



A U S T R A L I A N
R E T A I L E R S
A S S O C I A T I O N

SUBMISSION TO THE PRODUCTIVITY COMMISSION: Inquiry into Retail Leasing

AUGUST 2007

*Supporting
Retail Growth and
Sustainability*



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Retail Leasing

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About the ARA

The Australian Retailers' Association (ARA) is the peak national retail association representing the interests of the largest employing industry in Australia. We provide 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.

The retail industry contributes to more than 5 percent of Australia's Gross Domestic Product (GDP) and is the largest employer in Australia, providing 15% of all jobs.

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.

The ARA provide a range of comprehensive services, advice and representation suited to both small and large retailers in the areas of employment relations, occupational health and safety, tenancy, consumer law and retail business solutions. This includes a range of retail specific training that supports best practice in retail.

2. Retail Tenancy Leases and their Regulation

Legislation

Legislation regulating retail leases has been in force since the mid-eighties. Western Australia first introduced the Commercial Tenancy (Retail Shops) Agreement Act in 1985 and was followed by the Victorian Retail Tenancies Act in 1986. Other states introduced legislation in the nineties:

- Queensland - Retail Shop Leases Act 1994
- New South Wales - Retail Leases Act 1994
- South Australia - Retail and Commercial Leases Act 1995
- Tasmania - Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998
- Australian Capital Territory – Leases (Commercial & Retail) Act 2001
- Northern Territory – Business Tenancies (Fair Dealings) 2003

A number of states including New South Wales, Victoria and Queensland have conducted reviews of their Acts leading to a number of amendments clarifying the intention of the legislation and incorporating a number of sections from the Trade Practices Act covering unconscionable conduct and false and misleading information.

In the early nineties this Association in conjunction with the Building Owners and Managers Association (now the Property Council of Australia and the Shopping Centre Council of Australia) entered into a Voluntary Code in New South Wales that set out the essential conditions for good leasing practice and was a negotiated compromise providing a set of balanced guidelines, which if applied properly could produce a lease that was fair to both landlord and tenant.

Both Associations strongly recommended to their members that the Code be incorporated into all agreements on all leases commencing on or after 1 January 1992. However a number of key landlords only used those sections of the Code that suited them and ignored many key components. This led to the Code failing and the subsequent introduction of legislation in that state.

The object of all the legislation has been the establishment of good leasing practices with full and open disclosure of all matters relevant to the lease and in the event of a dispute a quick and cost effective method of resolution of the matter in dispute.

With the exception of Western Australia there is a similarity in the matters covered by the legislation. However there are significant differences in how some states handle certain matters. The definition of a retail/retail premises varies across all states. Victoria states that the lease must be in writing, whilst other states have no

provisions. The different approach taken by the states does cause confusion especially with those retailers who trade across state boundaries. Minter Ellison's "Retail Tenancy Legislation Compendium" Edition 4 and Clayton Utz "Retail Tenancies Comparative Analysis 2006", copies of which are attached to this submission do provide a useful tool for comparing the various state legislation.

The legislation has largely been distilled with the issues being agreed to by consensus, but from the retail tenant's perspective there are still a number of critical matters unresolved. As far as the landlords are concerned these will never be agreed to. These include:

- All leases should be gross leases
- The declaration of sales figures in a lease where percentage rent will never form a part of the payment of rent
- The term of the lease
- The treatment of the retail tenant at the end of the term of the lease

These issues will be addressed later in this submission.

Retail Leases

Retail shop leases are a binding contract between the landlord and the retailer, giving the retailer the exclusive right to defined premises for a specific period of time. They require the retailer to pay rent and other charges to the landlord for that specific period of time. In most shopping centers retail leases with the major landlord can run up to sixty pages. The lease will contain the following provisions:

- Definitions
- Base rent, payment of rent and rent review provisions
- Percentage rent provisions
- Outgoings and other charges to be recovered
- Promotions fund charges
- Permitted use
- Insurance
- Repairs and lessee's works
- Lessee's rights and additional obligations
- Lessor's rights and additional obligations
- Transferring, sub-letting and charging
- Destruction of or damage to premises
- Indemnities and releases

- Representations and warranties
- Holding over provisions
- Lessee's obligations at the end of the lease term
- Lessor's right to relocate
- Demolition clause
- General
- Rules

A copy of a Stockland's standard lease for Forster is attached. Most of the shopping centre leases are in a similar format to Stockland. The majority of small businesses does not seek professional advice before entering into the lease and sign it not knowing the full ramifications of the contract.

Not all leases are this complex but those that simple are in the minority.

Fit outs

Apart from the lease document, the retailer in a shopping centre will also be required to comply with a detailed fit out or design guide. This will dictate all the design features that the landlord requires in fitting out the premises together with the approved finishes allowed on walls, ceilings and floors. Lighting and signage criteria are also governed by this manual as is the type and style of shop front. All approvals required by the landlord from the landlord's consultants must be paid for by the tenant. The tenant is also required to have the tenant's designer approved by the landlord.

The cost of these fit outs in most regional centres are now in the range of \$2,500 - \$3,000.00 per square metre, meaning an investment of \$250,000.00 for a one hundred square metre shop.

All improvements undertaken by the tenant must be removed by the tenant prior to the tenant vacating the premises at the end of the lease or being required by the landlord to undertake a complete new shop fit as a condition of being granted a new lease.

3 Competition, regulatory and access constraints on the effective and efficient operation of the retail market

The existing legislation and regulations enforcing land use and zoning decisions have created a position, which significantly reduces the ability of extending the land available for use as retail except in the areas of greenfield sites associated with new subdivisions. The retail zoning restrictions have seen since the early seventies, the

supermarket centre grow into the regional centres of the eighties and now the super regional centres of two thousand.

