
10 Assessment and alternative approaches to regulation

The Commission was asked to report on the operation and regulation of the retail tenancy market in Australia, and the scope for further regulatory reform. While the Commission's assessment is that overall, the retail tenancy market is operating well (box 10.1), it is evident from this inquiry that there are also tensions between many tenants and landlords, and a considerable volume of ineffective or overly prescriptive legislation.

Detailed prescriptive regulation that has attempted to address tensions by targeting particular aspects of the commercial agreements between retail tenants and landlords, has not 'fixed' many of these problems. Rather, it has added complexity, inconsistency and increased compliance and administrative costs (chapters 6 to 9). It is also not readily apparent that prescriptive retail tenancy legislation on facets such as lease terms, has afforded the retail tenancy market substantial efficiency improvements, compared with outcomes in the less regulated broader commercial tenancy market.

The Commission's assessment is that there is not a strong case for further detailed regulation of the retail tenancy market. However, there are alternative approaches that could improve the operation of the market. This chapter assesses possibilities for improvement, while recognising that retail tenancy legislation is a State and Territory matter. It first presents participants' views on the unintended aspects of the current mix of legislation that hamper the operation of the market. The potential to reduce the extent to which retail tenancy legislation prescribes commercial outcomes is then considered, along with the merits of a retail tenancy framework that is consistent between jurisdictions, options to increase market information, and potential instruments to act as a 'circuit-breaker' to the existing tensions in the operation of many retail tenancy leases, particularly in shopping centres.

In considering these alternatives, the question addressed by the Commission is not whether 'good' leasing practices are pursued in the context of the current retail tenancy legislation, but rather, whether there are new or different approaches that could generate net economic and social benefits (including a reduction in administrative, compliance and information search costs) for society as a whole.

Box 10.1 The retail tenancy market is operating well

The Commission considers the market for retail tenancy leases to be operating well overall. Generally there is competition between landlords for tenants and between tenants for retail space.

- In the shopping centre segment of the market, the Commission was advised that centre managers continually seek to attract tenants (both anchor and specialty) that best suit their local market and attract the most customers to the centre. In the larger shopping centres, in particular, there is often considerable competition between potential tenants for access to retail space.
- In other segments of the market, including retail strips, the Commission was advised that landlords compete with each other to attract desirable tenants. While there are clearly tradeoffs associated with alternative potential locations, tenants do generally have a choice of more than one location for their business.

In both the shopping centre segment and the broader market, more desirable tenants and shopping locations are able to negotiate more favourable lease terms and conditions (chapter 6 and 7). More generally, a variety of lease terms and conditions are negotiated, and occupancy costs vary between retail formats and retail categories — as would be expected in a well-functioning market.

The Commission found that a large amount of market information and professional advice is available to those who seek it. The Commonwealth, States and Territories have a variety of education and advisory programs for small business and/or retailers, to advise of steps they could take to inform themselves of lease obligations and avail themselves of professional advice commensurate with lease commitments and business risk. Furthermore, a number of retail advisory services and tenant representative organisations with access to market information and collections of market benchmark data, have emerged in recent years and there is evidence that more retailers are making use of these. Nevertheless, the extent of information on the market that is available, does vary considerably between parts of the market and between states. There is also evidence that many market participants still do not make use of available information (chapter 8).

The Commission found no evidence that businesses are leaving retailing at a faster rate than other service activities in the economy — exit rates for retail businesses are comparable to those in other service activities (chapter 2). Further, the survival of retail businesses in shopping centres is comparable to survival rates of retail businesses elsewhere. Despite relatively low vacancy rates in shopping centres, the majority of retailers in these centres are offered, and accept, new leases — although it is recognised that the take up of a new lease or indeed business ‘survival’ does not in itself, indicate the comparative ‘health’ of a business or the satisfaction of its owners with the lease conditions to which they have agreed (chapters 8).

10.1 Views on aspects of regulation that hamper market operation

The regulatory approach to date has been to add detailed prescriptive provisions to the legislation governing the relationship between retail landlords (especially shopping centres) and tenants. A number of participants to this inquiry, including small businesses, argued that regulation in the retail tenancy market has gone ‘too far’— intruding into commercial negotiations, limiting flexibility and having unintended consequences for some parties. In this context, the Commission was told that aspects of retail tenancy regulation unduly prescribe lease terms and conditions, and are unnecessarily different across jurisdictions. Such aspects of retail tenancy regulation constrain the operation of the retail tenancy market or raise costs to parties without providing significant benefits. For example, one participant said:

Australia is almost unique in having established a very detailed and prescriptive set of rules and regulations that govern all aspects of the retail tenancy relationship, beginning before a retail tenant signs a lease.

This legislation restricts and in some areas prohibits the terms and conditions the parties who fall within this legislation can agree to. Consequently this legislation operates as a significant constraint on the effective operation of the retail tenancy market. (confidential submission)

Similarly, the Franchising Council of Australia

... accepts that another attempt at more prescriptive legislation may not be the most fruitful course in addressing well-documented market problems. (submission no. DR174, p. 1)

In discussing approaches to regulation in the retail tenancy market, the Australian National Retailers Association (ANRA) submitted that:

When considering the need for a new approach to retail tenancies, we should examine the situation in New Zealand. ANRA members who have a presence in both countries believe the system in Australia is over-regulated and inconsistent with multi-layered legislation. While the New Zealand market is vibrantly competitive, Australia in contrast has a small number of linked landlords controlling the market making it necessary to ‘build in’ tenant protections to the system. (submission no. 92, p. 6)

Some participants also expressed concern about the ‘intrusion in commercial negotiations’ and the risk that this ‘may result in a less dynamic and diverse and a more contrived market place’ than may otherwise have been the case (confidential submission). In a similar vein, it was suggested by the Shopping Centre Council of Australia (SCCA) that the existence of detailed regulation in Australia has led to a ‘protectionist mentality on the part of many retailers in Australia’, and that:

... the response of many retailers and retailer associations in Australia to the inevitable risks and uncertainties of retailing is to call for even more government intervention and regulation. (submission no. 83, p. 7)

In relation to the costs of ‘more’ regulation, the SCCA argued that little attempt was made in the past to properly consider the cost (to property owners, tenants and consumers) of further expanding retail tenancy regulation, nor was consideration given to alternative, less-intrusive means of achieving desired outcomes.

Some of the costs imposed by regulations covering the retail tenancy market are presented in box 10.2. While comprehensive estimates of the additional cost of retail tenancy legislation were not available, the Commission was advised that a change in retail tenancy legislation in any one State or Territory has been estimated to impose a once-off cost to a national landlord of around \$68 000, in present day terms (confidential submission).

