

SHOPPING CENTRE

COUNCIL OF AUSTRALIA

3 July 2015

Business Set-up, Transfer and Closure
Productivity Commission
GPO Box 1482
CANBERRA ACT 2601

Via email: business.inquiry@pc.gov.au

Dear Sir/Madam,

Draft Report – *Business Set-up, Transfer and Closure Inquiry* – May 2015

The Shopping Centre Council of Australia (SCCA) would like to make the following comments in relation to the Productivity Commission's Draft Report in May 2015 on the *Business Set-up, Transfer and Closure Inquiry*.

The SCCA provided a submission in response to the Issues Paper and also appeared at the 29 June public hearing in Sydney. I commend the verbal evidence provided at this hearing by my colleagues to you for consideration.

In this letter I will address in further detail the issues canvassed at the public hearing. Reflecting the nature of questioning at the hearing, I pay particular attention to the concerns raised by my colleagues regarding the proposal to extend current unfair contract term protections in the Australian Consumer Law to business to business contracts.

This letter also addresses the Presiding Commissioner's request for information regarding rates of insolvencies among retailers in shopping centres.

Business to business unfair contract term protections

The SCCA is very concerned about the statement on page 219:

"The Commission supports an extension of current protections in the Australian Consumer Law against unfair contract terms and conditions to small businesses, particularly as they share many similarities with individual consumers."

We also note, for completeness, the following sentence, with which we do not take issue:

"Crucial issues in implementing any extension to small businesses include identifying what is a 'small business' and what contracts should be within scope."

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We are unaware of any substantial study or inquiry, by the Productivity Commission or any other agency, which would justify the Commission's support for the extension of unfair contract term protections to small businesses. This was not part of the terms of reference of the Productivity Commission's *Review of Australia's Consumer Policy Framework* (Inquiry Report No 45 April 2008), which preceded the introduction of the Australian Consumer Law. None of the Commission's recommendations (which are listed on pages 65-76 of Volume 1) refers to, or even infers, that they would apply to business-to-business transactions. In particular, the recommendation relating to unfair contracts (recommendation 7.1 on page 71, which is considered in more detail in chapter 7.5 of Volume 2 of the Report) makes no mention of business-to-business contracts. Nowhere in the Commission's extensive discussion of 'Unfair contract terms legislation' (Volume 2, chapter 7.5, pp.149-169), and in its further discussion on 'Unfair contract terms' (Volume 2, Appendix D pp.404-441), does the Commission mention the extension of this law to business-to-business contracts.

We note that in a separate inquiry in 2008 the Productivity Commission did consider the notion of 'unfairness' in business-to-business transactions. In the report of the inquiry into *The Market for Retail Tenancy Leases in Australia* (Inquiry Report No.43 March 2008, p212), the Productivity Commission said:

"Attempting to legislate what constitutes a 'fair transaction', and what does not, is inherently difficult and is likely to add further uncertainty to the meaning of unconscionability and potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increasing uncertainty."

The Commission also concluded that introducing regulations relating to 'fairness' in business-to-business transactions could lead to 'moral hazard':

"Businesses would be afforded greater protection when undertaking negotiations or in a business transaction, increasing the likelihood of bad decision making through the reduced negative consequences of such decisions".

These comments by the Productivity Commission were made only one month prior to the release of its report on *The Review of Australia's Consumer Policy Framework*.

At the hearing on 30 June 2015 the Presiding Commissioner expressed the view that it was unlikely that many small businesses would take action under the new law because of legal cost considerations. We would be surprised if the Federal Government was introducing a law which was, in a practical sense, unenforceable. As we pointed out at the hearing, actions can also be brought by the regulator (see the proposed section 250 of Schedule 2 of the *Competition and Consumer Act*). In addition, industry associations are obviously in a position to fund actions on behalf of members. We also made the point that most of the legal costs will be borne by the party under challenge since the onus is on that party to prove that the contract is not a standard form contract and also to prove that the contract term is not unfair. When this matter was under consideration in 2009, and before the (then) Federal Government decided not to proceed with extending the unfair contract terms protections to business contracts, HBL Ebsworth Lawyers commented that:

"...the new provisions, if introduced, are likely to quickly become among the most litigated provisions in the [then] Trade Practices Act."

