

# **RESPONSE BY KINGSLEY'S CHICKEN PTY LTD TO THE PRODUCTIVITY COMMISSION'S DRAFT REPORT ON THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA**

## **1. Who We Are**

Kingsley's Chicken is a small specialty tenant in a number of shopping centres and shopping strips in the A.C.T., with actual experience in dealing with large shopping centre landlords, and landlords in the broader market, over the last 23 years.

## **2. Core Findings of the Commission**

The Commission has found that “*overall the market is operating effectively*” but that .... “*some change is warranted* “ Its recommendations for change, focus on improving education, information and dispute resolution procedures, and removing the more restrictive elements of retail tenancy legislation, and encouraging the States and Territories to establish nationally consistent template legislation, as well as reducing compliance costs for shopping centre owners and large tenants with multiple stores.

In our view, these recommendations will undo the significant improvements that have occurred in the broader market over the past two decades, where States and Territories have introduced the concept of market rent on renewal, and for a while, provided access (in the ACT) to leases that were registered. This registration aspect has now been diluted under the veil of the Privacy Act, and accessibility to leases has diminished. Shopping centre leases, if registered, are generally registered a year or more after they have been signed. Even the broader market is starting to revert to its previous dysfunctional state of bullying by landlords as it is not possible to determine market value of rent without access to other leases.

The Commission notes that regulation should not be used as a substitute for business decision making and risk taking or to give advantage to specific market participants (such as retailers currently operating in shopping centres).

If the Commission had carried out adequate investigation by interviewing tenants who had not renewed their leases, it would have determined that the retail tenancy market in the area of renewals is not working effectively, and shows clear indications of market failure caused by a lack of transparency. It would also have determined that prescriptive legislation action is required so as to achieve transparency so as to facilitate business decision making and risk taking, and to undo the advantage taken by shopping centres..

## **3. Failure to Address the Terms of Reference**

In reading the Draft Recommendations of the Productivity Commission's Draft Report on the Market for Retail Tenancy Leases in Australia, we note a failure to address the Terms of Reference.

In particular, the Commission failed to examine the following:

- 1) the structure and functioning of the retail tenancy market including the role of retail tenancies as a source of income for tenants (Terms of Reference 1)
- 2) the appropriateness of key factors that are taken into account in determining retail tenancy rents in lease renewal (Terms of Reference 5)
- 3) the appropriateness of provisions in retail leases to determine rights when the lease ends, that is in lease renewals (Terms of Reference 6)

It has also not carried out any examination and made recommendations about the inflationary effect of rising tenancy costs on the community generally.

Failure to address these key aspects of the Terms of Reference is what has led to wrong conclusions being formed, resulting in Draft Recommendations that do not address the main problems to do with the shopping centre lease renewal market.

This response attempts to highlight the shortcomings in the Commission's findings. We request that the Commission reconsider their findings, and complete their examination by focusing on the areas of its Terms of Reference that have not been addressed.

The Commission states in its draft report *The Market for Retail Tenancy Leases in Australia*, that its "inquiry stems from concerns by a number of small retail tenants about difficulties they face when presented with leases (renewals) over which they have little or no control".

By its failure to address the Terms of Reference raised above, it is not surprising that the Draft Recommendations were skewed towards plain English documents and reducing compliance and administration costs for shopping centres, and contain nothing to alleviate the concerns and difficulties of the shopping centre tenants.

The Commission has in its recommendation treated the minnows who operate in the small specialty tenants market in shopping centres as mere factors of production, when making its recommendations, and ignored the social costs of market failure in this sector.

#### **4. Background on Shopping Centres**

Shopping Centre landlords are well resourced with large professional organizations, and some like Westfield and Centro are now multinational.

Shopping centres have grown from 28% of total retail space to 38% of total retail space from 1991-2 to 2005-6 – about 35% growth (P.16).

500 separate owners own all the shopping centres in Australia, but four managers of shopping centre retail space manage 36% of gross lettable space in shopping centres, with one manager per centre. These shopping centre managers are also owners in their own right.

## **6. Churn Rate in Shopping Centres**

According to Westfield, 25% of five year leases were not renewed, Centro 19%, Colonial First 22% in 2006. There is a churn rate of almost 50% more in major shopping centres controlled by the main four managers of shopping centres, than in the broader market. We are unable to reconcile these facts with the Commission's finding (at pg 33) that there is no significant difference in churn between shopping centres and shopping strips. The Commission does however note that vacancies in shopping centres are lower than in the broader market (strip shopping). In many instances shopping centres approach successful retailers in strip shops and invite them to move into shopping centres with incentives. This could be contributing to higher vacancies in the broader market, and as successful retailers are targeted, there is a lower possibility of business failure.

