwealth legislation regulating retail leases. However, the generic provisions contained in the *Competition and Consumer Act 2010* to regulate trade and commerce apply to the retail tenancy industry.[22]

4.16 Unless the states and territories agree to surrender their powers in this area to the Commonwealth, there are constitutional issues with regards to the Commonwealth's capacity to legislate on retail leasing.

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16 Restaurant and Catering Industry Association, *Submission 2*, p. 1.

17 Law Society of South Australia, *Submission 13*, p. 1.

18 Law Society of South Australia, *Submission 13*, p. 1.

19 Dr Matt Harvey, *Submission 18*, pp. 2–3.

20 Queensland Government, *Submission 23*, p. 1.

21 Treasury, *Submission 15*, p. 1.

22 Treasury, *Submission 15*, p. 5.

4.17 If the Commonwealth were to regulate retail tenancies, the industry codes framework under the *Competition and Consumer Act 2010* (CCA) may apply. However, any move towards a mandatory code such as the Franchising Code could be problematic. The industry codes framework under Part IVB of the CCA relies on the Commonwealth's Corporations power (section 51(xx) of the Constitution). In principle, the Commonwealth legislation could apply to contracts between two corporations, or in relation to agreements involving at least one corporation, but would not be able to regulate tenancy relations between non-corporate entities. Furthermore, any new restrictions on existing leases may be an acquisition of property (under section 51(xxxii) of the Constitution) and would need to be done on just terms.[23]

4.18 Treasury noted that any Commonwealth legislation could be extended if all states and territories agreed to refer their powers of retail tenancy legislation to the Commonwealth. Alternatively, the states could cover gaps in Commonwealth legislation by agreeing to implement equivalent state legislation, which was the case with Australian Consumer Law.[24]

Voluntary national code of conduct for shopping centre leases

4.19 Alternatively, the PC 2008 report recommended that state and territory governments, in conjunction with the Commonwealth, should cooperate to introduce a voluntary national code of conduct for shopping centre leases, 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 availability of a new lease.[25]

4.20 The PC 2008 report recommended that the introduction of a national code of conduct should coincide with the repeal of the parts of state and territory regulation that seek to govern conduct, contract terms and conditions in rent.[26] This recommendation has not been implemented.

4.21 The SCCA advised that they would support a system of national regulations only if such regulation were in place of, not in addition to, the present system of state and territory regulation. They also stated that they would not support a national approach that:

- reflected the states and territories tendency to regulate what should be commercial contractual negotiations between a landlord and a tenant, such as lease terms; or

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23 Treasury, *Submission 15*, p. 10.

24 Treasury, *Submission 15*, p. 10.

25 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xxxiii.

26 Productivity Commission, *The Market for Retail Tenancy Leases in Australia*, Inquiry report no. 43, 31 March 2008, p. xxxiii.

- saw any greater encroachment of regulation than currently exists—for example, to require the disclosure of incentives or side agreements.[27]

4.22 The SCCA also questioned whether the states would agree to repeal their legislation if a national system was introduced. They also doubted this would be satisfactory to retailer associations which have historically opposed the repeal of state legislation. It stated:

> A national code is therefore more likely to create an additional layer of regulation, not a uniform system. If so it is also likely to lead to 'jurisdiction shopping' and legal disputes over inconsistencies between the national code and state/territory legislation.[28]

National Retail Tenancy Working Group

4.23 Following the PC 2008 report, COAG requested that the Small Business Ministerial Council (SBMC) commence work to improve transparency and consistency between the retail tenancy regulations of different jurisdictions.[29] A National Retail Tenancy Working Group (National Working Group) was established by COAG in the third quarter of 2008. The Working Group had a broad representation from federal and state governments, various retail industry associations, small business, the property sector and legal groups.[30] The stated objective for COAG's retail tenancy reform was as follows:

> Achieve greater national consistency, fairness and transparency in retail tenancy markets across jurisdictions, through the use of:
>
> - national disclosure statements; and
> - consistent data collection and reporting.[31]

4.24 Following the 2008 PC report, the National Working Group undertook work on:

- nationally consistent reporting—the project was led by NSW and aimed to 'identify mechanisms and standards for nationally consistent reporting to each jurisdiction on the incidence of tenancy enquiries, complaints and dispute resolution'; and
- inconsistent retail tenancy terminology between the various states and territories—the project was intended to identify common terms (and their

27 SCCA, *Submission 17*, p. 6.

28 SCCA, *Submission 17*, p. 6.

29 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 265.

