Productivity Commission Inquiry:

The Market for Retail Tenancy in Australia

Submission by WA Retailers Association Inc

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INTRODUCTORY COMMENTS

This submission focuses on the questions asked by the Productivity Commission (PC). That focus does not mean that the WARA considers answers to the questions to be either adequate for the PC to respond to the terms of reference or sufficient to meet the economic and social disaster that has prompted this inquiry.

Not all questions have been responded to. Given the short duration of the inquiry and the correspondingly limited time to make submissions it has not been possible to address some of the issues in depth or, in some cases, at all. Further submissions will be made progressively during the course of the inquiry.

This inquiry has such a short lead time; it parallels the Referendum on Retail Trading Hours which was announced to coincide with the WA State election in early 2005.

Since the Reid Report in 1997, real progress in the retail tenancy arena has been notable by its absence. In essence, it has been a very one-sided bloodbath with great wealth conferred upon a few chosen ones and enormous suffering inflicted on those whose blood, sweat and tears has then seen their Castles and their capital effectively transferred to those chosen few.

Bankruptcies are up in WA. Many wonder how people can still go belly-up in a so-called boom state.

These statistics, do not tell the whole truth. Indeed, I have often thought to myself that I have been personally involved in more than the bankruptcy numbers given.

The real situation is that very large numbers of the people in financial difficulty don't actually declare formal bankruptcy. They battle on and they go without and the statistics simply do not record their struggle and their privations.

This submission is those people's story..

You may or may not be aware of what people at both the grass-roots and the coal-face of retailing have been saying about this Inquiry. Probably the most common response has been "too little, too late" and, from a small retailers' perspective, "so much damage has already been done".

There is a great deal of cynicism about the timing of this Inquiry and especially about the Productivity Commission's Final Report not being due until after the dates likely for the up-coming federal election.

The most common feeling has been that the small retailing and small business sectors appear set to once more be

a) side-lined; side-tracked and otherwise neutralized; and
b) mucked around by 'economic and academic' experts armed with clipboard preferences for tables of data and, then worse, by politicians.

It would be easy to say that a great many small business people think that the law (and government inquiries) is an ass. Their feeling, however, goes much deeper.

I hear is a fairly steady stream of comments about how the law is against them and how just cannot afford lawyers, how would you feel if you were asked to put $50,000 into a lawyer's trust find and they'll come back to you when they need more?

You might be inclined to tick the box that confirms that they have "issues with access to justice" but even this doesn't do the feeling of small business any favours as frankly, Trade Practices law in this country is failing to help small business and to protect them from big business.

The Trade Practices Act is obviously inadequate, expensive, and it's painfully slow. It doesn't do what it is supposed to do. This is not good government or good legislation

Given the above, what is sought above all else is major changes to the Trade Practices Act and legal and administrative mechanisms to make it work..

Our submission includes many examples of where the legal process has broken down. Small business people have tried and tried the court systems over and over again and essentially, come-up not only achieving nothing of value but financially gutted and emotionally traumatized by the their experiences.

Small retailers are now deserting our courts and voting with their feet. They are heading for our nation's Tribunals instead.

Whilst required reforms to the Act are now way past overdue, there are also opportunities to much more comprehensively co-ordinate what is proposed as a mandatory Code of Conduct on Retail Leasing attached to the Trade Practices Act through the various levels of government and in particular through Australia's tribunal system.

1.0 What are the strengths and weaknesses of the current structure and functioning of the retail tenancy market? And… what are the effects (both positive and negative) on your business, and the wider community?

The current structure of the retail tenancy market has made winners out of a comparatively tiny number of corporations. In particular it has made huge financial winners of the senior executives and to a lesser extent, the shareholders of the corporations.

The key weakness of the current structure of the retail tenancy market is that while it has made a relatively small number of corporate 'executive' investors wealthy, this wealth – or transfer of capital if you like – has been at the expense of a very much larger group of individuals.

These people have invested their savings and the family home to try to beat what, in essence, has been a system that has been designed to ensure that their Lessor and the Lessor's representatives always win.

The message is getting out that the retail leasing market is very much loaded in the Lessor's favour.

Lessors' lawyers and staff write the agreements and large Lessors' representatives are not allowed to vary the pre-packaged legal wording of contracts and addenda.

The major weakness of the current functioning of the retail tenancy market is the apparent inevitability and indeed certainty of having one's small business at the mercy of a landlord who has the scale economies and tenancy knowledge to dominate individual tenants. Some strategic information has to be supplied by speciality shops which materially disadvantages them in their tenancy negotiation (e.g. monthly turnover figures).

This certainty has had attraction for the large number of superannuation firms who are Lessors leveraging their businesses at well above average rates of return or yields on what could be termed unethical investments. They are unethical because they are misusing their market power to transfer capital from a relatively under-informed lessee .

Since 1979, the core business of the WARA has been to assist the Association's members with retail tenancy matters. The section headed "The story behind the WA Retailers Association Inc" discusses this work.

The positive effects for the Australian economy of the current structure and functioning of the retail tenancy market are considered as having being outweighed many times over by the negative effects.

Major achievements have been that on two occasions in our current Chief Executive's tenure (over 8 years now), clear wins have been accorded on the issue of no further deregulation of trading hours in Western Australia.

Another positive outcome has been recognition that more resources and effort have to be provided to prospective small retailers *before* they sign a lease that doesn't give them an even break.

There needs to be a great deal more effort applied to informing existing retailers about what can be done to alleviate the financial and other hardships before they find themselves beyond the financial point of no return.

Unfortunately, the Association's target membership group (people who have already signed a small shop lease which is then held against them when they least expected for this to be the case) tends to either already be over-represented in all of the wrong kind of statistics.

The economic multiplier effects on the wider community are substantial. A dollar spent in a Western Australian country town goes around that local community some eight times which is distinctly dissimilar to the rents repatriated to the eastern seaboard-based banks of the major Lessors.

The reports compiled by PriceWaterhouseCoopers for both the National Association of Retail Grocers Australia (NARGA) and the Franchising Council of Australia (FCA) provide a valuable analysis of some of he issues. We are sure that the PC will have been given copies of these studies.

1.1 Does the functioning of the market for retail tenancies enable your business to operate effectively and efficiently, including in lease negotiation?

No. The major reason is what has been termed "information asymmetry"[1].

[1] *This a term coined by the Principal of the Australian Lease Management's Stephen Spring in his address to the July 2007 Small Business Summit in Sydney.*

What this term alludes to is that the information for any particular shopping centre is guarded by the Lessor's representatives very zealously. An existing or prospective tenant has enormous difficulty in accessing the information they need to make informed business decisions.

This is made even more difficult in States such as Western Australia where there is no form of lease registration.
Tenants have to rely on tenant-friendly organisations such as WARA to assist them to resist landlord gouging, particularly at market rent review and lease renewal time.

According to WA legislation (the Commercial Tenancies Act of 1985 as amended in 1998), the mechanism for a tenant to find and then retain their own Valuer – as is required by the legislation - is ridiculously difficult.

A series of factors that operate at different levels combine to significantly and seriously detract from an individual small business person's ability to be effective and efficient in the valuation process.

It is not merely because a small number of the larger real estate groups refuse to share all of their information though this is definitely an abiding characteristic of the situation.

Locating a working Valuer who will do the necessary legwork is a very rare breed.
The vast majority of working valuers are retained by those with an interest in keeping values artificially high for retail landlords.

On page 13 of the July 2007 edition of Australian Retailer, Don Gilbert wrote about this phenomenon, stating:

"… many valuers who accept appointments do not understand businesses and how they operate; cannot "test" evidence; often want to "create value" and not "interpret value", viz: (They) act as advocates which I can only think is a "cultural problem"; do not apply evidence to the outcome to make adjustments for terms of the lease, size of premises, location, frontage, depth, permitted use, wider fundamental economic and socio-economic issues."

Without a Valuer, the notion of some information provided by the Lessor's Valuer (who is usually an in-house agent) being better than none usually applies.

