24 February 2014

Dr Kathleen Dermody
Committee Secretary
PO Box 6100
Parliament House,
Senate Economics Committee
SG.64
CANBERRA ACT 2600

Dear Dr Dermody,

Inquiry into the need for a national approach to retail leasing

Please find enclosed the Shopping Centre Council of Australia's responses to the further round of questions on notice put to us by Senator Nick Xenophon and received via email on Tuesday 17 February, 2015.

Yours sincerely,

Angus Nardi
Executive Director

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ATTACHMENT 1 – Responses

1. **It's been put to me that landlords willingly negotiate long term leases of up to 10 years yet steadfastly refuse to provide rights of renewal to an equivalent time? For example, a 5 year plus 5 year lease or a 3 year lease with 2 x 3 year options?**

This statement overgeneralises the differing circumstances of regional shopping cetres (ie. large shopping centres) and neighbourhood shopping centres (ie. small shopping centres). Options leases are common in neighbourhood shopping centres. These tend to usually be of the 3x3x3 year variety. This is because the vacancy rates that exist in neighbourhood centres are usually much greater than exist in regional shopping centres. The most recent figures for 2014 published by JLL, for example, show vacancies in regional shopping centres were only 1.4% while in neighbourhood centres they were 4.2%. It follows that the market bargaining position of prospective tenants in neighbourhood centres is much stronger than those in regional centres.

Once the statutory minimum lease term of five years was introduced into retail tenancy legislation, five years generally also became the maximum lease term as well. This is an example where policy makers fail to understand the consequences of regulation. While there are examples of lease terms of more than five years in regional centres, the vast majority of leases are only for five years. A lease term of ten years, for tenancies protected by retail tenancy legislation, is very rare.

We draw reference to the verbal evidence given to this inquiry by Mr Michael Lonie from the National Retailer Association (NRA) regarding the issue of minimum lease terms:

"...If you get rid of that minimum term, the negotiations then open up widely. Queensland clearly has demonstrated that. There are more six, seven or eight year leases in Queensland than in any other state."

(Proof Committee Hansard, Senate Economics References Committee, 13 February 2015)

Mr Lonie suggests that the pressure for preferential renewal rights and discussions about options may be the result of the regulation of minimum lease terms. His evidence further suggests that deregulating minimum lease terms has led to longer leases in Queensland (where there is no minimum lease term specified in legislation).

Rather than seek to further regulate the relationship between a landlord and tenant, and further encroach on a shopping centres owner's freehold property rights, by introducing end of lease protections or requiring leasing options, the perceived anxiety about lease terms and renewals could be resolved throughout deregulation. This would leave the parties open to negotiating a mutually agreeable lease term.

2. **Development clauses are often included in the lease and according to legislation in some states does not attract compensation payment to the tenant if they are activated by the landlord. Given a tenant is often required to build an expensive fit-out as a pre-requisite for occupying a shop, how is it reasonable for the landlord to be able to terminate the lease by activating the development clause without paying compensation for the tenants loss?**

We believe this question is based on a false premise. We are unaware of any landlord being in a position to avoid the responsibilities and obligations under retail tenancy legislation in the event of termination of a lease in such circumstances. In all states and territories the relevant legislation contains minimum standards that must apply in the event of a lease being terminated as a result of a redevelopment of a shopping centre. If a provision of the relevant 'demolition clause' does not meet those minimum standards then the provision is void and the provisions of the Act prevail. (Please refer to section 56 of the *Victorian Retail Leases Act*; similar provisions exist in the legislation in all other states. The provisions in Western Australia are slightly different and are referred to below.)

Section 56 (and its equivalents) provides, among other protections for tenants, that "the landlord is liable to pay the tenant reasonable compensation . . . whether or not the demolition of the building is carried out, for the fit out of the retail premises to the extent that the fit out was not provided by the landlord." The amount of compensation is decided in negotiation between the landlord and tenant and, if agreement cannot be reached, is determined under the dispute resolution provisions of the Act.

