

**Final submission to the  
Productivity Commission  
inquiry into the market for  
retail tenancy leases in Australia**

Prepared by the Victorian Government  
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# 1 Overview

This supplementary submission by the Victorian Government to the Productivity Commission (the Commission) inquiry into the retail tenancy leases market in Australia elaborates on the State's policy and legislative framework described in the initial submission and outlines Victoria's response to the Commission's draft report.

The Victorian Small Business Commissioner was created primarily to provide access for retail tenants and landlords to efficient and effective dispute resolution. The successful dispute resolution process now in place in Victoria is supported by retail landlords, tenants and business organisations. Access to this process has improved retail market efficiency.

The Victorian Government's position on each of the Commission's draft recommendations is summarised below.

Commission's Draft Recommendation	Victorian Government position summary
<p><i>Draft Recommendation 1</i></p> <p><i>The following measures should be pursued by State and Territory governments to further improve transparency and accessibility in the retail tenancy market:</i></p> <ul style="list-style-type: none"> <li>• <i>enhance the use of simple language in all tenancy documentation and provide clear and obvious contact points for information on leases and dispute resolution.</i></li> <li>• <i>elaborate the significance of jurisdictional differences in the definition of unconscionable conduct and align definitions where practicable.</i></li> </ul>	<p>The Victorian Government <b>supports</b> this draft recommendation.</p>
<p><i>Draft Recommendation 2</i></p> <p><i>State and Territory governments should seek to improve the consistency of lease information across jurisdictions in order to lower compliance and administration costs. They should:</i></p> <ul style="list-style-type: none"> <li>• <i>encourage nationally consistent (plain English) models for retail tenancy leases and for tenant and landlord disclosure statements (for example, all jurisdiction and other specific provisions could be set out in annexes to the standard documents).</i></li> <li>• <i>institute nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolution.</i></li> </ul>	<p>The Victorian Government <b>supports</b> this draft recommendation.</p>
<p><i>Draft Recommendation 3</i></p> <p><i>State and Territory governments should relax key restrictions in retail tenancy legislation to better align the regulation of the retail tenancy market with the broader market for commercial tenancies.</i></p>	<p>The Victorian Government <b>does not support</b> this draft recommendation in its current form, believing that legislation in relation to retail tenancies and dispute resolution is working effectively, is adding to the efficiency of the retail market in Victoria and should not be undermined.</p>

<p><i>Draft Recommendation 4</i></p> <p><i>As unnecessarily prescriptive elements of retail tenancy legislation are removed, State and Territory governments should seek, where practicable, to establish nationally consistent template legislation for retail and commercial tenancies available to be drawn down to each jurisdiction</i></p>	<p>The Victorian Government <b>does not support</b> this draft recommendation in its current form, believing that legislation in relation to retail tenancies and dispute resolution is working effectively, is adding to the efficiency of the retail market in Victoria and should not be undermined. However, the Victorian Government believes there is scope to rationalise and harmonise retail tenancy regulation in Australia and proposes the establishment of a working group with representatives from all States and Territories to champion efforts to harmonise regulation.</p>
<p><i>Draft Recommendation 5</i></p> <p><i>While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.</i></p>	<p>The Victorian Government <b>notes</b> this draft recommendation. The Victorian Government supports and is committed to a program of continuous improvement to its planning system and believes that the focus of the inquiry should be on retail tenancy leases and the regulation of disputes arising in this market between landlords and tenants.</p>

## **2 Outline of initial Victorian Government submission**

The current retail tenancy regulatory framework in Victoria was established following a comprehensive public inquiry and review from 2000 to 2002, which included extensive consultation with key industry stakeholders. This culminated in the enactment of the *Retail Leases Act 2003* (the Act) and its associated regulations, as well as the concurrent introduction of the *Small Business Commissioner Act 2003*.

Victoria's policy approach to retail tenancy has focused on the principles of providing certainty, clarity and fairness to landlords and tenants through information disclosure, education, dispute resolution, and protection for small business from unconscionable conduct in retail leasing arrangements.

This approach is based on the view that the relationship between a landlord and retail tenant has distinct qualities that can lead to significant market power imbalances and information asymmetries. Regulatory intervention in the retail tenancy market can be necessary to provide an avenue for mediation and resolution of disputes between retail landlords and tenants, help to reduce inequities in the landlord-tenant relationship and address market failures.

The regulatory framework for Victoria's retail tenancy market has been in place for almost five years and is generally considered by stakeholders to be functioning well. The current regulatory framework in Victoria was introduced primarily to provide access for retail tenants and landlords to efficient and effective dispute resolution. The successful dispute resolution process now in place in Victoria is supported by retail landlords, tenants and business organisations. Access to this process has improved retail market efficiency.

Fundamental problems with the retail tenancy market in Victoria that may require substantial change to the regulation of the market have not been identified. The existence of enquiries and mediated disputes between landlords and tenants is evidence of a robust regulatory system where parties are able to access the information and advice they need and can seek low-cost mediation when required.