However, a number of participants associated with retailer interests disputed that the costs of compliance with regulation are significant. For example, the National Retail Association (NRA) stated that:

It should be recognized that costs of compliance should be considered against the total investment well in excess of \$100 billion, in retail property and businesses, and the economic costs to parties of non-compliance with a Code of Practice and/or relevant legislation, and are therefore negligible particularly for corporate landlords. (submission no. DR162, p. 3)

Also,

Reference to aspects of the legislation having ‘added to compliance and administrative costs’ if quantifiable should be compared with the added value that some aspects of the legislation could give to property values by improving the ‘quality’ of leases and their consequent rental values. It is a small price to pay for better quality outcomes for all stakeholders, compared with the very substantial costs to all stakeholders of poor investment decisions. (submission no. DR162, p. 9)

The Council of Small Business of Australia (COSBOA) also judged that compliance costs are not a significant part of the costs faced by tenants:

With capital costs in the hundreds of thousands and the lease commitments in hundreds of millions of dollars perhaps — perhaps millions of dollars — costs of compliance which range from a few hundred dollars to a few thousand dollars are a paltry amount of money relative to the protection that a lessee would be obtaining if it were otherwise the case. (transcript p. 285)

Box 10.2 Compliance costs imposed by regulation

Administrative and compliance costs imposed on the retail tenancy market by regulation may include the costs of:

- legal and financial advice required by tenants (in some states) prior to signing a lease;
- site surveys and mortgagee approvals required (in some states) prior to registration of a lease;
- lease registration;
- training landlords' management and leasing staff to ensure they comply with eight different sets of retail tenancy regulation and unconscionable conduct provisions of the *Trade Practices Act 1974*;
- providing the required disclosure documentation;
- preparing and auditing outgoing statements;
- preparing and distributing marketing and promotion statements;
- meeting procedural requirements for rent reviews, lease renewals and lease terminations;
- complying with relocation, planning and demolition requirements when redeveloping a shopping centre;
- land tax and lease preparation.

There could also be additional costs to taxpayers associated with:

- government bureaucracies established in each State and Territory to administer retail tenancy regulation;
- information and publications developed for retail tenants;
- the operation of retail tenancy mediation and dispute resolution services.

It is noted that some of the activities that generate these costs may provide net social benefits and therefore be worthwhile. It is only those costs that are excessive or unnecessary that should be reviewed. Further, in the absence of retail tenancy regulation, a proportion of these costs would still be incurred. For example, shopping centre owners and managers would still need to provide training for leasing staff and pay for the preparation of leases. But according to the SCCA, 'the administrative complexity and therefore compliance costs would undoubtedly be much less'.

Source: SCCA submission no. 83, p. 20.

A further concern related to the additional compliance costs faced by businesses subject to retail tenancy regulation compared to those businesses subject to more general commercial tenancy regulation. As set out by the SCCA:

... retail tenancy is subject to compliance costs that commercial tenancies are not. These extra costs are inevitably incorporated in the cost of the tenancy and therefore in consumer prices. This puts retail property at a significant disadvantage to other commercial property. (submission no. 83, p.17)

Aspects of the regulation considered to be ‘unnecessary’ in the current environment were also brought to the Commission’s attention. Two examples included:

- provisions under Victoria’s Retail Leases Act which require that certain details of signed leases be provided to the Small Business Commissioner; and
- the system for security deposits introduced to the New South Wales Retail Leases Act in 2006.

Other concerns on retail tenancy regulation raised by participants to this inquiry related to:

- retail tenancy legislative provisions that have confused or frustrated the execution of tenancy contractual obligations;
- the inadequacy of existing tenancy regulation in reducing tensions that can arise in the management of retail tenancies in shopping centres;
- differences in retail regulatory provisions between jurisdictions that have raised compliance and administrative costs; and
- unintended effects of broader regulations, such as those for zoning and planning.

Legislative provisions hinder execution of contractual obligations

While the initial intent of much of Australia’s retail tenancy legislation was to reduce abuses of bargaining power and information imbalances between shopping centre landlords and small retail tenants, some participants stated that the many changes to retail tenancy legislation in the recent past have inadvertently tilted the balance of protection heavily in favour of tenants, particularly those not in shopping centres — disadvantaging small landlords and frustrating the execution of some provisions in lease contracts.

Several participants noted that there are aspects of retail tenancy regulation related to lease termination for non-payment of rent which delay or frustrate the ability of landlords to achieve contractual outcomes (submission no. DR159 and submission no. 124). For example, one small landlord submitted that tenants under the current regulatory environment can contrive to avoid their contractual obligations and still retain tenancy:

I would like to state how extremely unfair the current NSW Retail Tenancy Act is towards landlords of small suburban shops that they do not have the power in cases like mine to

terminate a tenant's lease and remove them from the property when the tenants are clearly and consistently in breach of the lease conditions. (submission no. 124, p. 2)

Similar comments were made by the Real Estate Institute of Australia (REIA):

Retail tenancy legislation has been moving in a direction that, arguably, now favours the rights of tenants over landlords. Landlords can now find it exceedingly difficult to remove problem tenants without detailed explanation, multiple notifications, lengthy tribunal hearings (or court hearings), orders to assist the tenants in their business activities and significant costs arising from these delays. (submission no. 111, p. 15)

The prospect that tenancy legislation and its administration might systematically enable tenants or landlords to avoid contractual obligations is of concern. While the Commission did not receive evidence that such frustrations have imposed a significant cost, this issue appears to be of more relevance to non-centre tenancies (about which the Commission received fewer submissions). Given that the majority of the retail tenancy market is located outside of centres (chapter 2), the costs are potentially significant overall.

Existing regulatory instruments inadequate for centre tenancies

Some inquiry participants suggested that the existing regulation of retail tenancies and the resulting retail lease documents are inadequate to either describe or govern the management of shopping centre tenancies. Herro Solicitors stated in relation to retail leases that:

This whole idea of a lease: I don't even know if it is the right legal document any more for a shopping centre ... It's a document that used to work, but I think there's something else that should be in its place; something linked to centre performance. (transcript, p. 184)

Retail tenancies in shopping centres involve a management component that is additional to the rental of physical retail space in other non-centre retail formats. The additional management services that are part of the 'shopping centre package' and which tenants purchase are the skills of the centre manager in operating the centre — including through advertising, refurbishment and centre maintenance — to maximise foot traffic for the incumbent tenants. There can also be many detailed differences between leasing in retail strips and in centres and, in practice, the extent of these differences can vary considerably between localities. The major points of difference between a lease in a retail strip and that in a managed shopping centre raised in this report are summarised in a stylised manner in table 10.1.