If a reasonably-priced, competent working Valuer is located and retained, the chances of there being a dispute between what has been proposed by the Lessor's representatives and the tenant's Valuer is, in my experience, one hundred percent. Every tenant valuation and proposal will be disputed. Please note that the word "competent" is used because a competent Valuer will have regard to numerous factors including comparing like with like which Lessor Valuers do in only a very limited range of situations.

Gaining agreement from the Lessor and the Lessee about the appointment of a third Valuer (as required by the WA legislation) is also fraught with great difficulty in Western Australia.

This difficulty can best be described as deriving from an Australian Property Institute (please note that the API is professional body for valuers) Ruling that they will not intervene in a dispute involving two of their members and specifically, because of their interpretation of section 11 of the 1998 amendments to the original 1985 Act in the state of Western Australia.

There is an emerging mutation of many of the above-outlined matters in the State Administrative Tribunal (SAT.)

In a recent case before SAT a convenience store-cum-deli was compared to a liquor store and a pharmacy – that is, the like for like characteristic went right out of the window.

Don Gilbert has outlined the specifics of why this is not good valuation practice and a draft of his full article on this subject is submitted as Appendix A.

In summary, if stuffing people into a giant retail leasing sausage machine where only the name of the Lessor's lawyers differentiates the final product is what you mean by enabling "your business to operate effectively and efficiently, including in lease negotiation", this is what has been happening for many years.

Tenants are discouraged from changing a single word of their legal leases.The Lessors then know that they have got complete control over their small retailers in regard to tenancy conditions..

We should have standardized leases overseen by an independent authority, for example, by a unit that registers all retail shop leases's essential commercial terms and conditions because the legal clauses of the shop lease would already have been vetted as meeting the new mandatory Code of Conduct for Retail Leases?

I think that this would be a very, very significant step forward.

1.2 Is there evidence of failure in the efficient operation of the market for retail tenancy leases?

The answer is YES.
Combined, they suggest that the "failure" alluded to in the question is not only the status quo for the vast bulk of the market but that the WA State government has as yet not recognized or acknowledged the full extent of this failure..

1.3 What are the main features that influence your business's retail leasing arrangements?

The movement *from* net leases (or leases comprising net rent + budgeted and audited Variable Outgoings + rates & taxes + marketing & promotional levies) *to* semi-gross leases is also well underway.
Lessor's representatives complain long and loud that relatively few people get caught having to pay the additional rent. What they do not tell you is that the major function of the percentage rent clause is to get the tenant's numbers and then to actively work against the tenant's best commercial interests.
If the principles of both natural and procedural fairness along with basing rent on turnover is so sacrosanct, why doesn't it cut both ways? For example, with the break-even pointed utilized above of $1 million and say only $600,000 of sales is achieved, why isn't there a rent reduction?
The answer is simple: If it works to the Lessor's advantage, it's in and if it doesn't, it is out.. Every single expense that can possibly be sheeted home to the small retailers is charged for.
This point needs to be understood very clearly because in the retail leasing market, absolutely everything is charged for. A retail shopping centre is in other words, not like the negative gearing a landlord does on a residential rental property.

1.4 What do tenants and landlords look for in lease arrangements?

Small retailers also look for fairness. !
The technical aspects of what lessors tend to insist upon (usually at the tenant's expense yet to the lessor's advantage) and what lessees have very, very little choice about is detailed in section 1.3.

1.5 What, if any, is the relationship between the market for retail tenancies and the broader market for commercial tenancies?

This question presumes a knowledge of the circumstances applying in commercial tenancies. WARA is not sure how it fits within the terms of reference or which witnesses could give a balanced and knowledgeable response. The tenancy markets are separate.

2.0 What are the implications, if any, for the market in retail tenancy leases, of trends in urban and regional development, and changes in consumer preferences, in technology and in ways of working? How might such changes affect retail tenants, landlords and investors?

Centre public relations campaigns which outline the number of jobs created or the amount of stamp duties payable to the WA State Government and/or of new rates and taxes to the local council involved also tended to happen *before* the regional centre came into being.

Most shopping centres are now <u>not</u> publishing customer count data (sometimes still referred to but now as pedestrian traffic). This move from doing something and then dropping it like a hot potato is fascinating as customer counts were instrumental in persuading retailers that the move from strip shopping (often still referred to high street shopping from the experience in the UK) had potential.

Personalizing this even further is one of Australia's leading valuers in Don Gilbert from Queensland who – on page 13 of the July issue of the Australian Retailer magazine – asked: *"If the market rent of specialty shops is say 70% overstated… (and these shops) occupy 70% of the 'value', what extent are your businesses propping up a portion of these centers, wittingly or unwittingly?"*

<u>2.1 How have these changes impacted on the current market structure and functioning and how might they affect the market into the future</u>?.

Appendix A is but a single example in Western Australia. The cases and case studies provided in this Submission on the notion of unconscionability go even further.

Craig Kelly's data and bar graphs (for a copy, please see Appendix B) is another clear example that over-valuations for the largest section of the market AND the charging of 'below economic' or wholesale rents for the anchor tenants is not only rife but also so extraordinarily commonplace on the eastern sea-board that this overall pattern, in my view, simply cannot continued to be brushed under the carpet or ignored any longer.

The "failure" mentioned in the Commission's in the question is widespread and in evidence at all levels of government within Australia.

WA has had only had two Reviews of its Commercial Tenancies legislation in well over 22 years. There have been thirteen Reviews throughout Australia in the same timeframe.

Governments of both major hues politically have, in my view, either ignored the failure of efficient operation of the market for retail tenancy leases nation-wide or failed even the most basic duty of care towards the majority of companies in this market!

In my experience (which involves a minimum of one independent small business tenant issue per working day for the last 8 years) CERTAINTY & COMMERCIAL SUSTAINABILITY are the major goals but unfortunately, they are seldom achieved.

The larger regional and sub-regional centres set in train the worst examples for the bulk of the market which the neighbourhood and suburban shopping centres follow. .

For example, the movement away from fully gross leases (where the Lessor still takes some of the financial risk) is almost fully complete now in WA.

Under a semi-gross lease, prohibited content like the charging of management fees to tenants is included in the semi-gross rent and , very convenienetly for the Lessor's representatives, there's no more auditing of the many expenses that get included in variable outgoings with semi-gross leases .

The larger centres charge an annual rent review increase of either CPI + 1.5% or CPI + 2%. That's a built-in and guaranteed yearly profit which conveniently for the Lessor is also compounding on a small retailers' occupancy costs AND is over and above any above market rental in the first place.

The smaller centres have followed the larger centres in their adoption of this practice.

Next is cost-cutting by Lessors and their agents and the lack of valuers for independent retailers. Instead of a Lessor's managing agent having to complete a valuation for every tenant at market rent review and lease expiry time, they subscribe to a national database that lists only the peak occupancy rents achieved right around Australia for that particular tenancy.

An example should both illustrate and illuminate the process at issue.

Say you have a hairdresser in a shopping centre who has a market rent review due. The Lessor's agent accesses the database and finds somewhere in Australia where a tenant is trying to operate their business with an above-market rental.

Let's say it's a third of their sales turnover – it is generally accepted by professional accountants that no specialty shop can operate with an occupancy cost of more than 20% by the way – this tenancy is accepted as a valid comparison.

There is no acknowledgement or even recognition that if this comparison is allowed to stand, the hairdresser with the market rent review will follow the hairdresser who accepted an uneconomic above-market rental into bankruptcy in the medium term.

Unless the tenant has retained an informed business advisor (and possibly a competent Valuer as well –see above as to how difficult this is in WA), that hairdresser hasn't got a snowball's chance in hell.

The Lessor can also cut the expensive of even subscribing to the national database.

They can simply pluck a very high figure out of the air at lease renewal time (say 40/50/60% or more.)The number is significant in that this financial year's CPI figure for WA was just a shade over 3%, the previous three full financial years' CPIs were all below 3% .

Michael Lonie of the Australian Retailers Association talks of a non anchor retailer being both super vulnerable and an "economic captive" who is simply told to "Take it or leave it".