30 National Retail Association, answers to questions on notice no. 1, p. 1.

31 COAG Council on Federal Financial Relations, 'Current Implementation Plans for COAG Deregulation Reforms: Retail Tenancy Reform (start date 10 September 2010)', www.federalfinancialrelations.gov.au/content/Content.aspx?doc=related_agreements.htm (accessed 15 July 2014).

simple meaning) that would be used nationally in reference to retail tenancy leases.[32]

4.25 The Working Group only had one meeting with all stakeholders to develop a national disclosure statement, organised by one of the major accounting firms. The NRA noted:

> Following the meeting the late Michael Redfern from the Melbourne legal firm Russell and Kennedy was given the task of producing a draft for further discussion. The draft was produced in December 2008 and circulated. The rigid format of the statement meant that the majority of the larger landlords could not integrate it with their systems without substantial costs.[33]

4.26 In July 2009, a model national disclosure statement was endorsed by the SBMC. In 2011, it was reported that New South Wales, Queensland and Victoria implemented this statement from 1 January 2011.[34]

4.27 The NRA advised the committee that the Working Group did not meet again. Mr Lonie, National Retail Association explained that there was little or no consultation. He stated:

> …when it was dropped on the table there were many things in there that the Shopping Centre Council, in terms of the actual draft, could not work with—I am talking about within their systems. And there were many things in there that we sought as retailers that were not there. So it fell over.[35]

4.28 The 2011 PC report recommended that previous efforts to reform the regulatory environment be progressed:

> COAG should ensure that all current National Retail Tenancy Working Group projects are fully implemented. It should also re-examine the outstanding recommendations from the Commission's 2008 retail tenancy report with a view to expanding the work plan of its National Retail Tenancy Working Group.[36]

4.29 Treasury advised that the final meeting of the Working Group was held on 22 March 2012 as it had resolved 'that there were no new or existing retail lease projects to warrant the continuation of the working group and that it should cease.' Treasury also advised that the Working Group agreed that:

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32 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 268.

33 National Retail Association, answers to questions on notice no. 1, p. 1.

34 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 267.

35 Mr Michael Lonie, NRA, *Committee Hansard*, 13 February 2015, p. 4.

36 Productivity Commission, *Economic Structure and Performance of the Australian Retail Industry*, Inquiry report no. 56, November 2011, p. 259.

> …the Small Business Officials Group (comprising Commonwealth and state government officials) and the Small Business Commissioner's Group, now Chaired by the Australian Small Business Commissioner Mr Mark Brennan, provided sufficient mechanisms to finalise existing projects and handle any future retail tenancy issues.[37]

4.30 The 2014 PC report noted that the National Working Group was ultimately 'unable to achieve national harmonisation on a number of key retail tenancy issues' and has now been disbanded.[38] Treasury informed the committee that, the Working Group's core model disclosure statement project could be closed as it had been implemented to the extent possible.[39] In this regard, it should be noted that when it was implemented in 2011, only NSW, Queensland and Victoria had signed up to the uniform disclosure statement.

4.31 The SCCA observed that there is currently commonality in disclosure statements between Queensland and New South Wales. While Victoria had signed up for commonality originally, there are now four Disclosure Statements to be used depending on the particular circumstance. The Disclosure Statements listed are for:

- non-shopping centre retail premises;
- shopping centre retail premises;
- renewal of a lease; and
- assignment of a lease with an ongoing business.[40]

4.32 The NRA suggested that despite the failed initiative, this was an area where there was general consensus. Mr Evans stated:

> If you could do one thing in one day, I would recommend that you reprosecute the focus on getting uniformity in the disclosure statements. That is probably the easiest thing to do. It is probably the one which would lead to the biggest immediate gains in the reduction of regulations. That would have to be a COAG led approach. But, unlike the last time COAG attempted it, it has to make sure that all of the stakeholders are around the table.[41]

4.33 Lease1, a commercial lease negotiator, and the SCCA agreed that there is potential for consensus around a harmonised disclosure statement.[42] They noted:

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37 Treasury, answers to questions on notice no. 5, p. 3.

38 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade*, September 2014, http://www.pc.gov.au/inquiries/completed/retail-trade/report/retail-trade.pdf (accessed 11 February 2015), p. 135.

39 Treasury, answers to questions on notice no. 5, p. 3.

40 SCCA, answers to questions on notice no. 2, p. 9.

41 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 4.

