Submission to the Queensland Government's *Review of the Retail Shop Leases Act 1994*

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Context

The Australian Sporting Goods Association Incorporated (ASGA) welcomes the opportunity to make a submission to the Queensland Government's Review of the *Retail Shop Leases Act 1994*.

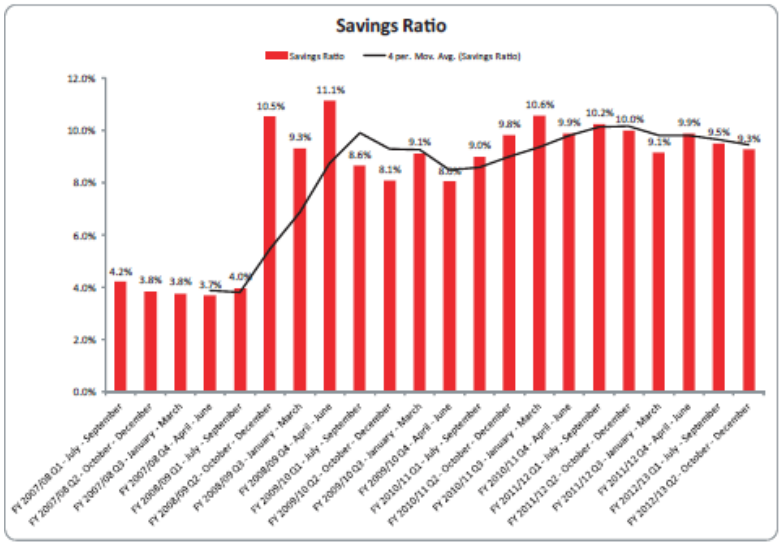
ASGA was formed in 1981 as the national industry association representing a broad spectrum of sporting goods and active lifestyle industry participants, including manufacturers, importers, agents, wholesalers and retailers.

ASGA is a leading industry voice on issues impacting the health, trade, regulation and taxation of the sporting and active lifestyle goods industries. ASGA aims to foster market growth, provide services and advocate for increased participation in sport and physical activity.

Members of ASGA include the world's leading sports brands and major Australian retailers. We represent over 1000 sporting and active lifestyle goods retail stores around Australia.

Sports retailers range from the very large (1,000+m^2) like Rebel Sport and Sportsmart, through to franchisees like The Athletes Foot, family-owned businesses in the High Streets of regional towns and tiny golf club pro-shops. Ownership and business models include franchises, listed corporations, family-owned companies and vertically-integrated international brands.

Queensland sporting goods retailers are facing significant challenges, from a higher household saving rate (see the graph below) to the low value threshold on goods purchased overseas.



Source: Reserve Bank of Australia

High rents and an opaque leasing process are part and parcel of the major challenges faced by retailers.

These rents are of particular concern within shopping centres. As noted by research conducted by the Shopping Centre Council of Australia (SCCA), shopping centres account for $84 billion in retail sales each year, across 1,338 individual centres. These centres are very productive in comparison to strip shopping areas, with nearly 41% of all retail sales in less than a third of available retail space across the country. The large centres attract in excess of 15 million shopper-visits per year.[1]

Indeed, as pointed out in the Australian Retailers Association (ARA) submission to the Productivity Commission's *Economic Structure and Performance of the Australian Retail Industry* inquiry in May 2011 "the smaller an individual business is, the greater the disparity in the power dynamic between the retailer and the landlord. This factor is further compounded by the very real notion that large-scale shopping centres are

[1] http://www.scca.org.au/HTML%20Pages/Research.htm

oligopolistic in nature. The fact that companies such as Stockland, Centro, Westfield and AMP are really the only providers in the market, retailers (even one with branches across different jurisdictions) are reliant upon securing sites within these premises. In addition, smaller retailers are further exposed to the inherit imbalance in the rental arrangements particularly when negotiating and continuing retail leases."[2]

We're basing this submission in large part on the Productivity Commission report *The Market for Retail Tenancy Leases in Australia* 2008[3] (PC Report), although we will be responding directly to those issues posed by the Options Paper.

