

NON-CONFIDENTIAL VERSION

THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA : PUBLIC INQUIRY (INQUIRY)

SUBMISSION TO THE PRODUCTIVITY COMMISSION (COMMISSION) BY STOCKLAND TRUST MANAGEMENT LIMITED (STOCKLAND)

Stockland welcomes the Inquiry by the Commission into the market for retail tenancy leases in Australia. Stockland considers that there is scope for considerable efficiencies and improvements in the market, for the benefit of landlords, retail tenants and retail customers and is keen for the Commission's report to make strong recommendations for changes to the industry so as to take advantage of the available efficiencies.

The approach taken by Stockland, in response to the Commission's *call for submissions* is as follows:

- (a) as a member of the Shopping Centre Council of Australia (SCCA), Stockland supports and adopts the submission of the SCCA; and
- (b) Stockland, in this submission:
 - (i) sets out the context to which, in its view, the Commission ought to have regard when considering the issues about which it has been asked to report by the Treasurer; and
 - (ii) makes submissions on particular issues that are of relevance to, or are specific to, Stockland, over and above the submission made by the SCCA.

This submission contains information that is **Commercial-In-Confidence**. The information that is commercially sensitive to Stockland identified in bold by the words, "**In Confidence**" at the beginning of the relevant sentence/paragraph. The Commission may not provide such commercially sensitive information to any person without first obtaining Stockland's consent in writing. For the convenience of the Commission, Stockland provides two versions of the submission. A version headed Commercial-In-Confidence that is only for the consideration of the Commission and a version that may be made available to third parties in which the confidential material has been excised.

EXECUTIVE SUMMARY

- Stockland is an owner and operator of a property portfolio in Australia that includes shopping centres as well as commercial, industrial, and office properties. Stockland is also a member of the SCCA. Stockland has reviewed the SCCA's submission to the Commission and it supports and adopts that submission.
- In addition, Stockland sets out the context to which, in its view, the Commission ought to have regard when considering the issues about which it has been asked to report by the Treasurer, and makes submissions and recommendations on particular issues that are of relevance to, or are specific to, Stockland.

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- Stockland's relationships with its retail tenants are regulated by a myriad of State/Territory retail tenancy legislation and Federal and State competition/fair trading legislation. The legislation provide very considerable protections and rights to retail tenants and place very onerous obligations on landlords. Further, each of the legislation has undergone significant amendment in the last decade to improve the bargaining position of the tenant. In addition to specific retail tenancy legislation, there have been significant changes in the last decade to the *Trade Practices Act 1974* (Cth) (**TPA**), as well as to the administrative processes of the Australian Competition and Consumer Commission (**ACCC**), that are of particular relevance to retail tenancies, giving improved rights and bargaining power to retail tenants.
- Stockland considers that the retail tenancies market is encumbered by a number of regulatory and structural factors that create significant inefficiencies and increase costs for all participants.

Stockland recommends rigorous analysis of the impact of concentration of major retail tenants on retailing and retail tenancy markets in Australia and the strict enforcement of section 50 of the TPA to ensure competitive market structure and ongoing competition in retailing and retail tenancy markets.

- **Information asymmetry:** Stockland supports disclosure of relevant information required by a potential tenant to enable it to make an informed decision whether or not to enter into a retail tenancy lease. Stockland's view however, is that any argument that suggests that there is a significant level of information asymmetry in the market between landlords and retail tenants is misconceived. There exists in the market, primarily due to retail tenancy legislation, as well as the advisory industry that has developed as a result, a significant amount of information available to retail tenants during the period in which a tenant is considering entering into a lease, during the life of the lease and at the end of the lease or consideration of renewal.

Stockland recommends that instead of placing further obligations on landlords, for reasons of consistency and reduction of any perceived information asymmetry, there be enacted a system of mandatory registration of leases in all States and Territories in Australia.

- **Provision of sales information from retail tenants to landlords:** Stockland requires its retail tenants across all centres to provide sales data on a monthly basis. Such sales data is critical to Stockland in a number of respects, including to determine financial viability of centres, a key factor in any decision to expand or redevelop a centre; to ensure its centres have a successful tenancy mix; for benchmarking purposes; and to comply with legislative requirements to inform prospective retail tenants in disclosure statements of a particular Stockland centre's performance.

Stockland recommends that no steps should be taken to limit landlords' ability to obtain monthly sales data from individual retail tenants in lease agreements.

- **Differences in retail tenancy regulation between States/Territories:** Stockland supports a system of national regulation of retail tenancies in place of the current State/Territory regulation. Stockland, like many other landlords, is required to have a number of different

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systems in place to comply with the individual State/Territory requirements. These inconsistencies create unnecessary cost and inefficiencies for landlords.

Stockland recommends that there be a single system of national regulation of retail tenancies replacing the existing multiplicity of State and Territory regulation. In the alternative, Stockland recommends a system to improve consistency between State and Territory retail tenancy regulation.

- **Dispute resolutions systems for landlords and retail tenants:** Each State/Territory legislation contains a dispute resolution system (albeit different in each State/Territory). In Stockland's view, the dispute resolution systems in place for landlords and retail tenants are adequate, save for the inefficiencies arising from inconsistent State/Territory legislation. Retail tenants have adequate avenues to resolve disputes with landlords. Further, Stockland's very low disputation figures are a result of the support Stockland provide to its retail tenants and the effectiveness of the current dispute resolution process.

Stockland recommends against providing any further avenues for dispute resolution for retail tenancy leases.

- **Assessment of rent renewals:** Stockland does not charge excessive rents on renewal of retail tenancy leases. Rents are a function of economics – supply and demand - and should be left to negotiation between landlord and tenant. Legislation has enshrined rights and protections for retail tenants, including dispute resolution clauses in circumstances where they are not satisfied with rent negotiations.

Stockland recommends that no steps be taken to interfere with market forces and the negotiation process between landlords and retail tenants in the setting of rents.

- **Security of tenure:** Australian retail tenancy laws do not impose a continued right of occupancy at the expiration of a lease. They do however mandate notice periods prior to termination of a retail tenancy.

Stockland recommends that there be no specific legislative measures to increase a retail tenant's security of tenure. However, Stockland is happy to negotiate longer term leases with its retail tenants. In fact, Stockland has a track record of negotiating longer term leases with retail tenants who request longer term leases.

- **Small business advisers:** In order that retail tenants have access to professional / quality advice, it is important to ensure advisors/advocates (an important form of retail tenant support) are appropriately qualified.

Stockland recommends the introduction of accreditation/statutory guidelines for retail advocates/advisors.

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1. BACKGROUND

Stockland

- 1.1 Stockland is an owner and operator (landlord) of a shopping centre portfolio in Australia. Stockland has a strong and diverse business model and asset base with a portfolio including 29 commercial properties, 27 industrial properties, 7 office parks, and 43 retail properties. The current value of Stockland's Australian retail portfolio is [In Confidence] and is comprised of in excess of 2,600 retail tenancies with approximately 128 million shopper visitations per year.
- 1.2 Stockland has made a significant number of purchases of shopping centre assets in recent times. Since June 2002, it has acquired 28 shopping centres, 16 centres as part of its acquisition of the AMP Diversified Trust in July 2003 and a further 12 individual centre acquisitions.¹
- 1.3 **Appendix 1** to this submission lists Stockland's current shopping centre portfolio in Australia.
- 1.4 Since July 2001, Stockland has undertaken eleven shopping centre developments, with total capital expenditure exceeding \$300 million. At present, Stockland has proposals for new developments or substantial refurbishment of centres that it owns and operates valued at in excess of \$1.5 billion.
- 1.5 Stockland centres, in addition to its major anchor tenants, have about 2600 retail tenants. Relevantly, about 1645 or almost 60% of retail tenants are "chain retail tenants" due to their size in the industry.

Recent developments in the market for retail tenancy leases : small businesses have been greatly assisted by a number of legislative and procedural reforms over the last decade

- 1.6 As set out above, about 60% of retail tenants having lease agreements with Stockland at its centres are larger multi-store retail tenants/ chain stores. These retail tenants are sophisticated, have bargaining power due to their ability to occupy premises at a number of centres, generally have the resources to obtain detailed advice about the terms and conditions of their leases with landlords and can "benchmark" the rents and provisions in leases between the various centres where they are located.
- 1.7 We provide below specific details about Stockland and its interactions with its retail tenants more generally. However, Stockland's relationships need to be contextualised by the regulatory environment in which Stockland operates. Specifically, Stockland's relationships with its retail tenants are regulated by a myriad of State/Territory retail tenancy legislation and Federal and State competition/fair trading legislation. The legislation provides very considerable protections and rights to retail tenants and places very onerous obligations on landlords relating to the terms and conditions of leases, the information to be provided to prospective retail tenants during the life of the lease, limit the ability of landlords to take certain actions during the life of the lease as well as providing

¹ As reported on 23 July 2007, Stockland is now developing a centre, in Townsville, with Myer as its anchor tenant, the first development for Stockland involving a major department store.

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for dispute resolution mechanisms in the event the parties cannot, commercially, resolve their differences. Further, each of the legislation has undergone significant amendment in the last decade to improve the position of the tenant.

- 1.8 As set out in the Commission's *call for submissions*, retail tenancy leases are governed by specific State and Territory legislation – the primary Acts in each jurisdiction are as follows:
- (a) NSW - *Retail Leases Act 1994*;
 - (b) Victoria - *Retail Tenancies Reform Act 1998*; *Retail Leases Act 2003*;
 - (c) Queensland - *Retail Shop Leases Act 1995*
 - (d) South Australia - *Retail & Commercial Leases Act 1995*;
 - (e) Western Australia - *Commercial Tenancy (Retail Shops) Agreements Act 1985*;
 - (f) Tasmania - *Fair Trading (Code of Practice for Retail Tenancies) Regulation 1998*;
 - (g) Australian Capital Territory - *Leases (Commercial & Retail) Act 1998*;
 - (h) Northern Territory - *Business Tenancies (Fair Dealings) 2003*.
- 1.9 The various legislation began to be enacted in each State over 20 years ago and without exception, each State has amended its legislation on numerous occasions. Each change has resulted in a strengthening of the rights and, in effect, the bargaining power of retail tenants in respect of the terms and conditions that are key as between landlord and tenant. In this regard, Stockland refers the Commission to the submission by the SCCA and the compendium referred to in that submission setting out a comparative, in each State, of the legislation relating to key terms of the landlord and retail tenant's relationship.
- 1.10 Stockland highlights in particular, that the legislation in each State regulates, and places obligations on, the landlord, as follows:
- (a) to provide specific information and documents (**disclosure statements**) to a prospective tenant prior to the signing of a lease;
 - (b) to register leases (in some States) providing for transparency of rent and other terms and conditions;
 - (c) to have specified minimum terms for leases and protections (in some States) for short term leaseholds;
 - (d) to follow strict procedural requirements for rent reviews;
 - (e) to ensure protection for retail tenants in assignments, relocation, damage to premises and demolition, including compensation in some circumstances;
 - (f) to provide terms controlling funding for advertising, marketing and the promotion of the centre and the reporting of such 'spend';

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- (g) to provide express provisions dealing with unconscionable conduct and misleading or deceptive conduct;
 - (h) to follow specified dispute resolution mechanisms; and
 - (i) to follow, in some States, provisions dealing with options to renew in some States and more generally, defined notice periods prior to termination of leases.
- 1.11 In addition to the material contained in the SCCA submission, Stockland attaches as **Appendix 2** to this submission, a table of examples of provisions of each of the State retail tenancy legislation that in Stockland's view have increased the rights of retail tenants in the last decade or so.
- 1.12 In addition to specific retail tenancy legislation, there have been significant changes in the last decade to the *Trade Practices Act 1974 (Cth)* (**TPA**), as well as to the administrative processes of Australia's competition regulator, the Australian Competition & Consumer Commission (**ACCC**) that are of particular relevance to retail tenancies, giving improved rights and bargaining power to retail tenants.
- 1.13 We note that many of the changes to the TPA have also been "mirrored" in changes made to the Fair Trading Acts of each State.
- 1.14 The major changes that have strengthened the rights of retail tenants are as follows:
- (a) the insertion of section 51AC into the TPA, which prohibits unconscionable conduct. Initially, this provision was available to businesses in circumstances where the value of the transaction/arrangement did not exceed \$1 million. Since enactment of the section in 1998, this ceiling has been increased to \$3 million and as part of a bill presently before the Parliament, is proposed to be increased to \$10 million;
 - (b) proposed changes to the misuse of market power provisions that arguably lower the threshold for founding an action on that basis;
 - (c) streamlining and simplifying the process for small businesses wishing to engage in collective bargaining with larger businesses in two ways:
 - (i) having a streamlined authorisation process; and
 - (ii) providing for a notification scheme for small business collective bargaining; and
 - (d) appointing a Commissioner focused on small business, presently John Martin. The bill presently before the Parliament proposes the appointment of an ACCC Deputy Chairperson for small business.
- 1.15 We attach as **Appendix 3** to this submission, further detail on the changes to the TPA and ACCC's process strengthening the rights of small business, including retail tenants.
- 1.16 In addition to the changes to the TPA and the ACCC's processes, the ACCC also produces various publications and makes available the following facilities to assist small business (including retail tenants) to understand their rights under the TPA, for example:

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- (a) The ACCC has released a number of publications designed to provide small businesses with an understanding of their rights and obligations under the TPA including, for example, guidelines on unconscionable conduct, collective bargaining and *Small Business and the Trade Practices Act, 2007*;
- (b) The ACCC also publishes *ACCC Briefing*: a regular bi-monthly news bulletin providing a snapshot of ACCC activities with commentary by the small business Commissioner and regional offices and *ACCC Infolink*: a one page monthly publication offering information on a current topic of relevance to small business;
- (c) The ACCC has a dedicated small business access point on its website and a dedicated small business helpline.

