

24 August 2011

Ms Amanda Blackwell / Ms Karen Keyser  
Legal Policy Officers  
Department of Commerce  
Consumer Protection Division  
Locked Bag 14  
CLOISTERS SQUARE WA 6850

Dear Ms Blackwell and Ms Keyser

**CONSULTATION REGULATORY IMPACT STATEMENT – COMMERCIAL  
TENANCY (RETAIL SHOPS) AGREEMENTS ACT 1985 – OPTIONS FOR  
IMPROVING ACCESS TO LEASE INFORMATION IN THE RETAIL TENANCY  
MARKET IN WESTERN AUSTRALIA**

I refer to the letter of 15 July 2011 from Anne Driscoll, Commissioner for Consumer Protection inviting comment in relation to the 4 Options outlined in the Consultation Regulatory Impact Statement.

The Law Society of Western Australia:

- supports Option 1 (Increased Valuer access to information) – but with certain qualifications;
- does not support (and opposes) Options 2 (Public Lease Register) and 3 (Mandatory Registration);
- otherwise favours Option 4 (Status Quo).

**Option 1**

The Society **supports** the recommendation in Option 1 subject to some qualifications.

This recommendation is that the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (**Commercial Tenancy Act**) be amended to require a landlord to provide information for a valuer who is undertaking a market review of rent.

The Society agrees that enforcement should be by means of an application to SAT for an appropriate order against the landlord.

The Society believes that the requirement should **only** apply to a valuation dispute which has been referred to SAT. This will enable SAT to properly supervise and enforce the requirement for the disclosure of relevant information.

The Society's qualifications for the support of Option 1 are as follows:

- (1) The mandatory disclosure of rental information should only be available for the purpose of a market review of rent and **not** in connection with the

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negotiation of the commencing rent for a new lease. The disclosure of information relating to comparable rentals should only be made mandatory when a *valuer* is determining the rent, not when the parties themselves are negotiating in a free and open market situation – that in fact is how market rents are established in the first place.

- (2) The disclosure of rental information should only be made mandatory when the lease is a lease in a retail shopping centre. Comparable rental evidence would only be of practical assistance when the landlord owns a retail shopping centre; ie more than 5 retail shop tenancies.
- (3) The valuer requesting the rental information should be required to specify which shops in the retail shopping centre are relevant to the information requested. The valuer should not be permitted to impose the unnecessary burden of requiring rental information for all tenancies in a retail shopping centre, merely as part of a "fishing expedition" but should be required to specifically identify the relevant tenancies.
- (4) The landlord should be entitled to charge a reasonable fee for the provision of required rental information, sufficient to cover the landlord's administrative costs.
- (5) There should be a reasonable period specified which the landlord may have to provide the requested rental information.

## **Option 2**

The Society **does not support** the proposal that the Commercial Tenancy Act be amended to require landlords to maintain a public lease register.

The reasons why the Society does not support this proposal were set out in the Society's letter of 5 October 2010. Those reasons are:

### **1. Problems related to Administration**

If the requirement is mandatory, meaning that penalties will be imposed, it will be essential to very carefully prescribe the manner in which the register must be maintained. Consideration will have to be given to the form of the register and how promptly information must be put into the register and how relevant parties will be entitled to gain access to the information in the register. As the information will need to be restricted, there could be difficult issues of determining proper authority to gain access. Furthermore, as the information will of necessity need to be general, it will be difficult to determine how much of the information is appropriate and relevant to a particular market review. Landlords do not necessarily have appropriately qualified and competent staff to manage the maintenance and control of access to such a register. There is potential for frequent disputes concerning access to the register to arise, necessitating referral to SAT or some other forum.

The Position Paper notes that management in a shopping centre already retains relevant lease information and suggests therefore that the regulatory burden imposed by a mandatory lease register will be lower. However, information kept by management staff is not regulated and, in the Society's



view, a significant administrative burden will be imposed on landlords if a compulsory register is introduced.

The Society notes that a public lease register option is not favoured because of the significant administrative burden. In the Society's view, this would be no less the case in relation to an attempt to require landlords to maintain a compulsory register. In addition there would be significant potential for increased disputation. In the Society's view, there are likely to be significant extra costs resulting from a compulsory lease register, which will be passed on to tenants through increased rent or outgoings.

## **2. Questionable Usefulness**

Even if a compulsory lease register were imposed, in the Society's view, there is no certainty that appropriate and proper use of the information would be made. It would not be possible for the register to contain all relevant circumstances relating to each individual lease agreement. It is a fundamental principle of freedom to contract that the parties can determine the relevant commercial factors which will apply to their bargain and as rents are not subject to economic regulation, various factors might determine the commercial arrangements of each lease. The limited information which will necessarily be available under a lease register may lead to inappropriate comparisons and distortion to a fair market valuation.

The Society is of a view that the information that would be available in a compulsory lease register may not be sufficient for a fair and accurate appraisal but may be misleading. It has always been the role and function of valuers to ascertain relevant information by diligent enquiry and then to use their training and skills to apply that information in an appropriate manner. The Society considers a compulsory lease register could be used as a poor substitute for proper investigation and enquiry by valuers.

The Society does not know of any other situation in which a mandatory "information register" of the kind proposed exists. In the Society's view, not only is the proposal objectionable on public policy grounds, it is also unworkable.

### ***Option 3***

The Society **does not support the proposal** that the registration of retail leases be made mandatory so that the Register can be searched to obtain rental information.

The reasons for objecting to this proposal are that:

- A registered lease would only reveal the commencing rent. It would not be possible by search to ascertain any variations to the rent resulting from rent reviews or agreement between the parties.
- The actual costs of registering a lease substantially exceed the \$160 Titles Office registration fee. The substantial costs result from:
  - the need to have a proper survey plan;

- the need to obtain consents from other encumbrancers;
- the need to have any prior mortgagee consent and (in the case of the first mortgagee) produce the title.

Usually the minimum additional cost to register a lease (over and above the normal lease preparation costs) is between \$1000 and \$2000. It can be more.

If registration is made mandatory, it is likely that tenants will end up bearing substantial extra costs for their lease, in circumstances where there may be little or no benefit to them.

### **Conclusion**

In conclusion, the Society considers that a fair and proper market review outcome can be achieved by the requirement that landlords engaged in a market review process under the Commercial Tenancy Act must provide relevant information. Enforcement can be achieved through the mechanism of relevant orders made by SAT.

It is not necessary to take the significantly more burdensome step of introducing a compulsory lease register, with the necessity for penalties to be introduced.

This option would be impracticable and unworkable.

The option of mandatory registration is also opposed. This option would not provide sufficiently up-to-date information but it would impose substantially increased lease costs on tenants.

In the Society's submission the best outcome is for:

- the Commercial Tenancy Act to be amended to require landlords of shopping centres to disclose rental information when requested by a valuer conducting a market review; and
- the status quo to be otherwise maintained.

Yours sincerely



Hylton Quail  
**President**