
4 Dispute resolution

Processes for dispute resolution for retail tenancy in Australia exist at both the State and Territory level, and at the national level through the Australian Competition and Consumer Commission (ACCC).

This chapter outlines the development of arrangements to resolve retail tenancy disputes in Australia (section 4.1) and the current operation of these arrangements (section 4.2).

4.1 Development of dispute resolution procedures

Prior to the introduction of retail tenancy legislation, disputes between landlords and tenants were handled as commercial tenancy disputes. For small retailers who were unable to settle disputes via direct negotiation, the only other options were either a tribunal or court with its associated formality, expense and delay. The cost of these options had the potential to act as a barrier to efficient dispute resolution. Also, the use of the courts to settle disputes had the potential to jeopardise ongoing commercial relationships between parties.

Queensland, the first State to introduce retail tenancy legislation in 1984, was also the first State to introduce a dispute resolution mechanism specifically for retail tenancy disputes. Prior to this, the 1981 report of the Cooper Committee, the Inquiry that preceded retail tenancy legislation in Queensland commented on the frustration experienced by retail tenants in their disputes with landlords because of the lack of a neutral third party. The Committee observed that:

... many of the problems brought forward by small tenants could have been resolved by intelligent, flexible, understanding attitudes and response by management. (Cooper Committee report 1981, p. 5)

The Committee also observed that some owners and managers already had arbitration clauses in their leases and that this practice was desirable.

About the time that that Inquiry was initiated, the Building Owners and Managers Association (BOMA) had proposed the establishment of a representative Retail Tenancy Advisory Body to investigate, using a conciliatory approach, legitimate complaints from either tenants or landlords. BOMA considered that such a body could work well given ‘the small magnitude of real disagreement’ in the industry

(Cooper Committee report, p. 40). The Cooper Committee also saw merit in BOMA's proposal and suggested that:

... such a body could well have a place as part of an overall package of measures which could be adopted to achieve industry self regulation and administration. (Cooper Committee report 1981, p. 40)

The Queensland Government, however, opted to introduce retail tenancy legislation in 1984. At the outset, the legislation had provisions for mediation and a tribunal. The other States broadly adopted Queensland's approach, introducing from the outset a dispute resolution process either in parallel with, or as part of, their retail tenancy legislation (box 4.1).

Reid Report identifies concerns

In 1997, the report of the Reid Committee (SCISR 1997) noted dissatisfaction amongst tenants with the operation of the dispute resolution procedures that were in place at that time:

... an overarching concern of retail tenants in the inquiry concerned mechanisms for dealing with retail tenancy disputes outside the courts. (SCISR 1997, p. 27)

Dissatisfaction with these procedures was most evident in Victoria and Western Australia. Neither of these States had separate retail tenancy tribunals at the time. In Victoria, concerns related to the high costs for retail tenants of resolving disputes, and the fact that arbitration determinations were not on the public record. In Western Australia, the main complaints made to the Reid Committee concerned delays and the lack of ultimacy of the rulings of the Commercial Tribunal (many verdicts were being immediately challenged in the District Court).

As discussed in chapter 3, the Reid Committee found that small businesses were often disadvantaged in their dealings with larger businesses and recommended a 'Uniform Retail Tenancy Code' that would:

- provide for low cost mediation and conciliation of retail tenancy disputes;
- provide for retail lease tribunals around Australia with jurisdiction to make binding decisions on retail tenancy disputes and afford limited rights of appeal to the courts; and
- explicitly exclude the option of legal representation for parties to a retail tenancy dispute, short of any eventual appeal to the courts. (SCISR 1997, p. 31)

Box 4.1 Introduction of dispute resolution procedures for retail tenancies

The States introduced, from the outset, dispute resolution processes either in parallel, or as part of, their retail tenancy legislation:

New South Wales — The Voluntary Code of Conduct for Retail Tenancies (1992) contained a dispute settlement mechanism comprising mediation and determination by an independent expert. The *Retail Shop Leases Act 1994* provided for access to the Registrar of Retail Tenancy Disputes who could negotiate with parties; make arrangements for mediation; facilitate access to either the Commercial Tribunal or to a court (with preference given to the tribunal rather than court to determine an order).

