

Australian Property Institute Limited

SUBMISSION TO THE SMALL BUSINESS COMMISSIONER

RESPONSE TO THE “MOSS REPORT” RECOMMENDATIONS FOR THE RETAIL AND COMMERCIAL LEASES ACT (SA)

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1. Introduction

- 1.1 The Australian Property Institute is the leading and contemporary membership organisation for property professionals that develops and supports our members to advise the community and business. The Australian Property Institute is impartial, objective and independent.

Australian Property Institute members can be found across all sectors of the property profession, in private practice and in the public sector. This broad base of qualified and skilled professionals is unique to the Australian Property Institute. The Institute is committed to building and maintaining a strong base for the future of the property profession through broadening the expertise and knowledge of membership.

Retail and Commercial Leases form the backbone of all non-residential investment property in all Australian markets. As a consequence any legislative framework impacting commercial and retail leases will impact such investment properties and may as a consequence of that impact directly alter the market value of those investments. Furthermore any changes to legislative frameworks impacting commercial and retail properties will have direct impact on the way those properties are managed and or transacted. As a consequence all of the different property related doctrines of which API's membership base comprises are likely to be touched in some way by any change to South Australia's Retail and Commercial Leases Act. The API therefore appreciates the opportunity to voice concerns of its members as detail herein.

In a general sense the API believes that change to any existing legislative framework should only be reasonably driven by a demonstrated need for that change and any proposed amendments to existing legislation should only be considered where the demonstrably address and identify need. Accordingly, we note with great interest that the vast majority of observations made in the Moss Report indicate that no change is required to a majority of the current clauses in the Act.

2. Our Concerns

- 2.1 For the sake of brevity, this submission responds only to those recommendations comprised in Section 55 of the Moss Report (using the alphabetised references from the Moss report) and includes our comments only on those individual recommendations with which we have a concern. For the sake of clarity, this means that the API supports the balance of recommendations made in the Moss Report.

We do ask however that the Commissioner consider the following areas of concern

- (i) Recommendation "D":

The API supports the Moss Report recommendation regarding the proposed Small Business Commissioner's powers of exemption however we would urge that a clear right of appeal to SACAT be included.

- (ii) Recommendation "F"

The API notes that in South Australia the Retail and Commercial Leases Act has no minimum application threshold and accordingly covers many leases for start-up businesses and existing small businesses including retail, commercial and industrial premises (where those premises are used in a manner which invites the public to trade). In respect of these businesses we are concerned that the proposed mandatory registration of leases (irrespective of requirements to provide survey plans) may generate an unnecessary financial impost on small business operators in particular, including both

Tenants and Lessors and therefore we see no demonstrated need to warrant such a recommendation applying to such small businesses in this State.

Although some API Valuer members may see mandatory registration as a valuable source of relatively confidential rental information, given the above-mentioned shortcoming, we would not as a professional body support this recommendation in its current form.

We would not wish to support any change where additional costs associated with registration would represent an impediment to the commencement of a small business.

(iii) Recommendation “K”

The API believes firmly that in any free market a “user pays” philosophy is appropriate. Accordingly, we disagree that recovery of Land Tax on a single holding basis should be selectively blocked for those property investments which fall under the control of the Retail and Commercial Leases Act.

(iv) Recommendation “M”

The API disagrees with the recommendation that all bank guarantees should be held by the Small Business Commissioner as we see no reasonable justification for any change in the current free market arrangements. This proposal would create an unnecessary public administrative cost and offer no tangible benefit to tenants or landlords.

(v) Recommendation “P”

The API objects in the strongest possible manner to the notion of provision of a legislative pathway for an orderly exit from a lease by failing business.

Since retail and commercial leases form the financial backbone of all non-residential property investment they set the market value of billions of dollars’ worth of property. The relationship between assessed risk associated with the cash flow from a lease, or leases, on an investment property, has a direct causal impact on the market value of that property. The very notion of the introduction of a risk of termination of cash flow on an investment property must be offset by an increased return rate which has the immediate effect of reduction in current market value. Furthermore, since not all retail and commercial investment property have leases which come under the control of the Act, the introduction of such a notion would immediately create an absolute division in the investment property market with a distinct differentiation between those properties which are impacted by the Act and those which are not. This would also place South Australia’s retail and commercial investment portfolio at a distinct disadvantage to those of other states further exaggerating the problem by redirecting demand interstate whilst supply remained constant. The API has no doubt that financial institutions would also view this proposal as totally unacceptable and would no doubt be advising that it would lead to a reduction in new investment funding and an increase in cost in any funding that did take place.

We would also like the Commissioner to reconsider the perceived need for such a change. At present if for any reason a Lessee’s business fails, or is failing, there is a motivation on behalf of both the Lessee and Lessor to find a commercial solution which mitigates the negative impact to both.

(vi) Recommendation “R”

The API does not agree that the current jurisdiction of the Magistrates Court to deal with matters of under \$100,000 should be revoked as we see no demonstrated need to warrant such a change. The suggested provision of the role of a Small Business Commissioner to mediate and determine disputes under the Act up to \$100,000.00 is not supported as it would not provide for the usual escalated appeal rights through superior courts.

(vii) Recommendation “T”

We note that the Moss Report recommends that penalties under the Act should be increased. Again, the API sees no demonstrated need for such a change and certainly will not support such a recommendation without specific grounds for a qualified change in each and every instance.

4. Conclusion

4.1 The API thanks the Small Business Commissioner for considering our submission.

The API looks forward to providing further advice and consultation on Retail and Commercial Leases Legislation. For any further information or clarification, or to arrange a meeting please contact the Amy Guy, National Manager – Member Services and Advocacy at aguy@api.org.au or on (03) 9644 7500.

APPENDIX 1

AUSTRALIAN PROPERTY INSTITUTE INC.

The Australian Property Institute, (formerly known as the Australian Institute of Valuers and Land Economists), has enjoyed a proud and long history. Originally formed in South Australia over 87 years ago in 1926, the Institute today represents the interests of approximately 8,000 property experts throughout Australia.

The API, the nation's peak professional property organisation and learned society, has been pivotal in providing factual, independent and dispassionate advice on a broad range of property issues addressed by the Commonwealth and State/Territory governments and their agencies since the Institute was formed.

In addition, the Institute's advice has increasingly been sought by international bodies such as the United Nations, the Food and Agriculture Organisation (FAO) and the World Bank, evidencing a level of expertise within the API and its membership, which is recognised regionally and globally.

As a professional organisation the primary role of the Australian Property Institute is to set and maintain the highest standards of professional practice, education, ethics and discipline for its members. Institute members are engaged in all facets of the property industry including valuation, property development and management, property financing and trusts, property investment analysis, professional property consultancy, plant and machinery valuation, town planning consultancy, property law, research and education.

Membership of the Australian Property Institute has become synonymous with traits and qualities such as professional integrity and client service, industry experience, specialist expertise, together with tertiary level education and lifelong continuing professional development.