
**REVIEW OF BARRIERS TO BUSINESS SET-UP, TRANSFER
AND CLOSURE**

**Submission to the Productivity Commission – February
2015**

Submission by the

Shopping Centre Council of Australia

20 February 2015

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1.0 Executive Summary

Thank you for the opportunity to provide this submission to the Productivity Commission's *Inquiry into Business Set-Up, Transfer, Closure*. The Shopping Centre Council of Australia (SCCA) represents Australia's major owners, managers and developers of shopping centres. A full list of our membership is provided at section 5.

Put simply, shopping centres are platforms for retail and other businesses to - relatively easily and cost effectively - enter, transfer within and exit the marketplace.

As per the background preamble associated with the *Inquiry's* terms of reference, **Australia's shopping centres play a huge role in "fostering innovation, competition, and thereby driving productivity and economic growth".**

A shopping centre owner's engagement with retail and other business entries is highly regulated through retail lease legislation. This State and Territory based regulation also provides for considerable rights and protections for tenants.

For a shopping centre owner to accept the property risk that comes with owning and managing a shopping centre, they anticipate that they will get a reasonable return on their investment. In the event that a business in their centre fails, or decides to exit for other reasons, minor, but important, protections in retail lease legislation assist to safeguard this investment.

As such, **the SCCA's interest in this inquiry is** threefold and we would welcome a draft (and final) report from the Commission which makes the following related findings:

Firstly, the Commission estimated in 2008 that there around 60,000 leases in shopping centres across Australia (there would be considerably more now). Shopping centres are required to constantly evolve to maintain an appealing tenant mix and facilitate emerging retail trends, such as the current trend towards maximising the fresh food and food and beverage offerings within shopping centres. In doing so, shopping centres are hubs of innovation and facilitate the entry of new businesses. Examples of this include:

- Facilitating the entry of international retailers into new markets across Australia,
- Providing opportunities for small or emerging retailers through short term (pop-up) leasing options, and
- **Facilitating emerging 'bricks and clicks' retail formats, where by a retailer integrates physical retail with an online presence.**

Suggested finding: Shopping centres invest heavily in innovation and act as dynamic platforms for businesses to enter, and grow within and between, markets.

Secondly, the benefit of leasehold arrangements provided for in shopping centres significantly reduce the barriers to entry for new businesses by lowering the capital cost required to establish a business (the alternative being the significantly higher cost of purchasing a freehold property), and considerable rights and protections are afforded to tenants under prevailing retail lease legislation, including comprehensive dispute resolution processes. Periodically suggestions are made to afford leasehold tenancies rights akin to freehold tenure, including providing a first right of lease renewal. We oppose these suggestions.

Suggested finding: Prevailing leasehold arrangements in shopping centres significantly reduce the capital barrier to entry for a new business than is associated with freehold title for a new business, and significantly reduces the capital risk for businesses upon failure and/or exit.

Thirdly, our members have commercial exposure to businesses which fail or exit for external reasons (eg. sale of business). They rely on a number of regulatory provisions, including lease assignment provisions and security bonds (often in the form of bank guarantees) to protect their interests in circumstances when a business exits, or changes hands. This is entirely appropriate. We **can't find any comment in the** Issues Paper regarding the protection of third parties who may be impacted commercially by a business exit.

Suggested finding: There are important regulatory protections which are afforded to shopping centre owners which safeguard their commercial interests in the event a retailer or other business in their centre fails, or decides to leave for other reasons, that should be retained under prevailing retail lease legislation.

We agree with the Commission's observation on page two of the Issues Paper that it has "*a large body of relevant work*" to draw on to inform this most recent review. We have actively participated in a number of relevant recent Commission inquiries and studies, including the 2008 Market for *Retail Tenancy Leases in Australia* inquiry, the 2011 inquiry into the *Economic Structure and Performance of the Australian Retail Industry*, the 2011 *Planning, Zoning and Development Assessment Study*, and the 2014 study into the *Relative Cost of Doing Business: Retail Trade*.

We are actively involved in the Competition Policy Review and are anticipating the release of the **Review Panel's Final Report early this year**. Our involvement in a Senate Economic References Committee inquiry into the need for a national approach to retail leasing arrangements has also just concluded. The Senate Committee is expected to table its report in early March 2015.

