
11 The Commission's recommendations

The Commission was asked to make recommendations for improving the retail tenancy market in Australia and to identify, and where practicable quantify, the likely benefits and costs of those recommendations for retail tenants, landlords, investors and the community generally. The Commission's recommendations seek to reduce unwarranted constraints on the retail tenancy market, improve the efficiency with which it operates and provide a pathway to lowering compliance, administration and information search costs.

The case for change in the regulation and conduct of the market for retail tenancies in Australia depends on evidence of impediments to economic efficiency in the market and related problems in current arrangements, as well as the capacity of various options for change to address those shortcomings.

Much of the current regulatory framework was developed primarily to address the concerns of small tenants operating in shopping centres. However, there is a larger group of retail landlords and tenants who do not operate in centres, but are still subject to retail tenancy legislation. Yet other retail landlords and tenants are excluded from the coverage of the legislation, either unintentionally or by design. The Commission is also cognisant of the fact that in many parts of Australia, the retail tenancy market operates effectively with little regard to regulation. Changes to the regulatory framework should not add regulatory burden in such areas.

Against this background, this chapter initially provides the Commission's assessment of the scope for regulatory improvement. The chapter then outlines measures, drawn from preceding chapters, that the Commission considers would improve the efficiency of the market and ultimately, lower compliance, administrative and information search costs. Finally, some suggestions are made for implementation of the Commission's recommendations and an assessment is provided of likely adjustment issues and impacts of the recommendations.

11.1 The scope for regulatory improvement

The Commission considers that aspects of the current regulatory framework for retail tenancies have improved the operation of the market. In particular:

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- disclosure requirements have improved awareness and knowledge of small landlords and tenants (chapter 8);
 - there is a culture of lease registration in some states which, in conjunction with market developments, has improved the accessibility and transparency of information on the retail tenancy market (chapter 8);
 - considerable information is provided in most jurisdictions on retail leasing and considerations for starting small businesses (chapters 8 and 10);
 - mediation and dispute resolution procedures have provided a low cost alternative to tribunals and courts (chapter 9); and
 - the introduction of unconscionable conduct provisions into the TPA and State legislation has afforded additional protection for small business in dealings with large business (chapter 9).

Notwithstanding these improvements, submissions to this inquiry and the Commission's own investigations suggest that the introduction of legislation has not significantly altered some aspects of leases (such as the average term of tenancies) or perceptions of imbalances in negotiating positions (chapters 6 and 7). Concerns were expressed about large shopping centre landlords, in particular, having considerable negotiating power in determining lease conditions. This negotiating power of landlords is seen to arise through superior information on centre operations and the performance of competing tenants; it persists because of the availability of a large number of tenants seeking retail space in centres. The existence of this negotiating power is claimed to harm the interest of small tenants, and is presented as an argument against the adoption of an alternative, less restrictive, legislative approach.

The Commission recognises that retail tenancy within shopping centres often involves quite different arrangements from retail tenancy in other settings such as retail strips. Entry and exit in the shopping centre segment of the market may also be more tightly controlled than in other retail locations, in part owing to relatively low vacancy rates and to in-house lease management. However, the Commission considers that the shopping centre 'package' is a retail tenancy arrangement that tenants can either accept, negotiate around, or reject in favour of other tenancy options elsewhere. Hard bargaining; an unwillingness to seek professional negotiating, financial or legal advice; varying business fortunes; and disappointments in performance within shopping centre or other retail formats, should not be confused with economic market failure and do not make the case for government intervention in the retail tenancy market.

The Commission also accepts that a shopping centre might be the preferred venue for many retailing activities, with retail space in centres highly prized by

prospective and existing tenants. However, the decision to bid for that space, in terms acceptable to the landlord, is a commercial one, and the consequences of this decision does not make the case for government intervention.