Therefore, the Victorian Government agrees with the Commission's observations that the retail tenancy market is operating reasonably effectively.

### *Information disclosure*

Disclosure requirements under the Act help to address information asymmetries between the landlord and retail tenant. The availability of information helps to ensure both parties are aware of their rights and obligations under the tenancy agreement and allows small business tenants in particular to make informed business decisions about their lease.

The Act requires the landlord to provide a tenant with a Disclosure Statement at least seven days prior to signing a new lease or 21 days prior to a lease renewal. Sanctions apply if disclosure requirements are not fulfilled. The contents of the Disclosure Statement are prescribed by regulation and include information about the term of the lease, permitted use of the premises, occupancy costs, rent payable, outgoings and, if applicable, information on the shopping centre in which the premises is located.

### *Dispute resolution*

The retail tenancy dispute resolution service in Victoria is a low cost and accessible avenue of redress for tenants and landlords. It also helps to promote the maintenance of the business relationship between the tenant and landlord should a dispute arise. The Office of the Victorian Small Business Commissioner, an Australian first, plays a key role in the mediation of disputes and alternative dispute resolution. It provides an accessible and informal avenue for both landlords and tenants to seek guidance and assistance in the resolution of disputes arising from retail tenancy matters.

A copy of the initial submission made to this Inquiry by the Minister for Small Business is at Attachment 1 for reference.

### **3 Victoria's position on the Productivity Commission's draft report**

The Victorian Government has considered the Commission's draft report on the market for retail tenancy leases in Australia and how the draft recommendations would impact on Victoria's retail tenancy market.

The Victorian Government believes that retail tenancy legislation is working reasonably effectively, but recognises that worthwhile improvements to the regulatory system can be made. There are also some points made in the draft report that require further clarification and consideration. In particular, while efforts to simplify and reduce the regulatory burden are commended, Victoria is mindful that:

- there is scope for greater national consistency and opportunities to rationalise and harmonise retail tenancy regulation amongst States and Territories;
- there is potential exposure of vulnerable tenants to unfair market practices and loss of access to a simple, low-cost dispute resolution system should constraints on retail leases be relaxed to align with broader commercial leases, particularly given that the goodwill of a retail business is so closely tied to its specific location; and
- the potential for relaxation of planning and zoning controls to be counter-productive for community development.

Comments in response to each draft recommendation are provided below in order of priority to Victoria.



## 4 Nationally consistent template legislation

### **Productivity Commission Draft Recommendation 4**

*As unnecessarily prescriptive elements of retail tenancy legislation are removed, State and Territory governments should seek, where practicable, to establish nationally consistent template legislation for retail and commercial tenancies available to be drawn down to each jurisdiction.*

**The Victorian Government does not support this draft recommendation in its current form, believing that legislation in relation to retail tenancies and dispute resolution is working effectively and should not be undermined. However, the Victorian Government believes there is scope to rationalise and harmonise retail tenancy regulation in Australia and proposes the establishment of a working group with representatives from all States and Territories to work on this.**

### **Key points of the Victorian Government response to the draft recommendation**

- The Victorian Government believes there is scope to rationalise and harmonise retail tenancy regulation in Australia and proposes the establishment of a working group with representatives from all States and Territories to champion efforts to harmonise regulation.
- Flexibility will be required to develop nationally consistent provisions, taking into account differences in current legislation and legislative histories, plus market and regional variations.

There is scope for rationalisation and harmonisation of retail tenancy regulation between States and Territories without adding to the regulatory burden.

Victoria's retail environment is characterised by a prominence of vibrant strip shopping areas, liberal shop trading laws and a distinctive café and bar culture. Consumer choice in Victoria is diverse and widely acknowledged in the Asia Pacific region as a "shopping destination".

The Victorian Government notes that the approach adopted in Victoria and New South Wales to strip shopping areas is more supportive to this style of retail outlet than other jurisdictions where the prevalence of strip shopping is limited, such as Western Australia.

The Victorian Government considers that there is scope to improve the market regulation through the adoption of nationally consistent template legislation.

## 5 Consistency in lease information across jurisdictions

### **Productivity Commission Draft Recommendation 2**

*State and Territory governments should seek to improve the consistency of lease information across jurisdictions in order to lower compliance and administration costs. They should:*

- *encourage nationally consistent (plain English) models for retail tenancy leases and for tenant and landlord disclosure statements (for example, all jurisdiction and other specific provisions could be set out in annexes to the standard documents).*
- *institute nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolution.*

**The Victorian Government supports this draft recommendation.**

### **Key point of the Victorian Government response to the draft recommendation**

- The Victorian Government believes there is scope to rationalise and harmonise retail tenancy regulation in Australia and proposes the establishment of a working group with representatives from all States and Territories to champion efforts to harmonise regulation.