Victoria — The *Retail Tenancies Act 1986* allowed for referral of disputes to commercial arbitration. In 1995, further reform introduced a scheme of compulsory conciliation prior to the referral of disputes to arbitration.

Queensland — *Retail Shop Leases Act 1984* included dispute resolution mechanisms with provisions for mediation and a tribunal.

South Australia — Provisions in the *Landlord and Tenant Act 1936*, introduced in 1985, provided access to the Commercial Tribunal. The *Retail & Commercial Leases Act 1995* established mediation and access to the Magistrates Court.

Western Australia — The *Commercial Tenancy (Retail Shops) Agreements Act 1985* provided for access to the Commercial Tribunal for alternative dispute resolution, with the Registrar required to attempt to resolve disputes through mediation before referral to the Tribunal

Tasmania — The *Fair Trading (Code of Practice for Retail Tenancies) Regulations 1998* requires the Code's Monitoring Committee to conciliate on disputes.

Northern Territory — The Territory's *Business Tenancies (Fair Dealings) Act 2003* established a Commissioner of Business Tenancies and introduced a two-step process of mediation or conciliation for retail leases followed by either access to an inquiry process by the Commissioner or court action.

Australian Capital Territory — The *Leases (Commercial and Retail) Act 2001*, transferred jurisdiction of commercial and retail matters from the Tenancy Tribunal to the Magistrates Court of the Australian Capital Territory. The Act requires the courts to actively manage disputes including, where appropriate, referral to alternative dispute resolution such as mediation.

Sources: BOMA and RTA (1991); Chadwick (1994); Chappell (1994); Australian Capital Territory OFT (2002); Victorian DSRD (2001).

In responding to the Reid Committee report, the Minister for Workplace Relations and Small Business supported the development of low-cost dispute settlement processes, stating:

The Government particularly believes that effective low cost justice is an essential element of any retail tenancy safety net and should be incorporated in all State and Territory legislation where it does not currently exist. (Reith 1997, p. 9)

In 1998, the Australian Government added its own protection for small business by amending the *Trade Practices Act 1974* (by inserting section 51AC) to prohibit unconscionable conduct in small business transactions. On announcing the changes, the Minister for Workplace Relations and Small Business said:

... This new provision will be particularly beneficial to retail tenants as it allows a court to have regard to the relative strengths of the bargaining position of the retailer and the landlord in determining whether the conduct complained of was unconscionable. (Reith 1997, p. 10)

At the State level in 1998, immediately following the Reid Committee report:

- Victoria introduced its *Retail Tenancies Reform Bill 1998* which provided access to the newly created Victorian Civil and Administrative Tribunal (VCAT); and
- New South Wales introduced legislative amendments that gave jurisdiction to the Administrative Decisions Tribunal (ADT) to deal with claims under the retail leases legislation, and established a new Retail Leases Division of the tribunal.

Further refinements made to dispute resolution processes

In more recent years, there have also been a number of refinements made to the dispute resolution processes at the State and Territory level. In response to a Review in 2001, Victoria's *Retail Leases Act 2003* established the Small Business Commissioner which has the power to investigate complaints and mediate retail tenancy disputes. The Victorian Government's policy intent in establishing the Small Business Commissioner was to allow parties to resolve their problems and maintain business relationships in a low-cost non-adversarial environment, and to take relatively small disputes out of the formal tribunal and court system. The 2003 reforms also required mediation before parties could access VCAT.

While the Victorian Government took a broad approach in establishing a Commissioner for Small Business, most of the Commissioner's work has been associated with retail tenancy (submission no. 111).

In 2004, the Australian Capital Territory Government also appointed a Small Business Commissioner, whose responsibilities included assisting the mediation of disputes involving small businesses (Quinlan 2004). However, the position was abolished in 2006, which left disputes to be dealt with by the Magistrates Court.

In Western Australia, legislative amendments in 2004 gave the State Administrative Tribunal (SAT) jurisdiction over retail tenancy disputes. In 2007, further legislative amendments made provisions for small businesses to be protected against unconscionable conduct and to have matters heard by the SAT.

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All State and Territories have dispute resolution mechanisms for retail tenancy which have generally focused on the development of alternatives to the courts through arrangements that are low-cost, accessible and timely.

