
9 Business conduct and dispute resolution

Extensive procedures exist in all States and Territories to facilitate the resolution of disputes between landlords and tenants (chapter 4). This chapter canvasses the views of both tenants and landlords on the operation of dispute resolution mechanisms and the operation of unconscionable conduct provisions (section 9.1). It then examines the number and nature of retail tenancy disputes (section 9.2), business conduct issues (section 9.3) and the scope to improve dispute resolution and business conduct (section 9.4). Section 9.5 provides a summary of the issues raised in the chapter.

9.1 Participants' views

Dispute resolution mechanisms

A number of participants to this inquiry considered that the retail tenancy dispute resolution mechanisms were operating well. The benefits of early intervention were acknowledged by many. Herro Solicitors, commenting on the system in New South Wales, said:

The requirement of the parties to attempt mediation is a very positive and beneficial requirement. It enables the party with less financial resources to have a venue for dispute resolution, without the needs to incur the significant and sometimes prohibitive cost of litigation. Further it enables the parties to restore and to build on, their relationship as landlord and tenant. (submission no. 64, p. 2)

The Australian Retailers Association observed:

The dispute resolution process based upon early intervention, the use of formal and informal mediation and [in] cases that cannot be resolved by mediation the use of the tribunal system has seen the majority of disputes resolved quickly and efficiently. (submission no. 119, p. 26)

A similar comment was made by Westfield:

... [the regulatory] framework within which the retail tenancy market operates ... incorporates a low cost and generally efficient dispute resolution process which is able to be accessed by retailers to obtain appropriate redress where genuine instances of

landlord malpractice occur. (submission no. 85, p. 11)

While the Shopping Centre Council of Australia (SCCA) noted that:

In most States disputes can fairly speedily be referred for mediation and the success rate of mediation tends to be quite high (around 80 per cent). While the quality of mediation can vary, it is generally of good quality. (submission no. 83, p. 42)

Others suggested that there was scope for improvement. Commenting on the dispute resolution process in South Australia, the State Retailers Association of SA said:

There is an urgent need for an effective system to deal with disputes — not court action, not mediation, but a return to the tribunal system which was effective. SA had a Tribunal which worked well, but it was abolished for cost reasons and now few retailers can afford to contemplate expensive court action, especially when the Act itself provides little protection.

Mediation, which isn't enforceable, is a blunt remedy and is useless in most cases. (submission no. 43, p. 5)

Similarly, the Small Business Development Corporation (SBDC) in Western Australia indicated that in that State it would be:

... supportive of the creation of an informal mediation service, specialising in the commercial tenancy area, which could be accessed by landlords and tenants prior to pursuing matters through the SAT or the courts.

Further, increasing tenants' awareness of their rights and responsibilities through education programs would assist to minimise the number of disputes that arise. (submission no. 81, p. 6)

Some participants also suggested that mediation could be ineffective where a party was unwilling to participate. One tenant group stated that, in their experience, the landlord:

... made a mockery of the proceedings. From the outset, they delayed the Mediation by refusing to agree to a date, on the basis that they needed time in which to prepare for the Mediation.

... After two months and the threat of the Tribunal setting the date, they finally agreed to a date for Mediation. ... [at the mediation, the landlord] clearly had no intention of resolving anything ... The Mediation was concluded within one hour without resolution. We subsequently applied for a Certificate of Failed Mediation. (confidential submission)

According to the participant, in this case the landlord agreed to a resolution one day prior to the scheduled tribunal hearing.

Other participants, while acknowledging the accessibility of the dispute resolution process, expressed some frustration with the speed of the processes. For example,

Newsxpress Pty Ltd said:

If you look at the Small Business Commissioner office in Victoria process, while it's an easy access process it's slow. If I'm having a problem today in small business I need to be able to let the landlord know that I've got someone else on my side very quickly, like literally within 24 hours. I know that there are checks and balances in current processes because you don't want vexatious or frivolous actions commenced but by the same token where there is real distress we need to be able to deal with that quite quickly. (transcript, p. 498)

Other participants suggested that there is a lack of awareness of, or confidence in, the official mechanisms to resolve genuine disputes and/or concerns about maintaining a commercial relationship and this leads parties to hold off referring disputes in the hope of resolving the situation themselves. For example, the Pharmacy Guild of Australia noted that, while few disputes are referred to statutory dispute resolution processes, the Guild receives numerous complaints from constituents about the behaviour of some shopping centre proprietors. The Guild suggested that it was 'hardly a surprise' that little recourse is taken to mediation/arbitration because of:

- the cost — both in terms of money and time away from the business; and
- the practical requirement of maintaining a commercial relationship with a landlord. (submission no. 109, p. 8)

The Franchise Council of Australia offered similar observations (submission no. 117).

A number of participants also claimed that, in some circumstances, tenants do not air grievances or register disputes for fear of retribution. For example, Herro Solicitors thought that while the legal framework was working:

... in some cases tenants fear that in seeking legal remedy for their issues against the landlord, that the landlord could retaliate against such tenants by refusing to give them good locations, whether in that particular centre or in other shopping centres owned by that landlord. (submission no. 64, p. 3)

The Australian Newsagents' Federation also commented that:

In reality, the imbalance of market power is so great that many retail tenancy disputes are not reported for fear of retribution. ANF is aware of Members who are reluctant to speak publicly about their dispute with the property's management for fear of retaliation or intimidation in other ways. ... With the newsagent's livelihood resting squarely with the landlord, particularly in shopping centres, being perceived as a 'difficult' tenant is considered highly risky. (submission no. 72, p. 5)

In a similar vein, one retailer informed the Commission that:

The term of those leases are finite and if action were to be taken against a landlord, the

[retailer] potentially risks non-renewal of their lease, or proposed renewal terms which are unviable. (confidential submission)

Another claimed that:

... most tenants don't report their concerns because they are intimidated by the shopping centre landlords. (confidential submission)

It was also observed that:

They are told how deep their pockets are and any litigation would and could lead to major losses. Therefore the tenants in most cases either disappear off the face of the earth or fight a little and then accept some piddly [*sic*] amount they are offered as compensation and sign a confidential agreement thus gagging them from that moment forward. (confidential submission)

Clearly, some individual retail tenants will assess current dispute resolution arrangements as not helpful for their situation and will limit their use of these services. This assessment may be influenced by a concern that accessing formal dispute resolution has the potential to harm their longer term relation with managers of retail space — fear of retribution. Others may judge that difficulties are better dealt with commercially, or that the potential benefits from formal dispute resolution are not justified by the likely financial costs or time. But, if disputes are not taken forward, then there is only limited evidence of unresolved problems.