### **5.1 Harmonisation of regulation across jurisdictions**

The Victorian Government acknowledges concerns expressed by stakeholders in the retail tenancy market and comments made in the Commission's draft report that inconsistencies in retail tenancy regulation across jurisdictions increase costs for businesses that operate nationally. These costs may be administrative or compliance related.

Harmonisation of regulation across States and Territories will provide greater national consistency and the starting point for moves towards national template legislation. Alignment in retail tenancy regulation across Australia would provide efficiencies for both tenants and landlords operating across the varying regulatory systems.

The Victorian Government agrees with the Commission's view that disclosure requirements comprise an area where the opportunity exists for national consistency. Standardising disclosure requirements could minimise compliance burdens on landlords and also potentially help tenants compare lease agreements. However, opportunities for regulatory consistency should not be limited to this area and may also be evident in other aspects of the regulatory framework.

### **5.2 Proposal for establishment of a retail tenancies working group**

The Commission's draft report points out that dialogue between jurisdictions has deteriorated over the last few years. National harmonisation will require communication lines between States and Territories to be re-established. The Victorian Government is willing to work with other jurisdictions and, in this respect, proposes the establishment of a retail tenancies working group. It is suggested that the working group have representation from all jurisdictions.

The role of the working group would be to identify areas for harmonisation, investigate the impact on respective jurisdictional markets and champion regulatory harmonisation. It is suggested that the working group be established at an operational level and report to a Ministerial advisory group. Operational areas responsible for the carriage of retail tenancy regulation will be most familiar with the historical development and working of the regulation. The working group would also be able to determine the best avenue to pursue progress of initiatives and work to the timeframes suggested by the Commission's draft report.

## 6 Transparency and accessibility in the retail tenancy market

### **Productivity Commission Draft Recommendation 1**

*The following measures should be pursued by State and Territory governments to further improve transparency and accessibility in the retail tenancy market.*

- *enhance the use of simple language in all tenancy documentation and provide clear and obvious contact points for information on leases and dispute resolution.*
- *elaborate the significance of jurisdictional differences in the definition of unconscionable conduct and align definitions where practicable.*

**The Victorian Government supports this draft recommendation.**

### **Key points of the Victorian Government response to the draft recommendation**

- The Victorian Government considers there is the potential for tenants to have greater access to comparative information on rent levels and the issue should be explored by the proposed retail tenancies working group.
- The potential misuse of market power will continue to be a risk for small retail tenants.

Victoria places a strong emphasis on ensuring that landlords and tenants have access to practical and accessible information on retail tenancy matters, including dispute resolution. For instance, the Act requires the Small Business Commissioner to prepare and publish an information booklet about retail leases for the public. This publication is specifically written to provide a basic overview of retail lease issues and is regularly reviewed by the Commissioner for its ease of understanding and accessibility. Victoria also delivers workshops on understanding the Act and on selecting a retail location.

The issue of harmonising unconscionable conduct provisions, would be appropriate for consideration by the proposed working group of State and Territory representatives.

### **6.1 Emerging national issues for consideration in the retail tenancy market**

#### *Addressing information imbalances*

Availability of and access to accurate information is critical to a competitive and fair retail tenancy market and has a significant effect on the landlord-tenant relationship. Equally, it is important to allow landlords to use their property to commercial advantage. Regulation of the retail tenancy market to correct information deficiencies must therefore balance appropriately the interests of both landlords and tenants.

The Victorian Government's approach to addressing information asymmetry issues principally focuses on the accurate disclosure of information prior to the entering into a lease arrangement. Disclosure of outgoings, fitout and renewal information are also important.

### *Transparency of information*

The Victorian Government notes comments made by the Australian National Retailers Association regarding the lack of information provided to tenants about the calculation of outgoings and inconsistencies in charges for outgoings to tenants. Certainly, transparency in outgoings is an issue of concern and has been addressed in Victoria's regulatory framework by the inclusion of specific provisions in this area.

The Act requires landlords to itemise fees and charges recoverable through outgoings and provide tenants with an estimate of expected outgoings. It also excludes the recovery of some costs from outgoing calculations, such as capital outlays, depreciation and land tax. These provisions help to limit the opportunity for landlords to take advantage of outgoing provisions to pass on inappropriate costs to tenants.

Concerns have also been expressed about access to a tenant's financial turnover information by a landlord. This is because such information provides landlords with detailed knowledge of the tenant's business operations and may potentially be used to determine a tenant's capacity to pay rent. While it can be argued that collection of such information is necessary for effective management of the property, there is still clearly the potential for misuse of the information by landlords.

