



Australia's property industry

**Creating for Generations**

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Chris Lamont  
Small Business Commissioner  
Government of New South Wales  
via email: [speakingup@smallbusiness.nsw.gov.au](mailto:speakingup@smallbusiness.nsw.gov.au)

***The proposed Retail Leases Regulation 2022***

Dear Commissioner,

The Property Council of Australia welcomes the opportunity to provide a submission to the New South Wales Government regarding comments and feedback on the proposed reforms of the *Retail Leases Regulation 2022* a new principle under the *Retail Leases Act 1994*.

Property is the nation's biggest industry, representing one-ninth of Australia's GDP and employing more than 1.4 million Australians, as well as being the largest employer in Australia. In NSW, the industry creates more than \$581.4 billion in flow on activity, generates around 500,000 jobs and provides around \$36 billion in wages and salaries to workers and their families.

Our members are the nation's major investors, owners, managers, and developers of properties of all asset classes. They create landmark projects, environments, and communities where people can live, work, shop, and play. The property industry shapes the future of our cities and has a deep long-term interest in seeing them prosper as productive, sustainable and safe places.

The Property Council has engaged in consultation with our members on the changes proposed to retail leases across NSW and in principle do not have major concerns with the inclusion of small bars with a maximum patron capacity of 120. Regarding the addition of Gymsnasiums and fitness centres, including yoga, barre, pilates and dance studios we wish to raise significant concern for the policy outcomes and to the simplification of process expressed in the Regulatory Impact Statement (RIS).

The definition is very broadly drafted as an inclusive definition and would capture potentially many more types of businesses that are contemplated in the RIS. We draw the Commissioner's attention to the fact that the health sector is not a retail offering. It by its own title is an offering of a health service

on a subscription membership basis. The nature of the use is very different to the other uses listed in Schedule 1. Often gyms are in non-retail areas such as in industrial other zones (warehouse type location) and the nature of these premises as well as their location demonstrate it is not a retail offering. The mediation service offered by the SBC can be used by anyone and is not limited or restricted to those leases that fall within the Retail Leases Act.

Issues arise in the RIS as there is no evidence to demonstrate why this use should be covered by the Retail Leases Act, nor any explanation as to why the Government seeks to intervene in the sector. Gyms have had the benefits of Covid regulations which applied to both retail and commercial leases and therefore were not disadvantaged during the Covid shutdowns by not being a Schedule 1 use and had the same benefits that retail leases had.

From our understanding of the regulation and the focus on mediation and disclosure statements in its assessment of impact, all the provisions of the *Retail Leases Act* would apply to gyms and not just these two provisions, which means that gym leases would become as highly regulated as other retail uses and would be a huge cost impost on the landlords. Many landlords are small landlords and given the nature of where the gyms are located, they are generally not large, sophisticated landlords. Gyms are already covered off inside a shopping centre. Nor are many players in the space “Small Businesses” as Virgin Active, Fitness First, and alike would attest.

In relation to the CIE report, it looks only at the impact on disclosure statements and mediation. It does not look at what impact all the other provisions of the Act would have on gym leases such as restrictions on rent reviews, recovery of outgoings, assignment and potential for s34 claims. As these areas have not been assessed, the Property Council supports a reopening of the report to complete the landscape. The high cost to the landlord incurred, particularly landlords of smaller businesses who are the ones that would be impacted would be substantial. The nature of the rights given to tenants under the *Retail Leases Act* are not consistent with the type of premises and locations where gyms are generally located outside of shopping centres. The introduction will cause an imbalance that will disadvantage and hurt landlords significantly and increase costs for the landlord of smaller premises and businesses.

The Property Council also notes that the time taken to prepare a Disclosure Statement is a lot more than 0.9 hours for landlords who do not have retail in their portfolio and intentionally do this as they prefer not to deal with the *Retail Leases Act*. The time taken to complete a Disclosure Statement would be somewhere between 2 to 3 hours as the business would need to collect the information and prepare the statement, which would require external assistance and add additional costs to their small business.

Another area of concern relates to the retrospective nature of the Regulation in its application, from our understanding if you have a gym lease with a ratchet clause, immediately after the introduction of the Regulation, the ratchet clause and other provisions that are contrary to the *Retail Leases Act* would be void.

Finally, the Property Council would like to raise that the focus of this regulation amendment is only on two aspects of the *Retail Leases Act* which contains over 100 provisions. Considering the new impost of this Regulation on businesses, it is disappointing that there has been no analysis of the impact of costs to the landlord of complying with the Act, especially those who have had never had to comply with the Act and have no knowledge or understanding. This should be a matter which is examined further as soon as possible.

