

4 September 2014



Dr Kathleen Dermody  
Committee Secretary  
Senate Economics References Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

By email: [economics.sen@aph.gov.au](mailto:economics.sen@aph.gov.au)

Dear Dr Dermody

**Inquiry into the need for a National Approach to Retail Leasing Arrangements**

The Law Council of Australia welcomes the opportunity to respond to the Committee's inquiry into the need for a national approach to retail leasing arrangements. Thank you for granting a short extension so that the Law Council could consult further amongst its expert members.

I am pleased to enclose a submission prepared by the Australian Property Law Group (APLG) of the Law Council's Legal Practice Section.

The APLG would welcome the opportunity to discuss the submission further. Please contact Hannah Jaireth on (02) 6246 3722 or [lps@lawcouncil.asn.au](mailto:lps@lawcouncil.asn.au)

Yours sincerely

A handwritten signature in black ink, appearing to read "Martyn Hagan".

MARTYN HAGAN  
SECRETARY-GENERAL

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# Retail leasing arrangements

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## Senate Economics References Committee

**29 August 2014**

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## Introduction

1. The Law Council of Australia welcomes the opportunity to make a submission to the inquiry by the Senate Economics References Committee into retail leasing arrangements.

2. The terms of reference for the inquiry require the Committee to consider:

*The need for a national approach to retail leasing arrangements to create a fairer system and reduce the burden on small to medium businesses with associated benefits to landlords, with particular reference to:*

- (a) the first right of refusal for tenants to renew their lease;*
- (b) affordable, effective and timely dispute resolution processes;*
- (c) a fair form of rent adjustment;*
- (d) implications of statutory rent thresholds;*
- (e) bank guarantees;*
- (f) a need for a national lease register;*
- (g) full disclosure of incentives;*
- (h) provision of sales results;*
- (i) contractual obligations relating to store fit-outs and refits; and*
- (j) any related matters.*

3. This submission addresses the terms of reference generally in Part 1, then sequentially in Part 2.

4. The views expressed in this submission rely on the expertise and experience of senior property lawyers who are members of the Australian Property Law Group (APLG) in the Law Council of Australia's Legal Practice Section. The APLG includes members of state and territory law society and bar associations' counterpart committees, representing the Law Council's 'Constituent Bodies'.

5. The Law Council of Australia is the peak national representative body of the Australian legal profession. It represents some 60,000 legal practitioners nationwide. [Attachment A](#) provides further details in this regard.

### **General comments**

6. The Law Council of Australia broadly supports a transition to a national approach to the regulation of retail leasing.

7. Consideration of the need for a national approach to retail leasing arrangements by the Senate's Economic References Committee is particularly timely.

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8. The Law Council has been heavily involved in two property law reform projects, namely:

- (a) the development of the National Electronic Conveyancing Law; and
- (b) the consideration of a Uniform Torrens Title Act.

Both of those projects illustrate the benefits that a nationally consistent approach in the property law sector can bring to participants, advisers and to the community as a whole.

9. Since Constitutional responsibility for real property based laws lies with the states and territories, there has been, and continues to be a divergence of regulatory regimes amongst Australia's various jurisdictions.
10. It is the Law Council's view that if a nationally consistent "best practice" model can be promulgated not only for the property law aspects of retail tenancies, but on a wider property law basis, then its adoption will provide significant benefits to all participants.
11. Given the impetus of technological change which is driving the E-Conveyancing initiative, and the broader policy discussions about the role of Torrens Title and land office registries, the Law Council welcomes the opportunity to provide some preliminary views in relation to the specific terms of reference set out below.

### **The first right of refusal for tenants to renew their lease**

12. An automatic first right of refusal is not supported by the Law Council. The matter of a first right of refusal should be for the parties to negotiate and is not something that should be the subject of national legislation.
13. In some jurisdictions there are already requirements in the legislation for a landlord to notify the tenant of their intentions at the end of the lease term, with an automatic extension of the lease being available in certain circumstances.<sup>1</sup>

### **Affordable effective and timely dispute resolution processes**

14. The Law Council supports the development of a national approach to dispute resolution. The Law Council's submission to the Productivity Commission's *Access to Justice Arrangements Inquiry* suggested that all levels of government should begin working toward national objectives on access to justice, and provide sufficient funding to meet those objectives. In the Law Council's view, the rationalisation of court procedures, pre-action protocols, targeted alternative dispute resolution (ADR), amalgamation of tribunals and other measures can improve the efficiency of the justice system and should be supported. However, providing access to justice and remedying inaccessibility can only be achieved if it is recognised that justice is a public good, with public benefits, and it is funded accordingly.
15. It is noted that in New South Wales affordable effective and timely dispute resolution processes are already in place, with mediation, and affordable timely tribunal hearings, with the Office of the Small Business Commissioner participating. Part 8 Division 2 of the [Retail Leases Act 1994](#) (NSW) deals with mediation. Part 8 Division 3 deals with the retail tenancy claims and unconscionable conduct claims, and the determination of claims by the NSW Civil and Administrative Tribunal. This system is working well in

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<sup>1</sup> See ss 44 and 44A of the *Retail Leases Act 1994* (NSW)

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the view of both the Alternative Dispute Resolution Committee of the Federal Litigation and Dispute Resolution Section, and the Legal Practice Section's Australian Property Law Group.