Broadly, ASGA is concerned, like many of the retail groups submitting to this Options Paper, with issues including: the power imbalance between landlords and retailers currently in favour of landlords; transparency of information available to both parties; security of tenure; the use of retail turnover to determine occupancy costs; rent and fit out costs.

As a general comment, in addition to those areas mentioned above, ASGA is also concerned with achieving consistent legislation across the country. As noted in the 2008 PC Report "Until 2001-02, jurisdictions met regularly with the aim of harmonising legislation, but these meetings were discontinued. Although the broad architecture of retail tenancy legislation or codes is similar across Australia, there are significant differences in detailed provisions and application between jurisdictions, and indications are that policies and regulations across jurisdictions will diverge further."[4]

For reviews like this one, harmonising Queensland state legislation with similar laws in other jurisdictions should be a priority, although not at the expense of tenant rights in Queensland.

Please note that ASGA will not be commenting on every option in the Paper.

ASGA is happy to discuss any of the recommendations to this review in more detail and looks forward to further discussions with the Minister's office about retail tenancy issues.

[2] http://www.retail.org.au/Portals/0/Policy/PCRetailInquiryARA%20submission%20-%20FINAL.pdf
[3] http://www.pc.gov.au/projects/inquiry/retail-tenancies/finalreport
[4] http://www.pc.gov.au/__data/assets/pdf_file/0011/82748/02-overview.pdf (Overview, p. XVIII)

Submission

Item 1: Object of the Act

ASGA strongly supports including a reference to greater transparency in the Object of the Act. ASGA members, particularly small businesses, have indicated they are often at a disadvantage when negotiating with landlords. This is not because of a lack of information necessarily (although that can be part of the problem), but rather because the information available is not transparent and requires significant legal advice to be understandable.

As noted in the PC Report: "The Commission was repeatedly told that there is an information imbalance in the relationship between shopping centre landlords and retail tenants. One retailer association stated that retailers often find themselves in an information 'vacuum' when negotiating or assessing their leases. While such claims are not new (similar concerns were expressed to the Reid Inquiry), they are made in the context of extensive information disclosure requirements under current regulations, considerable public information available from tenancy authorities and the development of a lease information and advisory sector." (p. 153)

A reference to greater transparency highlights to both landlords and tenants that all parties should have access to the same information when negotiating a lease.

Item 2.0: Leases excluded from operation of Act

As a general point, ASGA believes that all retail tenancies should be subject to the Act.

Item 2.1: Floor area exclusion

A number of sporting goods retail stores would fall under this potential exclusion should it come into effect. ASGA opposes any change to limit the size of a retail outlet for inclusion in the Act.

Item 2.2: Exclude leases by publicly listed corporation

While adopting the suggested change to exclude leases by publicly listed corporations would lead to greater harmonisation with retail tenancy laws in other jurisdictions, in this case the change would result in retailers – particularly franchisees – being disadvantaged.

In effect, landlords currently prefer negotiating with and leasing space to franchisors - often large, publicly listed corporations – because they prefer to deal with companies that have a proven business record and financial resources, rather than individual franchisees.

The suggested change will give landlords more bargaining power over individual franchisees, who may be forced to assume the tenancy themselves, rather than have their franchisor do so on their behalf.

In addition, the mooted change could potentially lead to two 'classes' or tiers of tenants, with those operating under the exclusion operating without the protections of the Act but with the market power of a national franchise and those store owners (franchisees or not), given the protections of the Act but potentially disadvantaged because they lack the power of a national franchise.

ASGA opposes this option.

Item 3.1: Definition of 'floor area'

ASGA supports including a definition of 'floor area' and agrees the PCA Guidelines are acceptable as a default guide for determining floor area. In regards to the issue of shopping strips and commercial/residential

premises above retail shops, ASGA submits that retail tenants should only be liable for the proportion of outgoings they themselves are responsible for. Either the landlord or other tenants (commercial or residential), should be liable for the non-retail proportion of those outgoings.

