
OVERVIEW

Key points

- The market for retail tenancies is dynamic and complex. It is an amalgam of large and small businesses participating as landlords and tenants.
 - There are around 290 000 retail tenancy leases in Australia with up to 58 000 written each year.
 - About one fifth of leases are in shopping centres with the remainder in retail shopping strips and other retail formats.
- Retail tenancy leases — legally binding documents that define the relationship between the landlord and tenant — are governed by State and Territory retail tenancy legislation.
- The main intention of specific retail tenancy legislation is to address bargaining imbalances between large shopping centre landlords and small retailers.
 - The legislation is highly prescriptive and has grown in volume — now amounting to some 700 pages across jurisdictions.
 - Significant and widening differences between jurisdictions persist, despite attempts at harmonisation.
 - Aspects of the legislation have constrained the market, lowered productivity and added to compliance and administrative costs.
- Nevertheless, a number of innovations appear to have been useful, in particular,
 - simple, low cost and accessible dispute resolution; disclosure statements; lease information; and the encouragement of registration of leases in some jurisdictions.
- In an environment where the market is working reasonably well overall, further attempts to prescribe lease terms and conditions would not improve outcomes.
- The Commission considers the most fruitful approach to improving the operation of the retail tenancy market and reducing costs would be to:
 - further improve transparency, disclosure and dispute resolution, to reduce information imbalances and unwind constraints on efficient decision making;
 - reduce the prescriptiveness of legislation and move to a nationally consistent retail lease framework, to increase efficiency and reduce costs; and
 - adopt a more focused approach to the shopping centre segment of the market, through the introduction of a national shopping centre code of conduct, to ease tensions and reduce costs in that segment and to support the move to less prescriptive legislation and national consistency.
- In addition, the potential to relax planning and zoning controls that limit competition and restrict retail space and its utilisation warrants further examination.

Overview

This inquiry examines the operation of the retail tenancy market in Australia. It assesses the operation of the market, attempted remedies and solutions to difficulties encountered by small retailers, and identifies possibilities for change.

The inquiry follows significant reviews and legislative activity focusing on retail tenancies dating back to the 1980s. These sought to redress a suite of problems experienced by small tenants widely believed to be due to imbalances in bargaining power between small retail tenants and large landlords. Over this period, there has also been progressive strengthening of the (Commonwealth) Trade Practices Act (TPA) and associated State fair trading acts intended to promote competition and fair trade.

The key questions faced by the Commission in this inquiry include:

- Is there evidence of significant failings in the retail tenancy market that reduce economic efficiency?
- Is there evidence that regulations to date have been effective in addressing perceived problems (including ‘fairness’) and improving efficiency?
- Are there new *or* different approaches that could generate net economic and social benefits?

The Commission has sought to take a broad view of these issues. It appreciated participants relaying their experiences and providing their perspectives on how the market is operating. The Commission became acutely aware of the commitment required to be a successful retailer, the stiff competition for the consumer dollar and the commercial risk faced in retailing. It heard that there are many traps for both new and more experienced retailers, and that downsides can be financially and personally devastating.

What are retail tenancy leases and how are they regulated?

Most retail business is conducted from premises covered by retail leases; a minority are covered by commercial leases and owner occupation. Retail and commercial leases are legally binding documents that define the relationship between a lessor (the landlord) and a retailer (the lessee or tenant). They cover a wide range of

matters including parties to the lease, lettable space, rent, lease terms, relocation, redevelopment, quality and maintenance of premises, rent reviews, fit-outs and expiry.

Retail tenancy leases differ from other commercial tenancy leases in that they are governed by specific State and Territory legislation and, in Tasmania, by a code of practice. Before the introduction of specific retail tenancy legislation, all retail tenancy leases were treated under law as standard commercial leases. In many countries similar to Australia, they still are.

Retail tenancy legislation covers matters such as information disclosure, lease terms, security bonds, unlawful threats, exclusion clauses and warranties. Associated dispute resolution processes provide tenants and landlords with access to low cost mediation, conciliation or arbitration before proceeding to a tribunal or court. The total volume of legislation is now some 700 pages across all jurisdictions.

