SHOPPING CENTRE
COUNCIL OF AUSTRALIA

18 July 2014

Ms Patricia Scott
Commissioner
Productivity Commission
GPO Box 1428
CANBERRA ACT 2601

And by email: retail.trade@pc.gov.au

Dear Commissioner Scott

Premier of NSW Submission: Retail Trade Industry Study

I am writing to respond to two issues raised in the NSW Premier's submission, dated 16 July 2014 (DR030), on the Commission's *Interim Report on the Relative Costs of Doing Business in Australia: Retail Trade Industry*. We believe the submission is selective, incomplete and potentially misleading in relation to 'lease incentives' and 'turnover data'.

The submission makes reference to the current review of the *NSW Retail Leases Act 1994*. We are a member of the NSW Government's working group for this review and provided a comprehensive submission in February 2014 in response to the *Issue Paper*. In this regard, we acknowledge some of the comments and reforms outlined in the submission including the commitment to reduce compliance costs, a voluntary standard lease, and an improved disclosure statement. We are broadly supportive of these reforms.

However, the comments in lease incentives and turnover data, which reportedly came from the *Office of the NSW Small Business Commissioner*, give cause for concern. Aside from the fact that the information is incomplete, we are also concerned it gives the impression the retail property owners are not in compliance with NSW regulation or 'doing the right thing'.

The submission doesn't reference the fact that these two issues have also been subject to the *NSW Retail Leases Act Review* (which is noted in other parts of the submission). Further, we feel compelled to respond given the NSW Government's *Issues Paper on the NSW Retail Leases Act Review* contained selective and incomplete references on the issue of lease incentives from the Productivity Commission's 2008 Inquiry into the Retail Tenancy Market, to which we responded as follows:

> The Paper's commentary on *Information Asymmetry* is biased against shopping centre landlords and makes various misrepresentations.
>
> The Paper also selectively references and misrepresents the 2008 Productivity Commission report in suggesting the Commission recommended that lease information, including incentives and side deals, "should be lodged in a publically accessible location". The Commission recommended "a standard one page lease summary" should be lodged "at a publicly accessible site". No specific recommendation was made in relation to the mandatory public availability of incentives and side deals.
>
> The Commission also states (at page 181) that "it does not appear that the lack of information has placed significant efficiency constraints on the market". At page 253 the Commission states: "The Commission considers that lodged lease information should not necessarily include information on incentives and 'side deals'. Such a requirement would be difficult to enforce and would not significantly add to market information".

(Excerpt: SCCA submission on the NSW Retail Leases Act Issues Paper)

In addition, we made the following comments:

> It is also perplexing why the Paper is ambiguous about lease registration; a statutory process under the *Real Property Act* for the purpose of establishing indefeasibility of title (i.e. a legal interest in the property – similar to lease registration in other jurisdictions such as Queensland).
>
> It is not correct to say that only where the parties agree to make it a requirement of a lease, do leases have to be registered. The law already requires leases (retail or otherwise) for a term of 3 years including options to be registered, and the majority of leases are in fact registered.
>
> We also do not agree that, if this is an issue at all, registration of leases is an issue that relates primarily to shopping centre leases as the Paper suggests. The requirement for leases to be registered applies irrespective of whether the shop is within a shopping centre or a single shop on a high street.
>
> The provision of lease information is a by-product of lease registration. This too is acknowledged in the Productivity Commission's 2008 report (at page 175) and could have been clarified in the Paper. For this reason, the statement at page 10 that "prospective tenants will not be able to understand the competitive environment for a shop by calculating the 'whole of the financial deal' from information available on the register" is misleading and doesn't present a complete picture. A suggestion put to us that the omission of all of the Commission's commentary was to prevent the Discussion Paper from being too long lacks credibility.

We are pleased to provide the following responses to the issues raised in the NSW Premier's submission:

Lease registration and incentives

Lease registration is a statutory process under the *NSW Real Property Act*, which has the purpose of establishing indefeasibility of title (i.e. a legal interest in the property). This is similar to lease registration in other jurisdictions such as Queensland. The purpose of lease registration, including the corresponding "publicly available registered leases", is not to provide information on lease incentives or side deals.

The provision of lease information is a <u>by-product</u> of lease registration.

This is a critical issue for the Commission to note as the suggestion that "incentives are often excluded from registered leases" could give the impression that retail property owners are doing the wrong thing.

The submission also doesn't address the issue that lease incentives are binding confidential arrangements and obligations in a retail lease negotiated between the landlord and tenant, and that not all retailers want this information disclosed and available on a public register; including to their competitors. This includes updated side deals, which could send up a 'red flag' to others (including competitors) that a retailer is not trading well and requires assistance. The retail sector is also not unanimous in seeking the disclosure of incentives.

We are obviously disappointed the NSW Government has not acknowledged these related issues, including the potential disregard for the confidentiality of financial arrangements between a landlord and tenant.