2. TERMS OF REFERENCE 1 AND 2

THE STRUCTURE AND FUNCTIONING OF THE RETAIL TENANCY MARKET IN AUSTRALIA, INCLUDING THE ROLE OF RETAIL TENANCIES AS A SOURCE OF INCOME FOR LANDLORDS, INVESTORS AND TENANTS AND THE RELATIONSHIPS WITH THE BROADER MARKET FOR COMMERCIAL TENANCIES

ANY COMPETITION, REGULATORY AND ACCESS CONSTRAINTS ON THE ECONOMICALLY EFFICIENT OPERATION OF THE MARKET

- 2.1 Stockland considers that the retail tenancies market is encumbered by a number of regulatory and structural factors that create significant inefficiencies and increase costs for all participants, namely:
 - (a) different legislative requirements in each State and Territory as well as an overlay of Commonwealth legislation and regulations; and
 - (b) structural factors in the market, particularly the lack of available anchor tenants to develop/redevelop shopping centres for the benefits of landlord, specialty retail tenants and consumers – see **Confidential** attached document (**Appendix 4**).

Recommendation

Stockland recommends rigorous analysis of the impact of concentration of major retail tenants on retailing and retail tenancy markets in Australia and the strict enforcement of section 50 of the TPA to ensure competitive market structures and ongoing competition in retailing.

Stockland makes recommendations relating to the multiplicity and inconsistency of legislation below.

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3. TERM OF REFERENCE 3

THE EXTENT OF INFORMATION ASYMMETRY BETWEEN LANDLORDS AND RETAIL TENANTS AND IMPACTS ON BUSINESS OPERATION

Transparency of rent and sales figures

- 3.1 Stockland supports disclosure of relevant information required by a potential tenant to enable it to make an informed decision whether or not to enter into a retail tenancy lease. Stockland's view however, is that any argument that suggests that there is a significant level of information asymmetry in the market between landlords and retail tenants is misconceived. There exists in the market, primarily due to retail tenancy legislation in each State as well as the advisory industry that has developed as a result, a significant amount of information available to retail tenants during the period in which a tenant is considering entering into a lease, during the life of the lease and at the end of the lease or consideration of renewal.
- 3.2 In this regard, Stockland refers to, and concurs with the submission of the SCCA setting out the information available to retail tenants during the abovementioned periods.
- 3.3 As an example, we set out below a table illustrating, the requirements in New South Wales for disclosure of information to retail tenants/prospective retail tenants.

Table 1: Disclosure of information requirements by landlords to retail tenants pursuant to the *Retail Leases Act 1994 (RLA)*.

Information	NSW requirements
Copy of the proposed lease	<p>A copy of the proposed lease must be available in written form for inspection by the prospective tenant as soon as they enter negotiations (s9 RLA).</p> <p>Financial penalties apply (\$5,500) (s9 RLA).</p>
Disclosure statement	<p>The landlord must prepare a disclosure statement containing information specified in Part 1 of Schedule 2 of the RLA.</p> <p>Must be provided at least 7 days before a new retail shop lease is entered into.</p> <p>If the retail shop lease is renewed, a written statement that updates the provisions of an earlier disclosure statement must be given to the tenant.</p> <p>Financial penalties apply where a landlord fails to supply a disclosure statement up to \$5,500 (s11 & Part 1 of Schedule 2 RLA).</p> <p>Retail tenants may terminate a lease by notice in writing at any time within 6 months after entering into a lease if a disclosure statement:</p> <ul style="list-style-type: none"> (a) was not given; or (b) was incomplete; or (c) contained materially false or misleading information.
Further documents to be provided to a tenant	<p>A retail tenancy guide prescribed by the Regulations must be made available to a prospective tenant at the commencement of lease negotiations (s9 RLA).</p> <p>Financial penalties of up to \$5,500 apply (s9 RLA).</p>

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Executed lease	<p>If the retail shop lease is not to be registered, the tenant must be given an executed copy of the stamped lease within 1 month of the lease being returned to the landlord or the landlord's lawyer after stamping.</p> <p>If the lease is to be registered, it must be lodged within 1 month of stamping and the retail tenant must receive their copy within 1 month of registration (s.159(1) RLA).</p>
Term end	<p>If a retail shop lease contains no option to renew, the landlord must, between 6 and 12 months before a lease ends, give the tenant notice that it:</p> <p>(a) intends to offer the tenant a renewal or extension of the lease on terms specified in the notification (including terms as to rent); or</p> <p>(b) does not propose to offer the tenant a renewal or extension of the lease (s44(1) RLA).</p> <p>If the landlord fails to notify, the retail shop lease is extended until 6 months after the landlord gives required notification where the tenant requests the extension in writing (s44(3) RLA).</p>

- 3.4 Landlords, in addition to being exposed to financial penalties and in some cases termination rights for the tenant where they contravene the above legislation, are also subject to the requirements of the TPA² not to engage in conduct that is misleading or deceptive (which might, for example, include incomplete disclosure statements or misleading or false information within a disclosure statement).
- 3.5 In addition to the information flowing between landlord and tenant/prospective tenant, there is, at least in New South Wales and Queensland legislation that allows for retail tenancy leases to be registered with the relevant titles office. Where leases are registered, any person may inspect, and obtain an entire copy of, the lease upon payment of a small search fee. It is Stockland's practice in New South Wales and Queensland to register all leases entered into with retail tenants. Stockland understands that other major landlords of shopping centres also adopt this practice.
- 3.6 Accordingly, in these jurisdictions, landlords and retail tenants are able to access retail tenancy leases and consider the rent under a particular lease as well as the other key terms and conditions. In fact, in these jurisdictions in particular, tenancy advisors, such as for example *Lease Information Services*, offer such information, as a benchmarking tool for retail tenants, as part of the suite of service offerings to retail tenants.
- 3.7 As stated above, the majority of retail tenants in Stockland's centres throughout Australia, some 60%, are chain retail tenants. Such retail tenants are sophisticated entities that are experienced in lease negotiations and are well informed on prevailing market rents.
- 3.8 Retail tenants are also able to avail themselves of a number of avenues to obtain information, including for example, the New South Wales Department of State and Regional Development has a retail tenancy unit designed to assist retail tenants with retail leasing issues. The retail tenancy unit has its own website and provides useful information to retail tenants including, for example its current "Protect Your Lease" information kit.

² See in particular, section 52 of the TPA.

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- 3.9 The level of information, at least in those States that provide for the registration of leases, is such that in Stockland's view there is no information asymmetry and thus no need to mandate any further information being provided to retail tenants about terms and conditions of leases and, in particular, rent. Any obligation on landlords to provide a data set of rents to retail tenants will result in significant costs to landlords in setting up and maintaining such databases, the administrative burden of maintaining and ensuring the accuracy of the databases in circumstances where there are constant changes to rent data and risks the likelihood of inaccuracy of data sets due to such constant changes. Such requirements would unnecessarily impose liability risks on landlords in circumstances where retail tenants are relying on such data sets as part of rent negotiations.

Recommendation

Stockland recommends that, instead of placing further obligations on landlords, for reasons of consistency and reduction of any perceived information asymmetry, a system of registration of leases be enacted in all States and Territories in Australia.

Provision of sales information from retail tenants to landlords

- 3.10 Stockland requires its retail tenants across all centres to provide sales data on a monthly basis. Such sales data is critical to Stockland in a number of respects, namely:
- (a) to determine the financial viability of its centres and the strength and weaknesses of its retail offering according to retail categories. Stockland has a development pipeline of approximately \$1.5 billion in the short to medium term. The development pipeline includes, primarily, plans to redevelop existing shopping centres. Understanding the financial viability of a centre is a key factor in any decision to expand or redevelop a centre. The utility of a landlord obtaining turnover information for this purpose was acknowledged earlier this month by the Chairman of the ACCC in his address to the National Small Business Summit:

*"One of the major complaints the ACCC hears from retail tenants is that they object to providing their turnover information details to landlords. We must remember that in some cases this information can be useful to a shopping centre when assessing possible future development and the tenancy structure that in turn assists with the success of the centre."*³
 - (b) to observe individual retail performance to ensure its centres have a successful tenancy mix. Stockland, like other landlords, carefully considers the mix of stores within a shopping centre. Stockland generally design centres so that like stores are adjacent to one another, a practice known as "precincting". Precincting assists in increasing consumer traffic volumes to retail tenants. Stockland must ensure its tenancy mix enables it to adapt to changes in the market place for each individual centre;
 - (c) **[In Confidence]**;

³ Graeme Samuel, "Competition and fair trading: a fair go for small business", address to the National Small Business Summit, Sydney, 3 July 2007.

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- (d) benchmarking purposes – in two respects – firstly, benchmarking for individual retail tenants allowing retail tenants to assess their performance against trends in its particular retail category and/or other sets of retail tenants within the centre. Stockland makes this information available upon request from individual retail tenants. Secondly, Stockland is able to benchmark its own performance against other landlords. Stockland submits data including sales data to a number of industry and independent bodies for benchmarking and other purposes;
- (e) to comply with the legislative requirements to inform prospective retail tenants in disclosure statements of a particular Stockland centre's performance – in particular:
- (i) in Queensland, Stockland is required to disclose details of the moving annual turnover (**MAT**); and
 - (ii) in New South Wales, Stockland is obliged to disclose the annual turnover of a particular centre and the annual turnover for specialties, broken down into a minimum of three categories (i.e. food, non-food and services).
- (f) as centres approach obsolescence due to their age or tenancy mix or changes in market trends or demographics, sales data assists Stockland to identify any associated impact on the centre's performance in order to ensure the ongoing success of the centre.

Recommendation:

In Stockland's view, no steps should be taken to limit landlords' ability to obtain monthly sales data from individual retail tenants in lease agreements.

To assist retail tenants, Stockland would be comfortable disclosing the annual turnover of its centres to prospective retail tenants (as currently required in Queensland and NSW) in all other Australian States and Territories.

4. **TERM OF REFERENCE 4**

SCOPE FOR REFORM OF RETAIL TENANCY REGULATION TO IMPROVE ECONOMIC PERFORMANCE, INCLUDING:

- **DIFFERENCES IN RETAIL TENANCY REGULATION BETWEEN STATES AND TERRITORIES; AND THE SCOPE FOR NATIONALLY AGREED REGULATIONS AND APPROACHES**
- **THE EXTENT AND ADEQUACY OF DISPUTE RESOLUTION SYSTEMS FOR LANDLORDS AND RETAIL TENANTS, INCLUDING DIFFERENCES IN DISPUTE RESOLUTION FRAMEWORKS BETWEEN THE STATES AND TERRITORIES**

Differences in retail tenancy regulation between States and Territories

- 4.1 Stockland concurs with the submission made by the SCCA and supports a system of national regulation of retail tenancies in place of the current State/Territory regulation.

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- 4.2 The SCCA submission identifies (in an attachment) the legislation/regulation in different States/Territories applying to retail tenancies, that there are sometimes significant differences in the provisions of the legislation/regulation and lists the numerous reviews of retail tenancy legislation that have taken place. It also identifies the scope for nationally agreed regulations and approaches. Stockland does not propose to duplicate those submissions but rather, sets out below some examples to illustrate the financial and administrative burdens associated with the present inconsistent regulation to Stockland (which operates nationally often with national retail tenants).
- 4.3 Stockland, like many other landlords, is required to have a number of different systems in place to comply with the individual State/Territory requirements. These inconsistencies create unnecessary cost and inefficiencies for landlords. Some particular examples are as follows:
- (a) As a result of each State/Territory adopting a different definition of "**retail premises**", national retail tenants (and landlords dealing with national retail tenants or retail tenants in various jurisdictions) are subject to the retail tenancy laws in some States/Territories and not in others. This, and similar inconsistencies in provisions of State legislation, makes it difficult for Stockland to establish a standard form of lease for these retail tenants and results in unnecessary expense and administration.
 - (b) States have different requirements for **short term leases**. In some States the retail tenancy laws do not apply to leases with terms less than 6 months. Most States adopt complex and often confusing interpretations and exceptions to the application of the laws. These inconsistencies can often make compliance difficult as a different administrative regime needs to be implemented in each State.
 - (c) **Non-Recoverable Outgoings:** Each State prohibits a different list of recoverable outgoings. This inconsistency creates administrative and economic burdens as outgoings need to be carefully assessed and paid according to each State/Territory's requirements. This may also require a different schedule being prepared for each jurisdiction.
 - (d) **Security Deposits:** Each State has different legislative requirements in the event that the tenant provides a security deposit as part of its lease. Some jurisdictions proscribe the maximum amount permitted, and others provide that the deposit must be held in an account bearing interest. South Australian legislation provides that the deposit must be lodged with the Commissioner. New South Wales requires lodgement with the Director General under a highly administrative regime which significantly limits the landlord's ability to draw down upon the security when required.⁴
 - (e) **Inconsistent forms of disclosure statements:** Each State has a different form of disclosure statement, the form of which is prescribed and unable to be altered. This

⁴ We note also that security deposits in NSW are not held in interest bearing accounts, which provides little benefit to the tenant.