If they accept the increase, they quickly find that they are up for every expense imaginable. The Lessor's lawyers' fees and proportional amounts for everything from gardening, security, cleaners for the common areas, council rates and taxes are all included.

In one case the Commercial Tribunal of WA was unbundling all of the items in an audit of what is known as the budgeted variable outgoings of a net lease.

The Centre Manager who was also in charge of the leasing for this shopping centre)but who did not have an office at the centre as they managed more than one centre for the Lessor) was particularly agitated by this process and complained at every opportunity.

When a matter involving charges for background music was raised, this person protested very vocally that that it was a particularly legitimate expense given that this music was especially piped to anyone using the escalators.

The trouble was this particular Centre was a single-storey shopping centre. It didn't have any escalators and neither did the other centre this person managed either! An offer of settlement emerged shortly thereafter.

Centre Management has the benefit of small specialty shop retailers signing a lease with a percentage rent clause in it. These numbers are then charted and monitored very regularly.

These numbers and charts tell the Lessor and the Lessor's representatives what potential there is for ramping up the rent at market rent review and lease renewal time. They also

give key insights as to what effects adding further direct and indirect competitors has on that particular tenant's business.

If this is not insidious enough, there is another benefit (beyond requiring the tenant to provide their monthly sales figures, that is) of a percentage rent clause: If the tenant's annual turnover exceeds the rental multiplied by the percentage rent expressed as a decimal - for example, 10% equals 0.1 – the tenant has to pay an additional rental charge of 10% of the amount the turnover exceeds the what is referred to as the break even point.

In the above example of a 10% percentage rent and a rental of say $100,000 a year, the break even turnover is a million dollars. Now, if the tenant sells $1.1 million in that year, the additional rent payable is 10% of $100,000 which equals an extra $10,000 in rent.

These same representatives do not publicise another clause that is invariably in leases with percentage clauses in them. This clause details that the if lessor's represenatatives suspect that the real numbers are not being supplied, that the tenant can be audited (at the tenant's expense, of course) and that financial penalties for under-reporting start at 10 times the amount found to have been understated.

The reason is that technically, if all of the Variable Outgoings of a centre are charged out, they cover the cost of running the centre.

This, means that centres are profitable from the day they exceed their Variable Outgoings which is very early in the product life cycle of a shopping centre.

This is why retail shopping centres are such cashflow goldmines that most of the world's largest superannuation companies tend to be lessors as well!

The reality is both look for advantage and it is very rarely available to small retailers.

Historically, the rise of regional shopping centres has been at the expense of either the nearest central business district or the nearest set of strip shops.

The battle for dollars per square metre per annum between strip shopping and a shop in a regional shopping centre was won convincingly by the regional shopping centres a long time ago.

Apart from the rise and rise of the regional shopping centre and the relatively big decline in strip shop values over time, bulky goods outlets and business incubators are still worth watching.

The main things to remember are that retail space is not like residential tenancies and unlike areas where small businesses can build-up their figures slowly but surely. In retail,

you really have to performing from very, very early-on in your lease term. The sales revenue numbers required in retail are much, much larger than for a traditional small business..

It is also crucial to understand that shopping centre landlords do not negatively gear. They pass on most of their expenditures to their tenants and (disproportionately) to the small but most numerous end of the retail market in particular.

The rise of the regional shopping centre to overcome the dominance of the CBD, the strip malls (including shops along arterial roads) and neighborhood /suburban shopping centres combined is a major trend in the global economy.

In WA, there was a study that followed-up the market share of the CBD and suburban centers combined with the market share of the regionals over a five year period from 1997.
The results shocked many: What began with the CBD and suburbans having a two thirds market share over the regionals having a third was reversed.In 2002, the regionals had two thirds and the CBD and suburbans, a third. Indeed, while the regionals took to placing full page ads in the newspaper highlighting the fact that it doesn't cost anything to park in the shopping centres, this conduct saw other campaigns like the Perth City Council's "Heart & Soul of the City" campaign to claw-back market share whilst still charging parking fees.

As the above-outlined longitudinal study suggests, the migration of consumers was swift given the development of shops along arterial roads took place over a much, much longer period – i.e fifty years versus five.

The money flows were also very significant.

Westfield bought its Carousel site in Perth's eastern suburbs from Coles-Myer for some $180 million and then spent some $300 million for the centre to be re-developed and re-opened in October of 1999.

When the centre was being re-developed, one literally could not a find a tradesperson because they were all working out at Westfield's Carousel site in Cannington.

This mega-centre was lavish. It is still WA's biggest regional shopping centre with over 250 shops in it.

Westfield's own annual general reports reveal that all monies, including initial purchase and re-development, were recouped inside its first five years of operation – that's about half a billion dollars!

Deficiencies in these counts were revealed. A mother with two children walking beside a trolley with the family dog was recorded as four additional potential consumers. A couple

of legal cases took place but, what had brought the retailers into the complex simply faded off the stage and then very much into the background.

Then there is the legislative minimum of a 5 year term becoming the only term offered – that is, the phenomena of the so-called "flat 5".

Given a choice, consumers do prefer to not paying parking fees to shop. Does this mean that people have stopped shopping in the CBD? No, it doesn't mean that at all.

Does research showing more two-income, time-poor families do smaller shops more often including at their more convenient local suburban shopping centers rather than one big weekly shop at their regional shopping centre? Yes, that is generally the case.

As for trends in "technology and in ways of working", these are easy to point to even though their significance is more difficult to evaluate.

For example, since Lessor representatives started charting the specialty shops monthly sales turnovers and then using these charts to work-out how much they could slug the retailer at their next Market Rent Review or lease renewal.

By way of a market overview of the Western Australian economy and its relation to what is usually termed 'shopping centre land' (read as the retail leasing market of WA), please see Appendix C.

Landlords and to a lesser extent, investors have received super profits from the burning and churning phenomena but the group that has paid the highest price for the super profits has undoubtedly been tenants and the specialty shop retail tenants in particular.

As for actual numbers, the statistical analyses have now been very well circulated by researchers like Craig Kelly of the Southern Sydney Retailers Association and with the assistance of Alan Jones in particular – see Appendix B for a copy of this data and their accompanying bar graphs.

Craig Kelly's data and his bar graphs demonstrate that the anchor tenants have been on the receiving end of sweetheart deals that simply do not account for occupying larger amounts of retail space than the space occupied by the specialty shops combined. Indeed, from a WA perspective, it is reasonably well known that Woolworths do not pay more than $200 per square metre per annum.

Less well known is that the peak rental within WA for a specialty shop is for a business migrant running an loss-earning (that is, an unprofitable) Food Hall tenancy in a major south of Perth shopping centre for $7,000 per square metre per annum
.
Less well known again is that every time the Lessor's representatives trot out the said Food Hall tenancy's rental as a Market Rent prospective renewing tenants at this

particular centre indicate that if this is the rental by which their space is to compared then they are off elsewhere.

In my own experience as a lease negotiator, the days when Lessors' representatives would say that without the anchors, they didn't have a shopping centre are long gone.

Indeed, the more contemporary truism is that without the specialties, the Lessor doesn't have a profitable shopping centre.

In short, they've made new urban and suburban developments rare and, as a partial result, expensive.

Redevelopment of existing neighbourhood and surburban centres in the Perth metropolitan area seems to be where most of the opportunities are located going forward. There is also the effect of the internet on travel bookings and on music and book shops which, while huge, are still dwarfed by a rampant and seemingly insatiable telecommunications sector.

Depending one's demographic/psychographic/personality type/lifestyle choice, fashion and brands still seem to have big roles to play as well.

As for prices to consumers, if rents for the small but numerous end were more reasonable and if the big ones had to pay more as well, I would say that consumers could expect a better deal from the major employer of Australians at the smaller end of the spectrum.

In essence, the changes are driving rents up far, far in excess of the official CPI numbers. Unless there is a major intervention (from our Government, for example), the "foreseeable future" appears to only have more and more of those increases on the horizon too.