In the period from 1995 to 2007 the retail space occupied by seventy nine regional centres grew by 61.29% from 3,894,574 square metres to 6,281,507 square metres. Of that increase only 14.1% of the additional space or 335,624 square metres represented growth by greenfield sites. Over 2.05 million square metres were added to existing zoned retail space using the zoning restrictions to gain a monopoly position in the catchment. Not only was the retail space consolidated into regional shopping centres, the ownership and management also underwent significant consolidation.

The following table shows that consolidation and how various owners have also taken up shareholdings in regional centres although they do not manage those centres.

Shopping Centres	GLA Square Metre	\$ Annual Sales (millions)	OTHER PARTNERS
AMP			
GC BOOROOGAN	78381	476.20	Westfield 25%
KARRINYUP	58113	338.70	Westfield /Stockland
KNOX	142,244	628.00	Westfield 30%/SAS Trustees 50%
MACQUARIE	98353	536.90	Westfield 50%
PACIFIC FAIR	106162	601.50	Westfield 40%
WARRINGAH	127177	689.50	Westfield 25%
	610430	3270.80	

Centro

ARNDALE	40238	153.40	
BANKSTOWN SQ	66554	308.20	
COLLANADES	42457	163.30	
GALLERIA	71402	370.00	
ROSELANDS	61227	280.50	
THE GLEN	58205	304.70	
TOOMBUL	44752	235.20	
TUGGERNONG	75475	259.20	
	460310	2074.50	

Colonial First State

BAYSIDE FRANKSTON	83538	362.00	
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BROADMEADOWS	51855	238.00	
CHADSTONE	137076	953.00	Gandel
CHATSWOOD	40707	370.00	
ELIZABETH	74826	240.00	
FOREST HILL	65305	222.00	
GRAND PLAZA	41821	250.60	
INDOOROOPIILLY	84579	508.00	Aria Property Fund & PSS/CSS A Property Trust
MIDLAND GATE	33636	181.11	Diversified Property Investment Fund 50% OFS 50%
MYER BRISBANE	111943	343.00	
NORTHLAND	76837	388.00	Gandel 50%
WERRIBEE	75299	287.00	Pacific Properties 100%
	802123	4055.71	

GPT

CASAURINA	49800	298.50	
CHARLESTOWN SQ	46720	326.60	
DANDENONG	63230	223.30	
HIGHPOINT	123200	653.80	Highpoint Property Pty Ltd 50%
MELBOURNE CENT	54050		
	337000	1502.20	

LEND LEASE

CAIRNS CENTRAL	52519	313.70	Westfield 50%
ERINA FAIR	107083	564.70	GPT 50%
GREENSBOROUGH	57604	322.70	
MACARTHUR SQ	R/D	R/D	GPT 50%
SUNSHINE PLAZA	60018	419.90	GPT 50%
	277224	1621.00	

QIC

CANBERRA CENTRE	56888	325.50	
CASTLE TOWERS	109697	650.30	
EASTLAND	78825	456.70	
GRAND C TOOWOOM	45936	228.10	
LOGAN	81801	381.60	J C Longhurst 50%
ROBINA TOWN CENTRE	85500	398.40	
WESTPOINT	71264	286.00	
	529911	2726.60	

STOCKLAND

GLENDALE	55238	205.30	
WETHERILL PK	57126	238.50	
	112364	443.8	

WESTFIELD

AIRPORT WEST	53946	245.80	
BAY CITY PLAZA	35746	186.20	Perron Group
BELCONNEN	74611	405.50	
BONDI JCT	126779	754.00	
BURWOOD	63603	358.70	
CARINDALE	113268	568.00	Suncorp Metway/Carindale Property Trust
CAROUSEL	80051	409.10	
CHATSWOOD	75980	458.00	
CHERMSIDE	77715	453.40	
CPOINT SCP	54106	353.60	
DONCASTER	57788	347.40	
EASTGARDENS	83552	464.50	Terrace Towers 100%
FOUNTAINGATE	138163	564.70	
GC KOTARA	43748	308.20	
GC MT GRAVATT	100873	528.30	AMP 50%
HORNSBY	97212	529.90	
HURSTVILLE	62264	356.30	Deutsche Asset Management 50%
LIVERPOOL	67920	299.40	AMP 50%
MARION	132553	666.50	
MIRANDA	108370	622.00	Deutsche Asset Management 50%
MT DRUITT	54658	274.30	Deutsche Asset Management 50%
PARRAMATTA	126754	570.00	SGIC 50%
PENRITH	87715	476.90	GPT 50%
SOUTHLAND	128028	660.70	AMP 50%
STRATHPINE	46419	212.60	AMP 50%
TEA TREE	93456	448.60	AMP 50%
TUGGERAH	79978	336.80	
WARRAWONG	56051	190.50	
WEST LAKES	60635	277.40	Deutsche Asset Management 50%
WHITFORDS	77750	363.30	Deutsche Asset Management 50%
WODEN	71271	406.10	GPT 50%
	253096		
	3	13096.70	

YU FENG

AUSTRALIA FAIR	59499	224.35	Yu Chieh Pty Ltd
BROOKSIDE	48700	208.00	
TOOWOONG VILL	45935	148.70	
	154134	581.05	

OTHER CENTRES

BELMONT FORUM	42872	266.75	Belmont Forum Shopping Centre Pty Ltd
LMORAYFIELD	42700	257.52	Leda Commercial Property Pty Ltd
MYER ADELAIDE	64692	206.00	Diversified Property Investment Fund
	150264	730.27	

These centres have become the dominant retail space with any retailer requiring good foot traffic being forced to locate in these centres as there is no other suitable space available if the retailer is to achieve the necessary productivity in sales to support the format. Much of the high street shops adjacent to these centres have declined substantially as the centres have grown in size vacuuming the better retailers from the strip into the shopping centre.

