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Competition &
Consumer
Commission**

14 November 2007

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Dear Mr Gretton

Re: ACCC Submission to the Productivity Commission Inquiry into the Market for Retail Tenancy Leases in Australia

Thank you for your cooperation in accepting the ACCC's amendment to its submission to the Productivity Commission Inquiry into the Market for Retail Tenancy Leases in Australia and for updating the Productivity Commission's website to reflect that change.

The revision of the ACCC's submission was necessitated by an incorrect quote on pages 20-21 of the document:

'ACCC v Westfield Indooroopilly was settled on June 2004, with Westfield accepting that it may have breached section 51 AC of the Act'.

The ACCC has now acknowledged that the *ACCC v Westfield Indooroopilly* matter was settled on a without admissions basis and, in the interests of correcting the record, has accordingly revised its submission on this issue.

I look forward to discussing the PC report with you and your colleagues.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Nigel Ridgway', written over a printed name and title.

Nigel Ridgway
General Manager

Compliance Strategies
ACCC



**Australian
Competition
Consumer
Commission**

**ACCC SUBMISSION TO THE PRODUCTIVITY
COMMISSION INQUIRY INTO THE RETAIL LEASE
MARKET IN AUSTRALIA**

REVISED

25 September 2007



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1. Introduction

The Australian Competition and Consumer Commission (the ACCC) is an independent statutory authority responsible for enforcing the Trade Practices Act (TPA). The complaints received by the ACCC constitute the primary material for its enforcement activities.

The ACCC has an ongoing interest in the behaviour of landlords and property managers in their dealings with retail tenants in the Australian market place. In 1998 major small business related amendments to the TPA included the introduction of section 51AC (s 51AC) to extend and clarify provisions relating to unconscionable conduct by larger businesses in dealings with small businesses. Retail tenancy issues were one of the matters focussed on by a Parliamentary inquiry that led to the introduction of s 51AC.

While the ACCC recognises the valuable work of the various State and Territory retail tenancy regulators in facilitating the resolution of the majority of disputes in this sector, the Commission's own enforcement, compliance and educative work at the national level continues to be important in complementing those localised efforts.

This submission briefly comments on the structure, economics and legislative framework of the retail tenancy market. It then outlines the nature of inquiries and complaints received in this sector by the ACCC from June 2002 to July 2007.

The ACCC recognises that certain retail tenancy related disputes receive a degree of claim coverage but the level of complaints received by the ACCC over recent years has tended to flatten out and indeed decline.

The submission outlines the ACCC's complaints handling, investigation and enforcement processes with reference to the complaints received in relation to retail tenancy.

The Commission has litigated a number of matters that concern s 51AC and successfully tested this provision in respect of retail tenancy disputes. However, the majority of tenancy complaints received by the ACCC fail to indicate conduct that contravenes the

Act. In those matters where a breach may be indicated the ACCC has encountered challenges related to:

- Lack of sufficient evidence; and
- Subsequent settlement between the parties.

The ACCC recognises the gravity of such conduct and has placed considerable effort in assisting small businesses to improve practices that would allow them to benefit from the protection available under section 51AC and wider provisions of the TPA.

The submission also outlines the ACCC's compliance and educational initiatives in relation to retail tenancy issues. While these efforts have concentrated on better equipping small retailers, the Commission recognises there has been a constructive compliance response from major shopping centre owners.

The ACCC has also addressed issues of retail tenancy and possible unconscionable conduct through wide ranging consultation with relevant State/Territory authorities and industry representatives on ways to address recurring issues of concern. In this regard the Commission has increasingly pointed to the potential for authorisation and notification of collective bargaining by groups of small retailers in negotiating terms and conditions with their landlord.

At the same time the ACCC has supported moves that have lead to proposed amendments to s 51AC which, if enacted, will list unilateral variation clauses in contracts a factor the Courts may take into account in establishing unconscionable conduct.

In addition, the Commission has been reviewing the manner in which it deals with substantive retail tenancy and other unconscionable conduct complaints to ensure that maximum impact can be achieved from in-depth investigation and enforcement.

2. Structure of retail tenancy market for shopping centres

As at 30 July 2006 the retail tenancy market for shopping centres was comprised of 1231 centres in Australia¹⁹¹ which occupied a combined floor space of 13,531,500 square metres.²¹⁰¹ These centres were then comprised of 65 regional centres, 257 subregional centres, 803 neighbourhood shopping centres and 106 Central Business District (CBD) centres³¹¹¹¹. They were distributed nationwide with approximately 30 per cent in New South Wales, 22 per cent in Queensland, 19 per cent in Victoria, 14 per cent in Western Australia, 10 per cent in South Australia, 2 per cent in the Australian Capital Territory and Tasmania, and 1 per cent in the Northern Territory.⁴¹¹²¹

It is reported that the ownership of shopping centres in Australia in regional areas is held by 16 different owners, in sub-regional areas approximately 100 different owners and in neighbourhood areas at least 500 different owners.⁵¹¹³¹ Data provided by Urbis states that more than 450 owners own only one centre and 85 owners own only two shopping centres.

Categories of shopping centres

As mentioned above, the ACCC has observed that the majority of complaints received relating to retail leasing practices concern the conduct of landlords towards their tenants in the context of retail shopping centres. The Shopping Centre Council of Australia divides shopping centres into four groups, being

- Regional centres
- Sub - regional shopping centres
- Neighbourhood centres
- CBD centres

(Smaller independent supermarkets, freestanding supermarkets or supermarkets in strip shopping centres are not included in this classification.^{611a1})

¹⁹¹ MapInfo, Dimasi, 2005/06.

²¹⁰¹ Ibid.

³¹¹¹¹ IJbris.

⁴¹¹²¹ Urbis.

⁵¹¹³¹ Property Council of Australia, *Directory of Shopping Centres in Australia*, 2007.

^{611a1} Jebb, Holland, Dimasi, *Australian Shopping Centre Industry*, Report prepared on behalf of the Shopping Centre Council of Australia, May 2000 Appendix 2.

These categories and a brief description of what they represent are outlined below.

Regional Shopping Centres

A regional centre is a major centre which incorporates at least one full scale department store supported by a wide range of other retail facilities."¹ The Property Council of Australia has defined three categories of regional shopping centre, being:

- A super regional centre which is stated to be generally in excess of 85,000 square metres in size. Such centres typically incorporate two full line department stores, one or more full line department discount stores, two supermarkets and around 250 specialty shops.¹¹⁶¹
- A major regional centre which has an area of between 50,000 and 85,000 square metres. The Property Council of Australia notes that this type of centre usually incorporates at least one full line department store, one or more full line discount department stores, one or more supermarkets and around 150 specialty shops.¹¹⁷¹
- A regional centre which has a floor area of approximately 30,000 to 50,000 square metres. This type of centre incorporates one full line department store, a full line discount department store, one or more supermarkets and around 100 specialty shops.¹⁰¹⁸¹ In the view of the Property Council a centre with two full line discount department stores without a department store serves as a regional centre.¹¹¹¹⁹¹

It should also be noted that the growth of factory outlet complexes, comprising of a wide variety of retailers, provides increased competition for these significant centres. However

⁷¹¹⁵¹ Jebb, Holland, Dirnasi, Australian Shopping Centre Industry, Report prepared on behalf of the Shopping Centre Council of Australia, May 2000, Appendix 2 Definitions and Data.

⁸¹⁶¹ The Property Council, 2001 Western Australian Shopping Centre Directory, c2001 Property Council of Australia Limited, page ii.

⁹¹⁷¹ Ibid.

¹⁰¹⁸¹ Ibid page 3.

¹¹¹⁹¹ Ibid page 3.

the establishment of such complexes can often be impaired by structural constraints that include, for example, planing and zoning requirements. In turn, this ultimately precludes competition and strengthens the bargaining position of individual landlords in their negotiation with regional shopping centre tenants.

Sub-regional Shopping Centres

Sub-regional centres are described as smaller (around 20,000 square metres)¹²¹²⁰¹ which are structured around one or more major discount stores and supermarkets. According to the Shopping Centre Council these centres usually include a variety small specialty stores.

Neighbourhood shopping centres

Neighbourhood Centre"Flare around 10,000 square metres and contain one or two major supermarkets and a variety of specialty shops. The supermarkets are usually members of a national chain however the definition also refers to independent supermarkets with floorspace in excess of 1000 square metres. These centres typically contain around 35 specialty stores.¹⁴¹²²¹ However there are distinct advantages in being in a shopping centre with the drawing power of a prominent anchor tenant, ease of parking, centre promotions and coordination of tenancies.

CBD centres

CBD shopping centres are inclosed centres anchored by a major retail tenant that include for example a supermarket or department store and are located in the core retail periphery of Australian Capital cities. These centres comprise a minimum retail floorspace of 1,000 square metres.

Tenancies within shopping centres are categorised as either a major tenancy, specialty store or food court. A major tenancy generally refers to a tenancy of more than 1000 square metres that occupies the largest space of any single tenancy in the centre and is

¹²¹²⁰¹ Jebb, Holland, Dimasi, Australian Shopping Centre Industry, supra, Appendix 2 - Definitions and Data.

¹³¹²¹¹ The Property Council of Australia refers to these centres as neighbourhood centres.

