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## 3 The regulatory environment governing retail tenancies

The regulatory environment governing retail tenancies is complex. It includes:

- legislation and regulation relating specifically to retail tenancy agreements;
- the interaction of retail tenancy and fair trading legislation;
- common law rights and obligations, with respect to both contract and tort law that apply to all commercial tenancy agreements, including retail tenancies; and
- legislation impacting on the availability of retail space and the conditions under which it is used.

The environment is also affected by government and trade associations' actions to improve education and awareness of tenancy obligations, and by the availability of commercial information and advice services.

This chapter examines the rationale behind the introduction of specific retail tenancy legislation and regulation and the attempted legislative remedies. Section 3.1 looks at the origins of retail tenancy legislation and regulation. Section 3.2 examines the legislative responses to tensions within the retail tenancy market, while section 3.3 looks at zoning and planning regulation.

Dispute resolution in the retail tenancy market is examined in chapter 4.

### 3.1 Origins of retail tenancy legislation and regulation

Prior to the introduction of specific retail tenancy legislation, all retail tenancy leases in Australia were treated under contract and tort law as standard commercial leases. Retail tenancy legislation evolved in Australia from the mid to late 1980s in response to concerns about bargaining power and information imbalances between shopping centre landlords and small retail tenants. These concerns escalated with the growth in suburban shopping centre complexes during the 1970s and 1980s. The Davies report on Common National Commercial and Retail Tenancy Issues in 1991, commenting on the catalyst for government interest in retail leases in Australia, stated:

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Over the past decade or more, there has been growing pressure on governments to reduce the incidence of disputation associated with commercial tenancy practice. The demise of the corner store in favour of the shopping centre created a different relationship between retail landlords and tenants and gave rise to a new set of concerns for tenants now sharing common facilities and services and associated costs. Lease arrangements became more complex and tenants' activities more restricted. A picture of the powerful, unreasonable landlords and the disadvantaged small business tenant became the perception of governments who were being lobbied to introduce legislation to redress the imbalance in the bargaining positions of commercial tenants and landlords, particularly those in the retail sector. (Davies 1991, p. 3)

As noted in chapter 1, Queensland was the first to introduce retail tenancy legislation (1984), followed by Western Australia in 1985 and Victoria in 1986. New South Wales first attempted a Voluntary Code of Practice (but significant non-compliance with the Code by landlords made it ineffective) before legislating in 1994. South Australia introduced specific retail tenancy legislation in 1995, which replaced provisions in the *Landlord and Tenant Act 1936*, introduced in 1985. The Australian Capital Territory introduced specific legislation in 2001, replacing provisions, including a code of practice, under the *Tenancy Tribunal Act 1994*. The Northern Territory introduced retail tenancy legislation in 2003. Tasmania adopted a regulated code of practice — under its Fair Trading Act — in 1998.

The enactment of Queensland's original retail tenancy legislation followed a report by the 'Cooper Committee' (Committee of Inquiry into Shopping Complex Leasing Practices 1981). Complaints made by shopping centre lessees to the Queensland Small Business Development Corporation prompted the inquiry. As Duncan noted:

At the foundation of these complaints was the fact that the lessees effectively had no bargaining power in relation to terms and conditions of their leases and were entirely at the mercy of the complex owners. (Duncan 1990, p. 28)

The parliamentary debates and second reading speeches for the original retail tenancy Acts in the other States suggest that their legislation sought to provide a more equitable bargaining position between large landlords and their small retail tenants. For example, the parliamentary debates relating to the introduction of Victoria's 1986 Act stated that 'the intention of the legislation was to protect small tenants, whom it was thought could not match the bargaining strength of large landlords' (Victorian DSRD, 2001, p. 12).

Similarly, in introducing the Retail Tenancy Review Bill, the New South Wales Minister for Small Business said:

It is all about fostering good leasing practice in the industry; it is about broadening co-operation amongst all parties to ensure that effective leasing relationships are established; it is to regulate only where the market-place has failed. The Government does not seek to intervene in the commercial relationship between lessees and lessors.

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The Government wants to provide for an equitable bargaining position amongst the parties. We believe that this bill will provide cost-effective and timely resolution of the management of retail leasing disputes. (Chappell 1994, pp. 2641-2)

The emergence of the large shopping centres led to the establishment of the original retail tenancy Acts that set up a prescriptive legislative framework for regulating rights and obligations for the formation of leases between landlords and small-medium sized retailers. The Acts had broadly similar provisions covering the scope of the legislation, minimum standards for the leasing of retail space and the establishment of dispute resolution systems.

## **Stated concerns remained, prompting further reviews**

### *Commonwealth reviews*

Despite the introduction of specific retail legislation in five States, in 1997, the Reid Committee report (see box 1.1) highlighted evidence of continuing problems in relationships between retail tenants and shopping centre landlords. In fact, the Reid Committee report described the situation as a ‘war’ in shopping centres between retail tenants and property owners and managers.

The Reid Committee found that small businesses were often disadvantaged in their dealings with big businesses and recommended a ‘Uniform Retail Tenancy Code be submitted to the Council of Australian Governments with a view to the adoption of uniform retail tenancy legislation around Australia’ (SCISR 1997, p. xvi.).

The Australian Government’s response to the Reid Committee report, in September 1997, indicated that it would amend the *Trade Practices Act 1974* (TPA) to prohibit unconscionable conduct in business transactions and work with jurisdictions to establish stronger retail tenancy regulation around key principles relating to: disclosure; ratchet clauses; relocation costs; rent reviews; outgoings (auditing and reporting); lease assignment; access to turnover figures; and dispute resolution procedures.

The Trade Practices Amendment (Fair Trading) Bill 1997, including the new section 51AC — unconscionable conduct in business transactions — came into force in 1998. The provisions of 51AC have subsequently been drawn down, either directly or in an amended form, into fair trading regulations in all jurisdictions. In December 1997, all State and Territory jurisdictions agreed to introduce key minimum standards into their retail tenancy legislation and regulation (Office of Small Business 2001).

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In 1998, a Joint Select Committee on the Retailing Sector was established to inquire into the impact of market concentration in the retail sector. In its report, *Fair Market or Market Failure* presented in 1999, the Committee recommended raising the transactions limitation on access to section 51AC of the TPA from \$1 million to \$3 million, and revisiting the Reid Committee report recommendation for a uniform retail tenancy code. The Committee also recommended the appointment of a Retail Industry Ombudsman.

In response to this report (in December 1999), the Government raised the transaction limitation to \$3 million. However, it did not accept that it should revisit the proposal to establish a uniform retail tenancy code or appoint an ombudsman.

The *Trade Practices Amendment (Operation of State and Territory Laws) Act 2001* provided for the concurrent operation of the TPA and the State and Territory laws. No provision was made for the consequential overlapping in administration and causes of action.