The sub-regional space has also seen an aggregation of the ownership over the past five years. This has also been supported by the zoning legislation. It is interesting to note that those who occupy a major position in the ownership and management of the regional shopping centres also play a major part in the sub-regional and lesser centres. One thing that is notable is that cross ownership is substantially less in these centres.

Shopping Centres	GLA Sq Metres	\$ Annual Sales (millions)	OTHER PARTNERS
AMP			
Bullcreek	14147	64.50	
Gateway Plaza	14330	52.00	
Malvern Central	14914	92.20	
Marrickville Metro	22946	187.20	
Mt Ommaney	37368	226.60	
Northbridge Plaza	7783	104.89	
Ocean Keys	21243	119.00	
Palms Centre	15087	53.40	
Riverside Plaza	15087	84.50	

Royal Randwick	15087	85.60	
Sugarlands	22748	152.60	
	200740	1222.49	

ARMSTRONG JONES

Endeavour Hills	30775	115.00	
Lakeside Joondalup	42137	255.23	ING Real Estate
Menai Market Place	16528	146.90	
Stud Park	26744	135.00	
	116184	652.13	

CENTRO

Albany	10221	60.98	
Albury	15845	83.60	
Altona Park	7646	26.60	
Belmont Village	13226	99.40	
Box Hill	23739	101.57	
Brandon Park	22782	116.93	
Buranda	11485	45.60	
Burnie	8527	37.00	
Cranbourne	33887	165.22	
Croydon	9727	58.40	
Dianella	20342	78.95	
Dubbo	12749	69.10	
Emerald Village	7288	56.70	
Gateways S Village	9349		
Goulburn	13084	64.50	
Hamilton Central	7971	48.30	
Harvey Bay	15553	82.40	
Hollywood	29633	122.48	
Indooroopilly	19214	27.16	
Innaloo	8847		
Kalamunda	8275	53.60	
Karingal	39759	189.82	
Karratha	23601	155.30	
Keilor	19355	98.90	
Kurraltta	10675	63.10	
Lake Macquarie	14833	85.70	
Lansell	18154	80.77	
Launceston	10051	74.80	
Lavington	20837	106.58	
Lennox	9026	69.10	

Lismore Central	8351	52.20
Lutwyche	19075	77.19
Maddington	28170	149.30
Maitland Hunter Mall	14542	52.40
Mandurah	39447	305.27
Meadow Mews	7628	60.40
Melville Plaza	9157	49.60
Mildura	19577	115.63
Mornington	11724	86.84
Murray Bridge	8321	53.70
Nepean	21011	156.30
Nerang	8422	57.70
New Town	11444	60.40
Newtown	13598	59.70
Northgate	15583	68.10
Oakleigh	13194	73.10
Pirie	8640	48.50
Raintrees	20554	66.78
Raymond Terrace	7231	52.60
Ringwood	15885	72.40
Seven Hills	19130	113.20
Southport	19281	103.42
Springwood	15497	74.40
St Agnes	10274	58.80
Sunshine	33678	113.20
Surfers Paradise	23113	122.12
Taigum	22532	121.10
The Gateway	9332	40.50
Toormina	12530	71.90
Townsville	13664	73.30
Tweed	18647	106.64
Victoria Gardens	30067	144.79
Warriewood	22142	152.15
Warrigal	11742	55.40
Warwick	31737	159.24
Westcourt	18268	69.12
Westside	16655	85.20
Whitehorse	12986	63.60
Wodonga	17590	88.70
	113610	
	0	5857.45

COLONIAL FIRST STATE

Altona Gate	28590	110.06	
Ballina Fair	13460	81.20	
Balmoral	7229		
Beenleigh M P	17752	120.11	
Bendigo M P	17218	130.49	
Brimbank Central	38940	171.04	
Castle Plaza	22600	130.52	
Clifford Gardens	25470	183.10	
Corio	30765	159.79	
Eastlands	33954	182.63	
Golden Grove	31144	168.19	
Gordon Centre	11972	86.90	
Ingle Parm	27174	137.95	
Lake Haven	40460	235.82	Diversified Property Investment Fund
Mt Pleasant Green	22487	171.32	
Noosa Fair	7911	77.00	
Port Phillip Plaza	18707	106.36	
Roxburgh Park	10704	60.70	
Runaway Bay	37597	213.18	
Salamander Bay	22254	146.21	
	466388	2672.57	

DB REEF

Casula Mall	19479	120.87	National Mutual Life Nominees
Port Central	14995	91.40	
Willows	24920	145.92	
	59394	358.19	

GPT

Carlingford	33300	161.90	
Chirnside Park	37800	228.00	
Floreat Forum	19000	106.30	
Forestway	9600	78.60	
Parkmore	36300	187.70	
Wollongong	38900	176.90	
	174900	939.40	

ING

Endeavour Hills	30815	113.00	
Settlement City	19179	124.00	

Stud Park	26732	121.00	
Wynnum Plaza	20515	118.50	
	97241	476.50	

ISPT

Arana Hills	13036	77.40	
Barkly Square	17718	102.30	
Campberfield Plaza	18115	84.60	
Eastgate Bondi Jct	15257	145.55	
Fairfield Forum	17964	67.30	
Firlie Plaza	12139	84.30	
Melbourne GPO	7493	36.50	
Richmond M P	18223	149.30	
Southgate Plaza	15052	92.60	
Southgate Sylvania	20778	138.60	
Toowoomba Kmart	12893	85.60	
Wagga Wagga	22020	140.40	
Welland PI	9023	49.60	
Wintergarden Mall	13272	74.80	
	212983	1328.85	