Item 3.5: Definition of 'turnover' – online sales

ASGA recommends the definition of 'turnover' be amended to exclude online sales. AZs well as questioning what right landlords have to any access to online sales data at any time, ASGA does not support the idea that the reference to "business carried on in a leased shop" (Section 9(1)) should cover online sales if the leased shop is involved in the sale in some nebulous fashion, like, for example, picking up a good purchased elsewhere (ie: online).

Online commerce – and the intersection between online and 'bricks and mortar' retail – is constantly evolving. There is a very real risk that any attempt to include online sales under the definition of turnover will be out-of-date by the time the amendments come into effect.

Item 3.7: Definition for 'renewal' of lease

ASGA supports Option B to give consistency for both parties.

Item 3.8: Definition of 'core trading hours'

ASGA is concerned the move to 24 hour trading places a difficult and unsustainable burden on retailers, particularly small businesses. ASGA would argue that any attempt to increase core hours, particularly into times when penalty rates must be paid, is an infringement of tenants' rights and should be resisted. Given the complexities however, ASGA is unwilling to accept or oppose the current option and recommends further discussion by the reference group.

Item 4.1: Date lease entered into

ASGA supports Option A, whichseems to be the simplest and most 'common sense' approach that also reflects the realities on the ground.

Item 4.4: Prohibition on contracting out of Act

ASGA agrees with this option.

Item 5.1.2: Timeframe for landlord disclosure

ASGA agrees with this option.

Item 5.1.4: Waiver provisions for all tenants

ASGA supports this option.

Item 5.1.5: Landlord disclosure on renewal/extension of lease

ASGA supports Option B. The disclosure statement provides important information about the shopping centre the tenant must have access to before deciding to exercise their option.

Item 5.1.6: Tenant's right to terminate for non-disclosure

ASGA supports this option.

Item 5.1.7: Certified copy of lease

ASGA supports this option, while noting that we recommend the mandatory registration of all retail shop leases (see *Item 16.14.1*).

Item 5.1.8: Uniform landlord disclosure statement

ASGA supports moving to a national, uniform landlord disclosure statement.

Item 5.2.2: Tenant declaration about pre-lease representation

ASGA opposes this option.

Item 5.3.1: Timeframe for assigner disclosure to assignee

ASGA supports this option

Item 5.3.2: Additional detail for disclosure by assignor to assignee

ASGA supports this option and agrees the provision should be strengthened to reflect Victoria's new assignor disclosure statement.

Item 5.4.1: Franchisor disclosure to franchisee

ASGA supports Option A. ASGA also supports consistency for *Item 5.4.2*.

Items 5.5.1/2/3: Financial and Legal Advice Reports

ASGA supports Option B for *5.5.1*. We also support the options for *5.5.2* and *5.5.3*.

Item 5.6: Failure to comply with disclosure requirements

ASGA does not support this option.

Item 6.1: Turnover rent and information (Inc. 6.1.1/2/3/4/5/6)

ASGA strongly advocates the legislation adopts a provision that makes it illegal to collect turnover data from retailers / tenants by landlords.

In our considered opinion, collecting turnover data is little more than a mechanism that allows landlords to hold tenants to ransom. Moreover, rents should not be based on tenant profits, they should only ever be determined by fair market value when compared to other retail shop leases in the centre or immediate area/ street shopping strip.

As noted by the ARA: "The ARA's grave concern is that there is presently no effective mechanism to accurately determine the market rate of commercial tenancies. The tenancy is initially calculated incorporating a theorised retail turnover figure and at the point of re-negotiation specific data has thus been collated by the landlord and then aggressively leveraged. This exacerbates the power imbalance between the parties. Moreover, the ARA objects to this practice as there is no comparable data provided to the tenant of the works or strategies undertaken by the landlord which would indicate their contribution to profitability other than providing a premises in which to transact."[5]

[5] http://www.retail.org.au/Portals/0/Policy/PCRetailInquiryARA%20submission%20-%20FINAL.pdf p. 6.