In 2003, a Senate Inquiry into the Effectiveness of the Trade Practices Act in Protecting Small Business was established. This inquiry looked into whether the Act adequately protected small business from anti-competitive or unfair conduct. In its report tabled in 2004, the Committee recommended that the Commonwealth negotiate with the States and Territories with a view to prohibiting retail lease provisions that compel tenants to keep their tenancy terms and conditions secret. But the Australian Government did not accept the recommendation, on the grounds that principles of contract law conferred on the parties freedom to negotiate the terms of a contract, including a lease. However, it agreed to amend section 51AC to allow a court to consider whether unilateral variation clauses in contracts are unconscionable. It also agreed to raise the transactions limitation on access to section 51AC of the TPA from \$3 million to \$10 million (Australian Government 2004).

### *State and Territory reviews*

There have also been a series of reviews of State and Territory retail tenancy legislation. These have led to a continual series of amendments since the inception of retail tenancy legislation (table 3.1). Broadly, subsequent amendments were premised on the notion that more prescriptive regulation covering how retail businesses should write leases and what the conditions of the leases should be, would address concerns about the imbalances in bargaining power and information between shopping centre landlords and small tenants.

**Table 3.1 Key amendments to retail tenancy legislation by State**

<i>Original Acts and key amendments</i>	<i>Commencement and key changes</i>
<b>New South Wales</b>	
<i>Retail Leases Act 1994</i>	<ul style="list-style-type: none"> <li>• Came into effect on 1 August 1994</li> <li>• Replaced the 1992 voluntary Retail Leases Code of Practice</li> </ul>
<i>Retail Leases Amendment Act 1997</i>	<ul style="list-style-type: none"> <li>• Commenced on 17 October 1997</li> </ul>
<i>Retail Leases Amendment Act 1998</i>	<ul style="list-style-type: none"> <li>• Commenced on 1 March 1999</li> <li>• Added unconscionable conduct provisions</li> <li>• Lessee disclosure statement</li> </ul>
<i>Retail Leases Amendment Act 2002</i>	<ul style="list-style-type: none"> <li>• Commenced on 10 January 2003</li> </ul>
<i>Retail Leases Amendment Act 2004</i>	<ul style="list-style-type: none"> <li>• Commenced on 17 December 2004</li> </ul>
<i>Retail Leases Amendment Act 2005</i>	<ul style="list-style-type: none"> <li>• Commenced on 1 January 2006</li> <li>• Lodgement of security bonds with Director-General</li> </ul>
<b>Victoria</b>	
<i>Retail Tenancies Act 1986</i>	<ul style="list-style-type: none"> <li>• Came into effect on 21 September 1987</li> <li>• First Victorian legislation</li> </ul>
<i>Retail Tenancies (Amendment) Act 1988</i>	<ul style="list-style-type: none"> <li>• Commenced 27 April 1988</li> </ul>
<i>Retail Tenancies (Rent Review) Act 1991</i>	<ul style="list-style-type: none"> <li>• Commenced 3 December 1991</li> </ul>
<i>Retail Tenancies (Amendment) Act 1995</i>	<ul style="list-style-type: none"> <li>• Commenced from 6 June 1995</li> </ul>
<i>Retail tenancies Reform Act 1998</i>	<ul style="list-style-type: none"> <li>• Commenced from 28 April 1998</li> <li>• Strengthen disclosure requirements</li> </ul>
<i>Retail Tenancies Reform (Amendment) Act 2001</i>	<ul style="list-style-type: none"> <li>• Commenced 24 October 2001</li> </ul>
<i>Retail Leases Act 2003</i>	<ul style="list-style-type: none"> <li>• Commenced from 16 April 2003</li> <li>• Inclusion of unconscionable conduct provision</li> <li>• Replacement of 1000m<sup>2</sup> threshold</li> <li>• Notification of lease to Small Business Commissioner</li> </ul>
<i>Retail Leases Amendment Act 2005</i>	<ul style="list-style-type: none"> <li>• Commenced 23 November 2005</li> </ul>
<b>Queensland</b>	
<i>Retail Shop Leases Act 1984</i>	<ul style="list-style-type: none"> <li>• Commenced from 12 May 1984</li> <li>• Initial legislation</li> </ul>
<i>Retail Shop Leases Act Amendment Act 1985</i>	<ul style="list-style-type: none"> <li>• Commenced 17 April 1985</li> </ul>
<i>Retail Shop Leases Act Amendment Act 1988</i>	<ul style="list-style-type: none"> <li>• Commenced from 3 May 1988</li> </ul>
<i>Retail Shop Leases Act Amendment Act 1989</i>	<ul style="list-style-type: none"> <li>• Commenced 31 October 1989</li> </ul>
<i>Retail Shop Leases Act Amendment Act 1990</i>	<ul style="list-style-type: none"> <li>• Commenced 5 April 1990</li> </ul>
<i>Retail Shop Leases Act 1994</i>	<ul style="list-style-type: none"> <li>• Came into effect on 28 October 1994</li> <li>• More prescriptive disclosure requirements</li> <li>• Removal of minimum 5 year term provision</li> </ul>
<i>Retail Shop Leases Amendment Act 1999</i>	<ul style="list-style-type: none"> <li>• Came into effect 30 April 1999</li> </ul>
<i>Retail Shop Leases Amendment Act 2000</i>	<ul style="list-style-type: none"> <li>• Came into effect from 23 June 2000</li> <li>• Introduced unconscionable conduct provisions (commenced from 24 June 2001)</li> <li>• Introduced lessee disclosure statement</li> </ul>
<i>Retail Shop Leases Amendment Act 2006</i>	<ul style="list-style-type: none"> <li>• Came into effect from 22 February 2006</li> <li>• Changes to definitions including 'lessee' and 'major lessee'</li> <li>• Changes to disclosure obligations.</li> </ul>

(continued next page)