The issues of planning and zoning and trading hours regulation have been considered and reconsidered by the Commission and others, including the Competition Policy Review Panel, as noted in the Issues Paper. Taking the Commission's lead, rather than revisit these issues in full, we simply refer to our previous commentary and recommendations on these matters and **don't intend to say anything further in this submission**.

We note that, most recently, we provided the following relevant recommendations to the Competition Policy Review Panel:

Trading hours

(We recommend) the removal of remaining regulation of shop trading hours. We recognise this is a matter for state governments. Nevertheless the Federal Government can significantly influence the decisions of these governments, through COAG and in other more direct ways. The Review Panel should recommend the Federal Government seek to persuade the remaining States to either completely deregulate trading hours (as in the ACT and the NT) or adopt the Victorian/Tasmanian model (where shops can open at any time, on any day, except Christmas Day, Good Friday and Anzac Day morning.)

Planning and zoning

The Review Panel should recognise the Productivity Commission's previous findings and recommendations in relation to the competition in Australia's planning systems and endorse these as the basis for reforms to be progressed at the relevant State and Territory levels.

(SCCA submission to Competition Policy Review Panel, June 2014)

In recognition of another Commission inquiry on foot, that into the *Workplace Relations Framework*, we will not be providing commentary on the impact of workplace relations frameworks, except to note that the Productivity Commission, in its recent study of the *Relative Cost of Doing Business: Retail Trade*, has recently commented that *"labour costs are the single largest area of expense for most retail businesses, whether based in Australia or elsewhere"* (p. 17, Final Report). The SCCA will be submitting separately in response to Commission's inquiry into workplace relations.

We would be happy to elaborate on any aspect of this submission. The SCCA's contact details are provided at page 16.

Angus Nardi
Executive Director

2.0 Shopping centre innovation

Suggested finding: Shopping centres invest heavily in innovation and act as dynamic platforms for businesses to enter, and grow within and between, markets.

More so than any other commercial asset type, shopping centres need to be constantly changing and growing to ensure they maintain a relevant tenant mix and continue to appeal to their customers. If shopping centres don't innovate, they will stagnate, lose their appeal to customers and face a decline in trade. In this regard, innovation and change is not only to the benefit of the owner, but it facilitates new business investment and benefits existing businesses in a shopping centre.

Shopping centres are also barometers of emerging customer preferences, such as the trend toward fresh food retailing and the increased prominence of cafes and restaurants. This is backed up by industry data which demonstrates that there was a 5.1% increase in turnover in 'food catering' in large regional shopping centres, and a 5.8% increase in CBD centres, in 2014 (Urbis Benchmarks, 2014).

This trend has exposed some barriers (or at least some delays) for new businesses entering a shopping centre as they go through the process of securing the appropriate licenses, specifically liquor licenses. This has started to present some back end delays for our members seeking to time the opening of a redeveloped centre. In the context of the Competition Policy Review we agreed with the Review Panel that the "ongoing review" of liquor retailing regulations should occur to "ensure that they are meeting their stated objectives at least cost to consumers" (p. 109, Competition Policy Review Draft Report). We are in early discussions with liquor authorities in some jurisdictions about how the licensing process can be further streamlined to prevent delays.

There are a number of particular innovations which are prominent across the shopping centre industry and deserve particular attention, not least because they clearly demonstrate that shopping centres chase investment from new business entries, provide short term / reduced commitment opportunities to help new businesses to 'start-up' and actively respond to retailer and customer preferences for multi-channel retailing opportunities.

2.1 Facilitating international retailers

The last 18 to 24 months has seen an influx of international retailers to Australia's shores and the shopping centre sector has played a huge role in facilitating their entry into different markets across Australia.

Shopping centre owners have essentially functioned as Australia's retail Business Development Managers to help drive this wave of retail investment and innovation. They have accommodated the specific requirements of these large multi-national organisations, such as large floor plates and multi-level tenancies and facades, in order to secure their entry to the Australian market.

The types of retailers that have entered the market in recent years are highly sophisticated and it has taken considerable effort from shopping centre owner to secure their investment in their centres. It has been noted by some industry commentators that "for many global retailers Australia is still a nice to have, rather than must have location" (Colliers 2013, pg. 11), so the shopping centre sector should be acknowledged for the role it has played in attracting these new businesses to Australia.

By way of example:

- The three current **H&M** stores in Australia are in SCCA member owned shopping centres (Melbourne GPO – owned by ISPT, Macquarie Centre – owned by AMP Capital, and Indooroopilly Shopping Centre – owned by Eureka Funds Management). H&M is one of the top 50 largest retailers internationally.