¹⁴¹²²¹ The Property Council, 2001 Western Australian Shopping Centre Directory, supra, page iv.

considered by customers to be a major attraction to the centre.¹⁵¹²³¹ A specialty store is a non-major retail shop in a centre that specialises in a narrow range of merchandise with an emphasis on product knowledge and customer service.¹⁶¹²⁴¹ The size of the shop is usually up to 400 square metres. A food court tenancy refers to retailers within a food court that sell a certain type of food product for consumption.

The economics of retail shopping centres

Retail shopping trips made by Australian consumers can be divided into four broad categories:

convenience shopping trips for example, for bread, milk or a newspaper;
weekly shopping trips for household essentials for example, groceries;
comparison shopping trips for example, for items of clothing, jewellery, music, gifts or cosmetics. This may also include multi-purpose"¹²⁵¹ shopping; and
special purpose shopping trips for example, for furniture, white goods, electronics, etc).

The volume of shopping trips within each of these four categories has implications for the economics and viability of a geographic region, and shopping centres, in broad terms. The creation of dedicated shopping districts or centres effectively reduces transport and time costs for consumers who wish to engage in comparison and multi-purpose shopping, making such areas an attractive destination. Consequently, retailers catering for these types of consumer categories choose to co-locate to minimise costs and maximise people traffic and profits¹⁸¹²⁶¹. In particular, multi-purpose shopping by consumers means that the co-location of retailers selling *dissimilar* goods reduces consumer search costs. Similarly, comparison shopping by consumers means that the co-location of retailers selling *similar* goods reduces consumer search costs.

¹⁵¹²³¹ The Property Council of Australia, *Directory of Shopping Centres 2001*, 2001 Property Council of Australia, Perth, page vi.

¹⁶⁶⁴¹ Ibid.

¹⁷¹²⁵¹ Consumers engage in multi-purpose shopping when they make a shopping trip for items from more than one category.

¹⁸¹²⁶¹ Co-location by retailers catering for multi-purpose and comparison shopping creates what is generally known in economic terms as a 'positive externality'. Positive externalities exist where, for example, acquiring a particular good or service generates benefits to persons other than the acquirer. In these situations, unless there is some coordination, less of the good or service is acquired than would be optimal for society as a whole. In this case the positive externality arises because co-location creates benefits beyond those accruing to the firms who co-locate. In particular, co-location provides spill-over benefits to consumers, thereby giving co-locating stores a competitive advantage.

Comparison shopping is characteristic of goods which are more expensive and less frequently purchased. Retailers will co-locate so long as the benefits of this demand exceed the cost of increased competition to individual retailers. More expensive goods again, such as furniture, higher value electrical appliances and white goods still involve demand externalities arising from comparison shopping. However, the savings in search costs for consumers are small relative to the value of the item. Consequently, retailers of these goods have less incentive to co-locate.

Given the different levels of expenditure on different types of goods and services, different types of retailers have different catchment areas. For example, newsagencies are likely to have smaller catchment area than clothing stores because consumers typically would spend significantly more in a clothing store than in a newsagency outlet. The smallest shopping areas include retailers with the smallest catchment areas and larger areas usually incorporate additional types of retailers with larger catchment areas.

Shopping centres - landlords and tenants

Some types of large retailers, referred to above as 'anchor tenant's, and include department stores or supermarkets, have very large catchment areas and are able to attract large pools of customers that generate a flow of people traffic to surrounding stores. Shopping centres seek to take advantage of this 'pulling power' and attract anchor tenants through offering substantially lower rents per square metre than those charged to other retailers. As the number of anchor tenants that can successfully co-exist in the same geographic area is limited; shopping centre owners themselves have to compete in relation to rental rates and other incentives, to secure these large retailers.

Shopping centres also incorporate a number of food court and specialty store tenants. A specialty store is a non-major retail shop in a centre that specialises in a narrow range of merchandise with an emphasis on product knowledge and customer service. Food court and specialty store formats range, in breadth of operation, from single store outlets through to national chains and franchise systems. Landlords clearly need to attract strong small retailers and a range of other speciality stores to cater for comparison shopping.

The shopping centre format allows landlords to control tenant entry, providing the means to maximise rents charged. Landlords are able to plan the mix of stores in centres so as to (at least potentially) maximise the customer traffic and revenue of each store.

For example, landlords may choose to trade-off the benefits of co-location of similar stores for comparison-shopping consumers with the costs of excess numbers of stores (which reduce store profits and therefore potential rents). Landlords also frequently restrict the number of stores relying solely on multi-purpose shopping by consumers.

Changes that flow from the management of this mix of stores, and associated extensions and renovation of the centres, can impact on individual tenants in the form of non-renewal of leases, changes to traffic flow, site relocation and, sometimes, the consequent imposition of fit-out costs. These impacts and the manner in which they are imposed, can result in inquiries and complaints to regulators, including the ACCC.

Finally, shopping centres are likely to reduce consumer search costs (including transport and time costs) more than any other retailing formation. For example, as shopping centres are enclosed, consumers avoid `costs' imposed by poor weather. The design, convenience and multi -storey nature of shopping centres might also allow more stores to be closely co-located than a strip-shopping area.

3. Legislative framework of the retail tenancy market

The retail leasing market in Australia is regulated through a network of specific retail tenancy laws, administered by Retail Tenancy Officials, in each State and Territory and the relevant provisions of the TPA which continue to apply to retail leasing arrangements (Sections 52, 53 and 51AC). This framework is briefly outlined as follows.

State and Territory re tall tenancy regimes

The retail tenancy regime within each State and Territory maintains primary responsibility for the regulation of local retail tenancy agreements, contributing to a nationwide network of regulation. This regulation provides for a variety of situations that regularly occur in the retail tenancy environment, but are not specifically addressed by the State/Territory' Fair Trading Acts or the TPA..

State and Territory retail tenancy laws

The laws within these regimes may vary significantly although in broad terms some similarities, aside from their purpose, can be identified. These similarities include, for example, the existence of low cost, accessible and effective dispute resolution schemes in most jurisdictions. Although the schemes themselves may vary they often encompass some form of alternative dispute resolution that may include mediation, conciliation and/or arbitration that may be exercised prior to a party having to pursue the matter in a Tribunal or a Court. Therefore, aggrieved tenants can resolve their issues at a relatively low cost through alternative dispute resolution or, as in most cases, through private action in Tribunals or Courts.

An additional similarity is disclosure obligations imposed on the landlord in retail leasing arrangements.¹⁹¹⁴ In these arrangements it is essential that correct and timely disclosure is provided prior to any agreement taking place. This helps to protect the legitimate interests of the weaker party to a commercial transaction by facilitating and enabling informed decision making. All of the States and Territories have ensured that their retail

¹⁹¹⁴ Please note that retail tenancy disclosure obligations are partly covered by the Franchising Code of Conduct.

tenancy laws state that a full and accurate disclosure document must be provided to the tenant by the landlord, prior to entering into a leasing agreement. However, there is some variation between the specific provisions, and related obligations, relating to disclosure in each jurisdiction.

Attachment A outlines the regimes in the States and Territories, providing the relevant legislation, the body administering this legislation and any recent amendments.

Trade Practices Provisions affecting retail tenancy

As noted above, the TPA does not contain a comprehensive retail tenancy regime, but is parallel to that of the States and Territories, with a number of specific provisions that may apply to retail tenancy disputes. These provisions include:

Section 52 which prohibits conduct that is misleading or deceptive or is likely to mislead or deceive. In retail leasing this may include, for example, incorrect advertising of site properties or rent levels or other inaccurate information that concerns the premises or its location; and

Section 53 which prohibits false or misleading representations. In the retail tenancy context this may include representations about future turnover, people traffic and shopping centre advertising and marketing.

The TPA also contains specific sections aimed at providing increased protection where there may be an imbalance of bargaining power between small businesses and their larger business suppliers or customers. For example, sections 51AA and 51AB which were introduced into the TPA in 1992.

Section 51AA was expected to provide greater protection for small businesses (including small business tenants) and to significantly extend the unconscionability provisions in the TPA. It was anticipated that this provision would be of particular use to lessees and franchisees that were in an unequal bargaining position with their lessors or franchisors. The practical operation of the provision produced mixed results.

The court's interpretation limited section 51AA to unconscionable conduct in accordance with the equitable doctrine. Section 51AA did not, however, live up to its

expectations in relation to retail leasing matters. Indeed the ACCC's submission to the House of Representatives Standing Committee on Industry, Science and Technology (the Reid Committee)²⁰¹⁵¹ noted that, notwithstanding enforcement of section 51 AA being a priority, it had been unable to build a case that would stand up in court in relation to complaints from retail tenants in shopping centres.^{21 f1}

In 1997 the Reid Committee heard submissions from many representatives of the retail sector and made recommendations^{22 p 1} in May 1997 which culminated in the 1998 amendment of Part NA and the insertion of Part IVB into the Trade Practices Act²³¹⁸¹. Part IVA was extended by the inclusion of section 51AC - the prohibition of unconscionable conduct in small business transactions.