The Real Estate Institute of Australia (REIA) suggests that the perception of an imbalance in negotiating power is inherent within the landlord–tenant relationship:

While tenants should (and do) have certain rights to the unimpeded enjoyment of premises as per the tenancy agreement, no amount of regulation will alter the fact that the landlord is the owner of the premises (enjoying the normal rights of ownership under common law) and the tenant is a temporary occupant. To try and regulate otherwise simply adds unnecessary administrative and compliance costs. (submission no. DR154, p.2)

However, the legislation does appear to have had some unintended adverse impacts on market participants. In particular, the Commission has been made aware that prescriptive legislation has not adequately dealt with conduct issues that have arisen in the negotiation and operation of many retail leases, particularly (but not limited to) leases in shopping centres (chapter 9).

The prescriptive legislation has also raised compliance and administrative costs for those landlords and tenants who operate in multiple jurisdictions and for those who wish to negotiate lease conditions that are more suited to their commercial circumstances than lease conditions that may be inherent in prescriptive legislation (chapter 10).

The Commission’s assessment is that the case for further prescriptiveness in tenancy legislation is weak. Instead, an alternative approach is warranted. Such an approach should maintain, and where practicable, improve the features of the current system that appear to be working well — dispute resolution, and information and disclosure — but should also:

- introduce a more focussed approach to regulation of retail tenancies, particularly in shopping centres, to ease existing tensions in the negotiation and operation of many shopping centre leases;
- progressively unwind the current prescriptive retail tenancy legislation in each State and Territory in areas that have sought to govern market behaviour, such as minimum lease terms, assignment and outgoing inclusions;
- move, where practicable, towards national consistency in lease documentation, legislation and in the provision of retail tenancy information and services.

The Commission’s recommendations are intended to encourage efficient investment, enhance operational efficiency and potentially lower compliance, administrative and information search costs. Coincidentally, the simplification in

retail tenancy regulation inherent in the recommendations is likely to bring about a closer alignment between the operation of retail tenancies and processes in the broader market for commercial tenancies.

The Commission acknowledges that an alternative approach to regulation of the market will not only take time to implement, but also that the benefits may not be evident for a number of years — possibly beyond the lease terms of many current market participants.

11.2 Actions to improve the operation of the retail tenancy market

Measures for the immediate future

There are several measures that should be implemented in the immediate future (for example, within two years) to move towards an alternative regulatory approach. The measures would:

- avoid more stringent and prescriptive regulation;
- improve the transparency and accessibility of information on leasing processes and lease documentation;
- collate lease information and enable public access;
- improve the national consistency of tenancy information;
- further clarify and align provisions of unconscionable conduct; and
- ease existing tensions in the negotiation and operation of many retail tenancy leases, particularly in shopping centres.

Avoid more stringent and prescriptive regulation

The Commission's preferred approach to retail tenancy regulation involves retail tenancy legislation that is less prescriptive of commercial outcomes for retail tenancies, and where practicable, more nationally consistent. Reforms toward such a framework need to be deliberate and progressive and avoid a piecemeal overlapping national/state framework. Accordingly, in the immediate future, States and Territories should not pursue measures that increase the prescriptiveness of retail tenancy legislation, particularly where it is unclear that there are substantial efficiency improvements, compared with outcomes in the less regulated broader commercial tenancy market. This pause in legislative change would be a precursor to the introduction of greater self-regulation in the retail tenancies market, the

removal of many of the restrictive provisions in tenancy legislation and, where practicable, a move towards more nationally consistent retail tenancies regulation. Adherence to this broad guideline is likely to reduce the extent and costs of adjustment in each jurisdiction.

In the immediate future, States and Territories should not pursue measures that increase the prescriptiveness of retail tenancy legislation nor further widen the gap between the retail tenancy market and the broader market for commercial tenancies.

Improve the transparency and accessibility of information

The accessibility and transparency of information pertaining to retail tenancy leases has increased significantly through the adoption of disclosure statements, tenancy documentation and information services (chapter 3). The vast majority of participants in the public hearings conveyed the view that increased disclosure in the retail tenancy market in recent years has been a significant improvement. Also, state retail tenancy agencies, for the most part, now provide a substantial amount of relevant information for market participants. These developments have been directed at increasing the effectiveness of decision making by small business, including, but not confined to, dealings with large well resourced landlords. However, the Commission was also advised that ‘too much’ information, particularly of a technical nature, can be confusing to traders and be an impediment to effective commercial decision making, and that many do not use available information and advice services (chapter 8). The Commission’s assessment is that increased transparency and information has contributed to improvements in market operation, but the extent of improvement and cost effectiveness is less clear.