While the legislation was mainly intended to deal with the relationship between shopping centre landlords and specialty tenants, the legislation applies more widely to all landlords (large and small) offering retail tenancies and, in some cases, to 'large' national tenants (depending on location of the business, floor space and activity levels). 'Bulky goods' and 'direct factory outlets' are generally not covered by retail tenancy legislation.

The TPA also contains provisions relevant to retail tenancy arrangements: Part IVA prohibits unconscionable conduct in business transactions (s. 51AC); Part IVB enables the establishment and enforcement of industry codes of conduct; Subdivision B enables collective bargaining; and Part V prohibits misleading and deceptive conduct.

Until 2001-02, jurisdictions met regularly with the aim of harmonising legislation, but these meetings were discontinued. Although the broad architecture of retail tenancy legislation or codes is similar across Australia, there are significant differences in detailed provisions and application between jurisdictions, and indications are that policies and regulations across jurisdictions will diverge further.

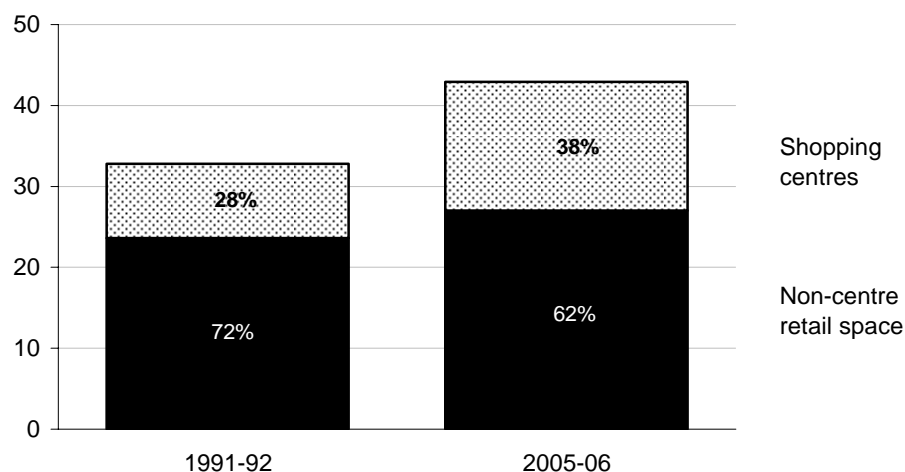
The market for retail tenancy leases

The market for retail tenancies is a dynamic and complex amalgam of small and large businesses participating in the market as landlords and tenants. The Commission has estimated that there are around 290 000 retail tenancy leases currently in Australia, with some 58 000 new leases written each year.

Broadly, retail tenancies provide for retail space in a range of premises from shopping strips (or high streets), to neighbourhood centres and larger regional centres. Also, a growing number of retail outlets handle bulky goods or act as direct factory outlets. Shopping centres — a retail concentration in an enclosed space with some common public facilities — have been the main contributors to retail space growth over the past decade or so. There are currently around 1360 shopping centres in Australia contributing nearly 40 per cent of total retail space, up from nearly 30 per cent in the early 1990s.

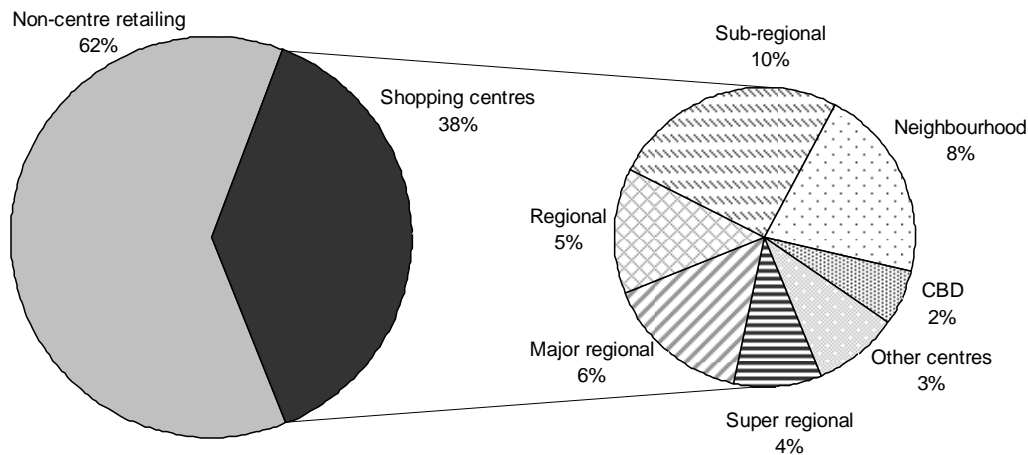
Around 60 000 retail tenancy leases — about one fifth of the total — are located in shopping centres.