Section 51AC

Section 51AC prohibits unconscionable conduct in small business transactions, having regard to all the circumstances and the criterion listed in the provision. This criterion includes:

Relative strengths of the bargaining positions - ss51AC (3)(a) and (4)(a)

The imposition of unnecessary conditions - ss51AC(3)(b) and (4)(b)

Whether the small business was able to understand the documents - ss51AC(3)(c) and (4) (c)

Whether any undue influence, pressure or unfair tactics were used - ss.51AC(3)(d) and (4)(d)

Availability and price comparison of goods elsewhere - ss. 51AC(3)(e) and (4)(e)

Whether the conduct was consistent with other dealings - ss.51AC(3)(f) and (4)(f)

Whether the requirements of any applicable industry code were met - ss 51AC (3) (g) and (4) (g)

Whether the requirements of any other industry code were met - ss 51AC (3)(h) and (4) (h)

Unreasonable failure to disclose intended conduct - ss.51AC(3)(i) and (4)(1)

²⁰¹⁵¹ The House of Representatives Standing Committee on Industry, Science and Technology which formulated the Reid Report, *Finding a Balance - Towards Fair Trading in Australia, May 1997*.

²¹¹⁶¹ ACCC Submission to the Reid Committee pp7-10, Reid Report, supra, para 2_36.

²²¹⁷¹ *Finding a Balance: Towards Fair Trading in Australia*

²³¹⁸¹ The provisions took effect from 1 July 1998.

Whether the party was willing to negotiate - ss.51AC(3)(j) and (4)(j)

Extent both parties acted in good faith with each other - ss.51AC(3)(k) and (4)(k)

It is also relevant to note that 'unilateral variations to contractual agreements' is currently proposed to be listed as an additional factor under section 51AC, under the *Trade Practices Amendment Bill (No.1) 2007* that is currently before Parliament. If these amendments are passed, this factor may assist in countering concerns that these type of clauses may be utilised by a stronger party to a transaction to obtain advantageous contract terms that may be to the detriment of a weaker party and amount to unconscionable conduct.

This provision expressly recognises that there may be an inequality in the bargaining position of parties to these types of transactions, and aims to afford small businesses protection from exploitation by a stronger party. This exploitation however, must go so far beyond normal hard commercial dealings that it offends good conscience and amounts to unconscionable conduct.

Small businesses are therefore afforded protection when they acquire goods or services from corporations in a superior bargaining position and are essentially acting in the capacity of a consumer. Thus, in the context of retail leasing tenants may be acting in a consumer capacity when dealing with landlords, who are often in a stronger bargaining position. It is the ACCC's experience that unconscionable conduct may be found to exist where retail landlords have in all the circumstances acted in a harsh and oppressive manner towards their tenants, taking advantage of their stronger position for other than the legitimate business reasons.

Since the findings of the Reid Committee and the introduction of section 51AC into the TPA, all of the States and Territories have enacted mirror provisions in retail tenancy legislation to promote harmonisation of the industry's legal framework. Victoria, Queensland, New South Wales, the Australian Capital Territory, the Northern Territory and Tasmania have equivalent provisions whilst South Australia have prohibited conduct that is in all circumstances 'vexatious' as opposed to 'unconscionable'; and Western Australia is awaiting commencement of these enactments.

Collective bargaining notification and authorisation possibilities

In addition to providing protection to small businesses, including small business tenants, the TPA also provides an opportunity for small businesses to improve their bargaining position when negotiating with larger businesses, such as landlords.

While competitors who act collectively in negotiations of price and other terms and conditions may be at risk of breaching the competition provisions of the TPA; the legislation makes provision for protection from legal action, including collective bargaining, where it is in the public interest.

Collective bargaining can lead to a number of potential benefits, such as allowing greater input by small businesses into their contract terms leading to more efficient outcomes. It may also address the information asymmetry that may exist, by improving the information available and increasing access to additional data. These are issues that may be relevant to small business tenants²⁴.

In the past, businesses have been able to obtain protection from legal action for collective bargaining arrangements through the authorisation process. Although it is now a legislative requirement that authorisation applications are considered within six months of being lodged with the ACCC, from January 2006 a streamlined authorisation process has been available for collective bargaining by small business. Under this process, the ACCC undertakes to issue a draft determination within twenty eight days of receiving an application for authorisation and to issue a final determination within three months of receiving an application.

Legislative amendments commencing in January 2007 have provided small businesses with an even easier and faster process for obtaining protection from legal action under the TPA by lodging a collective bargaining notification under section 93AB. The protection provided by a collective bargaining notification automatically commences twenty eight days after being lodged, unless objected to by the ACCC, and lasts for three years.

²⁴ For example, such as provided by firms like Leasing Information Services (www.leaseinfor.com).

The ACCC observes that collective bargaining will not and cannot be for everyone. Many small businesses may have individual issues or feel they are better off negotiating individually. However, collective bargaining provides a mechanism for addressing some of the issues arising in retail tenancy negotiations.

Dispute resolution

The legislative framework underpinning the retail tenancy lease market in Australia filters the vast majority of business disputes between lessors/lessees through various successful mechanisms of dispute resolution. This includes first, internal dispute resolution made available by the lessors' complaints handling system and secondly, those disputes that fail to be resolved at this stage may then filter down to the relevant State or Territory Retail Tenancy Office, where formal mediation can be attempted as a first step. According to the information received by the ACCC from the State and Territory Retail Tenancy Officials, the majority of disputes are resolved at this stage however, if the dispute is found unable to be resolved via settlement the matter may be enforced.

Some disputes bypass the State and Territory network and are referred directly to the ACCC in its role as the administrator of the TPA. These disputes are then received by the ACCC Information Centre (Infocentre)²⁵ or the Regional Offices and registered as contacts in the ACCC national database.

The State and Territory retail tenancy officials may also refer some of their matters to the ACCC. This can occur when the alleged conduct is found to extend beyond the State or Territory boundary; represents a particularly blatant disregard for the law and may require a wide ranging educational initiative from a national regulator or is beyond the local regulator's powers to resolve. However, it is the ACCC's experience that the States and Territories are successful in resolving the vast majority of these matters and carrying out compliance initiatives locally.

The State and Territory retail tenancy officers may also consult with the ACCC in seeking its views on the application of unconscionable conduct provisions, the approach

²⁵ Information centre 1300 302 502.

to a particular dispute or the extent of geographic distribution of conduct²⁶. The framework for the liaison work between the ACCC and the States and Territory Retail Tenancy Offices is discussed in the *ACCC Compliance liaison* section of this Submission.

The ACCC regularly refers complaints and inquiries it receives to the relevant State or Territory retail tenancy officials. The complaints are generally referred if the issue:

- does not constitute a potential breach of the Trade Practices Act but may fall within the ambit of State law (e.g. disclosure obligations); and/or
- is suitable for formal dispute resolution (provided by the State or Territory); and/or
- may be more efficiently resolved through the local laws and regulations.

As will be examined below, a large proportion of all retail tenancy contacts received by the ACCC is referred to the relevant States and Territories and is successfully resolved by their Retail Tenancy Offices. Those complaints that contain trade practices allegations and are not referred are escalated through the ACCC complaint management system which will be addressed in detail in the next section of this Submission.

²¹ The requests for information on geographic distribution of conduct have significantly diminished after the introduction of the AUZSF ARE database that allows State and Territory Retail Tenancy Offices to access this information independently.

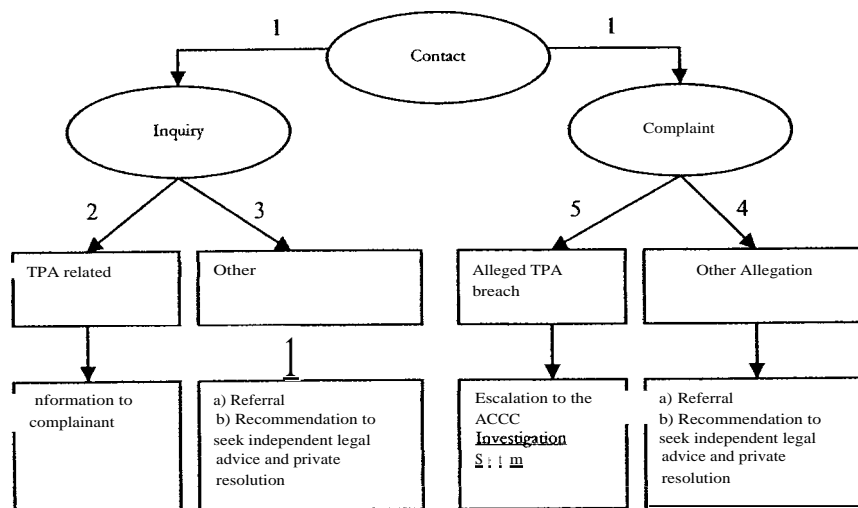
4. Retail Tenancy Complaints and Inquiries received by the ACCC from June 2002 to July 2007

Overview of the ACCC complaints and inquiries management process

All complaints and inquiries received by the ACCC are registered either by the ACCC Infocentre or directly by the ACCC Regional Offices. The contacts are logged into the ACCC central national database and the data is subsequently handled by the information management function of the ACCC.

The contacts are managed through a central complaint management system to ensure accuracy, consistency and transparency across the organisation. As a first step, this process involves determining whether the contact is a complaint or an inquiry (Point 1 of Table 1).

