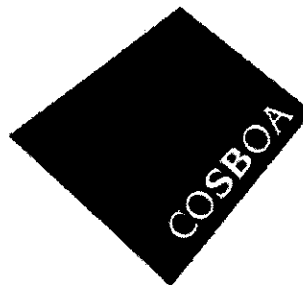
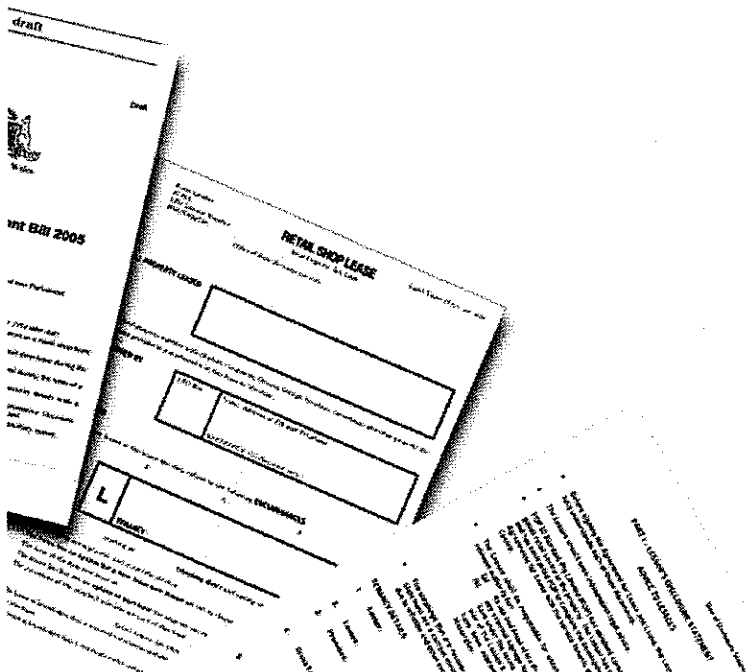


Council of Small Business
of Australia

LOST BALANCE A DECADE AFTER THE REID REPORT

Submission to the Productivity Commission
to the inquiry into

THE MARKET FOR RETAIL LEASING



Council of Small Business
of Australia



CONTENTS

ABOUT THIS SUBMISSION

ABBREVIATIONS	3
DEDICATIONS	4
1. INTRODUCTION	6
2. EXECUTIVE SUMMARY	8
3. STRUCTURE OF THE RETAIL LEASING MARKET	13
4. PLAYERS IN THE MARKET	18
5. HOW THE MARKET REALLY OPERATES	24
6. DETAILED REASONS FOR MARKET FAILURE	27
7. HISTORY OF ADDRESSING THE TWO KEY ISSUES OF END OF LEASE AND DISCLOSURE OF TURNOVER.	49
8. UNCONSCIONABLE CONDUCT	56
9. RECOMMENDATIONS TO ADDRESS MARKET FAILURE	59
10. ANSWERS TO ISSUES FOR CONSIDERATION	60





ABOUT THIS INITIAL SUBMISSION

Due to the timing, breadth and nature of the subject, it not possible to submit a comprehensive submission complete with cross referenced supporting material, documentation, case law and detailed recommendations. The author has used a sampling of material to illustrate key issues.

COSBOA would be happy to provide further examples of matters raised in this submission and take the Commission through the documentation at the industry consultations.





ABBREVIATIONS USED IN THIS SUBMISSION.

ABS	-	Australian Bureau of Statistics
ADT	-	Administrative Decisions Tribunal of New South Wales
ARA	-	Australian Retailers Association
ATO	-	Australian Tax Office
Code	-	Retail Tenancy Code
COSBOA	-	Council of Small Business of Australia
FCA	-	Franchise Council of Australia
GPT	-	General Property Trust
JHD	-	Jebb Holland Demasi
LPT	-	Listed Property Trust
NCRL	-	National Council of Retail Lessees
PCA	-	Property Council of Australia
SCCA	-	Shopping Centre Council of Australia
TPA	-	Trade Practices Act
VCAT	-	Victorian Civil and Administrative Tribunal
WARA	-	West Australian Retailers Association





DEDICATIONS

This submission is dedicated to entrepreneur retailers who have unwittingly been financially ruined by the system that is the retail leasing market. Despite current State legislation, watershed Government inquiries and ACCC intervention, speciality retail has entered an era when leasing space in many shopping centres is a very risky, marginal proposition requiring experience and expert knowledge. At a time when retail life cycles are shortening, competition is concentrating and buying power of retail space and merchandise is shrinking, independent speciality retailers see little way out. They cannot pass on higher rents and weaker purchasing power to customers because competition from the majors is too fierce and reaching economies scale by expansion is extremely difficult. This means only larger chains will likely survive.