4.2 Current dispute resolution procedures

State and Territory level

The dispute resolution frameworks currently in place are similar across jurisdictions and embody common elements such as access to mediation or conciliation prior to proceeding to a tribunal or the courts. However, there are differences in the operation and cost of dispute resolution processes across jurisdictions, which means that options for tenants and landlords vary depending on where they conduct their business. For example:

- In New South Wales, Victoria, Queensland and the Northern Territory, procedures in place generally mean that only in the case of mediation failing can disputes be referred to a tribunal (in the case of New South Wales, Victoria and Queensland) or the courts (Northern Territory).
- In South Australia, a dispute can be taken to the Commissioner for Consumer Affairs for mediation, or it can be taken to the Magistrates Court.
- In Western Australia, disputes proceed directly to the State Administrative Tribunal, where they may be referred to mediation or compulsory conference.
- In Tasmania, a dispute can be referred to the Office of Consumer Affairs and Fair Trading.
- In the Australian Capital Territory, disputes are dealt with by preliminary hearings, mediation and court hearings in the Magistrates Court (box 4.2).

For disputes not resolved at mediation, the authorities in New South Wales, Victoria, South Australia and Western Australia can intervene in tribunal or court proceedings, though such provisions have been very rarely used. Under retail tenancy legislation, in the first three of these States, the authorities can also institute proceedings.

Box 4.2 **Current dispute resolution procedures**

New South Wales — the Registrar can provide parties with preliminary assistance of an advisory nature. This information and advice is free. The Registrar may refer the matter to mediation and access to the ADT is generally only available if the Registrar certifies that mediation has failed or is unlikely to resolve the matter. The tribunal itself must also attempt to conciliate the dispute. Matters may proceed to the Supreme Court.

Victoria — the Small Business Commissioner can provide preliminary assistance of an advisory nature, for example, on a party's rights or obligations under the lease. The Commissioner can refer matters for alternative dispute resolution, including mediation. A dispute can only be subject to proceedings before the VCAT if the Commissioner certifies that mediation has failed or is unlikely to resolve the matter. Costs can be awarded by VCAT against a party that refuses to participate in prior mediation.

Queensland — the Registrar of the Retail Shop Leases Registry can arrange mediation. If this is unsuccessful or if the dispute is not settled within four months from lodgement, the matter may be referred to the Retail Shop Leases Tribunal for a directions hearing. The dispute may then proceed to a tribunal hearing. The tribunal must also attempt to conciliate.

South Australia — a party may apply to the Commissioner for Consumer Affairs for mediation using an independent mediation scheme administered by the Commissioner, though mediation is not mandatory. A dispute can also be taken to the Civil (Consumer and Business) Division of the Magistrates Court. Claims over \$40 000 must be referred to the District Court.

Western Australia — a dispute may be lodged with the SAT. Following a preliminary hearing, the tribunal can refer a matter to mediation or compulsory conference. If the dispute is not resolved by mediation the dispute can be heard by the SAT. Matters not resolved at the SAT can proceed to the Supreme Court.

Tasmania — an attempt must be made to resolve disputes by direct negotiation. If unsuccessful, parties may request the Office of Consumer Affairs and Fair Trading to investigate the dispute and attempt to negotiate a mutually acceptable solution. If unresolved, either party may refer the dispute to the Magistrates Court or Supreme Court as appropriate.

Northern Territory — parties to a dispute may apply to the Commissioner of Business Tenancies who calls a preliminary conference and, if required, a conciliation conference. Procedures at a conciliation conference include informal mediation as well as conciliation and other forms of alternative dispute resolution. If the conciliation conference fails, the Commissioner may hold an inquiry (if the claim is < \$10 000) or refer the matter to court (with the Commissioner's certification).

Australian Capital Territory — disputes are dealt with by preliminary hearings, mediation and court hearings in the Magistrates Court. Upon application, the court must hold a management meeting to assess the likelihood of parties resolving the dispute before the proceeding is heard. If resolution is deemed likely, the courts must promote settlement. If resolution is deemed unlikely, the court must give directions as to how proceedings will be conducted. Disputes may be referred to the Supreme Court.