Table 1: The ACCC complaints and inquiries management system



If the contact is an inquiry and it is established that the inquiry is trade practices related, if appropriate²¹, the required information is provided by the ACCC staff (Point 2 of Table 1). If the inquiry is in relation to the operation of another piece of legislation or

²¹ For example, in some instances trade practices legal advice is sought and cannot be provided by the ACCC.

regulation it is referred to the appropriate government agency, for example Anti-discrimination Commissioner or Commonwealth Ombudsman (Point 3 of Table).

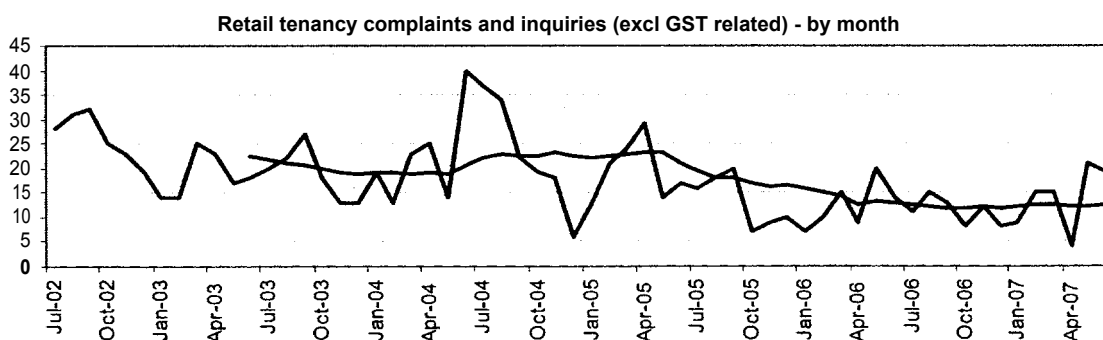
All complaints are assessed as to whether a breach of the TPA may have occurred. If the complaint does not contain an allegation of a breach of the TPA it is either referred to a more relevant government agency for example, the Australian Securities and Investment Commission (ASIC) or, if the dispute is of a purely contractual nature, the complainant is advised to seek legal assistance and private resolution (Points 4 of Table 1).

The complaints that contain allegations of a breach of the TPA where appropriate, escalated to the attention of the ACCC investigation staff (Point 5 of Table 1). A detailed discussion of the ACCC investigation system is provided below.

Retail tenancy complaints received by the ACCC from July 2002 to June 2007

Over the period 1 July 2002 - 30 June 2007, the ACCC recorded around 1,119 contacts relating to retail tenancy issues, comprising of 875 inquiries and 244 complaints. The 12-month average trend line provided in the chart below shows a marked decline in retail tenancy related contacts through to about mid 2006, at which time the average remains steady at between 10 and 15 contacts per month.

Table 2: Retail tenancy complaints and inquiries - by month



Please note that the large spike appearing in the middle of the chart (June July 2004) illustrates the effect high profile court cases may have on contact numbers. *ACCC v Wes eld Indooroopilly* was settled in June 2004. During and after the proceedings, the number of contacts received by the ACCC significantly

increased, affected by inquiries about the outcome of the case and complaints from retailers alleging that their situation mirrored that of the Westfield case.

Approximately one in five retail tenancy related complaints received by the ACCC involves an allegation of a breach of the TPA. The remaining contacts are largely requests for information or complaints about non-trade practices issues, i.e. contractual disputes.

Inquiries

The 875 retail tenancy related inquiries received by the ACCC since 2002 were situations where predominately small business callers sought to obtain information or discuss a dispute with their landlord, including in relation to rent increases, exclusivity clauses in leases and problems on lease renewal. These callers did not lodge a complaint with the ACCC and were generally advised that the best course of action was to try to resolve the issue through an escalating series of actions, comprising.

- direct negotiation with their landlord; and
- State/Territory based dispute resolution schemes; and
- State/Territory retail tenancy regulation enforcement options; or
- private legal action.

Complaints

The remaining 244 retail tenancy contacts received by the ACCC in the last five financial years were classified as complaints. These are situations where a breach of the Trade Practices Act was alleged by the complainant, or where the conduct described was identified as a possible contravention by the ACCC.

Sixty five of these allegations were immediately assessed (i.e. at Information centre level) as not amounting to a breach of the TPA subsequent to further information being elicited from the complainant by the ACCC. In these cases the complainant for example, described a situation that was a contractual dispute with their landlord, despite the allegation of a breach. These complainants were also advised to seek legal assistance and consider the escalating series of options outlined above.

The remaining 179 complaints were considered by the ACCC to be possible breaches and were escalated for further consideration. A detailed discussion on the progress of these complaints is provided in *ACCC investigation and enforcement* section of this Submission.

Allegations of misleading and deceptive conduct and misrepresentations in retail tenancy complaints received by the ACCC

This category of complaints includes a range of allegations of misleading advice or misrepresentations made prior to entering a lease, including allegations relating to:

- turnover of a previous tenant;
- actual or expected customer numbers;
- method of calculating rent increases;
- failure to disclose conditions imposed on tenants;
- the number of competing stores that would be allowed entry (complainants generally claimed they were promised exclusivity within a shopping centre);
and
- developments proposed or underway.

Allegations of unconscionable conduct in retail tenancy complaints received by the ACCC

As stated previously, in the last five years the ACCC recorded approximately 1,119 complaints and inquiries relating to retail tenancy, with approximately 11 percent involving allegations of unconscionable conduct (127 complaints). Below are the primary grounds behind the allegations of unconscionable conduct made by small business complainants:

- excessive rent increases;
- refusal to renew lease;
- lessor obstructing sale of business;
- tenant alleging lessor has broken lease agreement;
- general unconscionability - complaints in which callers allege their lessors have engaged in a wide range of non-specific conduct that taken as a whole is interpreted by them as being unreasonable or harsh;

- restriction of trade/exclusivity - includes cases where a lessor has retailers claim unconscionability where competitors have been allowed to set up shop nearby, and also those where an exclusivity clause has been invoked preventing the complainant from selling certain goods;
- misrepresentations amounting to unconscionability - these complaints generally relate to alleged misleading or false representations about foot traffic or turnover, made prior to entering a lease;
- harassment by a lessor;
- threat of legal proceedings;
- misuse of market power amounting to unconscionable conduct; and
- forced relocation - these complaints generally relate to circumstances where the tenants were required to move premises and who claim that their businesses have suffered as a result. Some of these incidents refer to the lessor refusing to renew a lease unless the retailer moved and some matters relate to `stalls' within shopping centres, rather than fixed shops.

While each allegation is closely considered only a limited number evidenced a contravention of s 51AC. For a list of unconscionable conduct factors please see above.²⁸

²⁸ *The legislative framework of the retail tenancy market* section

5. ACCC investigation and enforcement

The ACCC's role as a national trade practices regulator is not to investigate or take action in every matter which may involve a breach of the fair trading and consumer protection provisions of the TPA. Rather, it takes a risk/cost assessment based approach to selecting matters or industry-wide issues of concern which are appropriate for intervention. In particular, the ACCC focuses on matters of national significance and/or widespread consumer or business detriment. Other matters may be best dealt with through private action, intervention by a State or Territory fair trading agency, or another regulator such as, an industry-specific regulator or an ombudsman scheme.

The ACCC investigates a large number of potential breaches of the TPA each year. Most matters are discontinued at the initial investigation stage (Stage 2 of Table 3) due to insufficient evidence, no breach, complaint withdrawal or failure by the complainant to respond to the ACCC requests for supporting information. A small number of these initial investigations proceed to the in-depth investigation stage (Stage 3 of Table 3) at the end of which, if the evidentiary requirements are satisfied, the ACCC may commence court proceedings. However, the ACCC is not limited to litigation in its choice of effective enforcement actions.'

²⁹ Please see Attachment B *Administrative undertakings and court enforceable undertakings* for further information.

Table 3: A graphic representation of the ACCC investigation system

	Stage 1					Stage 2	
	Alleged TPA breach					Initial Investigation	
	Initial Consideration					<ul style="list-style-type: none"> No breach No evidence 	m
						<ul style="list-style-type: none"> Complaint withdrawn 	Initial Consideration
	<ul style="list-style-type: none"> No breach; or No evidence; or 	m					
	Complaint withdrawn	OH				Matter better suited for resolution by State and Territory agencies	a, m
	Matter better suited for resolution by State and Territory agencies	a,					
	Stage 3						
	In-depth Investigation					ACCC Committee decision	
	Insufficient evidence for court proceedings					<ul style="list-style-type: none"> Administrative resolution; or s.87B undertaking; or Litigation 	
	Investigation discontinued						

ACCC investigation process

As discussed, the ACCC investigation process can be subdivided into three broad categories through which all matters progress:

- initial assessment;
- initial investigation; and
- in-depth investigation.

This process can be summarised as follows:

Stage 1 - Initial assessment

At this stage preliminary assessment of the complaint is made by the ACCC Infocentre staff, ACCC investigators or the ACCC unit specialising in the conduct. The assessment may include the initial interview with the complainant to verify some general data such as, contact details and name of trader; and the initial analysis of the conduct. If the complaint is assessed as valid it is progressed to the next stage.