Like lemmings, thousands of mum and dad entrepreneurs continue to open and close shops in an endless cycle of hope, reality and crushing debt. Collectively, they will waste millions of dollars every year when dreams of self-employment turns to debt laden instability because risk management and pre-lease checks and balances fail them.

This submission is dedicated to the families who lost businesses and homes and whose lives have been shattered due to family breakdown caused when they challenged self-serving asset managers who hide behind armies of lawyers, leasing agents and retail leasing litigation experts.

And also to the unfortunate tenants who have taken their own lives as their best way of dealing with pressures placed upon them.





Council of Small Business
of Australia

“Free and fair competition is a basic tenet of a free enterprise economy.”

The Hon John Howard,
Minister for Business & Consumer Affairs, 1976





INITIAL SUBMISSION TO THE PRODUCTIVITY COMMISSION

INQUIRY INTO

THE MARKET FOR RETAIL LEASING

1. INTRODUCTION

The Council of Small Business Organisations of Australia ("COSBOA") is widely recognised as the peak body of small business organisations, industry groups and individual firms operating at a national level. Its small business retail organisations include:-

- (a) Queensland Retail Traders and Shopkeepers Association;
- (b) The Retail Confectionery and Mixed Business Association;
- (c) National Association of Retailers;
- (d) Australian Newsagents Federation;
- (e) Australian Gift and Homewares Association;
- (f) National Independent Retailers Association Inc;
- (g) Liquor Stores Association of Victoria;
- (h) Retail Traders and Shopkeepers Association of New South Wales;
- (i) The Pharmacy Guild of Australia;
- (j) Australian Toy Association;
- (k) Australasian Association of Convenience Stores;
- (l) Southern Sydney Retailers Association;
- (m) State Retailers Association of South Australia;
- (n) The Retail Traders Association of Tasmania;
- (o) Independent Retailers Organisation of West Australia;
- (p) The Retail Confectionery and Mixed Business Association Inc;
- (q) Lottery Agents Association Victoria;
- (r) National Association of Retail Grocers of Australia;





Council of Small Business
of Australia

- (s) West Australian Independent Grocers Association;
- (t) Tasmanian Independent Retailers;
- (u) Independent Grocers of Australia Retail Network;
- (v) Small Retailers Association of South Australia;
- (w) Australian Booksellers Association;

COSBOA is a founding member of the National Council of Retail Lessees ("NCRL"), a coalition of the Australian Retailers Association ("ARA"), Franchise Council of Australia ("FCA") and West Australian Retailers Association ("WARA").

COSBOA has been involved with the small business retail leasing debate at the highest level since prior to the watershed Fair Trading Inquiry of 1997. Its member organisations have been involved with the formulation and shaping of State based retail leasing legislation to protect small business since their inception.

On its own, COSBOA covers the retail leasing interests of more than 50% of the retail leasing market. Via the NCRL, COSBOA's coverage would be near 100%.





2. EXECUTIVE SUMMARY

COSBOA submits that the market for retail leases is a continual state of failure. As a result of that failure, COSBOA and its members have seen, first hand and at close quarter small business retailers suffer, mainly at the hands of large businesses.

COSBOA asserts the failure of the retail leasing market is geographically widespread and culturally systemic within large businesses operating in the retail leasing market as lessors - mainly large scale shopping centre owners and managers.

COSBOA contends that the current system encourages a distorted market to protect the retail property asset class. That system has artificially inflated rents and occupancy costs that retail lessees pay, which in turn, provides well above average returns for lessors and their investors. The system has produced a disconnect between the true relationship of profitability of retailers on the one hand, and property returns on the other. COSBOA argues the distortions within the current system leads to one way capital transfers from lessee to lessor through far higher occupancy costs than would be the case if it were a clear market.

COSBOA maintains there is a direct nexus between higher investment returns of the retail property and higher occupancy costs of retailers and the distortions within the retail leasing market. The distortion has been brought about because of five key reasons:-

- (a) **creeping acquisitions** in which certain shopping centre owners and managers have come to dominate key markets and retail trade areas;
- (b) **restrictive planning laws** in which certain shopping centre owners and managers have come to dominate some primary markets and certain retail trade areas;





- (c) **information asymmetry** with an inability of small business and their advisors to access information upon which to make sound commercial decisions to protect themselves, often at the start of the lessee lessor relationship;
- (d) shopping centre leases providing for mandatory **disclosure of monthly sales to lessors** of shopping centres enabling lessors to build a significant profile of retailer's profitability and to use that information to set rents;
- (e) Lack of uniform Australia wide tenancy law with State based retail tenancy legislation that fails to comprehensively address the number one issue in retail landlord and tenant relationships, the **end of lease** or so called 'sitting tenant' problem.

