



**Comment on Draft Productivity Commission Report Retail
Industry Inquiry 2011 ARA**

THE AUSTRALIAN RETAILERS ASSOCIATION

SUBMISSION

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Australian Retailers Association

- Voice of the Retail Industry

For over 100 years, the Australian Retailers Association (ARA) has been the peak industry body in Australia's \$240 billion retail sector which employs over 1.2 million people. As an incorporated employer body under the Fair Work (Registered Organisations) Act 2009 and with a range of member services including employment relations, policy development, advocacy and education, the ARA promotes and protects over 5000 independent and national retailers throughout Australia.

The ARA provides leadership and solutions to improve the long-term viability, productivity and visibility of the retail industry by proactively dealing with government, media and other regulatory bodies on behalf of our members. ARA members comprise a diversity of sizes and types of retailers reflecting the profile of the retail industry, ranging from large national chain retailers to one-person operators throughout the nation.

Retailers in Australia are facing an increasingly difficult operating environment. In the last ten years, the structure of the retail sector has shifted and evolved as a result of globalisation, advances in the digital economy, and changes to business practice policies (such as employment and tenancy frameworks). In addition, the retail sector has experienced various economic environments with the Global Financial Crisis and fluctuating Australian dollar having a significant effect on the performance of the industry. Many of the Productivity Commission's recommendations and findings identify significant industry, in some cases practical solutions, for government, regulatory authorities and retailers to follow. ARA would like

ARA will address each recommendation in the submission to the Draft Productivity Commission Report.

TRENDS AND ISSUES RELATED TO ONLINE RETAILING

DRAFT RECOMMENDATION 4.1

ARA agrees with the Draft Report recommendation to increase ABS data collection. During the current rapidly changing retail environment better data sets will allow the industry to target those areas in which it is facing the greatest trade exposure. In terms of including information on employment trends retailers would find benefits in understanding how employment trends will affect their business models as their online turnover increases. It will also be important to understand the degree of growth within overseas online retail for Government to maintain a level playing field for Australian retailers.

APPROPRIATENESS OF INDIRECT TAXATION ARRANGEMENTS

DRAFT RECOMMENDATION 6.1

ARA strongly supports the adoption of a tax neutral policy on imports of any value. ARA notes the Productivity Commission's comments in relation to the efficiency of the Customs and Border Protection Service and the handling of inbound parcels by air and sea cargo or international mail. ARA notes that documents from both Treasury, Customs and Border Protection Service under Freedom of Information after the deadline for submissions to the Productivity Commission Inquiry, estimate the additional cost of enforcing a reduced threshold of \$500, down from \$1000 at \$38m per annum. ARA believes this draws further attention to the inadequate and inaccurate reporting and advice of Government agencies on this matter.

There has been little evidence to suggest that either Customs or Treasury is equipped to properly examine or determine accurate costing or recommend efficiency measures that would allow the threshold to be reduced. Industry bodies including ARA have raised these issues with Government at a Departmental and Ministerial level for some time and we do not believe previous concerns have been given due consideration. ARA supports the Productivity Commission reporting on these inefficiencies and looks forward to Government taking steps toward change. ARA looks forward to Government taking steps to reduce inefficiencies and the cost of enforcement thus allowing for a reduction to the threshold.

ARA is concerned that despite the recommendation from the Productivity Commission that the threshold should be lowered to promote tax neutrality, there appears to be little evidence in the public comments made by the Government that it will be lowered. ARA supports parcel handling processes being reviewed and changes implemented to allow a more cost effective process; we strongly call for this recommendation to be implemented.

ARA strongly endorses the PC's finding of the need for tax neutrality.

DRAFT RECOMMENDATION 6.2

ARA supports changing the parcel handling processes of both air/sea cargo and internal mail, reducing administrative compliance and enforcement costs of administering the Low Value Import Threshold (LVIT), and allowing it to be reduced. ARA maintains the position that the objective of any changes should be tax neutrality.

ARA is concerned about the timeframe recommended by the Productivity Commission for the establishment of a taskforce to consider and recommend any changes. ARA believes that the current state of the retail industry, impacts on employment and consumer confidence is such that the sector would benefit from a more speedy response, while still allowing for proper consideration and research.

ARA recommends that the Productivity Commission recommend to Government, that the task force or other body convened by the Government reports on changes to the parcel handling and enforcement and compliance processes should provide its final report to Government by 30 June 2012. ARA also recommends that the Productivity Commission recommend that the taskforce or other body should provide an interim report after three months, thus allowing some advice to be available to Government ahead of any consideration for the 2012/13 Federal budget process.

ARA strongly urges the Productivity Commission to convey to the Government the sense of urgency in creating greater efficiencies in the handling of inbound packages by air and sea cargo or international mail.