In some instances the complaint cannot be progressed to investigation due to the reluctance of the complainant to have the matter so escalated, the withdrawal of the complaint or the conclusion reached upon discussions with the complainant or that the matter is best addressed through dispute resolution. The ACCC recommends mediation as a first step in dealing with most disputes where the ongoing relationship is of value to the parties.

Stage 2 - Initial investigation

At this stage the ACCC seeks information from the complainant, and any other relevant persons/traders, to substantiate the claim and establish a precise sequence of events. This may include conducting thorough interviews, obtaining and examining documents pertaining to the alleged conduct and careful application of the law to the known facts.

If at this stage the investigators fail to uncover sufficient corroborating evidence to support the claims, the investigation is discontinued for lack of evidence. In some instances, the facts brought to light by the vigorous process of investigation establish a clear lack of trade practices breach and the matter is discontinued. The complainants are then either referred to a more appropriate agency or advised to seek private resolution.

All complainants are advised that if any new corroborating evidence becomes available it can be provided to the ACCC for review. If new information is received the investigation is re-commenced.

If the initial investigation process is successful at collecting supporting information and the complainant has not withdrawn the allegation the matter is progressed to the next investigation stage.

Stage 3 - In-depth investigation

At this stage additional evidence is collected and all the existing information is reviewed and analysed by the ACCC senior enforcement staff. If it is agreed that the allegation/s is substantiated and reliable evidence exists to support that allegation, the matter will generally be referred to an internal Committee³⁰ for consideration. The Committee will then decide how the matter should be most appropriately pursued, having regard to the impact that the action may have on the ongoing business relationship and the national market. The Committee may elect to pursue the matter through litigation, resolve it by administrative resolution or by means of an enforceable undertaking.

In deciding how a matter may be most appropriately pursued, the ACCC considers inter alia the relief available to the complainant and any other persons affected by the conduct. This may necessitate a more efficient and timely resolution than litigation. Furthermore, the ACCC also considers the deterrent effect and precedent value of litigation against other alternatives.

The progress of retail tenancy complaints through the ACCC investigation process

Table 4 below provides a breakdown of the final outcomes for the 179 retail tenancy complaints that have progressed through the ACCC investigation system since 1 July 2002.

Table 4 - a breakdown of the ACCC retail tenancy complaints outcomes

Resolution	Number
No breach	108
Insufficient evidence	35
Referred to other agency	13
Guidance / Information provided	10
Administrative resolution	3
Not pursued	2
Active investigations	8
Total	179

³⁰ This Committee is generally the ACCC Enforcement Committee which is comprised of the ACCC Chairman and Commissioners.

No breach

Upon more detailed investigation it was determined that the conduct outlined in around 60 per cent of the 179 retail tenancy complaints received by the ACCC did not constitute a breach of the TPA.. The majority of issues related to contractual disputes between the retailer and their lessor. In many cases complainants alleged that significant rent increases, clauses preventing retailers from selling certain goods, non-renewal of leases, imposition of conditions regarding refurbishment etc, were unfair or even unconscionable. However, more detailed assessment of the issues revealed that the conduct described did not amount to a breach of the TPA despite the allegations. The assessment of these 108 retail tenancy complaints was discontinued because the complained of conduct was not in breach of the TPA.

Several complainants made allegations of exclusive dealing or other anti-competitive conduct. However, it was assessed that the conduct was unlikely to substantially lessen competition - the relevant test for a breach of this type of conduct under the TPA.

Insufficient evidence

A further 34 matters did not progress past initial investigation as there was insufficient evidence to support the allegation/s. While the alleged conduct may have constituted a breach of the TPA, the evidence provided was insufficient to establish a contravention. In some of these matters the complainants failed to respond to the ACCC requests for further information or withdrew their complaints due to mediation or private action. The consideration of these complaints by the ACCC was discontinued due to lack of evidence corroborating the allegations.

Referred to another agency

Thirteen retail tenancy complaints were referred to another agency following additional discussions with the complainant. It was agreed that the matter was more appropriately handled by the relevant State or Territory Retail Tenancy Office. Situations like these, where the referral is agreed to or requested by the complainant, occur more often in the Initial consideration and Initial investigation stages where, upon more information being uncovered by the ACCC and more extensive explanations being provided to the

complainant about the role of the ACCC and the roles of State and Territory Retail Tenancy Offices, the complainant elects to attempt to resolve the dispute through the local dispute resolution mechanisms. It is the ACCC's experience, that the overriding reason for such decisions by complainants is the importance of an ongoing relationship with the lessor as a factor in business viability.

Guidance / Information provided

On some occasions the initial complaint is the result of a misunderstanding about the rights and obligations under the lease agreement. Once those are resolved and where appropriate, the necessary clarification is provided, the complaint is also withdrawn.

Ten out of 179 retail tenancy complaints received by the ACCC since 2002 were resolved by providing complainants with advice or information to enable them to address their retail tenancy issue independently.

Administrative resolution

Three matters were finalised through an administrative resolution. In one case the lessor agreed to make concessions regarding a disputed retail lease after the lessee advised that he was contacting the ACCC for assistance. In the other cases the matters was resolved through successful mediation.

No action

Two complaints that may have represented breaches of the TPA were not pursued because the complainant was already taking private legal action in relation to the matter, or was taking similar legal action to which this matter could be linked. Please refer to **Attachment C** for a copy of the ACCC Intervention policy.

Active Investigations

At the time of writing, eight complaints are still under investigation.

Investigation of unconscionable conduct in retail tenancy allegations

As noted above, 127 retail tenancy complaints received by the ACCC since 2002 involve allegations of unconscionable conduct. These allegations generally present as a complex web of interlinking accusations and claims (i.e. misleading and deceptive conduct, harassment and coercion, misrepresentations) and personal grievances, and require intensive, time consuming investigations to untangle the legally relevant facts. As discussed above, when investigated by the ACCC, some of these allegations cannot be substantiated by sufficient evidence necessary to establish a breach in court proceedings and therefore must be discontinued.

However, the majority of unconscionable conduct allegations received by the ACCC are discontinued because the facts do not indicate that the conduct is unconscionable within the meaning of the TPA. While the ACCC considers that these matters are sometimes due to a misunderstanding among small business complainants of the concept of unconscionability, under the TPA, it is nonetheless determined to pursue such matters as enable it to clarify the law and thereby firm up a better definition of what constitutes unconscionable conduct.

The ACCC has also reviewed its existing educational outreach initiatives in relation to retail tenancy, a detailed discussion of which is provided later in the Submission, and is undertaking a number of new initiatives that may be able to better inform small business operators about the legal protections offered by the TPA.

The continuum of business conduct reflected in ACCC retail tenancy complaints

The conduct of landlords and property managers complained of by retail tenants to the ACCC constitutes a continuum from conduct which might be inept or tough to conduct which is unconscionable.

As has previously been discussed, the ACCC receives complaints of lessor conduct that may for example, include concerns about failure by the lessor to properly manage shopping centre marketing, fit-out conditions or shopping hours. In these situations, the small business complainants feel the damage to the business personally and tend to categorise the conduct as unconscionable 'because it is unfair' and because it directly

impacts the livelihood of their small businesses. The ACCC appreciates the serious personal nature of these disputes however, it is the ACCC's overwhelming experience that they are, in their majority, purely contractual³¹, and should be resolved by the parties to the existing contract as they are not illegal under the TPA.

The ACCC considers that the number of concerns of this nature could be significantly minimised with increased education of tenants by the lessors and joint ACCC/State or Territory Agency/ Industry association initiatives.

The ACCC also regularly receives complaints from its industry and business stakeholders about lessor conduct such as, rent increase, relocation of sitting tenant or lease reassignment that is alleged to give rise to a large number of retail tenancy disputes.

This type of conduct is not of itself illegal and is not prohibited by the TPA. However, the ACCC observes that in some limited circumstances it may be an indication of unconscionable conduct and a potential breach of s 51AC.

When investigating complaints of this nature the ACCC carefully considers all the circumstances surrounding the conduct. This may include, for example, whether the conduct is consistent with the conduct in other similar transactions, whether the terms required by the lessor were based on legitimate business reasons, whether any undue influence or pressure was exerted by the lessor, the extent to which negotiation was possible and whether the lessor acted in good faith. If it is found that unconscionable conduct factors are triggered by the alleged conduct and the investigation is able to furnish the necessary corroborating evidence, the ACCC may take legal action against the lessor.

The ACCC considers that some of the issues of this nature could be avoided through increased transparency implemented by the lessors. The issue of rental information disclosure has been raised with representatives of the Shopping Centre Council of Australia and the ACCC has suggested that where these details are not required to be disclosed by the State and Territory retail tenancy laws, landlords should consider

³¹ However, some of these issues may be covered by the specific regulations prescribed by States and Territories and in such cases the ACCC always refers the complainants to the relevant agency for consideration.

engaging in a voluntary process or an industry-wide code of conduct to ensure such information is provided. The ACCC notes that a voluntary code approach has been adopted by the Shopping Centre Council of Australia in relation to casual mall leasing concerns.