Unconscionable conduct provisions

Participants' comments on the concept of unconscionable conduct and its application in fair trading and retail tenancy legislation were wide ranging. Some claimed that there were few unconscionable cases because the interpretation of unconscionable conduct sets 'too high a bar' to cover the conduct that the majority of retail tenants complain about. In this regard, the Australian Retailers Association noted that the Reid Committee report recommended protection against 'unfair conduct', but that this concept is significantly different to that of unconscionable conduct:

The concept of unfair is significantly different to unconscionable and much of the behaviour that is defined as hard bargaining and not unconscionable would have been caught with the provisions outlined in this recommendation ... For a retailer to attempt to argue a case of unconscionable conduct the cost and time is prohibitive and the chance of success based on unconscionable conduct is small. (submission no. 119, p. 25)

The Pharmacy Guild considered the unconscionable conduct provisions 'nebulous' and said that pursuing an unconscionable conduct claim was difficult:

It is also obvious that what is ‘unconscionable’ is very subjective — hence the creation of a statutory ‘non-exhaustive’ list to guide decision makers. It is thus very difficult to advise a tenant as to the likelihood of success in bringing an action against a landlord. (submission no. 109, p. 11)

The Law Institute of Victoria also said:

... the unconscionable conduct provisions of the various states’ retail tenancies legislation ... suffer from a lack of definition.

There appears to be a reluctance by the courts and tribunals to enter into this area of adjudication and, if anything, a concern to apply these provisions by reference to established equitable principles ... In the LIV’s view, it would be of assistance if a stronger statement of the application of these provisions is contained in the legislation especially with respect to the conduct of both landlords and tenants in the retail leasing context. (submission no. 27, pp. 2-3)

In a similar vein, the National Retailers Association stated that ‘unconscionable conduct legislation has been proved to be largely ineffective’ (submission no. 47, p. 11).

Westfield, while suggesting that unconscionable conduct was not a widespread problem, also considered that the coverage of unconscionable conduct provisions was unclear because of a lack of case law:

Until such time as there is a substantive body of case law developed by Australia’s superior courts in relation to TPA S.51AC there will necessarily be uncertainty as to the range of circumstances and situations in which unconscionable conduct within the meaning of TPA S.51AC can be said to apply. (submission no. 85, p. 23)

Other participants were of the view that the provisions are ineffective in curbing unfair behaviour. For example, the SBDC said:

The SBDC is of the view that section 51AC of the TPA, unconscionable conduct in business transactions, has had little effect in protecting small business from unfair dealings in the marketplace. The notion of unconscionable conduct is considered an uncertain concept and the cost associated with pursuing a claim against larger competitors is a powerful deterrent to the majority of small businesses. (submission no. 81, p. 6)

Another interpretation, however, was that the very existence of the provisions has a significant influence on conduct in the retail tenancy market. For example, the Queensland Retail Traders and Shopkeepers Association, said:

Landlords appear nervous of the unconscionable conduct provisions and the consequences of adverse publicity if being found to have acted so during negotiations. (submission no. 50, p. 9)

The SCCA submitted that there was no evidence of systemic unfair or

unconscionable conduct by shopping centre owners or managers and that the success of the provisions should not be judged by the ‘number of scalps hanging from the ACCC’s belt’ because the low number of unconscionable conduct complaints shows that landlords are complying with the law (submission no. 83, p. 46).

Herro Solicitors also suggested that limited case law covering unconscionable conduct does not indicate that there isn’t action going on below the surface:

I don’t think that unconscionable conduct provisions in both the Retail Leases Act or the Trade Practices Act are not operating. I think that they do operate, because where there is a real case, from my experience, the parties reach a settlement. (transcript, p. 169)

A further comment relating to unconscionable conduct was that the various versions of the unconscionable conduct provisions caused some confusion. For example, the Australian Property Institute said:

Provisions in various state legislation seek to define Unconscionable Conduct. This however causes confusion with the Trade Practices Act by seeking to expand on those provisions. The legislation should be consistent. (submission no. 70, p. 19)

The ‘unconscionable conduct’ provisions of the TPA seek to prohibit actions that are unreasonable and offending of good conscience in the circumstances. While the unconscionable provisions set a high bar, there is also a significant incentive to settle an accusation of unconscionable conduct before it proceeds to court — just because the case history is limited does not mean that the provisions are not influencing business conduct.

9.2 Evidence on the incidence and nature of disputes

One measure of the extent of disputation in the retail tenancy market is the number of disputes being brought to government dispute resolution services or to the courts. Another is whether disputes are raised overwhelmingly by one party to the lease rather than the other and, related to this, the reasons for dispute.

Retail tenancy disputes at the State and Territory level

The majority of retail tenancy disputes are handled at the State and Territory level, with a relatively small proportion of claims dealt with at the national level under the provisions of the TPA.

Incidence of disputes

Over 20 000 retail tenancy enquiries a year are collectively received by the agencies administering retail tenancy legislation (table 9.1). In the context of a market consisting of an estimated 290 000 leases, with 58 000 new leases negotiated annually, the number of enquiries is considerable — equivalent to about 40 per cent of the number of leases signed each year. Enquiries are broadly distributed in proportion to the number of retail tenancy leases across jurisdictions.

Enquiries, however, cover requests for information and tenancy advice, including for potential new retail lessees, as well as complaints. The vast majority of enquiries do not indicate a problem — in fact, they are an indication of tenants seeking to become better informed (chapter 8).

Fewer than 2000 retail tenancy disputes at the State and Territory level (less than 1 per cent of the estimated 290 000 retail leases) are referred to formal dispute resolution procedures each year (table 9.1).

The distribution of disputes is broadly in line with the relative sizes of the retail tenancy market in each jurisdiction. Most retail tenancy disputes occur in the larger States of New South Wales, Victoria and Queensland, while there are fewer disputes in the smaller jurisdictions. For example, the Northern Territory recorded just five applications in the last three years.

Comparisons across the jurisdictions of the number of enquiries or recorded disputes needs to be interpreted with care as they are likely to be influenced by:

- the activities of the State and Territory agencies, such as how active they are in promoting the dispute resolution arrangements and facilitating disputes; and
- where the government agencies draw the line between what is classified as an ‘enquiry’ and a ‘dispute’, and at what stage an ‘informal’ dispute becomes a ‘formal’ one (and this in turn depends on the dispute resolution process in place).

Information on the number and progress of retail tenancy disputes varies across the States and Territories, with the most detailed information available for New South Wales, Victoria and Queensland. For these jurisdictions, the success rate for mediation of retail tenancy disputes appears high.

- Of 824 retail tenancy complaints in New South Wales in 2005-06, 496 (60 per cent) were dealt with informally (that is, before formal application), while 230 (28 per cent) were resolved at, before or shortly after mediation. Twelve per cent of registered disputes were not settled by mediation, with the Registrar issuing a certificate in 97 cases to allow access to the Administrative Decisions Tribunal (ADT).

