

28th August, 2014

Committee Secretary
Senate Economics References Committee
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Dear Secretariat,



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Re: Inquiry into the need for a national approach to retail leasing arrangements

I write to outline the Australian National Retailers' Association (ANRA) views on the need for a national approach to retail leasing arrangements.

ANRA represents Australia's largest retailers across the full spectrum of retail goods and services. ANRA's membership includes leading household names in supermarkets, department stores and specialty retailers. ANRA members account for more than \$110 billion of the more than \$260 billion in retail spending across Australia annually.

ANRA's central position is that there should be a nationally harmonised approach to retail leasing. However, any such framework should exclude large retailers and instead focus on the relationship between smaller retailers and landlords as this is the area where market-failure is most likely to occur.

A national approach ...

As national retailers, ANRA's members operate across multiple jurisdictions in Australia. This means any state-based regulations impose a higher compliance cost than would be the case under a national approach that required just one set of operating rules. As such, ANRA offers strong in-principle support for a national approach to regulation, including retail lease arrangements.

... that only covers small/medium retailers

Despite this support for a national approach, ANRA also believes that it is not necessary for large retailers to be part of such a regulatory framework.

Lease regulations are primarily focused on the relationship between small and medium sized businesses and landlords. These regulations are designed to address the reported market-failure that arises because of the different bargaining positions of small retailers and landlords. However, such a market failure does not exist for negotiations between large retailers and landlords. Retailers operating out of large stores, such as ANRA members, are comfortable negotiating with landlords. In circumstances where there is no market-failure to correct, any regulations imposed are simply restrictive red tape. As a result, it is appropriate to exclude large retailers from such a regulatory framework.

This exclusion is reflected in those state leasing regulations that exclude large retailers. This approach acknowledges that larger retailers have a greater capacity to negotiate with landlords than smaller operators. The system provides protections for smaller operators without inhibiting the competitive and sophisticated commercial negotiations between larger retailers and their landlords.

Moreover, some jurisdictions use listing status as a proxy for size of the retailer (i.e. all publically listed companies are excluded). However, ANRA members favour a store size limit (e.g. 1000 square meters as used in NSW) as there are a small number of retailers that use large format stores but are privately owned, such as the clothing retailer Best & Less. In a recent submission to the review of the *NSW Retail Leases Act 1994* ANRA recommended that any public listing exemption that is considered should be in addition to, rather than instead of, a store size based exemption.

Getting the balance right

It is important that any national approach provides protection without impeding competitive forces or discouraging innovation and flexibility as new retail formats emerge. This is a challenging balance for any regulatory regime but one that must be considered when implementing any national lease scheme.

For example, the terms of reference for this inquiry raises the issue of current retail tenants having the right of first refusal on a lease renewal. However, this imposes a minimum restriction on the landlord/tenant relationship outside the contract period. If tenants want to have the right of first refusal then this can be negotiated in the initial contract period and rents and lease arrangements will reflect this. It does not need to be a minimum requirement that has to be included in every lease agreement. Some retailers may not want this option, but be forced to pay higher than otherwise rents to have this 'right' they do not want.

Protecting commercial-in-confidence

Any national lease register should not compromise commercial-in-confidence information. Information put on the register should only be basic, such as rent and floorspace, and not include potentially sensitive information that could be misused by competitors such as sales data or negotiated incentives.

Avoid overlap with other regulations

Any new framework should not overlap with existing regimes that provide protection for business operators, such as existing competition laws and the Franchising Code of Conduct. New regulations must be focused on addressing market failure that is not already corrected and not just repeating existing protections. Areas of regulatory overlap cause confusion and uncertainty and should be avoided.

Drafting and implementation of any new framework should be cognisant of the Federal Government's stated deregulation and red tape reduction objectives.

Consistent rules

Apart from consistency between states, a national approach must also offer consistency between retailer locations. In recent years some states have considered introducing different rules for leases within a shopping centre and imposing additional burdens on landlords. ANRA does not support this approach as it distorts the market and creates confusion when legislators attempt to develop a workable definition of a shopping centre. All retail leases covered by any national leasing framework should be treated consistently.

Good faith bargaining requirement may limit need for more restrictive approach

ANRA would also encourage the Inquiry to examine the possibility of using the concept of good faith bargaining to underpin contract negotiations, as an alternative to heavily prescriptive regulations.

ANRA put forward such an idea on the recent inquiry into the Franchising Code of Conduct and believes that such an approach can be practically implemented and avoid the need for restrictive rules and costly legal actions.

Thank you for considering ANRA's position on the benefits of a national retail leasing register for small and medium retailers. Should you have any questions regarding this please contact Mr Russell Goss, Deputy Chief, at our Sydney office

Sincerely,

Margy Osmond
Chief Executive