Despite past efforts, it was suggested that there are still knowledge and information gaps, often with small landlords and tenants (chapter 8). Possibilities for further development that should be considered, include:

- greater use of simple language in all tenancy documentation and the addition of a one-page summary containing key provisions in the lease and disclosure statements; and
- providing clear contact points in each jurisdiction for information on the retail tenancies market and government services, including improved links between relevant agencies that deal with tenancy matters (in particular, between small business tenancy agencies, tribunals that handle tenancy disputes and the State land titles offices which handle registration of leases).

The Commission does not see a need for substantial additional *government* provision of information in the retail tenancy market. Nevertheless, there is scope for refinement to existing processes in each State and Territory — focusing on simplification, disclosure and accessibility of existing government services and lease documentation.

RECOMMENDATION 1

State and Territory governments should take early actions to further improve transparency and accessibility in the retail tenancy market. They should:

- ***Encourage the use of simple (plain English) language in all tenancy documentation.***
- ***Provide clear and obvious contact points for information on lease negotiation, lease registration and dispute resolution.***
- ***Encourage a one page summary of all key lease terms and conditions to be included in retail lease documentation.***

Lodgement of lease information and public access

Information imbalances between small tenants and shopping centre landlords in lease negotiations was a common concern of tenants and tenant organisations (chapter 8). To redress this information imbalance, tenant organisations, landlords and other participants made a number of suggestions to the Commission, including: mandating the registration of leases under state property law; requiring the lodgement of lease details with an independent third party organisation, at either a national or state level; and the removal of restrictions on disclosure of lease conditions to third parties.

The first of these suggestions has the advantage that under current property laws in each State and Territory, registration of fixed term leases (generally of more than three years) is already possible and offers certain legal protection (chapters 3 and 8). Despite the legal protection afforded to the lessor and lessee by registration, the Commission understands that, in most jurisdictions, a significant number of fixed-term leases for retail space are not registered and for those that are, there can be a significant lag between the signing of the lease and registration.

However, the decision of whether to register a lease or make it available to a third party is ultimately a commercial one by the contracting tenant and landlord albeit influenced by jurisdictional practices. The Commission's judgement is that it would not be appropriate to mandate the registration of leases (chapter 8).

Nevertheless, the Commission accepts that lodgement of lease information with an independent agency would potentially enable public searches of leases and increase information on the retail tenancy market. Additional information on the market could improve the decision making of smaller tenants or boost their confidence in lease negotiations, for a low additional cost. Furthermore, to the extent that lease information is able to be lodged (not restricted by the inclusion of non-disclosure clauses in leases), lodgement would potentially provide a source of information for use in market valuations. The Commission considers that lodged lease information should not necessarily include information on incentives and ‘side deals’. Such a requirement would be difficult to enforce and would not significantly add to market information.

One way for the lodgement of lease summaries to be implemented is through the creation in each State and Territory, of a site that collects and enables public access to the one-page summary of leases. Such a site may be provided, updated and maintained by either a government agency or by the private sector and may form a part of existing State lease recording or registration facilities. While lodgement on such a site should not be mandatory, to increase lodgements and thereby market information, consideration should be given to offering an inducement to those retail tenancy market participants who choose to lodge their lease summary. For example, such inducements may take the form of reduced access costs for market information from the site.

RECOMMENDATION 2

To increase the transparency of the market, State and Territory governments should, as soon as practicable, facilitate the lodgement by market participants of a standard one page lease summary at a publicly accessible site.

Improve the national consistency of tenancy information

A common concern raised by businesses that operate across jurisdiction boundaries, was the additional costs imposed by the need to tailor leases to the different requirements of respective State regulations (chapter 10). The Commission accepts that additional costs are incurred and that differences can be an impediment to expansion (particularly for small firms). However, what is less clear is the extent of additional costs and constraints on expansion, and whether they are linked to different retail tenancy laws or other areas of difference (for example, differences in property or building regulation). The Commission also notes that for lessors and lessees operating in only one jurisdiction, cross jurisdictional differences are of little or no concern.