Table 9.1 Enquiries, complaints and disputes by State

	<i>Enquiries</i>	<i>Complaints/ disputes</i>	<i>Disputes settled before proceeding to tribunal or court</i>	<i>Disputes dealt with by tribunal/court</i>
	No. per year	No. per year	%	No. per year
New South Wales (2005-06)	8 232	496 informal 328 formal disputes	60% dealt with informally prior to mediation; 70% of remainder settled at mediation	184 applications were filed and 156 were withdrawn, discontinued or settled without hearing or transfer.
Victoria (2006-07)	6 305	874 applications (mostly disputes)	At least 79% settled before or at mediation	212 cases resolved; around 15% settled through VCAT mediation
Queensland (2006-07)	4 000 to 5 000	1 335 complaints 115 formal disputes	91% settled before formal dispute registered; 83% of remainder settled prior to, during or following mediation	19 disputes heard by Retail Shop Leases Tribunal
South Australia (2006-07)	2 000	Not applicable	Not applicable	40 actions commenced in SA Magistrates Court (2006). Almost half finalised before trial
Western Australia (2006-07)	2 600	272 disputes	Not applicable	52 contested proceedings before the SAT
Tasmania (2006-07)	3 to 4	4 complaints	Not applicable	Data not available
Australian Capital Territory (2006-07)	Not available	Not applicable	Not applicable	64 conferences were held, 38 matters were the subject of orders made by the Magistrates Court
Northern Territory (2004-07)	50	5 disputes since mid-2004	2 disputes (40%) did not proceed to the first conference (since mid-2004)	3 certificates issued, allowing access to the courts. 2 matters heard.
Total	23 190 to 24 191	~3 314 complaints ~1 598 formal disputes	~80% settled before proceeding to court or tribunal	

Sources: Submissions no. 81, 104, 110, 111, 123 and 136; Australian Capital Territory Magistrates Court, personal communication, 23 August 2007; New South Wales ADT (2006, p. 24); New South Wales DSRD (2006, p. 14); New South Wales Retail Tenancy Unit, personal communication, 27 August 2007, 21 September 2007; Northern Territory Department of Consumer Affairs, personal communication, 19 July 2007; Northern Territory Department of Justice, personal communication, 28 September 2007; Queensland Retail Shop Leases Registry, personal communication, 13 July 2007; South Australian Attorney-General's Department, personal communication, 28 August 2007; South Australian Courts Administration Authority, personal communication, 2 October 2007; Commission estimate based on VCAT (2007b, pp 15, 38); Western Australian SAT (2007b); Office of the Victorian Small Business Commissioner, personal communication, 18 September 2007.

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- Of 874 applications (mostly disputes) in Victoria in 2006-07, by October 2007 692 (79 per cent) had been settled either before or at mediation, with 73 per cent reaching a successful outcome.
 - Of 1335 complaints in Queensland in 2006-07, 1220 (around 91 per cent) were resolved informally. Of the remaining 115 (around 9 per cent), 95 were settled either prior to mediation, at mediation or following mediation but prior to the scheduled hearing before the Tribunal. A total of 19 disputes were heard by the Retail Leases Tribunal.

Relatively few retail tenancy disputes proceed to tribunals or court — around 80 per cent of formal disputes are settled at mediation or before preceding to a tribunal or court hearing (table 9.1). The small variation between jurisdictions in the number of disputes dealt with by tribunals or courts does not seem sufficient to indicate significant differences in the effectiveness of dispute resolution, for matters brought to retail tenancy authorities, or market conduct across jurisdictions.

Nevertheless, the incidence of complaints and disputes is not strictly proportional to the number of leases in each jurisdiction. While a higher number of recorded disputes in one State or Territory could reflect a higher underlying level of friction, it also could reflect a wider knowledge of the existence of the local dispute resolution arrangements and their capacity to resolve disputes outside of the courts. For example, the Victorian Government noted that, since the Office of the Victorian Small Business Commissioner was established, the number of retail tenancy disputes handled by VCAT has declined, while the total number of disputes mediated by the Commissioner and VCAT (combined) has increased — that is, more problems are being resolved through such processes than previously (submission no. 111).

Initiation and location of disputes

The majority of recorded disputes (covering all retail formats) are initiated by tenants — around 63 per cent in New South Wales, 68 per cent in Victoria and 92 per cent in Queensland (New South Wales Retail Tenancy Unit, Office of Small Business, Victoria and Queensland Retail Shop Leases Registry, personal communication).

The proportion of formal disputes involving shopping centres and other retail formats varies substantially between jurisdictions, as does the proportion of shopping centre disputes raised by tenants.

- In New South Wales, 172 (49 per cent) of formal disputes during 2006-07 involved a shopping centre with 96 (56 per cent) of these lodged by tenants

(New South Wales Retail Tenancy Unit, personal communication, 25 September 2007).

- In Victoria, 476 (17 per cent) of all disputes handled by the Small Business Commissioner over the period May 2003 to June 2007 involved a ‘large’ shopping centre landlord, with 335 (70 per cent) of these disputes lodged by the tenant. Over 80 per cent of shopping centre disputes where the landlord was the respondent, were settled at mediation (submission no. 111, p. 8).
- In Queensland, 213 (71 per cent) of disputes over the period January 2005 to May 2007 involved a shopping centre with 202 (95 per cent) of these disputes lodged by the tenants (submission no. 123, p. 9 and Attachment 8, Queensland Retail Shop Leases Registry, personal communication, 22 August 2007).

Data on disputes involving a shopping centre in New South Wales, Victoria and Queensland indicate that in the vast majority of centres, there have been no disputes and where disputes occur, they have been isolated (table 9.2). In New South Wales, Victoria and Queensland, more than 90 per cent of centres had either no disputes, or only one dispute, in 2006-07. Fewer than 5 per cent of centres had 4 or more disputes.

Table 9.2 Distribution of shopping centre disputes by State, 2006 basis
Per cent of all centres

<i>State</i>	<i>No disputes</i>	<i>1 dispute</i>	<i>2 disputes</i>	<i>3 disputes</i>	<i>4 or more disputes</i>
New South Wales	75	17	5	1	2
Victoria	75	16	3	2	4
Queensland	77	18	3	1	<1

Sources: Commission estimates using 2006 data from table 2.2 and from New South Wales Retail Tenancy Unit for formal disputes in 2006-07 (New South Wales Retail Tenancy Unit, personal communication, 25 September 2007); from Queensland Retail Shop Leases Registry for disputes occurring from January 2005 to August 2007 (Queensland Retail Shop Leases Registry, personal communication, 22 August 2007), pro-rated to 12 months; and from the Office of the Victorian Small Business Commissioner for disputes occurring from May 2003 to 29 August 2007 (Office of the Victorian Small Business Commissioner, personal communication, 4 September 2007), also pro-rated to 12 months.

The Australian Property Institute (API), while agreeing with the Commission that there is a low incidence of disputes overall, suggested that this was not the case in the regional and neighbourhood centres. Using Queensland data, the API indicated that:

... the incidence of disputes is disproportional in those centres where the landlord is not a professional but an investor unaware of the dynamics of retail businesses. (submission no. DR172, p. 7).