## **7. Is a shopping centre landlord a monopolist?**

That the shopping centre landlord is a monopolist is a fact, as the landlord is the only supplier of lease rights in that shopping centre. It is further evidenced by the landlord's behaviour.

- **Signs of being a monopoly:**
  - o Supply of retail space is limited to one supplier per shopping centre.
  - o Bargaining power imbalances were identified in Shopping Centres in the 1980s (Davies report 1991)
  - o Information imbalances in shopping centres were identified in the 1980s (Davies Report 1991).
  - o The Cooper Committee set up an inquiry into "Shopping Complex Leasing Practices 1981) as lessees effectively had no bargaining power in relation to lease renewals.
  - o Submissions to this Productivity Commission inquiry highlight that shopping centre landlords have superior bargaining power despite legislation in all jurisdictions (pg 97)
  - o Legislation has been created to provide an equitable bargaining position between large landlords (shopping centres) and small retail tenants. The 1994 Retail Tenancy Review Bill identified that regulation was required as the market place had failed (pg 36).
  - o In 1997, the Reid Committee highlighted continuing problems between retail tenants and shopping centre landlords.
  - o The Joint Select Committee on the Retailing Sector recommended the appointment of a Retail Industry Ombudsman (pg 38).
  - o The 2003 Senate Inquiry recommended a prohibition on retail lease provisions that compel tenants to keep their tenancy terms and conditions

secret as a result of examining if there was adequate protection for small business from anti-competitive or unfair conduct (pg 38).

- Submissions to this Inquiry highlight that shopping centre landlords are still seeking excessive rent increase in rent renewals by threatening the main source of income of the incumbent small tenant.
- Evidence provided to the Commission that shopping centre landlords continue to have strong negotiating power when renewing leases.
- Asymmetry of information in the hands of the shopping centre landlord in regards to:
  - Lease terms of all tenants in the centre known to the landlord but not available to the tenant
  - Turnover of the tenant known to the landlord
  - Turnover of other tenants known to the landlord but unknown and unavailable to the tenant.

The reason for the many governmental inquiries into the problem of the shopping centre specialty tenant lease renewal market is that despite the attempts by States and Territories to regulate the retail tenancy market to provide security of tenure, shopping centre landlords are still able to use their monopoly power. None of the remedies attempted to date have successfully addressed this problem in shopping centres, while it has worked in improving the broader market. The reason for the success in the broader market is that market is an efficient market with many landlords and many tenants. Transparency and accessibility of lease information are the only means of achieving a competitive efficient shopping centre lease market.

To use the words of the Treasurer Mr Wayne Swan on 23/1/08 as quoted in the Australian Financial Review: *“to judge whether or not it is a competitive market, you need to have transparency”*.

## **7. Transparency through Disclosure Documents**

In their Draft Recommendations, the Commission has omitted participants' recommendations in submissions, relating to improving transparency through disclosure documents that can be used by potential and existing tenants, thereby facilitating business decision making and risk taking before investment of capital in shopping centres.

An example of how improved disclosure documents could improve transparency is the disclosure requirements of the Franchising Code administered by the ACCC.

Proposals for improvement in the disclosure documents before the Commission, include the disclosure of:

- A history of the area let and the number of shops in the centre
- Proposals for centre renovation and refurbishment
- Disclosure of foot traffic entering the centre, and requirement for the centre to ensure the accuracy of these counts, and redundancy in case of breakdown of

equipment (as this used to be a common excuse when centre management was approached for traffic numbers).

- Disclosure of leases that have been terminated by the landlord in the previous 5 years.
- Disclosure of leases that are not renewed by tenants with contact names and addresses should those tenants want to be contacted.
- Disclosure of average base rent per square metre over the previous 5 years.
- Disclosure of total lease incentives paid to tenants over the previous 5 years.
- Disclosure of a list of out of court settlements paid **to** tenants.
- Disclosure of a list of out of court settlements paid **by** tenants.
- Total outgoings by expenditure category over the previous 5 years.
- Any related parties that supply services, eg management services, to the centre, and the history of these service costs over the previous 5 years.
- Advertising Contributions received and categories spent on, over the previous 5 years.
- New tenants and existing tenants must be provided with a disclosure document or access to the disclosure document on a web site. An Ombudsman must be established and authorized to penalize shopping centres for not updating or distributing disclosure documents to tenants.