There is very little doubt that just a handful of corporations have what feels like either a foot on the throat of small business or a stranglehold and certainly on very large amounts of the key information they have now collected.

Who could blame our Big Business leaders for thinking that governments really do not know what is going on in our shopping centres. Huge consolidations, massive rental increases, big price hikes and, miraculously, close to full employment.

Our shopping centres have certainly become places of leisure in their own right now. Not quite 'our communities' or our community centres and not quite recreation but entertainment in their own right

Large levels of resources are concentrated in a few hands, This has to be a cause for concern. So many small business people apparently beholden to so few is an even bigger concern.

The divergence that will occur is that Lessor representatives will argue that they need more permission in the form of competition theory and then both less legislation and regulation.

Leading tenant representatives, on the other hand, are far more likely to acknowledge that they have been 'done over' by pursuing State-by-State legislative improvements instead of pursing a uniform national retail leasing position.

Only since viewing the legislative leap-frogging of the various States has it been possible to see how the lobbying of groups like the Shopping Centre Council of Australia (the SCCA) has been a clear case of pattern bargaining all along.

If WA obtains the ability to pursue unconscionable conduct in its Administrative TribunalTribunal the SCCA's members can still use loopholes in WA's market rent review legislation in this same Tribunal to combat the change..

2.2 How are these changes affecting rents and the operation of retail tenancy leases and how are anticipating changes likely to affect rents and the operation of the market into the foreseeable future?

2.3 How important are these patterns of development relative to other factors (including concentration of ownership and availability of land for retail developments)?

Answers to 2.3 and 2.3 may be provided at a later time.

3.0 Are there any competition, regulatory and access constraints on the effective and efficient operation of the retail tenancy market?

The National Council of Retail Lessees (of which the WA Retailers Association is part) contends that because anchor tenants do not pay market rent they are not part of the open retail tenancy market., Small retail tenant representative groups are literally representatives of the market and their collective approach is substantively different to that of the SCCA.

3.1 What is the nature of these constraints and how do they impact on the effective and efficient operation of the retail tenancy markets?

3.2Are the constraints likely to be affected by trends in urban and regional development, and changes in consumer preferences, in technology and ways of working?

These questions will be addressed at a later time.

3.3 To what extent are these constraints related to:

- ***the scope to pass on rents and other costs of tenancy (e.g., fit-outs, legal fees) to consumers?***

Large landlord lessors have been getting away with it for years.

Retail leases are not like residential real estate. All costs are technically recovered in retail with the covering of what are still referred to as the variable outgoings or the holding costs. In retail, there is no negative gearing.

Unlike residential real estate, retail is about cash flows and profit. .

For a lessor, it is much more a situation of getting into double digit percentage increases each and every year and then expecting the same to continue forever.

Be profitable and from very early on and then amortize re-development costs by cannibalizing one's pre-existing tenancy mix. That is, if you had one newsagent and a pharmacy before, just double-up.

In WA, we have a classic case of this where Norm Carey replicated his shopping centre with another one a mere 30 metres from the other.

Yes, that's right, and yes – for the record - there is actually even a special footpath that has been built between the two centres.

One centre has a Coles and the other a Woolies and there's a news agency in each one and a pharmacy in each one and so on..

You can access a Sales Monitor from the Valuer General's Office. The resultant report will cost you less than $30. Such a report will tell who bought what and when and importantly, for exactly how much.
Not so in retail. An independent retailer has very little to absolutely no idea about how many have preceded them and with what fate.

- ***the operation of State and Territory retail tenancy/ lease legislation and associated regulation and administration?***

This is a complex technical question which we may respond to at a later time.

- ***the operation of the Trade Practices Act 1997, including those laws prohibiting unconscionable conduct in business transactions in Part IVA?***

Following the route of unconscionable conduct is the roughest road imaginable.

If the ACCC with multi million dollar budget achieves nothing what chance has a small business person got.

Judicial interpretation has been extremely narrow in the past, viz: Special disability means that a blind person has a special disability when it comes to reading contracts!

- ***Significant gaps, overlaps or inconsistencies between elements of the legislative framework?***

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Any realistically-compiled listing of the legal precedents on unconscionable conduct suggests an expensive menu for any poor soul who dares to even complete such a foolhardy decision-making process..

Absolutely no-one I know doubts that the concept exists but heaven help anyone who tries it to convince a federal court judge of it..

The alternative is to go to Australia's system of Tribunals.

- ***Legislation and regulation enforcing land use and zoning decisions, for example, by unduly restricting access to land and buildings for retail tenancy?***

The sooner we all get to grips with this one, the better.

What I mean by this is that putting the NIMBY or Not-In-My-BackYard syndrome to one side for a minute, most people - most of the time - like to see new ideas proposed but they don't half mind kicking the absolute living daylights out of those proposed new ideas if it happens to please them either.

And as for who benefits the most from developments, well, that is a very good question.

The Feds get GST which they supposedly re-imburse the State Governments with and the State Governments don't mind that at all.

And local councils just love new rates coming in plus consumers don't mind having somewhere new to shop and especially, if that place wasn't there before and they didn't get their place bull-dozed for a new housing estate.

Hey, it looks like this could be a winner all around but hang-on a second.

Aren't we already over-shopped already? And aren't our primary producers and our farmers sick of their farms being viewed as outer suburbs of country towns?

Isn't re-developable land at an absolute premium and with a number of our urban neighbourhood and suburban shopping centres ripe and practically begging for re-development as residential land sub-divisions?

- ***the restrictions on access to land and buildings for retail tenancy?***

- ***restrictions on the provision of electricity and gas, communications or other utility services that materially restrict the use of land and buildings for retail tenancy?***

We are already over-shopped. We do not need to ease restrictions.

3.4 What are the regulatory and compliance costs of regulations affecting the operation of the retail tenancy market?.

This is a question which requires significant analysis that is not possible in the present time frame.

4.0 Are there restrictions on the availability of information to landlords or tenants that impact on business decisions and operations?

YES.,The restrictions specifically work to the disadvantage of the majority of tenants and/or the bulk of the retail leasing market, viz: To the most numerous and largest group of the market.

There has been a deliberate and discriminatory strategy executed by major landlords to unduly disadvantage the very people who have been used to effectively subsidize their anchor tenants (Coles and Woolworths in particular) and to allow their Lessors to make super-inflated profits.

4.1 Do these restrictions unduly advantage tenants,landlords or investors?

These restrictions directly advantage landlords and their investors at the direct expense and capital cost of their small retail tenants in particular.

4.2 Do the restrictions materially impact on the operations of businesses?

YES , especially on the operations of small retailers who are, in fact,the majority of the market.

5.0 Are the main factors influencing the level of rents and associated tenancy conditions appropriate and transparent to the landlords and (to) prospective tenants?

Not to existing small retail tenants and not to prospective small business retail tenants either..

At what is generally referred to as the micro-business part of the business spectrum (, the bulk of the small business market which employs fewer than five people) retail turnover is often less than $500,000 a year.

In retail, that is not enough to net a Mum & Dad-run retail operation an award wage year in, year out.

Unlike their employees, Mum & Dad have the family home and their family's future on the line as security for their venture as well. They accept this risk for a return of less than the $30,000 it costs to employ a full time Sales Assistant aged 21 and over for a year on the Retail Award!

Having stated these things, you will often hear from Lessors and their representatives in the retail leasing market of people buying a retail business as "buying themselves a job".

Whilst such descriptions are usually not meant as a compliment, the reality is that if the description is true, the job they are buying often tends to be for very, very long hours

> In WA, average shopping centre opening hours are 62.5 a week – not inclusive of out-of-shop administration; buying of stock; GST and other book-keeping and bank reconciliation compliance stuff - and yes, in WA, we still have regulated retail trading hours as well!

In this sense, one can say that the main factors influencing the level of rents and associated tenancy conditions are transparent to landlords and their representatives.

6.0 Are the provisions of leases establishing the rights of landlords and tenants when leases end, appropriate and transparent?