Others also suggested that it is often in the smaller size shopping centres where

problems occur. The State Retailers Association of South Australia said:

A lot of our problems and the real problems in the association are not with the major ones [shopping centres]. It's certainly with very much smaller. (transcript, p. 830)

Similarly, COSBOA stated that:

It's the second tier and the third tier ones that are not so transparent, mainly because if they've got things to hide or maybe they just don't know how to handle themselves. (transcript, p. 323)

A possible explanation for why there might be more disputes in the smaller centres is that landlords and centre managers of these centres may be less aware of their obligations under the legislation and be less skilled in conflict resolution than landlords of larger centres. The Commission was told that the large shopping centre managers spend considerable resources on educating their management and leasing staff to ensure that they are aware of their legal and ethical obligations in dealing with tenants. (submission 193, p. 48)

Causes of disputes

The Commission was advised that while retail tenants bringing disputes often list 'unconscionable conduct' in their complaints, in practice, most disputes are determined to relate to occupancy costs, performance of a tenant or landlord under a tenancy contract and the trading amenity provided by the landlord to a trader (box 9.1).

Nevertheless, a significant minority of disputes have involved claims of unconscionable conduct.

- In New South Wales, since 2002, the ADT has heard 29 cases alleging unconscionable conduct. In 4 cases, unconscionable conduct was found to have occurred but of these 2 were overturned at appeal, 1 matter was transferred to the Supreme Court, 5 matters were withdrawn, in 6 matters it was not necessary to determine unconscionable conduct and for the final 13 matters it was found that unconscionable conduct was not made out (New South Wales Retail Tenancy Unit, personal communication, 13 November 2007).
- In Victoria, 14 cases alleging unconscionable conduct have been taken to the VCAT. The tribunal has determined the claim in 13 of the cases. In all 13, the VCAT determined that unconscionable conduct did not occur, including one case where proceedings were brought by the landlord (AUSTLII 2007).
- In Queensland, over the five years from 1 July 2002 to 20 June 2007, the Queensland Retail Shop Leases Tribunal heard 8 cases involving claims of unconscionable conduct. The tribunal found that unconscionable conduct had

occurred in only 1 case (Queensland Retail Shop Leases Registry, personal communication, 3 and 9 August 2007).

- A further two cases were taken to the former Tenancy Tribunal in the Australian Capital Territory, though neither were successful (AUSTLII 2007).

Box 9.1 Proximate causes of disputes at the State level

At the State and Territory level, the most common reasons for retail tenancy disputes are:

- rent and occupancy costs, including the:
 - magnitude of rental increases, and
 - magnitude and nature of outgoings charged to tenants;
- issues with facilities, such as air conditioning, car parking, and repair and maintenance;
- impact of renovations/modifications to the shopping centre;
- renewal and termination issues; and
- rent in arrears.

Sources: Submission nos. 81, 104, 110, 123, 136; South Australian Attorney-General's Department, personal communication, 28 August 2007; Office of the Victorian Small Business Commissioner, personal communication, 10 July 2007.

While there has been only a small number of cases where State and Territory tribunals have found that unconscionable conduct has occurred, the cases heard provide some guidance as to what constitutes unconscionable conduct. For example, in the Queensland case, the tribunal in determining that the landlord was 'guilty of unconscionable conduct', took into account:

- the placing of 'for lease' signs on the premises during negotiations for a longer lease term;
- the landlord's negotiating with a major tenant for the claimant's premises at a time when the tenant believed a tenancy agreement had been concluded; and
- the tenant, in the belief that an agreement had been reached, proceeding to renovate and repaint the premises (Queensland Retail Leases Tribunal 2004).

FINDING

The number of retail tenancy disputes lodged with State or Territory authorities is very low relative to the size of the market. Recorded disputes are spread across shopping centres and other retail formats. In most shopping centres, no disputes are recorded. Tenants initiate the majority of disputes.

The vast majority of disputes, once registered, are settled before escalation to a tribunal or court.

Enquiries and disputes at the national level

The ACCC recorded around 1119 contacts relating to retail tenancy issues — 875 inquiries and 244 complaints over the period 1 July 2002 to 30 June 2007. Retail tenancy contacts declined from mid-2002 to mid-2006, and from this time have remained steady at about 10 to 15 contacts a month. As the ACCC put it:

The ACCC recognises that certain retail tenancy related disputes receive a degree of claim coverage but the level of complaints received by the ACCC over recent years has tended to flatten out and indeed decline. (submission no. 128, p. 4)

The 875 enquiries received by the ACCC since July 2002 were predominantly small businesses seeking information or wanting to discuss a dispute they were having with their landlord. In most cases, the ACCC advised an alternative course of action (for example, direct negotiations with their landlord, State and Territory dispute resolution schemes/regulation enforcement options, or private legal action).

The 244 contacts that went on to be classified as complaints were situations where a breach of the TPA was alleged by the complainant, or where the conduct described was identified by the ACCC as a possible contravention of the TPA. The majority of matters treated as complaints concerned the conduct of landlords towards their tenants in the context of retail shopping centres and related to allegations of ‘misleading or deceptive conduct’ or ‘unconscionable conduct’. On the provision of additional information, 65 of these cases were immediately assessed as not amounting to a breach of the TPA, leaving 179 complaints which were then subject to further consideration.

Upon further investigation of these 179 complaints, 108 (or around 60 per cent) were assessed as not constituting a breach of the TPA (table 9.3). The majority of these complaints related to contractual issues, such as rent increases, clauses preventing the sale of certain goods, and the non-renewal of leases which were not matters, of themselves, that would lead to a breach of the TPA.

Another 63 complaints did not progress through all stages of complaints investigation, over half due to insufficient evidence, while a significant number were either referred to other agencies, or resolved by the provision of guidance or information. A small number of complaints were resolved by commercial

negotiation, while a couple were not pursued because the complainant was pursuing private legal action. Currently 8 complaints (that is, less than 5 per cent of the total initial investigations) are under active investigation by the ACCC (submission 128).

Table 9.3 Outcomes of ACCC investigations of retail tenancy complaints, 1 July 2002 to 30 June 2007

<i>Outcome/status</i>	<i>Number</i>
No breach	108
Insufficient evidence	35
Referred to other agency	13
Guidance / Information provided	10
Administrative resolution	3
Not pursued	2
Active investigations	8
Total	179

Source: Submission no. 128, p. 27.

Complaints of misleading and deceptive conduct and of misrepresentation

Some 52 of the 244 contacts treated as complaints by the ACCC related to misleading and deceptive conduct or misrepresentation. (In addition, some of the remaining complaints involving unconscionable conduct claims may have included claims of misleading and deceptive conduct and/or misrepresentation.) Complaints to the ACCC that included an allegation of misleading and deceptive conduct or about misrepresentations in retail tenancy included matters relating to:

- use of a previous tenant's turnover data to determine rent;
- actual or expected customer numbers;
- the method of calculating rent increases;
- failure to disclose conditions imposed on tenants;
- the number of competing stores that would be allowed entry (complainants generally claimed that they were promised exclusivity within a shopping centre); and
- developments proposed or underway (submission 128).