If, however, the review finds that turnover data should continue to be allowed, it is vital that under *Item 6.1.5* that landlords do not have the right to terminate a lease based on turnover. Moreover, in *Item 6.1.6*, landlords must be required to provide turnover data to existing and prospective tenants.

Item 6.2: Rent review provisions (Inc. 6.2.1/2/3/4/5)

ASGA supports the four dot-points in *6.2.1*. In particular, using CPI for specific categories, rather than general CPI, makes sense and should make sense to landlords. While CPI increases for things like clothing and footwear is less than the all groups CPI at the moment, this is likely to change over time.

However, ASGA also notes the increased compliance and regulatory burden that will occur should these dot-points be adopted and so recommends further discussion by the reference group.

ASGA supports the option in *6.2.2* but notes further discussion needs to be held regarding a nationally uniform rental review regulation and process.

We do not support *6.2.3*.

ASGA supports Option B in *6.2.4* and notes that the option in *Item 6.2.5* becomes irrelevant at this point.

Item 6.3: CMR Determinations (Inc. 6.3.1/2/3/4/5/6/7/8/9)

ASGA supports:

- Option A in *6.3.1*
- The Option in *6.3.3*
- Option B in *6.3.4*
- The Option in *6.3.5*
- The Option in *6.3.6*
- The Option in *6.3.7*
- The Option in *6.3.8*
- The Option in *6.3.9*

ASGA notes the option in *6.3.2* becomes irrelevant following Option A in *6.3.1*.

Item 6.4.1: Management fees

ASGA supports Option B. In particular, we have grave concerns about landlords essentially 'double-dipping' – as landlords are often the managers of a centre, surely they cannot charge both rents and management fees? In the residential market, body corporate fees are only charged to the owner, not the tenant.

Item 6.4.2: Landlord's insurance excess

ASGA supports the option.

Items 6.4.3/4: Landlord's annual estimate and audited statements of outgoings and *apportionment of landlord's outgoings*

ASGA supports Option C for both items. However we recommend further discussions around the appropriate apportionment for *6.4.4*.

Items 6.5.1/2: Sinking fund contributions recoverable as outgoings and *Limitations on tenant contributions to sinking fund*

ASGA supports the options in both items.

Items 6.5.3/4/5: Distribution of sinking fund… and *Unspent advertising…* and *Landlord to make available…*

ASGA supports Option A for all three items.

Item 6.6 (Inc. 6.6.1/2/3)

ASGA supports the options in 6.6.1, 6.6.2 and 6.6.3, while noting the intention to have a mandatory registration of leases.

In particular, as noted in submissions from other organisations to previous consultations on this issue, it is a fundamental principle that an entity pays for its own legal and associated costs.

Item 6.7.2: Compensation for restrictions of access…

ASGA is opposed to both options A and B and recommends there be no change to the relevant provision. 'Recognised shopping centre practices' is another way of saying 'what landlords want' and their use in the provisions will reduce the rights currently held by tenants under the Act. Any claims for compensation should be judged against how much control over the changes the tenant (as compared to the landlord) holds in any given circumstance.

Item 6.7.3: Interaction between section…

ASGA supports Option A.

Item 6.7.4: Application of section 43(1)(f)…

Any change to 43(1)(f) would mean a tenant unwillingly moved to a less desirable location within the centre will be denied compensation. ASGA does not support this option.

Item 6.7.5: Limit on compensation claim for notified specific occurrences

ASGA believes the provision is adequate as it stands and would prefer to see no change. We support Option D. This also aligns with the PC Report of 2008.

Item 6.7.6: Exemption for landlord's emergency response

ASGA supports the option.

Items 6.7.7/8: Landlord's liability to franchisee…

ASGA supports Option A for both *6.7.7* and *6.7.8*.