42 Lease1, *Submission 19*, p. 3; SCCA, answers to questions on notice no. 2, p. 10

> This also requires an amendment to legislation in some states to introduce a provision similar to section 114(1) of the NSW Retail Leases Act which gives some flexibility in departing from the layout of the prescribed disclosure statement provided it contains the relevant information.[43]

4.34 While Treasury noted that a process of harmonisation could be led by the states and territories, it did not necessarily require Commonwealth involvement.[44] Mr Evans, NRA, observed that:

> … leaving it to each of the jurisdictions individually around the country has led to some movements towards harmonisation and consistency but has led to, probably, just as many new variations arising as they held their individual reviews. The places where they were willing to move towards consistency was only the areas where all of the parties around the table were unanimous in their views. There has been no willingness to take on any of the issues where there is some difference of opinion between the parties on either sides of a lease. So we do think national leadership is probably called for to try to get things to the next step. We have probably gained as much from the moves towards consistency as we are likely to gain through leaving it to each of the state jurisdictions. The COAG process or a nationally led process is probably what is needed to take things to the next level. But…you have got to make sure that you include all of the participants of industry when you undertake that process.[45]

4.35 The 2014 PC report noted that the disbanding of the National Retail Tenancy Working Group in 2012 would make progress towards more consistent retail tenancy law more difficult.[46]

Recommendation 2

4.36 **The Committee recommends that National Retail Tenancy Working Group be re-established to develop a national disclosure statement, taking note of the lessons learnt from its previous attempts, and ensuring vital stakeholders are actively involved in any consultation processes.**

Recommendation 3

4.37 **The Committee recommends that the Commonwealth take on a greater leadership role in encouraging the states and territories to move towards a harmonised approach through the COAG process.**

Conclusion

4.38 With the retail sector providing 1.7 million jobs Australia-wide and supporting over $120 billion in economic activity across all sectors in Australia,[47] the

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43 SCCA, answers to questions on notice no. 2, p. 10.

44 Treasury, *Submission 15*, p. 1.

45 Mr Trevor Evans, Chief Executive Officer, NRA, *Committee Hansard*, 13 February 2015, p. 4.

46 Productivity Commission, *Relative Costs of Doing Business in Australia: Retail Trade*, September 2014, p. 137.

importance of retail leasing arrangements—in particular small to medium businesses—cannot be overstated.

4.39 The committee notes that the 28 written submissions and the evidence provided at the public hearing demonstrates the potential for national harmonisation of retail tenancy law and that the sector is actively considering solutions.

4.40 The committee notes that the issues surrounding retail leasing arrangements are essentially matters for state and territory jurisdictions, and affirms a leadership role for the federal government. The committee encourages the Minister for Small Business to work through COAG in cooperation with the state and territory governments towards a fairer system and a reduction of the burden on small to medium businesses with regard to retail leasing arrangements. The committee encourages the Minister to consider the issues raised by submitters to the committee's inquiry.

Senator Sam Dastyari

Chair

47 Australian Retailers Association, *Submission 24*, p. 3.

Dissenting Report by Senator Nick Xenophon

Too Many Commercial Retail Tenants on a Short Lease

1.1 It is disappointing the committee failed to express a view on the majority of the matters explored during this inquiry. It is clear that many landlords and tenants, including representative organisations, favour a national coordinated approach and ultimately a single federal Act. As the states have not shown interest in harmonising their legislation, it is incumbent on the federal government to take a leadership role and incorporate the best practices from each state and develop model legislation. My views on Terms of Reference topics are as follows:

The first right of refusal for tenants to renew their lease

1.2 Preferential rights provisions are designed to address the power imbalance between landlords and tenants, which in the case of smaller retailers can be significant. In South Australia and the Australian Capital Territory, preferential rights are provided for in the relevant retail leasing acts; however, these statutory provisions do not necessarily translate into effective protection for tenants. For example, the South Australia legislation allows landlords to go to the market to obtain alternate offers from retailers who would use the premises for different purposes than the sitting tenant. The prospective tenant may be able to afford a higher level of rent than the sitting tenant (who has no ability to match this rental). SA Lease Management's (SALM) submission gave an example of how South Australia's legislation can fail to protect existing tenants:

> An interesting example of this situation arose in a small shopping centre in Glenelg where the sitting tenant was a chocolatier who ended up competing against a yiros operator who was able to trade much longer hours, achieve a higher level of turnover and pay a higher level of rent than the chocolatier could afford to pay. The chocolatier was given the option of either changing their business or vacating - they vacated.[1]

1.3 The Jewellers Association of Australia also expressed concerns that in the case of jewellery stores, landlords are refusing to acknowledge reductions in market rent when leases expire and instead prefer to keep tenants on monthly leases with high rents rather than negotiate a long term lease reflective of current market rental rates.[2]

1.4 In order to address these concerns, SALM has made a number of suggestions. Firstly, retail leasing legislation in each state could be amended to reflect provisions that currently exist in Tasmania's Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 that contain:

> The general principle… that once landlords and tenants agree that an existing lease will be renewed both landlord and tenant have to either

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1 SA Lease Management, *Submission 3*, p. 3.