NO, they are not and especially, not to tenants for the reasons outlined above and also later in this Submission.

6.1 Do the provisions impact unnecessarily or adversely on the tenant's operations?

YES, they do and on both counts – unnecessarily and also adversely on the tenant's operations.

The most commonplace scenarios will be outlined for you in detail within the next section of this Submission so you can see exactly how unnecessary and also how adverse the impact is for the three most major kinds of small retail tenant.

These are a prospective start-up, an existing small retail tenant and, someone who is considering buying a small retail business – that is, on someone who may or may not be a business migrant.

6.2 How are the impacts felt by business?

As a start-up in WA, the learning curve is particularly steep.

Hopefully, they have managed to get the name and telephone number of a government-subsidized Enterprise Officer to help them get a Business Plan together. This Business Plan should then have separate components on the financing and marketing of the business.

If they haven't been able to access this information, the start-up is likely to be relying on family, friends and other mates to supply them with the name and contact details of an accountant who can help them.

The finance component is then usually the acid-test as many small retail start-ups find themselves as having to rely on the invariably rather dodgy representations of a number of Lessor representatives about the pulling power or the star power of the retail locations the prospective tenant has before them.

At this stage, the prospective start-up usually does not have any idea firstly, that the Lessors' representatives work for the Lessor and secondly, that these representatives – whether as a Centre Manager; a Leasing Executive; a Real Estate Agent; or as a Property Management Consultant - are actually paid for by the existing tenants of that retail location.

That is, that representative is not paid to work in the best interests of the start-up but rather, to work in the best interests of the Lessor even though it is the tenants who pay. mean.

Next are the hard numbers and largest among these is the fit-out which the Lessor has to approve. Lessors tend only to approve very expensive fit-outs because it makes their asset look better than it would otherwise appear.

How expensive are these fit-outs? On average in WA, the figure of $1,000 per square metre is a benchmark even though certain fit-outs regularly exceed this particular benchmark.

Lottery kiosks - i.e those little islands that increasingly get slotted in the corridors (called common areas and paid for by the existing tenants through their variable outgoings) of shopping centers - tend to occupy between 20- 25 square metres in WA and their fit-outs regularly top $150,000, for example.

The thing to remember about these fit-outs is that they don't include the stock or inventory which has to be sold at a profit to make the business operation function.

Moreover, it is to underscore the fact that in retail (and unlike small business), you aim to be profitable from day one because you haven't got three years to build-up the systems and numbers as one might first do in a home office situation business incubator, for example.

So from estimates and guess-estimates and swatches of fabrics and colour samples and shelving and lighting and everything else as well, it's then time to have your advisors and accountant tackle how one's fit-out is going to be depreciated and over what period.

This sounds easy (it usually comes down to one of two methods) but both prospective and existing small business tenants regularly get caught-out by a clause that they didn't have explained to them by the Lessors' representatives, to wit, a refurbishment clause every three years which, guess what, the Lessor also has to approve.

That is, more major expense and why didn't they get a professional to knock that major expense and headache out of the original lease is what I hear a lot of on this particular matter – even though, it does make the Lessor's asset look that much better, of course!

From the fit-out, however, the next big item on the checklist is stock or inventory.

How much stock or inventory has to carried (read as “financed) for this happen? Well, it depends on the nature of the retail business and the margins those businesses tend to operate on.

For example, the commission on selling a lottery ticket does not exceed 8% in WA The margins on many grocery and common pharmaceutical items is often a lot slimmer – meaning that a lot more volume of sales has to be achieved in order to make a profit.

The point is that the stock and inventory has to be budgeted for out of one’s finances such that if the target is to make say $500,000 in sales, you need to carry considerably more stock than that to achieve the sales..

While sometimes referred to as understanding the seasonality of your business, the impacts on the business are all bottom line.

Now, ideally, one still hasn’t made the decision to go ahead yet (and by extension, that even though one hasn’t taken a dollar, the likelihood is that much time and money has already been spent to get to this stage).

One hasn’t employed any Staff and employees might sound like help but in the financial swing of things, they are both a major cost and a significant expense to boot.

This means that one’s accountant, if a good one, should have been directed to make a series of projection calculations specifically for the projected and grossed-up occupancy costs as a percentage of targeted annual turnover; the projected and also grossed-up wages bill as a percentage of targeted annual turnover; and, the financing costs of the whole exercise – including fit-out and refurbishment - as well.

If not, the prospective start-up will find that these are the things that have to be managed when one is in and running a small retail business for real.

These are the matters that determine whether you are actually working for yourself (that is, being your own Boss) or whether you are, in fact, just mainly working for your Landlord and , to a lesser extent, for your employees and/or ultimately for your Bank not to sell you up (again, mainly because of your Landlord/Lessor)!

A series of additional phenomena will now also be outlined. The first of these might sound dramatic but is nonetheless true.

The proprietors of existing small retail stores commonly earn less than an individual member of their Staff from the net profits of the business and that is even after taking into account any drawings (usually modest) that the proprietor takes from the business.

A particularly disturbing aspect of these impacts,(please note how they are all bottom-line financial impacts) comes to the fore with someone who is considering buying a small retail business – that is, on someone who may or may not be a business migrant.

Whilst it is true that all of the above considerations are 'advisable' for a business buyer, the belief that all prospective purchasers do their Due Diligence before doing so is not true.

Indeed, if the fundamental terms and conditions of the lease are not re-negotiated as part of the purchasing process and only the balance of the unfortunately now standard five year term is assigned, you can assume that the financial pressures on this business will be very large.

This gets to the heart of not only the retail leasing market but also to the business broking community as well.

People can literally be sold into a loss-earner very easily if they do not have access to the specialist advisors they need. A couple of quick scenarios should suffice to give you a sense as to how these impacts occur.

Assume, for example, you bought a deli in a shopping centre in the second or third year of a "flat 5". At the time, you reasoned that of course, you will make the cash register ring and the business sing within two years and definitely within three.

The Centre Manager, however, drops by the shop within the first few months of you working the deli and says that they need you to spend say $60,000 on giving the tenancy a "bit of a lick-up" – and believe it or not, a "bit of a lick-up" is how many Lessor representatives refer to a incredibly expensive refurbishment.

You did not budget for this. Neither did you budget for that exercising of the option and market rent review on the third anniversary of the previous tenant's lease.That same Centre Manager wants a 60% increase in your rent as well.

You hastily ring your accountant who thinks that they did a super job of explaining how the annual rent review increase is compounding but assumed that the market rent review increase would be around 5% (and certainly nothing like 60%).

You also ring the local business broker who tells you that one of the most common ways of valuing a business is to take the average of the last three years' net profits and multiply them by a multiple between 2 and 5 (and usually 2 point something) but that businesses in the last year of their lease have no Goodwill.

You are now very scared and rightfully so.

Your reflections about when you were so sure that you will make the cash register ring and the business sing within 2 years and definitely within 3 are but a distant memory to you and are now the source of considerable sadness as you realize that you have been burned and churned by much more powerful adversaries than you imagined would ever come after you.

So, you go to see your Bank Manager and they aren't full of a lot of good news for you either.You even ring a lawyer about suing that miserable so and so of a business broker who sold you the dog of a business in the first place.

You then go to see your Centre Manager to see if they will let you out of the lease or whether they will consider re-negotiating the terms of the lease so you can trade-out.

You are then shocked that to hear that if you do a runner or leave, they will chase you for the money owing on the balance of the term of the lease (ever see vacant glass but no "For Lease" sign on a shop window in a shopping centre – it means the previous tenant has found out that they go bankrupt slower if they continue to pay the rent but do not have the additional expense of inventory and wages).

This means that the Lessor can repeatedly call on your Bank Guarantee for unpaid monies and you are not even told about these "calls" by your Bank - You are simply required to top-up the Guarantee for the next exciting installment.

It also means that your Bank is monitoring the situation and that they may issue demand on you as well. That means the family home may be sold-up from underneath you to pay your now rapidly mounting debts.