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creates obvious administrative and economic burdens as landlords need to create and update six different forms as opposed to a uniform, nationally agreed statement.

- (f) **End of term notices:** Some States provide that the landlord must notify the tenant of its intentions at the end of the lease term between six and twelve months prior to expiry. Other States provide a different notice period. Legislation in South Australia and the Australian Capital Territory provide retail tenants with a preferential right of renewal. These provisions are often confusing and cumbersome and carry obvious administrative and economic burdens.
- (g) **Requirement to notify tenant of Option:** In Queensland and Victoria, a landlord is obliged to notify a tenant of its right to an option. No other State has this requirement.
- (h) **Assignment:** Landlord's consent is deemed to be given after a certain period of time in all States and Territories other than Queensland. However the deemed notice periods are different in different States. In addition, legislation in some States and Territories provide that a disclosure statement must be issued to the assignee, within varying timeframes and with varying content.
- (i) **Rent reviews:** Inconsistent rent review provisions in each State make it difficult for landlords to negotiate national agreements with national retail tenants.
- (j) In all states except Queensland, a retailer must obtain some form of certificate or advice and provide this to the landlord in order to waive its rights to the **minimum statutory term**. A common problem that arises is that retail tenants may not wish to seek or pay for legal advice, often resulting in the landlord having to pay for a tenant to obtain this advice.
- (k) In addition to the requirements already imposed in Victoria, in 2003 an additional obligation was introduced requiring certain details contained within a lease to be notified to the **Victorian Small Business Commissioner**. This reporting was considered necessary in circumstances where the Small Business Commissioner may need to communicate directly with landlords and retail tenants. Notwithstanding Stockland's compliance with this requirement at significant cost, since 2003, the Small Business Commissioner has had no reason to use this information. See Case Study – Section 25, Victorian Retail Leases Act in the submission made by the SCCA.

Recommendation:

Stockland recommends that there be a single system of national regulation of retail tenancies **replacing** the existing multiplicity of State and Territory regulation.

In the alternative, Stockland recommends a system to improve consistency between State and Territory retail tenancy regulation.

The dispute resolution systems for landlords and retail tenants are adequate

- 4.4 In Stockland's view, the dispute resolution systems in place for landlords and retail tenants are adequate, save for the inefficiencies arising from inconsistent State/Territory legislation referred to above.

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- 4.5 Retail tenancy legislation in each State and Territory establish a dispute resolution system. Each State/Territory has a different system. In New South Wales, for example, parties to a retail tenancy lease dispute may refer the dispute to the Registrar of Retail Tenancy Dispute for mediation. If mediation is unsuccessful, a claim may be lodged with the Administrative Decisions Tribunal (ADT).⁵ The ADT may also consider allegations of unconscionable conduct.
- 4.6 A summary of the dispute resolution system in each other State/Territory is usefully summarised in the SCCA submission.
- 4.7 The SCCA submission also sets out a number of statistics as to the number of retail tenancy disputes and their resolution.
- 4.8 Stockland provides the following statistics to assist the Commission. **[In Confidence]**.
- 4.9 **[In Confidence]**.
- 4.10 **[In Confidence]**.
- 4.11 Stockland's very low disputation figures are a result of the support Stockland provides to its retail tenants and the effectiveness of the current dispute resolution process.
- 4.12 Stockland provides a variety of support services to retail tenants including in the form of:
- (a) marketing assistance including direct financial contributions to promotional funds **[In Confidence]**;
 - (b) the provision of significant funds for infrastructure upgrades within centres; and
 - (c) the benefit of its expertise in the development and management of centres. **[In Confidence]**;

with the result that sales and productivity levels of retail tenants at Stockland centres are higher than industry benchmarks.

Success at achieving productivity/sales levels is a significant driver to ensuring low levels of disputation with retail tenants. **Appendix 5** provides further detail in this regard.

Recommendation:

Legislation has mandated dispute resolution mechanisms. While different in each State/Territory, they are currently working effectively. Retail tenants have adequate avenues to resolve disputes with landlords. Save for concerns regarding multiplicity, the dispute resolution mechanisms in each State are effective. Accordingly, save for changes to promote consistency, Stockland recommends against providing any further avenues for dispute resolution for retail tenancy leases.

⁵ Part 8 of the RLA.

NON-CONFIDENTIAL VERSION

5. TERM OF REFERENCE 5

THE APPROPRIATENESS AND TRANSPARENCY OF THE KEY FACTORS THAT ARE TAKEN INTO ACCOUNT IN DETERMINING RETAIL TENANCY RENTS

Assessment of rent renewals

- 5.1 The SCCA canvasses in detail, all of the factors taken into account in setting rent. Stockland concurs with the SCCA submission on this issue.
- 5.2 Stockland sets rents according to market forces – that is, rents are determined at any particular time by assessing supply of retail space and demand for such space. Rents are one of a number of terms negotiated with retail tenants upon entry into, and renewal of, leases. Market forces might manifest in these ways:
- (a) if there is an increase in supply – for example if a new centre is developed the catchment area of which overlaps with an existing centre, downward pressure is likely to be placed on rents for a period of time;
 - (b) economic downturns in the retail industry are likely to place downward pressure on rents; and
 - (c) in circumstances where there is a significant redevelopment of a centre, the increased demand from retail tenants for the centre may increase the value of the site and thus increase rents.
- 5.3 Anchor tenants enjoy significantly lower rents per square metre upon entry into, and renewal of, leases than specialty stores. This is because anchor tenants are of paramount importance to the development and sustainability of shopping centres. In essence, a shopping centre is built around anchor tenants. Customers are generally attracted to a shopping centre by its anchor tenants and, once there, will visit other stores in the centre, namely the smaller speciality retail tenants. Similarly, smaller specialty stores are drawn to the centres by the existence of anchor tenants. Without anchor tenants, the flow of customers into a centre diminishes, making the leasing of retail space at the centre a less attractive proposition for specialty stores.
- 5.4 In brief, the economics of shopping centres are such that landlords receive substantially lower rents from anchor tenants per square metre than from specialty retail tenants. The lower rents per square metre provide an incentive for anchor tenants to:
- (a) locate in a shopping centre, as opposed to a competing shopping centre or operate from a free-standing outlet; and then
 - (b) invest in larger, higher quality stores than they otherwise would, so as to attract a greater number of customers to the benefit of the shopping centre as a whole.
- 5.5 Stockland does not charge excessive rents on renewal of retail tenancy leases. **[In Confidence]**.
- 5.6 **[In Confidence]**.

NON-CONFIDENTIAL VERSION

Recommendation:

Rents are a function of economics, supply and demand, and should be left to negotiation between landlord and retail tenant. Legislation has enshrined rights and protections for retail tenants including dispute resolution clauses in circumstances where they are not satisfied with rent negotiations. Accordingly, Stockland recommends that no steps be taken to further interfere with market forces and the negotiation process between landlords and retail tenants in the setting of rents.

Rents are not determined by a tenant's monthly turnover

- 5.7 As stated above, Stockland sets rents based on supply and demand. The manner in which Stockland sets retail rents is explained at paragraph 4.2. Any anecdotal information that monthly sales data provided by retail tenants is used by Stockland to increase rent is misconceived.
- 5.8 Moreover, in some instances, retail tenants point to their sales figures when negotiating rent to seek rental concessions from Stockland.

6. TERM OF REFERENCE 6

THE APPROPRIATENESS AND TRANSPARENCY OF PROVISIONS IN RETAIL LEASES TO DETERMINE RIGHTS WHEN THE LEASE ENDS

Security of tenure

- 6.1 Australian retail tenancy laws do not impose a continued right of occupancy at the expiration of a lease. Such laws do make provision for "end of lease notification" by landlords to retail tenants. In New South Wales, for example, as set out in Table 1 at paragraph 2.5, a landlord must give the tenant notice between six and twelve months before a lease ends, that it:
- (a) intends to offer the tenant a renewal or extension of the lease on terms specified in the notification (including terms as to rent); or
 - (b) does not propose to offer the tenant a renewal or extension of the lease.⁶
- 6.2 Moreover, if the landlord fails to notify the tenant, the retail shop lease is extended until six months after the landlord gives required notification (where the tenant requests the extension in writing).⁷
- 6.3 Landlords are also required to disclose the term of the lease prior to its execution and provide retail tenants with a copy of a retail tenancy guide at the commencement of lease negotiations.
- 6.4 Stockland supports the submission of the SCCA that there should be no mandated security of tenure for the reasons set out in the SCCA's submission.

⁶ See section 44(1) of the RLA.

⁷ See section 44(3) of the RLA.

NON-CONFIDENTIAL VERSION

- 6.5 Stockland is however, happy to negotiate long term leases with its retail tenants and has done so in the past.
- 6.6 Stockland does not consider further regulation in this regard necessary but rather considers this a matter for negotiation with retail tenants on a case by case basis.
- 6.7 Longer term leases raise the following additional considerations for Stockland:
- (a) the impact on the existing portfolio lease expiry profile;
 - (b) the need for additional capital expense by the tenant to be invested in the business during the term of the lease;
 - (c) the impact on design fit-out/refurbishment during the term of the lease;
 - (d) the potential cost to Stockland on the centre's development potential (eg relocation and demolition clauses and costs);
 - (e) rental growth rates from assets (because growth is not uniformly spread between assets); and
 - (f) the impact on franchise business models (in particular, financing considerations) by having longer term leases.
- 6.8 There are a number of disadvantages in offering longer term leases. In particular, longer term leases affect Stockland's ability to respond to market changes, adjust the tenancy mix of a particular centre and ensure entry of new retail tenants.

Recommendation: Given that Stockland is prepared to negotiate longer term leases and the significant costs associated with legislated security of tenure, Stockland considers specific legislative measures to increase a retail tenant's security of tenure to be unnecessary.

7. **TERM OF REFERENCE 7**

ANY MEASURES TO IMPROVE OVERALL TRANSPARENCY AND COMPETITIVENESS OF THE MARKET FOR RETAIL TENANCY LEASES

- 7.1 Stockland has made comments with respect to asymmetry of information in respect of Terms of Reference 2 and 3 above.

8. **OTHER ISSUES**

SMALL BUSINESS ADVISERS

- 8.1 As outlined above, retailer advocates or retail tenant/small business advisors are another and an important form of retailer support.
- 8.2 In order that retail tenants have access to professional / quality advice, it is important to ensure advisors/advocates are appropriately qualified. An accreditation program/ statutory guidelines for advisors/advocates would provide retail tenants with more confidence in advice obtained.

NON-CONFIDENTIAL VERSION

Recommendation:

Stockland recommends the introduction of accreditation/statutory guidelines for retail advocates/advisors is appropriate.

Stockland is grateful for the opportunity to provide a submission in relation to the Commission's inquiry into the market for retail tenancy leases in Australia. Stockland would be delighted to meet with the Commission to discuss any aspect of its submission if it would assist the Commission in its inquiry. The Commission is invited to contact Stephen Bull on (02) 9035 3099 should it wish to do so.

27 July 2007

**APPENDIX 1:
STOCKLAND'S AUSTRALIAN RETAIL PORTFOLIO**

Property	Location	GLA (m2)	Book-value(m)	% of shopping centre portfolio	Annual Sales (Dec 06) (\$m)	Specialty Occupancy Costs (%)
Wetherill Park	NSW	51,062	307.5	8.0	242.9	12.7
Shellharbour	NSW	39,551	252.0	6.6	203.9	13.4
Townsville	QLD	32,620	230.0	6.0	208.9	12.5
Green Hills	NSW	32,384	207.0	5.4	280.3	10.0
Glendale	NSW	55,223	184.3	4.8	241.9	11.1
Cairns	QLD	48,813	181.0	4.7	210.1	11.8
Bay Village	NSW	29,127	176.7	4.6	167.0	14.8
Rockhampton	QLD	53,459	174.2	4.5	246.9	10.5 ⁸
Burleigh Heads	QLD	26,678	158.0	4.1	169.2	12.3
Merrylands	NSW	25,885	151.0	3.9	164.8	11.4 ⁹
The Pines	VIC	24,508	135.0	3.5	136.2	17.5
Jesmond	NSW	21,110	108.1	2.8	141.2	11.2
Karrinyup Shopping Centre ¹⁰	WA	58,975	106.2	2.8	367.4	15.6
Gladstone	QLD	27,230	97.5	2.5	144.4	11.0
Cleveland	QLD	15,659	84.5	2.2	118.8	11.2

⁸ Rockhampton Kmart Plaza excluded for calculation of occupancy cost.

⁹ Under development.

¹⁰ Book value represents Stocklands 25% ownership.