2 Jewellers Association of Australia, *Submission 6*, pp. 2-3.

> negotiate terms of a new lease which both accept or if agreement cannot be reached then the rent is set by an independent expert valuer and both parties are bound by the valuer's rental determination.[3]

1.5 In response to questions put on notice during the committee's public hearing, SALM proposed an alternative solution to the issues tenants face when negotiating lease renewals, particularly those tenants who have invested significant funds into shop fit-outs and refurbishment:

> Rather than have first rights of refusal, an alternative is for every retailer who is required to fit-out a shop in accordance with the landlord requirements, is offered a ten year lease term with various options -
>
> - The tenant will have the option of terminating the lease at any time without penalty after first giving a minimum of say, 3 months' notice.
> - The tenant to have the right of implementing a market review of rent twice during the term of the lease with the option of terminating in the event of the market rent being determined at a rent greater than the retailer can afford. There would be other criteria attached to the market review dates including not earlier than say 12 months after lease commencement and at least 3 years apart.
> - The landlord to have the right to implement a market review of rent twice during the term of the lease subject to the same criteria as imposed on the tenant.
> - The rights of early termination would only be taken up by the tenant if their business is failing and in full recognition of the cost of closing the business, reinstating the premises to bare shell and forfeiting the tenant's investment in the fit-out (other than what can be salvaged and installed elsewhere.[4]

1.6 The ability to call for a market valuation of rents would have benefited one retailer mentioned in SALM's submission. Their client owned a successful café business with an annual turnover of approximately $2 million per year. Turnover had increased by about 10 percent over the past three years and the business was making an annual profit (after wages) of about $70,000. However:

> Westfield decided it was time to expand the centre and introduced another café business into the centre at a much lesser rental rate per square metre and with a substantial capital contribution to assist in the cost of their fitout. The new business took customers from the existing café business and reduced its turnover from $2,300,000 to $1,800,000 (forecast to reduce to $1,750,000). Our client is stuck with a current high rate of rent but in the meantime will lose between $80,000 and $100,000 in the next 12 months. There is no requirement in the current legislation for the landlord to remedy this.[5]

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3 SA Lease Management, *Submission 3*, p. 2.

4 SA Lease Management, *answers to questions on notice no. 4*, p. 2.

5 SA Lease Management, *Submission 3*, p. 4.

1.7 Given the dramatic change in operating conditions, a tenant should be entitled to call for a market rent review. Similarly, situations may arise whereby a landlord may require a market review of rents; for example, if a landlord has made improvements to the property resulting in more customers and higher sales.[6]

1.8 My view is that the three options proposed above should be explored as they would best serve both retailers and landlords, as they provide a fair option for businesses that may experience hardship and recognise the financial investment retailers and landlords have in their respective businesses.

1.9 Such reforms could be combined with the national adoption of provisions within the Tasmanian Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 as they relate to lease renewals. Preferential renewal rights in all other states and territories do not take into account the current use of the site. However, in Tasmania, if a landlord offers renewal rights to a sitting tenant (who agrees to renew) and agreement on the commencing rent for the renewed term cannot be agreed, rent is set by an independent valuer who will determine the level of rent to be paid using the universally applied definition of market rent which takes into account the permitted use definition on the lease. If the tenant considers the determined rent to be too high the tenant still has the option of not proceeding with the renewal of the lease.[7]

Recommendation 1

1.10 That rights of renewal be enshrined on a national basis, using the Tasmanian Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 as a template.

Affordable, effective and timely dispute resolution processes

1.11 The cost to tenants of enforcing rights or challenging representations made by landlords in court is currently prohibitive for the majority of small businesses. For example, it is highly unlikely a small business will risk many tens of thousands of dollars pursuing a misrepresentation action against a landlord in court even if legal advice indicates they have a reasonably strong case.[8]

1.12 In its majority report, the committee acknowledged the importance of the dispute resolution role played by Small Business Commissioner offices around Australia. Statistics provided to the committee by the Shopping Centre Council of Australia (SCCA) demonstrated the successes of some of these offices, including in New South Wales where 94 percent of all matters referred for mediation are resolved without proceeding to court for a decision.[9]

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6 SA Lease Management, *Submission 3*, p. 4.

7 SA Lease Management, *Submission 3*, p. 4.

8 Mr Brian Scarborough, *Committee Hansard*, 13 February 2015, p. 15.

9 SCCA, *answers to questions on notice no. 2*, p. 11.

1.13 The committee has recommended that where possible the Federal Government should give recognition to and where ever possible support the role of small business commissioners. While it is encouraging to see the committee's favourable view of small business commissioners, I would like to see a firmer commitment to Federal Government support for these roles; for example, by way of an industry code of conduct managed by the Australian Competition and Consumer Commission.

Recommendation 2

1.14 An industry code of conduct in respect of fair, effective, and cost efficient dispute resolution be implemented, to be managed by the ACCC.