## **8. The Feasibility and Benefits of Transparency through Lease Registration**

The Commission has shown in its draft report that the market for shopping centre specialty tenant leases lacks transparency, but its recommendations do not address achieving this transparency for the purposes of facilitating efficient and effective lease renewals, and undoing the advantage by the shopping centre participants in the retail tenancy market.

**To achieve this transparency** in the case of shopping centre specialty tenant leases, two key ingredients must be present with lease documents:

- Lease documents must be registered and the way to achieve this is for mandatory registration to be stipulated by law.
  - o To enforce it, legislation covering registration must require that the terms of the lease do not come into effect until the lease is registered. This would overcome the current practice by shopping centre landlords of registering leases more than 12 months after they have been signed, a

delay that defeats the possibility of using the terms of a registered lease to determine the value of market rent when negotiating a new lease.

- Both potential and current tenants must be allowed to access these registered leases. Access to the registered leases, which used to be available, is now not available in some jurisdictions that claim that privacy laws do not allow the release of these documents.

There is a mention in the Commission's Draft Report that lease registration and accessibility would breach confidentiality agreements; however the Commission has not examined what sorts of matters are included in a lease and require confidentiality. It should be apparent that any "confidential" terms must be to the detriment of other tenants or are special arrangements that would in fact change the market value of the premises, otherwise why the confidentiality?

- o Submissions 83 (p.57) gives the answer – "*the tenant had previously been on a very favourable rent*" ie below market value (meaning this business's competitors would be facing a much higher rent, without knowing that this tenant had more favourable terms as the other tenants negotiating would not be aware that the landlord had offered "very favourable rent" to another, which should reduce market value).

**The benefits that mandatory lease registration together with accessibility will provide are:**

- facilitating informed decision making with new leases by reducing the information imbalance leading to efficient business investment, or "voting with their feet"
- allowing existing tenants to reach informed decisions when negotiating lease renewals leading to lower incidence of business failure
- preventing (reducing scope for) unconscionable conduct claims when negotiating leases and reducing negotiation costs.
- reducing the number of disputes on lease renewal, and reducing the cost to government (pg 70)
- providing leases that can be used by valuers to determine market rent.
- reducing the cost of renewal to both the tenant and the landlord - leveling the playing field when it comes to negotiation of new leases or renewals of leases, instead of the current 'hard bargaining' which is required as one party has all the required information and the other party has none.
- reducing the social cost of tenants being driven out of business, in many cases losing their families and homes.

- reducing the rates of increase in rent, resulting in a lower rate of increase in prices through cost recovery by affected tenants, and thus reduce inflation. Currently rent increases range from 15.6% to 71.9% (table 6.1) – very clearly above the rate of the C.P.I. These are increases on rents that are already premium rates (for the traffic available in shopping centres).
- deterring landlords from making sweetheart deals such as transferring costs like advertising costs by exempting favoured tenants, or paying incentives to new tenants to lure them.
- deterring landlords from leasing premises to tenants at rates that would be “*substantially more advantageous*” to the landlord, (pg 107) as the new tenant would be able to make an educated decision.
- reducing the use of lease negotiators as accessibility to other leases would enable and empower tenants to negotiate similar terms.

The SCCA (Submission 83) agreed that there should be mandatory registration of leases in States that do not require registration to improve transparency, and Westfield state (Submission 85) that they would not oppose the adoption of lease registration.

As both tenants and landlords are in agreement there should be mandatory lease registration, it is inexplicable that the Commission has not recommended mandatory registration and open accessibility for all leases.

## 9. Costs of registration

The cost of lease registration is very affordable (see Table 8.1), and should not be a deterrent to the mandatory registration of retail tenancy leases, and will generate funds for government. As government registries already exist for registration, there is little additional cost for the Government to provide the service of registration.

Search costs are also currently low and affordable, and would provide a benefit to Government, as it would be a further source of income to government.

