

30 July 2007

The Productivity Commission
PO Box 80
Belconnen ACT 2616

Email: retailtenancies@pc.gov.au

**RE: PRODUCTIVITY COMMISSION INQUIRY INTO THE MARKET FOR RETAIL
TENANCY LEASES IN AUSTRALIA**

The Australian Property Law Group (**APLG**) is The National Committee of the Law Council of Australia focussing on national property law issues. It is made up of representatives of each State and Territory.

The Group wishes to respond to the call for submissions to the Productivity Commission with respect to Retail Tenancies. The submission is, in general terms, that there should be a uniform approach throughout the Commonwealth in respect of legislation relating to Retail Tenancies. Currently each State and Territory has its own individual legislation dealing with Retail Tenancies which up to now has been seen as a State issue dealing with land and leases and not a matter of federal or national concern.

However, the APLG has over the last decade been at the forefront of the endeavour to harmonise property law throughout Australia. One such initiative now having significant currency is a national electronic conveyancing system (NECS) which is endeavouring to establish a national electronic uniform conveyancing registration system. NECS is well down the track of establishing such a system and it is anticipated that it will be introduced in 2009. The Chairman of the NECS Board is Mr Les Taylor, the former company secretary and legal officer of the Commonwealth Bank. The CEO of NEC is Mr Simon Libnis, former Registrar of Titles.

As evidenced by the movement towards a uniform registration system for land title, issues relating to property law are becoming more national and no longer just within the province of the individual State. Similarly with leases and in particular Retail Lease, we have national landlords and national tenants operating throughout the Commonwealth. The fact that Retail Tenancies now is of national interest, is evidenced by this reference to the Productivity Commission. However, as with property law and registration processes throughout Australia, there is a lack of uniformity.

Please find **enclosed** Schedules indicating examples of differences in the legislation governing Retail Tenancies throughout the Commonwealth.

The Schedules are detailed as follows:

1. **Schedule 1** details what is in fact a retail shop as defined by each State or Territory Act. There are significant differences in the definition of "Retail Shop".
2. **Schedule 2** then taking the definition of a "Retail Shop" uses a number of examples such as childcare centres, dentists, internet café, bakery, travel agency, service stations and bowling and cinema centre. It is noted that in some instances the users are covered by the Acts in various States and in some cases, they are not so covered.
3. **Schedule 3** shows special exemptions apply in respect of the legislation governing retail tenancies and again there is a lack of consistency throughout the States of Commonwealth.

We have only identified a small portion of the legislation to highlight the inconsistencies. A full examination of the legislation in respect of all aspects relating to retail leasing covered by the legislation will highlight significantly more inconsistencies especially in relation to the way outgoings are dealt with, disclosure documentation, marketing levies, etc.

Accordingly, we would recommend to the Productivity Commission that a uniform approach be adopted by all States and Territories based on the Uniform Companies Code in that, a model law was prepared and then passed by each State and Territory. In some respects, retail tenancies is now no different to what the position was relating to company law in the middle of the 20th century. Company law originally was state based but because of the fact that companies transacted business in various States it became critical if not fundamentally necessary to have a uniform company law throughout Australia. This was adopted by model legislation proposed in 1963 and then passed by each State. We would recommend a similar procedure be adopted for Retail Tenancies.

We would be happy to expand upon our submission at a later stage if necessary.

Yours sincerely

A handwritten signature in black ink, appearing to read "P. Webb", with a large, stylized initial "P" that loops around the first part of the name.

Peter Webb
Secretary-General

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Definitions of retail shops in legislation governing retail tenancies