**Table 3.1 (continued)**

<i>Original Acts and key amendments</i>	<i>Commencement and key changes</i>
<b>Western Australia</b>	
<i>Commercial Tenancy (Retail Shops) Agreements Act 1985</i>	<ul style="list-style-type: none"> <li>• Commenced on 1 September 1985</li> </ul>
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1990</i>	<ul style="list-style-type: none"> <li>• Commenced on 30 November 1990</li> </ul>
<i>Commercial Tenancy (Retail Shops) Agreements Amendment Act 1998</i>	<ul style="list-style-type: none"> <li>• Commenced from 15 January 1999</li> </ul>
<i>Retail Shops and Fair Trading Legislation Amendment Act 2006</i>	<ul style="list-style-type: none"> <li>• Commenced on 11 May 2007</li> <li>• Introduced unconscionable conduct provisions</li> </ul>
<b>South Australia</b>	
<i>Statutes Amendment (Commercial Tenancies) Act 1985</i>	<ul style="list-style-type: none"> <li>• Commenced on 1 January 1986</li> <li>• Added a part on commercial tenancies to the <i>Landlord and Tenant Act 1936</i></li> </ul>
<i>Landlord and Tenant Act Amendment Act 1987</i>	<ul style="list-style-type: none"> <li>• Commenced 1 January 1988</li> </ul>
<i>Landlord and Tenant Act Amendment Act 1990</i>	<ul style="list-style-type: none"> <li>• Commenced 15 November 1990</li> </ul>
<i>Landlord and Tenant Act Amendment Act (No. 2) 1990</i>	<ul style="list-style-type: none"> <li>• Commenced from 11 March 1991</li> </ul>
<i>Retail and Commercial Leases Act 1995</i>	<ul style="list-style-type: none"> <li>• Entered into force on 30 June 1995</li> <li>• Originally titled <i>Retail Shop Leases Act 1995</i></li> </ul>
<i>Retail Shop Leases Amendment Act 1997</i>	<ul style="list-style-type: none"> <li>• Commenced 6 October 1997</li> <li>• Increased disclosure provisions</li> <li>• Introduction of preferential rights provision</li> </ul>
<i>Retail and Commercial Leases (Miscellaneous) Amendment Act 2001</i>	<ul style="list-style-type: none"> <li>• Commenced 4 February 2002</li> </ul>
<i>Retail and Commercial Leases (Casual Mall Licences) Amendment Act 2001</i>	<ul style="list-style-type: none"> <li>• Commenced 1 September 2002</li> <li>• Added a casual mall licence code of conduct</li> </ul>
<b>Tasmania</b>	
<i>Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998</i>	<ul style="list-style-type: none"> <li>• Commenced 1 September 1998</li> </ul>
<i>Fair Trading (Code of Practice for Retail Tenancies) Amendment Regulations 1999</i>	<ul style="list-style-type: none"> <li>• Commenced 24 April 1999</li> <li>• Definition of 'small business tenant' changed</li> </ul>
<b>Northern Territory</b>	
<i>Business Tenancies (Fair Dealings) Act 2003</i>	<ul style="list-style-type: none"> <li>• Commenced 1 July 2004</li> </ul>
<b>Australian Capital Territory</b>	
<i>Tenancy Tribunal Act 1994</i>	<ul style="list-style-type: none"> <li>• Commenced 1 January 1995</li> <li>• Under the Act, a Commercial and Retail Leases Code of Practice was also established</li> <li>• The code prohibited conduct that was unconscionable; coercive; or harsh and oppressive</li> </ul>
<i>Leases (Commercial and Retail) Act 2001</i>	<ul style="list-style-type: none"> <li>• Commenced from 19 April 2001</li> <li>• Replaced the <i>Tenancy Tribunal Act 1994</i> and its code of practice</li> <li>• Incorporated first right of refusal for lease renewal</li> </ul>

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Reviews of legislation have arisen for a number of reasons. Amongst these have been review clauses in the legislation. Retail tenancy legislation has also been subject to review as a requirement under National Competition Policy.

Typically, reviews have resulted in lengthier and increasingly prescriptive legislation. For example, Queensland's *Retail Shop Leases Act 1994* is now over 100 pages in length, compared with the original 1984 Act that was just 26 pages. Moreover, there are more than twice as many sections — the original Act had 61 sections, while the current Act has 129. Progressive adoption and amendment of retail tenancy legislation across the country has seen the total volume of legislation reach almost 700 pages. As the Shopping Centre Council of Australia (SCCA) said:

The various State and Territory Acts of Parliament are also reviewed on a regular basis, probably far more regularly than any other legislation. Over the last decade there have been 13 separate reviews (in some States there have been several reviews in that time) and these reviews have either led to new legislation (the Australian Capital Territory in 2002 and the Northern Territory in 2003) or amendments of existing legislation. Each amendment of existing legislation led to increased regulation. (submission no. 83, p. 15)

Despite the recommendation of the Reid Committee for uniform national retail tenancy around Australia, the various reviews across jurisdictions have resulted in differences in the legislation across jurisdictions. Commenting on changes to the retail tenancy legislation at the State and Territory level, Cameron and Blom said:

At a national level, the outcome of all of this 'reform' is inconsistencies between the respective Acts and, as a consequence, additional costs to both national landlords and national tenants through the need for State and Territory specific leases and legal advice. (Cameron and Blom 2004, p. 1)

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*Specific regulation of retail tenancies has been adopted in all jurisdictions. The regulations have been adopted primarily because of perceived imbalances in negotiating power between small tenants with limited resources and large well resourced landlords. The regulations have been continually reviewed and amended.*

### **3.2 The nature of legislative and other responses**

The reviews at State and Territory level have generally led to increasingly complex and prescriptive provisions in each of the key areas covered by the legislation, including: the definition of retail tenancies; security of tenure; terms of the lease; information provisions; and unconscionable conduct (table 3.2).

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**Table 3.2 Key matters covered by retail tenancy legislation**

<i>Category</i>	<i>Matters within category</i>
Defining retail tenancies	Definitions of premises, tenants and ‘who’ or ‘what’ are covered by the legislation
Security of tenure	Minimum lease terms, renewal rights where present
Conditions of the lease	Implied terms, rent review, outgoings, sinking funds, assignment, subletting
Information provisions	Provision of draft leases and other information; disclosure statements by landlords and tenants; termination rights from failures to deliver information and disclosure statements; notification/registration of leases; requirement for tenant to have legal/commercial advice
Unconscionable conduct	Behaviour that might be construed unconscionable
Dispute resolution	Role of courts, mediation systems, role of registrars and small business commissioners; valuations, confidentiality of proceedings and evidence
Other matters	Key money, compensation to tenants, trading hours, security deposits, personal guarantees, land and sales tax provisions, payment of rent during fit out, management fees, advertising and promotion

*Source:* Based on table presented in Crosby (2006).

Most of these matters are outlined in more detail in this section, highlighting developments over time and differences between the States and Territories. Dispute resolution is discussed in chapter 4.

## **Defining retail tenancies**

As small retail businesses were considered most likely to be at a disadvantage in terms of access to information and negotiating power in lease negotiations, the various jurisdictions sought to define a retail business for the purpose of the legislation and the threshold needed to define a ‘small’ business.

- In New South Wales, Western Australia, Tasmania and the Northern Territory, retail tenancy legislation applies to premises used for any business in a shopping centre, or to premises used for specified retail businesses in other locations. There is a cap on the size of leased premises that are covered by the legislation of up to 1000 square metres.
- In Queensland, retail tenancy legislation applies to specified retail businesses or any premise in a shopping centre. There is a size cap of 10 000 square metres, or 1000 square metres if the lessee is a listed corporation or their subsidiary.
- In the Australian Capital Territory, the legislation applies to premises located in a shopping centre or retail premises outside a shopping centre that are under 1000 square metres, as well as commercial premises under 300 square metres.

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- Victoria and South Australia have a value-based limit. In Victoria, the legislation applies if premises are used wholly or predominantly for the sale or hire of goods by retail or the retail provision of services, but not where the lease occupancy costs exceed \$1 million per annum or the premises are leased to a listed company or its subsidiary. In South Australia, the legislation does not apply to premises where the rent exceeds \$250 000 per annum (covering retail and commercial) or are leased to a listed company or its subsidiary.

There are also jurisdictional differences in what constitutes a ‘shopping centre’ and each Act has its own special provisions for shopping centre premises.