Dispute resolution arrangements cover most but not all disputes. Some jurisdictions — including New South Wales, Victoria and Queensland — exclude coverage of rent determination, or have different arrangements for related disputes. There is also some requirement that matters be meaningful — legislation for the ADT in New South Wales, VCAT in Victoria, the SAT in Western Australia and the Hearing Commissioner in the Northern Territory expressly allow vexatious or frivolous applications to be declined or dismissed. In New South Wales and Queensland the tribunal can make an order on costs if a dispute is assessed as being vexatious or frivolous.

There are also differences across the jurisdictions in the costs to claimants of accessing dispute resolution processes (table 4.1). The fact that parties must meet some costs is intended to guard against frivolous use of dispute resolution, while the overall level of costs to parties is low compared to court action.

Table 4.1 Statutory cost to parties of dispute resolution by State, 2007^a

<i>State/territory</i>	<i>Mediation</i>	<i>Tribunal</i>
New South Wales	\$180 application fee, plus \$145 per hour per party	\$55 (\$110 for unconscionable conduct claim)
Victoria	\$95 per party per day	\$284 application fee (\$568 for claims over \$100 000), \$114-\$284 per day hearing fee (depending on length of hearing).
Queensland	\$100 filing fee	Each party must pay own costs.
South Australia	\$500 per party for a 3 hour mediation session, and includes a pre-mediation interview for each party (mediation free in Magistrates Court)	For Magistrates Court, \$12 filing fee
Western Australia	As per SAT	\$60 application fee, plus \$120 per hearing day after the first day
Tasmania	Nil	For Magistrates Court, \$88 filing fee (\$104 for claims over \$5 000)
Northern Territory	Conciliation costs shared equally unless otherwise agreed	For Supreme Court, \$300 filing fee
Australian Capital Territory	As per Magistrates Court	For Magistrates Court, \$108 fee to institute proceedings (or \$377 for amounts over \$10 000)

^a All charges are rounded up to the nearest dollar. Statutory charges do not cover the costs of mediation in all States and Territories, and additional financial contributions may be made by governments. For example, in Victoria an explicit subsidy for mediation of \$400 per day is provided (Office of the Victorian Small Business Commissioner 2007, p. 25).

Sources: Australian Capital Territory Magistrates Court 2007; New South Wales ADT (2007); New South Wales Retail Tenancy Unit (2007b); Northern Territory Supreme Court (2007); Office of the Victorian Small Business Commissioner (2007); Queensland Retail Shop Leases Registry and Tribunal (2007a and 2007b); South Australian Commissioner for Consumer Affairs (2007); South Australian Magistrates Court (2007a and 2007b); Tasmanian Magistrates Court (2007); VCAT (2007a); Western Australian SAT (2007a).

In general, cost recovery for alternative dispute resolution in retail tenancy does not cover all costs associated with these arrangements. To illustrate this, box 4.3 sets out the costs of dispute resolution for the Victorian Government.

Box 4.3 Estimated costs to government of dispute resolution procedures

In most States, governments carry some of the costs of alternative dispute resolution. For example, in 2006-07 in Victoria:

- the Government expended over \$2 million on the Office of the Small Business Commissioner (whose main work relates to retail tenancy disputes); and
- Government expenditure on VCAT's Retail Tenancies List is estimated to be in excess of \$300 000.

In New South Wales, government expenditure on the Administrative Decisions Tribunal's Retail Leases Division is estimated by the Commission to be in the order of \$550 000 (in 2005-06 by allocating total government expenditure on the tribunal by the share of retail tenancy cases to total cases heard).

Sources: Office of the Victorian Small Business Commissioner (2007); Commission estimates based on VCAT (2007b); New South Wales ADT (2006).

The financial limits on claims also vary across jurisdictions. For example, in the Northern Territory, the inquiry system limits claims to \$10 000, with claims above this value referred to a court. On the other hand, the New South Wales tribunal can hear claims up to the value of \$400 000.

Information on dispute resolution procedures is available from the State and Territory retail tenancy offices. Information on retail tenancy disputes, together with State contacts, is also provided by the Australian Government Office of Small Business.

Provisions for dispute resolution also under fair trading legislation

Fair trading legislation in a number of the jurisdictions also contain unconscionable conduct provisions and access to tribunals or courts under which claims can be heard (table 4.2).