LIF

Leichhart M P	17618	119.76	
Sturt Mall	15065	85.60	
	32683	205.36	

LEND LEASE

Caneland Central	39336	272.60	
Carlingford	32682	166.20	
	72018	438.80	

MIRVAC

Alexandra Hills	12418	61.00	
Cherrybrook	9500	105.28	
City Centre Plaza	14108	67.90	
Coleman Court	9918	79.20	
Gippsland Centre Sale	21809	105.64	
Greenwood Plaza	8725	78.20	
Hinkler Central	19822	Redevelop ment	
Kawana	27914	228.02	
Kwinana Hub	17311	69.00	

Mt Sheridan Plaza	7650	41.60
Orange City Centre	18065	74.31
Rockhampton CC	14108	67.90
St Marys	16169	76.30
Stanthorpe Village	7231	46.70
Taree City	15811	95.80
Waverley Gardens	31278	92.00
	251837	1288.9

PERRON

Campbelltown Mall	34939	177.00
Cockburn	11283	82.80
Epping Plaza	42889	168.00
Gateways S C	10494	50.00
Mirrabooka	41862	183.49
	141467	661.29

QIC

Woodgrove	21780	116.30
	21780	116.30

STOCKLAND

Batemans Bay	14928	73.80
Bathurst	19391	117.90
Baulkham Hills	11187	84.60
Bay Village	29296	163.73
Bull Creek	16711	97.00
Burleigh Heads	26678	167.30
Caloundra	15704	119.03
Cleveland	15663	117.28
Corrimal	9972	83.00
Cairns	48454	194.30
Forster		
Gladstone	27214	142.20
Glenrose	9204	59.60
Greenhills	32315	276.80
Jesmond	20978	137.60
Kin Kora		
Merrylands	25540	165.80
Nowra	16041	119.23
Parrabanks	25042	143.10
Riverton	17057	90.50

Rockhampton	37969	210.60	
Shellharbour	39523	201.90	
The Pines	24485	134.20	
Townsville	33840	203.50	
Traralgon	19628	87.10	
Wendouree	22996	133.00	
	559816	3323.07	

SAS

Capalaba Central	36850	141.00	
Plumpton	18354	134.20	
Smithfield	30311	127.30	
Tweed City	42395	205.00	
	127910	607.5	

WESTFIELD

Figtree	19846	148.90	
Helensvale	42354	203.10	
Innaloo	37835	188.70	
North Lakes	25403	132.30	
North Rocks	21029	101.10	
	146467	774.10	

YU FENG

Aspley	37432	101.07	
Booval	19371	142.00	
Capalaba Park	33108	155.00	
Logan Central	16842	77.00	
Peninsula Fair	29443	152.00	
Redbank Plaza	37542	130.00	
Stafford City	26617	117.00	
Sunny Bank Plaza	32240	135.00	
	195163	908.00	

OTHER CENTRES

Alexander Hills	12501		Guardian Trust Australia LTD
Ashfield Mall	25172	129.00	Abacus Property Group
Australia on Collins	7800	36.00	Thakeral Ltd
Bass Hill Plaza	19679	84.10	Memo Corporation Australia Pty Ltd
Birkenhead Point	30225	110.00	Birkenhead Investments Pty Ltd

Bonnyrigg Plaza	23172	99.13	Shopping Centre Management P/L
Bunbury Forum	20800	144.00	Atlas point Pty Ltd
Cannon Hill	16849	79.09	Yu Chieh Pty Ltd
Central Square	21706	81.75	Majestic Properties Pty Ltd
Deception Bay	17330	78.00	Morial Pty Ltd
Deepwater Plaza	18372	102.84	Schwatz Family Company
Eastwood Shopping Centre	15195		Bernard Chan Nominees P/L
Gladstone Park	19611	78.40	Proprietors of Strata Plan
Glenquarie T C	11707	41.60	Fincob Pty Ltd
Gosford Market Place	14047	22.92	
Horsham Plaza	12612	32.60	Rayworth Pty Ltd/Seventh Dector Pty Ltd
Imperial Centre Gosford	14776		A & A Lederer Pty Ltd
Ipswich City Square	28084		Memo Corporation Australia Pty Ltd
Kenmore Village	11792	76.20	Intro International Ltd
Market City	14749	133.00	Intro International Ltd
Market Square	19745	116.25	Davinski Holdings Pty Ltd
Market Town	9033	88.30	Carter Holdings Pty Lts
Mid Valley	36300	143.00	Julliard Group
Minto Mall	25333	68.20	World Best Holdings Pty Ltd
Narellan Town Centre	31570	168.66	Greenfields/Vitocco
Neeta City	19881	60.00	Emergency Superannuation Scheme
North Blackburn	11804	66.00	Australian Unity Property Pty Ltd
Northgate Tas	19019	106.50	Northgate Property Syndicate
Northpark	9638	46.20	Duke Group
Orana Mall	20016	162.55	Comet (Aust) Pty Ltd/Bachrach (Nominees) Pty Ltd
Park Beach Plaza	41958	248.90	H A Bachrach (Nominees) Pty Ltd
Phoenix	20460	95.10	Volley Investments Pty Ltd
Q Supa Centre	20554	135.12	Jen Retail Properties
QVB	13775	157.10	SGIC
The Oasis	21668	89.75	Thakeral Ltd
The Pines	28251	146.00	The Pines Shopping Centre Pty Ltd
Thornlie Square	13104	65.40	York Capital
Top Ryde	20449	120.00	Bellavista Pty Ltd
Warilla Grove	11834	85.20	Keyvac Pty Ltd
Winston Hills	22371	185.90	Private
Woodridge Plaza			
	772942	3682.76	

Of the sub-regional and other centres there are approximately only thirty-nine that are not owned by major property landlords. Experience would indicate that many of these centres will undergo redevelopment especially those in the 30-40,000 square metres size range and move to a more dominant role in the provision of retail space. This ownership does not provide for a free and open market to operate within the retail property sector. It also limits the choice that retailers have as to where they can open a store. Such a market does not operate in either the industrial or commercial property markets where there is much more diverse ownership of the property.