The 1000 square metre floor area limit covers most small-medium businesses, while excluding large retail businesses such as supermarkets and department stores. However, a floor limit proxy provides little link to the financial resources of a tenant. As noted in the 2001 Review of Victorian Retail Tenancy Legislation, some large Australian retail businesses have relatively small premises, and so would be covered by legislation with a floor area limit. Following this review, Victoria moved away from the 1000 square metre floor area limit to a limit based on occupancy costs.

Commenting on the jurisdictional differences in the coverage of the retail tenancy legislation in Australia, Crosby observed that:

... some companies are included in the Act in some States and not in others. In addition the definition of retail is not always consistent. The concentration on indicators that relate to the premises rather than the tenants suggests that in many States the legislation is in fact a smaller retail premises Act rather than a small business tenant Act, with some small commercial premises included in some States. (Crosby 2006, p. 2)

As noted earlier, the stated aim of retail tenancy legislation is to overcome the imbalance in available information and negotiating power between large landlords and small tenants in shopping centres. However, as Duncan noted, the coverage of the legislation appears to be far wider than originally intended:

... the emphasis is upon the expression ‘retail’ which requires some element of the provision of goods or services for public consumption. However, in a divergence from the original intention of the Act, the retail shops to which all Acts refer need not be situated in a retail shopping centre. Stand alone retail shops or retail shops in small strips of less than five shops would be caught by the legislation. It is submitted that the ambit of each Act goes far beyond that which was originally proposed, particularly if one takes into account that the clamour for regulation came solely from small traders in large retail shopping complexes. It is also submitted that a stand alone retail shop or a retail shop in a small strip of shops was probably suffering very few of the same perceived disadvantages as the counterpart in a large centre. (Duncan 1990, pp. 29-30)

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Similarly, Murdoch, Rowland and Crosby also question why retailers operating outside shopping centres are covered by the legislation and suggest this could be explained by the fact that this group of retailers are a less organised group:

It is not entirely clear why the legislation covers retailers not in shopping centres as they do not appear to be dissatisfied with their leases. It may be that retail tenants outside shopping centres are less well organised into groups which can represent their grievances. (Murdoch, Rowland and Crosby, 2001, p. 20)

The net cast by the retail tenancy legislation is wide and captures a broad range of tenancy agreements. This imposes an extra regulatory burden on a range of agreements where it is potentially not required, such as where there are large well resourced tenants, who operate relatively small premises; and where landlords are small, for instance, those with retail premises outside of shopping centres.

## **Security of tenure**

There have been various attempts to include provisions in retail tenancy legislation intended to increase small tenants' security of tenure.

### *Minimum lease terms*

Current legislation in all jurisdictions, except Queensland, requires that lease terms be a minimum of five years. This can be a combination of an initial lease period plus options (exercised by the tenant), for instance, a three year lease with a further two year option would meet the minimum term requirement.

There are also some exceptions to the minimum lease period. These vary between jurisdictions, but broadly, include:

- provisions on the extended lease. A lease can be less than five years if it has an exercised option renewing an existing lease where the total term is five years or more. This is further extended in Victoria to include where the lease is a renewal, which includes exercising an option or a renegotiated lease for the same premises with substantially the same terms and conditions, aside from rent. In South Australia, a lease need not be a minimum five years where the tenant has been in possession of the shop for at least five years;
- subleasing. A sublease cannot be inconsistent with the term of a head lease. That is, a party cannot sublet a premise for longer than the lease of the premises; and
- a lease can also be for less than the minimum term if a tenant expressly agrees and obtains certification from the Commissioner/Registrar or a solicitor (depending on jurisdiction).

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The origin of the minimum five-year lease period dates back to recommendations of the Cooper Committee in 1981. The Cooper Committee reported a preference amongst lessors in that State for three year terms without options and a preference of lessees for five-year lease terms. However, the Committee considered that, while a five-year term would be reasonable, if the terms of a lease were understood by the tenant then the lease term should be a matter for market judgement.

Nevertheless, following the recommendation in the subsequent Joint Parliamentary report, when the bill was introduced to the Queensland Parliament in 1984, an automatic option to extend the lease to a total of five years (subject to some limitations) was included (Anderson 1992). Similar minimum five-year lease term provisions were subsequently included in the legislation of all other jurisdictions.

A further twist occurred in Queensland when the 1984 legislation was replaced by the *Retail Shop Leases Act 1994*. Under the new Act, the automatic options for a five-year minimum term were removed, reportedly as a result of lobbying by tenant representatives who felt that five-year minimums were potentially too restrictive on tenants. This was acknowledged by the Queensland Government in the second reading speech:

... the Bill does not provide for guaranteed minimum lease terms for lessees because such a provision would be too prescriptive and would not necessarily advantage all tenants. In fact, many tenants prefer to negotiate shorter lease terms, depending on the circumstances of the retail shopping centre, their own personal situation or their assessment of the market opportunities available to them. (Sullivan 1994, pp. 9546-7)

Security of tenure and minimum lease periods was also raised as an issue in the Reid Committee report. Numerous submissions to that inquiry expressed concern about sitting tenants who were unable to extend lease terms beyond expiry. A number of submissions suggested that five-year minimum terms with no options did not sufficiently meet the security of tenure concerns of retail tenants. Subsequently, in making recommendations for the design of a uniform national tenancy code, the Reid Committee recommended that the code provide for:

- minimum lease terms of five years;
- sitting tenants to have the option of lease renewal for a further five years; and
- sitting tenants to have the first right of refusal of the lease for subsequent five-year periods.

Since these recommendations were made, there have been relatively few changes to retail tenancy legislation in this area. Queensland has not reinstated minimum five-year terms. No jurisdiction has amended legislation to mandate further options for sitting tenants beyond the five-year minimum term.

Minimum lease periods, while introduced as a means of providing some level of security of tenure for lessees, appear to have introduced some rigidity into the retail

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tenancy market. In fact, some commentators have suggested that tenants may be worse off under minimum lease periods:

Prior to the introduction of the minimum five year term, many leases of speciality shops were granted for three years with two 3 year options for the tenant to renew. Since the legislation, many leases in shopping centres are granted for five years without any options to renew. It would therefore appear that the tenants are actually worse off as a result of this statutory intervention. (Murdoch, Rowland and Crosby 2001, p. 25)

### *Rights of renewal*

To increase security of tenure for sitting tenants, South Australia and the Australian Capital Territory have included 'end of lease' provisions including the right of first refusal for tenants located in shopping centres. However, in balancing the rights of the owner, the provisions contain exemptions on providing preferential rights for a number of reasons. Chief among these is if the landlord wishes to change the tenancy mix or if it would be substantially disadvantageous to the landlord to renew the lease with the sitting tenant.

### *Notification of landlord intentions*

Retail tenancy legislation in all jurisdictions also requires that landlords provide adequate notice of lease renewal or termination. In most jurisdictions, the landlord must provide notice between 6 and 12 months prior to the expiry (at least 3 months before expiry in Tasmania) of the lease either offering the tenant a new lease (including the terms of the lease) or stating that the landlord does not intend to renew the lease.

## **Conditions of the lease**

There have been various attempts to include provisions in retail tenancy legislation intended to provide more certainty, particularly for small tenants.