Item 6.7.9: Compensation payable by tenant…

ASGA does not support the option to delete section 43A.

Item 6.7.10: Compensation where landlord introduces excessive competition

ASGA supports this option but notes it may be very difficult to implement on the ground. We recommend further discussion by the reference group.

Item 6.8 (Inc. 6.8.1/2/3/4/5/6/7)

ASGA notes that in all case where a landlord requires the tenant to vacate the premises, the tenant is either owed compensation or the shop must be moved at the landlord's expense.

In regards to specific items and options, ASGA:

6.8.1: Supports the option
6.8.2: Supports the option
6.8.3: Supports Options A and B
6.8.4: Does not support any changes to the provision
6.8.5: Supports Option A
6.8.6: Supports the option
6.8.7: Does not support any changes to the provision (and notes there are no similar provisions in other jurisdictions).

Item 6.9 (Inc. 6.9.1/2)

ASGA supports the option in *6.9.1* and supports Option B in *6.9.2*

Item 6.10 (Inc. 6.10.1/2/3)

ASGA does not support the changes described in *6.10.1* or *6.10.3*. We do support the option in *6.10.2* (Landlord to give tenant advance notice of proposed alteration/.refurbishment)

Item 6.11 (Inc. 6.11.1/2/3/4/5/6/7)

ASGA does not support changes to *6.11.1*; *6.11.2*; *6.11.3*; *6.11.5*; *6.11.7*.

ASGA supports the option in *6.11.4*. We support Option C in *6.11.6.*

Item 6.13.1: Replace unconscionable conduct test with unfair conduct test

ASGA believes the current test is reasonable and does not support a change.

Item 6.13.2: Expand QCAT powers to deal with unconscionable conduct

ASGA believes there is no reason why QCAT should not have the full range of orders available to it on making a finding that a party has engaged in unconscionable conduct. We support Option A.

Item 6.14.1: Mandatory registration of leases, including lease incentives

Further to Item 1, it is vital that tenants have access to the full range of information when they are negotiating a lease with a landlord, particularly a large shopping centre landlord. Registering leases and including the full range of information on them is one method of providing all parties with access to equal amounts of data.

ASGA strongly supports both Options A and B.

It should also be noted that the purposes of this registration are for informational purposes for all parties. It is not the same as registering a parcel of freehold land under the Land Titles Act 1994. While the simpilest administrative outcome may be to register retail leases in the same manner as registrations under the LTA, that should not be the only mechanism evaluated for this purpose. Entering the details into a simple, searchable online database hosted by the Queensland Government could achieve exactly the same desired outcome, without being linked to the LTA in any way.

Items 6.14.2/3/4

ASGA does not support any changes to the current provisions in these items.

Item 6.14.6: Security of tenure – statutory minimum lease term

ASGA is sympathetic to the argument that minimum lease terms of seven or eight years provide more certainty for tenants, particularly given the amortisation costs of fit-outs, which often take longer than the current, standard, five year leases. However, we are also cognizant of the fact that some retailers prefer shorter leases.

ASGA recommends that if a minimum term is introduced, the prospective tenant be given the option of reducing the lease term.

ASGA strongly recommends further discussion be held by the reference group about this issue.

Item 6.14.7: Implied lease conditions for damaged premises

ASGA supports the option.

Item 6.14.8: Rent abatement where landlord closes shopping centre as precaution

ASGA does not support the option and recommends no change to the provisions.

Items 6.14.9/10/11

ASGA does not support any of the options in these three items.

Items 7.1/2/3/4

ASGA recommends no changes under any of these four items.

Items 7.5/6/7

ASGA notes the difficult issues raised by these three items and recommends the reference group discusses these matters further.

Item 8.1: Penalties

ASGA recommends further discussion by the reference group for all the matters raised under item *8.1*.

Item 8.2: Provision for mandatory statutory review

ASGA does not support the option to repeal section 122. While the seven year term should be open for discussion, it is important that legislation is reviewed periodically to ensure it remains relevant.

ENDS

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