Figure 1 Retail space in Australia, 1991-92 to 2005-06
Million square metres of gross lettable retail space



There is significant diversity amongst shopping centres. The largest (that is ‘super regional’) shopping centres are substantially owned by 6 companies/trusts, account for around 1 per cent of the number of shopping centres, and contribute about 10 per cent of lettable retail space of centres — just under 4 per cent of all retail space. Neighbourhood centres are diversely owned, account for about 60 per cent of all shopping centres, but provide only around 20 per cent of the lettable area of centres — 8 per cent of all retail space. These proportions differ markedly between states.

Figure 2 **Shopping centres in Australia, 2006**
Per cent of centre retail space



Evidence of negotiating imbalances?

This inquiry stemmed from concerns among small retail tenants about leases over which they feel they have little or no control. Despite the now substantial body of retail tenancy legislation, these concerns are little different from earlier concerns that arose with:

- the emergence and rapid growth of the shopping centre model;
- the lack of familiarity of retailers with the shopping centre environment compared to familiar shopping strip and arcade formats, that often have dispersed ownership of retail space; and
- the lack of low cost, accessible and effective disputes mechanisms appropriate for managing disputes between well resourced and organised landlords and often small, demoralised specialty tenants.

The basic negotiating balance between landlords and tenants is determined by supply and demand conditions in the market, and individuals' assessment of their market prospects.

The retail market operates within the confines of zoning and planning controls. While such controls can have merit in preserving public amenity and contributing to the cost-effective use of public infrastructure, their application can limit competition and erode the efficient operation of the market for retail tenancies. They restrict the number and use of sites, can confer some negotiating power on incumbent landlords and retail tenants, and restrict commercial opportunities of others. Zoning and

planning controls can particularly advantage owners that have control over large conglomerations of retail space located some distance from competitors and their tenants. They can also disadvantage businesses that wish to gain access to additional space.

Where the tenant and landlord are of similar size and there is competitive provision of retail space, there is no evidence of an imbalance in bargaining position (for example, there are many small landlords and small tenants on retail strips, and large tenants dealing with large landlords).

Where there is a large landlord of a centre which is a drawcard to the consuming public, and many small existing and prospective specialty tenants competing for limited retail space, imbalances in negotiating power can exist. Large centre landlords who are able to offer contracts on a ‘take it or leave it’ basis, provide a clear indication that demand for such retail space has been outstripping supply.

However, large shopping centre landlords do not always hold the negotiating power. Where the supply of retail space (such as after a redevelopment) increases or if a landlord desires a particular product line or trader, incentives and concessions may be initially used to draw businesses into centres. Such offers indicate a tenant being in an initial position of relative negotiating strength. However, such negotiating strength may only be transitory and not persist through time (due to changes in consumer preferences, saturation of the market or general increases in competition for scarce retail space).

For centre landlords, there is a strong commercial incentive to maintain the attractiveness of their centre(s) and to choose the most successful mix of retailers so as to achieve the highest return possible from their investment and that of the ultimate owners — individual shareholders, superannuation funds and other investors. Centre shopping environments favoured by consumers enhance a landlord’s negotiating power.