Property	Location	GLA (m2)	Book-value(m)	% of shopping centre portfolio	Annual Sales (Dec 06) (\$m)	Specialty Occupancy Costs (%)
Bathurst	NSW	19,392	83.0	2.2	117.9	11.5
Caloundra	QLD	15,705	82.0	2.1	119.9	9.9
Nowra	NSW	16,042	79.1	2.1	119.2	11.3
Parabanks	SA	25,035	78.1	2.0	142.0	12.3
Bull Creek	WA	16,687	72.5	1.9	101.9	13.7
Traralgon	VIC	19,340	71.2	1.9	90.8	11.5
Baulkham Hills	NSW	11,187	70.4	1.8	75.8	N/A
Wendouree	VIC	23,420	69.8	1.8	133.1	10.4
Batemans Bay	NSW	15,016	69.6	1.8	75.0	10.7
Corrimal	NSW	9,845	58.4	1.5	85.1	12.2
Forster	NSW	18,993	54.6	1.4	73.0	N/A
Shellharbour Super Centre	NSW	22,149	46.7	1.2	69.7	N/A
135 King Street ¹¹¹²	NSW	3,931	40.0	1.0	18.7	N/A
Glenrose	NSW	9,033	39.9	1.0	59.9	10.9 ¹³
Riverton	WA	17,057	35.0	0.9	101.5	11.3
Piccadilly	NSW	4,388	34.7	0.9	18.2	21.7
Bridge Plaza	NSW	6,460	17.8	0.5	43.3	8.6 ¹⁴
Burleigh Central	QLD	7,913	17.0	0.4	N/A	N/A

¹¹¹¹ Under development.

¹² Under development.

¹³ Under development.

¹⁴ Under development.

Property	Location	GLA (m2)	Book-value(m)	% of shopping centre portfolio	Annual Sales (Dec 06) (\$m)	Specialty Occupancy Costs (%)
Merrylands Court	NSW	6,304	16.1	0.4	N/A	N/A
Woolworths Toowong	QLD	2,275	8.0	0.2	N/A	N/A
Vincentia	NSW	N/A	7.4	0.2	N/A	N/A
Baldives	WA	N/A	5.6	0.1	N/A	N/A
Auckland Creek, Gladstone	QLD	N/A	3.6	0.1	N/A	N/A

**APPENDIX 2
AMENDMENTS MADE TO STATE LEGISLATION FROM 1997 – 2007: INCREASES IN THE RIGHTS OF RETAIL TENANTS**

APPENDIX 2 AMENDMENTS MADE TO STATE LEGISLATION FROM 1997 – 2007: INCREASES IN THE RIGHTS OF RETAIL TENANTS	
SOUTH AUSTRALIA	
<p>New Disclosure Statement</p> <ul style="list-style-type: none"> ▪ As from 6 October 1997. ▪ All leases entered into, renewed or assigned must be accompanied with a new form of disclosure statement prescribed by Regulation. 	<ul style="list-style-type: none"> ▪ A landlord must disclose any profit margin, including % and basis of calculation on any outgoings, any monetary obligations other than rent and outgoings, the legal consequences of breach of a term of the leases including consequences of early termination of the lease by the tenant, a warning that oral representations made by the landlord or the landlord's agent on which the tenant has relied should be reduced to writing and a warning that the tenant obtain independent financial and legal advice before entering into the lease. ▪ If the tenancy is situated in a retail shopping centre, the landlord must also disclose changes to the shopping centre proposed, whether the landlord is prepared to give the tenant assurance that current tenant mix will not be altered to tenant's disadvantage by the introduction of a competitor and the current tenancy mix and any proposed changes. ▪ If disclosure statement is not given as required, the Magistrate's Court has the power to make various orders including an order avoiding the lease in whole or part. For this kind of order to be made, the tenant must have been substantially prejudiced as a result of the landlord's failure.
<p>Preferential Rights</p> <ul style="list-style-type: none"> ▪ Effects all leases entered into from 6 October 1997 ▪ Part 4A of the Act introduced which grants all tenants of leases (or a periodic tenancy) for premises within a retail shopping centre preferential rights to negotiate and enter into a new lease at expiry of the original lease. 	<ul style="list-style-type: none"> ▪ Where preferential rights apply a landlord must enter into negotiations with the existing tenant for a further lease to be granted on no less favourable terms as the landlord may receive from a third party. Negotiations must be conducted in good faith. ▪ Preferential rights do not apply if the lease is for a term of 6 months or less, if the lease contains a certified exclusionary clause (solicitor's certificate) or is a sub lease where the term of the sub lease is as long as the head lease. ▪ A landlord is not obliged to prefer an existing lease where the landlord reasonably wants to change tenant mix of the centre, the existing tenant has been guilty of a substantial breach or persistent breaches of the lease, the landlord requires vacant possession for purposes of demolition or substantial repairs or renovation, the landlord does not propose to re let premises within a period of 6 months and requires vacant possession of premises for its own purposes, or where the renewal or extension of the lease would substantially disadvantage the landlord.
<p>Limitation of Liability of Lessee and Guarantor on Assignment of leases</p> <ul style="list-style-type: none"> ▪ New Section 45A introduced on 4 February 2002 provides further disclosure requirements for assignees and landlords and gives significant releases for assignors and their guarantors. ▪ Section has retrospective application. 	<ul style="list-style-type: none"> ▪ Specific procedure to be followed by any assignor of a lease under the Act. Provided the statutory procedures for assignment are strictly followed by the assignor its liability for any ongoing lease obligations will be limited to the earlier of 2 years from the date of assignment, the expiry of the lease or the date of any further assignment or a renewal of the original term. This limitation also applies to any Guarantor. ▪ The limitation of a tenant and guarantor's liability applies regardless of any agreement between the parties. Landlord's can no longer rely on the financial strength and reputation of the assignor and its guarantors and must (subject to the limitations of section 43 of the Act) assess each assignee on its merits as if they were entering into a new lease with that particular party.
<p>Introduction of Casual Mall Leasing Code</p> <ul style="list-style-type: none"> ▪ On 1 September 2002 section 62A was inserted into the Act. ▪ S62A states that all landlord's of a retail shopping centre must comply with the provisions of Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001. ▪ The Code applies to all casual mall licences (any short term licence of 180 days or less) in 	<ul style="list-style-type: none"> ▪ A landlord's Policy must include a floor plan which shows mall areas within centre that may be subject to licence, the number of sales periods for each accounting period (sale periods are periods not exceeding four weeks where the landlord promotes a sales event in the centre) and a statement as to whether the landlord reserves the right to grant casual mall licences in respect of special events otherwise in accordance with the Code (special event includes community, cultural, sport, arts entertainment, recreational, promotional or other similar event that is held in centre over limited time). ▪ All tenant's must be provided with a copy of the Policy and the Code and details of a complaints administrator. A landlord must also ensure that all information is provided to any new tenant of the centre at the point the disclosure statement is served on the tenant. ▪ There are strict obligations on landlords in dealing with casual mall leasing, including making variations to the Policy and ensuring that casual mall leasing does not interfere with the sightlines to an existing tenant's shopfront. ▪ Landlord's are prohibited from granting casual mall leasing to a competitor of an adjacent existing tenant if that competitor would have a

<p>retail shopping centres in South Australia.</p> <ul style="list-style-type: none"> ▪ Landlord’s must prepare a Casual Mall Leasing Policy 	<p>significant adverse effect on the trading of the adjacent tenant’s shop.</p> <ul style="list-style-type: none"> ▪ Landlords must also make an adjustment of recoverable outgoings at the end of any accounting period. The Code provides that non specific outgoings recoverable from centre tenants must be reduced to take into account casual mall licences. These licenses are deemed to contribute to these outgoings whether or not they actually do.
NEW SOUTH WALES	
<ul style="list-style-type: none"> ▪ Retail Leases Amendment Act 2004 No 84 (“2004 Amendment Act”) ▪ Lease preparation costs 	<ul style="list-style-type: none"> ▪ The amendment effected by the 2004 Amendment Act in relation to lease preparation costs is that it prohibits a landlord from recovering lease preparation expenses from tenants except to the extent that any amendments to the lease are requested and negotiated by the tenant and only after being given a copy of the account (section 14). ▪ This amendment is perceived to make the negotiating process more transparent by allowing the tenant to be aware upfront of the cost of entering into a lease.
<p>Security bonds</p>	<ul style="list-style-type: none"> • The 2005 Amendment Act (among other things) establishes a new regime in relation to the collection, management and refund of security bonds. The new Part 2A creates (and regulates) the obligation to lodge security bonds with the Director General of the Department of State and Regional Development (“Department”). Landlords must deposit with the Department security bonds received for retail leases within 20 days of receipt. • Interest on security deposits is recovered by the Department. The Department must under the 2005 Amendment Act establish two accounts, a retail leases security bonds trust account and a retail leases security bonds interest account. Interest earned from the first account is paid into the second account. From the second account, the costs or expenses are paid for the administration of the Act and any other payments authorised by or under the Act. However, when a security bond is paid out the interest paid on the security bond will be a fixed rate, not the same as that earned by the Department. • Payments out of security bonds may be made by application to the Director-General of the Department jointly by the landlord and tenant or if one party requests that a payment be made to the other party. These types of applications can be made at any time. • If a party wants to make an application for payment of the security deposit to itself (without the other’s consent), there is provision for notice to the other party and payment out can occur unless, within 14 days after service of the notice, the other party has commenced prescribed proceedings and notifies the Director General. Payment can then occur after a judgement or order in those proceedings or after a successful mediation.
<p>Disclosure statements and Retail Tenancy Guide</p>	<ul style="list-style-type: none"> ▪ New forms of landlord and tenant disclosure statements are included in the 2005 Amendment Act. ▪ The new form of disclosure statement places greater obligations on the landlord to disclose and provide information expeditiously to tenants, at least 7 days before the lease is entered into. ▪ At the disclosure stage, landlords are required to provide a copy of the lease and prescribed Retail Tenancy Guide as soon as the parties enter into lease negotiations otherwise a fine is imposed.
<p>Fit-out</p>	<ul style="list-style-type: none"> ▪ New provisions dealing with fit-outs are included in the 2005 Amendment Act. In particular, where the landlord is carrying out a fit-out, the maximum amount payable by a tenant for works conducted by a landlord to enable the tenant to fit-out premises (or a formula for calculating that amount) must be agreed in writing between the landlord and tenant before a lease is entered into. Under the 2005 Amendment Act, a landlord cannot require a tenant to pay more than the agreed maximum amount. ▪ If a landlord requires fit-out works to be conducted to a particular standard of construction, a fit-out statement or guide containing the relevant information must be provided to the tenant with the disclosure statement or lease. The tenant will not be required to carry out fit-out works to the extent that they are not covered, dealt with or provided for in the statement.
<p>Short-term leases</p>	<ul style="list-style-type: none"> ▪ A significant change introduced by the 2005 Amendment Act relates to short-term leases. The Act now applies to successive short-term leases where the combined term of the short-term leases exceeds 12 months. ▪ The Act applies on and from the date that the tenant has been in possession for more than 1 year and to any successive leases where the tenant’s possession of the premises (or entitlement to possession of the premises) has not been interrupted. ▪ The Act may provide such a tenant with a right to require a grant of a lease for a minimum 5 year term if the tenant notifies the landlord in writing during the term of the lease that the tenant elects to have the benefit of section 16 of the Act. However, in that case, any period for which the tenant has already been in possession of the premises without interruption is taken to be included in the term of the lease.

<p>Outgoings estimates and statements</p>	<ul style="list-style-type: none"> ▪ The 2005 Amendment Act makes the following changes in respect to outgoings: <ul style="list-style-type: none"> ○ The written estimate of outgoings is to be itemised under the item descriptions used in the landlord’s disclosure statement. ○ Estimates of outgoings should be given to the tenant before the lease is entered into and at least 1 month before the commencement of each accounting period. ○ If the premises are in a retail shopping centre, the estimate should cover management fees and cleaning costs. ○ If the landlord fails to give a written estimate of outgoings or an outgoings statement within 10 business days after being requested to do so by the tenant, the tenant is permitted to withhold its contribution to outgoings. ○ After the landlord furnishes the estimate or statement, the tenant must pay the withheld contributions to the landlord within 28 days.
<p>Unconscionable conduct and misleading and deceptive conduct</p>	<ul style="list-style-type: none"> ▪ In respect of unconscionable conduct, the 2005 Amendment Act has expanded the provisions of clause 62 of the Act to allow guarantors to obtain relief. ▪ In respect to misleading and deceptive conduct, the Act has a new division which provides that: <ul style="list-style-type: none"> ▪ a party to a retail lease must not, in connection with the lease, engage in conduct that is misleading or deceptive to another party to the lease or is likely to mislead or deceive another party to the lease. ▪ a person or party who suffers damage by reason of misleading or deceptive conduct of another party may make a claim for compensation as a retail tenancy claim. ▪ If a party suffers loss or damage as a result of another party’s misleading or deceptive conduct, that party is entitled to make a claim to the tribunal for compensation as a retail tenancy claim.
<p>Expansion of retail shop businesses</p>	<ul style="list-style-type: none"> ▪ The 2005 Amendment Act has expanded the list of retail shops in Schedule 1 of the Act to include a number of new categories of retail shops. ▪ The 2005 Amendment Act has amended the definitions in section 3 of the Act so that the Schedule can be expanded further by regulation rather than by amendment to the Act itself.
<p>Advertising and promotion expenditure statements</p>	<ul style="list-style-type: none"> ▪ As part of the 2005 Amendment Act amendments, the 6 monthly and yearly advertising and promotion expenditure statements provided by the landlord must now include details of the amounts contributed to by the landlord and tenant and the unspent amounts that will be carried forward. ▪ The amendments allow tenants to withhold payment of contributions for advertising and promotion costs if the landlord fails to provide to the tenant a marketing plan, details of proposed expenditure on an opening promotion, an expenditure statement or an advertising statement within 10 business days after receiving the tenant’s written request to do so. ▪ A tenant is not required to pay its contribution to advertising and promotion costs until 28 days after the landlord has provided the required details.
<p>Compensation for disturbance</p>	<ul style="list-style-type: none"> ▪ The 2005 Amendment Act substantially amends section 34(3) of the Act so that a landlord can only prevent or limit a claim for compensation for disturbance to the tenant’s business if the landlord provides a written statement specifically drawing the tenant’s attention to the details of the anticipated disturbance before the lease is entered into and the statement includes the following: <ul style="list-style-type: none"> ○ a specific description of the nature of the disturbance; ○ a statement assessing the likelihood of the disturbance occurring including an indication of the basis on which the assessment was reached; ○ a statement of the timing, duration and effect of the disturbance so far as they can be predicted. ○ A general statement to the effect that a tenant may encounter disturbances during the lease term without setting out the specific details of the likely disturbance, will not be sufficient for a landlord to limit or prevent a claim for compensation.
<p>Assignment</p>	<p>As part of the amendments made by the 2005 Amendment Act, a landlord now has 28 days (previously 42 days) in which to give notice to a tenant either consenting or withholding consent to an assignment of lease. If the landlord does not respond within this timeframe, the landlord is deemed to have consented to the assignment.</p>
<p>Relocation</p>	<ul style="list-style-type: none"> ▪ The 2005 Amendment Act clarifies the costs payable by the landlord to the tenant if the landlord relocates the tenant during the lease term. ▪ The relocation costs that the tenant can recover from the landlord has been expanded to include: <ul style="list-style-type: none"> ○ costs incurred by the tenant in dismantling fittings, equipment or services;