A single national legislative framework was suggested by a cross section of participants as a way of addressing this concern. Recognising State and Territory jurisdiction over retail and commercial tenancies more broadly, a single national legislative framework is beyond the scope of this inquiry. Nevertheless, some steps towards national *consistency* are possible.

In the immediate future, the first step towards a nationally consistent tenancy framework could be achieved through the development of a national reference lease that contains a key set of items (and terminology) to be included in all retail tenancy leases and in tenant and landlord disclosure statements. This reference lease should focus on establishing transparency of lease obligations, but should not be prescriptive of actual lease terms and conditions — matters properly the subject of commercial negotiation. The set of items to include would represent a minimal level of information to be consistently reported in lease documentation. It should be flexible enough to enable changes over time in the detail required in particular components (such as outgoings) and to enable extension to different retail formats or premises.

The Commission also notes that while a significant amount of information is available on tenancy enquiries and disputes in each State and Territory, it is not readily available in a format that enables a broad analysis of tenancy disputes or a comparison between jurisdictions (chapter 9). Nationally consistent information on tenancy enquiries, complaints and disputes would aid evaluation of the operation of the dispute resolution processes and the nature and causes of disputes.

RECOMMENDATION 3

State and Territory governments, in conjunction with the Commonwealth, should seek to improve the consistency and administration of lease information across jurisdictions in order to lower compliance and administration costs. They should:

- ***Encourage the development of a national reference lease with a set of items (and terminology) to be included in all retail tenancy leases and in tenant and landlord disclosure statements.***
- ***Institute nationally consistent reporting by administering authorities on the incidence of tenancy enquiries, complaints and dispute resolution.***

Further clarify and align provisions for unconscionable conduct

A number of participants submitted that further clarification of what is unconscionable conduct is warranted, citing differences in legislative provisions between jurisdictions and the small number of test cases heard by tribunals and courts at the national and State levels (chapter 9). Other participants suggested that

the criteria for what is unconscionable conduct should be relaxed. The Commission recognises that the interpretation of unconscionability is contentious and that there is debate concerning whether unconscionability should focus on ‘conduct’ in commerce or be broadened to focus on commercial ‘outcomes’.

The Commission’s assessment is that it would be inappropriate to extend the concept of unconscionability applying to business-to-business transactions in the retail tenancy market. Such a refocusing would constrain the operation of the tenancy market, lower efficiency and would be unlikely to resolve the broader business conduct issues in the market (chapter 9). However, ongoing measures to improve clarity would be beneficial. Such measures could include achieving better community recognition of the distinction between unconscionable conduct and other matters affecting the landlord–tenant relationship, such as adherence to contractual obligations and deceptive or misleading conduct. The Commission also notes the intention of the ACCC to further test unconscionability claims in tribunals and courts (chapter 9). There are strong incentives for businesses to settle disputes involving unconscionability claims before proceeding to tribunal or court, and the Commission considers that it would not be appropriate for government to contrive to bring cases before the courts.

In addition, the Commission’s assessment is that a detailing of the significance of differences in jurisdiction-specific provisions relating to unconscionable conduct and, where practicable, alignment of legislated definitions across jurisdictions, could lower the incidence and cost of disputation.

RECOMMENDATION 4

The significance of jurisdictional differences in the provisions for unconscionable conduct, as applying to retail tenancies, should be detailed by State and Territory governments in conjunction with the Commonwealth, and aligned, where practicable.

Measures to reduce tensions and improve efficiency

As a next step towards improving the operation of the retail tenancy market in Australia and moving towards national consistency, changes should focus on a shopping centre code of conduct. A national code of conduct for shopping centre leases could ease existing tensions in the negotiation and operation of many retail tenancy leases in shopping centres and facilitate a transition toward greater self-regulation. It would also facilitate the removal of those aspects of tenancy regulation that attempt to prescribe commercial outcomes and drive a wedge between the retail tenancy and commercial property markets. Work toward these

measures should be initiated as soon as practicable to enable implementation over the next two to three years.