We believe the removal of the competitive disadvantage imposed by the current LVIT should be a priority for the Government and does not believe the retail sector should have to wait three years before it sees any change. ARA finds itself in agreement with a number of industry bodies on this issue including the peak union for the retail sector the SDA.

ARA is concerned about the proposed membership of a task force convened for the purposes of examining and recommending changes to parcel handling processes.

ARA recommends the membership of any taskforce should be broadened to contain representatives of the retail sector, industry representatives, the peak industry union, wholesale importers and other experts. ARA believes that membership of the taskforce should be broadened to allow for a greater inclusion of skills and industry knowledge not available to the public service. ARA strongly urges the Productivity Commission to alter its recommendation to convey to the Government that the acceptable outcome from such a taskforce process is greater efficiencies in the handling of parcels and a lower threshold.

PLANNING AND ZONING REGULATION

DRAFT RECOMMENDATION 7.1

Agreed and the Council of Australian Governments (COAG) should be the recommended body used to facilitate a national approach which will create a greater availability of retail space in retail activity areas.

DRAFT RECOMMENDATION 7.2

ARA would also find any move to create a greater competitive environment allowing retail development in existing business zones a positive move from local government. ARA would like to see a mechanism facilitated by the Federal Government through COAG to achieve this.

DRAFT RECOMMENDATION 7.3

The proposal to take into consideration the social and economic impacts of “dead centres” when local government undertakes assessment of new “out-of-centre” planning proposals is one ARA would support if part of that assessment would be to still allow rejuvenation projects in existing retail areas. It is also important to consider “out-of-centre” developments which are beneficial to the community such as outlying areas.

DRAFT RECOMMENDATION 7.4

While ARA can see benefits in the “as-of-right” benefits to approval processes and certainty for new retail entrants wanting developments ARA would still like to see these zones placed and reviewed in connection with desired outcomes in Draft Recommendation 7.3.

DRAFT RECOMMENDATION 7.5

The ARA finds itself in agreement with the Australian National Retailers Association (ANRA) who primarily represents the half a dozen big retailers however its view would also cross over significantly with ARA's small to medium enterprises membership in the Commission's summary of “gaming of planning”.

The suggestion that costs be awarded against vexatious planning appeals would, in all reason, reduce compliance costs, time and funding costs for retail developments. As with a number of these matters the Commonwealth would need to look at ways of facilitating this move through mechanisms such as COAG.

ARA will support moves which reduce these unnecessary development costs.

DRAFT RECOMMENDATION 7.6

As outlined in previous benchmarking report State and Local Government can undertake a range of process and assessment improvements to increase retail space approval speeds and reduce costs significantly.

With improving technology Local Government could undertake large parts of the approval processes electronically using methods such as Process Application Interfaces meaning as an application went through an applicant could instantly see what was wrong before trying to continue and address the issue immediately. This would limit the appeals process, improve the ability of council staff to understand the commercial implications of any delays and gain an understanding of how significant any delays can be for developers and retail tenants.

RETAIL TENANCY LEASES

DRAFT RECOMMENDATION 8.1

The dependency on securing tenancies within shopping centres poses a significant structural challenge to the ongoing viability of the retail sector. The oligopolistic nature of shopping centre ownership and a retail tenancy regime which is skewed in favour of these large-scale landlords both present an inherent disadvantage to Australian domestic bricks and mortar retailers in terms of equitable competition.

Retail tenancy market issues are compounded by the prevalence of cross-ownership in shopping centres. In practice, while there may appear to be a market of competing shopping centre owners, these are in fact shared ventures where centres may be 25% or 50% joint-owned by consortium. The sharing of turnover

figures relevant to individual retailers, leading to greater inequity in the marketplace for retailers attempting to negotiate with these consortium landlords has become one of the industry's most significant issues.

ARA agrees with the overall intent of the Productivity Commission that all the current national Tenancy Working Group projects overseen by COAG must achieve a more equal framework for retailers negotiating leases.

There are four distinct issues retailers within shopping centres are currently facing in relation to retail tenancies and ARA would see as needing to be addressed:

1. In addition to the base rental cost, significant additional rental expenditure is imposed through "Turnover Rent" whereby, built into the rental agreement, the landlord is entitled to a percentage of takings in addition to the minimum rent.
2. A retailer conducting business in a rental premise has little long-term certainty and thus the significant costs associated with set-up and/or relocation are heavily leveraged at the point of re-negotiation. Due to the standard terms of a lease, which is usually five or seven years, a retailer has no security and can be told to leave the premises for the simple reason of "not fitting" with the centre's image, notwithstanding their investment into the retail space. Additionally, the retailer is subject to the perceived threat that an alternative tenant is prepared to pay more for the same tenancy. Therefore the ARA believes there should be a First and Last right of Refusal. It is often a situation where a retailer has completed the initial term of a lease, typically five years within a shopping centre, whereby any option has not been offered. As a requirement of that initial lease term the retailer has invested a significant amount of funds into shop fitting and sunk costs which cannot be fully depreciated during the initial term of the lease due to ATO guidelines. As such the retailer is at a significant disadvantage as a sitting tenant knowing that they will be required to write off a significant capital cost if they do not accept the landlord's excessive, above market rental as part of a new lease arrangement. As a result the sitting tenant is beholden to the landlord and is also subject to the threat, real or otherwise, that an alternative tenant is prepared to pay more for the same tenancy.