If you have any further questions or would like to discuss further, please feel free to contact Senior Policy Advisor, Matthew Wales at [mwales@propertycouncil.com.au](mailto:mwales@propertycouncil.com.au).

Kind regards



**Adina Cirson**

Acting NSW Executive Director

We have included areas of the RIS below that need to be redrafted due to issues and claims that impact the sector with either misleading or no basis to be used. These include:

**1. Tenancy Disputes**

From Page 8 of the RIS

*During that time, the Registrar of Retail Tenancy Disputes observed similarities in the tenancy relationships between health and fitness businesses that are not situated in shopping centres, to those businesses listed in Schedule 1 of the RL Act. The inclusion of the various types of health and fitness businesses in Schedule 1 of the RL Act would potentially remove a distinction between those businesses situated in retail shopping centres and those outside them (for example in standalone premises and premises on retail shopping strips).*

**Recommendations:**

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| <p><b>1. The Property Council recommends the NSW Government either amends the statement as there have been no examples to support the observation or include an example which relates specifically to the need for inclusion.</b></p> |
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From Page 9 of the RIS

*The Registrar of Retail Tenancy Disputes noted a 4-fold increase in applications for mediation following the introduction of the COVID-19 Leasing Regulation and a 34 percent increase in the proportion of applications for mediation for commercial (non-retail) leasing disputes.*

**Comment:**

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| <p><b>1. During the pandemic, issues that arose were in regards to rent relief and were covered under the COVID Regulations. Mediation between Landlords and Tenants was the policy intent to open discussions to give both sides the opportunity to explain their circumstances. These</b></p> |
|---|

mediation sessions did not cover other issues. Allowing mediation as a course of action advantages multinational organisations not doing the right thing.

## **2. Location and Size**

From Page 10 of the RIS

*Schedule 1 of the Act would potentially remove a distinction between those business situated in retail shopping centres and those outside them (for example in standalone premises or located on shopping strips) to ensure that the latter group benefits from the mediation regime in Part 8, Division 2 of the RL Act.*

**Comment:**

- 1. There are many businesses/uses where they are not covered outside a shopping centre but are covered inside the shopping centre, in this way Gyms are not unique. Both Banks and Travel agents are also given this distinction.**

From Page 10 of the RIS

*The proposed amendments to include businesses outside shopping centres will not capture the larger operators who would be excluded from the jurisdiction of the Act where the premises are over 1000m2 and lease terms less than six months or longer than 25 years.*

**Recommendations:**

- 1. The Property Council recommends an amendment as larger operators can be included as the size of the premises is not relevant to the size of the organisation. The size of a premises is dependent on location and offer, many larger overseas owners have smaller premises which would be caught by this amendment.**

From Page 10 of the RIS

*Failure to include these businesses may impair an equitable and optimal operating environment.*

**Comment:**

- 1. No evidence supports this statement.**

## **3. Disclosure statement costs**

From Page 9 of the RIS

*The main impacts of the RLA relate to the dispute resolution function and a general increase in transparency (for both landlords and tenants) in lease negotiations. For example, a Productivity Commission Inquiry into The Market for Retail Tenancy Leases in Australia (2008) noted that the following elements of retail tenancy laws had been useful*

**Comment:**

- 1. The Property Council does not believe this to be accurate.**

From Page 15 of the RIS

*The time burden imposed on non-shopping centre landlords for preparing a disclosure statement is estimated at 0.9 hours. This is based on stakeholder feedback to the Victorian RIS which suggested that large landlords generally have the internal capacity to prepared disclosure statements themselves, whereas small landlords require external assistance.*

**Comment:**

- 1. The statement on small landlords to carry the burden of the cost is unfortunately abundantly clear.**

Table 4.3, Number of small bars and health/fitness centres, within Shopping Centres

**Recommendations:**

- 1. The table refers to the number of both small bars and health/fitness centres but only includes bars. The Property Council recommends changing the title of this table.**

On page 13 of the RIS

*There are 5853 Gyms and Fitness Centres businesses in Australia as of 2022.8 Assuming that the number of gyms in NSW is proportional to the population, this would imply that around 31% (or 1,839) of these businesses are located in NSW.*

**Recommendations:**

- 1. The Property Council recommends that the NSW Government removes all assumptions about gym businesses and refers to facts and findings only. Clarification for Table 4.4 is also needed as some context is needed to understand its use.**