Voluntary national code of conduct for shopping centre leases

The Commission recognises that retail tenancy within shopping centres often involves quite different arrangements to retail tenancy in other settings such as retail strips, and that furthermore, the majority of concerns and suggestions for change that were raised by participants of this inquiry (and in previous inquiries and reviews), relate to retail tenancies in shopping centres. Despite the prominence of large shopping centre landlords in discussions relating to conduct, it is evident to the Commission that concerns about conduct are also present in the second and third tier centres (regional, sub-regional and neighbourhood centres) (chapter 9).

As outlined in chapter 10, the Commission does not advocate further prescriptive legislation to address these ongoing concerns — it would be inappropriate to further constrain the shopping centre model through regulation or to introduce further regulatory measures that provide no efficiency improvements in the retail tenancy market, compared with outcomes in the broader commercial tenancy market.

As an alternative to further prescriptive legislation, the Commission’s assessment is that there are a number of issues — largely specific to shopping centre tenancies — that could be covered by self-regulation of market participants through an *industry developed* and accepted national code of conduct for shopping centre leases (chapter 10).

Such a code could include:

- standards of conduct at all stages of lease negotiation, operation and termination;
- measures to improve the transparency and accountability of tenancy management within centres, including provision of effective rent figures and lodgement or registration of leases; and
- conduct of dispute resolution, prior to a dispute proceeding to a mediator, tribunal or court.

However, a code of conduct should *not include* measures that prescribe possible outcomes of commercial negotiations, such as minimum lease terms. That is, it should act to improve the cost-effectiveness of practices of both landlords and tenants in shopping centres, but avoid undue interference in normal commercial relationships and associated bargaining between parties.

The Commission considers that a *voluntary* code of conduct offers several advantages over a mandatory code:

- It would act as a readily identifiable signal for prospective tenants and landlords, of the willingness of potential parties to a retail lease to conduct business according to agreed and transparent standards.
- It requires no arbitrary coverage definitions, as potentially any retail landlord or tenant could agree to adhere to its provisions.

A voluntary code may be implemented and enforced by the retail tenancy sector — that is, self-administered — or it could proceed to become a prescribed voluntary code that is enforceable by the ACCC. Because of the national importance of a code, the Commission considers that it would be appropriate for the code to be prescribed under the TPA.

A voluntary code, or any other measure, could not be expected to remove tensions associated with commercial negotiations, hard-bargaining and business failure, or the choice of business model adopted in shopping centres. However, it would provide scope to delineate the ‘rules of the game’ in a way that would potentially reduce the extent of protracted and adversarial negotiations, improve efficiency in the market through lower transaction costs and improve investment decisions for both landlords and tenants. The code of conduct could be referred to in State and Territory legislation and any modifications or updates to the code take effect nationally to avoid the potential for inconsistent legislative changes in each jurisdiction.

While a code of conduct would be of most benefit to shopping centre tenants and landlords, its introduction would also potentially benefit the broader community by enabling the more prescriptive aspects of the current State and Territory regulation to become redundant and be repealed and by reducing the need for legislative reviews.

RECOMMENDATION 5

State and Territory governments in conjunction with the Commonwealth, should facilitate the introduction, by landlords and tenant organisations in the industry, of a voluntary national code of conduct for shopping centre leases that is enforceable by the ACCC. The code should:

- ***include provisions for standards of fair trading, standards of transparency, lodgement of leases, information provision and dispute resolution; and***
- ***avoid intrusions on normal commercial decision making in matters such as minimum lease terms, rent levels, and the availability of a new lease.***

Remove constraints on commercial decision making

The Commission was advised of a number of areas in which retail tenancy regulation is unduly prescriptive or frustrates the execution of commercial contract obligations and rights, and thereby imposes costs on participants in the shopping centre and broader market for retail tenancies (chapter 10).