## **A fair form of rent adjustment**

16. The Law Council suggests that the New South Wales legislation provides a fair form of rent adjustment and may be a desirable model for national harmonisation.
17. The New South Wales legislation provides for market rent reviews both during the term of a retail lease and on the exercise of an option. The legislation prevents ratchet clauses applying. It enables the valuers to know what criteria are to be taken into account, and allows for valuers to have access to information concerning incentives and rent frees and outgoings.
18. The *Retail Leases Act 1994* (NSW) includes various sections which deal with the issue of a fair form of rent adjustment. For example:
  - s 18 provides restrictions on adjustments of base rents and includes restrictions on ratchet clauses;
  - s 19 provides for reviews of 'current market rent' (as defined);
  - s 31 provides reviews of current market rent on exercise of options;
  - s 31A regulates the uses of information provided to a valuer; and
  - s 32 provides an opportunity for a lessee with an option to renew or extend to have the current market rent determined between six and three months before the expiry of the option.

## **Implications of statutory rent thresholds**

19. The Law Council considers that rent thresholds should be discussed and agreed by the parties in each lease negotiation, and should not be the subject of statutory intervention.

## **Bank guarantees**

20. The Law Council considers that the *Retail Leases Act 1994* (NSW) operates fairly in relation to bank guarantees and could be a model for national harmonisation. Part 2A Division 1 of the Act regulates security bonds. Parties may choose whether to use that legislation with security deposits, or separately have their own agreement and use a bank guarantee, as negotiated on a case by case basis.

## **A need for a national lease register**

21. Consistent with the development of a Uniform Torrens Title Act, the Law Council would not support the concept of a separate register being created for retail leases. The appropriate register for leases is, in the Law Council's view, the Land Titles Office Torrens Title Register in the various states and territories.
22. The adoption of a Uniform Torrens Title Act, would allow for a uniform and consistent approach for registering leases, whilst respecting the rights of each state and territory to maintain their own Torrens register.

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23. The Law Council considers that national consistency in the registering of leases is desirable. At present there is a divergence of regulatory approaches amongst jurisdictions, with some jurisdictions, such as Victoria, not ordinarily requiring leases to be registered on the register, but relying on the right of occupation as providing good title to tenants, whereas other jurisdictions require leases of a certain duration, to be registered. In New South Wales, leases are generally registered in the Land Titles Office Register and as part of harmonisation or even a national approach, it is recommended that all leases should be registered where they are for a term of greater than, say, three years.

### **Full disclosure of incentives**

24. The Law Council considers that the relevant provisions of the *Retail Leases Act 1994* (NSW) could be the starting point for a model for national harmonisation. Section 19 of the Act provides for reviews of current market rent and s 31 deals with reviews of current market rent on the exercise of an option. Both provisions require a lessor to supply information on incentives and other information to specialist retail valuers.

25. However, the Law Council recognises that the negotiation of the terms of any retail tenancy requires confidential discussions as to the financial arrangements, and that the confidentiality of a particular incentive is often for the mutual benefit of both landlord and tenant.

26. The Law Council's APLG Executive Committee does not yet have a consensus view as to whether it is practical and enforceable to require "full" disclosure of incentives, but the Committee is interested in debating and considering the matter further.

### **Provision of sales results**

27. Section 50 of the *Retail Leases Act 1994* (NSW) prohibits a lessor from divulging information required by the lease to be provided to him or her concerning the turnover of the lessees' business, except in listed circumstances. The exceptions include for example, where the lessee has given consent; disclosure in a generic document that does not identify an individual business; disclosure to a court, arbitrator, mediator, valuer or other professional adviser, or in good faith to a prospective purchaser of the retail shop or the building of which it forms part. There should be no reason why a landlord should not have access to this information, if the parties agree that the landlord is allowed to have access provided the landlord keeps the information confidential.

### **Contractual obligations relating to store fit outs and refits**

28. Where parties can agree amongst themselves in relation to a proposed development, there is no need for legislation to intervene. In the Law Council's view, it is up to the parties to negotiate when a fit out or a refit can occur, and the extent of a fit out or a refit. The *Retail Leases Act 1994* (NSW) does include relevant provisions but these are not necessarily appropriate for national harmonisation.

### **Any related matters**

29. The Law Council supports deregulation, and the removal of "red tape" where that is consistent with best practice and does not compromise the achievement of legislative outcomes. Retail lease legislation can be burdensome for small to medium businesses in relation to disclosure requirements.

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For example in NSW, the [Schedule 2](#) lessor and lessee disclosure statements requirements can involve the compilation of several hundreds of pages of information. There appears to be scope for simplifying these disclosure requirements whilst still providing useful information to the parties.

30. The Law Council would be very interested in further contributing to discussions in relation to the simplification and clarification of those disclosure requirements.

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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia represents the legal profession at the national level, speaks on behalf of its Constituent Bodies on national issues, and promotes the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2014 Executive are:

- Mr Michael Colbran QC, President
- Mr Duncan McConnel President-Elect
- Ms Leanne Topfer, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Dr Christopher Kendall, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.