In an apparent breakthrough, the shopping centre's leasing executive contacts you and says that if you will consider paying the leasing incentives for another sucker, they may or may not have someone to take the shop over for you but "no promises mind".

Now, these leasing incentives are considerable, up to six months rent plus a contribution to the fit-out of the prospective new tenant. It's 'bite-the bullet' or 'get shot by it' time.

You have urgent meetings with key members of your family, your employees, your accountant and your Bank Manager and throughout each and every one of these meetings, you wonder how you could have got into such a mess in such a relatively short period of time

You then read in a report that retail turnover in WA is close to $22 billion a year. Your health has also taken a few big hits with the stress of everything as well – you just wanted to run a deli, for goodness sakes.

7.0 Is the notion of unconscionable conduct sufficiently clear?

NO, it is not.

It is true that speeches given by the current Chairmanof the ACCC have resulted in warnings being issued by the Shopping Centre Council of Australia to Australia's largest lessors that the notion is to be more rigorously enforced (see the SCCA's email broadcast in early July, 2007).

It is also true that many other print and press publicity releases have sent mixed messages on this notion.

In an article published in the Australian newspaper in early July 2007, for instance, Graeme Samuel speaking at the 2007 Small Business Summit in Sydney was reported as acknowledging that the ACCC had not done enough and had failed to secure the clear legal precedents the ACCC had been charged with obtaining in the first place.

Previously the ACCC – as Australia's most powerful regulator and enforcer of the Trade Practices Act – had authorized the release of material which attempted to distinguish unconscionable conduct from behaviour described as "harsh and oppressive" or as a "hard bargain".

Also in an earlier article , there was the suggestion that the ACCC had not been given the funding required to retain senior counsel to fight cases which alleged unconscionable conduct in the Federal Court.

It would be a very, very brave person who suggested that the notion of unconscionable conduct is clear. What has been established is that this notion is very, very expensive to test in our legal system - lawyers (especially good ones) have never been cheap.
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The law itself is flawed and by inference, both the legal case management system and the legal processes are also flawed so that outcomes sought cannot be guaranteed or made either clear or certain.

As a consequence there is a move away from the court system and towards mediated settlements particularly within the Tribunal system.

The first case to consider these issues is now known as the Farrington Fayre case . will be précised and then both compared and contrasted with three other matters which, while also long and tortuous, had different resolutions.

The second matter was resolved legally with a win for a franchisee-tenant who nonetheless still lost his home due the legal expenses of not being able to defend an appeal of a Supreme Court decision against his very much more well-resourced franchisor.

The third matter was privately resolved involving WARAf and without the legal and court systems. The fourth matter is one which, while comparable to the Farrington Fayre matter in terms of taking more than 5 years to resolve, settled on the first morning of a trial in the Federal Court which was set down for 3 weeks in mid 2007.

Regarding the Farrington Fayre case, the start of the matter concerned a number of tenants who, sensing that their efforts to negotiate for new lease terms were not really getting anywhere, sought relief in WA's Commercial Tribunal in 1996.

Now, at that time, class actions were not permitted in this tribunal and the matters appeared as a series of individual claims by the tenants involved.

The Lessor then let it be known that he would only negotiate on new leases on his preferred terms and, if and only if, the tenant dropped pursuing their particular claim in the Commercial Tribunal of WA.

This, combined with the inability to pursue collective action, was considered as unreasonable. Eventually, as the various claims moved from the Commercial Tribunal of WA through the courts, this aspect was regarded as constituting the heart or core of the unconscionable conduct matter.

The process or procedure within the Commercial Tribunal (now re-configured as the State Administrative Tribunal,) was that if a matter could not be settled with the assistance of a Registrar at Mediation within 3 months, the matter was then referred to the Tribunal proper for "determination" – that is, an arbitrated result.

The Tribunal made its determination (that is, on the Lessor's condition that each action was dropped was not successful) and it was in favour of those who listed individual but nonetheless obviously linked claims.

The Lessor then appealed the Tribunal's determination into the District Court which, after its case management system of seemingly endless Preliminary & Directions Hearings and many, expensive calls for "further and better particulars", upheld the Commercial Tribunal of WA's determinations.

The Lessor then appealed the District Court's decision into the Supreme Court where the legal expenses continued accumulating such that several of the tenants discontinued their actions without relief..

They decided not to continue with their retail tenancies as they had not secured new leases. No compensation had been awarded that had not been appealed to the highest of the superior courts in Western Australia.

Around this time, earlier feelings about the Lessor's refusal to negotiate turned to an evaluation of whether the Landlord's actions constituted unconscionable conduct under section 51AA of the Trade Practices Act concerning Special Disability

A number of the original claimants had not traded for a very considerable period. The Lessor continued to claim rents from those still trading. Additionally, if the Lessor was successful in having the matters appealed the question was whether he could rightfully claim his legal expenses back from the tenants.

If the tenants were successful in having the appeal overturned at the Supreme Court level, they still had to fight any costs order because of clauses in their original leases that stated that the Lessor could effectively recoup his legal expenses win, lose or draw.

As it became likely the Supreme Court was going to uphold the decision of both the District Court and the Commercial Tribunal, the tenants and the then CEO of the WA WARA approached the ACCC to fund a test case of the unconscionable conduct provisions under section 51AA.

The ACCC indicated that they would fund the tenants' case if the matter was tested at the Federal Court level. The matter of costs and how they would be treated, however, remained unclear albeit there was much discussion about what has since become known as 'uneven bargaining positions'.

The Lessor, in turn, approached his representative body in the Property Council for financial assistance and funding which, ultimately, wasn't anywhere near likely to be of the order or magnitude the Lessor had hoped of his request.

The issue was listed as a Trade Practices Act matter within the Federal Court.

The events that came next will stretch anyone's belief that the law is accessible for all. The matters were then referred-up to the very highest court jurisdiction in the land – the High Court of Australia – on, of all things, "constitutional grounds".

The Federal Court came down with a mixed verdict – that is, what was left of the original group of the tenants won on some points and the Lessor on others.

Of particular note was the judicial interpretation that Special Disability meant that effectively, someone could not be expected to understand a contract if they were blind; and that there was a need for new law and specifically what eventually then become known as section 51AC on Special Disadvantage.

By the time Federal Court's mixed verdict was released – well into 2001, a number of the original tenants had either gone into bankruptcy; gone onto welfare; or died!

For its involvement, the ACCC – by 2002, had spent some $750,000 of a total of a million dollars allocated to them in order to secure clear legal precedents. It still had new law to draft and get through the Houses of Parliament.

To return to the original question as to whether the notion of unconscionability is clear, the answer in 2002 was definitely NO and even with the new law, is still NO as well.

So, what has happened since – has the notion become any clearer?

Well, the interest of the ACCC in funding new cases has ceased. Indeed, that is when the ACCC's line of distinguishing between a hard bargain or harsh and oppressive behaviour became the ACCC's custom and policy .

Has that "line" from the ACCC been sufficiently clear?

I would say no, it has not been sufficiently clarified (not under section 51AC of the TPA in particular) as the ACCC has since signaled and/or repeatedly telegraphed through print and press releases that legal claims which dared to allege unconscionable conduct faced huge legal debate (and hence, huge legal expense) and what will be termed 'a rocky road' for a tenant or group of tenants and for their personal and financial futures in particular.

The Lessor involved in the Farrington Fayre is very much still in business.

Indeed, his property portfolio is a great deal larger than what it was before and during the many twists and turns of the case.

The Lessor – unlike a number of the lessees in the matter - is not only alive, <u>not</u> on welfare and <u>not</u> bankrupt but apart from changing the name of the shopping centre involved, he is also very much a considerably more wealthy man than those who are his former lessees.

What instead has become ingrained in this now incredibly complicated area of law is that it is all about money, power and influence such that the law becomes prostituted to a process that very, very few can afford .One Federal Court judge distinguished himself on this subject, for instance, by stating in an article in a journal dedicated to publishing pro-mediation developments that not even he could afford to litigate in his own courtroom!