The Victorian Government has sought to address this concern in a specific provision of the Act, Section 77 (m) states that one of the matters that may be considered for the purpose of determining whether a landlord has engaged in conduct that is, in all the circumstances, unconscionable is:

*“the extent to which the landlord unreasonably used information about the tenant's or previous tenant's business to negotiate the rent.”*

### *Lease registration*

The Victorian Government does not believe that there is evidence that lease registration, as applying in some states, has enhanced the performance of the retail tenancy market in states where a lease register exists, or that information asymmetry issues have been addressed by the register.

Further, the Victorian Government considers that there are substantial difficulties associated with maintaining the quality of data available on the register that hinder its effectiveness.

For example, the quality of information available on the register is reduced by the inevitable time lags involved in obtaining and updating lease details. This can reduce the effectiveness of the register to assist tenants to evaluate the suitability and market value of lease agreements. In addition, the comparative value of the information can be limited by the inability of the lease register to reflect the full terms and conditions of a lease. For example, information on the register may be distorted by the exclusion of rent-free periods or reimbursements of outgoings or fit-out costs.

Further, the register imposes a significant burden on governments to maintain the register and on tenants to lodge leases.

Other approaches may prove more effective and efficient in providing tenants with comparative information on rent levels, such as rental information provided by the landlord as part of the disclosure process.

Overall, the Victorian Government is cautious of applying additional administrative and compliance burdens on business in circumstances where the cost and benefits of a lease register are not clearly established. The Victorian Government however, considers there is the potential for tenants to have greater access to comparative information on rent levels and the issue should be explored by the proposed retail tenancies working group.

#### *Misuse of market power*

It is a commercial reality that a disparity of bargaining power exists between a landlord and a small retail tenant and that the smaller tenant will usually be at a disadvantage during lease negotiations.

The Victorian Government assists small business wherever possible by providing information and education about leasing, but ultimately the agreed terms and conditions of a lease represent a commercial decision made by the tenant.

The potential misuse of market power by major landlords has been of concern to smaller retail businesses for some time. These concerns have been fuelled by claims that commercial arrangements between large retailers and shopping centres are being negotiated to disadvantage smaller businesses. Taken together with concerns regarding other forms of unconscionable conduct in business transactions and market practices, it is clear that the exploitation of inequalities in the market can have a detrimental impact on fair competition and consumer choice in the long term.

Given that small businesses in the retail sector are particularly susceptible to the misuse of market power, effective legislative protections are needed. Regulation should clearly identify and sanction such behaviour to deter potential offenders. Recent amendments to the Commonwealth *Trade Practices Act 1974* go some way to strengthen protections for vulnerable market players.

## 7 Relaxing retail tenancy legislation

### Productivity Commission Draft Recommendation 3

*State and Territory governments should relax key restrictions in retail tenancy legislation to better align the regulation of the retail tenancy market with the broader market for commercial tenancies.*

**The Victorian Government does not support this draft recommendation in its current form, believing that legislation in relation to retail tenancies and dispute resolution is working effectively and should not be undermined. However, the Victorian Government believes there is scope to rationalise and harmonise retail tenancy regulation in Australia and proposes the establishment of a working group with representatives from all States and Territories to champion efforts to harmonise regulation.**

### Key points of the Victorian Government response to the draft recommendation

- The Commission's distinction between retail and commercial tenancy is not clear. As such, the Victorian Government is reluctant to relax key restrictions in retail tenancy legislation, particularly as the broad application of the *Retail Leases Act 2003* in Victoria is operating successfully.
- The practice of casual mall leasing is growing nationwide and should be monitored to ensure the interests of both landlords and tenants are protected.

### 7.1 What is a retail tenancy in Victoria?

The Commission's use of the term 'commercial tenancies' in the draft recommendation does not provide a clear explanation of the term or the nature of the differences between commercial and retail tenancies. Accordingly, Victoria would encourage the Commission to clarify and give further consideration to the relationship between retail and commercial leases.

Under the Victorian legislation, a retail premises is essentially defined as a premises that under the terms of the lease is used, wholly or predominantly, for "*the sale or hire of goods by retail or the retail provision of services*". In the case of *Wellington v Norwich Union Life Assurance Society Ltd* (1991) it was established that retailing was "*the provision of an item or service to the ultimate consumer for fee or reward*".<sup>1</sup>

Therefore, the Victorian legislation has comparatively broad coverage and extends beyond simply shops or shopping centres. However, it clearly does not apply to premises at which goods or services are not provided to the ultimate consumer (eg. industrial and wholesale activities). This broad definition in Victoria contrasts significantly with those used in other jurisdictions, where coverage is limited to the types of shops listed in a schedule to the Act.

The location of a retail outlet is of critical importance, with pedestrian traffic and exposure being key factors affecting the viability of a retail business. Accordingly, negotiation of a favourable agreement in a particular location can be a competitive advantage for the business.

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<sup>1</sup> Croft, Clyde, *Retail Leases – being the Fourth Edition of Retail Tenancies*, Volume 2, 2004, Leo Cussen Institute, p 97

For example, the ability of a retail business to secure a long term lease or positive tenancy conditions will contribute to the overall competitive position of the business in the market.