The existing laws and regulations underpinning the operation of the retail tenancy market in Australia address some of the issues of weaker bargaining power and information asymmetry by deeming certain types of conduct by the landlord towards the small business tenant to be unconscionable and therefore illegal. It is the ACCC's experience that unconscionable conduct may be found to exist where retail landlords have in all circumstances acted in a harsh and oppressive manner towards their tenants, taking advantage of their stronger position for other than the legitimate business reasons³². In other words, unconscionable conduct as interpreted by the courts in Australia is the type of conduct that is so reprehensible that it is against good conscience.

This type of conduct is considered to be a breach of the relevant State and Territory retail tenancy laws and the TPA and, if detected, can be addressed through enforcement action by the relevant agency.

ACCC litigation of retail tenancy matters (s5L4C)

As an effective national regulator the ACCC must be selective in the matters it chooses to litigate focusing in particular on issues of national significance, wide consumer detriment and/or clarification of law. Other more localised matters are best dealt with by State and Territory fair trading agencies or specific regulators like the Retail Tenancy Officials.

The introduction of the prohibition of unconscionable conduct under s 51AC of the TPA necessitated a period of active clarification of the boundaries of the new law and its application to business reality. As the national regulator and the administrator of the TPA, the ACCC was very active in carrying out this work. Since 1998 fifteen

³² *ACCC v Simply No Knead (Franchising) Pty Ltd [2000] FCA 1365*

unconscionable conduct cases were litigated (thirteen successfully, one unsuccessfully and one pending appeal). These cases were successful in laying the groundwork for the now active mirror unconscionable conduct provisions in the State and Territory retail tenancy laws and regulations (excl. WA³³).

Approximately 26 per cent of all unconscionable conduct cases taken by the ACCC in that time focused on allegations of unconscionable conduct in the retail tenancy sector and to other tenancy types, i.e. agricultural lease. These cases were successful in educating the landlords and tenants of their rights and obligations under the TPA and have assisted in clarifying the concept of unconscionable conduct in the retail tenancy context. A brief description of all the retail tenancy cases and one agricultural lease matter is provided in **Attachment D**.

As has already been discussed, the ACCC thoroughly and effectively investigates all unconscionable conduct allegations it receives and is prepared to take strong enforcement action if sufficient corroborating evidence is available. However, there are three major limiting influences in the ACCC being able to deal fully with such matters.

Firstly, it is the difficulties faced by many small businesses in keeping the type of records that are needed to prove breaches of the law. As has been demonstrated, in the majority of matters where a potential breach has been established, investigations must be discontinued due to lack of evidence necessary to support an unconscionable conduct claim in legal proceedings. The ACCC has placed emphasis on this challenge in its outreach education and information program for small business discussed below.

The second influence is the propensity in matters where there is potentially a substantive s 51AC case for the parties to reach some form of amenable settlement or arrangement that in many cases facilitates the all important re-continuation of an ongoing business relationship. In such cases there is usually a withdrawal of the complaint to the ACCC by the interested small businesses - in these cases litigation is redundant. These issues are further compounded by the Commonwealth Legal Services Directions, Model Litigant Policy.

³³ Pending commencement.

In most cases of this nature the ACCC is not made aware of the agreement details that lead to the settlement. Certainly, these are not matters that the ACCC can publicly refer to as both the original complaint and its withdrawal remain confidential to the parties involved and the ACCC.

6. ACCC compliance initiatives

In addition to its enforcement role, the ACCC is committed to developing and maintaining industry awareness of and compliance with s 51AC and wider provisions of the TPA. It is the ACCC's experience that small business awareness and understanding of the TPA, and associated rights and obligations, increases the capacity for voluntary compliance and minimises the likelihood of inadvertent breaches.

The ACCC observes that there is now an increasing awareness in all Australian industry sectors of the value of business compliance and the central role that employee/member education plays in developing compliance culture and minimising the likelihood of future regulatory intervention by the ACCC or otherwise.

The ACCC has always placed considerable emphasis on its work with industry stakeholders and has established and maintained strong, productive relationships with most small business/franchising representative associations and government departments with a responsibility or an interest in small business issues.

Liaison with Retail Tenancy Officials

The ACCC maintains regular contact with State and Territory Retail Tenancy Officials. This liaison includes regular discussions, sharing of information, collaboration on retail tenancy matters and formal meetings between the relevant representatives and the ACCC. The ACCC has always considered this collaboration to be positive and productive and will continue to foster and develop these discussions.

Liaison with key industry and business representatives

in the retail tenancy sector the ACCC maintains continuous contact with a number of industry and business organisations including, the Franchise Council of Australia (FCA), Australian Retailers Association (ARA), Shopping Centre Council of Australia (SCCA), Council of Small Business in Australia (COSBOA), Motor Trades Association of Australia (MTAA), Pharmacy Guild of Australia and many others.

The active liaison ensures that industry issues are identified and discussed, allowing the development of collaborative and pro-active strategies. The ACCC also regularly convenes and hosts specialist discussion groups to gain a greater understanding of the needs of its stakeholders and their members. These include:

- Small Business Advisory Group;
- Franchising Consultative Panel; and
- Unconscionable Conduct roundtables. The recent Roundtable meeting held in May 2007 provided a constructive forum for the identification and discussion of issues concerning this type of conduct (including issues in the retail tenancy sector) and more importantly, enabled the development of joint strategies to address these issues.

7. **ACCC Educational Outreach activities**

The ACCC approaches the attainment of effective compliance with the Trade Practices Act as largely dependent on education. It is for this reason that educating the Australian marketplace, including small businesses, as to their rights and obligations is a high priority for the ACCC. The ACCC is committed to continuing to provide educational outreach and minimise the risk of compliance failures.

The ACCC Educational Outreach Program focuses on keeping businesses and consumers in metropolitan, rural and regional areas informed about their rights and obligations under the TPA. The Program is delivered through a variety of initiatives, including.

- Regional Outreach Managers actively seek contact with small business groups through presentations to and interaction with local industry and consumer associations, business enterprise centres, ethnic associations, local government and other relevant bodies;
- The Regional Outreach Managers also utilise the Regional Supporter Network, comprised of 400 organisations throughout Australia. These organisations include Local Governments, Area Consultative Committees, Rural Transaction Centres, Business Enterprise Centres, Chambers of Commerce and Industry and small businesses. In addition to providing trade practices information, each Supporter acts as a contact point for referral to other services. Larger Supporters also play an active role in coordinating opportunities for the ACCC to talk directly to local traders and consumers;
- Development and production of publications advising small businesses of their rights and obligations under the Trade Practices Act. Over 3,000 small business publications are distributed on average each week,
- The ACCC Small Business Helpline is a telephone inquiry service for small business and franchising inquiries. The service operates during business hours and can be reached by telephone on 1300 302 021. If appropriate, information received through the Small Business Helpline is passed on to ACCC investigators.

The Educational Outreach Program is a proven tool for effectively delivering trade practices messages to their relevant audiences. This program is also used to deliver the ACCC initiatives on retail tenancy. The most recent examples of such initiatives include:

- *Being smart about your nets franchise: checklist before signing a lease agreement* is a retail leasing checklist designed to assist prospective franchisees in considering issues such as, contractual obligations, renewal and transfer options, occupancy costs, and franchise territory;
- *Franchise Bulletin - Being smart about your new franchise and your retail lease* provides guidance to prospective franchisees about the types of leasing arrangements they may enter into and their associated rights under the Franchising Code of Conduct. It also contains a checklist to assist prospective franchisees in undertaking research and exercising due diligence when considering the leasing arrangement, and related franchise opportunity, prior to entering into a retail lease agreement. (The *Bulletin* provides more detailed information if compared to the *Franchisee checklist*.);
- *Small Business Bulletin: Being Smart about your retail lease*. This publication is currently under development. When completed it will explain the protections afforded by the Trade Practices Act and address the role of the ACCC in the retail tenancy sector;
- *Being smart about your small business: checklist before signing a lease agreement*. This publication is currently under development. When completed it will provide a useful checklist that is designed to assist small business owners in considering their retail tenancy issues;
- *A Small Business Guide to Unconscionable Conduct* provides guidance as to what constitutes unconscionable conduct in small business transactions under the Trade Practices Act; explains the distinction between unfair and unconscionable conduct.

ATTACHMENT A State and Territory retail tenancy laws

Tasmania
Consumer Affairs & Fair Trading

Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998 - commencement date - 1 September 1998

Fair Trading (Code of Practice for Retail Tenancies) Amendment Regulations 1999

Key Features:

Commenced on 1 September 1998.

Dispute resolution mechanism.

Retail Tenancies Code of Practice Monitoring Committee:

- Considers matters referred by Minister, Consumer Affairs, tenants/owners of retail premises;
- Oversees operation of the Code, reviews its operation and effectiveness, recommends amendments;
- Attempts to resolve disputes between owners and tenants. 1999 Amendments:
- Definition of 'small business tenant' changed and various subclauses were removed and replaced.