Table 10.1 Leasing in retail strips and centres

The specialty tenant and landlord relationship

Market participants

Size, number and ownership structure of tenants (chapter 2)	Both strips and centres can have a large number and variety of tenants, although more tenants in larger centres are part of a national chain or franchise.
Size, number and ownership structure of landlords (chapter 2)	Retail strips tend to have many small landlords who are individuals, partnerships or small companies. Larger centres usually have a single landlord, often a national or international corporation. Some smaller centres are owned and managed by individuals or small companies.
Property management (chapter 2)	<p>Leases in retail strips tend to be managed by the landlord, a local real estate agent or another local professional. Larger centres usually have 'in-house' centre management that is often a large company specialising in shopping centre management.</p> <p>The manager of leases in retail strips is mainly concerned with management of the retail space and may have little direct influence on the shopping environment. In shopping centres, the shopping environment is micro-managed through varying the tenant mix, promotion of the centre, and monitoring of tenant performance.</p>

Leasing environment

Shopper foot traffic (chapter 7)	Individual tenants and landlords in shopping strips may have little influence on 'walk by' foot traffic. They may however, influence their customer base by advertising efforts and the attractiveness of retail services. In centres, tenancy mix and management decisions are typically focussed on maximising overall centre foot traffic.
Lease terms and options (chapter 6)	Leases in retail strips often exceed 5 years and can have multiple options. Whilst 'drawcard' tenants in centres may also have long leases with options, leases for specialty tenants in centres are usually of about 5 years with no option to renew.
Fit out requirements (chapter 7)	There are usually no landlord specified fit out requirements in retail strip leases. Centre leases typically involve detailed fit out requirements.
Outgoings (chapter 7)	Outgoings for retail strip shops are typically limited to site-specific use-associated costs (electricity, water etc). For shops in centres, outgoings also include costs for shared centre facilities and management, and can vary from year to year at the landlord's discretion.
Turnover disclosure (chapter 7)	Retail turnover is typically disclosed by tenants to centre landlords, but not to retail strip landlords.
Rent setting (chapter 7)	Rent in retail strips is negotiated between parties that typically have little control of the general shopping environment. Rent negotiations in centres are heavily influenced by tenancy mix requirements of centres, and the nature and expected performance of the tenant's business.
Information (chapter 8)	Lease information is typically simpler and more accessible in shopping strips compared to centre tenancies. Centre landlords typically have more information on tenants and the immediate leasing environment than do landlords in retail strips.

(continued next page)

Table 10.1 (continued)

Goodwill and the value of the business

Business value (chapter 6)	Goodwill that depends on location accrues to the property owner (the landlord) in both retail strips and centres. The only goodwill that is transferable on the sale of a business is that related to the product/brand of the business.
Lease expiry (chapter 6)	On lease expiry, the value of a trading right is exhausted. A retail business heavily dependent on securing a particular location for viability (in a strip or centre) would therefore have little or no value.

Conduct and disputes

Business conduct and disputes (chapter 9)	Disputes are not concentrated in either shopping strip or centre formats. Tensions associated with commercial negotiations and disputes are heightened: in relations between small specialty tenants and large landlords; and where there is strong demand for retail space (such as in large shopping centres or in proximity to a 'drawcard' tenant).
---	---

To some extent, the retail leasing market has adapted to these changing needs and there are now acknowledged differences in leases for shopping centre space, compared with leases for retail space in other formats. The Australian Newsagents Federation (ANF) noted that:

Shopping centre retail leases, in addition to traditional property rights, contain accompanying elements not often present in normal retail leases including management provisions and obligations similar to franchise agreements and management contracts. As a result, shopping centre managers are in a position to micro manage retail businesses through a series of predetermined key performance indicators. For those retailers relocating to a shopping centre from other retail formats the impact of these additional obligations is often unclear. (submission no. DR179, p. 8)

The SCCA noted that retail leases for tenants in shopping centres typically include provisions for the centre manager to collect additional information from the tenant (such as store turnover) in order to perform this management service:

... landlords do this [collect turnover information from their tenants] to micro-manage their centres ... They are able to keep track of individual tenants — see how they are performing — to know whether corrective action needs to be taken with a particular tenant. (transcript, p.93)

While these centre management aspects are often spelled out in lease documentation, a number of inquiry participants indicated that centre management is largely unaccountable under existing legislation, for their performance in delivering management services to tenants and that this contributes to tensions. The manner in which shopping centre leases are negotiated has also been highlighted in the inquiry, with use of aggressive and evasive tactics commonplace (chapter 9).

The inability of the existing regulatory structure to deal with matters of conduct, particularly in the shopping centre segment of the market, elevates the need for a consideration of alternative instruments in the market.

Inconsistent legislation between jurisdictions imposes costs

Landlords and tenants who operate in more than one State or Territory submitted that the lack of consistency in retail tenancy regulation between jurisdictions imposes unnecessary administrative and legal costs (box 10.3).

While State retail tenancy regulation has largely been formed by the jurisdictions ‘borrowing’ from each other when legislating, much of the initial harmony was undone as a result of subsequent State-based reviews. As Professors Duncan and Christensen note, there has been a:

... tendency for the reviewers in each jurisdiction to naturally consider what was last done in another State or Territory most recently reviewed, the result being piecemeal reform, not based upon any nationally agreed principles, but upon ‘ad hoc’ problems in the last reviewed jurisdiction. (submission no. DR153, p. 1)

Similarly, another participant suggested that:

... the States have continued to leapfrog each other as they attempt to take the best bits of others’ legislation and remove those that do not work as well. Although this approach may have led to more consistent legislation and conformity in certain aspects, in the main it has not and has often led to more frequent change and greater inconsistency which creates increased compliance costs and inefficiencies for both landlords and tenants. (confidential submission)

Participants provided examples of inconsistencies, including differences in:

- retail businesses covered by retail tenancy legislation;
- disclosure statements, including when they must be given to prospective tenants and the form and content of disclosure statements;
- the type and frequency of rent reviews;
- how outgoings are calculated, including whether land tax is payable and the recovery of lease preparation costs;
- duration and days on which particular tenants can trade;
- how security deposits and bank guarantees are to be held by the landlord;
- relocation and demolition clauses; and
- provisions for unconscionable conduct.

Box 10.3 **Participants' views on consistency in retail tenancy legislation**

Australian National Retailers Association — 'ANRA members are all nationally-based retailers with outlets in all States and Territories. Lease arrangements are therefore often with a few nationally based landlords, but differing regulatory requirements make it impossible to negotiate one uniform agreement with each landlord. Instead, separate agreements are forged to satisfy the different regulations and then weeks are spent while lawyers reconcile the range of inconsistent regulations. This is a time-consuming and costly exercise that is unacceptable to both landlords and retail tenants'. (submission no. 92, p. 6)

Australian Retailers Association — 'The different approach taken by the states does cause confusion especially with those retailers who trade across state boundaries'. (submission no. 119, p. 4)

Westfield — 'A degree of further cost and inefficiency which nationally operating landlords, such as Westfield, need to contend with arises from inconsistencies between retail tenancy laws in the various States and Territories (which give rise among other things to a lack of uniformity between States and Territories in the provisions of retail leases in use within different jurisdictions) and inconsistencies between State and Federal laws (for example, in some States the drawn down unconscionable conduct provisions of retail lease laws do not replicate TPA S.51AC as they specify a more extensive list of specific matters to which regard is to be given in determining whether unconscionable conduct has occurred'. (submission no. 85, p. 16)

Coles — 'Consistency across the states would provide for easier understanding, cheaper administration costs and fewer areas for dispute or debate'. (submission no. 48, p. 1)

General Property Trust Group — 'As a result of each state and territory having its own legislation it is very difficult for national retailers and landlords to keep abreast of all the differences from state to state. This requires extensive training for executives on the relevant retail lease legislation and additional legal resources to keep on top of all the various regulations. Each landlord needs to update standard documentation for each state and territory. It goes without saying that additional costs are being expended by having to update eight versions of disclosure statements, leases, assignment documentation, etc rather than one common form of documents'. (submission no. 34, p. 2)