COSBOA asserts that the gaps in State retail tenancy has allowed some lessors to exploit lessees to the point where many small businesses in shopping centres are not viable and proprietors are being decapitalised, or working for less than award wages. Some are even supported by welfare

COSBOA claims that its common practice for some lessors to lease shops to lessees fully aware those shops could not be profitable or have a high chance of failure at occupancy costs required to produce the budgeted rate of return for the lessor.

COSBOA challenges the current business practice of the retail leasing industry and with particular attention to the end of lease problem. This is when many lessees in shopping centres face upwards of 20-60% rent increases yet still have fit-out capital to be written down and face a brand new fit out as pre-condition to a lease renewal – rendering that tenants business instantly unviable.



Each key component in (a)-(e) above can and does work in isolation in individual cases of a retailer distress, but when taken as a whole, collectively they contribute to a continual failure of the market in retail leasing. Taking into account the social impact on families, trading losses and intellectual and capital costs thrown away, the current failure in the retail leasing market produces a net public detriment.

COSBOA believes there is a strong case for significant regulatory reform in a few key areas. It submits that either:-

- (a) the existing State legislative regimes should remain unchanged and the Trade Practices Act 1974 ("TPA") be amended to include a Retail Tenancy Code ("Code") similar to the Franchise Code to overcome State's deficiencies; or
- (b) the States, via the Council of Australian Governments all agree on a new retail tenancy model regime incorporating the principles of the mandatory Code and co-operate with the Federal government with its implementation;

COSBOA submits that a mandatory Code incorporating the principles of promoting fairness and minimising information imbalances would clearly solve the current failures and correct the distortions of the retail leasing market. That Code would encompass four important amendments:-

A. Independent collection of turnover figures

The Code would include a provision that, if a lease provides disclosure of turnover figures to the landlord, that provision is void. Instead:-

- (a) the Australian Bureau of Statistics ("ABS") is to be supplied with a retailer's sales on a quarterly basis by the retailer;



- (b) the ABS is responsible for collection, collation and aggregation of the turnover figures;
- (c) a standard chart is to be developed to categorise usages;
- (d) both retailers and landlords can access the performance of the category on an aggregated basis only and for total shopping centre performance;
- (e) cost to access the scheme is user pays, such as a fee for service to potential tenants with permission;

B. National registration of retail leases

The Code would include a provision that, all Australian leases must be registered with the National Retail Leases Register ("NRLR").

- (a) the NRLR requires every retail lease under 1000m² of more than 6 months duration to be listed on the register;
- (b) a listing is by way of a prescribed form;
- (c) a prescribed form details location, parties to the lease, use of premises, commencement and termination date, area, use of equipment, rent, outgoings, rent escalation, all incentives, rent free periods, all assignment details;
- (d) access to the register is public, or restricted to either party to the lease or their authorised representatives including authorised valuers;
- (e) cost to access this scheme is user pays, such as fee for service to potential lessees.



Such schemes would completely eliminate the information asymmetry problem.

C. Minimum 7 year term

A Code would include a provision that, all retail leases are to be a minimum of 7 years unless the lessee requests a lesser term.

D. Market review on renewal if no agreement on rent

A Code would include a provision that mirrors section 44 of the Retail Leases Act NSW with the addition of:-

wherever a retail shop lease does not provide an option to renew or extend the lease at current market rent, and the lease does not contain any provision determining, or providing for determination of the rent payable after the current term expires, and the lessor offers the lessee a renewal or extension of the lease, the lease is renewed or extended at a current market rent.

or

adopt the principles in the ACT legislation as set out in sections 106 – 112 of that legislation.

Such an end of lease provision would eliminate the sitting tenant problem and satisfy the concerns of property owners that lessees rights do not expand into anything more.



3. STRUCTURE OF THE RETAIL LEASING MARKET

Most speciality retailers rent premises. There is no clear data on the proportion of retailers who rent premises versus those who own or are purchasing, but it's been estimated there are about 230,000 leases on foot in Australia.

Page 1 of Appendix A shows the Shopping Centre Council's "Shoptalk" dated 18 May 2007:-

"Nobody can say with any accuracy how many retail leases are on foot in Australia. For some time the estimate has been between 120,000 and 150,000. This now appears to be a considerable underestimation. Landlords in Victoria are required to advise the Small Business Commissioner's Office once a retail lease has been signed. The SBC reports this number runs at slightly more than 14,000 a year. Assuming each retail lease is for the minimum term of five years, this suggests there are around 70,000 retail leases in Victoria alone. Making crude but reasonable assumptions based on Victoria's share of retail sales we can approximate the number of retail leases in Australia at 230,000."

The market for retail leases is geographically widespread. Where and why a