

SCENTRE GROUP

1 August 2014

Unfair Contract Terms Consultation Paper
Small Business, Competition and Consumer Policy Division
The Treasury
Langton Crescent
PARKES ACT 2600

Dear Sir / Madam

Submission to the Department of Treasury consultation paper on extending unfair contract term protections to small businesses

This is the Scentre Group submission to the Commonwealth Department of Treasury on the Consultation Regulation Impact Statement on extending unfair contract term protections to small businesses (**UCT Proposal**).

Background

Scentre Group was created following a merger of Westfield Group's Australia and New Zealand business and Westfield Retail Trust in June 2014. Scentre Group manages, develops and has an ownership interest in 47 Westfield branded shopping centres, with over 12,500 retail outlets, in Australia and New Zealand.

Scentre Group is a member of the Shopping Centre Council of Australia (**SCCA**) and has had the advantage of reading the submission of the SCCA in relation to the UCT Proposal. Scentre Group endorses and supports the views expressed in the SCCA submission. Given the significant implications of the UCT Proposal Scentre Group considers it necessary to highlight some key concerns it has with the proposal.

Comments on UCT Proposal

Scentre Group does not support the UCT Proposal.

Scentre Group notes that the Government has expressed a repeated determination to fulfil its election commitment in relation to the UCT Proposal however Scentre Group considers that the introduction of the UCT Proposal has the potential to create substantial business uncertainty, increase red tape and business costs.

The business to business relationship is inherently different to that of business to consumer, and standard form contracts are not only a fundamental building block for efficient working relationships between businesses but also commonly reflect standard market practices and are often authored and/or endorsed by industry and legal bodies (such as the standard contract for sale of land prepared by relevant state law associations).

Owner and Operator of  in Australia and New Zealand

SCENTRE GROUP LIMITED ABN 66 001 671 496

Level 30, 85 Castlereagh Street, Sydney NSW 2000 Australia · GPO Box 4004 Sydney NSW 2001 Australia · T +61 (02) 9358 7000 · scentregroup.com

For the purposes of this submission we have adopted a consistent approach with the SCCA and, while noting our overall concerns with the UCT Proposal, we restrict our specific comments below to Option 3 (which the Consultation Paper notes is the preferred option).

(a) Existing regulatory environment for retail tenancies

As a shopping centre owner, manager and developer Scentre Group is already subject to well-established and expansive State and Territory retail tenancy legislation.

Retail tenancy legislation covers a broad range of issues between landlords and retail tenants including minimum conditions which must apply in the lease entered into by the landlord and tenant, detailed rules on key aspects of the retail tenancy relationship, and an easily-accessible and cost effective mediation regime. The legislation in effect operates to ensure there is a fair relationship between landlords and small (and even medium sized) tenants.

In light of the substantial regulatory protections already in place with regard to retail tenancies, adding another layer of regulation would create substantial uncertainty for landlord and tenant arrangements and increase the cost and complexity of such arrangements.

We strongly recommend that retail leases (contracts) which are regulated by State and Territory retail tenancy legislation should be exempted from the proposed legislation.

(b) Definition of small business

Scentre Group recommends that the definition of 'small business' should be consistent with the definition adopted for 'small business employer' in the *Fair Work Act 2009* i.e. a business that employs fewer than 15 employees. If this is not accepted we recommend that the definition from the *Income Tax Assessment Act 1997* be adopted i.e. an aggregated annual turnover in the previous year of less than \$2 million.

Scentre Group also recommends that publicly listed companies are excluded from the UCT Proposal irrespective of the definition of 'small business' that is adopted.

(c) Clarification and drafting concerns

Scentre Group recommends three major changes to the current legislation if it is extended under the UCT Proposal:

- The current exemption in section 26 of the Australian Consumer Law, that the laws do not apply to "a term required, or expressly permitted, by a Commonwealth, State or Territory law" needs to be extended to include "or which meets the minimum standards of a Commonwealth, State or Territory" – this would have the effect of minimising duplication with existing legislation;
- The 'rebuttable presumption' in section 27 (that a contract is presumed to be a standard form contract) and in section 24 (that a term of a contract is presumed not to be reasonably necessary to protect the legitimate interests of the party) should be reversed so that the onus is on the party challenging the contract terms – this is appropriate in the context of business to business contracts where there is widespread acceptance of the importance of the role of standard form contracts to streamline business relationships and minimise costs; and

- Guidance must be given in the legislation, or in the Explanatory Memorandum, on the degree of negotiation which must occur before a contract falls outside the scope of being a 'standard form contract'. Scentre Group considers that once single term has been amended, this is sufficient evidence that a contract is no longer a standard form contract.

Yours faithfully

A handwritten signature in blue ink, consisting of a stylized 'P' followed by a series of loops and a long horizontal stroke extending to the right.

Peter Allen
Chief Executive Officer, Scentre Group