Table 4.2 Unconscionable conduct provisions in fair trading law and retail tenancy law by State^a

<i>State/territory</i>	<i>Fair trading law</i>	<i>Tribunal/ Court to hear</i>	<i>Retail tenancy law</i>	<i>Tribunal/ court to hear</i>
New South Wales	Section 51AB	General Division, ADT	Section 51AC	Retail Leases Division, ADT
Victoria	Section 51AC	Various lists, VCAT	Section 51AC plus additional factors courts may consider; specifies certain behaviour as not unconscionable	Retail Tenancies List, VCAT
Queensland	Section 51AB	Industry tribunal or Supreme Court	Section 51AC	Retail Shop Leases Tribunal
South Australia	Section 51AB	District Court	Prohibition on 'vexatious' behaviour and the making of threats in relation to lease renewal or extension	Magistrates Court if claim <\$10 000, or/else District Court
Western Australia	Section 51AC	Supreme Court	Section 51AC plus additional factors courts may consider; specifies certain behaviour as not unconscionable	Commercial and Civil Stream of SAT
Tasmania	Section 51AC	Supreme Court	Prohibition on 'harsh, unjust or unconscionable' behaviour (specifies certain threats as unconscionable)	Magistrates Court or Supreme Court
Northern Territory	Section 51AB	Supreme Court	Section 51AC	Local or Supreme Court
Australian Capital Territory	Section 51AB	Magistrates Court	Prohibits conduct that is 'unconscionable or harsh and oppressive', and most elements of section 51AC	Magistrates Court

^a Reference to Section 51AB relates to the draw down of that section of the TPA prohibiting unconscionable conduct in relation to consumers. Reference to Section 51AC relates to the draw down of that provision of the TPA prohibiting unconscionable conduct in business transactions.

Sources: AUSTLII (2007); Tasmanian Office of Consumer Affairs and Fair Trading, pers. comm., 17 September 2007.

As is evident from table 4.2, in Victoria and Western Australia, there is potential overlap in the unconscionable conduct provisions in fair trading law and retail tenancy law. In New South Wales, Queensland, the Northern Territory and the Australian Capital Territory, fair trading law has only drawn down section 51AB of the TPA. As such, the drawing down of most or all elements of section 51AC in retail tenancy law in these jurisdictions is complementary to rather than duplicative of the unconscionable conduct provisions in fair trading legislation.

The greater detail in retail tenancy legislation's unconscionable conduct provisions — such as additional factors that the courts may consider when determining unconscionability, or specific behaviour that would not be deemed unconscionable — is aimed at providing some certainty about the application of the law in the retail tenancy market. The Victorian provisions specifically included additional factors so as to ensure greater clarity concerning how unconscionable conduct may relate to retail tenancies (Brumby 2003). Similarly in Western Australia, the drawing down of section 51AC into retail tenancy legislation (at the same time it was drawn down into fair trading law), aimed for provisions 'tailored to the circumstances of retail leases' (Kobelke 2003, p 12049).

National level

Provisions for dispute resolution also exist at the national level through the ACCC and its enforcement of the TPA. The provisions include:

- section 51AC which prohibits unconscionable conduct in business transactions (see box 4.4 for factors a court may consider in determining whether conduct is unconscionable);
- section 52 which prohibits conduct that is misleading or deceptive or is likely to mislead or deceive. In retail leasing, this may include, for example, incorrect advertising of site properties or rent levels or other inaccurate information that concerns the premises or its location; and
- section 53 which prohibits false or misleading representations. In the retail tenancy context, this may include representations about future turnover, people traffic and shopping centre advertising and marketing (submission no. 128).

Box 4.4 **Criteria for determining whether conduct is ‘unconscionable’**

The term ‘unconscionable conduct’ is not defined in the TPA. However, for the application of the concept of unconscionable conduct in dispute resolution, section 51AC includes a set of criteria to assist tribunals and courts in determining whether unconscionable conduct is present in a transaction. The factors a court *may* consider include:

- bargaining strength of each party;
 - of this, requiring conditions which were not reasonably necessary to protect the legitimate interests of the stronger party;
- capacity of the small business to understand any document;
- use of undue influence, pressure or unfair tactics;
- whether the small business could obtain an arrangement on better terms elsewhere;
- consistent conduct in similar transactions;
- adequate disclosure;
- willingness to negotiate;
- extent to which each party acted in good faith; and
- requirements of any relevant industry code, including those reasonably seen as relevant by the small business.