## 10. Dispute Resolution

The Commission’s found at xxvii that “the incidence of formal disputes between retail tenants and landlords is very low” and also that “many judged the current disputes system to be working well particularly for disputes between **small landlords** and **small retail tenants, which** begs the question: **why has the Commission remained silent on large landlords and small tenants, although in its introduction it states that this Inquiry “stems from” this sector of the market?**

The Commission states that there is a view that latent substantive disputes exist that are greater in number than recorded, and yet **fails to carry out adequate investigation and examination to establish the likely number of these disputes. It concludes – without any due diligence or examination** - that preliminary assessment is that **the processes**

**are working reasonably well** and are widely accessible on the one hand, but on the other hand, goes on to say they can be improved by:

- *“improving dispute resolution accessibility”* and
- *“strengthening requirements for parties to use low cost alternatives prior to taking a case to a tribunal or court”*.

### **Dispute Resolution Costs**

The Commission’s findings that the costs of raising a dispute are modest is correct, but it has **evidently not investigated the real cost of dispute resolution through the courts**. The experience of Kingsley’s Chicken and the submission by the Australian Retailers’ Association (Submission 119) shows that these costs are indeed high, and the well resourced shopping centre landlord can drain the tenant financially over many years. Court action leaves small tenants financially drained and prepared to walk away.

Submissions made by:

- the Pharmacy Guild of Australia
- the Franchise Council
- the Australian Newsagents Federation

and other participants should have led the Commission, like the Reid Committee, to carry out investigation into leases that were not renewed. It would find that the low number of disputes that go to the courts reflects fear of the extremely high costs of dispute resolution in the courts. Westfield’s assertion that dispute resolution is *‘low cost and generally efficient’* is thus simply not true.

**The low level of recourse to formal disputation reflects the fact that intimidation and standover tactics by the shopping centre landlords, together with the extremely high costs of resolution in the courts, are the reasons for leases not being renewed instead of being taken to court.**

**Legislation should ensure that dispute resolution does not lead to recourse to the law courts** due to the extremely high cost of the court process, and the comparatively low rental difference being disputed. This would make the market efficient and effective.

### **Recommendation for Dispute Resolution as an alternative to the court process.**

- The tenant and landlord should each get valuations carried out (based on leases being accessible from a registry), and these should value the whole lease (not just the first year).
- There should be an avenue for mediation.



- If the mediator finds that no agreement can be reached, the matter should progress to a tribunal which should be enabled to appoint its own valuer to audit the two valuations and make its recommendation.
- The tribunal should then make a decision.
- An ombudsman should be set up so that there is an appeal process.
- There should be a strict timetable for the whole process.

This system would of course require mandatory registration of leases, as well as accessibility and the right of inspection by the public of these leases to facilitate transparency.

### **11. The Case for Prescriptive Legislation**

Using the Commission's figures (submissions 78 and 85), one out of five (20%) to one out of three (33%) of specialty tenants in shopping centres do not renew their leases.

It is not reasonable that specialty tenants would choose not to renew their leases, because they incur significant costs in not renewing, such as:

- a) write off of their capital investment
- b) write off of their goodwill
- c) payment to "make good" the site to the original condition of the site (some \$50,000 per site)
- d) (if they continue in business) the entire set up costs at the new site.

And these costs would be prohibitive to a small tenant, sending many into bankruptcy and breaking up families resulting in substantial social cost.

**That tenants would incur such substantial costs and yet "vote with their feet" to use the words of the Commission, is the clearest indication that there is market failure, and there should be detailed examination. We would expect this examination to result in a recommendation by the Commission for more prescriptive legislation providing for mandatory lease registration and accessibility of information on leases, and security of tenure for tenants.**

### **12. Legislation should also provide for Security of Tenure (Pg 40).**

The landlord can ascertain prior to issuing the first lease whether the lessee is 'riskier' or, as per Submission 112 p.5, a 'successful retailer', and both landlord and tenant are free at that stage to reach agreement, or "vote with their feet". New tenants currently do not have access to other leases to ascertain market value but can nevertheless at least make a commercial decision based on projected sales; however, the introduction of Disclosure

Documents as suggested in 8 above , and registration and accessibility of leases would provide key ingredients for decision making and risk taking.

This right to walk away, unfortunately, is an expensive option as spelt out in Point 11 above, after a tenant has invested both physical and entrepreneurial effort and capital to build goodwill in their business.