In particular, the Commission's attention was drawn to some differences between the regulation of retail tenancy leases and the less prescriptive regulation of the broader market for commercial leases. Mandatory retail lease provisions, such as the right to renew a lease or the imposition of a minimum lease term (which does not reflect commercial reality for many businesses), tend to drive a wedge between the market for leases under retail tenancy regulation and the broader commercial tenancy market and provide no clear public benefits. The prescription of which expenses are included in outgoings is also likely to unduly restrict commercial negotiations.

The legislated guidelines for the assignment of retail leases also differs, in most jurisdictions, from that in the broader commercial tenancy market. Application of those guidelines could have unintended adverse side effects including the restriction of businesses from entering or leaving the retail tenancy market and lower productivity of businesses in the market (chapter 10).

The Commission's assessment is that provisions in retail tenancy legislation (such as minimum lease terms, preferential rights of renewal, lease assignment and outgoings) should be evaluated using the principles set out in chapter 5. Retail tenancy provisions that potentially constrain the efficient operation of the retail tenancy market, or that do not provide any clear public benefit, should be removed.

RECOMMENDATION 6

State and Territory governments should remove those key restrictions in retail tenancy legislation that provide no improvement in operational efficiency, compared with the broader market for commercial tenancies.

Further measures for the medium term

The Commission recommends further regulatory changes over the medium term (two to five years) in order to lower administration and compliance costs for governments and businesses operating with retail tenancy regulation and explore opportunities to reduce planning and zoning constraints on the supply of retail space.

Improving national consistency of tenancy regulation

The Commission's assessment is that there is merit in moving toward a national approach to retail tenancies through the establishment of nationally consistent reference or model legislation. The idea of a national approach is compatible with a simplification of regulation in the market and the adoption of a national code of conduct for shopping centre leases. It is also consistent with increased alignment in the operation of retail tenancies with practices in the broader commercial tenancy market. There has been considerable support for a national approach, from a cross section of market participants (chapter 10).

A nationally consistent reference or model for retail tenancy legislation should be guided by the principles provided in chapter 5 and focus on provisions that establish lease rights and commercial processes, rather than prescriptive guidelines for contractual outcomes (for example, it would avoid provisions that specify minimum lease terms and other conditions). Fundamental differences between retail formats could be enabled through use of alternative schedules in the model legislation. The model would be available to be referred to in each State and Territory's legislation or codes of practice, as determined appropriate by the jurisdiction, with minimal jurisdiction-specific provisions (chapter 10).

During consultations, the Commission's attention was drawn to the view that the less populous jurisdictions potentially did not need as detailed and complex legislation as the more populous jurisdictions that have larger and more complex local economies. This view is evidenced by current regulatory differences between jurisdictions. To reflect differing needs while maintaining consistency with the national model, the model legislation should contain broad principles for retail tenancy regulation that are relevant in every jurisdiction, such as processes for lease negotiation, operation, dispute resolution and information disclosure. A State or Territory's legislation would then refer to the model legislation for national consistency, but also include regulations specific to that jurisdiction's retail tenancy market.

RECOMMENDATION 7

As unnecessarily prescriptive elements of retail tenancy legislation are removed, State and Territory governments should seek, where practicable over the medium term, to establish nationally consistent model legislation for retail tenancies, available to be adopted in each jurisdiction.

Explore opportunities to reduce constraints on the supply of retail space

The Commission considers that there is scope to increase retailing opportunities and competition in the retail tenancy market for the benefit of new entrants to the sector and consumers more generally. While recognising the merits of zoning and planning controls in enhancing public amenity and economising on the use of public infrastructure, the application of such controls restrict the availability and use of retail space and can reduce competition. The Commission believes that it would be appropriate for State and Territory governments to examine the potential to relax those zoning and planning controls that unduly restrict the availability of retail space and the conditions under which it is utilised.

RECOMMENDATION 8

While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

Longer-term regulatory focus

The focus of tenancy regulation in the longer term should shift from shopping centres to the retail tenancy market more generally. This would be possible following the introduction of a voluntary national code of conduct for shopping centre leases and a corresponding reduction in those aspects of retail tenancy legislation that are prescriptive of commercial outcomes. Any further regulatory changes should build on the benefits of the above recommended changes.