In the past four years there have been numerous challenges to new operators seeking to accommodate emerging retail formats such as bulky goods or factory outlets by the entrenched property owner through the court system. These formats would have great difficulty in surviving with the occupancy costs levels of the traditional shopping centres based on their margins. Such challenges were usually based on the objections of land currently used for other purposes being rezoned for retail. The cost of the land and its redevelopment cost meant that the owner would have been to charge a rent that allowed the new format to trade profitably. In some instances the occupancy cost would have been 50% less than the same space in a regional centre.

The zoning laws and their regulations when combined with the aggregation of ownership have contributed significantly to the lessening of competition in retail space within shopping centres. To some extent it has led to an oligopoly.

In respect of the retail sector being able to pass on the costs and other tenancy costs such as fit outs and legal to the consumers, the sector is perhaps the most competitive of any sector operating within Australia. In fact over the past ten years there has been a noticeable decline in gross profit margins of many retailers and if they had not been able to better source their products from overseas markets many would be in business today. Many retailers especially in apparel are selling their products at the same price that they were five years ago. For example menswear is as cheap today as they were in 2003. The same applies to underwear. In fact in a number of categories there has been a deflationary effect upon prices with the retailers being required to sell more individual items to make the same turnover. This has not been the case with the retail rental market.

Urbis JHD Retail Averages in 1993/1994 reported the average occupancy for specialty shops in regional centres was \$989 per square metre or 13.7% of sales, an increase of 30.2%. In 2003/2004 occupancy cost had risen to \$1288 per square metre or 16.1% of sales. Sales of specialty stores in regional shopping centres averaged \$7096 per square metre in 1993/1994 and had only risen 12.5% to \$7,986 per square metre. In the same period the Consumer Price Index had risen 30.2%,

4 What are the implications for the market in retail tenancy leases of trends in urban and regional development, changes in consumer preferences, in technology and in ways of working?

The retail sector is continually evolving to meet the changes in consumer habits. In today's market a retail format has a life of approximately five to seven years before it needs to undergo change. Many have forgotten that supermarkets that are an everyday part of our life were unknown before 1960 in Australia. Department stores are now competing with discount department stores who have taken a clear position of providing every-day low prices for basic merchandise. In the past five years we have seen the introduction of the "big box" format in hardware, the growth of "bulky goods" and the opening of "factory outlets" all of which have been as the result of consumer demand.

Many of these formats have chosen to locate in areas where they were able to obtain land at a cheaper price because their margins would not support occupying space in the normal shopping centre. Further their format also dictated that they did not require the level of fit out that the landlords in the shopping centres were requiring. Their needs were more basic in fit out but their requirements as to loading and unloading as well as close customer car parking were more stringent than could be provided by the normal shopping centre.

The impact that these formats had upon retailing leasing was most noticeable in the rent levels being much less, the fact the sales figures were not provided by most of retailers especially in the bulky goods sector and the cost of fit requirements were much more realistic. The biggest difference was the fact the new formats were able to obtain long term leases usually with options and with current market reviews being quite common. Both options and current market rent reviews are a rarity in the traditional shopping centre industry. Since the introduction of the various state legislation, which banned lease clauses that prevented rents from going down, current market reviews ceased to be offered. The offering of an option for a lease in regional and sub-regional shopping centres ceased in about 1994 when fixed terms of five years became the minimum term that a landlord was required to offer a tenant for a retail shop. That five-year term has become the term.

In the shopping centre sector there is no discernable difference in the occupancy cost structures between metropolitan and regional areas. This applies to both regional centres as well as sub-regional centres. It is worth noting especially in the sub-regional type of centre with the consolidation of ownership in this category, the levels of occupancy follows the level set in the best performing where that is set as the benchmark. The fit out requirements of the owners of these properties is same as for the centres they own in the metropolitan areas. See Stockland's manual for Forster on the mid north coast of New South Wales which is same that are for their

metropolitan centres even though Urbis JHD report in their “Retail Averages” over a million dollar difference in the average retail sales of the specialty shops.

Consumer’s preferences will continue to change as will retail formats to meet that need. Technology may have some impact but the desire to touch and feel will continue to exist in the foreseeable future.

5 Are there restrictions on the availability of information that impact on business decisions and operations?

Sales figures

There is a clear asymmetry in the information available to the landlord and that available to either an existing tenant or to a prospective tenant. As earlier highlighted the landlord as a lease condition based upon a percentage rent clause requires all the specialty tenants to declare their sales figures monthly and to provide a certified statement annually by an accountant as to what the sales figures were for a full twelve months. This only occurs in shopping centres and does not occur in strip shops. Any retailer challenging the right is told that the clause is to remain in the lease and if not acceptable a lease will not be issued.