- The four current **Uniqlo** stores in Australia are in SCCA member owned shopping centres (MidCity Centre – part owned by Lend Lease, Macquarie Centre – owned by AMP Capital, Chadstone Shopping Centre – part owned by Novion Property Group, and Emporium Melbourne – owned by Novion Property Group).
- The six current **GAP** stores in Australia are SCCA member owned shopping centres. GAP is one of the top 100 largest retailers internationally.

Shopping centres will also play a key role in the entry of some of these retailers into Western Australia, with the AMP Capital owned Garden City Booragoon facilitating **Zara's** introduction to Perth, and Lend Lease owned Lakeside Joondalup reported to be welcoming **H&M** later this year.

Although the retail sector, and consumers, have been energised by these arrivals, a recent Deloitte report, *Global Powers of Retailing 2015*, reveals that only 15% (or 37) of the top 250 international retailers are currently operating in Australia, with the largest segment being apparel/footwear. Deloitte notes that this gap, and the decline in the Australian dollar, is likely to see continued interest from international retailers and, therefore, potentially more competition for domestic retailers.

2.2 Short-term (pop-up) leasing options

The shopping centre sector is also increasingly playing a role in facilitating pop-up or start-up space for emerging businesses. As noted on one SCCA member's website, pop-up opportunities are an *"an exciting way to trial a new business opportunity"*, demonstrating in as many words how shopping centres are using this innovative, lower cost and higher flexibility approach to assist retail and other business entries to the market. At the same time, these emerging businesses are able to trial their business plans without entering into the obligation of a long-term lease.

This approach also has the dual advantage of allowing shopping centres greater flexibility in managing vacant retail space in circumstances where, for example, a longer term tenant cannot be secured immediately following the previous business exit, while maintaining a dynamic and interesting environment for customers.

2.3 'Bricks and clicks'

Shopping centres are also accommodating of formats where a retailer integrates physical retail with an online presence. For example, stores within centres can be the collection point for online purchases and centre websites can also facilitate retail purchases.

The Collection Bar at Mirvac's Sydney Broadway shopping centre is another great example of a shopping centre interacting with online retailing.

It is also becoming more common for shopping centres, particularly the large regional centres, to provide free wi-fi capabilities for customers.

3.0 Benefits of leasehold

Suggested finding: Prevailing leasehold arrangements in shopping centres significantly reduce the capital barrier to entry for a new business than is associated with freehold title for a new business, and significantly reduces the capital risk for businesses upon failure and/or exit.

Acknowledging that the Issues Paper spends considerable time contemplating the presence of barriers to business entries and **what “efficiency-enhancing” changes could be made to “reduce such barriers”** (Inquiry ToR), we think it is valuable for the Commission to reflect on business models which already significantly lower barriers to entry, and exits for that matter, for new retail and other businesses.

We agree with the observation in the Issues Paper that **“access to finance, from either debt or equity sources, is crucial for business set-up and expansion”** (p. 10) and highlight to the Commission that retail leasing already significantly reduces the capital barrier to entry that retail or other businesses would otherwise experience in securing a freehold shop.

The capital cost and associated risk continues to be carried by the shopping centre owner.

3.1 Leasehold lowers the barrier to entry

Retailers often prefer to rent shops rather than purchasing their own properties. This is because leasehold, unlike freehold, removes the property risk **from retailers’ business plans**. This means they have a smaller capital outlay (or a lower debt) and greater flexibility in locating their business.

By definition, the security of tenure under a leasehold agreement is only provided for the term of the lease. However, leasehold is inherently more flexible than freehold as a tenant is not anchored to their current premises for any longer than the period of the lease. This is particularly important if the location turns out to be a poor one for their retail offer. It means that they can relocate to another centre or to another retail location at greater convenience at the end of the lease.

By purchasing a shop the owner retailer is anchored to that location. If they want to move from that location, they are exposed to the risk that any attempt to sell the shop will be (during poor trading periods) difficult and protracted. They have to find a buyer **for the retail business (not an easy task if it is in a poor retail location) or, if they can’t sell the business as a going concern, they have to find a buyer for the shop** (which also might not be easy if it is a poor location for retail).