A fair form of rent adjustment

1.15 Most rent reviews were based on CPI plus a set percentage. Whichever calculation method is used, it is always detailed in the originating lease. However, as detailed by SA Lease Management and Mr Bensimon, the rental at the finalisation of the lease term is often excessive for long-term sitting tenants. Some landlords are capitalising on the fact that the retailer has built their business up over many years and will not vacate, no matter how high a new rental is. There is also evidence to suggest that retailers new to a shopping centre are being offered significant rental discounts and incentives, which are in effect being offset by the higher rent imposed on sitting tenants.

1.16 Concerns were raised with the committee that increases in rental rates were far surpassing growth in turnover:

> In the past when the Australian economy has grown significantly and retail sales have performed well, annual rent increases of up to 5% have been accepted as an affordable impost of entering into new leases to occupy prime locations in shopping centres.
>
> Over the past five years this situation has changed and growth in shopping centre turnover, retail sales and customer traffic has remained virtually flat and has not kept pace with movement in the Consumer Price Index. Over the past five years CPI has grown by about 10% on a cumulative basis, and rent has increased by between 15% and 20% over the same period.[10]

1.17 SALM confirmed these concerns in its submission, telling the committee that a conversation with a landlord of a major shopping centre revealed that 'they can only achieve growth equal to CPI by maximising rental growth from sitting tenants to offset rent reductions for new tenants.'[11]

1.18 Based on these experiences, it is clear sitting tenants are often vulnerable to rent increases that do not necessarily reflect the profitability of their businesses. Together with factors such as large initial fit-out costs (discussed later in this report), tenants can become hamstrung when they must decide whether to stay on in their

10 Jewellers Association of Australia, *Submission 6*, p. 4.

11 SA Lease Management, *Submission 3*, p. 5.

current location in order to write-off fit-out costs or try to find a new location. As Mr Polkington pointed out:

> The problems of a small family shop is that the shop is their job, it is their superannuation and it is their life, and they cannot afford to lose it. They are in a very much weaker position when it comes to negotiating all of those things.[12]

1.19 SALM has proposed that ratchet clauses (a clause that operates to prevent rent decreases when rent rates are reviewed) should be excluded from all leases. Ratchet clauses are particularly harmful where rent may have increased to an amount which then takes the lease outside of the protection of retail leasing legislation (see below). As SALM explains:

> The leases are now outside of the Act and although market rent may be less than $400,000, because the lease includes a ratchet mechanism, the rent cannot be less in the event of market review. The lease is never brought back under the Act as the ratchet clause is activated.[13]

Recommendation 3

1.20 Ratchet clauses be excluded from retail leases, unless expressly agreed to by the tenant.

Implications of statutory rent thresholds

1.21 Statutory rent thresholds are intended to provide some protection to smaller tenants through provisions contained in retail tenancy legislation. The Shopping Centre Council of Australia and the Australian National Retailers Association argued that larger retailers are 'capable of looking after themselves in negotiations with landlords'[14] and that any national harmonised approached to retail leasing 'should exclude large retailers and instead focus on the relationship between smaller retailers and landlords as this is the area where market failure is most likely to occur'.[15]

1.22 In South Australia, it is possible for a lease to come under the Retail and Commercial Leases Act 1995 at its commencement, but should rent exceed $400,000 per annum the lease is then excluded from the Act. SALM explained the consequences of this:

> In South Australia we have the situation whereby a lease can be under the Act when it commences and then as a result of rent reviews becomes outside of the Act during the term of the lease. This occurs even though the type of business has not changed nor have the proprietors. Typically turnover has not grown, the number of employees has not grown, and the type of products sold has not changed, however, as a result of legislation the business is now redefined as big business and outside the protection of

12 Mr Polkington, *Committee Hansard*, 13 February 2015, p. 20.

13 SA Lease Management, *answers to questions on notice no. 4*, p. 4.

14 SCCA, *answers to questions on notice no. 2*, p. 10.

15 ANRA, *Submission 20*, p. 1.

> the Act. This means that at the time of lease renewal, the tenant is no longer protected by Preferential Rights and if there is a right of renewal the landlord no longer has to follow the rules which would otherwise apply.[16]

Recommendation 4

1.23 Whatever the terms of the lease are at the time it is entered into ought to continue for the full term of the lease, unless explicitly agreed to otherwise.