Historically in the seventies and eighties sales figures were provided by retailers as a lease condition when a significant proportion of tenants had occupancy costs that were lower than the natural break-in figure for the payment of what was known as overage rent. For example if a tenant was on a rental of \$52,000.00 per annum with a percentage rent clause that stated he paid 10% percentage, on a turnover of \$650,000.00 he would have paid the \$52,000.00 minimum rent plus \$13,000.00 in percentage rent. The total occupancy cost would have been ten (10) percent of sales.

In today’s market with the average occupancy cost of 16% and on a sales figure of \$650,000.00, the rent would be \$104,000.00 and percentage rent would not be paid. In a survey conducted in 1999 by the Association on occupancy with over 4,000 respondents only four were paying percentage rent. The landlords shifted from each sharing the risk to one of an assured income for the landlord upon which to bank the value of the asset and the percentage rent clause today for the small specialty tenant is simply a means of the landlord gaining an in depth knowledge of the business. The collection of sales figures by the landlord despite what the property industry states is used to assess how much additional rent can be obtained from the retailer when it comes time to renew the lease.

The figures are used to gouge additional rent out of a sitting tenant at the end of lease term based on the landlord's knowledge of these figures and the vulnerability of an economic captive who has his investment, good will and livelihood tied up in

the business at the end of the lease term at the end of lease term. Examples of this are forwarded under separate marked "Confidential in Confidence".

More importantly as highlighted in the ownership table the landlords also know the performance of all retailers across their total portfolio as well as the rents. The market for rent is not a true market but one set as the landlords market. This is totally supported by the lack of relevant information being available to the other party to the contract.

Whilst much of the legislation provides for the confidentiality if this information there is significant leakage of the figures as personnel move from one organization to another and take with them the various tenancy schedules and sales figures. Further with the cross ownership of many of the regional centres this information is available to the various partners again contributing to an asymmetry in knowledge between parties to a lease.

Statements that are made suggesting that it is required for the redeveloping or marketing of the centre do not stand the test. All the Economic Impact Statements required under the various zoning legislation are based on demographic studies of the catchment, the incomes within the catchment and the projected growth that is likely to occur within a specified time frame. This even applies to an extension to an existing centre. There is very little analysis of the sales figures when it comes to filling a vacancy within a centre with retailers constantly seeing additional retailers being added to a category even though that category is over catered for within the centre.

It is interesting to note that the majority of the landlords involved in the bulky goods sector do not see the need to place such obligations in their leases. This sector forms a substantial amount of total retail sales. T

The major retailers in shopping centres all have a percentage rent clause within their leases. The very structure of their relationship is based on a low rent. The average supermarket in a shopping centre of 3,250 square metres has a gross rental in the range of \$300-350.00 per square metres. Their percentage rent is on a sliding scale paying 3% for sales between \$32.5 million and say \$40.0 million, 2.5% on sales between \$40.0 million and \$60.0 million and 2% on any sales above \$60.0 million. On sales of \$60.0 million they would pay \$975,000.00 base rent and \$740,000.00 in

percentage rent. Occupancy costs would be approximately 2.8% of sales. Percentage rent clauses for the major tenants are integral to the commercial deal.

Percentage rent clauses to the specialty shops are not integral to the commercial.

On a number of occasions the Association has put to various reviews of the legislation that an independent body should be responsible for the collection of such information if it is to be collected. It should be collated in a format that does not identify any individual retailer and available to all at cost. The cost of such collection would be borne by the industry. This would make the information freely available to all and would be a form that did not give one party to the contract a decided advantage in the negotiations. It would also remove the number one issue of dispute between the landlord and the retail tenant.

Rents

Currently the only person that has any detailed knowledge as to what rentals are being achieved by the landlords for retail space is the landlord. Even in those states where retail leases are registered as a part of the land titles system the true picture of what is the real rent is unknown. Many of the deals that relate to rent free periods or fit out contributions that in some cases may be equivalent to a year's rent are not recorded anywhere other than in an exchange of letters between the parties that are declared to be "Commercial in Confidence" and not for any third party's knowledge.

This totally distorts what is the true value of rent over the term of the lease. Some of these arrangements are not even disclosed to valuers when they are being required to undertake a market rent review or to value the asset. The valuer takes the face rent that is on the lease and not the effective rent that would take into account the incentive. This system is totally inappropriate and provides no transparency for any party wishing to be fully informed as to the market that is operating in the leasing of retail shops especially in shopping centres.

Such a lack of transparency often leads to a retailer entering into a lease that is well in excess of what is the true market rent and when the retailer signs the lease at the higher level, it becomes the new market rent for that permitted use. It is ratcheting the rent by stealth.

Outgoings

The majority of leases contain the provision for the landlord to recover outgoings associated with the property. Under the various state legislation, as a result of disputations as to the authenticity of some charges, outgoings are now regulated as a result of the legislation. This has led to more transparency but a cost which has been borne by the tenant.

All leases should be gross leases where there is a single charge that includes rent, outgoings and marketing fund costs. From a retailer's perspective the total cost of occupancy is the main concern and such a lease would remove the significant cost burdens incurred by the landlord in the operation of the accounts, the individual charges, the preparation and circulation of budgets and audited statements for both outgoings and marketing funds for those retailers in shopping centres. As stated previously these charges are passed onto the retailer. There has always been arguments as to the recovery of some outgoings especially the management fees charged by the landlord as to what applies to the centre and what are costs associated with head office and not directly related to the day to day operation of the centre. A gross lease would not only lead to a more efficient and cost effective system but also would place upon the landlord an obligation to manage his outgoings rather than just passing on the costs.

Professor Millington in his paper "Retail Property in Australia – A Review of the Retail Property Market in Australia" strongly supported this view. A copy of his paper is attached.