Claims of unconscionable conduct

Some 127 complaints of the 244 contacts treated as complaints to the ACCC (that is, about 11 per cent of the total contacts relating to retail tenancy issues) over the five years to 30 June 2007 included an allegation of unconscionable conduct. The

primary grounds behind the allegations of unconscionable conduct were:

- excessive rent increases;
- refusal to renew lease;
- lessor obstructing sale of business;
- tenant alleging lessor has broken lease agreement;
- general unconscionability (a wide range of non-specific conduct);
- restriction of trade/exclusivity;
- misrepresentations amounting to unconscionability;
- harassment by a lessor;
- threat of legal proceedings;
- misuse of market power amounting to unconscionable conduct; and
- forced relocation.

According to the ACCC, while each allegation is closely considered, only a limited number have evidenced a contravention of Section 51AC:

... the majority of unconscionable conduct allegations received by the ACCC are discontinued because the facts do not indicate that the conduct is unconscionable within the meaning of the TPA. While the ACCC considers that these matters are sometimes due to a misunderstanding among small business complainants of the concept of unconscionability, under the TPA, it is nonetheless determined to pursue such matters as enable it to clarify the law and thereby firm up a better definition of what constitutes unconscionable conduct. (submission no. 128, p. 30)

In those matters where a possible breach of national significance may occur, the ACCC indicated that it has encountered ‘challenges’ in bringing actions due to:

- lack of sufficient evidence; and
- subsequent settlement between parties (submission no. 128).

To date there have been three cases of unconscionable conduct in retail tenancy taken by the ACCC (box 9.3). These cases provide some indication of the types of behaviour that the ACCC consider the courts would find to be unconscionable and for which a court determination would be of national public interest.

FINDING

Most disputes brought to the ACCC are resolved through consultation or mediation. Challenges to bringing action on unconscionable conduct include insufficient evidence and settlement between parties. The definition of unconscionable conduct relies on case law.

Box 9.2 **ACCC action under Section 51AC in the retail tenancy sector**

ACCC v Leelee Pty Ltd: In February 1999 the ACCC filed proceedings against Leelee Pty Ltd (Leelee), a commercial landlord, alleging that it had breached section 51AC by imposing unreasonable conditions on a tenant, including increasing the rent contrary to the lease terms and forcing the tenant to charge not less than a particular amount for certain food dishes while allowing his competitors to charge less for the same. In 2001, the court made a consent order with declarations that Leelee had acted unconscionably by consenting to, or giving approval for, another tenant to infringe on the exclusive menu entitlements conferred by Leelee on one of its tenants; and specifying the price at which its tenant sold their dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.

ACCC v Suffolk Parke Pty Ltd: In September 2001 the ACCC instituted proceedings against Suffolk Parke Pty Ltd (Suffolke Parke), a master franchisee that leased premises to a sub-franchisee, which the ACCC alleged had acted unconscionably by refusing permission for its tenant (also sub-franchisee) to sublet a separate part of shop premises when on two prior occasions it had not objected to such subleasing. The ACCC considered that the refusal was not reasonably necessary for the business interests of the landlord, but rather was in response to the sub-franchisee being involved, with other sub-franchisees, in correspondence from a solicitor to Suffolk Parke about complaints concerning franchising aspects of the business. In 2002, the court declared that Suffolk Parke had acted unconscionably toward its tenant and had breached the Franchising Code of Conduct by refusing to attend mediation. The court's orders included that Suffolk Parke Pty Ltd and its director compensate the franchisee.

ACCC v Westfield Shopping Centre Management Co. (Qld) Pty Ltd (and associated companies and individuals). On 29 October 2001, the ACCC commenced proceedings against Westfield alleging misleading and deceptive conduct and unconscionable conduct in breach of the Act. The ACCC alleged that Westfield acted unconscionably by imposing unnecessary conditions in circumstances where there was a significant difference in the relative bargaining strengths of the parties. Westfield made it a condition of the settlement of private litigation that former tenants must sign a deed of release containing a 'release of liability' clause, requiring former tenants not to commence, recommence or continue any action in connection with the subject matter of their private litigation, including any administrative or governmental investigation against Westfield. The ACCC considered that the condition might have impeded the tenants from approaching or assisting the ACCC in any investigation into Westfield's conduct. Westfield acknowledged that the condition may have discouraged the tenants from approaching or assisting the ACCC, although this effect was not intended.

The ACCC's action was settled on a 'without admissions' basis with Westfield agreeing to pay an amount to the former retail tenants and providing an undertaking that, in future, it will use a specific release of liability clause when entering into settlement agreements with retail tenants.

Sources: Submission no. 128; ACCC, personal communication, 26 September 2007.

Other cases of unconscionable conduct that have been brought to the courts broadly indicate that when one party acts ‘unreasonably’ to limit the commercial interests of another, the actions of the first could be deemed ‘unconscionable’ (box 9.3). These cases also help give legal definition to the notion of unconscionable conduct as it relates to Section 51AC, and are informative for industry participants in retail tenancy, as elsewhere.

In the ACCC’s experience:

... unconscionable conduct may be found to exist where retail landlords have in all circumstances acted in a harsh and oppressive manner towards their tenants, taking advantage of their stronger position for other than the legitimate business reasons. In other words, unconscionable conduct as interpreted by the courts in Australia is the type of conduct that is so reprehensible that it is against good conscience. (submission no. 128, p. 32)

The case history also indicates what actions are not likely to be considered unconscionable by the courts. Christensen and Duncan (2005), on examining the types of lessor conduct that retail lessees claim is unconscionable, concluded that:

A clear principle emerging from the decisions on s51AA and s51AC is that the use of superior bargaining power to drive a hard bargain is unlikely of itself to be unconscionable conduct. (Christensen and Duncan 2005, p. 165)

The unconscionable conduct provisions appear to have been effective in dealing with the most egregious form of conduct in business-to-business transactions in the retail tenancy market.¹ This may be explained by:

- reasonable clarity of what constitutes unconscionable conduct under the TPA in terms of business to business transactions (including an explanatory memorandum associated with the amendment act that created section 51AC);
- a defined case law specific to retail tenancies (despite only a limited number of cases); and
- the ability to hear unconscionable conduct cases in low cost dispute resolution systems due to the drawing down of provisions into retail tenancy law.

¹ The Commission found in its review of Australia’s consumer policy framework that, in that context, the unconscionable conduct provisions dealing with consumer-business transaction under section 51AA and AB were not effective (see PC 2007).

Box 9.3 What courts assess as unconscionable

Case law characterises conduct that the courts see as unconscionable. In *Cameron v Qantas Airways Ltd* (1994), the courts found that, for conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable must be demonstrated. In *Qantas Airways Ltd v Cameron* (1996), the courts relied on the *Shorter Oxford* definition of unconscionable as 'showing no regard for conscience; irreconcilable with what is right or reasonable', and also found that, for Section 51AC to be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract 'unfair' or 'unreasonable' or 'immoral' or 'wrong'.