Duncan and Christensen — '... there are still what could only be described as irrational differences in approach to the same issues between some jurisdictions which simply cannot be justified by claims of the need to comply with other existing property legislation affecting leases generally in any one particular jurisdiction. (submission no. DR153, p. 2)

Real Estate Institute of Australia — '... independent regulation creep has led to the development of numerous inconsistencies between the various jurisdictions, which when viewed from a national perspective, are likely to be constraining the efficiency of the retail tenancy market. (submission no. DR154, p. 2)

A notable example of discrepancies between various pieces of legislation relates to the definition of a retail business. The Law Council of Australia submitted that:

... childcare centres, dentists, internet café, bakery, travel agency, service stations and bowling and cinema centre ... in some instances ... are covered by the Acts in various States and in some cases, they are not so covered. (submission no. 68, p. 2)

The Australian Property Institute also said:

Various state legislation attempts to include or exclude, for various reasons, different types of property. Generally the result is cumbersome. By limiting the application to prescribed premises, problems associated with offices being caught in the legislation will not occur. (submission no. 70, p. 6)

Professors Duncan and Christensen suggested a number of advantages that could be afforded by a more consistent approach to retail tenancy regulation across jurisdictions:

There is sufficient commonality at present to initiate some national approach to regulating this market, either through COAG or another mechanism which would ultimately over a period lead to greater harmonisation and consistency of application nationally. It might also lead to more regularity in reviews of the legislation on a nationally agreed timeframe with major reforms being introduced once into all jurisdictions instead of on the irregular and random time frames which now exist. (submission no. DR153, p.2)

While national consistency was advanced in order to avoid the additional compliance and administrative costs that arise from jurisdictional differences in tenancy legislation, the Commission did not receive specific evidence to enable the quantification of these additional costs. Nevertheless, the high incidence of tenants, franchisors and landlords operating across jurisdictions suggests that such costs could be significant, particularly for those businesses that operate within the shopping centre segment of the market (chapter 2).

Planning and zoning laws affect competition

Some participants in this inquiry recognised that while planning and zoning restrictions are essential for urban planning, they also pose some limit on the supply of retail space, particularly at the shopping centre level. Indeed, the SCCA noted that ‘by seeking to support CBDs and suburban centres, centres policies arguably impose greater planning constraints on shopping centre development than on retail strip development’ (submission no. 83, p. 24).

The practice of limiting new retail developments to either existing developments (such as through expansion) or in certain retail zones was also seen as creating barriers to the establishment of new retail concentrations. The ACCC noted that the

establishment of factory outlet complexes ‘can often be impaired by structural constraints that include, for example, planning and zoning requirements’ (submission no. 128, p.8). Similarly, the Australian Retailers Association (ARA) claimed that:

... the existing legislation and regulations enforcing land use and zoning decisions have created a position, which significantly reduces the ability of extending the land available for use as retail except in the areas of greenfield sites associated with new subdivisions. (submission no. 119, p. 5)

The SCCA even suggested that planning restrictions, by regulating investment in centres, were beneficial:

... abolishing planning restrictions might raise the prospect of wasteful (excessive) use of scarce investment resources ... investment providing an excess supply of retail space would not be viable over time, and investors doing their ‘sums’ would recognise this and (not) act accordingly. (submission no. DR193, pp. 24-26)

A number of participants argued that the limited supply of shopping centre sites has increased the ownership concentration of retail space (box 10.4). Indeed, evidence of such commercial advantage has been demonstrated by some landlords disputing, through the courts, retail establishments in areas zoned for bulky goods. As stated by the Bulky Goods Retailers Association:

In relation to bulky goods/homemaker retailing there are wide ranging inconsistencies between the States in relation to both of these key regulations. This results in uncertainty and contributes to inefficiencies in the operation of national businesses. In recent years there has been a significant increase in legal disputes arising from these inconsistencies.

There has also been an increase in legal disputes arising from the fact that the market is constantly evolving while planning regulations remain static. Planning policy needs to keep pace with current and future markets in order to provide certainty for the industry. (submission no. 126, p. 6)

Retail strips and local shopping areas do not appear to have faced the same supply pressures. In fact, as noted in chapter 2, with the emergence of larger shopping centres, the overall share of occupied retail space that is in shopping strips has declined, with vacancy rates generally higher in the shopping strips than in the CBDs and the larger shopping centres.

A number of retail developments have also emerged outside of current planning regulations, and potentially offer competition to existing retail centres (box 10.5). The distinction between bulky goods zoning (which allows a certain type of retailing) and general retailing appears arbitrary, especially if sufficient public infrastructure exists to support retailing at the bulky good sites.

Box 10.4 Participants' views on planning and zoning regulation and bargaining power of landlords

Australian Retailers Association — 'The current planning regulations covering the zoning of retail has created an oligopoly of approximately twelve landlords that control a substantial part of the retail shop leases market especially within the shopping centre industry'. (submission no. 119, p. 26)

ACCC — noted that planning and zoning requirements for factory outlet complexes 'ultimately precludes competition and strengthens the bargaining position of individual landlords in their negotiation with regional shopping centre tenants'. (submission no. 128, p.8)

Southern Sydney Retailers Association — The 'existing retailing hierarchy' have protected themselves from competition by the manipulation of state government planning regulations, which has enabled them to obtain monopolistic powers over independent retailers which they have ruthlessly exploited'. (submission no. 90, p. 1)

Finally, planning and zoning restrictions for retail space have had flow-on effects to property and tenancy markets more generally. The ARA submitted that:

The zoning restriction has contributed to the escalation of the price of land in the correctly zoned areas resulting in higher rents and less opportunity for other developments on cheaper land that may have to go through the rezoning process. (submission no. 119, p. 26)

The extent that planning and zoning regulations have altered the market provision of retail space is unclear. Despite this, these types of restrictions do influence the quantity and location of retail space available and are likely to affect competition in the retail market. This, in turn, can influence outcomes in the retail tenancy market.

Box 10.5 Developments outside the scope of planning policies

Not all retail developments have had to abide by State and Territory planning policies. The most well known cases are the establishment of direct factory outlets (DFOs) on airport land (similar developments have occurred on mixed bulky goods and industrial zoned lands).

Airports obtain the land necessary for their operations under Commonwealth leases, with planning arrangements under control of the Australian Government (PC 2002, 2007b). This means that developments on airport land (including commercial operations that are not directly connected with the operation of the airport, such as retailing) are not subject to State or Territory planning controls.

Recently, DFOs and homemaker centres have been established on land leased from airports — that is, land outside planning centres. This land is also often available at lower cost than retail zoned land.

Developments on airport land have faced opposition from both existing retail developments and State and Territory planning authorities. For example, many local councils, such as Randwick City Council, Brisbane City Council and the Launceston City Council complained that developments of this type have not faced the same level of scrutiny or public consultation as other retail developments. In particular, they claim that the economic and social effects, including on traffic and congestion, have not been considered (Brisbane City Council 2006; Launceston City Council 2006; and Randwick City Council 2006).