Hence the ARA seeks to require that a sitting tenant must be offered both first and last right of refusal to release the premises prior to the landlord executing a lease for another tenant. 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.

We 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.

3. Based on the abuse of the "Turnover Rent" provision, landlords are able to determine a rent increase which is geared within what a retailer "can afford to pay" rather than a common and transparent market rate mechanism thanks to accrued data provided under the "Turnover Rent" clauses. Invariably it is not disclosed to a tenant prior to agreeing to this term, that these figures would be required to evaluate the performance of their business in relation to other business in the centre. In fact, the structure of such a term is usually based around financial requirement within the lease to pay a percentage of turnover as an additional rent component, called "TURNOVER RENT". Most often, this financial requirement to pay "TURNOVER RENT" is set at such an unrealistic level of turnover, which would most likely never be achievable by the tenant, that true intention of the collection of turnover figures constitutes a misrepresentation of the consequences of

agreeing to such a term.

The ARA believes the retailer's monthly turnover figures should be reported by the tenant to a third party aggregator, and not directly to the landlord, and then these figures be advised from the third party to the shopping centre on an aggregated category basis rather than individual figures being reported to the landlord directly. An exception would apply if the rent paid by the retailer was based solely as a percentage of tenants' turnover figures.

4. In the period after the current lease term is expired, but prior to a new lease being agreed to, the tenant is regarded as being the occupant month-to-month under a "lease holding over" period. If, and when, a new lease is signed at a different rate, the retailer is obliged to pay back the difference and this is obviously an unbudgeted and unexpected financial burden to the individual retailers.

For these reasons ARA would require these changes to protect tenants' turnover and any other commercial in-confidence information which could impact on negotiations with landlords.

RETAIL TRADING HOURS REGULATIONS

DRAFT RECOMMENDATIONS 9.1

While there is some evidence small to medium enterprises maintain a significant proportion of the market if partially deregulated there is also evidence of social and economic impacts for many smaller retailers in deregulated markets. With the current inflexibility in wages and hourly rates the impost falls on many owner operators to undertake additional opening hours themselves.

ARA can see the competitive benefits for the sector with deregulation, particularly in an increasingly global and trade exposed market. We do however believe a balanced approach needs to be taken in worker hourly pay rates and flexibility.

WORKPLACE REGULATION

DRAFT RECOMMENDATIONS 10.1

Fair Work Australia (FWA) will undertake a review of all modern awards, including the *General Retail Industry Award 2010* ("the Award"), in compliance with their statutory obligation under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. The review must commence as soon as practicable after 1 January 2012.

The review must consider whether modern awards:

- (a) Achieve the modern awards objective; and
- (b) Are operating effectively, without anomalies or technical problems arising from the Part 10A award modernisation process.

FWA is obliged to review all modern awards as part of the process. With over 120 modern awards to be reviewed there is a well founded fear in the business community that there will be insufficient time for the review to fully evaluate each individual award. This is coupled with a complete absence of information from FWA about how they will be undertaking the process.

The review will be a vitally important issue for the retail industry through 2012. The effective management of labour costs has become more important than ever before for the industry in an environment where sales are stagnant and the consumer has developed an expectation of discounted pricing.

DRAFT RECOMMENDATION 10.2

The Commission identified a number of issues that will be relevant to the retail industry. Most telling of these was the recognition of the difficulties faced by retailers working under an award structure that imposes higher labour costs at times when consumers want to shop. This is becoming increasingly problematic as Sunday continues to establish itself as an important trading day.

The 2012 Review will represent an opportunity for the industry to communicate to the Government the difficulties and inflexibilities being presented by the Award in its current form. ARA will be pushing for amendments to the Fair Work legislation that will allow retailers to more effectively manage their labour costs and provide greater flexibility.

ARA is of the view that the "one size fits all" structure of the current award is fundamentally failing to allow for the flexibility required to promote growth in the industry.

ARA will, over the course of the next four months, be actively seeking the views of members, and engaging with the broader retail industry, to identify key common concerns and develop a strategy for ensuring that FWA conducts a comprehensive review of these concerns.

As Australia's peak employer association for the retail industry we will be taking a lead role in the process to achieve a positive outcome for members. We strongly encourage members to provide information about their own experiences with the Award, to advocate for change and raise issues of concern with the government through ARA or via their own approaches.