### *Rent determination and rent reviews*

The way in which rents are determined, including the methods used to calculate rents and the fairness of such methods, was one of the initial contentious matters raised by small retailers. The issue of percentage rents, for example, was identified by the Cooper Committee:

Small retailers felt strongly that they would be penalised for their initiative. They further felt that their increase in turnover would be the basis for lifting the base rent.

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The actual size of the percentage figure was in many cases hotly disputed. (Cooper Committee report, p. 24)

While conceding that in some cases percentage rents would be appropriate (for example, to attract major tenants into shopping centres), the Cooper Committee suggested that the system 'was not really satisfactory in its present form for the position of small tenants in shopping complexes'. The Cooper Committee report noted that an increase in turnover was not necessarily a good measure of an increase in the capacity to pay and that percentage rentals were in some ways akin to a tax on initiative and hard work. It recommended that the practice of percentage rents be dropped when dealing with small traders (Cooper Committee report, pp. 25-6).

In response to these concerns, the original Acts in Queensland and Western Australia contained provisions stating that rent could not be determined by reference to turnover unless the lessee had agreed in writing to this. Further, a lease would be void unless it specified, as part of this provision, the formula by which the rent was to be calculated (Duncan 1990). These provisions, however, were assessed to be of little assistance to small retailers (Anderson 1992) and were subsequently removed from legislation.

The Reid Committee again heard concerns from tenants about methods used to calculate rent and the fairness of such methods. The Committee indicated that it was 'not convinced that specialty retailers were paying fair rents'. Rather, it considered that specialty retailers were being 'charged maximum achievable rents' (SCISR 1997, p. 52).

While the Committee did not consider it appropriate for regulators to determine the appropriate method of calculating retail rent, it suggested that it was appropriate for retail tenancy legislation to 'set down some procedural rules for fair rent negotiations'. Recommendation 2.7 of the Reid Committee report stated that:

Recognising that rent will always be a matter for negotiation between landlord and tenant, the Committee recommends the Uniform Retail Tenancy Code provide that:

- (a) the disclosure statement set out clearly the method by which rent is to be calculated for the term of the lease without provision for review or for unpredictable increases;
- (b) market rent review only be permitted on renewal of the lease; and
- (c) the level of market rent on lease renewal be determined by an independent accredited valuer, with costs shared between the parties. (SCISR 1997, pp. 56-7)

The current State and Territory retail tenancy legislation requires certain information about rents to be contained in lease disclosure statements and prescribes the scheduling of rent reviews and the basis upon which rent reviews can be conducted.

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Many jurisdictions restrict the frequency of rent reviews (although the Reid Committee's recommendation of reviews only on renewal of leases has not been adopted). For instance, in New South Wales and South Australia, a change in base rent may not occur in under 12 months unless the change is by a pre-specified amount or percentage. In Victoria, Tasmania and the Australian Capital Territory base rent changes at less than 12 monthly intervals are prohibited. Most jurisdictions also prohibit discretionary rent review clauses that allow rent to be determined by the highest of two or more different methods. In some States, such as Victoria, legislation is more specific and permits a rent review only on the basis of one of the prescribed methods. All jurisdictions have prohibited upwards-only rent reviews.

The legislation in each of the jurisdictions also defines 'current market rent' and the process to obtain market rent. This typically requires a specialist valuer and, in cases where parties cannot reach agreement, the tenant or the landlord can request an independent valuation.

The legislation in each of the States and Territories now prescribes the items that can be included in the definition of turnover and contains confidentiality provisions restricting disclosure by landlords of turnover data. For instance, landlords may only release information publicly (without tenant consent) as part of aggregate shopping centre figures. Western Australia and Tasmania do not permit landlords to request turnover data unless required for the purposes of calculating turnover based rent. In Victoria, the alleged misuse of turnover data is a factor that the courts consider when determining whether a landlord has engaged in unconscionable conduct. Commenting on the provisions relating to turnover data Webb said:

Concerns regarding turnover information appear to have been reduced through the imposition of obligations of confidentiality and prohibitions of termination for inadequate sales. Arguably, however, the access to such figures could still enable landlords to calculate maximum rental the tenant could pay, a common allegation before the Reid Committee. The Victorian initiative to include the misuse of turnover figures in the unconscionability provision gives weight to this alleged problem, however proving such misuse may be an arduous task. (Webb 2006, p. 269)

### *Outgoings*

Complaints from tenants in shopping centres about landlords seeking to recover certain expenses led to the original retail tenancy Acts containing requirements that the extent of the recovery of operating expenses be carefully defined. Areas of particular concern were the use of sinking funds and the operation of promotional funds (Murdoch, Rowland and Crosby 2001).

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In more recent years, greater clarity has been sought on the items that could be recouped as outgoings. The legislation in each of the States and Territories now requires that leases specify the outgoings that are to be regarded as operating expenses, how they are determined and apportioned to the lessee, and how they are to be recovered by the lessor. While there is some variation across jurisdictions, the legislation generally requires landlords to provide tenants with an estimate of outgoings, an outgoings statement and an audited annual statement. As Webb put it:

The legislation generally has adopted enhanced documentation regarding the calculation of outgoings and promotions and there are considerable obligations on lessors in relation to audited statements. (Webb 2006, p. 273)

Some jurisdictions have prohibited particular operating expenses. In Victoria, Queensland and South Australia, for example, landlords are prohibited from recovering contributions for land tax. In Western Australia and Victoria, the recovery of management fees paid for collecting rent are prohibited.

### *Relocation/compensation*

The Reid Committee reported that, although retail tenancy legislation recognised tenants' rights to compensation for disturbance and relocation, it had heard 'some horrific stories' about the disturbance to trading suffered by retailers during redevelopment of shopping centres, with inadequate compensation paid to cover trading losses (SCISR 1997, p. 72).

The Committee recommended that retail tenants be compensated for disturbance caused by redevelopment and compulsory relocation according to a pre-determined formula.

Under the current legislation, lessors in all jurisdictions are required to inform tenants of any plans for redevelopment and relocation.

Relocation clauses in a lease agreement are covered in the legislation of all jurisdictions except Western Australia. Generally, relocation during the course of a lease may be initiated by a landlord if there are plans for substantial refurbishment, redevelopment or extensions to the shopping centre that cannot be carried out without vacant possession of the tenant's shop. The landlord must then provide an offer for an alternative shop for the lease period on the same terms as the existing lease. However, rent may be adjusted to account for difference in the commercial values of the two premises. This offer must be made with at least three months notice in most jurisdictions, while there is a six month minimum in Tasmania. Upon receiving the notice, the tenant has the right to terminate the lease. If the tenant agrees to relocation, they are entitled to the reasonable costs of relocation.

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Legislation in all jurisdictions provides for the payment of compensation to tenants for certain occurrences, including where a landlord substantially alters or inhibits the flow of customers to the shop. Inclusion of such clauses indicates an acknowledgment by legislators that retail leases, particularly in shopping centres, represent more than the rental of physical space and that shopping centre landlords can affect the foot traffic or number of customers within a centre. These clauses represent an attempt to make landlords accountable for the management of a centre.