### **Westfield Arguments against Security of Tenure in Shopping Centres**

The Commission states that a lease should not grant a retail tenant a right to trade in the centre beyond that lease, and the business has little or no enduring goodwill from a shopping centre tenancy. We note that this argument was put forward by Westfield (Submission 85, p.21). Unlike the Commission, we disagree with this argument because both the lease documents currently used in shopping centres, and the State/Territory legislation governing retail tenancies, cover lease renewal and the rights of renewal, which would lead a tenant to believe that they have a right to expect lease renewal if they perform in accordance with the terms of the lease.

A landlord issuing leases which include clauses relating to renewal, while actually believing that the tenant has no rights beyond that lease (as in Submission 25), must raise the question whether that landlord is engaging in ‘misleading and deceptive conduct’. Legislation must require that a lease should clearly state whether new leases would result in a renewal or not if the terms of the lease are met, however introduction of any such change would result in a transitional minefield as rents that have been agreed to currently would have been agreed to with the full expectation of lease renewal.

As regards the arguments given by landlords in submissions against security of tenure (pg 106):

- **The landlord may wish to change the tenancy mix.** The landlord is free at any time to buy the tenant’s business, and do with their property as they wish.
- **The landlord requires vacant possession of the premises.** The landlord is free to buy out the tenant’s business and relet the premises whenever they wish to do so.
- **It would be substantially more advantageous to lease the premises to another tenant.** If all leases are registered, and the new tenant can establish what the rent should be, then perhaps the new tenant would buy out the existing tenant, instead of paying a rent which is advantageous to the landlord.
- **The tenant has substantially or persistently breached the lease.** This is breach of contract and of course the landlord has remedy at law for this, and there is abundant legal evidence of this occurring.

**The timing of lease renewals should require that agreement on terms for lease renewal be reached before lease expiration, with failure to do so resulting in the existing lease continuing as the basis for the tenancy relationship.**

## Negotiating Tactics by Shopping Centre Landlords

Shopping centre landlords use a number of tactics in negotiation for renewals, to get tenant capitulation and agreement to draconian rent increases that can be as high as 70% or more. Tactics used include:

- issuing terms to the tenant to sign off, as an offer to the landlord
- withdrawing the offer to renew the lease if the tenant disputes market rent, thus jeopardizing the tenant's tenure and livelihood
- tactically delaying the renewal negotiation to a date just before expiry of the lease, and demanding agreement to terms
- issuing termination notices on the expiry date
- if the tenant seeks relief by taking the dispute to court, the landlord drags the case out to make it uncommercial to the tenant.

To reduce the incidence of this behavior by shopping centre landlords, legislation should provide that failure to conclude lease renewals at market value before the expiration of the lease will result in the tenant continuing to pay rent at the old rate. There should be no 'back rent' paid if the renewal of the lease is finalized at a rental higher than the old rent after the expiry of the lease. These regulations would motivate the landlord to facilitate quick lease renewal at market value. There must be a strict timetable put in place for the determination of the lease renewal rent using a tribunal system, and with ombudsman appeal (perhaps one that we describe in Point 11) to determine the rent.

**If a landlord does not want to renew a tenant's lease**, the landlord must inform the tenant a reasonable period before the expiry of the lease (this is currently 12 months in A.C.T. legislation), and must offer to pay the tenant for the written down value of all equipment, and must also pay for the 'make good'. This would facilitate access to the property by the landlord and allow the tenant to move their business or wind down and move out.

**If the tenant does not wish to renew the lease**, they must provide notice to the landlord a reasonable period before expiry, or if the period is shorter, must pay rent, whether the site is occupied or not for the period past expiry for a reasonable period from the date of the tenant's notice.

### **13. Legislation should prevent demands by landlords to refit premises as this is a unilateral baseless impost by the landlord on the tenant.**

Legislation should prevent landlords from requiring fitouts. **The landlord, a supplier to the business, should not be able to interfere** and determine when a business **in which they have no investment, needs to be refurbished.** The tenant is carrying out a business, and if a store's fitout is not up to standard, the tenant's customers will stay away. The market will therefore determine whether a fitout is desirable, and tenants can

ascertain when to carry out a fitout for themselves. **The effect of unnecessary fitouts on carbon emissions**

The fitout of businesses that do not actually require upgrading is an inefficient use of resources, and also contributes to greenhouse gases and carbon emissions. This wasteful behaviour is not socially desirable, and can only be prevented by legislation.