Moreover, a very recent article in the Australian Financial Review in July of 2007 outlined that currently, the ACCC does not legislatively or administratively have the power to retain senior counsel in legal matters alleging unconscionable conduct!!

This brings me to the second of the cases alluded to earlier.

This was a case where the issue of powerlessness was at the core of the alleged unconscionability.

I cringe to have to say "alleged unconscionability" because the Supreme Court of WA actually bought down a decision which found that the franchisor had clearly acted unconscionably by entering into business arrangements which cost the franchisee a great deal but over which the franchisee-tenant had no control over.

To retail leasing specialists like myself, this is not an unusual situation and especially where under a head lease, the franchisor can agree to increases in market rent for which the franchisee simply has to pay in order to continue to run their franchise.

That is, without a lease, the license to run the franchise (in this case an automotive repair franchise though there are other instances in the giftware industry, for example, where this is very common) is academic.

What made this automotive franchise noteworthy, however, was that after actually winning his case, the franchisor appealed the matter – again to the Supreme Court and in between the original decision and the appeal.

The franchisee-tenant's own barrister issued demand for unpaid legal bills and as a direct result, the tenant-franchisee's house was sold up; his marriage broke up and the tenant/franchisee and his business literally broke-down.

The significance of this case is that the damages and costs the plaintiff applicant was awarded after winning his case could not be paid because the case was subject to an appeal. He could not afford the additional costs without the monies awarded to him from the original decision!

This is standard legal suicide in major cases where the winner hasn't got enough money.

The above case will now be compared and contrasted with another matter that I am sure will remain perpetually burned into my memory bank for altogether different reasons.

This matter was against the world's largest shopping centre group.

The tenant was a long time tenant of the area with a great deal of experience in the retailing of sporting goods. Prior to entering this regional shopping centre, he ran a successful sporting goods business from a retail strip just off-site to what became one of Perth's most major regional shopping centres.

While in no way a young or even a middle-aged man, he had been very prudent in his lease negotiations and only agreed to come into the centre with several option periods.

He not only continued to build his business but he also employed his son, his daughter-in-law; a son-in-law and one of his grandsons in the business as he progressively built the business up over a decade plus period.

What he did not count on was that a result of him having to declare his monthly turnovers, his Lessor's representatives decided that not only would his rent rise radically (and always only after he had exercised his options – that is, he had no other choice but to battle on regardless) but his Lessor's representatives would add other direct and indirect competitors against him as well.

For the uninitiated, this became the pre-cursor to what a great many tenants have now learned to fear.

That is, the development of the precinct system where similar businesses are grouped together in the belief that everyone and especially consumers must benefit.

At the third exercising of his option and market rent review, the Lessor placed his latest competitor - this time a large franchise *plus* a brand spanking new and very well-funded merchandizing outfit - in the most prominent corner location just two doors from his own tenancy and also directly across from his tenancy as well.

The Lessor then also increased his rent and occupancy costs massively.. Perhaps not surprisingly, his sales figures went down.

The tenant re-structured the business, cut back on product lines, made sure he bought particularly well and even though aged well into his seventies, it looked like the business was going to make it into his 17th year in the centre before he suffered an enormous stroke and his family contacted me.

After researching exactly who had the authority to make the painful decision to close (which wasn't easy let me tell you as large corporations certainly do not advertise this information) and armed with medical certificates and briefed about most of the above by family members, I went into the negotiations.

My Client Member couldn't attend - he had lost the ability to speak and the use of his preferred right arm with his Stroke - but essentially, I expected to be more of a Mediator and definitely not as an adversarial advocate as I figured that compassion would be the biggest factor to a mutually-agreed resolution.

The Lessor's representative – a young fellow in his twenties opened the meeting by saying that he didn't care if his Lessor got the balance of the term of the lease from the lessee or out of his estate after the lessee had died.

Compassion was, in other words, not even on the radar let alone in the business equation.

It is also noteworthy at this stage to detail that the unconscionability emanated from the fact that at the end of each of this tenant's lease periods, he had to consider whether or not to commit to the next lease period without a knowledge of the Lessor's proposed new market rental or tenancy mix.

After running the gauntlet on previous occasions (which definitely did have deleterious consequences for his business) his health gave out before his business skills and abilities did.

The resolution of this matter is thankfully much happier as I was able to negotiate the payment of 'go away' money to the Lessor's representative.

I was also able to re-locate the tenant's business; and organize for some business mentoring for his extended family members in this new business location.

The business survived and against all of the medical information available at the time, the Patriarch did too and went on to make a substantial medical recovery.

Indeed, so much so, that he returned to managing the new business part-time; built-up the business and then sold the business at which point, he distributed the funds from the sale to setting-up those family members who still wanted to be their own employers!

This brings me to my fourth case study which I contend is something of a more modern parallel to the Farrigton Fayre matter.

I say "more modern parallel" because while the intervening jurisdiction was singular (the Federal Magistrates' Court was but an expensive and useless sideshow at the time), both matters took over five years to materialize.

A key difference is that the decision was taken not long after the actions first took place not to pursue unconscionable conduct but rather, false, misleading and deceptive conduct.

In this matter that began in 2002 and settled on the first day of a trial set down for a full three weeks, the problem was again the Lessor (two other previous Lessors were also joined to the current Lessor in this action) increasing occupancy costs and simultaneously introducing new competition - both direct and direct - to the existing tenancy mix, many of whom had already consented to new leases with massively increased rentals.

This case was exacerbated by the knowledge that at least, the two most recent lessors had charted the turnovers of their tenants; implemented very large increases; and then further undermined the viability of these same businesses by introducing known lower cost competitors (for example, franchises known only to ever pay percentages of turnover as rent) and other non-precinct competition as well.

By "other non-precinct competition", it will help to know that like many shopping

centers around Australia, this particularly large regional centre had a Food Hall.

This did not, however, stop the Lessors and their representatives from inserting extra and additional kiosk-style food tenancies in the common corridor and centre stage areas (which the previous tenancy mix continued to pay via their former variable outgoings and then via higher semi-gross rentals) and then 7 day traders outside the first floor level of the Food Hall as well.

The sales turnovers of the continuing tenants plummeted and the Lessor's representatives knew this as they continued to insist on the sales figures being supplied to them monthly.

A series of court actions begun in 2002 were settled on the very first morning of a 3 week trial in early July of 2007.

7.1 Do notions of unconscionability differ between jurisdictions, and, if so, does this cause any problems?

YES and from the above-outlined 'real life' case studies, very obviously so.

Within WA, the legislation allowing lessee applicants to allege unconscionable conduct took effect from 11 May 2007 – that is, well in excess of 5 years from when the WA Parliament received the 70 Review recommendations of the Commercial Tenancies Act of 1985 and 1998 and then passed just two of those 70 recommendations.

The body now charged with the task of processing claims of unconscionable conduct in WA (the State Administrative Tribunal or SAT) set a completely different guideline/threshold test than the court jurisdictions.

Unlike the 'beyond reasonable doubt' threshold in criminal cases (where cases are bought by the Crown) and the 'balance of probabilities' threshold in civil matters, the State Administrative Tribunal's guideline is to look at alleged matters from the perspective of "equity, merit and good conscience".

As to whether the different thresholds cause any problems, I can say that an application to the SAT in WA costs $29 but that a mediated outcome (as with the last case outlined above) have absolutely no precedent value.

Whilst definitely premature to make any assessments of the efficacy of the SAT in WA (the legislation hasn't been in effect for a full quarter yet), it is significant to note that the only avenue of appeal from the SAT is to the Supreme Court of WA.

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Moreover, the expenses of previous legal action (and especially when the lessee has clauses in their lease that say that the lessee must indemnify the Lessor from any legal expenses they incur in an action against the lessee) have caused massive financial problems and other inestimable damage to any belief that retail landlords do not act against the commercial interests of the bulk of their paying customers, i.e The small but most numerous retailers in these shopping centers.

7.2 Does the way unconscionability provisions are applied differ between jurisdictions?

Again, obviously YES and especially YES as detailed in the case studies.