	<ul style="list-style-type: none"> ○ costs incurred by the tenant in replacing, re-installing or modifying finishes, fittings, equipment or services to the standard existing immediately before the relocation but only to the extent that they are reasonably required in the premises to which the tenant's business is relocated; and ○ legal costs incurred by the tenant. <p>(section 34A(f)).</p>
Negotiation for renewal or extension of lease	<p>The 2005 Amendment Act inserts new section 44A into the Act which means that a landlord is precluded from advertising the availability of the retail shop premises during the term of the lease unless:</p> <ul style="list-style-type: none"> ▪ the landlord has offered the renewal or extension of the lease to the tenant under section 44 of the Act and the tenant has not accepted such renewal or extension and the landlord has informed the tenant that negotiations are concluded without any result; or ▪ the landlord informs the tenant that the landlord does not propose to offer the tenant a renewal or extension of the lease and there are no arrangements to allow the tenant to remain in possession of the shop; or ▪ the tenant informs the landlord that the tenant does not wish to enter into negotiations for the renewal or extension of the lease or that the tenant wishes to withdraw from the negotiations; or ▪ the tenant has vacated or agrees in writing to vacate the shop; or ▪ the tenant consents in writing to publication of the advertisement.
Dispute resolution	<ul style="list-style-type: none"> ▪ Retail tenancy claims and unconscionable conduct claims were required to be made within 3 years after the alleged claim arose or conduct occurred. ▪ The 2005 Amendment Act inserts new section 71B into the Act which now increases the limitation period to more than 3 years and less than 6 years after the alleged claim arose or conduct occurred, if the Tribunal orders that the claim may be lodged with the Tribunal. ▪ The Tribunal may make such an order if the applicant satisfies the Tribunal that it is just and reasonable to make the order.
Opportunity for lessee to have current market rent determined early	<ul style="list-style-type: none"> ▪ Where a lease includes an option to renew at current market rent, section 32(1) of the Act provides that the tenant is entitled to request a determination of the current market rent at any time between 3 and 6 months before the date that the tenant is required to exercise the option. ▪ One of the amendments made by the 2005 Amendment Act is that if the determination of rent is not notified within 21 days before the end of the term of the lease, then the tenant may exercise the option within 21 days after the determination is notified to the tenant (whether before or after the term of the lease) and the term of the lease is extended by the appropriate period to enable the tenant to exercise the option after the lease would otherwise expire. This amendment is perceived to prevent landlords from drawing out the process for notifying the tenant of the new market rent.
WESTERN AUSTRALIA	
Section 6A 1 July 1998	<ul style="list-style-type: none"> • Tenant code must be correctly located in lease. If tenant code is not correctly located, tenant may terminate lease within 60 days with 14 days written notice and/or apply to the State Administrative Tribunal for compensation and/or termination of lease. • Tenant notified of tenant's rights under retail shops legislation. Tenant given right to terminate lease and/or apply for compensation in certain circumstances if tenant is not notified of tenant's rights in prescribed form under lease.
Tenant Code	
Assignment of Lease	<ul style="list-style-type: none"> • Assignors and guarantors are released from lease obligations as from the date of assignment. Landlords cannot require assignors and guarantors to agree to guarantee obligations of assignee. Once tenant has sold business and assigned lease, tenant and its guarantors are released from any obligations.
Section 11 - Rent Reviews	<ul style="list-style-type: none"> • Single basis for rent review – no alternative bases. • Landlords may not initiate a rent review more than 3 months before and more than 6 months after a rent review date unless lease specifically provides otherwise.

	<ul style="list-style-type: none"> • Leases may not preclude or limit the increase or decrease of rent. • Leases may not preclude tenant from voluntarily disclosing rent. • Landlord may not increase or decrease rent unless tenant agrees or matter is resolved by a valuer – adjustments are then made to the rent paid to date • Tenant not subject to more than one basis of rent review at any one time where the landlord otherwise may have had the ability to choose form of rent review which achieves the highest rent depending on economic conditions (for example provisions precludes rent review to the greater of CPI or market). • Landlord cannot instigate rent review after prescribed time for commencing rent reviews has elapsed. • Tenant has benefit of rent reduction on market rent reviews if market conditions are such that market rents have decreased in the market during the relevant period. • Gives the tenant the ability to better inform themselves as to what the current market conditions for the payment of rent are. • Where there is a dispute at a rent review, the tenant does not have to pay increased rent until the rent has been properly determined in accordance with the retail shops legislation.
Section 12 Variable Outgoings	<ul style="list-style-type: none"> • Variable outgoings must be proportional to lettable area of tenancy and must not be greater than the relevant proportion without the approval of the Tribunal. • Tenants not operating outside standard trading hours not required to contribute to after hours expenditure. • Introduction of operating expenses statement (OES). • Tenants not required to pay variable outgoings until landlord has provided OES. • Tenants not liable for variable outgoings not specifically referable to them and contribution must not be greater than the relevant proportion. • Landlords may not charge management fees to a tenant. • Tenants pay notional land tax only. • Tenant is only responsible for outgoings: <ul style="list-style-type: none"> • on a proper proportional basis; and • that are properly referable to the tenant and in respect of which the tenant derives a benefit • Tenant is able to better verify that outgoings tenant is charged for by the landlord have been properly charged in accordance with the retail shops legislation. • Tenant is not required to contribute towards outgoings until the tenant is provided with the relevant information on which it is able to verify the outgoings. • Tenant is not required to contribute to landlord management fees. • Tenant is not penalised for increased land tax rates in circumstances where landlord owns more than one property.
Section 12(3) Strata Titles	<ul style="list-style-type: none"> • Strata levies must be apportioned into items of a variable outgoing nature and then apportioned. • Tenant is only responsible for outgoings on a proper proportional basis.
Section 12(a) Sinking Funds	<ul style="list-style-type: none"> • Purpose of sinking fund must be specified in lease. • Sinking fund available for certain purposes only. • Landlord must invest fund in an interest bearing account. • The fund must be audited and provide copies of report to tenants within 3 months of end of accounting year. • If landlord does not provide copy of report to tenant then tenant not required to make further contributions until it has received copy of report. <ul style="list-style-type: none"> ▪ Landlord must prepare scheme of repayment of sinking funds to tenants, to be approved by Tribunal, if shopping centre ceases to operate. • Tenant is better informed as to the purpose of any sinking fund contribution required to be made by the tenant. • Tenant is better protected as landlord is under strict obligations to use the sinking funds only for prescribed purposes. • Ensures on behalf of tenant and landlord that sinking fund is properly invested in interest bearing account • Tenant is better informed of how the sinking fund monies are applied and it is better able to verify that sinking fund has been used only for permitted purposes.

	<ul style="list-style-type: none"> • Tenant does not have to contribute to sinking fund unless it is provided with the prescribed information.
Section 12(b) Promotional Funds	Similar to sinking funds.
Section 12(c) Hours of Operation	<ul style="list-style-type: none"> • Leases may not specify hours during which tenant is required to keep its business open for operation. • If landlord refuses to renew lease because tenant did not open shop for business at specified time then tenant may apply to Tribunal for compensation. • The landlord can not force the tenant to open its business for hours that the tenant does not wish to operate for.
State Administrative Tribunal Amendments and Repeal Act 2004 1 January 2005.	State Administrative Tribunal replaced Commercial Tribunal of Western Australia
Retail Shops and Fair Trading Legislation Amendment Act 2006 - 11 May 2006 Section 12 Tenant Associations	<ul style="list-style-type: none"> • Landlords may not discriminate against or prohibit a tenant from forming or joining a tenants association. • Tenant may apply for compensation if landlord breaches this. • Gives the tenant a better ability to lobby for improved trading conditions.
Section 15C Unconscionable Conduct	<ul style="list-style-type: none"> • Landlord may not engage in unconscionable conduct in accordance with the detailed provisions contained in section 15C. • Tenant may not engage in unconscionable conduct in accordance with the detailed provisions contained in section 15D. • Tenant is better protected against unconscionable conduct by a landlord.
QUEENSLAND	
Retail Shop Leases Amendment Acts 2006, 2000, 1999	<ul style="list-style-type: none"> • Probably the clearest example of the extent of changes and the increased complexity for both tenants and landlords in this area is the fact that the Act started life in 1984 as 24 pages with 55 sections. Today the Act extends to 85 pages with 158 different sections. This has a significant effect on time and cost involved for compliance and administration for all parties and reduces productivity and flexibility. • Another difficulty for landlords is that tenants have a variety of different venues to bring and double up on their claims - for example, they can claim for trade practices like issues under the Act in the Retail Shop Leases Tribunal (eg: unconscionable conduct under s.46A) and then if not successful, claim again under the Trade Practices Act in the courts.

Disclosures	<ul style="list-style-type: none"> • Disclosures were extended to cover assignments so that landlords need to provide disclosure statements to assignees [2000]. • Tenant disclosures and financial and legal advice certificates were also introduced which benefit tenants by ensuring they have appropriate advice and allowing tenants to note on record alleged representations or similar statements by the landlords or its agent in a formal process [2000]. • Disclosure information has been expanded to require that landlords advise tenants of moving annual turnover and pedestrian counts and expiry dates for major tenants [2006]. • Tenants now have an extended period of time - was 2 months now 6 months - to terminate a lease if a landlord does not give a disclosure. In addition, the right of termination is extended to cover circumstances where the disclosure is misleading or deceptive [2006]. • Tenants also have the right to claim compensation where no disclosure statement was given or it was false or misleading at any time during the term of the lease. This change extends landlord liability substantially even though tenants should have the ability to raise any concerns or be aware of issues early in their lease [2006]. • Now franchisees can also claim compensation for false or misleading statements in disclosures even though they have no legal relationship with the landlord [2006]. See also comments on compensation below.
Lease payments	<p>The types of payments, and the proportions of outgoings tenants are required to contribute to have also been continually restricted with restrictions on default interest recovery and further limitations on outgoings and other cost recovery [2000 and 2006].</p>
Rent Reviews	<ul style="list-style-type: none"> • Only one rent review is permitted each year (except in the first year) [1999]. • Reviews are limited to one basis (or a combination eg CPI + 2%) [1999 and 2006]. The Act previously included provisions with this intent however they were not effective and these amendments overcame those issues. • The Act was subsequently amended to allow the tenant to choose between methods where the lease provided for one of two or more methods - eg market or 5% whichever is greater - however other invalid reviews still result in no review. This change ensured that tenants could opt for a review where the rent was going to go down - eg if market were less than the previous years rent - although it also benefited landlords ensuring that in most cases there was some review albeit that the tenant could choose [2000]. • Further changes gave tenants and landlords a little more flexibility with rent review alternatives although they still remain heavily regulated [2006]. • The Act now expressly permits caps (i.e. CPI but not more than 3%), whereas previously they were invalid review methods [2006]. • Major tenants (tenants of 5 or more shops) can agree on alternate review methods outside the Act [2006].
Market reviews	<ul style="list-style-type: none"> ▪ Tenants with options where rent is reviewed to market are able to require early determination of market rent before they exercise their option. Because rent is determined as at the date of the tenant's notice, tenants can effectively have rent determined up to 1 year early. ▪ This creates an artificial market position and potentially means landlords rental returns will be 1 year behind market for the whole of the new lease [2006]. In these circumstances the last date to exercise the option is also extended until after the market rent is determined or the expiry date of the lease (whichever is later).
Options	<ul style="list-style-type: none"> ▪ Where a lease includes an option the landlord must give the tenant at least 2 months notice of the last date to exercise the option [2006]. ▪ Where a lease does not include an option the landlord must give the tenant notice at least 6 months before the end of the lease advising whether or not the landlord intends to offer a renewal of the lease. Where notice is not given the tenant can sometimes extend the lease [2006]. ▪ It is probably worth noting that the difficulties with notices for options, early market reviews etc have a deterrent effect in that most landlords avoid options, and when they are granted don't agree to market reviews because of the negative impact of those sections.
Compensation	<ul style="list-style-type: none"> ▪ Franchisees and tenants on holdover are now entitled to claim compensation from landlords and are "tenants" for that purpose. This change extends the compensation provisions substantially and creates significant difficulties for landlords in that they could be subject to separate compensation claims from both a tenant and a franchisee. In addition landlords could be liable to pay compensation to franchisees when they have no commercial relationship with them [2006]. ▪ Tenants can claim compensation (or lodge a dispute) up to 1 year after the lease has ended (previously 4 months) [2006]. ▪ Assignees can now claim compensation for misleading disclosure statements from both assignors and landlords [2006].