Bank guarantees

1.24 Bank guarantees can be a necessary form of security for landlords in the event that lease terms are broken by a tenant.[17] However, concerns were raised with the committee regarding the amount some landlords are demanding as security, which has 'the effect of reducing the amount of working capital available to tenants in addition to costing between 2% and 4% per annum in bank fees'.[18] The Jewellers Association of Australia estimated that between $1 and $2 billion could be tied up in bank guarantees in the retail sector.[19]

1.25 Concerns were also raised in relation to when bank guarantees can be drawn down by a landlord. The Restaurant and Catering Industry Association suggested that retail leasing legislation should 'be explicit about when bank guarantees can be drawn down, including the requirements for informing tenants when this has occurred'.[20]

1.26 Tenants may find themselves in a difficult position where they have agreed to pay a high level of rent but can no longer afford to do so. A landlord may also struggle to find another tenant who will agree to pay the same level of rent while running a similar business to the sitting tenant. The landlord may then draw down on the entire bank guarantee, putting the tenant at risk of financial ruin, particularly if they have given a personal guarantee.[21]

1.27 I support SALM's proposal that:

> A better way of imposing bank guarantees on tenants is to limit the bank guarantees to 28 days in the same way as security deposits are limited and restrict them to apply only to the fair market rental value of the tenancy, not the super rent being paid by a tenant which may never be paid by another.[22]

Recommendation 5

1.28 Bank guarantees on tenants be limited to 28 days.

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16 SA Lease Management, *Submission 3*, p. 5.

17 SCCA, *Submission 17*, p. 19.

18 Jewellers Association of Australia, *Submission 6*, p. 5.

19 Mr Polkington, *Committee Hansard*, 13 February 2015, p. 19.

20 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

21 SA Lease Management, *Submission 3*, p. 6.

22 SA Lease Management, *Submission 3*, p. 6.

A need for a national lease register and full disclosure of incentives

1.29 Responses to this particular term of reference were mixed as views hinged on what information should be included in such a register. At the outset it is important to emphasise the rationale behind a national lease register; namely to address the information asymmetry that currently exists between tenants and landlords.

1.30 Leasing Information Services described this information asymmetry in more detail, as well as its consequences:

> Information asymmetry within the retail leasing market is a serious economic issue which leads to price distortions due to the fact that one party possesses more or better information than the other. This creates an imbalance of power in transactions which leads to inefficiency and in the worst case scenario, market failure.
>
> Although our aim as a business is to simply empower all participants within the retail market, favouring neither tenants nor landlords, our experience has shown that it is generally the tenants who lack key information to make informed and enabling decisions. Often left in the dark with a limited number of comparables, great burden is put on tenants within an already competitive industry to secure the optimal rent.[23]

1.31 While lease registers do already exist in some states, SALM was of the view that they:

> …are of little benefit to most retailers in negotiating their leases. They are not searchable to provide a mechanism for sorting the data into location, tenancy type, shop area, retail type, date commenced, method of rent review, etc. The data is expensive to purchase and impossible to interpret by anyone other than an expert.[24]

1.32 The effect of this lack of transparency was described by Mr Scarborough at the committee's public hearing in February:

> I was sitting on a board meeting of a group that I was representing, talking around the table about market rents and how information on what rents are being paid is shared between various members. One question was asked of a party who had just finished negotiating a lease as to what level of rent they were paying. They said between $2,000 and $2,100 per square metre. They said that seems relatively expensive and asked if there was an incentive involved. There was a very large incentive. It was about $150,000. We said, 'If we had not asked you that question and you were not required to give that out, we would be believing that the market rent was in the range of $2,000 to $2,100 when it is actually not.' The incentive of $150,000 offset the cost of the fit-out enormously; instead of having to fund a $200,000 fit-out over five years, they only have to fund $50,000. Amortising at seven or eight per cent—I am not going to do the math, but

23 Leasing Information Services, *Submission 8*, pp. 4-5.

24 SA Lease Management, *Submission 3*, p. 6.

> let's keep it simple—it changes dramatically the actual market value of the rent.[25]

1.33 The Jewellers Association of Australia also provided the example of rent free periods distorting market rent values and the potential risks involved in relying on data supplied in some current registers:

> Mr Pocklington:…One of the concerns we have is: let's say that there is a lease for $100,000 and the landlord says, 'Let's make it $120,000 but we'll give you a few months rent free.' The net result for that tenant is the same, but the supposed market value is revalued by 20 per cent. I think that is a concern on the retailers that, when looking at lease figures, maybe are not the real market figure.
>
> Mr Bensimon: I would agree and just want to add that it also misleads. The government is providing that data on the lease registers in New South Wales and Queensland and is therefore providing inaccurate information to the market as it is government-provided data.[26]

1.34 Lease transparency is also important for financiers, who typically rely on valuations that are based on the full lease value. Unreported incentives potentially over-value the property, which may be mortgaged or provided as some other form of security.