Capabilities of parties are relevant to courts' determinations of unconscionability:

- In *ASIC v Preston* [2005], the court found unconscionable conduct had occurred against what it termed 'gullible persons'.
- In *ASIC v National Exchange Pty Ltd* [2005], the respondent was found to have engaged in unconscionable conduct by setting out to systematically implement a strategy to take advantage of the fact that amongst shareholders there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer [of shares at a significant under value].

Behaviour constraining fair dealing has been deemed unconscionable:

- In *Auto Masters Australia Pty Ltd v Bruness Pty Ltd* [2002], the plaintiff was found to have breached Section 51AC in terminating the defendant's auto repair franchise without complying with the Franchising Code of Conduct and in circumstances found to be capricious and unreasonable.
- In *ACCC v Simply No-Knead (Franchising) Pty Ltd* [1999], the respondent failed in an application to stay proceedings brought by the ACCC under Section 51AC claiming that the respondent had engaged in unconscionable conduct in its dealings with certain franchisees, in its way of dealing with complaints, on the conditions imposed on meetings with franchisees, and by threatening to withhold essential business supplies unless the franchisee complied with certain conditions.

Unsuccessful cases indicate a poor bargain has not been deemed unconscionable.

- In *Macdonald v Australian Wool Innovation Ltd*, [2005] the applicant, who was induced to leave secure employment by representations made by the respondent concerning a research and development venture, was unsuccessful in claiming unconscionable conduct when the venture did not proceed.
- In *Idameno (No 123) Pty Ltd v Angel-Honnibal* [2002], the defendant failed, on the facts, to prove that contract amendments which she had agreed to while recuperating from an addiction, while she was under financial strain and while she was without legal advice, were procured by the plaintiff as a result of unconscionable conduct within the meaning of Section 51AC.

Sources: Miller (2007); ACCC (2001).

Despite the body of court interpretations and professional opinion as to what is and what is not unconscionable, the Australian Retailers Association submitted that there remain misperceptions among players on what is unconscionable conduct:

Much of the behaviour that people are calling unconscionability or unconscionable is in fact either hard bargaining or unfair. It does not necessarily meet the hurdle of being unconscionable. More importantly, in some of the disputes — and I go back to being critical of some of the legal profession in this regard — when they would wrap up a dispute to take it to the various units, just for good measure they would put unconscionability into it. Guess what the first thing that was thrown was. The unconscionability. So it has been sort of misused in that regard. (transcript, p. 68)

Without prejudicing what may be considered unconscionable by the courts, a number of suggestions received from participants on what ‘might’ be considered to be unconscionable indicate a perception amongst many retailers that unconscionable conduct provisions cover a wide range of events, including matters relating to rent and occupancy costs (box 9.4). Indeed, the ACCC reported regularly receiving complaints about a broad range of tenancy matters, such as rent increases, relocation of sitting tenants and lease assignment. While the source of these complaints is not necessarily prohibited under the TPA, in some limited circumstances it may be an indication of unconscionable conduct and a potential breach of s51AC requiring investigation and possible action (submission no. 128).

While a case history is emerging in relation to unconscionable conduct, in general, complaints made in relation to Section 52 (prohibiting misleading and deceptive conduct) and Section 53 (prohibiting misrepresentations) can have stronger prospects in the investigation process than those involving allegations of unconscionable conduct. As the Chairman of the ACCC recently said:

In most unconscionable conduct cases there is also an element of misleading and deceptive conduct, which is much easier to prove. (Samuel 2007, p. 3)

Thus, complaints involving allegations of misleading and deceptive conduct or misrepresentations have stronger prospects in the investigation process than those involving allegations of unconscionable conduct.

FINDING

The threat of action under unconscionable conduct provisions appears to have had an influence on the most egregious forms of market conduct. Nevertheless, further interpretation and clarification could improve understanding of the concept.

Box 9.4 Examples provided by participants on what might be considered unconscionable conduct

Confidential submission: '[The landlord's] conduct fits perfectly within the parameters of the definition of 'unconscionable conduct'. They proceeded to double the nett lettable area of the Centre, knowing full well that the increased level of competition within the Centre would result in the failure and demise of many small business tenants'.

Confidential submission: '... the centre here has been talking a major redevelopment for the last 5 years or more. So in turn the small independent business[es] are just continually offered one year leases only, so the landlord will not have to pay anything under a relocation clause. I believe this is unconscionable conduct as nobody has been told of any plans or anything to do with refit, only that it is going to happen but no other information is forthcoming.'

Pharmacy Guild of Australia: ' "Well, you're taking X and you can afford to pay 8 per cent of X and that's the number." So I guess that goes into some of unconscionable clauses in leases, if you like, in that you're told one thing and then it's immediately used for the very purpose that you obviously as a tenant didn't want it used.' (transcript, p. 345)

LeaseWise Group: 'In the process of negotiation, sure, they will go high and we'll go low and somewhere in the middle, we'll do a deal or not; that's fine. But is it unconscionable for a landlord to say 100 per cent of the time, no matter how good you're doing, "You are going to be moved on"?' (transcript, p. 487)

Law Institute of Victoria: 'Just in our own practice we've had at least three cases where there's been an absolute refusal to renew for arbitrary and unconscionable grounds, we would say, but they're not strong enough to take to court'. (transcript, p. 632)

9.3 Concerns about business conduct

While the Commission heard of good working relationships between retailers and landlords, it was also frequently stated that the conduct of some players in the retail tenancy market was 'harsh' and 'unfair' (also that this type of conduct did not meet the hurdle of being unconscionable and fell outside the dispute resolution arrangements). Such business conduct, it was argued, takes place largely because of imbalances in negotiating power between the players and, according to some participants, is the fundamental problem with the current system. Herro Solicitors, for example, argued that:

... the Commission's recommendations should focus on dealing with and overcoming the fundamental problems and injustices in the current system... The real issue is not unconscionable conduct or breaches of the *Retail Lease Act* – the current framework

deals with these, the real issue is the bigger picture as to how to create competition so that rather than being dictated to by one landlord, the tenant has a range of options before it or there are safeguards put in place such that this market monopoly is controlled. (submission no. DR175, pp. 9-10)

Majority of concerns related to shopping centre tenancies

The majority of concerns heard by the Commission about business conduct were in relation to large shopping centres.