10.2 Main features of an alternative approach

In the Commission's assessment, regulation of the retail tenancies market should, in the first instance, maintain and bolster those parts of the State and Territory legislation that are working effectively. In particular, dispute settlement and information disclosure have effectively addressed market impediments related to transaction costs and information differences, and should remain part of the regulatory framework. To address the outstanding concerns and the unintended consequences of existing retail tenancy legislation, the Commission's assessment is that an alternative approach should also:

- ensure that the parties to a retail lease have sufficient information to fully understand the implications of their contract;
- progressively unwind the current retail tenancy legislation in each State and Territory in areas that have sought to include specific provisions in contracts, such as formulae for annual rental increases, minimum lease terms, assignment and outgoing inclusions;

-
- move, where practicable, towards national consistency in legislation, lease documentation and the availability of market information; and
 - facilitate the shift towards a less restrictive, nationally consistent framework and seek to ease tensions that exist predominantly in the shopping centre segment of the market, through the introduction of an industry negotiated national code of conduct for shopping centre leases.

The design principles developed in chapter 5 provide a means to guide policy development affecting the market for retail tenancies. In brief, any regulation of the landlord-tenant relationship should only proceed with caution and should not seek to rewrite the current rules and laws that govern standard business contracts. Also, as with all regulation, non-regulatory approaches should be evaluated prior to extending the current mix of retail tenancy laws.

Maintain dispute settlement processes and information disclosure provisions

Two major components of the current mix of retail tenancy legislation — namely dispute settlement and lease disclosure statements — appear to be working effectively in reducing the transaction costs associated with disputes and improving the information available to participants when entering tenancy agreements (see chapters 9 and 8, respectively).

In all jurisdictions except Queensland and New South Wales, the suite of dispute resolution processes (including mediation and tribunal hearings) are not restricted to retail tenancies. Rather, they extend to small businesses in the broader market for commercial tenancies (chapter 4). Thus, available dispute resolution processes contribute to cost-effective outcomes for small businesses in the commercial tenancy market in these jurisdictions.

In New South Wales and Queensland, the borderline for tenancies that can and cannot use the dispute resolution procedures is defined by the retail tenancies legislation. An alternative approach should aim to provide access to low cost dispute resolution processes for all small-business retail and commercial tenancies in each State and Territory. This approach would potentially lower transactions costs associated with dispute resolution and reduce constraints on economic efficiency arising from differences in the treatment of different types of businesses.

The Commission notes that access to unconscionable conduct provisions are already available to all ‘small’ businesses in the retail and commercial tenancies market.

Inquiry participants indicated that lease disclosure provisions have effectively reduced the information gap between retail tenants and landlords (chapter 8). While maintaining these provisions as part of an alternative regulatory approach, there is some scope to enhance the transparency of decision making through design improvements, such as the greater use of simple language and the addition of a one page summary of key lease conditions. Such provisions could also be adopted in the broader commercial tenancy markets, if it were deemed appropriate and cost effective by industry participants.

Reduce the level of prescription in the legislation

Retail tenancy legislation contains many provisions regulating the tenant–landlord relationship, which unduly intrude into the commercial contractual arrangements negotiated between landlords and tenants. Examples of such provisions in retail tenancy legislation include minimum lease terms, first right of refusal provisions, liability attached to assignment and outgoing inclusions (box 10.6). Provisions relating to security of tenure (chapter 6) and occupancy costs (chapter 7) do not appear to have been effective in influencing the market, and to the extent that they bite, may have constrained efficiency. Moreover, some participants argued that the tenancy legislation and its administration have hampered the operation of the market and raised costs unnecessarily (section 10.1).

In the Commission’s draft report, a winding back of legislative provisions that intrude into negotiated contractual arrangements was canvassed. Such an approach would provide the added benefit of reducing the differences that exist between regulation in the various States and Territories. This would also more closely align the framework governing retail tenancy leases with the broader market for commercial tenancies.

Professors Duncan and Christensen observed that:

Provisions which do not achieve their purpose, or only do so at great cost or complexity in process should be repealed ... Where there is cogent evidence that compliance with existing requirements is either ignored, becomes too costly, time consuming or otherwise complex, it is time to repeal the provisions establishing those requirements. (submission no. DR153, p. 4)

The REIA consider that:

... a specific review should be implemented by governments to examine the potential to remove key restrictions across all jurisdictions in areas including minimum (or maximum) lease terms, preferential rights of lease renewal, assignment and sub-letting, rent reviews, limits on rent inclusions, and recoverable outgoing. (submission no. DR154, p. 6)

Box 10.6 Examples of overly prescriptive legislation

Minimum lease terms

Minimum lease terms reduce market flexibility, restricting both tenants and landlords in the choice of lease terms (chapter 6). Such restrictions can make it difficult for tenants and landlords to negotiate tenancy agreements that are mutually beneficial, hindering transactions. Also, these provisions can effectively become a maximum lease term which is not necessarily in the commercial interests of landlords or tenants. Removing these provisions could reduce constraints on efficient market operation.

Options for preferential right to renew or extend a lease

Rights to renew are included in retail tenancy legislation in South Australia and the Australian Capital Territory (chapter 6). However, the provisions are highly qualified so as not to reduce the rights of a landlord over leased premises. They are therefore likely to be ineffective in adding to tenant's security of tenure. To the extent that the provisions have had an impact, they may hinder a landlord in choosing a tenant who (in the landlord's commercial judgement) would make best use of the retail space. This would potentially lower productivity.

Lease assignment

Retail tenancy legislation includes provisions to govern lease assignment (except in Tasmania — chapter 3). These provisions have potentially introduced inefficiencies and represent a departure from common law. Under common law, the assignor had a strong incentive to choose the most (potentially) productive and successful purchaser, as the landlord had the option to recover any assignee default losses, from the assignor through 'privity on contract' (Bradbrook, MacCallum and Moore 2002). However, retail tenancy legislation has removed this option, and has created an incompatibility in the incentives of a tenant and landlord. The assignor now has an incentive to choose an assignee with the greatest willingness to pay (that is, an assignee with the most optimistic assessment of their trading ability), regardless of their potential success. As incentives are no longer aligned, the removal of liability on the assignor could increase the reluctance of landlords to agree to assignment.

Experience in the United Kingdom shows that with the removal of the liability of the assignor, alternative market mechanisms for this to remain arose. Since reforms were made to the Landlord and Tenants Act in 1996 to remove liability for the assignor, it has become common for leases to include provisions that enable the landlord to obtain a guarantee from the assignor of the assignee's performance (Questbook 2007).

Outgoings inclusions

Retail tenancy legislation in each jurisdiction requires leases to clearly specify the level of outgoings, how they are determined and apportioned to the lessee, and how they are to be recovered by the lessor (chapter 3). While disclosure of such information is likely to be mutually beneficial to landlords and tenants, the prescription of which expenses are included in outgoings is likely to unduly restrict commercial negotiations.

Broadly, an approach involving less prescriptive legislation could reduce constraints to the efficient operation of the retail tenancy market and lower compliance and administrative costs incurred in implementing the legislation and adapting to, what has become, frequent regulatory change.

Relax planning and zoning controls

The Commission has not considered whether *specific* planning and zoning regulations might have an impact on the efficient operation of the retail tenancy market. Nevertheless, there appears to have arisen at each level of government, a range of planning policies and development procedures which can have the effect of restricting the availability of retail space and its use. These regulatory controls potentially reduce competition between shopping centre landlords, and increase the bargaining power of landlords vis-à-vis their tenants, by reducing tenants' ability to relocate close by and preserve their business after lease expiry.