Although owner retailers and tenant retailers both carry the risk that their business plans will not be successful, a tenant retailer carries no property risk. As such, if a tenant **retailer’s business fails, that is the extent of their loss. They do** not also carry the risk that property values will decline. That risk is being carried entirely by the owner of the shop or by the owner of the shopping centre.

While tenants may struggle through sluggish periods in the retail sector, they **don’t have** the compounding issue of also managing the debt on a mortgaged property during these periods. Tenant retailers are able to fully concentrate on managing their business, while the property risk continues to be carried by the landlord.

For ease of understanding, the relative advantages of freehold and leasehold are demonstrated in **Table 1** below, which compares the position of the owner retailer and the lessee retailer (both in a shopping strip and a shopping centre).

Table 1. 'Owner' Retailers v. 'Lessee' Retailers

	Capital outlay required	Risk being carried	Advantages	Disadvantages
Owner retailer	<ul style="list-style-type: none"> • purchase of shop, including financing costs • fit out of shop • business set up costs 	<ul style="list-style-type: none"> • property risk • retailing risk 	<ul style="list-style-type: none"> • security of tenure • no rent 	<ul style="list-style-type: none"> • greater capital outlay • more capital at risk • unable to easily change locations (less mobility) • generally subject to mortgage
Lessee retailer (shopping strip)	<ul style="list-style-type: none"> • fit out of shop • business set up costs 	<ul style="list-style-type: none"> • retailing risk 	<ul style="list-style-type: none"> • less capital outlay • less capital at risk • greater mobility • lower rent (than a shopping centre) 	<ul style="list-style-type: none"> • no security of tenure beyond term of lease • lower turnover • less control over location of competitors
Lessee retailer (shopping centre)	<ul style="list-style-type: none"> • fit out of shop • business set up costs 	<ul style="list-style-type: none"> • retailing risk 	<ul style="list-style-type: none"> • less capital outlay • less capital at risk • greater mobility • higher turnover and sales productivity • greater control over location of competitors 	<ul style="list-style-type: none"> • no security of tenure beyond term of lease • higher rents (than a shopping strip)

Leasing space in a shopping centre also has the added benefits of relatively high productivity and turnover (approximately \$110 billion total turnover in 2013-14, Urbis) and footfall (approximately 4 billion in 2013-14, Urbis), and a coordinated approach to, for example, centre marketing and security.

At time of writing, a review of publically available commercial property listings reveals that a freehold building, apparently with three shops under one tenancy, in Chapel Street in Melbourne has an asking price of \$6,500,000. **One shop on Sydney's Oxford Street has** an asking price of \$2,200,000. Presumably, these figures would also be exclusive of required fit-out costs. This gives an indication of the scale of the capital barrier that a retailer would need to overcome if they wanted to secure a freehold shop in a premium retail strip.

3.2 Leasehold is not freehold

We regularly engage with **State and Territory Government's** on reviews of prevailing retail lease legislation. By way of example, the South Australian **Retail and Commercial Leases Act** is currently under review, the review of the Queensland **Retail Shop Leases Act** concluded at the end of last year and the review of the NSW **Retail Leases Act** is continuing.

In the process of these continuous inquiries, including a Senate inquiry into the need for a national approach to retail leasing (which has recently concluded), we are often faced with suggestions that the protections afforded to retail tenants should become more akin to those enjoyed in freehold premises. This includes suggestions that a leasehold tenant should be afforded first and/or last right of refusal upon the renewal of their lease. We strongly oppose these suggestions as they would further encroach on the freehold property rights of the landlord.

If a retailer wants the security of freehold premises, they should purchase a shop.

This means they will need to overcome a significant additional capital barrier and assume responsibility for managing the associated property risk, which is otherwise negated in a leasehold arrangement.

We stress this point to cut off at the pass any suggestion that the significant lowering of the barrier to entry presented by leasehold tenure is not enough and that even more protections including, for example, lease renewal rights, are needed. Doing so would effectively offer a leasehold tenant the protections of freehold title, but without the associated cost. This would also erect further barriers to other, perhaps more innovative, retailers entering the industry.

As the lower capital barrier provided for through leasehold in a shopping centre is provided for as a result of the landlord continuing to carry considerable property and investment risk, we object to any suggestions which would see a leasehold tenancy afforded quasi-freehold rights. These suggestions are most frequently raised in the context of security of tenure and the opportunity for tenants to have a first/last right of refusal upon lease expiry.