Retailers — especially those who do not operate ‘drawcard’ or ‘destination’ outlets but rely on passing traffic for custom — have an incentive to locate within shopping centres to take advantage of proximity to customer traffic and centre management. Tenants are also advantaged if other tenants of a centre are able to draw customer traffic. However, achieving a lease within a centre (or other retail space) does not grant a tenant the right to hoped for returns or to trade at the site beyond the lease. This means that the business may have little or no enduring goodwill. A tenant’s success and negotiating position will therefore depend on their individual offering and the matching of that offering with the shopping environment offered by the landlord.

Many of the perceptions of shopping centres’ ‘misuse’ of negotiating power stem from a lack of understanding or acceptance that the business model of a retail shopping centre is fundamentally different from traditional retail strips. Retailers who sign a lease in a large managed shopping centre without realising that the ‘rules of the game’ are very different, are at a disadvantage and can be seriously disappointed, if not financially devastated. Retailers who do understand the shopping centre model, and work within it, can prosper. Well managed shopping centres can unify a large and divergent group of tenants, and help centre trade. In return, tenants in centres generally pay higher rents and outgoing expenses than similar tenants in a shopping strip, and forego some independence in operating their business.

Retailers have a strong incentive to balance their trading prospects in a centre against the cost and term of occupancy, opportunities elsewhere and the risks of both business success and failure, before commitment. An informed tenant should know at what point a lease becomes unsustainable for their business model — tenants have the choice to bid for and sign a lease, or not. The ultimate bargaining chip is to walk away, but the Commission heard that, a significant number of tenants are reluctant to exercise this option. This can be because of the strong entrepreneurial spirit required to be a successful retailer and a desire to secure a particular location. It can also be that some retailers, in their desire to achieve a foothold in a shopping centre (or other retail precinct), do not fully weigh up trading prospects, obligations and alternatives before committing to tenancy contracts. This strengthens the landlord’s hand in lease negotiations.

Market tensions may arise

The Commission was also made aware that tensions in the landlord-tenant relationship can and do arise, including when:

- retailer expectations of performance are not realised (for example, because foot traffic and sales projections do not eventuate);
- retailer expectations of a new lease at the expiry of a fixed-term lease (often 5 years) or the continuance of current lease conditions, are not realised;
- differences in information held on site rental and centre performance is perceived to disadvantage a retailer at lease negotiations;
- the reporting of each retailer’s individual turnover data to centre management is perceived to disadvantage a retailer in subsequent negotiations with landlords; and
- the trading opportunities of tenants are adversely affected by renovation or refurbishment activity in shopping centres or changes in tenancy mix.

Many of these tensions arise from market processes, are not confined to shopping centres and do not indicate a failing in the market. However, the difficulties are perceived to be greatest in relation to shopping centre tenancies because of the control exercised by large and identifiable landlords over centre operations, the attractiveness of centre locations to many retailers, and stiff competition for the consumer dollar.

Effectiveness of legislative and other developments

The regulatory and other changes to date have been premised on the expectation that government action could redress imbalances of negotiating power between small tenants and large landlords, reduce tensions and significantly improve the operation of the retail tenancy market. The Commission has found mixed evidence to support this expectation.

Features that have not been effective

The current legislation has attempted to prescribe matters that would normally be the subject of negotiation, such as lease terms, first rights of refusal and occupancy costs. It has also attempted to circumvent matters that are subject to common law such as lease assignment. While well intentioned, the Commission did not receive convincing evidence during the inquiry or from its own research to support the view that these measures have influenced the supply and demand for retail space and helped redress negotiating imbalances between tenants and landlords. If anything, the more prescriptive measures have favoured the well informed and those with strong legal support.

In addition, the current approach has:

- widened the gap between retail and commercial leases, and between States, as landlord and tenant interests seek legislation on matters that would normally be subject to commercial negotiation;
- failed to fully educate small retailers about the significant differences between a centre and traditional shopping strip retailing;
- constrained commercial decision making as businesses endeavour to comply with legislated provisions rather than their commercial best interests; and
- added to business and compliance costs as businesses study the implications of the legislation, accommodate those matters in leases and participate in State and Commonwealth reviews.