### *Assignment*

Retail tenancy legislation in all States and Territories contain provisions governing the assignment of leases, that is, where the lease is transferred from one tenant to another, typically as part of the sale of the retail business located there. Assignment of leases is subject to the approval of the landlord, but there are restrictions on the capacity of the landlord to disallow an assignment. Typically, a landlord may only disallow an assignment if the assignee intends to change the use of the premises, or the assignee's financial resources and/or business skills are inferior to those of the existing tenant.

A key feature of assignment — in all jurisdictions except Tasmania<sup>1</sup> — is that liability is passed to the assignee and the previous tenant absolved of liability (subject to correct procedures being followed, such as provision of an assignor's disclosure statement in some jurisdictions, such as New South Wales). This is a relatively recent addition to retail tenancy legislation. For instance in Victoria, protection from liability was not incorporated until the introduction of the *Retail Leases Act 2003*. In New South Wales, this provision was incorporated in 1998 and revised in 2005, while in Queensland, release from liability provisions was incorporated in 2006 amendments.

### *Casual mall licensing*

Casual mall licensing governs the operation of casual short-term tenants located in the common areas of shopping centres. South Australia is the only State that has regulations governing the operation of these types of lease arrangements. The mandatory casual mall licence code of conduct operates as a schedule under the South Australian Retail and Commercial Leases Act. Under the code, a landlord can not grant a casual mall license unless they have a casual mall licence policy. Landlords must meet a range of disclosure requirements and there are restrictions

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<sup>1</sup> In Tasmania, liability is removed only if the terms of the lease, other than rent, are changed after assignment without their agreement.

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on the granting of licenses that result in the unreasonable introduction of competition to adjacent tenants.

Concerns over competition with existing tenants appear to have been a primary reason for the introduction of the code:

The Code will provide a legislated framework in which casual mall licensing can operate. It will clarify the entitlements and expectations of affected parties, ensure that lessees have access to greater information about casual mall licensing in retail shopping centres and significantly reduce the tensions which have occurred from time to time between shopping centre owners/managers and retail lessees over this issue.

The use of common areas of shopping centres by retailers selling goods or services pursuant to licences granted by shopping centre owners (casual mall licensing) is widespread. A number of issues have arisen in relation to the practice. Some tenants are concerned that casual mall licensing can result in the unreasonable introduction of competition. There is also concern that, in some cases, the holders of casual mall licences are subsidised by lessees' payments for outgoings. (Brindal 2001, p. 2831)

While no other jurisdictions have introduced provisions governing casual mall licensing, there has been recent adoption of a casual mall leasing code of practice by industry. This industry code of practice is modelled on the South Australian code. The code is voluntary and it is up to shopping centres to elect to subscribe to the code. This code has been authorised (for an initial five years) by the Australian Competition and Consumer Commission (ACCC), meaning that adherence to the code provides immunity from prosecution under the TPA for actions that would otherwise be of concern. The code took effect from 1 January 2008.

FINDING

*In attempting to improve security of tenure and reduce the uncertainties of retail tenancy leases, regulation has become increasingly complex and prescriptive in stipulating the terms of leases — increasing differences between jurisdictions and with commercial tenancies more broadly.*

## **Increasing information and disclosure**

Information provisions under the retail tenancy legislation are aimed at ensuring that landlords and tenants have the relevant information available to help them make appropriate decisions before signing a lease. The Review of Victorian Retail Tenancies Legislation 2001, for example, stated that one of the key policy principles for retail tenancy regulation was that:

Government involvement in retail tenancies matters should aim at ensuring that prospective tenants have sufficient knowledge to make an informed business decision.

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... Government regulation should focus on addressing information imbalances and the misuse of market power. (Victorian Government 2001, p. 5)

### *Provision of disclosure statements*

The original legislation in Queensland did not require the provision of disclosure statements. Amendments to the legislation required landlords to provide prospective tenants with a range of particulars prior to signing a lease, although the form was not specified. The introduction of new legislation in Queensland in 1994, however, prescribed both the content and form of disclosure statements.

In 1997, the Reid Committee report noted that the failure of one party to disclose information remained a problem:

The Committee received evidence that, even where mandatory disclosure applies, some property managers are failing to provide enough accurate information to allow sensible decisions on the part of prospective tenants. (SCISR 1997, p. 65)

The Victorian Government review of the *Retail Tenancies Act 1986* (which led to its replacement by the *Retail Tenancies Reform Act 1998*), also found that tenants rarely received disclosure statements and that there was no effective remedy to ensure that such statements were provided. As a means of compelling landlords to provide disclosure statements, the Retail Tenancies Reform Act stipulated that tenants were not liable to pay rent until they received the disclosure statement (Office of the Minister for Small Business and Tourism 1997).

The disclosure statement requirements stipulated under the current State and Territory retail tenancy legislation involve the provision of a considerable amount of information, such as rent, estimated outgoings and any plans for development of the centre. Penalties apply if leases are entered into without the provision of the appropriate information in the specified time frame, or if the information contained in the disclosure statement is materially false or misleading. According to Webb:

Disclosure statements have become more comprehensive over time with more factors being added, it seems, with each amending Act. (Webb 2006, p. 276)

In most States and Territories, the SCCA submitted that the landlord is now required to supply the prospective tenant with:

- a letter of offer;
- a copy of the proposed lease;
- a copy of the legislation, retail tenancy guide or information brochure;
- a copy of the Lessor's Disclosure Statement (completed by the lessors);

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- a copy of the Lessee’s Disclosure Statement (to be completed by the lessee);
  - details of the fitout requirements for speciality shops (in the case of larger shopping centres); and
  - other documentation (such as acceptance forms, centre rules, bank periodical payment requests and privacy policy forms (submission no. 83).

The Queensland Retail Shop Leases Act also requires prospective tenants who are not ‘major lessees’ (that is, those with fewer than five shops nationally) to provide a financial advice report and a legal advice report. These reports are to certify that tenants have been provided with advice about their financial and legal rights and obligations under the lease. The reports also require these professionals to advise tenants to seek further professional advice on a range of specific financial and legal matters if necessary. According to the SCCA, other States have also considered these provisions but, to date, have not imposed these additional obligations on prospective lessees (submission no. 83).

FINDING

*All jurisdictions require the provision of disclosure statements. The statements detail important information intended to improve transparency and decision making.*

### *Lease registration*

There are provisions for the registration of leases (typically those exceeding three years) in all States and Territories under the various land title Acts. Under these Acts, registration requirements are not specific to retail tenancy leases. However, it was brought to the attention of the Commission that the incidence of lease registration varies across jurisdictions. In New South Wales, registration of retail tenancy leases (under the *Real Property Act 1900*) appears common. Lease registration also appears common in Queensland, the Northern Territory and the Australian Capital Territory. Registration appears to be less common in the other jurisdictions.

The purpose of registration of the lease with land title offices is to register the interest in the property and have indefeasibility of title. However, as part of registration, pertinent particulars, including rent, are recorded on a publicly accessible register. Access to this data provides a source of market information on the retail tenancy market, and is a secondary benefit from registration that is being exploited by some industry participants and information service providers.