By contrast, the success or failure of a non-retail business is not considered to be as dependent on its location. Non-retail businesses use client appointments as part of the business process and are able to operate successfully in locations with less pedestrian traffic and exposure, sometimes even in residential areas. Therefore, the lease or tenancy agreement can be less critical to the overall viability of that business. Thus, imbalances in the negotiating position are less apparent and the relationship between the landlord and tenant is not considered to necessitate specific regulatory intervention.

When considering the size of businesses protected by retail tenancy legislation, one of the key policy principles underpinning the Act is that it should only protect small and medium sized businesses. The definition of “retail premises” has been important to ensuring that the regulatory framework matches the espoused principles for regulatory intervention and that the protections offered to retail tenants and landlords are available only to those who most need them.

The Victorian Government considers that relaxation of the constraints on the retail tenancy market will weaken the bargaining position of tenants and potentially expose vulnerable tenants to inappropriate market practices. It may also discourage entrepreneurs from establishing new retail opportunities by increasing the risk for retailers to enter a business.

The case for change to the regulatory framework is weak, particularly as the existing regulatory framework has the support of community and industry stakeholders and is demonstrated to be effective. This is evidenced in Victoria by the relatively low number of retail tenancy disputes and high success rate of around 75% for the settlement of disputes before or at mediation by the Small Business Commissioner.

## **7.2 Casual mall leasing**

Casual mall leasing refers to the practice by shopping centre landlords of providing a licence to retailers to use part of the common area of a centre for the sale of goods and services on a short term basis. It is now a well established practice in shopping centres around Australia.

The introduction of new competitors through the use of casual mall licences has been an obvious concern for existing tenants within a shopping centre. The Victorian Small Business Commissioner has indicated that, from time to time, matters related to casual mall leasing arise in retail tenancy enquiries and disputes. However, these issues have not been considered sufficient in number to warrant regulatory intervention in the Victorian market at this time.

The introduction of a national voluntary Code of Practice agreed between the Australian Retailers Association, the Retail Traders Association of Western Australia, the Shopping Centre Council of Australia and the Property Council of Australia to help guide casual mall leasing practices has been welcomed by the Victorian Government. The incidence and nature of enquiries and disputes will continue to be monitored by the Victorian Government to determine the effectiveness of the Code.



## 8 Planning and zoning controls

### **Productivity Commission Draft Recommendation 5**

*While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.*

**The Victorian Government notes this draft recommendation. The Victorian Government supports and is committed to a program of continuous improvement to its planning system and believes that the focus of the inquiry should be on retail tenancy leases and the regulation of disputes arising in this market between landlords and tenants.**

### **Key points of the Victorian Government response to the draft recommendation**

- Current Victorian planning policies and zoning controls support retail activities locating in and around activity centres. This approach is similar to many other national and international jurisdictions.
- While the ‘locations’ for retail development are controlled by zoning (as it is for industrial or residential uses), within these locations planning restrictions on the ‘type’ of retail proposed are minimal with a wide range of retail uses able to establish without the need for planning approval.
- Ensuring a range of opportunities exist in a number of appropriate locations to accommodate retail growth is more critical to fostering a competitive sector than relaxing planning and zoning controls.
- The Victorian Government is currently undertaking a state review of retail planning policy which will examine the policy and statutory framework for planning decisions in relation to retail development.

### **8.1 Victoria’s anticipated population and retail growth**

Melbourne’s population is second highest amongst Australian cities, with population projections by the Australian Bureau of Statistics to 2051 indicating Victoria will remain one of the two most populous states in Australia.<sup>2</sup> Recent commentary also suggests that Melbourne’s population is growing faster than that of Sydney and will ultimately surpass Sydney in the future. These increasing population levels and expectations of continued growth will help drive demand for additional retail space.

Research commissioned by the former Victorian Department of Sustainability and Environment estimates the total amount of existing retail floorspace in Melbourne to be 7.86 million m<sup>2</sup>. Retail floorspace is estimated to increase to 9.63 million m<sup>2</sup> in 2020 and 10.93 million m<sup>2</sup> in 2030.<sup>3</sup> This represents growth of approximately 40% in the amount of retail space over the next 25 years.

<sup>2</sup> Australian Bureau of Statistics, Population Projections – Australia, Cat. No. 3222.0

<sup>3</sup> p. 38, *Retail Floorspace Forecasts for Metropolitan Melbourne 2006 – 2030*, Essential Economics, March 2007

This growth trend is also evident in regional areas of Victoria, where retail spending continues to grow and supports demand for new and expanded retail facilities. It is forecast that residents in regional Victoria will support just over 4 million m<sup>2</sup> of retail floorspace by 2030, increasing from the current estimated amount of 2.92 million m<sup>2</sup>.

Information such as this demonstrates the level of retail growth likely to be needed and planned for across Victoria over the next 25 years.