Jurisdiction	Definition
NSW - <i>Retail Leases Act 1994</i>	- Premises used for one of the businesses prescribed for the purposes of this paragraph – reference to Schedule 1 - Business premises in a retail shopping centre
VIC - <i>Retail Tenancies Reform Act 1998</i>	- Premises used for the carrying on of a business involving the sale or hire of goods by retail or the retail provision of services - Exemptions are possible by s5 or regulation – no relevant exemptions so far
VIC - <i>Retail Leases Act 2003</i>	- Premises used for the sale or hire of goods by retail or the retail provision of services - Exemptions are possible by regulation – no relevant exemptions so far
QSL - <i>Retail Shop Leases Act 1994</i>	- Shops situated in a retail shopping centre - Shops used wholly or predominantly for retail businesses – reference to Regulation
SA – <i>Retail & Comm.l Leases 1995</i>	- Business premises - at which goods are sold to the public by retail - at which services are provided to the public - or classified by Regulation
WA – <i>Comm. Tenancy Act 1985</i>	- Premises situated in a retail shopping centre, used for business purposes - Premises situated elsewhere, but - involving the sale of goods by retail - involving a specified business – reference to Regulation
TAS – <i>Fair Trading Regulation 1998</i>	- Premises that are used for a business listed in Appendix C - Business in a shopping centre
ACT – <i>Leases Act 2001</i>	- Premises used for - the sale or hire of goods by retail - the supply of services by retail - Special provisions in s12
NT - <i>Business Tenancies 2003/2007</i>	Premises used for - the sale or hire of goods by retail or the retail provision of services - a business in a shopping centre - the carrying of a business as prescribed by Regulations

Examples of differences in legislation governing retail tenancies

Jurisdiction	Child Care Centre	Dentist	Internet Cafe	Bakery	Travel Agency	Service Station	Bowling and Cinema Centre
NSW - Retail Leases Act 1994	No	No¹	Yes	Yes	Yes	No	No²
VIC - Retail Tenancies Reform Act 1998	Yes	Yes	Yes	Yes	Yes	Yes	Yes
VIC - Retail Leases Act 2003	Yes	Yes³	Yes	Yes	Yes	Yes	Yes
QSL - Retail Shop Leases Act 1994	No⁴	No	No	Yes	Yes	Yes⁵	No
SA – Retail & Comm. Leases 1995	Yes	Yes	Yes	Yes	Yes	Yes	Yes
WA – Comm. Tenancy Act 1985	No	No	No	Yes	No	Yes⁶	No
TAS – Fair Trading Regulation 1998	No	No	No	No	No	Yes	No⁷
ACT – Leases Act 2001	Yes⁸	Yes	Yes	Yes	Yes	Yes⁹	Yes
NT - Business Tenancies 2003/2007	Yes	Yes	Yes	Yes	Yes	Yes	No¹⁰

¹ Exemption for Medical Centres in Sydney Airport (s80B).

² Specially exempted in s5 (c).

³ Exception: If the premises were located above the 3rd level of a multi storey building in which case such premises are specifically excluded from the operation of the Act.

⁴ However, "Children's amusements" are covered by the regulation.

⁵ Cf. however s17 of the Act providing exceptions for cases in which the Petroleum Retail Marketing Franchise Act 1980 applies.

⁶ Cf. however the definition of "retail shops" in s3 of the Act providing exceptions for cases in which the Petroleum Retail Marketing Franchise Act 1980 applies.

⁷ Explicitly exempted in s2 (4) (b) of the Act.

⁸ Explicitly mentioned in s12 (1) g of the Act.

⁹ Explicitly mentioned in s12 (1) (k) of the Act, s3 (a) of the regulation.

¹⁰ Explicitly exempted in s6 (c) of the Act.

Special exemptions for retail shops in legislation governing retail tenancies

Jurisdiction	Lettable Area	Rent	Term	Companies	Others
NSW - Retail Leases Act 1994	More than 1,000 sqm		- 25 years or more - 6 months or below		Premises in an office tower that forms part of a retail shopping centre
VIC - Retail Tenancies Reform Act 1998	More than 1,000 sqm				
VIC - Retail Leases Act 2003		More than \$ 1 000 000		- Listed Corporation as defined in the Corporations Act - Securities in a foreign stock exchange	
QSL - Retail Shop Leases Act 1994					
SA – Retail & Comm. Leases 1995		More than \$ 250 000	1 month or less	- Public company, - ADI - Authorised corporate insurance - certain listed companies (e.g. hotels owned by certain brewing companies like S.A. Brewing Company ltd.)	Lessee is the Crown, a state/territory or the Commonwealth/district council etc.
WA – Comm. Tenancy Act 1985					
TAS – Fair Trading Regulation 1998	1,000 sqm or more				
ACT – Leases Act 2001	More than 1,000 sqm leased to a public company		6 months or less		Certain exempted companies and areas
NT - Business Tenancies 2003/2007	1,000 sqm or more		- 6 months or less - 25 years or more	- Listed corporations - Securities in a foreign financial market	