Features of the current system that are working reasonably well

There are a number of innovations and practices of the current system that have been useful and are working to reduce tensions and improve the operation of the market. These do not seek to prescribe the terms of contracts, but rather enhance landlords' and tenants' ability to operate effectively in the market. They include:

- disclosure requirements on lessees and lessors to encourage better informed decision making and contracting;
- education and advisory programs by State and Commonwealth governments, and the industry itself, designed to address information gaps and improve decision making, particularly amongst less experienced small businesses;
- the registration of leases in some jurisdictions under property law which, as a by-product, provides a source of market information about lease terms and conditions; and
- low cost and accessible dispute resolution alternatives that reduce waste associated with lingering commercial disputes, particularly for small business.

In addition, the 'unconscionable conduct' provisions of the TPA and State fair trading acts seek to prohibit actions that unreasonably exploit differences in negotiating position and offend good conscience in the circumstances. While some suggested that the current concept of unconscionable conduct sets too high a hurdle, given the substantial incentive for centre landlords to settle an accusation of unconscionable conduct before it proceeds to court, the Commission's assessment is that the current provisions are influencing conduct and reducing costs associated with unnecessary disputation.

Active lease advisory services have evolved

The market has also responded to information gaps. A very active leasing advisory service industry has developed to advise prospective tenants on business plans and leasing conditions, and to provide negotiation services. In addition, a substantial range of information about retail tenancy leases and costs is also available on a fee-for-service basis. This information covers shopping centres and other retail property.

The advisory sector appears to be mainly serving the better informed and more experienced segment of the market, although some small and/or inexperienced tenants also use services to support dealings with large landlords and to manage risk.

Information and advisory services have emerged to fill a market need — improving decision making and the operation of the market for retail tenancies. However, this area still needs to evolve further, as there are substantial differences in the quality and usefulness of the advice being offered.

Collective bargaining holds little promise

Collective bargaining is also available under the TPA with accessibility improved from 1 January 2007. However, strong commonality of interest between tenants is rare with the highly atomistic and competitive nature of retailing placing limits on the usefulness of the provision. The Commission's assessment therefore is that collective bargaining by small retailers negotiating with large shopping centres is unlikely to substantially address any negotiating imbalances, particularly as they may affect contract terms and conditions critical to an individual tenancy.

Is change warranted?

Competitive pressures, difficulties in lease negotiations and the certainty that some businesses will fail have led many participants to suggest that there are fundamental failings in the market. It was also suggested that these warrant continued government intervention to modify conduct and redress negotiating imbalances, and thereby reduce tensions.

Across the economy, large and small firms in all sectors trade without special regulation detailing the terms of their business relationship. The Commission did not find strong evidence that the difference in the size of market participants in the retail tenancy sector distorts the efficient operation of the market. Overall, the market is working reasonably well — hard bargaining and varying business fortunes should not be confused with market failure warranting government intervention to set lease terms and conditions. Generally,

- there is no convincing evidence that systemic imbalance of bargaining position exists outside of shopping centres;
- in larger shopping centres, there is stiff competition by tenants for high quality retail space and competition by landlords for the best tenants, reflected by relatively low vacancy rates and high rates of lease renewals;
- the more desirable tenants and shopping locations are able to negotiate more favourable lease terms and conditions;
- the incidence of business failure in the retail sector is not exceptional compared to other service activities; and

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- formal disputes are relatively few and widely dispersed both geographically and according to shopping formats.

In this environment, it is unlikely that market tensions will be resolved or eliminated by government intervention into contracts through retail tenancy or other regulation. Regulation is not a good substitute for due diligence, the appropriate use of commercial lease advisory services and lease information — and sound business judgement. Nevertheless, there is room to improve the regulatory framework and market information, and some change is warranted. Change should be focused on:

- improving, where practicable and cost effective, education, information and dispute resolution procedures;
- moving more towards self regulation rather than continued reliance on government legislation; and
- removing the more restrictive elements of retail tenancy legislation, including divisions between jurisdictions and the broader market for commercial tenancies, that impede contracting between firms.

What principles should guide change?