1.35 I strongly support SALM's proposal that landlords could complete a standard form setting out the 'all the commercial terms in a tenancy schedule format which could be electronically registered'.[27]

Recommendation 6

1.36 An organisation such as the Australian Property Institute (Valuation Division), in consultation with tenant and landlord stakeholders, should develop a standard form to be completed by landlords when entering into a lease. This form should require the disclosure of the commercial terms of the contract, including all incentives offered to the tenant.

Provision of sales results

1.37 Unsurprisingly, organisations representing tenants expressed reservations about the provision of sales results, particularly in the context of these results being used in rent negotiations.

1.38 In its submission, the Restaurant and Catering Industry Association stated:

> Turnover data is an area of considerable contention for restaurant owners. The ability of landlords to request turnover data and make decisions based on this information results in inequity for operators in the decision making process. There is no transparency in how this information is used across

25 *Committee Hansard*, 13 February 2015, pp. 16-17.

26 *Committee Hansard*, 13 February 2015, p. 20.

27 SA Lease Management, *answers to questions on notice no. 4*, p. 3.

> multiple tenant arrangements, particularly in shopping centres. Rarely do landlords grant struggling tenants rent concessions following a review of turnover data, yet rents are revised upwards based on favourable earnings recorded.[28]

1.39 SALM told the committee:

> Most leases in shopping centres require tenants to give monthly reports on sales for the previous month. This is done on the premise that it allows landlords to gauge the performance of the centre and adjust advertising/promotion/tenancy mix to achieve the best retailing atmosphere for the benefit of their tenants. This may be the reason given by landlords but the underlying reason is to ensure they maximise the amount of rent their tenants can pay and determine the degree to which they will want to renew leases rather than vacate. If a tenant has a successful business, their sales levels will be high and flagged to the landlord via monthly sales reports. The tenant will be disinclined to give up that business and vacate the tenancy and will agree to a much higher rent than would otherwise be required to secure the space in the event of it being vacated and a new deal negotiated.[29]

1.40 There are currently discussions surrounding a code of practice governing (amongst other things) the provision of sales information being conducted between the Shopping Centre Council of Australia, the National Retail Association, the Australian Retailers Association and the Pharmacy Guild.[30]

1.41 Mr Michael Lonie of the National Retail Association hinted there was some frustration as to the progress of these discussions, telling the committee

> …we thought that we were moving towards obtaining a code of conduct between landlords and the various retail associations, we were only to find that a couple of the retailer associations had gone back to their board and could not agree with what was going on. Whereas, we were more than happy to move forward in having a code that gave greater disclosure of what the turnovers were that related to various centres.[31]

1.42 A meeting is being arranged between the Australian Retailers Association and its members to discuss the terms of this draft code in more detail.

1.43 Consideration should be given to a system whereby tenants provide information as to the general movements of sales such as whether they have increased or decreased in the past month, but not the actual amount of increase or decrease. This type of index would provide a guide to landlords as to the performance of their centres, whether promotional activities have been effective and whether they have achieved the right mix of tenancies. Specific turnover figures would no longer need to

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28 Restaurant and Catering Industry Association, *Submission 2*, p. 3.

29 SA Lease Management, *Submission 3*, p. 7.

30 SCCA, *Submission 17*, p. 26.

31 *Committee Hansard*, 13 February 2015, p. 3.

be supplied by tenants, putting at rest concerns about the inappropriate use of such data in rent negotiations.

Recommendation 7

1.44 A code of practice that incorporates the broad reporting of sales and occupancy costs in Australian shopping centres be finalised and implemented as soon as practicable. Such a code should prohibit specific commercial-in-confidence sales and occupancy data being provided to landlords.

Contractual obligations relating to store fit-outs and refits

1.45 The ability of a tenant to ameliorate the cost of a store fit-out and refit over the life of a lease is an essential component when negotiating lease terms and renewals. A typical store fit-out for a 100m square metre store is approximately $200,000 to $300,000. As SALM explained:

> Where a lease term is five years, the cost of the fit-out must be written off over the five year term. If the fit-out costs $250,000 and the interest is 8% the annual expense to the retailer is approximately $60,000.[32]

1.46 While on the face of it leases with longer terms may be more attractive to tenants as they allow the cost of a fit-out to be written off over a longer period of time, this is not necessarily the best scenario for tenants. Mr Scarborough suggested to the committee that they key was negotiating a more secure and fair method for how a lease is dealt with when it reaches the end of its term, including rights of renewal and the ability to obtain an independent valuation of market rents at that time.[33] Shorter lease terms also protect tenants from being trapped in an arrangement that they cannot afford.