The Presiding Commissioner also expressed the view at the hearing that our concerns about 'double regulation' of retail leases (which are already regulated by state or territory retail tenancy legislation) would be assuaged by the exemption provisions of the Bill. In our submission on the Exposure Draft Bill we pointed out:

"We consider this provision is too restrictive and sets the bar far too high. We doubt any law could be prescribed if these provisions are taken literally. The provision removes any discretion that may be needed by the Minister in making a judgement about whether the provisions of another law are "equivalent" to the unfair contract terms provisions" (p.9).

Unfortunately our recommendation for drafting changes was not adopted. Since the Bill was introduced on 24 June 2015, the law firm, Baker & McKenzie has noted:

"The Bill contains a very narrow power to exempt small business contracts that are subject to a prescribed law identified by regulation. For a law to be eligible to be prescribed, the Minister must first be satisfied that the law provides "equivalent protections" to the unfair terms laws to a business employing fewer than 20 people. The narrow scope of the exemption means few, if any, laws are expected to qualify for listing." (Client Alert 1 July 2015).

(Incidentally the SCCA is not a client of this law firm and this firm was not the source of the legal advice on which we based our drafting recommendation on the exemption procedure in our submission on the Exposure Draft, referred to above.)

The consistency of this legal advice suggests retail leases to small businesses – which are likely to range to up to 20% of all speciality leases in shopping centres and a much higher proportion of leases outside shopping centres – will be subject to 'double regulation' by governments. This is frustrating because the Productivity Commission has previously found, in its inquiry into *The Market for Retail Tenancy Leases in Australia*, that:

"...it is unlikely that market tensions will be resolved or eliminated by government intervention into contracts through retail tenancy or other regulation" (Report p.xxvi).

Indeed the Commission's recommendations in this inquiry involved moving away from restrictive regulation – recommendations which have largely been ignored by state and territory governments.

As requested by the Commission at the hearing we **attach** copies of our submissions on the 'Consultation Paper - Extending Unfair Contract Term Protections to Small Businesses', dated 1 August 2014, and our submission on the 'Exposure Draft – Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015', dated 12 May 2015.

Commercial leasing arrangements

We have a general comfort that the Commission has not made any specific recommendations with regard to the commercial leasing arrangements discussed on page 220 of the Draft Report. We note that the Commission has deferred to the recommendations of previous inquiries and reviews.

For the easy future reference of the Commission, we **attach** the submission the SCCA provided to the Senate Economics References Committee inquiry into the need for a national approach to retail leasing, dated August 2015. This submission provides a comprehensive overview of the SCCA's position with regard to a range of relevant retail leasing matters, including shop fit-out obligations, renewal rights, dispute resolution and sales reporting.

Planning and zoning

With respect to planning and zoning, as noted in the verbal evidence provided at the hearing, it is still the SCCA's overarching view that, despite many reviews and inquiries, an overly simplistic view of retail planning and policy exists. Coupled with this is our view that too much attention has historically been given to the pleas of so called "new entrants" rather than delivering a level playing field for all participants.

We have since offered general support to the Competition Policy Review Panel's planning and zoning recommendation in its Final Report to Government released in March. In particular, we support the specific and deliberate link it draws with the proposed introduction of a "public interest test". We have provided a submission to Federal Treasury in response to the Final Report and look forward to engaging further with the Federal Government and jurisdictions on this reform area.

Insolvency among retailers

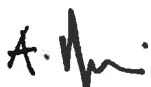
The Presiding Commissioner requested we supply any information about the rates of insolvencies among retailers in shopping centres. We do not have such information and have been advised that this information is not specifically collected by our members. The Productivity Commission has previously made a study of market entry and exit rates for retailers in its inquiry into *The Market for Retail Tenancy Leases in Australia*. This is included in the report of that inquiry at pp. 32-35. The Commission found:

"Entry and exit rates of retail businesses is not exceptional compared to other service activities. The survival of retail businesses in shopping centres is in line with survival rates of retail businesses elsewhere" (p.35).

We note that the Commission has updated much of this information in Appendix B of the Draft Report.

Please contact Kristin Pryce, the SCCA's Senior Adviser, on 02) 9033 1941 or kpryce@scca.org.au for any further information.

Yours sincerely,



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Executive Director