In particular, States and Territories should seek to maintain national consistency in tenancy regulation in the longer term and reduce differences between the operation of retail tenancies and the operation of tenancies in the broader market for commercial leases. Inconsistency in tenancy regulation potentially raises business costs and may hinder business expansion across jurisdictions. The Commission's assessment, therefore, is that the most appropriate approach to lower compliance and administrative costs in the longer term would be for each State and Territory to implement a nationally consistent regulatory framework, by reference to nationally consistent model legislation.

Consideration should also be given to enabling tenancy information and dispute resolution services to be available (in those jurisdictions that do not already do so), to small businesses in the commercial leasing market, as well as those in the retail tenancy market.

11.3 Implementation, adjustment issues and impacts

Implementation options

The power to regulate with respect to property and the leasing of property resides under the Constitution, with the States and Territories. Consequently, a number of the Commission's recommendations for retail tenancy regulation can only be effected by the States and Territories.

Some of the recommended changes could be implemented independently in each jurisdiction. For example, each State and Territory could, within their retail tenancy market, act to:

- further improve transparency and accessibility;
- enable market participants to lodge lease summaries at a publicly accessible site;
- relax key legislative restrictions; and
- examine planning and zoning controls (recommendations 1, 2, 6 and 8).

These aspects of regulatory change could be facilitated by a small business tenancy office in each State and Territory (as described in chapter 10).

However, given an overall goal for increased national consistency, some coordination and agreement between States and Territories would be necessary to implement the following aspects of an alternative regulatory framework for retail tenancies:

- improving national consistency and administration of lease information;
- aligning provisions for unconscionable conduct;
- facilitating the introduction of a voluntary national code of conduct for shopping centre leases; and
- establishing and implementing nationally consistent legislation for retail tenancies (recommendations 3, 4, 5 and 7).

Consistency in information provision and unconscionable conduct provisions

To improve the consistency and administration of lease information and bring about greater alignment in unconscionable conduct provisions, some coordination and agreement is necessary between jurisdictions. This may be facilitated by the creation of a working group (consisting of industry and government representatives from each jurisdiction) to operate either within the COAG framework or under the

guidance of an agency in the Australian government (such as the Office of Small Business).

Development of a code of conduct

The development and introduction of a voluntary national code of conduct for shopping centre leases should primarily be an industry initiative and be administered by the industry itself. To ensure the workability of the code, it should be adopted (or not) in its entirety by landlords and tenants — rather than enabling market participants to choose which parts they wish to adhere to. Those landlords and tenants who do become signatories to the code should (while governments are relaxing constraints in retail tenancy regulation), then be exempt from the related provisions of state retail tenancy legislation.

For signatories of the code, dispute resolution would be governed by provisions in the code and be coordinated with existing dispute resolution services and small business tenancy agencies. Formal monitoring procedures should be established in each jurisdiction to ensure that once the code of conduct is operational, restrictive provisions of state retail tenancy legislation are repealed. The Commission recommends that the code be enforceable by the ACCC. A less stringent requirement that could be considered is for industry to administer and enforce the code.

Achieving national consistency in legislation

Under the current division of legislative power between States and the Commonwealth, national consistency in regulation between the States and Territories would require the creation of ‘model’ legislation. The model legislation could contain broad principles for retail tenancy regulation that are relevant in every jurisdiction, such as processes for lease negotiation, operation, dispute resolution and information disclosure.

There are several possible options for the *creation* of this legislation and for the process by which it is adopted. One option to facilitate the creation of model legislation is for an agency within the Australian Government (such as the Office of Small Business) to coordinate the development of legislation in conjunction with representatives from States and Territories and from industry. State and Territory representatives may include the small business tenancy office in each jurisdiction. Another option could involve the establishment of a working group comprised of representatives from each jurisdiction, to operate within the COAG framework. Under either of these options, the model legislation could be drafted by one of the states, but not formally enacted.

Several legislative approaches are available to achieve nationally consistent *adoption* of the model legislation in each State and Territory. One approach is for the model legislation to be enacted, without modification, in each jurisdiction. Such an approach may be inflexible to jurisdiction-specific circumstances and it could be difficult to maintain the timeliness and consistency of updates. In the retail tenancy market, such an approach is unlikely to be workable, given differences in property law and the retail tenancy market between jurisdictions.