It is our strong view that end-of-lease restrictions are fundamentally unfair, and

- would stop centres from reinventing and redeveloping,
- would unfairly provide incumbent tenants with the benefits of freehold title but without the cost and risk of freehold title, and
- discriminate against other small retail tenants by limiting competition and restricting the entry of new retail tenants.

We note that most pieces of retail lease legislation provide that retail leases must be of a minimum five year term. The exception is Queensland, which does not specify a minimum term. During verbal evidence provided by the National Retail Association (NRA), at the recent public hearing held by the Senate Economics References Committee as part of its inquiry into the need for a national approach to retail leasing, it was suggested that the pressure for a first right of renewal may be the result of the regulation 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)

The NRA's evidence points to the fact that deregulating minimum lease terms has led to longer leases in Queensland. Rather than seek to further regulate the relationship between a landlord and tenant, and further encroach on a shopping centre owner's freehold property rights, by introducing end of lease protections, the perceived anxiety about lease terms and renewals could be resolved through deregulation. This would leave the parties open to negotiating a mutually agreeable lease term.

3.3 Other protections and dispute resolution

In addition to benefiting from a lower capital barrier, tenants also have other protections and access to related processes, including dispute resolution mechanisms, inherent in prevailing state and territory based retail lease legislation. To a large extent, these protections are there for the sole benefit of the tenants, not the landlord.

These protections include (not exhaustive):

- what information must be provided to a prospective tenant, and when, in the form of a disclosure statement, and penalties for providing incorrect information in a disclosure statement (for example, the potential invalidation of a lease),
- how and when a landlord can go about advertising space in their shopping centre if there is a sitting tenant,
- rules for rent reviews,
- how disruptions to business operations (eg. redevelopment works) must be managed and compensated, and
- what costs a landlord can and can't recoup from a tenant as outgoings.

Retail lease legislation in each jurisdiction also provides for low cost dispute resolution mechanisms. These, typically, seek to have disputes resolved informally or mediated between parties before it can proceed to the relevant tribunal or court for deliberation.

In NSW, for example, the Retail Leases Act outlines that a retail tenancy dispute may not be the subject of proceedings before any court until the Registrar who, in this case, is the NSW Small Business Commissioner, certifies in writing that the mediation was unsuccessful. There is no application fee for mediation and it costs \$152 per hour (shared equally between parties). If unsuccessful, a dispute claim can be lodged with the NSW Civil and Administrative Tribunal (NCAT, formerly the Retail Leases Division of the Administrative Decisions Tribunal) for decision. The NCAT can also hear unconscionable conduct claims under the provisions of the Retail Leases Act.

By and large, disputes between landlords and tenants are resolved prior to, or at, mediation. By way of example, the Victorian Small Business Commissioner reported that in 2012-13 they received 1,103 applications for dispute resolution related to the Retail Leases Act. Of these, only 594 progressed to mediation and the success rate was 80.3%. These numbers are consistent with information provided earlier in the report which details that about 42% of all applications received by the VSBC are resolved prior to mediation.

These dispute resolution mechanisms give tenants confidence that there is a relatively affordable mechanism whereby any issues with their leasehold tenancy can be resolved, thereby making it a more attractive proposition for a business entry.

Our members also advise that these processes work relatively well and we have no concern about jurisdictions mandating that parties attempt to mediate a dispute prior to a matter being progressed to a tribunal or court.

Although we stress to the Commission that retail lease legislation is not there to protect landlords, and is there primarily to the benefit of lessees (but largely to the administrative cost of a landlord), we concede that there are some regulatory protections and processes which further reduce barriers to entry for retail and other businesses into leasehold tenancies, in shopping centres in particular, which make them an even more attractive place to establish a business.

4.0 Protections for landlords upon business exit or transfer

Suggested finding: There are important regulatory protections which are afforded to shopping centre owners which safeguard their commercial interests in the event a retailer or other business in their centre fails, or decides to leave for other reasons, that should be retained under prevailing retail lease legislation.

We note that the Issues Paper seems to be silent on the issue of protections for third parties which may be impacted commercially by a business exit. While the paper notes that *"business closures, particularly where businesses fail, have a number of negative effects"* (pg. 14), the subsequent list of impacts does not reference the potential costs/losses to a third-party that was deriving an income from the operation of that now closed or failed business.