6 Are the provisions of leases establishing the rights of landlords and tenants when leases end appropriate and transparent?

Most leases clearly define the landlord's right at the end of the lease. Only one state and one territory offer the tenant some rights as to renewal of the lease. In all other jurisdictions the tenant has no right at the end of the lease term. The landlords have made their position very clear and it was spelt out in the hearings before the Standing Committee on Industry, Science and Resources in 1997 that the only right a retail tenant is the "right to a cash flow" and under no circumstances does a retail lease confer any property rights other than that of quiet enjoyment during the term of the lease. The landlord reserves the right to treat with the property as he or she sees fit.

The difficulty that arises at the end of the lease is the position of the sitting tenant in a shopping centre where he or she is an economic captive having invested heavily in a fit out, stocked the shop for a the term of the lease and contributed substantially to the asset of the landlord. If the tenant is to vacate they are confronted with the loss

not only of their goodwill and also the value of the business as a going concern and their livelihood for the majority of small businesses.

Having provided the landlord with the details of his sales for the past five years he now finds himself subjected to the vulnerability of an ambit claim by the landlord to gouge a much rent as the landlord can in the name of hard bargaining. Claims of thirty and fifty percent increase are not uncommon when a realistic increase could be as little as five percent or in some cases even a decrease. The following table using the Straight Line method shows the difference between an asset written down over ten years at ten percent per annum and being scrapped at the end of five years using twenty percent per annum on cost.

	Asset to last 10 years		Asset scrapped in 5	
	Claim	W D Value	Claim	Residual
Year 1	\$20,000	\$180,000	\$40,000	\$160,000
Year 2	20,000	\$160,000	\$40,000	\$120,000
Year 3	\$20,000	\$140,000	\$40,000	\$80,000
Year 4	\$20,000	\$120,000	\$40,000	\$40,000
Year 5	\$20,000	\$100,000	\$40,000	Nil
Year 6	\$20,000	\$80,000		
Year 7	\$20,000	\$60,000		
Year 8	\$20,000	\$40,000		
Year 9	\$20,000	\$20,000		
Year 10	\$20,000	Nil		

If the Diminishing Value method is used the following table below demonstrates further the dilemma that faces small business at the end of a five year lease which as stated earlier in this report is the standard term that is offered by landlords operating shopping centres.

	Asset to last 10 years		Asset scrapped in 5	
	Claim	W D Value	Claim	Residual
Year 1	\$40,000	\$160,000	\$80,000	\$120,000
Year 2	32,000	\$128,000	\$48,000	\$72,000
Year 3	\$25,600	\$102,400	\$28,800	\$43,200
Year 4	\$20,480	\$81,920	\$17,280	\$25,920
Year 5	\$16,384	\$65,536	\$10,368	\$15,552
Year 6	\$13,107	\$52,429		
Year 7	\$10,486	\$41,943		
Year 8	\$8,389	\$33,554		
Year 9	\$6,711	\$26,844		
Year 10	\$5,369	\$21,475		

Whilst the landlord might believe that their property rights are prime, some consideration should be given to the financial implications that retail tenants find themselves at the end of the lease term. The five year that has become the norm in shopping centres clearly needs to be extended given the investment that they are forced to undertake as a condition of complying with the fit out standards required by the landlords. If the retailer is unable to renew the lease not only is there the economic loss associated with what is left on the balance sheet but also the cost of removing and disposing of the fit out most of which is unsalvageable. This cost is of the order \$20-30,000.00.

The Australian Capital Territory is the only state or territory that has a provision in its legislation that grants a right to the tenant at the end of the lease term. The Australian Retailers Association has expressed its concern of the ambit claim for rent that a sitting tenant is confronted with at the end of the lease term. The concern has been raised at every review of legislation that has occurred in Australia but apart from the ACTT no government has sought to address the issue in any of the reviews on the basis that they would not interfere with property rights.

The shopping centre landlords state that they set the market rent for the property. The Association has put forward at the reviews that if the landlord offers a sitting tenant a new lease in good faith and the sitting tenant believes that the rent is in excess of what a market rent would be for permitted use of the retailer then the matter should be referred to a valuer to have the rent determined in accordance with the provisions in the various acts governing such a determination. The proposal has been rejected outright by the landlords.

The definition of s current market rent is as follows:

A current market rent is the rent that would reasonably be expected to be paid for the shop, as between a willing landlord and a willing tenant in an arm's length transaction (where the parties are each acting knowledgeably, prudently and without

compulsion), determined on an effective rent basis having regards to the following matters:

- *The provisions of the lease,*
- *The rent that would reasonably be expected to be paid for the shop if it were unoccupied and offered for renting for the same or substantially similar use to which the shop may be put under the lease,*
- *The gross rent, less the lessor's outgoings payable by the tenant,*
- *Rent concessions and other benefits that are frequently or generally offered to prospective tenants of unoccupied retail shops.*

The current market rent is not to take into account the value of goodwill created by the tenant's occupation or the value of the tenant's fixtures and fittings in the retail shop premises.

In valuing your premises for current market rent the valuer would be required to estimate what a similar retailer would pay in rent for the premises if it were vacant and available for lease, and knowing what your current sales are. A sitting tenant is not in an arm's length transaction as he cannot walk away, so the criteria must be what a retailer would pay for the premises without any compulsion.

Such a provision would remove once and for all the highest and best use provision that the landlords within shopping centres wish to use. Such a provision does not take into account the profitability of the business of the retailer or his ability to be able to meet all his obligations. The knowledge of the tenant's sales figures and the use of the highest and best use rentals adversely impacts upon the retailer's business.