#### **14. Legislation should prevent turnover reporting**

Legislation should prevent landlords from requiring the reporting of turnover as they are not investors in the business, and should not have a right to a return on the tenant's turnover. The only exception to this should be where the only rent collected by the landlord is based on turnover as, in this case, the landlord is sharing the business risk.

#### **15. Voluntary Code of Conduct**

Voluntary Codes of Conduct failed in the States and Territories, and will fail especially if in the hands of the ACCC, as the ACCC will not be in a position to investigate lease renewals of small tenants who are not of any national import. The transactional limits for the ACCC would be too high to address this segment of the tenancy market. **Only substantially more prescriptive legislation would correct this area of market failure and control the coercive methods of monopolistic shopping centres.**

#### **16. Compliance and Administration Costs**

**Draft Recommendation 2** concerns attempts to lower compliance and administrative costs for landlords, and for cross jurisdictional tenants.

The submissions relating to these costs were all from large shopping centre owners and not the broader market. The costs have not been quantified, and the Commission has not investigated what the actual compliance and administration costs are for these shopping centres. A simple analysis would show that this market has grown by 50%, in Australia, over the past 15 years, and some of these shopping centre owners have taken their business model to other countries, probably using capital from Australia. If compliance costs are that much of an issue, this growth by these commercial giants would not have occurred.

#### **17. Failure of the Commission to Address the Role of Retail Tenancies as a Source of Income for Tenants.**

In Terms of Reference No 1, the former Treasurer requested that the Commission examine the role of retail tenancies as a source of income to tenants. No evidence of any such examination appears in the Draft Report. The small specialty tenant has invested capital, time and effort to build goodwill, and is not in a position to move out without losing his livelihood. Any increase in rent from a renewal of his lease directly reduces his income from his business.

To determine the effect of retail tenancies as a source of income for tenants by interviewing tenants who have not renewed their leases, the Commission would have found the level and extent of financial drain, the breakup of families, bankruptcies and other social costs.

**18. Alignment of the retail tenancy market in shopping centres with the broader market for commercial tenancies**

**Draft Recommendation 3**, recommending the alignment of the retail tenancy market with the broader market for commercial tenancies, is not logical and ill founded. The lease renewal market for small specialty tenants in shopping centres is a monopolistic market, while the broader market for commercial tenancies is relatively efficient.

Analysis of the two markets shows:

The broader market for commercial tenancies	The market facing small specialty tenants in shopping centres
<ol style="list-style-type: none"> <li>1. This is an efficient market as there are many locations, many owners and many tenants</li> <li>2. The economic strengths of the landlords and tenants are comparable</li> <li>3. No evidence provided of intimidatory behaviour by landlords</li> <li>4. Market is working well, and landlords are happy to provide renewals to avoid vacancies which would affect their own income.</li> <li>5. The vacancy rate is lower than in shopping centres.</li> </ol>	<ol style="list-style-type: none"> <li>1. Each shopping centre is a monopoly as all the space is owned and controlled by the one landlord and there are many tenants.</li> <li>2. The landlords have substantially greater economic strength than their tenants.</li> <li>3. Serious allegations (pg 165) of large organizations representing large groups of small specialty tenants who report that disputes are not registered for fear of retribution, and fear of not being offered sites in other centres.</li> <li>4. Market failure has existed for the last 30 years with many legislatures attempting to provide security of tenure, while the landlords believe that the tenant has no rights beyond the lease they currently hold.</li> <li>5. Shopping centres have lower vacancy rates than the broader market.</li> </ol>

Shopping centres cannot be changed so that they more closely resemble the broader market, as **shopping centres by their nature have one owner and many tenants**. This basic error in analysis makes the Draft Recommendation ill-founded.

The recommendations that we have made, however, are very easily achievable and would make the market competitive, efficient and effective.

We trust the Commission will find that it is necessary to carry out further unbiased and comprehensive analysis, and focus on the monopolistic market segment relating to small specialty tenants in shopping centres, where there is clear and evident market failure because in each shopping centre, there is only one supplier and many buyers, which leads to coercive price determination with the tenant being under the threat of having a lease renewal terminated. It simply does not make sense to try to align the efficient broader market with a monopolistic market.

In its Terms of Reference the Commission was requested to make recommendations for improving the operation of the retail tenancy market. It is our opinion that the recommendations of the Commission in its Draft Report, if proceeded with, will harm rather than improve the operation of the retail tenancy market, and that the proposals in this submission to improve transparency are the best way to improve the market for all participants.