Regulation should not be used to:

- substitute for business decision making and risk taking, particularly to compensate for changes in competitive pressures arising from developments in the retail tenancy market structure; or
- give advantage to specific market participants, such as particular businesses currently operating in shopping centres.

In addition, retail tenancy regulation should not be used to compensate for the effects of restrictions on land use, variations in the level of general economic activity or changes in consumer taste. These matters should be addressed directly or left to the market.

The Commission identified options that, if implemented, are most likely to improve efficiency in the operation of the retail tenancy market, allow firms greater flexibility to adjust to changes in consumer preferences and general economic conditions, and reduce administrative, compliance and information costs.

Principles for assessing regulation of retail tenancies

To ensure the efficient and fair operation of the retail tenancy market and facilitate commerce, regulations should:

- not extend or overlap with current laws governing all commercial transactions (including common law and the TPA) unless there is a clear net benefit to the community;
- not unduly restrict the provision or the conditions (and hence availability) of retail tenancy space;
- ensure all lease conditions (rights and responsibilities) are clear and transparent to lessees and lessors and that lease and property rights are clearly defined;
- not restrict commercial decision making including through:
 - arbitrary regulatory distinctions between businesses (whether landlord or tenant) based on the type or level of activity, or geographic location;
 - prescriptive rent setting or mandated rent setting processes; and
 - limitations on the flexibility of landlords and tenants to decide whether or not to re-enter a new lease agreement.
- not provide opportunities for market participants to shift risks associated with letting retail space or undertaking retail business;
- ensure that those significantly involved in the negotiation and management of a lease are subject to unconscionable conduct provisions and legal proceedings, but not overly prescribe levels of ‘unconscionable’ behaviour in a manner that would reduce the efficient operation of the market;
- not restrict the commercial provision of market information;
- provide affordable and accessible dispute resolution and judicial processes; and
- be the minimum necessary and not unduly add to administrative and compliance costs.

What action could improve the operation of the retail tenancy market?

The legislative changes proposed by some participants would entail even more regulation prescribing lease terms and conditions, and the relationship between landlord and tenant. The existing approach has not ‘fixed’ many of the ‘problems’ it has sought to address, but rather has added complexity, inconsistency and increased compliance and administrative costs. It discriminates against market entrants and market participants outside the target group and does not fit well with the broader market for commercial tenancies. It also has raised expectations amongst some businesses and their advisors, of the scope for government regulation to affect commercial realities in their favour.

The case for greater prescriptiveness of lease terms and conditions in tenancy legislation is weak. Instead, an alternative approach is warranted. Such an approach would maintain, and where practicable, improve the features of the current system that are working reasonably well — dispute resolution and information, and disclosure — but also:

- progressively unwind provisions in retail tenancy legislation in each State and Territory in areas that have sought to prescribe lease terms and conditions, such as minimum lease terms for firms covered by the legislation; and
- move, where practicable, towards national consistency in legislation.

The Commission also considers that the shopping centre section of the leasing market — the focus of most legislative activity seeking to prescribe leasing terms and conditions — could be instrumental in the reform process and reduce tensions associated with transactions between well resourced landlords and small less experienced retailers. This could be achieved by developing a *voluntary* national shopping centre code of conduct. Such a code would be a better focused and more cost effective alternative than retail tenancy legislation for outlining rules of engagement between centre landlords and retailers.

The Commission considers that this alternative approach offers the best prospects for reducing tensions and improving efficiency in the retail tenancy market. Coincidentally, it would improve the alignment of regulations and practices governing retail tenancies with those governing tenancies in the broader market for commercial tenancies. It would not eliminate ‘hard bargaining’, errors of judgement, risk, financial success or failure — or disappointment.

The Commission’s recommendations recognise that retail tenancy regulation is a State and Territory matter, as is regulation of the broader market for commercial leases and real property. Nevertheless, many landlords and tenants operate in the tenancy (and property) market on a national basis and advised that nationally consistent regulation would lower compliance costs and was strongly favoured.