Internet searches provided to me by the Associate Dean of the Faculty of Law at the University of Western Australia, Eileen Webb, regarding matters listed in the tribunal in NSW as the ADT and in Victoria known as VCAT suggest real hope for Western Australian small retailers wanting to allege 'unconscionable conduct' in WA's State Administrative Tribunal – please see Appendix E for a copy of the cases listed in the NSW ADT and VCAT.

7.3 Can claims based on unconscionability be raised and argued in a timely and cost effective manner?

Given the sections immediately above, increasingly YES albeit it is too early to say in WA's situation because its Retail Shops & Fair Trading Legislation Amendment Bill was only proclaimed on 11 May 2007.

As for claims based on unconscionability in Federal jurisdictions and under the Trade Practices Act as it is at the time these submissions were called (and even as it is currently proposed to be amended as well), there is no cost or time efficiency.

8.0 What regulatory and other avenues are available for dispute resolution between landlords and retail tenants?

There are regulatory and other avenues available for dispute resolution between landlords and retail tenants.

In WA, these include going to see the Small Business Development Corporation or SBDC (the SBDC is a statutory corporation set-up mainly to assist start-up small businesses but while they have often employed lawyers, they are prevented from giving legal advice); engaging expensive legal assistance; and/or coming to see WARA.

Interestingly, the SBDC's commercial tenancy unit are taking something like 4,000 incoming phone calls from small businesses and independent retailers.

Apart from the obvious difficulty of the legally-trained staff at the SBDC not being able to give legal advice, by my calculation , that's (20)incoming phone calls per working day.

8.1 Are the available dispute resolution systems timely and cost effective?

In the main and especially if they are court-based, NO, they are not *unless* they are Members of the Association I represent and I forget to bill them which I tend to do on purpose and do fairly regularly too.

8.2 Do the available systems impact adversely on the economic efficiency of the retail tenancy market?

YES, again in the main, they do.

Please revisit sections 6.1 and 6.2 of this Submission for an outline of the three major scenarios the small retail business market face then add legal and other advisory expenses.

And by "other advisory expenses", budget for at least, a long series of additional administrative, accounting and bank manager costs too

Almost every lawyer tends to work out quite quickly that the sections of the lease concerning how the Lessor and their representatives can claim back all of their legal expenses from the small retailer is a particularly bitter blow for small retail tenants.

Many of the big legal firms compete keenly for the large Lessors' legal work and once they've got the Lessor's preferred lease locked away in the word processor, it's simple work thereafter.

When small retail tenants realise that they have been done like a dinner with the lease that they really should have had looked at or employed a leasing specialist who worked for them and especially not "looked at" by the Lessor's legal team.

Typically, the Lessor's legal team are invariably reticent to change anything about a pre-approved standard legal lease suggested by the Client and especially not the bits about how they can charge the Lessor's lessees their legal fees at lease negotiation time!

In fact, they often record the amount of time taken to hear-out a particular tenant, prospective or otherwise, bill them, and then come back in a very short phone call back later on to say that they approached the Lessor and no, no changes at all will be contemplated; it's a straight "Take it or leave it" proposition, and by the way, please pay the bill quickly, or they will sue you for it.

The one-sidedness of the Lessor and the Lessor's representatives is obvious.

9.0 What is the scope of regulatory or policy change to improve the effectiveness, operation and economic efficiency of the retail market in Australia?

There is a major opportunity to change policy and regulation to make the system fairer and less expensive for small and medium sized retail tenants.

9.1 Is there scope for more transparency and availability of information to landlords and tenants, without breaching commercial confidentiality?

YES, there is *but* the Federal Government's rejection of the 2004 Senate Committee's recommendation that – and I will directly quote the seventh bullet point on page 3 of the Inquiry's call for submissions concerning the Commonwealth negotiating with the States and Territories *"with a view to introducing measures that prohibit retail lease provisions compelling tenants to keep their tenancy terms and conditions secret"* is irresponsible.

So, in essence, the Australian government argument against the Senate Committee's recommendation in 2004 runs completely counter to the undeniable need for more transparency and availability of information to landlords and tenants

9.2 Is there scope to extend or improve the dispute resolution systems between landlords and tenants?

This question may be responded to at a later time.

9.3 Is there scope to reduce differences in retail tenancy regulation between States and Territories?

YES but it needs to be handled carefully. .

I know about the constitutional implications and particularly those available under the corporations law with the WorkChoices. implementation

Te new Workplace Relations system currently covers incorporated entities in the ACT and the Northern Territory as "territories".

The following facts are relevant:

1. the WA State Government did away with stamp duty on retail shop leases as at 1 January 2004;

2. WA's total annual retail turnover was $21.209 billion (to January 2006);

3. while WA has had two reviews of its Commercial Tenancies Act in something like 22 years, WA still does not have a Lease Register; and

4. while WA's current rating and ranking as a "boom state", the moves to amalgamate and consolidate WA's local councils to a much reduced number is underway.

9.4 Are there other actions available to government to cost effectively improve the effectiveness and operation of the retail tenancy market in Australia?

There are other actions available.

By way of background various articles published in the Australian Financial Review and elsewhere show how inadequate the post Dawson Review's amendments to the Trade Practices Act are..

To have so many critics saying that the proposed changes are "window dressing"; "cosmetic only" and that, at best, they constitute "the emperor's new clothes" is noteworthy.

What about all of these new Tribunals the State Administrative Tribunal in WA; VCAT in Victoria; and the Retail Leasing Unit and ADT in NSW?

Now, to me, there is definitely an opportunity of empowering them in much better, much more fully informed and co-ordinated ways than has been the case to date.

Employing the new international valuation practices on market rent reviews would gain instant credibility for each of these relatively new bodies. Looking at the new International Accounting Standards and especially IAS 138 on disclosure by listed entities of the new and approved accounting treatment of property and related intellectual property would also be valuable.

Adopting the fairness test in the Tribunals listed above instead of the ridiculously legalistic definition of unconscionable conduct from the judicial officers of the High Court of Australia would be another major initiative.

9.5 What are the potential risks associated with policy action/inaction?

This question will be addressed later.

9.6 Is there scope to reduce 'red tape' associated with legislation and regulations governing the operation of the retail tenancy market in Australia?

Yes, there is considerable scope if it is handled carefully and comprehensively.

10.0 If participants see a need to reform current arrangements, what should those reforms be and what are the likely benefits and costs of such reforms to retail tenants, landlords and investors?

Australia and Australians need a fully national lease register so they can be fully informed about exactly who is being charged and what they are receiving.

As a guide but also as a bare, bare minimum, this Register should be available at a nominal fee for whoever wants to access it.

In the short to medium term, the most major thrust of a mandatory Code of Conduct should be on ensuring that it is mandatory (that is, it is like the Franchising Code of Conduct in this regard) and that Lessors are required to submit details of all current leases at their own expense.

The costs of submitting lease data should definitely not be again at the expense of their long suffering small retailers.

The proposed mandatory Code of Conduct should also include the very best concepts that the State and Territory legislatures have been able to include in their legislation to date. For example, within the retail leasing community for small retailers, it is well known that NSW has the best, potentially new, national mandatory on Variable Outgoings.

In a similar fashion, the ACT currently appears to have the best lease renewal provisions. Queensland's dispute resolution system is currently well ahead of the rest of Australia.

South Australia has the best *potentially* mandatory code of conduct on casual mall leasing to date.

This 'best of the best' approach needs to be recommended by Productivity Commission andto be attached to the Trade Practices Act .!

There needs to be an acknowledge that the retail tenancy market in Australia cannot continue to operate in its present form – making money for a few at the top and disadvantaging the many small retail traders..

10.1 What should be the priorities for action?

10.2 What is the expected impact of possible policy actions at the business, industry or national levels and what are expected costs of inaction?

10.3 What might be the regulatory and compliance costs of possible reforms?.

10.4 What is the expected impact of policy actions on consumers and what are the expected costs of inaction?

Question 10 will be answered in supplementary submissions

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