7 Is the notion of unconscionable conduct sufficiently clear?

Whilst Section 51AC was introduced into the Trade Practices Act following the Reid Report in 1997 a subsequently drawn down into most of the state retail lease legislation, it has always been viewed as having too high a hurdle to cover the behavior that the majority of retail tenants complain.

The Reid Report in Recommendation 6 advocated legislative protection against Unfair Conduct. The concept of unfair is significantly different to unconscionable and much of the behavior that is no defined as hard bargaining and not unconscionable would have been caught with the provisions outlined in this recommendation. Unfair conduct was to form a new section 51AA of the Trade Practices Act.

For a retailer to attempt to argue a case of unconscionable conduct the cost and time is prohibitive and the chance of success based on unconscionable conduct is small.

8 What other regulatory avenues are available for dispute resolution between landlords and tenants.

Much of the state legislation retail lease legislation provides for a simple, quick and cost effective for many of the disputes that arise out of a retail lease. The dispute resolution process based upon early intervention, the use of formal and informal mediation and the cases that cannot be resolved by mediation the use if the tribunal system has seen the majority of disputes resolved quickly and efficiently.

The figures kept by the various state units demonstrate that there is a need for such a system especially to cover the strip shops where disputes on issues such the state of the fabric of the building, whether the landlord is entitles to recover various outgoing, the failure to grant an option that has been be correctly exercised are resolved quickly and effectively.

The system has also been used effectively for disputes within shopping centres. These disputes can relate to compensation for loss of profits as a result of an action of the landlord interfering with the business. Matters relating to outgoing charges, failure to provide outgoing and marketing fund budgets and certified statements are but a few that have again quickly and effectively resolved. Many of the disputes with shopping centres are usually resolved at an early age.

9 What is the scope of regulatory or policy change to improve the effectiveness, operation and economic efficiency of the retail tenancy market in Australia?

1. The current planning regulations covering the zoning of retail has created an oligopoly of approximately twelve landlords that control a substantial part of the retail shop leases market especially within the shopping centre industry. The cross ownership when combined with the sharing of information relating to tenancy matters creates a market that lacks transparency and a market in which the information is held by only one party.

The existing players are fiercely territorial in preserving their catchments and use all legal avenues to keep any new players out. The zoning restriction has contributed to the escalation of the price of land in the correctly zoned areas resulting in higher rents and less opportunity for other developments on cheaper land that may have to go through the rezoning process.

The objections that have been fought out in the courts against the introduction of new retail formats demonstrates the length the existing landlords will go to restrict competition.

2. Any proposal that has been put forward to make the information more freely available has been rejected out of hand by the landlords. The registration of leases across Australia has been agreed but the inclusion of all the incentives and side deals was rejected on the basis that they were commercially in confidence. However such deals impact significantly on what is the true effective rent. The face rent on the lease is of little value if the balance of the deal is not known. All aspects relating to the commercial terms should be included in the lease.
3. Again information relating to sales within shopping centres is totally available to the landlord but is only available the tenant in a limited form. In the last review conducted in New South Wales the shopping centre industry agreed to providing the total sales within the centre, the average sales per square metre for the food and non food specialty stores and that was it. This concession only came about when it was shown that these figures were already in their annual report to unit holders and as such was public information. If the figures are to be collected it should be done by an independent body, collated into categories agreed to by industry and available at a cost to all parties.
4. There is currently a push to wind-back the amount of information that is contained in the Disclosure Statement that is required under most of the legislation. The Disclosure Statement in most jurisdictions is only required to be issued seven days prior to the lease being entered into. However most landlords now use this template in their original letter of offer to a prospective tenant. Much of the extra information that is contained in the letter of offer relates to other conditions the landlord wishes to impose such as the Fit out Manual, the EH&S Management System relating to any tenant's works, Agreements for Shop fitters, Periodical Payment Request, Terms and Conditions of the Bank Guarantee and the company's Privacy Policy. In many circumstances if any of the matters relating to the commercial terms are changed a new disclosure statement is not issued.
5. The existing dispute resolution procedures in the matters that are to be dealt with under the existing legislation are cost effective and timely in resolving the majority of the disputes.

6. The differences in the various retail lease legislation reflects the differing approaches that the various governments and parliamentary draftsmen take in developing the legislation. It does impact upon those retailers who trade in a number of states. However in developing uniform regulation it is essential that it reflects the best practice and not the lowest common denominator as wanted by some. There would be benefits from reducing the differences.
7. One area that varies substantially is the exemptions from the regulations. The landlords have argued that public corporations should be removed from the regulations. Removal of such retailers creates a system in which the landlords will give preferential treatment to those businesses that are exempt at the expense of those small businesses that are covered by regulation. In turn this could lead to the reintroduction of such practices as demanding key money for the granting of a lease, no compensation for any interference as the result of an action of the landlord and the recovery of many charges that are purely a landlord's cost which should not be passed back to the tenant.
8. The introduction of gross leases within the shopping centre industry.
9. Longer term leases of at least seven years to allow for a reasonable depreciation of the cost of fit outs now being demanded by landlords. There should be a mid-term market review that would take into account the changing conditions and the impacts that these conditions. The "ratchet provisions" should continue to be prohibited within leases.
10. That if a landlord offers a tenant in good faith a renewal of an expired lease, there is right to have the rent reviewed to market where the tenant believes the rent is in excess of what is market rent for that use in the premises.
11. Uniformity in the legislation and such uniformity is based on best practice and should not be used to wind back any of the regulations to the lowest common demominator

For any market to operate effectively and efficiently there needs to be full disclosure of relevant information and transparency in negotiations. The Association is only too willing to provide any additional information that Commission may require concerning any of the matters outlined in the submission.

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