Submissions favouring a nationally consistent approach also alluded to the dangers of burdensome compliance costs that may arise from a reform path involving overlapping national and state frameworks — they expressed a preference for the current ‘dog’s breakfast’ of state legislation rather than a piecemeal overlapping national/state framework. The Commission therefore considers change should be implemented progressively and focus on what may be achieved in the immediate future (up to 2 years), medium term (2 to 5 years) and longer term (beyond 5 years). Within this framework, the introduction of a shopping centre code of conduct, which has a national focus, should be synchronised with the removal of the restrictive/overlapping elements of State and Territory retail tenancy legislation.

Measures for the immediate future

As indicated, the Commission's preferred approach to retail tenancy regulation involves less prescriptive retail tenancy legislation, greater alignment with the law governing commercial tenancies and, where practicable, greater national consistency. Reform towards the Commission's preferred framework needs to be deliberate and progressive and avoid piecemeal overlapping national/state measures.

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

The pause in legislative change would parallel measures to improve: transparency and accessibility of lease information; market information; and national consistency of lease information. They would be a precursor to the introduction of *less* restrictive provisions in tenancies legislation and, where practicable, a move towards nationally consistent regulation.

Improve transparency and accessibility of lease information

Despite past efforts, there are still knowledge and information gaps (often with small landlords and tenants) that contribute to poor decision making and tension. Possibilities for further development include:

- greater use of simple language in tenancy documentation; and
- improving links between relevant agencies dealing with tenancy matters, including between land title offices and retail tenancy agencies.

While the Commission does not see a need for substantial additional measures to increase information and knowledge in the retail tenancy market, there is scope for refinement — focusing on simplification, disclosure and accessibility of existing services. The industry itself can play a large part in this.

RECOMMENDATION 1

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

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

The main direct benefit would come from reduced tension associated with poor understanding of lease obligations and associated costs, and efficiency improvements through better informed retail tenants and landlords.

Improve tenancy market information

To provide information about the tenancy market and redress information imbalances between small tenants and centre landlords, it was widely suggested that either lease registration with land titles offices be mandated or that key lease details (a one page summary or epitome) be made publicly available. While the decision whether to register (or lodge) a lease or make details available to third parties is a commercial one by the contracting parties, the Commission considers that wider availability of key lease details would contribute market information and be widely used, and should be facilitated. The wide support by tenant and landlord interests during the inquiry, suggests a high level of voluntary participation would be achieved. Tenant organisations should encourage members to lodge lease details and landlords should facilitate prompt lodgement.

RECOMMENDATION 2

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

Because practices concerning the collection of lease information differ between jurisdictions, the Commission considers the method adopted for lodgement should be tailored to the practices of individual jurisdictions. In the longer term, a single national data base may emerge.

Improve national consistency of lease information

A common concern raised by businesses that operate across jurisdiction boundaries, was the additional costs imposed by the need to tailor leases to the different requirements of respective state regulations. In the immediate future, the first step towards national consistency could be achieved through national reference disclosure statements and tenancy leases. These should focus on establishing transparency of lease obligations on a nationally consistent basis, but avoid prescribing lease terms and conditions — matters properly the subject of commercial negotiation.

The Commission also notes that while a significant amount of information is available on tenancy disputes, it is not readily available in a format that enables a broad analysis of the Australian tenancy market. Nationally consistent information on disputes would enable evaluation of the dispute resolution processes and the nature and causes of disputes.

RECOMMENDATION 3

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

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

The groundwork for a national tenancy framework would provide potential benefits in the short term through improved information about lease obligations and sources of disputation on a nationally consistent basis. Over the longer term, this could lead to more efficient investment decisions and reductions in administrative and compliance costs.

Improve clarity of unconscionable conduct

The Commission's assessment is that measures to improve clarity, such as detailing the significance of differences in jurisdiction-specific provisions and, where practicable, alignment of legislation, could lower the cost of disputation and be beneficial..

RECOMMENDATION 4

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

Because of the strong incentive on businesses to settle disputes involving claims of unconscionability before proceeding to tribunal or court, the Commission does not see an imperative for government to contrive to bring cases before the courts.