In forming its findings, we urge the Commission to acknowledge the important, although relatively minor, regulatory protections which are afforded to landlords under prevailing retail lease legislation which protects their interests in the event a retailer or other business in their centre fails, transfers ownership or exits for other reasons.

Shopping centre owners can also register their financial interest in relevant property within a **tenant's fit-out** through Federal personal property security legislation (although this framework is relatively complicated and not well understood, a point we raised during the recent review of the *Personal Property Securities* Act facilitated by the Federal Attorney General's Department).

The nature of this exposure for landlords includes potential non-payment of rent or outgoings, **failure of a tenant to 'make good' their premises** on departure, abandonment of goods, and a gap in income stream from a premise while a new tenant is found.

Considering the benefits of the lower barrier to entry afforded to tenants through the leasehold arrangements in shopping centres, and the associated protections which are afforded to tenants during the life of their tenancy, it is entirely appropriate that a landlord has some regulatory protections which safeguard their commercial position and ameliorate the potential impact of a business exit (or transfer).

Criticism is often levelled at shopping centre landlords that the protections described below, in fact, increase the barriers to entry to a shopping centre; are too onerous on tenants; and lead to inefficiencies. This is particularly the case with respect to the requirements for tenants to provide some form of security to a landlord, and the control a landlord is able to apply in the context of lease assignment.

We disagree and note that, unlike almost every other aspect of retail lease legislation, these items are there for the benefit and security of the landlord so they can safeguard their commercial interests, not for the protection of the tenant. We also point out that some of our larger members have recently reported close to 100% occupancy of their centres, which is hardly a reflection of a sector with a high barrier to entry.

4.1 Security deposits, including bank guarantees

We note that the Issues Paper states that *"it is often the lack of equity available to the business that requires business owners, or people associated with them, to provide guarantees and security such as residential real estate"* (p. 10, Issues Paper).

We would say that the more fundamental point is that, regardless of the equity that is available to a tenant, a commercially exposed third party, such as a landlord, should be able to safeguard their interests in the event that a business fails.

The provision of a security deposit **relates to a lessee's obligations under the lease**. It is there for the benefit of the landlord and is only drawn upon when a tenant breaks a relevant lease condition. The ability to obtain a security deposit is a common mechanism in most retail lease legislation and they are a small but important protection of shopping centre owners.

Security deposits should not be construed by the Commission as a barrier to entry for new businesses, as is claimed by some stakeholders.

By way of example, the Jewellers Association of Australia (JAA) recently claimed in the context of the Senate inquiry into the need for a national approach to retail leasing that:

"the practice of having to give a cash deposit, or a bank guarantee supported by a cash deposit, for three month's rent in advance, in addition to paying a month's rent in advance, is in our view onerous, and I think it also detracts from the ability of small businesses to operate as efficiently as they could".

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

The JAA, and others, misunderstand the objective of a security deposit and fail to acknowledge that they are there for the benefit of the landlord, not the tenant. Security deposits are a small concession for the lower barrier to entry, and associated benefits, which come with leasehold tenure. Further, when compared to the capital that would need to be laid-down upfront to purchase a freehold shop which, in some cases could extend into the hundreds of thousands of dollars, providing a security deposit or **guarantee to the equivalent of several months' rent is a relatively small price to pay.**

The JAA's comment also makes **a judgment that the lessor's right to security for their own property is somehow less important than the lessee's need for cash.**

Security can take a number of forms, including the provision of a bank guarantee drawn in favour of the shopping centre owner. Bank guarantees are a common tool of security across many business sectors, not just retail leasing, and we are not aware of any administrative issues that have arisen as a result of the use of bank guarantees as a form of security.

A guarantee is released when the lease ends and the lessee has met all their lease obligations, and the guarantee is only drawn upon when a lessee fails to meet their obligations under the lease. Provisions regarding the draw down and return of a bank guarantee are matters for lease negotiation and for agreement with the relevant bank. Insolvency legislation addresses key points in relation to when such guarantees may be called upon.

It should be noted that the use of bank guarantees as a preferred form of security has arisen as a result of the over-regulation of cash security deposits now defined in some retail leasing legislation. While, historically, a shopping centre owner was able to hold a **tenant's cash deposit relatively unencumbered, regulation is increasingly seeing** owners being required to deposit a security deposit into a government operated account or scheme, such as the Retail Bond Scheme in NSW. This has had the disadvantage that tenants now receive very little interest on their cash security deposit.