Provision of turnover data

It is important that the Commission understands the reasons why landlords require the disclosure of turnover information and why this information is vital for shopping centre landlords <u>and also</u> vital for the retailers in those shopping centres. These reasons are outlined **Appendix A** (N.B. this information formed part of our submission on the *NSW Retail Leases Act Review*).

Further, the Commission should also note that the issue of turnover information was raised in the Productivity Commission's 2008 retail tenancy inquiry and that it was found that the provision of turnover data and its use by landlords is a matter for commercial negotiation and that prohibiting reporting of turnover information would reduce the flexibility of the parties to negotiate a mutually benefit lease and would be unlikely to lower average occupancy costs.

Beyond the reasons note above, the *NSW Office of the Small Business Commissioner* is aware that there are current discussions to develop an industry code for the collection, supply and use of retail turnover information in shopping centres. This includes ourselves, as well as the major retailer groups such as the Australian Retailers Association (ARA), National Retail Association (NRA) and Pharmacy Guild. This was highlighted in our submission on *NSW Retail Leases Act Review* in February 2014. Since that time, substantial progress has been made and this work is nearing final consideration and endorsement by each organisation's relevant executive committees (e.g. Board of Directors). We intend to brief the NSW Government (and other jurisdictions) once this work is completed, if it is endorsed by all organisations.

The submission also failed to make reference to the fact that the *NSW Retail Leases Act* (at section 50) currently regulates issues surrounding the provision of turnover information.

The Commission should also note that retailers regularly seek aggregated turnover information from landlords during the term of a lease (in order to benchmark their performance against others in the same retail category), and consider turnover information to be a vital tool for the benefit of both landlords and tenants.

We respectfully request that the Commission considers this submission in preparing its final report for the Federal Government.

As always, I would gladly discuss this further with you

Yours sincerely,

Angus Nardi
Executive Director

APPENDIX A: DISCLOSURE OF TURNOVER INFORMATION BY TENANTS

It is important that the Commission understands the reasons why landlords require such disclosure of turnover information and why this information is vital for shopping centre landlords and also vital for the retailers in those shopping centres. This issue has been raised on many occasions during retail tenancy reviews and all have accepted that the continuing collection of this information is vital. This issue was also raised before the Productivity Commission in 2007-08, as part of its retail tenancy inquiry, and the Commission found the provision of turnover data and its use by landlords is a matter for commercial negotiation and that prohibiting reporting of turnover information would reduce the flexibility of the parties to negotiate a mutually beneficial lease and would be unlikely to lower average occupancy costs.

Market share analysis

Turnover information is necessary for proper market share analysis – to determine the overall financial performance of a shopping centre; the strengths and weaknesses of the centre's retail offer according to various retail categories; and if it is losing sales to a competitor. This information is critical for decisions on expansions and refurbishments of the centre. Shopping centres usually require major refurbishments, involving substantial amounts of capital, every 10 years or so.

Decisions on refurbishments and expansions are always major risks and to embark on these projects without proper market share analysis would be a case of 'flying blind'. To expect shopping centre owners to undertake such major capital expenditures without knowledge of the turnover of particular centres would be like expecting, say, David Jones to make similar decisions about its chain of department stores without knowing the turnover of individual stores or of individual departments within those stores. Turnover is needed, in turn, to inform shopping centre investors' expectations about the rates of return on investment.

Tenancy mix

If a shopping centre doesn't maintain an appeal to all of its customers (i.e. have the right 'tenancy mix') it will lose customers and stagnate. That will be to the detriment of its tenants as much as its owners. Occasional changes to the tenancy mix of shopping centres, as well as fairly regular redevelopments, are therefore a very necessary fact of life. Management of the tenancy mix is a constant and evolving process designed to maximise the customer pulling power of the centre for the benefit of all retailers.

Turnover information is therefore necessary to ensure a centre has a successful tenancy mix strategy to enable it to adapt to a constantly changing market place. Without turnover information it would not be possible to monitor the retail performance of individual shops and categories. Over time the tenancy mix strategy would become largely 'hit and miss' and ultimately detrimental to the customers' needs; to retailer turnover levels; and to the centre's retail profitability.

Marketing and promotional strategies

Turnover information is also vital to most effectively target shopping centre marketing and promotional strategies in order to ensure a centre gets maximum value for its marketing and promotional expenditure. A typical regional shopping centre will spend between $1 million and $2 million a year on marketing, funded jointly by contributions from centre retailers and the centre owner. A detailed assessment of turnover information enables the centre to direct its marketing funds to where they are needed most; to evaluate the success of marketing strategies; and, particularly, to boost those categories of retail experiencing difficult trading periods.

Independent industry researchers

Turnover information is vital to industry researchers to, among other things, compare the relative performance of shopping centres. For example, the independent magazine *Shopping Centre News* publishes each year comparative performance tables based on turnover for shopping centres, which are important for investors, retailers and owners. Retailers use the tables to decide in which centres they will seek premises. The magazine relies on this information to compile its comparative lists (what it calls 'Big Guns', 'Middle Guns' and 'Little Guns') and this would not be possible if turnover figures were not disclosed. Leading retail research firms, such as Urbis and Macroplan Dimasi, rely on turnover figures to prepare important industry data, including sales and occupancy cost analysis, which are used by both owners and retailers for benchmarking and location decisions. Urbis and Shopping Centre News both made submissions to the Review of the Queensland Retail Shop Leases Act outlining how vital this information is to the industry and we are happy to supply copies of these submissions to the NSW Review.