It is important to stress that such clauses specify only minimum conditions (such as notification, timing of information and compensation) and it is open to tenants to negotiate more favourable conditions to apply in the event of demolition and many tenants do so. Ultimately such matters become a commercial negotiation between the landlord and the tenant and it is rare that agreement is not reached and for the dispute resolution provisions to be invoked.

Western Australia does not have a provision similar to section 56 in its retail tenancy legislation. However, in that state, a demolition clause cannot be relied upon unless the approval of the State Administrative Tribunal (SAT) is obtained. A landlord (or a tenant) must submit a proposed demolition clause to SAT for approval before it can apply.

3. **What do you consider is a fair and reasonable way of setting rent for lease renewals?**

On the renewal of a lease, it is fair and reasonable for a tenant and landlord to negotiate the terms of a new lease, including rent.

4. **In what circumstances do you consider landlords should be held accountable for decisions they make which adversely impact on their existing tenants? How should landlords be held accountable?**

Retail tenancy legislation already holds landlords accountable for a range of actions which may adversely impact on their existing tenants. These include: a landlord's obligations when tenants have to be relocated; a landlord's obligations in the event of termination of leases when a centre is being redeveloped; consequences for failure to provide a disclosure statement to tenants or issuing a false or misleading disclosure statement; consequences for failing to issue an annual estimate of outgoings or to provide a timely audited statement of outgoings; consequences for misleading and deceptive conduct and for unconscionable conduct by the landlord.

One searches retail tenancy legislation in vain for similar accountability on the part of tenants for actions which may adversely impact on landlords. A recent Discussion Paper in South Australia relating to a review of retail tenancy legislation even proposes restricting a landlord's right to enforce the most basic obligation of a tenant: to pay the rent for the premises that was freely negotiated between the two parties and outlined in the agreed lease.

In addition to the areas of accountability outlined above, retail tenancy legislation in all states and territories also includes provisions requiring landlords to pay compensation for loss or damage in a range of areas. (Please refer to section 34 of the *NSW Retail Leases Act* and equivalent provisions around Australia.) These circumstances include, among other actions, if the landlord substantially inhibits the tenant's access to the premises; if the landlord takes action that substantially inhibits or alters the flow of customers to the premises; if the landlord unreasonably takes action that causes significant disruption to, or has a significant adverse effect on, the tenant's trading; and if the landlord neglects to adequately clean, maintain or repair the shopping centre.

We would point out that such compensation is only payable in shopping centres. If a retailer is in a shopping strip or a main street location and, for example, the local council decides to dig up the footpath outside their shop, or a state government transport authority makes major changes to routes, thereby impeding access to the shop, they have no legislated right to compensation at all.

It is also sometimes claimed that the landlord should be held accountable for the introduction of another retailer selling the same products (as a result of a redevelopment or simply a change to the centre's tenancy mix).

The issue of exclusivity is addressed in the context of the disclosure statement at the start of lease negotiations. There should be no expectation that the retailer will not face additional competition at some stage. Indeed for a retailer to argue that they should have a legislated right not to face competition, or not to face additional competition, flys in the face of competition policy and would probably attract the attention of the ACCC.

The issue of competition needs to be considered rationally. It makes no sense for a shopping centre manager to introduce a competitor if the introduction of that competitor substantially damages an existing retailer. While no-one would argue that such judgments can be made with complete precision, they are usually based on a careful assessment of increased demand for particular products or services, and whether existing retailers can meet that demand.

A shopping centre manager has to put the interests of the centre (and therefore its customers) first. If there is only one café in a centre and it regularly has long queues of customers waiting to be served, the manager, in the interests of the centre and its customers, would be remiss not to seek to meet this demand by introducing another café. The café owner, of course, is quite happy to have customers queuing up for their product as this maximises their turnover but it is not in the interests of the centre or its customers. If the centre manager did not act to meet this excess demand, then customers would eventually get tired of waiting and take their custom elsewhere and this would ultimately be to the detriment of all the centre's retailers.