Measures to reduce tensions and improve efficiency

As a next step towards improving the operation of the retail tenancy market in Australia, changes should focus on a national shopping centre code of conduct to ease tensions in the operation of the retail tenancy market and to facilitate the removal of those aspects of tenancy regulation that attempt to prescribe commercial outcomes and drive a wedge between the retail tenancy and commercial property markets. Work toward these measures should be initiated as soon as practicable to enable implementation over the next two to three years.

Voluntary national code of conduct for shopping centre leases

Retail tenancy within shopping centres often involves quite different arrangements to retail tenancy in other settings. Furthermore, the majority of concerns and suggestions for change that were raised by participants to this inquiry (and previous inquiries and reviews), relate to retail tenancy in shopping centres which, as noted, comprise around 20 per cent of retail tenancies, and have little relevance to other retail formats.

The Commission considers that a voluntary national code that seeks to establish good leasing practices (the objective of the original retail tenancy legislation) has merit as a strategy for addressing conduct issues. Such a code would involve landlords and tenants setting out their own ‘rules of the game’ focusing on issues of acceptable processes and transparency (but avoiding interfering in the commercial relationships between landlords and tenants). It could moderate the adversarial nature of relationships and the more extreme negotiating tactics.

A voluntary code would have the benefit of acting as a readily identifiable signal to prospective traders of a willingness to conduct business according to agreed and transparent standards. It would also not require arbitrary coverage definitions as any

landlord or tenant could join. While a number of models for the implementation of codes exist, in view of the likely national importance of the code, the Commission considers that it would be most appropriate for the code to be ‘prescribed’ under the Trade Practices Act. As a prescribed code, it would be enforceable by the Australian Competition and Consumer Commission (ACCC).

RECOMMENDATION 5

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

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

The code of conduct for shopping centre leases, as part of a new streamlined regulatory framework, could potentially lower transaction, compliance and administrative costs of operating in the retail tenancy market. The parts of the legislation that seek to govern conduct, contract terms and conditions in current State and Territory regulation would become redundant and should be repealed coincident with the centre code coming into effect.

The focus of tenancy legislation could appropriately shift from shopping centres to the tenancy market more generally.

Remove constraints on commercial decision making

As a complementary measure to the introduction of the shopping centre code of conduct and to achieve more significant progress towards improving the operation of the retail tenancy market in Australia, the Commission recommends more substantial changes to reduce the restrictiveness of retail tenancy legislation to business, reduce costs of overlapping state frameworks and move further towards a nationally consistent commercial leasing framework.

Changes would involve State and Territory governments relaxing key restrictions on commercial decision making in retail tenancy legislation, including those relating to minimum lease terms, preferential rights of renewal, lease assignment and outgoings.

RECOMMENDATION 6

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

Further medium term options to lower costs and improve efficiency

To move further towards national consistency, the Commission recommends model retail tenancy legislation be developed. Such a model and its provisions would be available to be adopted in each State and Territory jurisdiction. The framework would include legislation-consistent lease contracts and disclosure statements.

RECOMMENDATION 7

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

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

RECOMMENDATION 8

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

Longer-term options

In the longer run, the Commission considers that the most appropriate option for lowering compliance and administrative costs associated with separate retail tenancy regulations in each jurisdiction, is to adopt a nationally consistent

framework. Recognising that tenancy and real property are state responsibilities, the most appropriate approach to achieving a nationally consistent framework is for jurisdictions to adopt the provisions of agreed nationally consistent legislation for retail tenancies.

Economic impacts of the recommendations

Reforming the retail tenancy market is likely to improve the efficiency of its operation and lead to benefits for the Australian economy, including consumers. Although difficult to quantify, the Commission received ample evidence that aspects of the current framework with its focus on prescribing lease terms and conditions and legislative differences across jurisdictions impede business and raise costs. The Commission also found that there are knowledge and information gaps in the sector that add to difficulties of lease negotiation, raising costs and potentially lowering operational efficiency. These costs could be substantial and contribute to the overall regulatory burden on business. Addressing these gaps and shortcomings is likely to increase flexibility in lease terms, improve business and government decision making and lower administrative and compliance costs.