Many of the participants' comments were raised in the context of lease negotiations. For example, the Australian Retailers Association (ARA), spoke about 'intimidatory behaviour' and 'strong-arm negotiation tactics' at lease negotiation:

... it really isn't the law but the behaviour and application of the law by the landlords and in particular their employees or agents that is of concern and requiring a code. ... intimidatory behaviour and strong-arm negotiation tactics put business ethics out the window when it comes to some retail lease negotiations. I can go on further about some practices during questions. Suffice to say behaviour needs to change and the master-servant culture that exists within some agents needs to change. (transcript, p. 557)

Also:

The question to ask is this: what protection does the retail tenant have of abuse of this enormous power the landlord has within negotiation? What protections are there under current law? What rights do they have? The answer is none. Hence this inquiry and indeed other inquiries over the years. More needs to be done at the end of the lease. Perhaps it simply comes down to an ideal of negotiating in good faith. (transcript, p. 559)

COSBOA also commented that:

... it's a furphy that negotiations for renewal of a lease in a sitting tenant are undertaken in the context of supply and demand for retail space. ... It has all to do with what the landlord can get away with and I've seen it too many times to know otherwise. If the landlord can increase the rent, knowing what they know about the lessee's position, it will. 'Can the lessee stay in the same spot and continue to operate? How much rent pain can they bear? Will I lose them? Will they walk away if I push them too hard? Can I push harder? They won't walk away from a relatively new fit-out, will they?' (transcript, p. 285)

In addition, some participants spoke about a lack of trust when negotiating with centre landlords. For example, one retailer, Michael Bradley said:

... when you're trying to establish a relationship, you have to have trust. There's an agreed perception of how things should be conducted. (transcript, p. 260)

... these fellows are playing the high roller's game. They're playing winner takes all, and these little people that are sitting out here as small business people, they don't

matter. They will crunch them. They will put you through the mixer. (transcript, p.263)

It was also put to the Commission that landlords use delaying tactics. For example, one retailer stated that landlords deliberately delay the return of signed leases to limit public information:

Landlords have a strategy of delaying or refusing to promptly return executed or registered Leases and Lease Agreements. This is done to prevent the information becoming readily available publicly as it would permit tenants to gather information that would substantiate market rent at a specific shopping centre. (confidential submission)

It was widely acknowledged during the public hearings, that while tough negotiating positions are adopted, the larger shopping centre landlords seek to uphold particular standards. However, another retailer, Graeme Woods also noted that conduct can go astray because of the incentives placed on leasing executives:

... it's the sort of conduct or behaviour that goes on. Generally you have to accept the fact that your Westfields and your Colonials are very professional people and they usually hire pretty professional people and they've got an image to uphold and they have certain standard[s]. They have training programs and all of that, but you know that's all fine, but there's also pressure on these professionals to perform and get so many deals and that's when they may go off the rails a little bit, but overall they're professional public companies. (transcript, p. 513)

These comments were given life to the Commission during the inquiry through 'horror stories' from both tenants (not just small tenants but also those with multiple sites) and landlords. Indeed, one tenant commented 'that's life'. While it is difficult to find evidence to build the case that shopping centre landlords deliberately take advantage of tenants at lease renewal (tenants can always walk away from lease negotiations), there were some negotiating and conduct matters repeatedly drawn to the Commission's attention including:

- aggressive and evasive negotiating tactics that place tenants at a disadvantage relative to the landlord;
- the open use of turnover data by landlords in lease negotiations; and
- slow registration of leases to establish indefeasibility of title in certain jurisdictions;

It was also drawn to the Commission's attention that some tenants adopt aggressive negotiating tactics (chapter 6). However, many tenants do not equip themselves as well as they might when going into lease negotiations and as a consequence fail to secure leases on the most favourable terms. For example, while it is reported that the large shopping centres offer leases on a take-it-or-leave-it basis, the Commission also heard of a number of cases where tenants had signed 'unsignable'

leases. As discussed in chapter 6, to some extent tenants can counter the imbalances in negotiating power by seeking financial, legal and negotiating advice and knowing at what point in the lease negotiations they need to walk away. But, perceptions concerning the nature of a lease deal can vary. For example, Crosby, Murdoch and Webb (2007) commented that:

...there is evidence that small business tenants generally are vulnerable to the imposition of unsuitable terms and there is often a very fine line to be drawn between unsuitability and unfairness. (Crosby, Murdoch and Webb 2007, p. 23)

However, Christensen and Duncan (2005) also observed that acting in good conscience in the context of lease negotiations, as interpreted by the courts under current unconscionable conduct provisions, does not require landlords to give up a commercial advantage:

... significant latitude is given to a lessor in negotiations for a new lease in the absence of any legal obligation to grant one. The fact that requests by a landlord for large premiums for the grant of the lease, significant rental increases, cancellation of negotiations after the tenant has refurbished the premises and threatening to cancel the lease if documents are not returned were not considered to be unconscionable, suggests that most judges consider that good conscience does not require a lessor to give up a commercial advantage or neglect their own interests. (Christensen and Duncan 2005, pp. 172-3)

Delivery of services and accountability

A number of participants also argued that a source of ‘great injustice and hardship’ in the shopping centre context occurs because shopping centres are unaccountable to tenants for delivery of management services implied by the business relationship with tenants. Herro Solicitors, for example, said:

It is often assumed that always sales increase in a particular centre – that is not always the case particularly where a centre closes down to refurbish and then struggles to regain its market share ... The tenant is obliged to pay rent for the next 5 years notwithstanding that the centre itself is not performing. In this sense the lease protects the landlord and guarantees the landlord a certain return whether or not the landlord delivers by making the centre successful The landlord may not acknowledge the failure of the centre and unfortunately are under no obligation to do so. (submission no. DR175, p. 5)

Similarly, one retailer, Howard Kerrsmith, said:

I’ve always been of the opinion that you don’t mind paying whatever the rent is providing the business is there and the traffic is there and, usually, that’s a partnership between the landlord and tenant, which is understood. (transcript, p. 153)

... in that situation where it doesn’t work and basically the landlord hasn’t worked it out properly, hasn’t attracted the traffic flow to the centre, why should the tenant

suffer? ... it seems that percentage rent when sales go well is acceptable, but when the shopping centre causes the turnover to go down, there's no comeback. (transcript, p. 162)

One solution suggested for landlords' non-accountability was a performance guarantee. At the public hearings in Melbourne, Rad Williams, a small retailer, said:

... as much as the tenant puts up a bond against their performance against paying rent, I think the landlord should have to put up some sort of performance that could guarantee against what they're saying they're going to provide, such as foot traffic, and there should be a code or a standard against how you measure foot traffic and how it's reported because the whole business is around foot traffic. (transcript, p. 522)

Tenants could seek to negotiate some form of accountability on the landlord in the event of non-delivery of the package that they signed up for (for example, the option to renegotiate rent). The Commission was repeatedly advised, however, that it is very difficult to negotiate with shopping centre landlords amendments of this nature.

The National Retailers Association, in the context of market reviews, suggested that:

The very narrow concept of compensation in very specific cases would at the least temper the more aggressive negotiation that says pay up or out you go, and there is quite a lot of that. It can be a pretty arbitrary and brutal process. (transcript, p. 418)

Ultimately, the nature of accountability agreements between tenants and landlords need to be negotiated by both parties to be successful.

