

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

10 March 2008

Dr Neil Byron
Commissioner
Productivity Commission
PO Box 80
BELCONNEN ACT 2616

Dear Dr Byron

Inquiry into the Market for Retail Tenancy Leases

There were a few comments made during the public hearings and in subsequent submissions to which we would like to respond.

Lease Renewals in the ACT

During the hearings in Sydney, Ms Joanne Howarth referred to the results of an SCCA survey of lease renewals in Canberra which found that 89% of leases were renewed (see p.141 of transcript). This high renewal rate was then attributed to the ACT's preferential right of renewal of leases provisions in the *Leases (Commercial and Retail) Act 2001*. This is incorrect. As we pointed out in our initial submission, when citing these renewal figures (p.70), this survey covered the calendar years 2003 and 2004 before these new preferential lease renewal provisions (which were enacted in 2001 and applied prospectively to new leases) had come in to effect. In other words, this high proportion of renewals was not attributable to the preferential renewal provisions.

Proposal for a national database of lease summaries

During the public hearings in Brisbane, it was suggested by Mr Cameron Graham (p. 404) that instead of lease registration, legislation could require the preparation of "some form of epitome or summary of the lease which would set out the essential commercial terms. It could be signed by the parties when they sign the lease, so it's done at the same time and the information is current".

We would point out that, as well as duplicating lease registration in those jurisdictions which already have it, the summary or epitome would be no more current than the lease because, like the lease, it would have to be signed by all parties and it is the signing process that causes most of the delay in registering leases. It would also be an administrative burden on landlords, just as the requirements of section 25 of the Victorian Retail Leases Act is a costly burden on landlords. The SCCA remains of the view that lease registration is the simplest most effective way to make lease information publicly available.

Provision of turnover information to prospective tenants

In a further submission to the inquiry Mr Stephen Spring states that although shopping centres may share turnover information with existing tenants, they do not do so with prospective tenants, possibly due to concerns that it would be deemed to be a representation (p.3). We would point out that retail tenancy legislation in a number of states such as NSW and Queensland requires landlords to give prospective tenants any available annual turnover information (by category) in the lessor's disclosure statement.

Leaders in Shopping Centre Advocacy

ABN 41 116 804 310

Shopping Centre Council of Australia Limited
Level 1 11 Barrack Street Sydney NSW 2000

Telephone: 02 9033 1902 ~ Facsimile: 02 9033 1976 ~ www.scca.org.au

Submission by Senator Andrew Murray

We note the comments in Senator Murray's submission about so-called "secret pricing" in shopping centres. Senator Murray believes that there should be a 'price list' of the rents payable in a particular shopping centre freely available to prospective retail tenants in the same way that consumers have price lists or individual price tags on products or services.

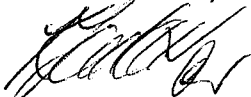
In stating this, Senator Murray appears to confuse consumer transactions with business to business transactions. The retail tenancy relationship is a business to business relationship and contracts and prices are normally the result of negotiation. For example, a prospective supplier to a retailer will not present the retailer with a take or leave it price list but will negotiate a price with the retailer based on any number of factors such as the size of the order, its frequency or its urgency. Even in consumer transactions, there are many circumstances where a consumer will not be presented with a complete price list. For example, the 'rack rate' for a hotel room will be much higher than the rate that can be obtained for that room through a travel agent or on internet, through membership of a 'loyalty program', or even by direct negotiation by the prospective guest depending on the time of day of the check in and the length of the stay.

This comment also betrays a lack of knowledge of how a shopping centre actually operates. In a shopping centre, some tenants draw traffic to the centre (including but not limited to anchor tenants) while other tenants take advantage of the traffic generated by others. Obviously, the centre owner will charge the tenant who draws traffic to the centre less than the tenant who does not. In these circumstances, the idea that there could be a 'price list' of tenancies in a shopping centre is absurd. The rent in a shopping centre is a result of negotiation between two businesses, the retailer and the centre owner, and based on supply and demand for that space and the benefits (if any) that a particular retailer can bring to a centre (in terms of attracting customers to the centre) or the benefits (if any) that the centre can bring to the retailer in terms of passing customer traffic.

As the Commission would be aware from the public hearings, Senator Murray is also incorrect in stating that retail tenancy advisory services do not provide market price information. There are a number of firms providing this sort of information to prospective tenants primarily in those jurisdictions where registered lease data is available. One example is Leasing Information Services which appeared at the public hearings in Sydney on 5 February 2008.

Senator Murray also refers to the Senate Economic Committee report on the effectiveness of the Trade Practices Act in protecting small business and claims that no action has been taken on the Committee's recommendation to prohibit provisions in retail leases that compel tenants to keep their tenancy terms and conditions secret. Senator Murray overlooks the fact that the Committee's minority report did not support this recommendation and that the Commonwealth Government carefully considered this recommendation but rejected it because it would violate a fundamental principle of the law of contract that parties are free to negotiate the terms of the contract, including a lease. The issue was referred to State and Territory Governments for their consideration. We refer you to page 33 of our original submission.

Yours sincerely



Milton Cockburn
Executive Director