The effect that planning and zoning regulations have on competition for retail space is an issue that needs to be more thoroughly and widely considered by State and local planning authorities. In particular, the restrictiveness of existing planning and zoning policies could be reviewed as part of the proposed broader moves to ease the prescriptiveness of current regulations governing the retail tenancy market.

Move towards national consistency

A range of participants to this inquiry expressed support for the adoption of a national retail tenancy framework on the grounds that it would reduce compliance costs. But concerns were also expressed over the potential for a national framework to overlap with the current State and Territory legislation (box 10.7).

The Commission recognises that achieving nationally consistent retail tenancy legislation would not be an easy task and is not something that is likely to happen in the short term. Retail tenancy law is a matter for State and Territory governments and, in practice, national consistency would have to be achieved through the alignment of tenancy legislation and regulation that exists in each jurisdiction. There is, however, scope for a move towards a 'model' for national consistency. A number of industry participants support the continuance of current legislative measures, with a view to harmonisation around minimum leasing standards across retail tenancy laws. Other participants supported a national approach based on a simplification and reduction in the extent of the legislation.

Box 10.7 **Support for a national framework**

Landlords, multi-jurisdictional retail tenants and tenant organisations expressed a strong preference for a national framework. Despite this, differences exist over what a framework would look like. On one hand, some participants expressed support for the continuance of the current measures, albeit at a national level. For example, the Franchise Advisory Centre stated:

The Centre would wholly support moves to bring about standard national retail leasing legislation, rather than the piecemeal state-by-state legislation which currently exists, and which adds unnecessary compliance costs to franchisors as they grow their systems nationally. (submission no. 76, p. 2)

The ARA advised that:

... in developing uniform regulation it is essential that it reflects the best practice and not the lowest common denominator as wanted by some. (submission no. 119, p. 28)

On the other hand, some participants suggested that legislation be simplified and reduced when adopting a national framework. For example, REIA stated:

The REIA strongly supports greater simplification and harmonisation of retail tenancy legislation across all Australian jurisdictions. It is a fact that many landlords and tenants operate in multiple jurisdictions and are continually frustrated by the lack of consistency in this and other regulatory areas ... Ideally, a nationally uniform tenancy code should be developed and adopted by all Australian States and Territories. (submission no. 112, p. 11)

Similarly, ANRA indicated that:

ANRA is supportive of the streamlining of varying State and Territory legislations ... (submission no. 92, p. 3)

Also from the SCCA:

... the drafting of a Commonwealth Bill, to be negotiated with the States and Territories, in consultation with relevant stakeholders, would also present an opportunity to critically scrutinise existing regulation with a view to removing any unnecessary regulation. (submission no. 83, p. 3)

Westfield similarly expressed a preference for national legislation, but cautioned that legislation by both the Australian Government and individual States and Territories would not be efficient:

... nationwide uniform retail tenancy laws are desirable, but only on the basis that the States voluntarily surrender their legislative powers to the Commonwealth in this field. It is acknowledged that this would be difficult to achieve as a matter of political reality. There is no case for an overlay of Federal regulation which, apart from questions of constitutional validity, would only exacerbate existing regulatory inefficiency and attendant administrative cost. (submission no. 85, p. 4)

The Law Council of Australia recommended

... that a uniform approach be adopted by all States and Territories based on the Uniform Companies Code in that, a model law was prepared and then passed by each State and Territory. (submission no. 68, p. 2)

Irrespective of the approach taken, in developing such legislation, differences between jurisdictions would need to be considered to avoid burdening smaller jurisdictions with provisions not relevant to their market. For example, provisions considered relevant for larger jurisdictions such as New South Wales and Victoria would not necessarily be appropriate for smaller jurisdictions such as Tasmania and the Northern Territory, where there are fewer transactions, less formality and arguably greater ease in reaching agreement through commercial negotiation.

FINDING

Less prescriptive legislation and greater harmony in legislation between jurisdictions could improve the efficiency of the retail tenancy market and lower compliance and administrative costs.

Introduce a national code of conduct for shopping centre leases

Concerns were repeatedly raised by tenant and landlord representatives in this inquiry about the manner in which lease negotiations are often conducted (particularly in shopping centres) and way in which lease provisions are implemented (chapter 9). Under these circumstances, it can be difficult to develop effective commercial relationships that are necessary for least-cost business decision making by both landlords and tenants, and resources can be wasted. While dispute resolution mechanisms in retail tenancy legislation have been effective, they are limited to cases where there has been a breach of lease or legislative provisions. As discussed in chapter 9 and section 10.1, the accumulation of retail tenancy legislation that has sought to influence conduct through prescribing aspects of the landlord–tenant relationship has not been successful in improving relationships between landlords and tenants or alleviating tensions. This suggests that an alternative way of dealing with business conduct is required.

Where such situations have arisen in other parts of the economy, codes of conduct have been introduced to outline responsibilities and standards of behaviour or practice that can be expected of businesses. The term ‘code of conduct’, however, is used to cover codes that vary widely in coverage and operation — from mandatory enforceable industry wide codes and regulation to voluntary codes (that may or may not be binding or enforceable), and there are fundamental differences in the operation of these codes.

Regulated codes of conduct, including *mandatory* enforceable codes under the TPA (such as the franchising code of conduct), are little different in operation to other regulation. These codes set up rules and constraints which all prescribed businesses are bound by. The main difference between mandatory codes and government

legislation may be the greater scope for industry to determine the content of a mandatory code.

To date, only a few codes have been mandated under the TPA. The franchising code of conduct that was established to deal with similar concerns to those expressed in the market for retail tenancies is one example of a mandatory code. The franchising code has set in place mechanisms for dispute resolution and established best practice templates, such as a pro-forma disclosure statement (submission no. 76).

In contrast, *voluntary* codes contain a set of rules and/or guidelines that a business, as a signatory to the code, voluntarily agrees to abide by in their dealings with other businesses. Agreement to abide with a voluntary code can be a signal to other market participants of the willingness of a businesses to operate within the set standards. In this respect, a voluntary code of conduct is akin to a corporate social responsibility program.

The success of a voluntary code is dependent on the nature of a code, including the enforceability of its provisions and the ramification for breaches of the code. To instil confidence in the code, it is necessary that the code have sufficient ‘teeth’ to ensure compliance and that there be an avenue for dispute resolution. One method of enhancing the strength of a voluntary code is by having the code enforceable by the ACCC — that is, prescribed under the TPA (box 10.8). Although there are now several voluntary codes of conduct in Australia (box 10.9), each operates within its respective industry without being prescribed under the TPA.

Past attempts to develop voluntary codes of conduct in the retail tenancy market have had mixed success. An example of a *national* voluntary code in the retail tenancy market is the casual mall licensing code of conduct (chapter 3) which was developed by landlord groups (including the SCCA) and tenant advocates (including the ARA) (submission nos. 18 and 83). In contrast, a voluntary shopping centre code of conduct on outgoings was drafted by the ARA in 2002, but did not receive necessary support for implementation (ARA 2003).