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Victoria is the only jurisdiction that requires notification of the lease (to the Victorian Small Business Commissioner) under retail tenancy legislation. This was introduced as part of the 2003 legislation. It is notable that lease details notified to the Small Business Commissioner in Victoria are not publicly accessible.

#### FINDING

*Leases can be registered in all States and Territories under property law.*

#### *The role of government in the provision of education and advice*

Governments also play a role in providing information. At the national level, the Office of Small Business provides general advice to small businesses about operating a business, as well as specific information on retail leasing. It seeks to advise small business and/or retailers of steps they can take to inform themselves of lease obligations and avail themselves of professional advice commensurate with lease commitments and business risk.

The ACCC, through its TPA educational outreach program, also provides a range of educational and training advice to small businesses, including small retailers, about their rights and obligations under the TPA (box 3.1).

Most State and Territory governments also provide educational resources and training on retail leasing matters and operating a small business generally. In New South Wales, for example, the Retail Tenancy Unit distributes a number of documents aimed at improving retailers' knowledge and understanding of leasing matters and dispute settlement. These include the *Retail Tenancy Unit Dispute Resolution Kit*, the *Protect Your Lease Handbook*, along with template disclosure documents (New South Wales Retail Tenancy Unit 2007a). Similar publications are produced by Business Victoria who also conduct a series of regular workshops aimed at potential and existing retail tenants. For example, the 'Signing a Retail Lease Workshop' seeks to provide tenants with '... important information about the *Retail Leases Act 2003* and retail leasing in general' (Business Victoria 2007, p. 1). This workshop is conducted at low cost to participants (\$30 per person), takes just over 3 hours and covers topics such as:

- the importance of retail tenancy to your business;
- before entering into a lease;
- unconscionable conduct;
- getting the right advice;
- after the lease is signed;

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- dispute resolution; and
  - contacts for further assistance.

### Box 3.1      **The ACCC's educational outreach program**

The ACCC runs a Educational Outreach Program to attain effective compliance with the TPA by informing stakeholders of their rights and obligations:

The program is delivered through a variety of mechanisms, including:

- regional outreach managers — who interact with, and conduct presentations to, small business groups, local industry and community associations, business enterprise centres, ethnic associations and local government;
  - regional outreach managers also utilise the ACCC's Regional Supporter Network which consists of 400 organisations throughout Australia who act as a contact point for the ACCC.
- the development and production of publications — these are used to inform small business of their rights and obligations under the TPA with over 3 000 publications distributed, on average, each week; and
- the ACCC's Small Business Helpline — which provides an inquiry service for small business and franchising inquiries.

Recent examples of ACCC initiatives related to retail tenancy include:

- *Being smart about your new franchise: checklist before signing a lease agreement* — a checklist developed to assist prospective franchisees in considering issues in relation to retail leases such as contractual obligations, renewal and transfer options, occupancy costs, franchise territory;
- *Franchise Bulletin: Being smart about your new franchise and your retail lease* — guidance for prospective franchisees about leasing arrangements they may enter into and their associated rights under the franchising code of conduct (including a checklist for research and due diligence in relation to a retail leasing arrangement);
- *Small Business Bulletin: Being Smart about your retail lease* — aims to explain the protections afforded by the TPA and the role of the ACCC in the retail tenancy sector (publication currently under development);
- *Being smart about your small business: checklist before signing a lease agreement* — a checklist designed to assist small business owners in considering their retail tenancy issues (publication currently under development); and
- *A Small Business Guide to Unconscionable Conduct* — provides guidance as to what constitutes unconscionable conduct in small business transactions under the TPA and explains the distinction between unfair and unconscionable conduct.

Source: Submission no. 128.

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FINDING

*Information and educational resources on retail tenancy matters are available from government agencies in all States and Territories and from the ACCC.*

### **Fair trading — unconscionable conduct provisions**

The Reid Committee report (p. 171) referred to the ‘very real economic and social costs currently involved in the unfair exploitation of small businesses by larger businesses’. The report further states that:

If stronger parties are allowed to shift the liability for risks onto others, which should arguably be theirs, they may behave more carelessly than they would otherwise do. (SCISR 1997, p. 169)

As stated earlier, in response to recommendations in the Reid Committee report (as well as other considerations), unconscionable conduct provisions were included as section 51AC of the TPA (see section on fair trading legislation) and drawn down into retail tenancy legislation in all States and Territories, except South Australia and Tasmania. This occurred as early as 1998 in New South Wales and as recently as June 2007 in Western Australia. In addition, the unconscionable conduct provisions have been drawn down into fair trading laws of all States and Territories.

South Australian retail tenancy legislation has clauses prohibiting vexatious conduct and threatening behaviour by landlords towards tenants, but does not contain the phrase ‘unconscionable’. The provisions in Tasmania state that parties may not engage in conduct that is ‘harsh, unjust or unconscionable’. The Australian Capital Territory, while having drawn down the provisions of the TPA, also prohibits conduct that is ‘harsh and oppressive’. Box 3.2 provides more details of unconscionable conduct provisions in the retail tenancy legislation of each State and Territory.

FINDING

*All States and Territories have unconscionable conduct or similar provisions within retail tenancy legislation. There is some variation between jurisdictions.*

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### Box 3.2      **Unconscionable conduct in retail tenancy**

Unconscionable conduct provisions in retail tenancy law vary across the country.

**South Australia's** Retail and Commercial Leases Act prohibits 'conduct that is (in all the circumstances) vexatious'. A landlord may not require a premium for a renewal, nor threaten a tenant to prevent them from exercising a right to renewal or a right under the Act.

In **Tasmania**, the Code of Practice for Retail Tenancies prohibits conduct that is 'harsh, unjust or unconscionable'. Unconscionable conduct by a property owner may include a threat to subsidise a competitor to the tenant in nearby premises, or to not renew the lease unless the tenant agrees to a proposal by the property owner to pay a rent in excess of the market value rent.

The **Australian Capital Territory's** Leases (Commercial and Retail) Act prohibits conduct that is 'unconscionable or harsh and oppressive'. The legislation specifies the matters that courts may consider include most of the factors set out in section 51AC except for those relating to industry codes, and the willingness to negotiate lease terms. It requires consideration of the extent to which parties 'acted honestly' rather than 'acted in good faith', as under the TPA.

In **New South Wales**, the Retail Leases Act prohibits 'unconscionable conduct' and requires consideration of all factors listed in section 51AC. The legislation specifically notes that a failure to renew a lease will not constitute unconscionable conduct.

In the **Northern Territory**, the requirements under the Business Tenancies (Fair Dealings) Act are the same as those in New South Wales.

**Queensland's** Retail Shop Leases Act prohibits conduct that is 'in all the circumstances' unconscionable, with the same considerations as for New South Wales.

In **Victoria**, the Retail Leases Act prohibits conduct that is 'in all the circumstances' unconscionable. It requires consideration of all factors listed in section 51AC, as well as the unreasonable use of tenant's turnover figures and the reasonableness of fit-out costs and preparedness to incur them. The legislation specifies that a failure to renew or a failure to agree to an independent valuation of current market rent will not constitute unconscionable conduct.

