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## ARA SUBMISSION REGARDING REVIEW OF THE NSW RETAIL LEASES ACT

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments to the NSW Small Business Commissioner in relation to the review of the *Retail Leasing Act 1994 (NSW)* (the Act). We also note and appreciate being given the opportunity to meet with the Commissioner as part of the review process.

The ARA is the oldest, largest and most diverse national retail body, representing a \$400 billion sector that employs 1.3 million Australians and is the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate across the country and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

### COMMENTS AND RECOMMENDATIONS

The retail landscape has changed considerably in recent times due to the impact of the global pandemic, strengthening economic headwinds and the ongoing digitalisation of the retail market, which was accelerated in the last three years. For retail, these changes are set against the backdrop of a shift in consumer behaviour, which is driving a transition towards a hybrid retail model that encompasses both an online presence with the traditional storefront.

We note that most ARA members in NSW would be captured by the scope of the Act. Tenancy issues are an area of concern for these members as we move into 2023, with inflationary pressures affecting rents and other costs of doing business, including the rising costs of labour, energy and fuel.

We therefore make the following recommendations in response to the key questions raised in the Commission's Discussion Paper.

#### 1. Objectives of the Act: are they being met and do they remain appropriate?

1.1 Is the Act meeting its objective to foster good leasing practices and reduce disputes?

The ARA submits that the Act is meeting its current objectives, particularly around reducing potential disputes by ensuring both landlords and tenants have clear rights and obligations.

We submit there is potential to clarify these rights and obligations and shifting some transactions to digital solutions may assist in improving transparency, accessibility, timeliness and ease of understanding for all parties.

<p>1.2 Are there any changes to the retail landscape or leasing practices that warrant changes/ updates to the Act?</p>	<p>Yes, the ARA believes there are several factors that require consideration in terms of updating the Act:</p> <ul style="list-style-type: none"> <li>• The rise of online shopping means there is a need to modernise definitions and practices with regard to sales reporting so that online sales are treated appropriately.</li> <li>• COVID-19 has demonstrated the need to have clear and simple exit pathways for businesses needing to terminate a lease in the event of similar emergencies where an otherwise healthy business becomes unviable in a very short space of time. To this end a standard force majeure clause, as well as provisions that apply generally in the event of an emergency event with broad impact are recommended.</li> <li>• The ability to clawback Landlord capital contributions and rent free periods in the event of a lease assignment or default requires Act clarification. This is a highly contentious issue and one which has a different approach in each State/Territory, with Tenants being forced to rely on case law to tackle this issue.</li> <li>• It would be beneficial to have a section of the Act which tackles the nuances of the Franchising relationship (where a Franchisor holds the Lease). Currently, there is a lot of debate and confusion between Landlords and Franchisors in respect of: <ul style="list-style-type: none"> <li>- Franchisor (as Sublessor) disclosure obligations (do they have to replicate the Lessor Disclosure or can they simply pass it on as-is)</li> <li>- Wording for “Franchising Consent” clauses (tackling consent/approval of Franchisee, assignment etc)</li> <li>- The ability for the Franchisee (Sub-Tenant/Licensee) to be the Guarantor in the Head Lease and provide insurance and bank guarantees directly etc</li> </ul> </li> </ul>
<p>1.3 Are there any additional policy objectives the Act should meet?</p>	<p>Additional policy objectives the ARA recommends are:</p> <ul style="list-style-type: none"> <li>• Industry education and access to information for landlords and tenants, preferably in digital format would be helpful</li> <li>• Work towards national harmonisation</li> <li>• Improved transparency and consistency in relation to disclosures between lessors and lessees.</li> </ul>
<p><b>2. Requirements of the Act: are there opportunities to improve outcomes?</b></p>	
<p>2.1 Are the requirements of the act effective at reducing disputes?</p>	<p>As noted above, the ARA believes the Act is useful in reducing disputes.</p> <p>We recommend that the threshold for a dispute fall with the tribunal’s jurisdiction should be increased from \$750,000 to \$1 million to bring it into line with the rise in typical rents over the last several years.</p>
<p>2.2 How could the Act be improved to reduce compliance costs, including by removing unnecessary requirements or adopting alternative approaches to achieve objectives?</p>	<p>The ARA’s position is that national harmonisation with other jurisdictions will result in a reduction of compliance costs for many retailers. In particular, the use of standard, national forms for disclosures between lessees and lessors would result in cost savings and reduce compliance risks.</p>

2.3 Are there any parts of the Act that are unclear or overly complex?	ARA members have indicated that there is a lack of clarity around the obligations in Clause 32, specifically to provide a reminder notice regarding lease options to renew. We recommend that there is a clear obligation for notice to be provided to the tenant early.
2.4 Are disclosure and registration requirements appropriate and how could they be improved?	<p>The ARA recommends an approach based on national harmonisation around disclosure requirements.</p> <p>As noted above, registration processes that can be digitalised will streamline arrangements and likely lead to cost savings and efficiencies, even if only in time saved.</p> <p>We also note that the current registration requirements do not include an obligation to register associated Deeds and other contractual arrangements, for example around rental rebates and fit-out contributions. For transparency it could be useful to have the registration requirement also capture these associated agreements if they are relevant to the lease.</p>
2.5 Are there any deficiencies in the current approach to defining a retail lease and is the scope of the Act's jurisdiction appropriate?	The ARA believes the current scope of the Act's jurisdiction is appropriate. In principle, we support a definition and scope that captures a broad range of retail leases and has an appropriate level of flexibility around physical size of the premises as well as financial thresholds in relation to the business. We also support national harmonisation around the definition and minimum standards.
2.6 Can user experiences with bond processing and recovery arrangements be improved?	The ARA recommends that consideration should be given to requiring a well-documented entry condition report in the Act. This would, in turn, improve bond processing and recovery arrangements at the end of lease. We also support the inclusion of Tenancy Bond Insurances to provide more flexibility to lessees.
2.7 What are the emerging stakeholder needs not currently addressed by the Act?	<p>ARA members have indicated that the on-selling of energy to retail lease holders in embedded networks does not pass on any efficiencies or savings from the bulk purchase of energy. In fact, the experience of retail leases is the opposite.</p> <p>The ARA recommends that there should be a percentage cap on any profit landlords can make from the on-selling of energy to lessees. We believe this would result in significant savings for lessees.</p>
<b>3. Legislative context: does the Act operate well with other legislation?</b>	
3.1 Are there any areas where the operation of the Act does not operate well with other legislation?	<p>The ARA is not aware of any issues with the current Act in terms of operating with other legislation.</p> <p>However, as noted above in section 1, the ARA recommends that the Act include a standard force majeure clause and emergency measures and provisions that would potentially be triggered by the declaration of a state of emergency by the Premier or National Cabinet and this most likely would need to be consistent with other legislation governing those processes.</p>

We note that WA is in the process of reviewing its equivalent legislation and regulatory framework. We urge engagement between these two reviews to share findings and recommendations, so that we can move closer to a nationally consistent model of best practice in terms of retail leases.

We also suggest that the review process should strive to recommend improvements to the Act, with the objective of building a model piece of legislation on retail leasing that other jurisdictions across the country could replicate.

Thank you again for the opportunity to provide a submission and we look forward to further engagement as the review process progresses.

Any queries in relation to this submission can be directed to our policy team at [policy@retail.org.au](mailto:policy@retail.org.au).

Yours sincerely,



**Paul Zahra**  
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