At the *state* level, codes of conduct for retail tenancies have generally not endured. For example, a voluntary code of conduct in New South Wales did not succeed and was followed by formal legislation (submission no. 119). Failure of the code has been variously attributed to non-compliance by many landlords who were signatories to the code (submission no. 136); to the short time span given for the code to work prior to introduction of legislation (just over 2 years); and to the fact that it was introduced at a time when Victoria and Queensland were moving down a legislative path to retail tenancy regulation (transcript, p.105). In the Australian Capital Territory, a mandatory code of conduct for commercial and retail leases applied from 1994, before it was replaced by legislation in 2001.

Box 10.8 Codes of conduct and the TPA

The TPA makes provisions for both mandatory and voluntary codes of conduct. If an industry code is declared as a prescribed voluntary code under the TPA, participation is voluntary, but the ACCC can take action against signatories for breaches of the code. The purpose of prescribing a code is to strengthen a voluntary code in an industry that has not otherwise been able to meet the code's objectives.

The government will only consider prescription of a code of conduct if:

- the code would remedy an identified market failure or promote a social policy objective;
- the code would be the most effective means for remedying that market failure or promoting that policy objective;
- the benefits of the code to the community as a whole would outweigh any costs;
- there are significant and irremediable deficiencies in any existing self-regulatory regime — for example, the code scheme has inadequate industry coverage or the code itself fails to address industry problems;
- a systemic enforcement issue exists because there is a history of breaches of any voluntary industry codes;
- a range of self-regulatory options and 'light-handed' quasi regulatory options have been examined and demonstrated to be ineffective;
- there is a need for national application as state and territory fair trading authorities in Australia also have the options of making codes mandatory in their own jurisdiction.

For both mandatory and voluntary codes, where there are provisions that are potentially anticompetitive, the code must be authorised by the ACCC. Authorisation provides immunity from legal action under the competition provisions of the TPA and is granted if it can be demonstrated that these provisions provide net public benefits.

Source: ACCC (2005)

There was widespread support from both tenant and landlord representatives for a code of conduct in the retail tenancy market, with most proponents expressing a preference for such a code to be mandatory. Support for a national code of conduct, albeit mandatory, was expressed by business groups such as COSBOA (submission no. 94) and other groups such as RICS Oceania (submission no. 39). The Law Institute of Victoria (LIV) suggests that:

While the LIV believes that it would be beneficial to provide for special controls in respect of shopping centres, it does not believe that these will be effective if limited to a voluntary code of conduct. (submission no. DR147, p. 2)

The NRA also believe that a code of conduct would fail if voluntary:

Based on experience and commercial imperatives, no landlord would unilaterally and voluntarily enter into and observe a Voluntary Code that was enforceable. (submission no. DR162, p. 3)

Box 10.9 Selected codes

Mandatory codes

- *Tasmanian Code of Practice for Retail Tenancies* — mandatory regulation, similar to retail tenancy legislation in other jurisdictions. It appears to work successfully, albeit in a relatively small market.
- *ACT Commercial and Retail Leases Code of Practice* — mandatory regulation, similar to retail tenancy legislation in other jurisdictions, replaced by Leases (Commercial and Retail) Act in 2001.
- *Franchising code of conduct* — mandated and enforceable under TPA. Appears to be well regarded within industry.

Voluntary codes

- *New South Wales Retail Tenancy Leases Code of Practice* — voluntary code adopted in 1992, similar to legislation in other states, replaced by legislation two years later.
- *Casual Mall Licensing Code of Practice* — voluntary industry code, only come into effect in 2008, so it is not yet possible to gauge its effectiveness
- *Motor Vehicle Insurance and Repair Industry Code of Conduct* — voluntary industry code, generally viewed as effective in resolving friction between insurers and repairers.
- *United Kingdom code of practice for commercial leases* — voluntary code that contains only very general recommendations, with no scope for dispute resolution or consequences of breeches. Analysis of the code has found that it is having little direct effect on negotiations and that some aspects of the code are rarely followed (Crosby, Murdoch and Hughes 2005).

However, a drawback of a code of conduct that is mandatory would be the need for arbitrary coverage guidelines. This means that the code would be prescriptive and could simply replace current State and Territory legislation with a national set of regulations (or could even overlay the current set of legislation). A voluntary code of conduct would avoid this drawback. Indeed, some tenancy groups expressed support for a code of conduct to be established to replace the current legislative arrangements.

As stated by the ANRA:

Given the complex and inconsistent nature of the current framework, any new approach must seek to streamline and simplify the system to allow a level playing field for landlords and tenants alike. In that vein, ANRA is supportive of light-handed regulatory measures such as Codes of Conduct. Any proposed changes must be assessed carefully to a minimal cost impact for retailers and shoppers alike. (submission no. 92, p. 10)

Star Shots Photography noted that:

The code of conduct for casual mall leasing ... appears to be effective. It also operates on a national basis. A similar code in relation to retail leases would also have national application and would get around the problem of State Governments not being able to agree on all issues. (submission no. DR181, p. 1)

Lease1 similarly suggest that in a market in which there are varying lease formats given the diversity of ownership, retailers and statutory bodies, a code of conduct can offer consistent and commercially prudent minimum standards across the nation (submission no. DR163, p. 2).

The SCCA cautioned that market participants would need some assurance that prescriptive legislation would be wound back, before a voluntary code of conduct could be negotiated:

... we believe it is too much of a leap of faith for owners, given our experience over the past decade or so, to enter into negotiations on such a code without a clear commitment from all state and territory governments that the quid pro quo will be delivered; that is, that we would be released from retail tenancy legislation (transcript, p.80)

In its submission, SCCA outline several other issues that would need to be addressed before a code of conduct could operate successfully in the market (submission no. DR193). In particular, they note a need to ensure that there are no inconsistencies between a code of conduct and State and Territory legislation; that differences between centres are accounted for; and that dispute resolution services are available to deal with disputes that might arise under a code.

A number of other participants suggested that in order for a code to be successful, consultation with all relevant groups would be necessary when establishing the specific standards of conduct under which business transactions should occur. A code of conduct would need to be developed to cover the main segment of the market over which concerns have arisen — shopping centres — but remain open to all market participants. The REIA noted that:

... any code of conduct would need to be developed in consultation with both landlords and tenants and be binding across the entire industry. A code should not be costly to industry and should not impose more compliance requirements ... It maybe problematic

and difficult to achieve a truly workable code of conduct that is supported by both the landlord and the tenant. (submission no. DR154, p. 10)

In a similar vein, the Retail Traders' Association of Western Australia (RTAWA) stated:

The RTAWA strongly supports this path [code of conduct] of self-governance in preference to further legislation; however, all stakeholders would need to be closely involved in the drafting of such a code. (submission no. DR171, p. 4)

A voluntary national code of conduct for shopping centre leases could help establish clear rules for the conduct of shopping centre leases and resolve many of the difficulties raised by participants of the inquiry. *Industry-developed* ground rules could also be effective in reducing resources spent on disagreements and legislative reviews. A code of conduct should be an industry initiative and be administered by the industry itself. While it would generally only be in the event of a failure of an industry-based code to meet its agreed objectives that the code would need to become enforceable under the TPA, consideration could be given to prescribing the code under the TPA, because of its likely national importance.