Relocation	<ul style="list-style-type: none"> ▪ The relocation provisions are now much more prescriptive. The intent was to create some consistency with other jurisdictions (eg NSW) however the drafting is problematic in that the section (s.46C) arguably only applies where the specific wording under the Act is repeated in the lease rather than applying to any relocation provisions as with NSW. It is not clear if relocation provisions which don't fall under the Act are effective or not [2006]. ▪ Relocation is also only permitted (where the Act applies) if there is a redevelopment refurbishment etc which requires vacant possession of the shop. Relocations for tenancy mix are most likely no longer permitted [2006]. ▪ As part of the provisions there are restrictions on the new premises, rent changes and a right of early termination for the tenant etc to mirror NSW provisions [2006].
Demolition	<ul style="list-style-type: none"> ▪ Termination for demolition is now only permitted if the building is to be demolished requiring vacant possession of the shop. The tenant also has an early termination right [2006]. ▪ There are reduced compensation provisions where the demolition intention was genuine and the landlord proceeds with the demolition but again that this subject to the potential to claim additional compensation for the same loss under s.43(f) which has not been deleted [2006].
Assignment	<ul style="list-style-type: none"> ▪ Tenants are released on assignment, subject to compliance with certain disclosure requirements [2006].
Disputes	<ul style="list-style-type: none"> ▪ As noted above, disputes can be lodged up to 1 year after the lease has ended (previously 4 months) [2006]. ▪ The Retail Shop Leases Tribunal has jurisdiction to hear disputes regarding unconscionable conduct under the Act. This allows tenants to venue shop and to have two or more bites of cherry.
VICTORIA	
General	<ul style="list-style-type: none"> • The operative provisions of the Retail Leases Act 2003 (RLA) commenced on 1 May 2003, being approximately 5 years since the commencement of the Retail Tenancies Reform Act 1998 (RTRA). The effect of this legislation was to double the size of the retail legislation in Victoria, much of which favoured tenants. Further, when the RTRA commenced in 1998 it was twice the size of its predecessor legislation, the Retail Tenancies Act 1986 (RTA). • Given that the RLA substantially altered and in many instances replaced the vast majority of provisions of the RTRA and the RTA, we have limited this paper to the changes made by the RLA (notwithstanding that the RTRA commenced in 1998) as the provisions of the RTRA have largely been made redundant as they have been harmonised back to the provisions of the new RLA. • The RLA made a number of retrospective amendments to the RTRA and the RTA which took effect from 1 November 2003 and which essentially meant that certain terms of leases entered into under the RTRA and RTA would be overridden by the RLA. The areas subject to this retrospective impact include market rent reviews, notices to be given at the end of lease terms, provision of outgoing estimates and statements, notice to tenants of proposed works and relocation clauses. • The main reasons behind the introduction of the provisions in the RLA were to attempt to harmonise Victorian retail leasing legislation with that of NSW and to enhance “certainty and fairness of retail leasing arrangements between landlords and tenants” (Section 1 RLA). • There are however a number of significant departures from the NSW model, including in relation to coverage of the legislation, the removal of land tax from outgoing able to be recovered by a landlord, caps on management fees and an extension of the drawdown of Section 51AC of the Trade Practice Act 1952 (TPA) from the NSW model. • The Victorian Minister of Small Business undertook a review of the RLA in 2005, limited to clarification of a number of these issues which has resulted in the Retail Leases (Amendment) Act 2005 (Amending Act). The Amending Act came into force on 22 November 2005 however certain sections of the Amending Act have retrospective application. The stated aim of the Amending Act was to streamline and improve the practical operation of the RLA. • There have been a number of smaller “reviews” of the legislation by the major stakeholders to the legislation with the relevant ministers in the last 10 years.

<p>Removal of 1000 square metre threshold and replacement with rent threshold (Section 4)</p>	<ul style="list-style-type: none"> ▪ This ensures that more “medium sized” tenants are covered by the retail legislation as previously many “mini-major” tenants were exempt. ▪ The “occupancy cost” threshold is currently \$1,000,000 which is unlikely to be reached by any except the largest major tenants in the largest shopping centres.
<p>Public companies included in RLA but not listed public companies (Section 4)</p>	<ul style="list-style-type: none"> ▪ Previously all public companies fell outside the operation of the retail legislation. This was amended so that only listed public companies and their subsidiaries are outside the operation of the RLA. Accordingly, more corporations are now subject to the retail legislation.
<p>Short term leases/ Holding Over (Sections 10 and 12)</p>	<ul style="list-style-type: none"> ▪ The RLA does not apply to leases that are for a period of less than one year, however the RLA will apply if the lease is one where it is initially for a period of less than one year but is renewed so that the tenant is continuously in possession of the premises for more than one year after 1 May 2003. This was included to avoid the common situation where landlords granted tenants rolling “364 day leases” to avoid the operation of the retail legislation. ▪ If a tenant holds over for 12 months then the RLA will apply and the recent case of <i>Daco Enterprises Pty Ltd v The Golden Sultana Pty Ltd</i> (2006) means that a tenant is therefore entitled to a 5 year term from commencement of that holding over period, regardless of how long they have previously occupied the premises.
<p>New form of Disclosure Statement (Section 17)</p>	<ul style="list-style-type: none"> ▪ A far more detailed form of Disclosure Statement is now required to be provided by a landlord to a tenant prior to the entering into of a lease. This gives a tenant far more detail regarding the proposed lease and the shopping centre of which the premises forms part. Examples of this include details of presently known or likely changes in the tenancy mix of the shopping centre, details about casual mall leasing in the shopping centre and the landlord’s contribution to promotion/marketing the shopping centre. ▪ The stated aim of this provision was to minimise retail tenancy disputes by ensuring that the parties have sufficient information to make a sound business decision about entering into and renewing a lease.
<p>Copy of lease to be provided at negotiation stage (Section 15);</p>	<ul style="list-style-type: none"> ▪ This section requires a tenant to be provided with a copy of the pro-forma lease for the Premises at first contact by the landlord or its agent. This is to ensure that a tenant is aware of the major non-commercial lease terms prior to agreeing to enter into a lease of retail premises.
<p>Minimum 5 year term (Section 21)</p>	<ul style="list-style-type: none"> ▪ The right to a minimum 5 year term (including option term(s)) was extended to apply to all tenants not just first time tenants. This means that all tenants, regardless of whether they are national chain or experience tenants are entitled to a 5 year term. This requirement does not apply where the lease is a “renewal” of an existing lease, however the definition of “renewal” is so narrow that in reality all leases whether they be new leases or renewals by agreement will be required to be 5 years in length unless the tenant waives this right and obtains a certificate from the Small Business Commissioner in respect of same.
<p>Security Deposits (Section 24)</p>	<ul style="list-style-type: none"> ▪ The RLA requires that any security deposit held by the landlord is to be held in an interest bearing account and the landlord must account to the tenant for interest on the deposit. If the tenant performs its obligations under the lease the landlord must return the security deposit to the tenant as soon as practicable after the lease ends.
<p>Notification of lease to Small Business Commissioner (Section 25)</p>	<ul style="list-style-type: none"> ▪ A landlord must provide the Small Business Commissioner with details of a lease (including the parties to the lease, details of the premises, the date when the lease was signed by all of the parties to it and the expiry date of the lease) within 14 days after the tenant enters into the lease. This has resulted in additional administrative costs for landlords and to date we are not aware of any use to which this information has been put by the Small Business Commissioner.
<p>Category 1 Works costs (Section 30)</p>	<ul style="list-style-type: none"> ▪ As there have been situations where the cost of works to services or structure required to facilitate a tenant’s fitout (Category 1 Works) have blown out, Section 30 now requires that the maximum cost of those works on a basis or formula with respect to those costs is to be agreed in writing by the landlord and tenant before the works begin. If there is no agreement then the maximum cost is to be determined by an independent quantity surveyor. A tenant is not liable to pay an amount that is more than the maximum cost agreed or determined (as the case may be).

<p>Fitout obligations (Sections 31, 58 and 59)</p>	<ul style="list-style-type: none"> ▪ If a landlord is responsible for providing some or all of the fit out and the landlord's obligations have not been met by the time the tenant is to occupy the premises, then the tenant is not liable to pay rent while those obligations are not met and the landlord cannot refuse the tenant possession (except on reasonable grounds of safety) just because the landlord has not met their obligations (Section 31). This is similar to the NSW provision. ▪ A provision in a lease requiring the tenant to refurbish or refit the premises is void unless it gives such details of the refurbishment or refitting as are necessary to indicate generally its nature, extent and timing (Section 58). This is similar to the NSW provision. ▪ A provision in a lease which limits or has the effect of limiting the tenant's right to employ or engage persons the tenant chooses is void (Section 59). This is similar to the NSW provision. A landlord can specifying minimum standard of competence and behaviour, prohibit work from being carried out on landlord's property and require the tenant to comply with an award or agreement in a shopping centre.
<p>Rent Reviews (Sections 35 to 38)</p>	<ul style="list-style-type: none"> ▪ Under the RTRA it was possible for landlords to purposefully delay the timing of a rent review in the expectation of a more favourable outcome. The RLA addresses this by providing that rent reviews are to take place as early as practicable within the time provided by the lease. If the landlord has not initiated the review within 90 days after the end of that time, the tenant may initiate the review. ▪ The RLA also inserted a definition of "current market rent" and stated factors to be taken into account in determining same. ▪ Landlords are also now obliged to supply relevant information to a valuer when one is appointed to determine a valuation of current market rent. Failure to do so incurs a fine. Such information must be kept confidential.
<p>Outgoings and Marketing Fund Expenditure Statements and other outgoings issues (Sections 39 to 48 and 71)</p>	<ul style="list-style-type: none"> ▪ The RLA requires that an outgoings and marketing expenditure statement be made available to tenants at least once during the relevant accounting period as well as at the end of the relevant accounting period. ▪ The outgoings provisions are generally consistent with the provisions of the NSW legislation except for Section 47(7). Section 47(7) of the RLA requires that a tenant be given an opportunity to make a written submission to the auditor on the accuracy of the outgoings statement. ▪ Outgoings must be properly and reasonably incurred by the landlord (Section 48). ▪ Non-recoverable expenses which were not previously excluded are (See also sections 49 and 50 below): ▪ an amount in respect of depreciation (Section 42, as per NSW provision); ▪ any contribution to a sinking fund to provide for capital works (Section 43); ▪ (c) rent payable under any head lease under which the landlord holds the retail premises or land on which the retail shopping centre is located (Section 45, as per NSW provision).
<p>Cap on recovery of increases in management fees from tenants (Section 49);</p>	<ul style="list-style-type: none"> ▪ A tenant's liability to contribute to management fees is capped at CPI increases from year to year. The aim of this provision was to give tenants more certainty regarding management fees in shopping centres.
<p>Removal of landlord's ability to recover land tax from tenants, including under an option to renew granted in a lease entered into prior to the introduction of the RLA (Section 50).</p>	<ul style="list-style-type: none"> ▪ This ensures that a tenant's contribution to land tax, although likely to be incorporated into the base rent, is effectively capped to the increases in the base rent. As this is a very high cost in shopping centres, this is of great benefit to tenants. This prohibition will also apply to a renewal by option of an RTRA lease. The government's stated reason for this amendment is that land tax is an expense that bears little relation to a tenant's activities.
<p>Lease costs (Section 51)</p>	<ul style="list-style-type: none"> ▪ A landlord cannot recover from a tenant costs relating to the negotiation of a lease. This is in addition to lease preparation costs which were prohibited under the RTRA.
<p>Urgent Repairs (Section 52)</p>	<ul style="list-style-type: none"> ▪ As per the RTRA a tenant may arrange urgent repairs to those things for which a landlord is responsible at the landlord's reasonable expense, where the fault causes a substantial effect on the tenant's business and the tenant made reasonable efforts to get the landlord to fix the problem. Unlike the RTRA there is no cap on the landlord's exposure in this regard (previously \$5000).
<p>Notice of Interference (Section 54)</p>	<ul style="list-style-type: none"> ▪ As per the RTRA, a lease is taken to provide that a landlord is required to pay reasonable compensation to a tenant for loss or damage suffered by the tenant because of the actions of the landlord or a person acting on behalf of the landlord in specified circumstances. However, unlike the RTRA, a tenant is not required to provide written notice to a landlord to enable the landlord to rectify any interference before the tenant is entitled to compensation.
<p>Relocation (Section 55)</p>	<ul style="list-style-type: none"> ▪ The more significant changes to the relocation provisions are: ▪ the alternative premises must be "reasonably comparable" to the existing premises; ▪ "reasonable costs of relocation" are to include (but not be limited to) the costs of dismantling and reinstalling or modifying or replacing any