Victoria
Office of the Victorian Small Business Commission

Retail Leases Act 2003 (incorporating amendments) - commencement date - 1 May 2003

Retail Leases (Amendment) Act 2005

Retail Tenancies Reform Act 1998 - commencement date - 1 July 1998

Retail Tenancies Act 1998 (some leases are still covered by this) - commencement date - 21 September 1987

2005 Amendments (some of the more significant) include:

- Section 146 of the *Property Law Act 1958* now requires a landlord to notify a tenant of a breach of the lease, giving the tenant 14 days to rectify it. This includes a breach for non-payment of rent;
- Amendment to *Retail Tenancies Reform Act 1998* which, as a result of *Ovideo Camdeo Nominees Pty Ltd v The Dog Depot Pty Ltd*, enabled tenants to recover rent during a period where they had not been provided with a disclosure statement. The Act states that such claims cannot be made after 1 May 2006.

Northern Territory
Consumer Affairs, Department of Justice

Business Tenancies (Fair Dealings) Act 2003 - commencement date - 1 July 2004

Key Features-

- Ban on ratchet clauses
- Mandatory disclosure
- Five year leases
- Mediation

- Compensation claims.

South Australia
Office of Consumer and Business Affairs

Retail and Commercial Leases Act 1995 - commencement date - 30 June 1995,
excluding sections 63-66 which commenced on 16 September 1996.

Key Features:

- Minimum of 5 years including any option to renew
- Lessor must provide a copy of the proposed lease
- A month prior to an accounting period, the lessor must provide the lessee with a written report
- When the lease is assigned, the continuing liability of a lessee who has assigned the lease is 2 years
- Act provides parties with access to mediation.

Queensland Department of State Development, Trade and Innovation

Retail Shop Leases Act 1994 - commencement date 28 October 1994

Retail Shop Leases Amendment Act 2006 - commencement date - 3 April 2006

2006 Amendments (numerous significant changes) include:

- Changes to definitions including 'lessee' and 'major lessee'
- Changes to disclosure obligations, including 'major lessees' (5 or more retail businesses in Australia) can waive the requirement for a lessor's disclosure statement
- Lessee's obligations to make particular payments
- Timing and bases of rent reviews
- Sinking fund for maintenance and repair

New South Wales <u>NSW Department of State and Regional Development</u>
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Retail Leases Act 1994 - 1 August, excluding Part 8 which commenced on 25 November 1994

Retail Leases Amendment Act 2005

2006 Amendments include:

- Pre-lease requirements on tenants and landlords.
- Improving access to information by both parties so negotiations are on a more equal basis.
- Improving the effectiveness of market rent reviews and dispute resolution.
- Streamlining lease transfer processes.
- Extending the capacity of the Administrative Decisions Tribunal to resolve landlord and tenant disputes.

Western Australia
Department of Consumer and Employment Protection
Small Business Development Corporation

Commercial Tenancy (Retail Shops) Agreements Act 1985 - commencement date - 1 September 1985

Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998 - commencement date - 1 July 1999

1999 Amendments include:

- Improving disclosure and information for prospective tenants
- Prohibition of ratchet clauses (that do not account for market rent levels)
- Introducing limitations of tenant contributions to valid landlord expenses
- - Prohibition of management fees being able to be recovered from tenants
- Clarifying obligations in relation to sinking, marketing and promotion funds
- Adopting nationally recognised audit standards
- Extending the jurisdiction and powers of the Registrar and Commercial Tribunal

NOTE: *The Retail Shops and Fair Trading Legislation Amendment Bill* has been passed and will amend the existing legislation to prohibit unconscionable conduct. The commencement date for sections 1 and 2 was on 4 Oct 2006; Act other than section 1 and 2 - 11 May 2007.

Australian Capital Territory
ACT Magistrates court handles all commercial and retail matters

Leases (Commercial and Retail) Act 2001 - commencement date 1 July 2002

Tenancy Tribunal Act 1994 (previous legislation)

ATTACHMENT B **Administrative resolutions and enforceable undertakings**

Administrative resolutions

The ACCC may decide to resolve an investigation by administrative agreement in certain, limited, circumstances. This category of resolution includes resolution by way of letter that the ACCC will not take proceedings so long as a company does certain things (or will refrain from doing others). This sort of administrative resolution is generally not publicised, but may be in certain circumstances.

Court-enforceable undertakings (section 87B)

To resolve a possible contravention of the Trade Practices Act, the ACCC may decide to accept formal administrative settlements or undertakings from businesses, in addition to or in lieu of taking legal proceedings. It usually does so pursuant to its power under section 87B of the Trade Practices Act to accept court-enforceable undertakings.

The undertakings are public documents and are kept on an online Public Register on the ACCC website. The undertakings may include but are not limited to any of the court ordered orders and remedies above. If a section 87B undertaking is breached the Federal Court may make enforcement and compensation orders. The ACCC does not accept such undertakings unless the undertakings are to be made public and do not contain denial of contravention of the Trade Practices Act.

The ACCC monitors compliance with undertakings given by traders and will not hesitate to enforce them should they be breached. The vast majority of businesses comply with the undertakings they offer.

ATTACHMENT C ACCC intervention guidelines

ACCC intervention in private proceedings guidelines

These guidelines set out the factors the Australian Competition and Consumer Commission (ACCC) will consider when assessing whether to intervene in private court proceedings instituted under the Trade Practices Act 1974 of the Commonwealth (the TPA).

Amendments to the TPA made by the Trade Practices Amendment Act (No. 1) 2001 have given the ACCC an expanded statutory basis for applying to a court to intervene in private proceedings.

The ACCC's role

The ACCC is the Commonwealth agency responsible for achieving compliance with the Act and the competition codes of the states and territories. It has the power to commence proceedings for alleged contraventions of the Act or codes. Private parties can also bring actions irrespective of ACCC action. Remedies available to the ACCC differ from those that private litigants are able to obtain. For example, any party can seek damages or injunctions, but only the ACCC can seek:

- penalties for breaches of Part IV
- injunctions in respect of price exploitation and mergers that substantially lessen competition
- community service orders, probation orders, orders requiring the disclosure of specified information, and corrective advertising orders.

The ACCC also has the power to bring representative actions. In appropriate cases the ACCC may also seek leave of the court to intervene in private proceedings.

ACCC intervention in private proceedings-background

In the past, Australian courts have recognised that the public interest may be served by permitting the ACCC to be heard in private proceedings, for example if the case involves an issue of general public importance-as in *O'Keefe Nominees Pty Limited v BP Australia Limited and Trade Practices Commission [Intervener]* (1995) ATPR 41-393. Another reason is if the outcome would help to clarify the law.

Before the Trade Practices Amendment Act (No. 1) 2001 was enacted in July 2001 the ACCC had a limited statutory power to intervene in private proceedings brought under the Act. Section 163A(3) empowered it to intervene in private proceedings brought for a declaration under Part IV of the Act only. For example, the ACCC relied on s. 163A(3) to apply to intervene in:

Bass & Anor v Permanent Trustee Co. Limited & Ors (1999) 198 CLR 334, in relation to Crown immunity and the application of ss. 51 AB and 52

Melway Publishing Pty Limited v Robert Hicks Pty Ltd (trading as Auto Fashions Australia) (2001) 178 ALR 253 in relation to the interpretation of s. 46

NT Power Generation Pty Ltd v Power and Water Authority and Gasgo Pty Ltd (2001) ATPR 41-814, a case involving derivative Crown immunity and the application of s. 46 to the Crown

Bray v F. Hoffman-La Roche & Ors [2002] FCA 243 (13 March 2002), which are private proceedings against various international vitamin manufacturers that the applicant alleges were engaged in price fixing and market sharing. This case raises important issues involving the application of the Act to foreign entities.

Intervention in private proceedings not instituted under the Trade Practices Act

Aside from trade practices matters, if the ACCC wished to intervene in any other private proceedings it had to rely upon an appropriate discretionary power being vested in the relevant court or tribunal by its rules. These have been matters where the ACCC has formed the view that the interpretation of the legislation has implications for the application of the TPA and intervention by the ACCC was in the public interest.

In deciding whether to apply to intervene in proceedings that were instituted under legislation other than the TPA, the ACCC will consider such matters on a case-by-case basis, but the guiding principle will continue to be whether the public interest would be served by the ACCC intervening in the proceedings.

Trade Practices Amendment Act (No. 1) 2001

Item 33 of Schedule 1 to the Trade Practices Amendment Act (No. 1) 2001 came into operation on 26 July 2001. It enacted a new s. 87CA, which states that the ACCC may, with the Federal Court's leave and subject to any conditions imposed by the court, intervene in any proceeding instituted under the Act (subsection (1)). If the ACCC

intervenes it becomes a party to the proceeding and has all the rights, duties and liabilities of such a party (subsection (2)).

In amending the TPA, Parliament clearly intended to permit the ACCC to intervene in a broader range of cases than previously contemplated under s. 163A and expects that the ACCC will use its increased power accordingly. The ACCC now has an express statutory right to apply to intervene in a wide range of private actions under the Act without having to rely on the court's inherent jurisdiction.

The amendment forms part of a broader spectrum of changes to the TPA aimed at enhancing the ACCC's ability to protect consumers and small business.

The explanatory memorandum for the amending Act stated that the ACCC would develop guidelines to outline when it may intervene in private proceedings. This publication sets out those guidelines. The ACCC will review them in light of its experience in using s. 87CA.