Within the code of conduct, an understanding of what constitutes acceptable conduct and standards of fair trading could be established — including conduct during end of lease negotiations and accountability of parties to the lease (box 10.10). Importantly, the code should avoid intrusions into normal commercial relations between tenants and landlords and not attempt to specify or regulate, on an industry-wide basis, the outcomes of commercial negotiations.

The code of conduct could form part of a new regulatory framework — it could lower the level of transactions, compliance and administrative costs of operating in the retail tenancy market (relative to the current legislative approach) and help facilitate the removal of the more prescriptive elements of current State and Territory regulation.

FINDING

The development of a voluntary national code of conduct for shopping centre leases could help establish clear rules of conduct and resolve many difficulties raised by participants, and facilitate the removal of ineffective and inefficient elements of the legislation.

Box 10.10 Possible scope of a voluntary national code of conduct for shopping centre leases

A national code of conduct for shopping centre leases could include provisions for:

- standards of fair trading, particularly in relation to;
 - initial lease negotiation, offer and acceptance;
 - managing change during a lease term, including for variations in rent, fit-out requirements, relocation and redevelopment; and
 - conduct at the end of a lease and offers of negotiation for a new lease.
- standards for transparency in lease costs, including;
 - the use of ‘effective rent’ or ‘comparison rent’ figures; and
 - provisions for efficiency auditing of centre outgoings, which are separately charged to tenants and subject to change during a lease.
- prompt lodgement of lease summary page on publically accessible lease register;
- information provision and accountability in relation to centre operations, including in relation to foot traffic and centre turnover;
- internal dispute resolution processes and access to those processes before lodgement of a formal dispute; and
- conduct in disputes lodged by tenants with formal dispute resolution processes.

The code should avoid intrusions into normal commercial decision making of tenants and landlords and not attempt to specify or regulate, on an industry-wide basis, such matters as:

- minimum lease terms or specific options for lease renewal;
- rent levels and their determination;
- the trading rights of individual tenants or the tenancy mix of shopping centres; and
- the ability of shopping centres managers to decide whether to re-enter into a new lease agreement with an incumbent tenant.

Further develop the small business tenancy office model

There is a framework in place in most States and Territories for the provision of retail leasing advice and to direct complaints on retail tenancy matters. The agencies established under these frameworks vary between jurisdictions in terms of their accessibility to non-retail businesses and their integration with other parts of the regulatory framework (table 10.2). A small business tenancy office in each State and Territory could be used as a focal point for the collection and dissemination of information on commercial (including retail) tenancies and to further improve the

handling of complaints on tenancy matters. That is, the small business tenancy office could have both advisor and dispute resolution (or ombudsman) roles.

Advisors and ombudsmen exist in other markets in order to facilitate dispute settlement and provide a focal point for information and complaints. For example, the role of the Banking and Financial Services Ombudsman is to:

... provide an accessible, independent dispute resolution service to individuals and small business customers of financial services providers. (BFSO 2007, p.1)

Similarly, the role of the Franchising Code Mediation Advisor 'is to conduct the initial assessment of the complaints and appoint a mediator' (ACCC 2007, p.1).

Table 10.2 Existing government retail advice services by State^a

<i>State/Territory</i>	<i>Organisation</i>	<i>Coverage</i>
New South Wales	Retail Tenancy Unit (Department of State & Regional Development)	Retail small businesses
Victoria	Office of the Small Business Commissioner	All small businesses
Queensland	Retail Shop Leases Registry (Department of Justice & Attorney-General)	Retail small businesses
South Australia	Office of Consumer & Business Affairs	All businesses
Western Australia	Small Business Development Corporation	All small businesses
Tasmania	Office of Consumer Affairs & Fair Trading (Department of Justice)	All businesses
Northern Territory	Office of Consumer & Business Affairs (Department of Justice)	All businesses
Australian Capital Territory	Office of Regulatory Services (Department of Justice & Community Safety)	All businesses

^a In addition to these listed agencies that specifically provide advice on retail leasing, there are other organisations, departments and hotlines in each State and Territory that provide more general advice services for businesses, including retail businesses.

Whilst the dominant focus of the small business tenancy office may be retail tenancies, other commercial tenancies should not be excluded from access to the services provided. Nor should the establishment of a small business tenancy office replace existing mechanisms in each jurisdiction. Rather, the office could operate within the existing framework to:

- provide a single focal point for information about retail (and other commercial) tenancies, including what information tenants should consider prior to signing a lease and summary information on current leases in segments of the retail tenancies market;

-
- provide advice to potential tenants and landlords in relation to their lease responsibilities and rights;
 - provide initial advice on complaints before these progress through the relevant tribunal or court or to the ACCC for dispute settlement;
 - collect and report data on the number and type of complaints (at various levels) that occur each year in each jurisdiction; and
 - report on developments in the retail tenancy market and their effect on the relationship between landlords and tenants and the efficient operation of the market.

The Commission was advised that in some states at least, there is scope for improving links between government agencies that deal with tenancy matters. For example, the Small Business Development Corporation (SBDC) of Western Australia advised that:

... the links between dispute resolution bodies, such as the State Administrative Tribunal in Western Australia, and advisory bodies, such as the SBDC need to be significantly improved. Improving these links would better clarify dispute resolution procedures, interpretations of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (CTA) and facilitate more efficient resolution of retail tenancy disputes. To date, the SBDC has found it difficult to establish an effective relationship with the SAT. (submission no. DR194, p. 12)

The creation of a focal point for retail tenancy market participants should enhance the effectiveness of information dissemination and dispute settlement processes, without adding further administrative layers to the operation of retail tenancies.

Some additional administrative costs would necessarily be involved with the creation of a small business tenancy office. Also, the effectiveness of such an organisation in helping to inform decision making by participants in the retail tenancy market would depend on how well participants are able to use information provided. If individuals are not currently making use of available information (from State registrars and the ACCC), then it is possible that creating a single focal point for information flow and dispute settlement processes would not lead to a material benefit for market participants or the Australian economy as a whole.

FINDING

Potential exists for the role of government small business and tenancy agencies to be strengthened in the areas of information provision, the scope of dispute resolution and in achieving national consistency.

10.3 Summing up

A movement away from prescriptive retail tenancy legislation could improve the operation of the retail tenancy market by removing barriers to its efficient operation. Such a move could also bring about greater harmony between legislation that exists in all States and Territories. Nevertheless, a less prescriptive approach should not seek to remove or replace other aspects of the legislation that are working well in each jurisdiction, such as dispute resolution processes and information disclosure.

Recognising that the focus of retail tenancy legislation has been on the relationship between small tenants and shopping centre landlords, there would be merit in an industry-developed, national code of conduct for shopping centre leases. This would facilitate the unwinding of the prescriptive elements of the current retail tenancy legislation. However, a code should not be developed to add an additional layer of regulation on the market and should only be pursued if the current legislative arrangements are to be reformed.

Finally, the creation of a small business tenancy office in each State and Territory could address participant concerns as to the availability of market information and facilitate moves toward national harmonisation in the operation of retail tenancies.