	<p>fixtures and fittings and legal costs;</p> <ul style="list-style-type: none"> the rent for the new premises is to be the same as the rent for the existing premises, adjusted to take into account the difference in the commercial values of the premises at the time of relocation.
Demolition (Section 56)	<ul style="list-style-type: none"> A new section governing the requirements of demolition clauses was incorporated including: that a landlord cannot terminate the lease on the ground of proposed demolition unless the landlord has provided the tenant with details of the proposed demolition that are sufficient to indicate a genuine proposal to demolish the building within a reasonably practicable after the lease is to be terminated and that the landlord must have given at least 6 months' notice of the termination date; if the lease is terminated by either party under such a clause, the landlord is liable to pay to the tenant reasonable compensation: if the demolition of the building is not carried out, or not carried out within a reasonably practicable time after the termination date, for damages suffered by the tenant as a consequence of the early termination of the lease (unless the landlord proves that there was a genuine proposal to demolish the premises within a reasonably practicable time after the termination date when the notice was given); and whether or not the demolition of the building is carried out, for the fitout of the premises to the extent that the fit out was not provided by the landlord.
Abatement and Termination on Damage (Section 57)	<ul style="list-style-type: none"> A new section governing abatement and termination on damage was included. This Section states that a tenant does not have to pay rent, outgoing or other charges for any period during which damage to the building results in their premises not being able to be used or are inaccessible due to that damage except where the tenant caused the damage. If the premises can be used but that use is reduced by the damage, the tenant's liability for rent, outgoing and other charges is reduced to the same extent. If the landlord reasonably considers that the extent of the damage makes repair of the premises impracticable or undesirable and notifies the tenant in writing of that, either party may terminate the lease by no less than 7 days written notice to the other. If the landlord fails to rectify the damage within a reasonable time after the tenant requests the landlord to do so, the tenant may terminate the lease by no less than 7 days written notice to the landlord.
Changes to assignment provisions (Sections 60 to 62)	<ul style="list-style-type: none"> The test for a landlord to be able to refuse to consent to an assignment is that the landlord considers that the proposed assignee does not have sufficient financial resources or business experience to meet the obligations under the lease. This does not require a tenant to have specific experience in the relevant permitted use or even retail experience, just business experience. Further, if a tenant gives the landlord and the proposed assignee a copy of a disclosure statement in accordance with Section 61, and the disclosure statement does not contain any information that is false, misleading or materially incomplete, then the tenant and the guarantor are released from their obligations under the Lease (Section 62). Accordingly the effect of this is that a tenant can assign to a person with retailing skills and/or financial resources inferior to those of the tenant and the tenant still be released from their obligations under the lease.
Core Trading Hours (Section 66)	A landlord cannot change the core trading hours of a shopping centre unless a majority of the tenants in the retail shopping centre agree in writing to the landlord doing so.
Confidentiality of Turnover Information (Section 67)	A landlord must not divulge or communicate to any person any information about the turnover of the tenant's business provided by the tenant without the tenant's consent. A penalty applies to a breach of this provision (as per the NSW provision) however there are some exceptions.
Making available statistical information (Section 68)	Where the landlord prepares information and statistics on the operations of a shopping centre and the tenant is required to contribute to the cost of the preparation of this information as part of the outgoing, the landlord must, at the request of the tenant, make this information available to the tenant (as per the NSW provision).
Advertising and Promotion (Sections 69 to 72)	<p>The RTRA did not specifically deal with expenditure and adjustment of promotion fund contributions. A new provision was inserted which provided that:</p> <ul style="list-style-type: none"> A lease cannot provide that a tenant undertake any advertising or promotion of the tenant's business (this does not extend to contributing to the landlord's cost of advertising or promoting the centre) (Section 69) (as per the NSW provision). If a lease requires the tenant to pay an amount to the landlord for advertising or promotion costs then the landlord must make available to the tenant a marketing plan giving details of the landlord's proposed expenditure on advertising and promotion during the relevant accounting

	<p>period at least one month before the start of that period. This also applies to an opening promotion, in which case the details must be made available at least one month before that opening promotion (Section 70 and as per the NSW provision).</p> <ul style="list-style-type: none"> ▪ Any amount contributed by a tenant in a shopping centre in respect of the landlord’s advertising or promotion costs and not spent must be carried forward by the landlord to be applied towards future expenditure on advertising or promotion of the Centre. When the lease ends there is to be an adjustment between the landlord to take account of any under or over payment by the tenant on a “pro rata” basis. There has been no clarification of what a “pro-rata” basis actually is (Section 72). ▪ Statements of expenditure and audited statements for promotion fund contributions are to be provided along the same lines as for outgoings.
Provisions of termination for inadequate sales prohibited (Section 73)	<ul style="list-style-type: none"> ▪ A retail lease is not permitted to grant a landlord a right to terminate a lease on the ground that a tenant has failed to achieve specified sales or turnover performance (per NSW provision).
Geographical restrictions on tenants prohibited (Section 74)	<ul style="list-style-type: none"> ▪ A retail lease is not permitted to contain a provision which has the effect of preventing or restricting the tenant from carrying on business outside the retail shopping centre in which the premises are located. Accordingly tenants could have shops within close proximity to each other (as per the NSW provision).
Unconscionable conduct provisions from TPA (Part 9, Sections 76 to 80)	<ul style="list-style-type: none"> ▪ These provisions were drawn down from the Trade Practices Act into the legislation. We are not aware of any cases brought by tenants or landlords under these provisions of the Retail Leases Act 2003 that have been successful since the introduction of this part. The draw down of these provisions was a commercial compromise reached by some of the major stakeholders to avoid provisions being inserted into the legislation regarding security of tenure or preferential treatment at lease end. ▪ Part 9 dealing with unconscionable conduct applies not only to retail leases commenced or renewed after the commencement of the RLA but also to those leases commenced or renewed before the commencement of the RLA if the RLA would have been applicable to them had it been in operation together with leases proposed to be entered into pursuant to the RLA. The conduct in question must have occurred after the RLA comes into operation. ▪ Section 77 is effectively a drawdown of section 51AC of the Trade Practices Act 1974 (Cth), tailored to the circumstances of retail leases, together with the inclusion of additional matters to which VCAT may have regard in determining whether a landlord has engaged in conduct that is unconscionable and states that: <ul style="list-style-type: none"> ▪ “A landlord under a retail premises lease or a proposed retail premises lease must not, in connection with the lease or proposed lease, engage in conduct that is, in all circumstances, unconscionable”. ▪ Section 77(2) then goes on to list 14 factors that the Victorian Civil and Administrative Tribunal (VCAT) may take into consideration in determining whether a landlord has acted unconscionably. VCAT is not limited to these factors. ▪ The factors listed in Sections 77(2)(l), (m) and (n) are not in the NSW RLA and can be seen as an attempt to introduce (by the back door) security of tenure. These are: <ul style="list-style-type: none"> ▪ “(l) the extent to which the landlord was not reasonably willing to negotiate the rent under the lease; ▪ the extent to which the landlord unreasonably used information about the turnover of the tenant’s or a previous tenant’s business to negotiate the rent; and ▪ the extent to which the landlord required the tenant to incur unreasonable fit out costs.” ▪ VCAT must not have regard to any circumstances that were not reasonably foreseeable at the time of the alleged contravention and may have regard to circumstances existing before the commencement of this section but not to conduct engaged in before that commencement. ▪ Section 78 is essentially the reverse of Section 77, whereby a tenant must not, in connection with a retail premises lease or proposed retail premises lease, engage in conduct that is unconscionable in all the circumstances. The factors set out in Section 77(2) are repeated.
Small Business Commissioner (Section 84)	<ul style="list-style-type: none"> ▪ The RLA requires that the Minister appoint a Small Business Commissioner (SBC), the functions of which include to organise resolution of disputes through alternative dispute resolution, to prosecute any offences against the RLA, to report to the Minister on the operation of the RLA, to endorse standard form leases (and charge a fee), to confirm certificates given in accordance with Section 21, to prepare guidelines

	and information about retail leases that the public can purchase, to create and maintain a register for information about leases required to be lodged under Section 25 and to perform such other functions as may be conferred or imposed by or under the RLA or any other Act (e.g. the function to investigate compliance with a liquor licensing code of conduct).
Alternative Dispute Resolution (Section 87)	<ul style="list-style-type: none"> ▪ A retail tenancies dispute can only proceed to VCAT if the SBC certified that mediation or alternative dispute resolution has failed or is not likely to succeed. Any parties to a lease may refer a dispute to the SBC for mediation or alternative dispute resolution.
Disputes heard at VCAT (Sections 89 to 92)	<ul style="list-style-type: none"> ▪ Each party bears their own costs, however, if VCAT believes that one party conducted the proceedings in a vexatious or frivolous way etc. that unnecessarily disadvantaged the other side or refused to participate in a mediation, then it may order that party to pay all or a specific part of the costs of the proceeding (Section 92). VCAT may determine disputes under the RLA, the RTRA or the RTA. ▪ A retail tenancy dispute is justiciable at VCAT (other than applications in respect of relief against forfeiture and claims of unconscionable conduct). ▪ The parties in the proceeding are the applicant, the other party to the dispute and any party that VCAT considers appropriate to join to the proceeding.
Notice before exercising right of re-entry (section 94A)	<ul style="list-style-type: none"> ▪ A landlord must give a tenant notice before exercising a right of re-entry for default.
Retrospective Amendments to the Retail Tenancies Reform Act 1998 (Sections 100 to 109)	<ul style="list-style-type: none"> ▪ The RLA repeals the RTRA from the commencement of the RLA but also made some retrospective amendments to the RTRA to clarify some matters under the RTRA and also to bring certain provisions of the RTRA in line with the provisions of the RLA (from 1 November 2003) largely to the benefit of tenants in relation to market rent reviews, percentage rent, notices of renewal/non-renewal at lease end, notice requirements advising of the last date of exercise of option and provisions relating to renewals, outgoing estimates and expenditure statements; provisions relating to a landlord giving tenant notice of proposed works and a landlord's liability for repairs and urgent repairs; relocation.
Retrospective Amendments to the Retail Tenancies Act 1986 (Sections 110 to 117)	<ul style="list-style-type: none"> ▪ The RLA made some retrospective amendments to the RTA to clarify some matters under the RTA and also to bring certain provisions of the RTA in line with the provisions of the RLA (from 1 November 2003) largely to the benefit of tenants in relation to market rent reviews, percentage rent, notices of renewal/non-renewal at lease end, notice requirements advising of the last date of exercise of option and provisions relating to renewals, outgoing estimates and expenditure statements, provisions relating repairs and relocation.

**APPENDIX 3:
AMENDMENTS TO THE TPA, AND PROCEDURAL REFORMS, OVER THE LAST
TEN YEARS, TO ASSIST SMALL BUSINESS**

1. Since 1997, there have been a number of significant legislative and procedural reforms designed to address the perceived competitive disadvantages faced by small businesses.
2. Set out below are the most significant amendments.

(a) **The Reid Report and "New Deal: Fair Deal"**

In May 1997, the Standing Committee on Industry, Science and Technology released a report on the major business conduct issues arising out of commercial dealings between firms in Australia, focusing on franchising and retail tenancy. The report, entitled *Finding a Balance: Towards Fair Trading in Australia* (**the Reid Report**) found that there was an imbalance of bargaining power between big businesses and small businesses. The Reid Report made a number of recommendations to address this issue, relating to retail tenancy legislation, franchising, misuse of market power, small business finance and access to justice and education. In addition, the Reid Report recommended that the TPA be amended to provide legislative protection against unfair conduct in commercial transactions.

The Australian Government responded to the Reid Report on 30 September 1997, with the *New Deal: Fair Deal – Giving Small Business a Fair Go* package (the **Response**). The Government accepted in large part the recommendations made in the Reid Report. In addition to proposed amendments to legislative standards for protection of retail tenants, reforms relating to small business finance and the implementation of an information and awareness campaign targeting small businesses, TPA amendments and reforms to ACCC practice introduced by the Response were:

- the insertion of a provision in the TPA to protect small businesses against unconscionable conduct;
- the insertion of a provision in the TPA to allow industry-designed codes of practice to be made mandatory under, and enforced as breaches of, the TPA;
- the insertion of a provision in the TPA to allow the ACCC to take representative actions on behalf of small business for misuse of market power by big business;
- the insertion of a provision in the TPA giving small business interests equal importance to consumer interests when appointments are made to the ACCC – that is, requiring the appointment of at least one full-time Commissioner with experience in small business matters;
- the issuing of a direction to the ACCC under the TPA requiring the ACCC to enforce small business legal rights against unfair business conduct, and the provision of funding to empower the ACCC to bring test cases on behalf of small businesses.

Most of these proposed amendments were made by the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth), which commenced on 22 April 1998. The second reading speech given in relation to the Trade Practices Amendment (Fair Trading) Bill 1997 made clear the small business focus of these reforms:

"This Government is strengthening the Trade Practices Act 1974 to better protect the legal rights of small businesses, to ensure that small business can confidently deal with large firms in the knowledge that the rules under which they are operating are fair, and that there will be proper redress available when those rules are broken."