1.47 The ability to negotiate fair lease renewal terms in the face of high fit-out costs and high rents was explained by Mr Bensimon at the committee's public hearing:

> Mr Bensimon:…one example is our Myer Centre store, that we had in Adelaide City. We really had to be prepared to walk away—we had a $350,000 shop-fit on that—and the rent was at a level that was so high to our turnover ratio that we had to bail out. We have other stores to be able to pick up the slack, so it was not the end of our business. But were that to be our only store, it would have been a devastating day for us. When we handed in that letter saying we would vacate, our rent was dropped by 40 per cent. So it shows that there was a huge buffer that these people were prepared to let us suffer through before they would allow us to lower that rent, and it is an example of what happens out there.[34]

Recommendation 8

1.48 The cost of fit-outs ought to be a factor in determining the length of the lease.

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32 SA Lease Management, *Submission 3*, p. 7.

33 *Committee Hansard*, 13 February 2015, p. 16.

34 *Committee Hansard*, 13 February 2015, p. 20.

Conclusion

1.49 A common theme addressed throughout this inquiry is that retail leasing has been the subject of numerous inquiries, both at a federal and state/territory level. Despite these reviews, it seems little has changed in the industry. Ms McPhee, the Chief Executive Officer of the Australian National Retailers Association summarised the frustration felt by many in the industry:

> I think the challenge is a number of these issues have been prosecuted in numerous inquiries and reviews over many years. Recommendations to support changes have been made, yet change has not been forthcoming quickly.[35]

1.50 Meaningful reform is urgently needed. Greater transparency is required in terms of incentives offered by landlords to tenants, particularly if they have the effect of distorting market rents. A comprehensive package of reforms, as recommended above, while initially resisted by some landlords, should have the effect of giving more small businesses the confidence to enter into long term leasing arrangements because such reasonable protections are afforded. This could only stimulate the commercial retail leasing market.

Senator Nick Xenophon
Independent Senator for South Australia

35 Ms McPhee, *Committee Hansard*, 13 February 2015, p. 3.

APPENDIX 1

Submissions received

Submission Number	Submitter
1	Tribe, Conway & Company Solicitors
2	Restaurant & Catering Industry Association
3	South Australian Lease Management
4	Victorian Small Business Commissioner
5	Council of Small Business Australia
6	Jewellers Association of Australia
7	Law Institute of Victoria
8	Leasing Information Services
9	Law Society of New South Wales
10	National Footwear Retailers' Association
11	National Retail Association
12	Commercial and Property Law Research Centre, Queensland University of Technology
13	Law Society of South Australia
14	Confidential
15	The Treasury
16	Not allocated
17	Shopping Centre Council of Australia
18	Dr Matt Harvey
19	Lease1 • Attachment 1
20	Australian National Retailers Association

21	Property Law Reform Alliance
22	Australian Registrars National Electronic Conveyancing Council
23	Queensland Government
24	Australian Retailers Association
25	Law Council of Australia
26	Australian Lease & Property Consultants Pty Ltd • Response received from the Queensland Civil and Administrative Tribunal
27	Transworld Enterprises
28	Confidential
29	Confidential

Answers to questions on notice

1. Answers to questions on notice received from the National Retail Association on 20 February 2015, following a public hearing held on 13 February 2015 in Canberra.

2. Answers to questions on notice received from the Shopping Centre Council of Australia on 20 February 2015, following a public hearing held on 13 February 2015 in Canberra.

3. Answers to additional questions on notice received from the Shopping Centre Council of Australia on 24 February 2015, following a public hearing held on 13 February 2015 in Canberra.

4. Answers to questions on notice received from South Australian Lease Management on 20 February 2015, following a public hearing held on 13 February 2015 in Canberra.

5. Answers to questions on notice received from the Treasury on 20 February 2015, following a public hearing held on 13 February 2015 in Canberra.

6. Answers to questions on notice received from ANRA on 6 March 2015, following a public hearing held on 13 February 2015 in Canberra.

APPENDIX 2

Public hearings and witnesses

CANBERRA, 13 FEBRUARY 2015

BENSIMON, Mr Toby, Director, Jewellers Association of Australia

DOLMAN, Mr Ben, General Manager, Small Business, Competition and Consumer Division, The Treasury

EVANS, Mr Trevor, Chief Executive Officer, National Retail Association

GIUGNI, Mr Paul, Member, Shopping Centre Council of Australia; and Advisory Member, Lease Law Committee, Shopping Centre Council of Australia

LONIE, Mr Michael, National Retail Association

McPHEE, Ms Anna, Chief Executive Officer, Australian National Retailers Association

MEZGAILIS, Mr Oskar, Analyst, Small Business, Competition and Consumer Division, The Treasury

NARDI, Mr Angus, Executive Director, Shopping Centre Council of Australia

POCKLINGTON, Mr Colin, Director, Jewellers Association of Australia

SCARBOROUGH, Mr Brian, Principal, South Australian Lease Management