4.2 Fit-out requirements

The issue of fit-out requirements is often thrown back at shopping centre owners as being an onerous barrier to entry to a shopping centre.

We disagree, and note that fit-outs are necessary in all shops, whether they are in a shopping centre, a strip shop or a stand alone shop. It is also worth noting that fit-out costs can be amortised over the period of the lease.

Fit-outs are extremely important to maintaining the brand and appeal of a shopping centre. This is not dissimilar to a franchisee being required to maintain their business to a standard acceptable to the franchisor.

Although slightly removed from the premise of a commercial exposure upon a business exit, ensuring that tenants have quality fit-outs is a mechanism to ensure that the shopping centre remains attractive and appealing to customers, thereby safeguarding the profitability of the centre and its retailers.

Fit-out requirements are also vastly misunderstood and taken out of context. To site one **scenario, a 'luxury precinct' in a high-end shopping centre** is hardly going to prosper with retailers that have cardboard signs blu-tacked to the shop front. It is also often the surrounding retailers that have an interest in ensuring a high standard of fit-out.

Fit-out requirements also address the need to comply with relevant laws, such as the energy efficiency requirements of the *National Construction Code* and the disability access requirements related to the *Disability Discrimination Act*. These are hardly **onerous or required on the basis of a shopping centre owner's whim**.

Other requirements need a tenant to ensure that a fit-out does not obstruct vision to **adjacent retailers**. One member's fit-out guide also gives guidance on Environmentally Sustainable Design (ESD) and **provides tips on how to 'create maximum impact' with their tenancy**.

It is important to understand that a shopping centre owner cannot impose upon a tenant a requirement for a store fit-out and refit which is not provided for in the lease. If such a provision is included in the lease, it means the owner and the tenant have agreed to these provisions.

Lessors also know that excessive fit-out costs will retard rental growth so it makes no sense for a lessor to be imposing ridiculous costs on a tenant if that is going to jeopardise their ability to pay rent. It must also be recognised that fit-out standards vary significantly depending upon the location of premises. In strip centres and small shopping centres, fit-out standards are often non-existent or minimal. In high-end shopping centres, however, they are a factor contributing to the centre being classified as **'high-end' and retailers know, if they seek premises in such centres, they must expect to pay** higher fit-out costs and that new fit-outs will almost certainly be a requirement of a new lease.

4.3 Lease assignment

In the event that a tenant wants to leave a tenancy before the end of their lease, they are able seek to assign their lease to a third party. Lease assignments occur at the instigation of the lessee, not the shopping centre owner, and, as such, an owner is not involved in identifying an appropriate assignee.

In most jurisdictions the shopping centre owner maintains the right to determine whether an assignee is adequately skilled to take on a business in their shopping centre, with no recourse to the lessee/assignor for the **landlord's exercise of that discretion**. This means that the landlord has a **say as to whether the 'new' retailer has the appropriate** experience to run a business in their shopping centre. Limitations also exist around the continued use of the premises in accordance with the agreed use. This means that a lessee cannot find an assignee that will turn a shoe shop into a restaurant.

It should remain a landlords right to do due diligence on an assignee to determine if they are, for example, going to have the necessary experience and ability to meet their critical obligations (such as rent obligations) over the term of the lease. This is also important in protecting adjacent retailers against poorly-performing or inexperienced retailers taking over the premise and, therefore, leading to reduced foot traffic to that part of the centre.

Without limiting a tenant's ability to seek to, for example, sell their business and assign their lease to another party, it is entirely appropriate that a landlord is able to insert themselves into the decision making process and retain final control over the retailers in their centres.

5.0 Shopping Centre Council of Australia

The Shopping Centre Council of Australia represents Australia's major shopping centre owners and managers. Our owners own and manage more than 11 million square metres of retail space. Our members are AMP Capital Investors, Blackstone Group, Brookfield Office Properties, Charter Hall Retail REIT, DEXUS Property Group, Eureka Funds Management, Federation Centres, GPT Group, Ipoh Management Services, ISPT, Jen Retail Properties, Lancini Group, JLL, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Novion Property Group (formerly CFS Retail Property Trust Group), Perron Group, Precision Group, QIC, Savills, SCA Property Group, Scentre Group (formerly Westfield Group and Westfield Retail Trust) and Stockland.

Contact

The Shopping Centre Council would be happy to discuss any aspect of this submission.