In September 2007, the TPA was amended to include an additional factor — whether there is a contractual right to unilaterally vary a term or condition of a contract. According to the ACCC:

This provision expressly recognises that there may be an inequality in the bargaining position of parties to these types of transactions, and aims to afford small businesses protection from exploitation by a stronger party. (submission no. 128, p. 15)

The amendment also raised the transactions limitation on access to section 51AC from \$3 million to \$10 million.

Some disputes are notified directly to the ACCC as the administrator of the TPA. Other disputes are referred to the ACCC by State and Territory retail tenancy officials. Referral from the States and Territories generally occurs when the alleged conduct is found to:

- extend beyond the State or Territory boundary;
- be beyond the local regulator’s powers to resolve;
- represent a particularly blatant disregard for the law; or
- require a wide ranging educational initiative from a national regulator (submission no. 128).

All disputes are assessed on the basis of whether a breach of the TPA has occurred. If the dispute does not contain an allegation of a breach of the TPA it is either referred to a more relevant government agency, or if it is of a purely contractual nature, the complainant is advised to seek legal assistance and private resolution. The ACCC also regularly refers complaints and inquiries it receives to the relevant States and Territories. The complaints are referred if the issue:

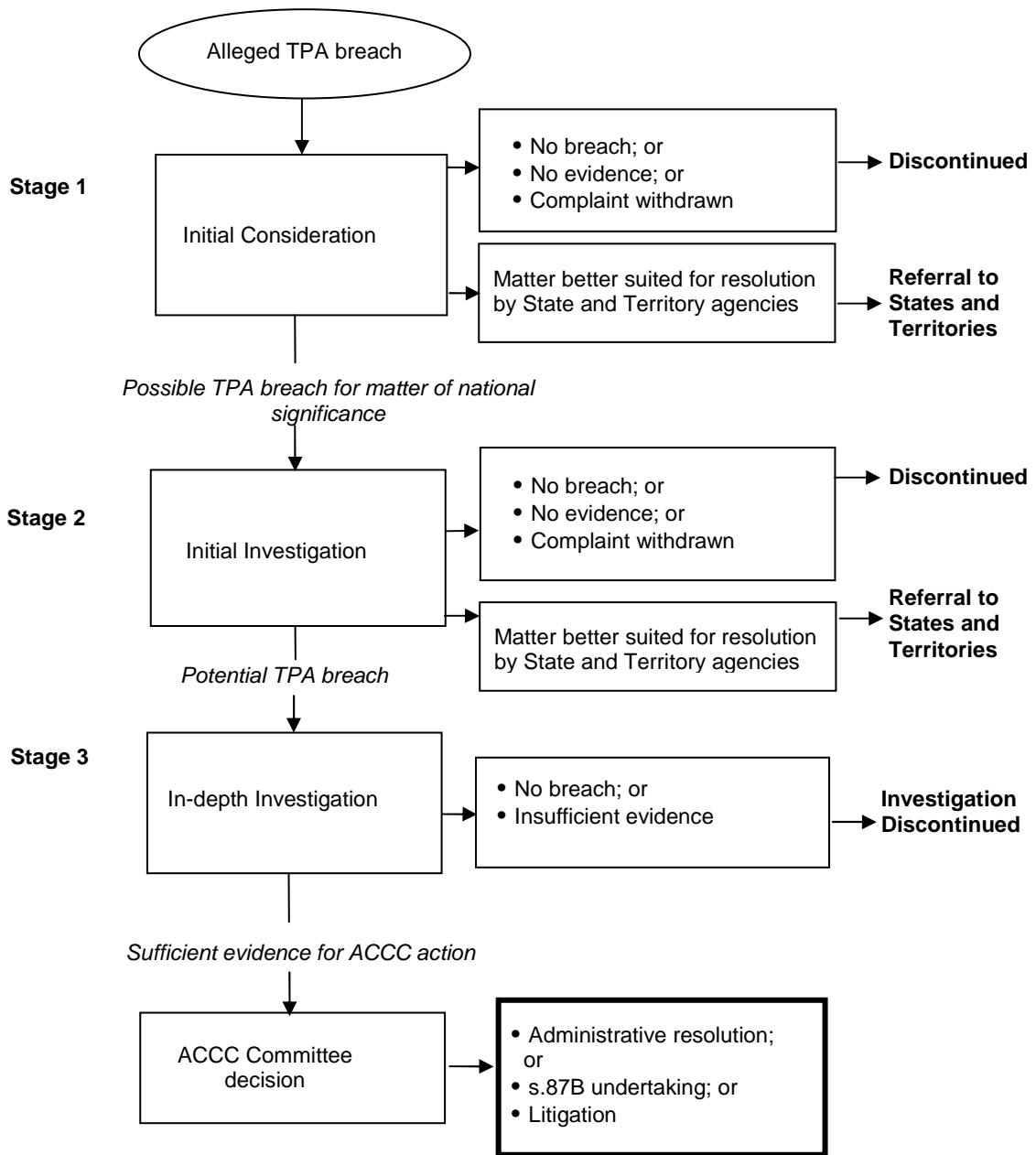
- does not constitute a potential breach of the TPA but may fall within the ambit of State law (such as disclosure obligations); and/or
- is suitable for formal dispute resolution; and/or
- may be more efficiently resolved through the local laws and regulations.