## **8.2 Victoria's planning context**

One of the primary objectives of Victoria's planning system, under the *Planning and Environment Act 1987* is to provide for the fair, orderly, economic and sustainable use and development of land. It is acknowledged that there are a number of competing priorities associated with this objective, such as community safety, transport and infrastructure requirements, accessibility, and economic competition. However, it is the responsibility of planning authorities (generally local councils) to balance these priorities in the interest of present and future generations.

Victoria's State Planning Policy Framework sets out planning policies for land use and development across the state. In accordance with this framework, locations in and around established or planned 'activity centres' are identified as preferred locations for major retail, commercial, administrative, entertainment and cultural developments, so as to provide community benefit through efficient infrastructure use and accessibility. While the planning framework clearly seeks to incorporate a range of uses in these locations, there is nevertheless a tendency for centres to be dominated primarily by retail development. *Melbourne 2030*, the Victorian Government's long term strategy for metropolitan Melbourne, identifies a clear direction to broaden the base of activity in centres to include a wider range of services over longer hours.

This policy approach is similar to that applied in other state jurisdictions and countries, and has also been outlined in other submissions to the Commission. The approach provides a level of certainty to the industry as to preferred locations for future investment. Consideration may be given to locations outside an activity centre, where it can be demonstrated a development would be of net benefit to the community in the region.

## **8.3 Impact of planning policies and controls on retail development**

It is acknowledged that the planning system can impose constraints on retail development and consequently retail tenancies; however, as outlined in the Shopping Centre Council of Australia's submission, the situation is no different to any other commercial or non-commercial land uses<sup>4</sup>.

In planning for urban growth, planning authorities are encouraged to facilitate orderly development through the preparation of structure plans. Structure planning for activity centres, particularly in Metropolitan Melbourne, should identify opportunities for future supply of a range of activities, including retail development. In recent years the Victorian Government has allocated significant resources to assist Councils in planning for their activity

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<sup>4</sup> p. 23, Shopping Centre Council of Australia first submission to the Productivity Commission Inquiry into the Market for Retail Tenancies, July 2007

centres through various programs. More recently, a program has been established specifically to provide specialist expert advice to assist Councils in finalising and implementing structure plans for activity centres.

As previously outlined, Victoria's retail environment is characterised by a prominence of strip shopping areas and liberal shop trading laws. In addition, with the exception of areas identified specifically for bulky goods, areas identified for retail development do not discriminate between retailer type or size. While the 'locations' for retail development are controlled by zoning (as it is for industrial or residential uses), within these locations planning restrictions on the 'type' of retail proposed are minimal with a wide range of retail uses able to establish without the need for planning approval.

Ensuring a range of opportunities exist in a number of appropriate locations is more critical to fostering a competitive sector than relaxing planning and zoning controls.

Currently, the Victorian Government is undertaking a state review of retail planning policy, with the aim of developing a whole-of-retail policy position. The review will examine the existing policy and statutory framework for planning decisions and planning, development and investment in retail activity in Victoria.

#### *Other factors impacting on competition*

It is understood that shopping centres try to attract large retailers, such as supermarkets or department stores, as an anchor tenant to the centre. As identified in the Commission's draft report, rents associated with shopping centre locations are higher than traditional strip centre locations. Small retailers, without the leverage or market power that larger retailers command, often feel compelled to locate in shopping centres and directly leverage their own businesses off customer foot traffic.

The Australian Retailers Association's submission identifies that competition is significantly lessened in situations where planning regulations that limit supply are combined with an aggregation of ownership.<sup>5</sup> This is particularly prevalent in shopping centres, where the ownership of centres within close proximity rests with only a few organisations. This may lead to localised retail oligopolies and in some cases monopolies in particular locations.

An alternative to a shopping centre location for retailers can often be found in an adjacent or nearby strip shopping area. These areas generally offer lower rents, but also lower commercial exposure. Such locations may be appropriate for specialty retailers that are 'destinations' in their own right.

The choice of location for a retailer, whether this is in a shopping centre or strip shop, is ultimately based on their preferences for exposure and foot trade. While the approach to planning and development may concentrate retailing activities, this is an inherent aspect of the marketplace that should be considered in the commercial decisions by retailers.

Some retailers have noted, anecdotally, that restrictive covenants placed on property titles by previous owners have in some cases prevented the development of certain retail opportunities. For example, a particular retailer may vacate premises to relocate to newer premises within

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<sup>5</sup> p. 17, Australian Retailers Association first submission to the Productivity Commission Inquiry into the Market for Retail Tenancies, August 2007

the same centre and, in doing so, apply a covenant that effectively prohibits a similar retail use from establishing in the vacant premises in order to restrict competition in the market. This practice places pressure on existing rental tenancies.