(b) **Section 51AC: prohibition on unconscionable conduct**

The unconscionable conduct prohibition was inserted into the TPA in 1998 in the form of the new section 51AC. As was apparent from the second reading speech in relation to the Trade Practices Amendment (Fair Trading) Bill, the inclusion of section 51AC had the direct purpose of redressing the imbalance of bargaining power between small and large businesses (see above) and was considered to be especially useful in relation to retail tenants:

"[Section 51AC] will be particularly beneficial to retail tenants as it allows a court to have regard to the relative strengths of the bargaining position of the retailer and the landlord in determining whether the conduct is unconscionable."

The equivalent of section 51AC, or an amended version of the section, has since been introduced in State fair trading legislation around Australia.

In line with its small business focus, when it was first introduced, section 51AC only applied to business transactions not exceeding \$1 million. Since its introduction, however, the business transaction threshold has been increased to encompass transactions of up to \$3 million. This amendment was made in response to the 1999 report of the Joint Select Committee on the Retailing Sector, *Fair Market or Market Failure*, which recommended that the threshold be increased so as to "enable the unconscionable conduct provisions to be available to a wider group of complainants".¹⁵ The Government responded to this report in December 1999 and expressed support for this amendment, which was later contained in the *Trade Practices Amendment Act (No 1) 2001* (Cth).

There are moves to increase further – in fact, to more than triple – the threshold, to \$10 million, in response to the report tabled in March 2004 at the conclusion of the 2003 Senate Economic References Committee Inquiry into the Effectiveness of the *Trade Practices Act 1974* in Protecting Small Business. The Committee recommended, among other things,¹⁶ that the threshold be removed. In its

¹⁵ In addition, the Report recommended that the ACCC be given wider powers to bring representative actions and to seek damages on behalf of third parties under Part IV of the TPA, that a Retail Industry Ombudsman be appointed, that a mandatory Code of Conduct relating to the retail industry and that an ongoing education program should be implemented by the ACCC.

¹⁶ Some other notable recommendations made in the 2004 Senate Report were that the unilateral variation of contract clauses be added to the list of matters contained in subsection 51AC(3) to which the courts may have regard in

response, the Government rejected this recommendation, instead proposing to increase the threshold to \$10 million to allow for some small businesses for which the \$3 million threshold was too low. The Government concluded that to remove completely the thresholds would alter the small business focus of section 51AC:

"At the time of enactment, in 1998, the Government intended to limit the protection afforded by section 51AC to small businesses. This was achieved by limiting access to the protection to prices not exceeding \$3 million (originally \$1 million) for the supply or acquisition of goods. Removal of the cap would broaden the focus of the provision in a way unintended by the Government".

The \$10 million increase and other amendments are contained in the Trade Practices Legislation Amendment Bill (No 1) 2007, which is currently before Parliament, the second reading speech having been given on 20 June 2007. If the Bill is passed and the threshold is increased without being entirely removed, the unconscionable conduct protections will be available to an even greater number of small businesses, involved in quite substantial transactions.

(c) **Section 46: Misuse of market power**

The *Trade Practices Legislation Amendment Bill (No. 1) 2007*, introduced on 20 June 2007, proposes amendments to the misuse of market power provisions to, "improve the operation of the Trade Practices Act in relation to small business". The Bill proposes to amend the provision to provide:

- (i) that a court may have regard to a firm's contracts, arrangement and understandings with others in assessing that corporation's market power;
- (ii) that a court may find that a corporation has substantial market power even when it does not "substantially control the market" and when it does not have "absolute freedom from constraint" by competitors, customers and suppliers; and
- (iii) more than one corporation can hold substantial market power in a given market.

A new provision specifically relating to predatory pricing proposing that a court may have regard to whether the corporation supplied goods or services "for a sustained period at a price that was less than the relevant cost to the (firm) of supplying such goods or services", and the reasons for that conduct.

determining whether conduct is unconscionable, and that measures be introduced to prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret. The Government refused to take the latter recommendation on board, arguing that it would be contrary to the principles of contract law conferring on the parties freedom to negotiate a contract, but did agree to amend section 51AC to allow a court to consider whether unilateral variation clauses in contracts are unconscionable. This amendment is also contained in the Trade Practices Legislation Amendment Bill (No 1) 2007, which is not yet passed.

(d) **Procedural reforms**

In addition to the above, more substantive reforms, there have been procedural reforms in recent years directed at assisting small businesses to compete with big business.

In particular, recent amendments to the procedure for seeking authorisation for collective bargaining. In December 2005, the ACCC announced it had streamlined the authorisation process for small businesses engaging in collective bargaining. The quicker and cheaper process has been available since 1 January 2006.

Under the streamlined authorisation process the ACCC will undertake to respond to requests for interim authorisation and issue a draft determination within 28 days of receiving an application and will finalise its consideration within 3 months.

The process has since been further simplified by way of amendments to the TPA. In April 2003, the "Dawson Report" was released, consequent upon an independent review of the competition provisions of the Trade Practices Act 1974 and their administration, which was commenced in October 2001.

One reform recommended by the Dawson Report was the introduction of a notification process for collective bargaining, providing an exemption from the TPA prohibition against such conduct for small businesses in circumstances where collective bargaining would be to the benefit of the public. The Report proposed that this exemption be restricted to small businesses in negotiation with big business "where experience has shown that collective bargaining may do little or no harm to the competitive process and may generate public benefit. The Report recommended that the definition of "small business" be by way of transaction value, with \$3 million providing the threshold for applicable transactions. In making this recommendation, the Report acknowledge the imbalance in bargaining power between small and large businesses:

"Collective bargaining by a number of competing small businesses may be necessary if they are to achieve bargaining power to balance that of the big businesses with which they have to deal. Collective bargaining at one level may lessen competition, but, at another level, may be in the public interest, provided that the countervailing power is not excessive."

As a response to the Dawson Report, the Trade Practices Legislation Amendment Bill (No. 1) 2005 (Cth) was passed in October 2006. Included in these amendments was the introduction of the collective bargaining notification scheme for small businesses. The notification offers a reprieve for small businesses, enabling them to negotiate more freely, and is designed to be less cumbersome and time-consuming than the authorisation process. The Amending Act adopted the Dawson Report recommendations in relation to the \$3 million threshold and the requirement that the negotiations in question be between small businesses and big businesses.

In parallel with these amendments, the Australian Competition and Consumer Commission (ACCC) has publicly stated its commitment to assisting small businesses in Australia including in the market for retail tenancy:

"I remain perplexed as to the unwillingness of [shopping] centre tenants to engage in some form of collective bargaining with centre landlords – for surely this approach would offer a strengthened negotiating hand to tenants in their lease dealings ...I'm somewhat bewildered, and indeed frustrated, that small businesses have not yet taken advantage of the improvements to the collective bargaining system.

Not only has the ACCC simplified accessibility to these provisions through the streamlining of our processes for authorisation and collective bargaining arrangements and recent changes to the TPA have also brought about a significant new advantage to groups of small business.

...

We are continually addressing areas of concern to small business..."¹⁷

In addition, the ACCC has released a number of publications designed to provide small businesses with an understanding of their rights and obligations under the TPA, including, for example, *Small Business and the Trade Practices Act, 2007*.

Moreover:

- (i) a Small Business Advisory Group was established in 1996 to promote consultation on trade practices issues between the ACCC and small businesses across Australia;
- (ii) the ACCC Small Business Program, committed "*to protecting the interests of small business*", is involved in education (including by way of publications, online resources – including small business access point on the ACCC website and a dedicated small business helpline) and enforcement to achieve its commitment; and
- (iii) a Bill currently before Parliament proposes the appointment of an ACCC Deputy Chairperson for Small Business.

(e) **Franchising Code of Conduct**

Another significant small business related TPA reform flowing from the *New Deal: Fair Deal* package is the Franchising Code of Conduct.

The Franchising Code of Practice was established in 1993 in response to the 1991 report of the Franchising Task Force to the Minister for Small Business and Customs.

In 1997, the Reid Report recommended that:

¹⁷ Speech by Graeme Samuel, "Competition and fair trading: a fair go for small business" at the National Small Business Summit, Sydney, 3 July 2007.

- (i) the Code provide for full disclosure of information relating to rental, outgoings, promotion, expenses, tenancy mix and redevelopment proposals to franchisees who sub-let their premises from the franchisor; and
- (ii) the Commonwealth Government enact specific franchising legislation providing for compulsory registration of franchisors and compliance with codes of practice.¹⁸

The Government's *New Deal: Fair Deal* package accepted these recommendations, concluding that a strengthened franchising code of practice must be re-established as "a matter of urgency" and that the code should be mandatory, with key elements such as pre-contractual disclosure underpinned by the TPA. These recommendations were largely implemented by way of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth).

The Code comes under the TPA by virtue of sections 51AD and 51AE, and is set out in the *Trade Practices (Industry Code Franchising) Regulations 1998*.

The Code was reviewed in 1999-2000, subsequent to which various amendments were made, primarily in relation to the disclosure provisions of the Code. The Code was reviewed again in 2006 and the Matthews Committee Report of the review was released in October 2006. The Matthews Report recommended that the operation of the Code be assisted in various ways, including by way of enhanced disclosure requirements, requirements relating to the documents provided to franchisees, improved provision of information to franchisees by the Government and industry bodies, and the removal of some exemptions from the operation of the Code. The Government's Response to the report was released on 6 February 2007, in which the Government agreed or agreed in principle with all but three of the 34 recommendations. Two recommendations, relating to unilateral franchisor termination rights and unilateral franchisor changes to franchise arrangements, have been addressed through the aforementioned amendments to section 51AC whereby unilateral variation clauses are a factor that may indicate a corporation has engaged in unconscionable conduct. Otherwise, there have not yet been amendments made to the Code as a result of the Review.

¹⁸ Less relevantly, the Reid Report also recommended that the Petroleum Retail Marketing Sites Act and the Petroleum Retail Marketing Franchise Act remain in force until new generic franchising legislation is enacted.

[IN CONFIDENCE: WHOLE APPENDIX]
APPENDIX 4

**APPENDIX 5:
SUPPORT SERVICES FOR STOCKLAND'S RETAIL TENANTS**

1. One of the reasons Stockland has a significantly low number of disputes with its retail tenants is the number of substantial benefits for retail tenants in locating within a centre. Centres offer a range of benefits to retail tenants. Shopping centres are able to attract a large number of shoppers to centres and deliver them to the door of retail tenants (due to shopping centres satisfying consumer demand for convenient and easily accessible shopping opportunities including the provision of parking facilities and providing consumers with a "one-stop" experience with competitive retail offerings). Customer traffic volumes generally create high trading potential for retail tenants resulting in high turnovers. Stockland, and other landlords, carefully consider appropriate tenancy mix and the precincting/placement of a particular specialty store. More importantly, Stockland has support mechanisms to assist struggling retail tenants not offered to retail tenants outside centres.
2. In particular, Stockland is acknowledged as a leader in the sustainable development, management, leasing and marketing of shopping centres throughout Australia. Its strengths, off which retail tenants may leverage include:
 - (a) an experienced and industry leading management team;
 - (b) Stockland's senior retail personnel have a significant amount of management, marketing, leasing and development experience with Stockland's top eight executives each having an average of 20 years experience collectively, and involvement in over \$10 billion in retail development programs.

As a result, Stockland has consistently achieved sales productivity levels above JHD industry benchmark for specialty sales, whilst deriving significant returns from its significant development pipeline. Success at achieving productivity/sales levels is a significant driver to ensuring low levels of disputation with retail tenants. [**In Confidence**].

3. In addition, Stockland promotes executive coaching in all areas of its business and uses a number of experts to deliver this training, including the Property Council of Australia for in depth industry training. Stockland also enforces compulsory compliance training that addresses legislative provisions including compliance with trade practices laws. The training assists in Stockland's dealings with retail tenants. Stockland's Retail Shopping Centre Division spent around [**In Confidence**].

Marketing and other forms of assistance

4. In addition, Stockland offers retail tenants a range of initiatives to help retail tenants to sustain successful, profitable businesses within its centres.
5. The assistance offered can range from use of centre signage, casual mall leasing, internal events, free use of communication mediums to preparation of specialised retailer training and preparation of business and marketing plans tailored to the retailer's business.
6. There are also a range of advertising avenues, such as newsletters, radio, mail, local media, internal posters and notice boards. In addition to its own internal training programs, Stockland also has access to many external retail consultants that are dedicated to identifying the strengths and weaknesses of a business to help initiative meaningful and

productive changes in order to help boost sales. External media and advertising companies also readily assist, with Stockland able to negotiate reduced rates for retail tenants.

7. In some instances, Stockland is able to recognise that a short term promotional allowance may assist in times of difficulty or to help a retailer to trade through an unstable period of the centre's cycle (i.e. a redevelopment). In more extreme cases, Stockland is not adverse to considering a surrender of lease or a relocation to another more suitable part of the centre should it be deemed necessary.
8. To assist retail tenants, Stockland regularly conducts surveys and market analysis of all of its centres, often distributing this information to its retail tenants in order to provide accurate and up to date customer and trade area information as well as statistics to assist with media planning.
9. Stockland is implementing a significant service upgrade program throughout its centres.
10. **[In Confidence]**.
11. **[In Confidence]**.