Retailer benchmarking purposes

Turnover information is vital to individual retailers for benchmarking purposes. It enables the retailer to compare the performance of their store to the trend of that particular retail category and to the trend of all specialty shops in that centre. This can alert them to the need for corrective action. Major chain retailers now regularly request this information to enable them to benchmark the performance of their stores in various centres against the performance of other stores in the same category so they can make better business decisions. Major landlords, as a matter of course, now make this information available to retailers who request it, provided it can be aggregated so that it does not identify the sales performance of individual retailers.

One of our members, the Scentre Group (formerly the Westfield Group), provided the Productivity Commission with a sample monthly sales report, prepared by its research team, which obviously does not identify the retailer for whom the report was prepared, nor the relevant retail category. Scentre advised that there were over 430 recipients on the distribution list for these sales records, representing more than 100 different retailers, and that requests for this information were growing. These are obviously mainly from retail chains but the information is also available, upon request, to individual retailers. Westfield has advised that the increasing demand for customised sales analysis by individual retailers, together with the increasing number of retailers requiring reports, was a key reason why it has heavily invested in a new system for turnover reporting which is now fully operational.

The report enables the particular retailer to know, each month, for each Westfield shopping centre in which the retailer is located:

- the number of other stores in the same category;
- the area of the store (m2) and the area of all the stores in the same category;
- the sales per square metre for the category and the sales per square metre for the store, for the particular month, and the percentage variance for both, and where the store ranks in that particular category;
- the actual MAT (moving annual turnover) for the preceding 12 months, again by category and store, and variance, and ranking within the category;
- the monthly MAT on an annualised basis, again with variance; and again with the ranking within the category; and
- the same information is given for each state and territory (in this case four states and the ACT) enabling each store to also be benchmarked against state and total figures for the above.

Most major landlords now provide similar vital, and free, information for retailers and this enables them to pinpoint the stores that are doing comparatively well and those that are doing comparatively poorly. This enables them to take any necessary corrective action quickly. Armed with similar information from other landlords, these retailers can also make informed decisions about states, locations and centres in which they wish to be located (or from which they wish to withdraw) and this is obviously valuable information for them at lease renewal time. Sales reports are particularly important to retailers who are making changes to their businesses or are operating in a changing industry or environment. In times of change the reports help retailers understand how quickly they are improving or declining and enables them to act at the earliest opportunity.

Major retailers constantly compliment our members for providing this information. Many retailers seek guidance on an ongoing basis and make regular calls throughout the year to discuss the implications of the findings. Often this is followed by a request for further, more detailed, customised analysis to investigate specific issues. Retailers in, say, the unisex category (which is a fairly broad sales category) may request analysis comparing their performance to a number of specific retailers that they see as occupying a similar position to them in the market. Other retailers ask for an analysis of trend to help them understand changes in their relative position within the market.

There is an obvious disconnect between the position of those retailer associations which are pressing for turnover information not to be disclosed and the position of many of their members who are using turnover figures supplied by the landlord to better inform their business decisions. In the last review of the *Retail Shop Leases Act* in NSW the relevant retailer associations did not seek to have the declaration of turnover information prohibited. Instead those retailer associations argued that the sales performance of the shopping centre (moving annual turnover), where it is collected, should be included on the landlord's disclosure statement so that this information is readily available to prospective tenants. This was agreed by the SCCA and it is now a requirement in NSW that centre turnover information (according to food, non-food and services) be included on the landlord's disclosure statement in that State. Obviously this information could not be provided to prospective tenants if sales information was not collected.

Productivity Commission Finding

The issue of retailers reporting turnover information to landlords was thoroughly considered by the Productivity Commission in its inquiry into the market for retail tenancy leases in 2007-08. The Commission found: "*Prohibiting the reporting of turnover data would be unlikely to lower average occupancy costs*" (Report p.148). "*Prohibiting the collection of turnover data, or mandating that it be provided at a store category level, could limit shopping centre owners' managing their assets optimally. This could limit the performance of centres, ultimately disadvantaging centre tenants and consumers. Also, while the reporting of turnover data was one of the most contentious issues raised during this inquiry, it is very unlikely that any means to prohibit the collection of turnover figures would materially ameliorate the expressed concerns (chapter 6). Given information on vacancy rates, and that it is likely shopping centre managers could gauge a tenant's performance and turnover through other means, it is not clear that prohibiting the provision of turnover data (or legislating the fashion in which it is provided) would materially affect occupancy costs. The Commission's assessment is that the provision of turnover data, and its use by landlords should be the subject of commercial negotiations between the parties to a lease.*