An alternate approach for nationally consistent adoption is for the model legislative provisions to be referenced (either in part or in its entirety) in the retail tenancy legislation of each State and Territory. State or Territory specific regulations may also be included in each jurisdiction's relevant tenancy legislation to account for differences in background law. This approach to the achievement of national consistency has merit and is preferred by the Commission as it would enable future agreed amendments to the model being applied throughout Australia at the same time, while maintaining flexibility for jurisdiction-specific requirements, and avoids the need for regular updates to legislation in each jurisdiction.

Adjustment issues and impacts

Reforming the retail tenancy market along the lines suggested by the Commission is likely to improve the efficiency of its operation, and be of benefit to Australian consumers and the economy more broadly. It is evident that information and skill gaps persist in the sector, that the current framework is constraining business decision making, and that additional costs are incurred due to differences in State and Territory regulation. While inquiry participants have indicated that these costs are not high for an individual business, cumulatively, they could be substantial for the community — particularly if passed on by retailers as higher prices to consumers. Furthermore, to the extent that tenancy legislation does impose a burden on businesses, it may be more of a burden for smaller landlords and tenants. Studies of compliance with regulation in other sectors of the economy indicate that the burden of compliance can be disproportionately larger for small businesses (NARGA 2005; Bickerdyke and Lattimore 1997).

Addressing identified gaps and shortcomings is likely to increase flexibility in lease terms, improve business and government decision making and lower administrative and compliance costs. However, there has been little quantitative evidence provided to this inquiry to indicate the *magnitude* of potential reform benefits or the costs to industry and government of achieving those benefits.

It is acknowledged that some of the recommendations may, by changing the operating environment for landlords and tenants, alter the risks and returns

associated with operating in the retail tenancy market. For example, more flexible lease terms would enable tenants to negotiate leases that better align lease terms with business models. More information about lease markets would aid aspiring retailers to better choose their preferred retail model: whether it be an operation in the managed environment of a large shopping centre or a stand alone operation in a shopping strip. Further, improvements in efficiency and lower compliance costs could have wider implications for the financial institutions supporting tenants and property owners/managers, and for the investment and superannuation funds which invest in shopping centres in particular.

However, in formulating options for change, it should be noted that the focus of this inquiry — as defined by the terms of reference — is on the efficiency of the retail tenancy market. While it is not possible, nor appropriate, to assess the impact on individual traders and businesses (this will depend on how they respond to change), it is possible to indicate the broad direction of benefits. For example:

- An improvement in the efficiency and effectiveness of regulations affecting the market and dispute resolution procedures should directly benefit small landlords and tenants.
- Enabling the lodgement of lease summaries at a publicly accessible site should improve market information and assist in market valuations and lease negotiations of small landlords and/or tenants.
- Clarifying and testing the meaning of unconscionability should protect small business from egregious conduct and reduce constraints on negotiation options and commercial decision making.
- Introduction of a voluntary national code of conduct for shopping centre leases is likely to be of direct benefit to the operation of tenancies within centres, reducing tensions and the costs of doing business. It should also reduce the costs of retail tenancy regulation to the broader tenancy market and costs to the community of separate state regulatory updates to deal with shopping centre-specific issues.
- Increasing the flexibility of landlords and tenants in lease negotiations should improve the economic efficiency of business decisions.
- Reducing inconsistencies in the regulation of retail and commercial tenancies and in the regulation of tenancies across jurisdictions should reduce compliance costs to businesses operating in the respective markets, and associated adverse allocative effects arising from those differences.

Balanced against these benefits, additional government administrative costs could be incurred in collating or providing additional tenancy market information; dealing with information requests and disputes; investigating and prosecuting for violations

of a voluntary code of conduct; and in developing and applying national reference lease documentation and nationally consistent tenancy regulation.

However, as noted in the Commission's assessment, reforming the retail tenancy market along the lines recommended is likely to improve the overall efficiency of the market and provide benefits for the Australian economy and consumers.