**Western Australia's** Commercial Tenancy (Retail Shops) Agreements Act is similar to legislation in Victoria.

## 3.3      **Zoning and planning**

The supply of land for retail activities, which is governed by planning regulations in each State and Territory, can also affect the operation of the retail tenancy market.

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## The planning context

In terms of retail and commercial activities, State and Territory governments have formed planning policies around the ‘centres policy’ (New South Wales Department of Planning 2005; Western Australian Planning Commission 2000; and ACT Planning and Land Authority 2002). Centres policy seeks to set in place systems that exploit the benefits of concentrating activities in the one location. This policy is reflected in both metropolitan plans, such as Victoria’s *Melbourne 2030*, and regional plans, such as Queensland’s *Wide Bay Burnett Regional Plan 2007-2026* (Victorian Department of Sustainability and Environment 2003; Queensland Department of Local Government, Planning, Sport and Recreation 2007a).

Centres policy is based around the notion of combining all major trip-generating activities, such as retail and commercial activities, in the one location with the aim of reducing ‘unnecessary’ car use and traffic congestion and making better use of (or planning decisions pertaining to) public infrastructure such as public transport and roads (Cockburn 2005). As the SCCA recognised:

... retail developments that are permitted outside these designated centres inevitably generate their own demand for road and transport infrastructure and, in a constant climate of scarce public resources, this will inevitably be at the expense of continuing public investment in designated urban centres. Such out-of-centre developments are therefore discouraged because of their significant community and environmental cost. (submission no. 83, p. 23)

Other benefits from concentrating activities in central locations are argued to arise from:

- improved access to retail, commercial, health, education, leisure, entertainment and cultural facilities, along with cultural and personal services; and
- increased competition, collaboration and innovation amongst businesses from clustering (New South Wales Department of Planning 2005).

Each State and Territory has separate planning policies and legislation which governs development within cities and regional areas (see box 3.3). In many cases, State legislation provides an overarching guide for implementation that is conducted at the local council level.

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### Box 3.3 State regulation governing planning and zoning

Each State and Territory has its own legislation and regulations that cover planning and the zoning of retail space. Often, zoning is left to individual local councils under the guidance of State planning laws and policies. Retail zoning in States and Territories is governed by:

- The *Environmental Planning and Assessment Act 1979* in New South Wales;
- The *Planning and Environment Act 1987* in Victoria;
- The *Integrated Planning Act 1997* in Queensland;
- The *Town Planning and Development Act 1928* in Western Australia and the *Western Australian Planning Commission Act 1985* which establishes the authority which develops State planning policies;
- The *Development Act 1993* and associated *Development Regulations 1993* in South Australia;
- The *Land Use Planning and Approvals Act 1993* in Tasmania;
- The *Planning Act 2007* in the Northern Territory; and
- The *Planning and Land Act 2002* in the Australian Capital Territory.

Planning policies vary across States and Territories based on the individual characteristics of each jurisdiction. Thus, the extent to which the supply of retail space is regulated, and the degree of centre planning varies. Despite this, all jurisdictions apply centre policy principles to some extent in their planning.

Changes to zoning usually require applications be made to local councils. Before rezoning is allowed, there is generally a period of public consultation, with many rezoning plans also required to be approved by State or Territory planning departments/authorities.

*Sources:* New South Wales Department of Planning (2007); Western Australian Planning Commission (2006); Victorian Department of Sustainability and Environment (2007); Queensland Department of Local Government, Planning, Sport and Recreation (2007b); Planning SA (2007); Tasmanian Department of Infrastructure, Energy and Resources (2007); Northern Territory Department of Planning and Infrastructure (2007); ACT Planning and Land Authority (2007).

## Zoning and the supply of retail space

In terms of retail zoning, the centres policy has concentrated retail activity into specific locations. A key determinant in decisions made about retail (and commercial) zoning has been access to public transport and other infrastructure. As stated by the New South Wales Department of Planning:

Clear guidance is required as to where retail and commercial office activities should be located with a critical determinant being good public transport and boosting activity and vitality in centres across the spectrum to encourage and sustain investment. (New South Wales Department of Planning 2005, p. 104)

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Such policies have aimed to reduce or eliminate the emergence of new retail concentrations in areas outside identified centres. For example, the NSW Metropolitan Strategy suggests that the emergence of retailing in some industrial areas has both displaced some light industry and created excess trip generation. Planning policy thus restricts such activities to those which are ‘ancillary to the industrial use or has operating requirements or demonstrable offsite impacts akin to industrial uses (such as building and hardware, plumbing and nurseries)’ (New South Wales Department of Planning 2005, p. 105). That is, retail activities should not be permitted in industrial zones unless they are by nature selling bulky goods (for example, a homemakers centre) or supplementary to the industrial activities undertaken on the site.

Instead, planning policies aim to induce new retail investment into under-developed, or poorly maintained existing retailing developments — particularly strip shopping centres in main transport corridors (such as Parramatta Road in Sydney, which has been signalled as an area for redevelopment in the New South Wales *Metropolitan Strategy*). This also provides for uniform regulation for businesses that conduct relatively similar activities — such as factory outlets and more traditional retail stores. For example, the New South Wales *Right Place for Businesses and Services* policy (New South Wales DUAP 2001), which sets out the policy framework that governs zoning for retail, commercial and industrial areas, states that factory outlets, apart from those which are ancillary to industrial activities, ‘are simply shops seeking low rents and could be encouraged to agglomerate in existing declining centres where they can play a positive role in their revitalisation’ (New South Wales DUAP 2001, p. 12).

Such policies are mirrored in other States and Territories, for example, in Victoria’s *Melbourne 2030* policy (Victorian Department of Sustainability and Environment 2003), in Western Australia’s *Metropolitan Centres Policy Statement for the Perth Metropolitan Region* (Western Australian Planning Commission 2000) and the *Planning Strategy for Metropolitan Adelaide* (Planning SA 2006).

Limiting such ‘non-centre’ developments has also been prompted by concerns over congestion and the availability of infrastructure. The creation of trip-generating activities outside of centres, for which infrastructure has been developed (and for which continued development is planned) has the potential to put strain on existing infrastructure, and create externalities such as congestion. Further, it is believed that concentrating retail activities will also promote competition, leading to consumer benefits (New South Wales Department of Planning 2005).

#### FINDING

*Zoning and planning controls affect the location, quantity and use of retail space.*

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## 3.4 Summing up

The last two decades or so has seen a transformation in the regulation governing the retail tenancy market. From initial beginnings in Queensland, specific retail legislation has been extended to cover every State and Territory, except for Tasmania where a regulated code of conduct has been applied. Moreover, legislation has been continually amended and expanded, resulting in complex and prescriptive, and to some extent, arbitrary rules.

In general, the legislation across jurisdictions covers the same broad topics, although there are many differences with respect to detailed provisions. Chapter 5 outlines participants' views of the operation of the retail tenancy market in the context of this legislative framework and develops some principles for assessing regulation of the retail tenancy market.