## 9 Characteristics of Victoria's retail tenancy market

Victoria's retail tenancy market is primarily characterised by a combination of shopping centres and strip shopping areas. The establishment of Melbourne's first shopping centre at Chadstone in the 1960s was followed by significant growth of other centres, particularly in new residential areas. In recent years, the development of homemaker centres, factory outlet centres and hardware superstores has introduced new retail formats into the market and added to its diversity.

Despite strong competition from shopping centres, strip shopping areas continue to be an important part of Victoria's retail market. There are a number of distinct strip shopping areas around Melbourne, covering both the Central Business District (CBD) and suburban locations. The development of these areas has evolved over time with the location of some strip shopping areas influenced by Victoria's historical textile and clothing industry origins. For example, the establishment of retail fashion outlets on Bridge Road in Richmond was initially due to their close proximity to clothing factories in the surrounding area. Strip shopping areas are also strongly prevalent in regional Victoria, particularly in areas without access to a shopping centre nearby.

Melbourne's retail landscape is enhanced by the addition of strip shopping areas, offering businesses a greater choice of potential retail opportunities.

The Victorian Government is concerned that the availability of data on strip shopping areas is limited. The importance of this market to the retail sector has led the Victorian Department of Innovation, Industry and Regional Development to source data specifically on retail tenancies in Victorian strip shopping areas, to provide a greater understanding of this market. A copy of this report is provided at [Attachment 2](#) to inform the Commission's inquiry, together with comments comparing data for strip shopping areas to that of shopping centres, where possible, to highlight differing market characteristics.

## **10 Conclusion**

In summary, the Victorian Small Business Commissioner was created primarily to provide access for retail tenants and landlords to efficient and effective dispute resolution. The successful dispute resolution process now in place in Victoria is supported by retail landlords, tenants and business organisations. Access to this process has improved retail market efficiency.

The Victorian Government supports efforts to improve regulation of the retail tenancy leases market and favours harmonisation of regulation nationally. This approach will provide greater consistency for landlords and tenants and help to reduce overall compliance and administration costs for business.

The establishment of a working group with representatives from all jurisdictions is suggested to facilitate moves towards harmonisation.

The Victorian Government wishes to thank the Commission for the opportunity to provide input into the inquiry and comment on the draft report and looks forward to the release of the Commission's final report.

**11 Attachment 1 – Victorian Government initial submission to Inquiry**

## 12 Attachment 2 – Melbourne Street Front Retail Market

### *Strip shopping areas versus shopping centres*

The continued survival of strip shopping areas in the face of competition from shopping centres and new retail formats points to their continuing ability to respond to ever changing consumer shopping demands.

The report indicates that vacancy rates amongst Melbourne’s key retail strip shopping areas are currently low, but remain generally higher than those in shopping centres. According to data presented by the Shopping Centre Council of Australia in its first submission to the inquiry, the average vacancy rate for all shopping centres was 1.2% in 2006<sup>6</sup>. Key strip shopping areas, including the CBD, recorded vacancy rates in March 2007 ranging from 2.2% to 7.1%.<sup>7</sup> Overall, vacancy rates in strip shopping areas appear to have declined since 1995.

Instances of relatively high vacancy rates have occurred from time to time in some strip shopping areas. This may coincide with development in the area increasing the amount of available retail space and creating new retail opportunities. For example, the high vacancy rate in the CBD in March 2003 reflected substantial redevelopment of the CBD at that time involving the creation of additional retail space.

**Table 1 - Vacancy rates for key strip shopping areas in Melbourne**

Centre Name	March 1995	March 1997	March 2001	March 2003	March 2007
Bridge Road	6.6%	3.9%	4.4%	4.7%	5.8%
Burke Road	3.4%	5.3%	3.8%	4.8%	3.3%
Centre Road	6.3%	7.2%	4.8%	4.3%	2.9%
Chapel Street	4.2%	6.2%	12.0%	5.4%	6.8%
Church Street	4.4%	3.3%	5.6%	6.1%	2.2%
High Street	5.9%	4.7%	2.1%	3.4%	2.5%
Puckle Street	6.9%	8.3%	6.3%	2.1%	6.2%
Toorak Road, Toorak	8.2%	7.6%	14.7%	13.5%	7.1%
CBD Core	9.9%	8.6%	10.7%	20.5%	5.2%

Source: Savills

Variations in rents payable in these strip shopping areas are generally confined to a fairly narrow range. Competition amongst landlords in strip shopping areas helps to control rental increases. There is also a degree of interchange between tenancy locations from street to street and within the street, which acts as an additional constraint on rental increases.