Guideline considerations-intervention under the Trade Practices Act

The ACCC will consider intervention in private proceedings under the Act in one or more of the three following circumstances. In applying to intervene the ACCC generally will seek to provide the court with a broader perspective than that of private litigants.

Issues of significant public interest

The ACCC would usually only intervene in cases involving significant public interest – for example, if there is a major detrimental effect on fair trading and competitive market forces and the ACCC wishes to make submissions to preserve the competitive process and prevent future contraventions of the TPA.

In *O'Keeffe Nominees Pty Limited v BP Australia Limited and Trade Practices Commission [Intervener]*-a case involving allegations of misuse of market power in the form of price discrimination and exclusive dealing-the ACCC was given leave to intervene in private proceedings on the basis that the issues in question were not only of general public importance, but also of particular importance to the ACCC in its former identity as the Trade Practices Commission.

Construction of the Trade Practices Act-in untested areas or to clarify its operation

A key objective of the ACCC's enforcement functions is to seek clarification of the law. The ACCC's role in this has been recognised consistently by the courts, for example in cases involving the 1998 unconscionable conduct provisions (*ACCC v Leelee PO Ltd* (2000) 22 ATPR 41-47, *ACCC v Simply No Knead Pty Ltd* (2000) 22 ATPR 41-790 and *ACCC v Goldy Motors Pty Ltd* (2001) ATPR 41-80). The ACCC believes it can provide a perspective that may help a court to see matters in a wider public interest context than could private parties, who may be unable or unwilling to do so.

If a party contends that a provision of the TPA is ambiguous and the matter to be determined rests on the interpretation of that provision, or if there are important and novel questions of interpretation, the ACCC may wish to make submissions to clarify the TPA through precedent.

For example, the ACCC successfully intervened in the High Court appeal by *Melway Publishing Pty Limited v Robert Hicks Pty Ltd (t/a Auto Fashions Australia)*. This case involved the interpretation of the phrase 'taking advantage' in s. 46. The ACCC sought to put forth an interpretation of that provision that had not previously been considered by either party to those proceedings. It is important to note that in this case the ACCC sought to draw the court's attention to a new issue of statutory interpretation. Generally speaking, the ACCC will not intervene in private litigation if its role is confined to reiterating the views of a party to the proceedings.

International conduct

Globalisation, new technology and liberalisation can be seen as opportunities for new forms and areas of market power, for instance anti-competitive conduct and consumer exploitation on an international scale. The ACCC has strong links to overseas competition, consumer protection and regulatory communities. These links are critical for the ACCC to effectively address issues such as e-commerce, other cross-border consumer protection matters and global cartels.

In appropriate private cases the ACCC may wish to make submissions to the court about the deleterious international nature of the conduct being complained of, even if the

economic impact in Australia is limited, or the actual conduct in Australia is only a small element of the international conduct.

ACCC intervention in matters other than those that meet these three criteria will be considered case by case, but the guiding principle will be whether the public interest would be served in some way by the ACCC intervening in the proceedings. Depending on the circumstances of the case the ACCC may find it more appropriate to participate as a friend of the court (*amicus curiae*), rather than to apply for intervention and be a party to proceedings. Intervention in this way would be for a limited purpose, such as the making of submissions to the court only, where the ACCC was not proposing to adduce new evidence or seek orders from the court.

Principles upon which intervention will occur

The ACCC will not subsidise trade practices litigation brought by private parties. Further, it will not bear the cost of any party to civil proceedings. It sees its role in this area as being different to that of the various legal aid bodies in Australia. Rather, the ACCC will ordinarily exercise its right of intervention in the public interest, with the leave of the court and subject to any conditions imposed by the court, on the following terms.

The ACCC will bear its own costs in relation to intervention. It may agree to share certain costs with other parties (e.g. experts' fees, consultants' reports). The ACCC will appear through its own counsel only.

When the ACCC supports submissions by another party it will, to the extent possible under the Act and other relevant legislation, exchange information with that party. However, it will be on a confidential basis and subject to the other party agreeing that it will be at the ACCC's discretion whether that information is put before the court. See the ACCC's procedural guide, *Collection and use of information*, for more information.

Requests for intervention

The ACCC invites requests from persons who believe the public interest would be served by the ACCC's intervention in their private proceedings. The request must be in

writing from a party to the proceedings or its solicitors and must contain the following information:

a copy of all pleadings filed in the proceedings so far
legal advice (by the solicitors or other agencies) on the likelihood of the case being successful and identifying, where practicable, the matters on which submissions by the ACCC could assist
a summary of the matters that would justify ACCC intervention, addressing the guideline considerations outlined above, with specific reference to how the public interest would be served by the intervention.

Requests should be sent to the senior ACCC officer in the state or territory where the proceedings have been commenced.

The intervention, whether sought by the ACCC or requested by the parties, will be allowed at the court's discretion. The court can tailor the intervention so that it is appropriate to the proceedings and fair to the existing parties.

Cases to which these guidelines apply

The ACCC can only use this power to apply to intervene in proceedings instituted on or after the date of commencement of s. 87CA: 26 July 2001. With respect to private proceedings instituted before that date, the ACCC will take the above-listed considerations into account when deciding whether to apply to intervene.

ATTACHMENT D Litigation in retail tenancy related matters

*ACCC v Leelee Pty Ltd*³⁴¹²⁷¹

On 5 February 1999 the ACCC filed proceedings against Leelee Pty Ltd (Leelee), a commercial landlord. The ACCC alleged that Leelee had acted in contravention of section 51AC by imposing unreasonable conditions on a tenant. These conditions included increasing the tenant's rent contrary to the terms of the lease, failing to act to protect the tenant's rights under the lease and forcing the tenant to charge not less than a particular amount for certain food dishes while allowing his competitors to charge less for their food dishes.

On 13 June 2000 the court made a consent order with declarations that Leelee had acted unconscionably by:

- consenting to, or giving approval for, another tenant to infringe on the exclusive menu entitlements conferred by Leelee on one of its tenants; and
- specifying the price at which its tenant sold their dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.

*ACCC v Avanti Investments*³⁵¹¹⁻⁸¹

* Please note that the issue *ACCC v Avanti Investments* centred around an agricultural lease as opposed to retail tenancy arrangements, however, it has made a substantial contribution to clarifying the notion of unconscionability in retail leasing and is therefore discussed in this submission.

On 1 May 2001 the ACCC commenced proceedings against Avanti Investments (Avanti) alleging that the trader had engaged in unconscionable conduct in breach of section 51AC against four of its lessees.

³⁴²¹ *ACCC v Leelee Pty Ltd* (2000) ATPR 41-742; [1999] FCA 1121.
^{3s1281} *ACCC v Avanti Investments Pty Ltd and Gixseppe Rocco Barbara*. Federal Court of Australia (SA) Proceeding no S51 of 2001.

The ACCC alleged that Avanti were aware of the limited ability of the lessee's to understand their contract with Avanti, due to their Vietnamese background. Avanti also exercised undue influence, or unfair tactics, and failed to act in good faith through making the lessee's sign new lease agreements whilst representing they were substantially the same as the original agreement. Avanti also demanded outstanding water charges for excess water usage.

On 5 March 2002 the case was settled by consent with the court declaring that Avanti had engaged in unconscionable conduct in breach of section 51AC of the Trade Practices Act. This matter provided some clarification on the relationship between section 51AC and commercial retail leasing and the court's view of what amounts to acceptable commercial conduct by a landlord.

ACCC v Suffolk Parke Pty Ltd^{36[29]},

On 20 September 2001 the ACCC instituted proceedings against Suffolk Parke Pty Ltd (Suffolke Parke), a master franchisee that leased premises to a franchisee. The ACCC alleged the master franchisee acted unconscionably by refusing permission in October 2000 for its tenant (also sub-franchisee) to sublet a separate part of shop premises that it leased from Suffolk Parke, when on two prior occasions it had not objected to such subleasing.

The ACCC considered that the refusal was not reasonably necessary for the business interests of the landlord, but rather was in response to the sub-franchisee being involved, with other sub-franchisees, in correspondence from a solicitor to Suffolk Parke about complaints concerning franchising aspects of the business.

On 8 May 2002 the court declared that Suffolk Parke had acted unconscionably toward its tenant and that the company had breached the Franchising Code of Conduct by refusing to attend mediation.

^{36[29]} *ACCC v Suffolk Parke Pty Ltd* (FCA 5159 of 2001).

ACCC v Westfield Shopping Centre Management Co (OLD) Indooroopilly

On 8 March 2001 the ACCC commenced proceedings against Westfield alleging unconscionable conduct in breach of the Act.

The ACCC alleged that Westfield acted unconscionably by imposing unnecessary conditions. Westfield made it a condition of the settlement of private litigation that former tenants must sign a deed of release containing a 'release of liability' clause. The clause required the former tenants to not commence, recommence or continue any action in connection with the subject matter of their private litigation, including any administrative or governmental investigation against Westfield.

After the ACCC intervention, Westfield agreed to pay an amount to the former retail tenants and provided an undertaking that, in future, it will not use a specific release of liability clause when entering into settlement agreements with retail tenants. On this basis, the ACCC agreed to discontinue proceedings against Westfield. The consent order and undertaking in this matter provided some deterrence for this type of conduct by key players in the retail leasing industry.