Complaints that contain allegations of breach of the TPA escalate to the attention of the ACCC.

The ACCC's three stage dispute or complaints investigation process involves initial consideration, initial investigation and in-depth investigation (figure 4.1):

- Stage 1 — is a preliminary assessment of general data and initial analysis of the conduct. Valid complaints are progressed to the investigation stage. In some cases a complaint may not be progressed to investigation due to the reluctance of the complainant to have the matter so escalated, the withdrawal of the complaint or the conclusion reached in discussion with the complainant that the matter is best addressed through dispute resolution.
- Stage 2 — investigators seek to find sufficient corroborating evidence to support the claim. If successful, and the complainant has not withdrawn the allegation, the matter is progressed to the in-depth investigation stage. If the evidence is lacking, the investigation is discontinued.
- Stage 3 — involves further collection of information and assessment. If the allegation is substantiated and reliable evidence exists to support it, the matter will generally be referred to an internal Committee. Options at this stage include litigation, administrative resolution (where the company agrees to do certain things or refrain from doing others) or resolution by means of a court enforceable undertaking (where the ACCC accepts formal administrative settlements or undertakings from the business, in addition to or instead of taking legal proceedings) (submission no. 128).

Figure 4.1 ACCC complaints investigation process



Source: Adapted from submission no. 128, p. 25.

The ACCC does not investigate or take action in every matter which may involve a breach of the TPA. Rather, it takes a risk/cost assessment based approach to selecting matters or industry-wide issues of concern which are appropriate for intervention. In particular, the ACCC focuses on matters of national significance and/or widespread consumer or business detriment. As such, even when TPA provisions are duplicated in State or Territory law, the operation of such law in the States and Territories does not appear to duplicate the operation of Commonwealth law.

Amendments made in 2001 to the TPA (section 87CA) also gave the ACCC an expanded statutory basis for applying to a court to intervene in private proceedings instituted under the TPA. The principle guiding a decision to intervene is whether the public interest would be served by doing so (submission no. 128). The ACCC can also undertake representative actions under section 87(1B).

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The ACCC's role in dispute resolution is additional to that of State and Territory authorities, with a focus on addressing breaches of the Trade Practices Act that are assessed to be of national significance.

4.3 Summing up

A key objective of retail tenancy dispute resolution is to provide an alternative to tribunals and courts. As a result of developments over the last two decades, retail tenants and landlords now have access to low-cost alternative arrangements for dispute resolution in each jurisdiction. This is intended to be of particular value to small retail tenants and small landlords.

While these arrangements have many common elements, such as access to mediation or conciliation prior to proceeding to a tribunal or the courts, there are differences in the operation and cost of dispute resolution processes across jurisdictions. Moreover, some provisions relevant to dispute resolution in the retail tenancy market in some States duplicate provisions in fair trading law.

The ACCC's role in dispute resolution is complementary to that of State and Territory authorities. Its focus is on addressing breaches of the Trade Practices Act that are of national significance.