Over the last decade, there has been little movement in rents payable in key suburban strip shopping areas. Changes have largely been confined to increases of less than 5% per annum since 2004, reflecting the low inflationary environment and annual retail turnover growth. This observation is consistent with comments made by the Shopping Centre Council of Australia in respect to shopping centres that “*while average rents have increased over the last five years; they have not increased faster than sales over the same period*”.<sup>8</sup>

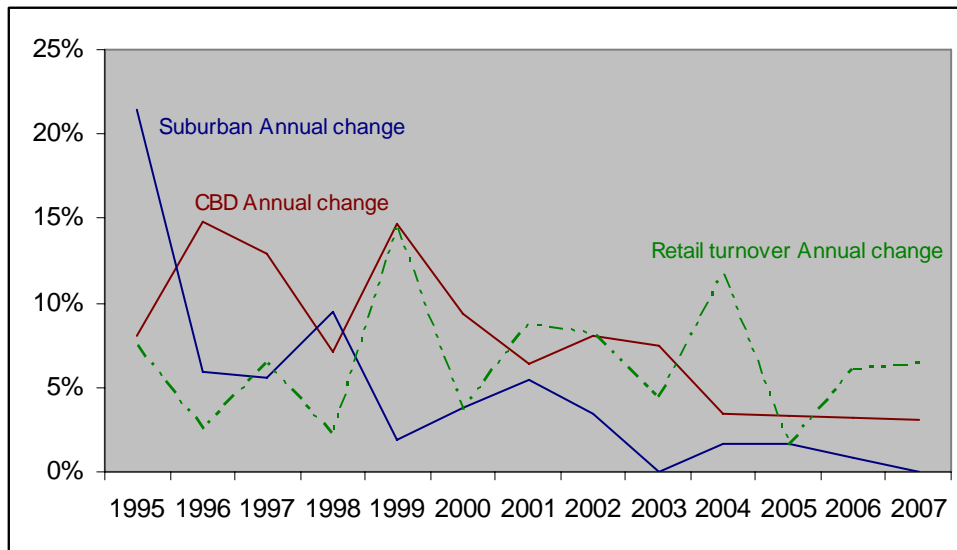
<sup>6</sup> p. 52, Shopping Centre Council of Australia first submission to the Productivity Commission Inquiry into the Market for Retail Tenancies, July 2007

<sup>7</sup> p. 6 Melbourne Street Front Retail Market, Savills Australia, September 2007

<sup>8</sup> p. 55, Shopping Centre Council of Australia first submission to the Productivity Commission Inquiry into the Market for Retail Tenancies, July 2007



**Graph 1 - Annual change in rent values and retail turnover**



Source: Savills and Australian Bureau of Statistics

Only about half of tenants in key suburban and CBD strip shopping areas are the same after five years, although a core group of ongoing and long term retail outlets does exist with around a quarter of tenants the same after 10 years.<sup>9</sup> The accessibility of strip shopping areas to new and inexperienced businesses may be a likely contributing factor to the turnover often experienced in these areas. In contrast, shopping centre tenancies appear relatively more stable from year to year with 85% or more of shopping centre retailers in the centre the previous year.<sup>10</sup> However, it is difficult to directly compare relative turnover of retail tenants in strip shopping locations compared to shopping centres and greater longitudinal data is needed to make more conclusive assessments of tenant stability.

The retail tenancy market for strip shopping areas is more responsive and susceptible to fluctuations in market activity than the centrally managed shopping centres. Strip shopping areas generally rely on pedestrian traffic and are geared to encourage opportunistic shopping. In contrast, shopping centres are designed to meet a range of more clearly defined consumer needs and invest significantly in marketing the centre to attract consumers. Therefore, it could be argued that businesses located in shopping centres are marginally less exposed to downward changes in retail spending as compared to tenants in strip shopping areas.

#### *The changing retail mix of strip shopping areas*

It is well recognised that the retail mix within shopping centres is closely managed and controlled to reflect average consumer preferences and ensure the optimum performance of the centre. In comparison, the retail mix in strip shopping areas is determined more directly by market forces. Ownership of retail outlets in strip shopping areas is dispersed amongst many different landlords and rarely is one landlord able to exercise broad control over the retail mix of the strip shopping area. The market more directly drives growth of retail businesses in this environment and changes and trends in consumer preferences are more quickly evident in strip shopping areas.

<sup>9</sup> p. 13 Melbourne Street Front Retail Market, Savills Australia, September 2007

<sup>10</sup> p. 52, Shopping Centre Council of Australia first submission to the Productivity Commission Inquiry into the Market for Retail Tenancies, July 2007

Over the past decade strip shopping areas in Victoria have seen the establishment of greater numbers of hospitality and clothing outlets.<sup>11</sup> This is perhaps a reflection of buoyant economic conditions in Australia which in turn has created demand for increased discretionary spending. This has also been accompanied by a decrease in the number of newspaper, book and stationary outlets.<sup>12</sup> The movement away from hard copy information sources might be attributed to technological advancements and greater use of computers and the Internet.

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<sup>11</sup> p. 14 Melbourne Street Front Retail Market, Savills Australia, September 2007

<sup>12</sup> p. 14 Melbourne Street Front Retail Market, Savills Australia, September 2007