Regulation and tension

A number of participants argued that regulation has not been effective in reducing market tensions for dealing with business conduct issues in the retail tenancy market. The Australian Retailers Association, for example, said:

The bottom line is that the market needs good landlords and landlords require good tenants, in fact, we need each other. That's an important point. Yet the tenants are saying that they are being mistreated in terms of their investment with the landlord. It is this message from tenants that has been ringing within the ears of legislators for more than 15 years yet although solutions have been suggested from many inquiries and recommendations have been made, little action has been taken and the problems remain. When I say little action what I mean by that is that the legislations have been changed but there doesn't seem to be any change in the application of the law. (transcript, p. 556)

The State Retailers Association of South Australia also said:

The harsh if not unconscionable tactics of landlords are facilitated by incredibly poor legislation across Australia, which doesn't enable fair play or fair competition in the first instance and as such is used to the disadvantage of tenants by these predators. (submission no. 43, p. 1)

The SCCA went as far as suggesting that the adversarial nature of relationships that had built up in the Australian retail tenancy market is, itself, linked to the highly regulated nature of the industry:

It is also notable that the relationship between retail landlords and retail tenants in Australia is much more adversarial and more legalistic than is the case in New Zealand. There seems little doubt that the existence of retail tenancy regulation, and the 'win, loss' nature of retail tenancy legislation reviews, is a major contributing factor to this adversarial approach. (submission no. DR193, pp. 52-3)

Crosby, Murdoch and Webb (2007) also commented that in the United Kingdom tenants appear to be less critical of landlord behaviour than in Australia. The explanation provided for this was that shopping centre owners in the United Kingdom need to compete for tenants.

The situation in the UK appears to be quite unlike that in Australia. There has never been the widespread criticism of landlord behaviour as occurred in the evidence put before the Reid Committee. This is not to suggest that UK landlords behave perfectly but rather that they operate in a very different context and in one that tends to militate against unfair practices.

The adverse comments in Australia have largely been aimed at landlords of retail property and the most obvious point to make is that the retail market in the UK is far more diverse. There is not the same concentration of premises in shopping centres (although this is increasing) and the ownership of shopping centres is spread amongst a far greater number and range of landowners. This means that, rather than being in a dominant position and being able to dictate terms to prospective tenants who have few alternative locations, the owners of UK shopping centres need to compete for tenants. This in itself tends to encourage them to develop a positive image. (Crosby, Murdoch and Webb 2007, pp. 21-22)

The evidence received by the Commission indicates that the accumulation of retail tenancy legislation seeking to govern behaviour through prescribing all aspects of the landlord and tenant relationship has not alleviated market tensions or improved the cost effectiveness of commercial negotiations. The Commission was not presented with evidence to suggest that even more stringent legislation would change the negotiating balance between landlords and tenants, reduce tensions and improve the operation of the market.

Nevertheless, in an environment where there are major differences in negotiating power between small retailers and large landlords and relationships are adversarial, it can be difficult to develop the effective commercial relationships that are

necessary for least-cost business decision making by both landlords and tenants, and consequently, resources can be wasted. This suggests that an alternative approach is required.

FINDING

Legislation has not been effective in addressing general business conduct issues.

9.4 Assessing the case for change

The efficient operation of the market for retail tenancies in Australia is impeded where there are obstacles to tenants and landlords resolving disputes cost effectively or the conduct of tenants or landlords unreasonably limits the activities of other market participants. Available information suggests that formal dispute resolution is working reasonably well and that business choices are not being unreasonably limited, given general market conditions. However, it is apparent that there remain some conduct issues in the operation of the market, particularly in the area of lease negotiation.

A number of suggestions were received to improve dispute resolution and modify market conduct. The suggestions involve:

- further refining dispute resolution processes largely to improve access and transparency;
- further clarifying the concept of unconscionable conduct;
- strengthening unconscionable conduct provisions to provide tenants with greater protection; and
- introducing a code of conduct.

Enhancing dispute resolution mechanisms

Available dispute resolution mechanisms generally offer a low-cost alternative to the courts for those who wish to use them, with only a small proportion of disputes going to the tribunals and courts. Although some participants have suggested that the level of aggravation is higher than indicated by the incidence of formal disputes, the Commission has not received evidence that those who wish to use these arrangements are denied access. For instance, Lease1 indicated that many disputes are resolved prior to proceeding to the formal processes and this occurs partly because the formal arrangements are in place:

We find that 98 per cent of issues and disputes can be resolved quite amicably before even entering into the formal dispute process. One of our veins is to certainly get

involved, take the egos and the heat out of it, put the commercial terms on the table and you usually find that both parties will get around the issue, particularly when you advise them of the process and what is the next step. ... But saying that, it wouldn't be the case if we didn't have the process of the tribunal in the respective states and territories there to support it, as the next step. (transcript, p, 430)

The various suggestions for change focused on improving accessibility and transparency of dispute resolution in the retail tenancy market including:

- promoting better awareness of dispute settlement processes by developing a single point of contact for all commercial matters (submission no. 84);
- establishing an ombudsman to deal quickly with disputes as a first step in the dispute process (transcript, p. 498-99);
- creating a uniform dispute resolution process across jurisdictions, one suggestion being that the national model be based on the New South Wales, Victoria and Queensland systems (submission no. 88, confidential submission);
- in South Australia, establishing a retail tenancy tribunal (submission nos. 43 and 89);
- in Western Australia, establishing an informal mediation process specialising in commercial tenancy matters, prior to matters going to the SAT (submission no. 81);
- removing claim limits for tribunals (confidential submission);
- requiring landlords to provide information to tribunals in a timely manner (confidential submission); and
- mandating that landlords exhaust dispute resolution processes prior to turning to more expensive court proceedings (confidential submission).

In assessing the various options, issues for consideration include:

- whether specialist services and tribunals would be cost-effective in all jurisdictions, given the scale of disputes in the smaller jurisdictions that are currently without them;
- whether, at the margin, additional government support may formalise disputes that would otherwise have been settled privately between parties; and
- where there is fear of retribution, some parties may only wish to deal with matters privately regardless of government-provided arrangements.

Because of different market and legal structures and the number of industry participants across jurisdictions, the Commission has reservations concerning the likely cost effectiveness of implementing 'uniform' dispute resolution processes across jurisdictions. Nevertheless, there may be merit in establishing more stringent

requirements for parties to mediate or enter into other alternative dispute resolution processes prior to proceeding to a tribunal or court. For example, while there are provisions for mediation in each of the jurisdictions, the requirement for parties to participate is more stringent in some jurisdictions (such as Victoria) than others (for example, South Australia and Western Australia). In Victoria, VCAT may award costs against a party that refuses to participate in mediation where that necessarily disadvantages another party regardless of the outcome of the tribunal hearing. Such provisions have the potential to reduce the costs associated with resolving disputes. Accordingly, there may be merit in adopting these provisions in other jurisdictions.

There may also be merit in considering:

- broadening access to low-cost mediation to cover all small businesses in those jurisdictions where access is restricted to retail tenancies to avoid preferential treatment being afforded to firms on the basis of their activity;
- raising the maximum claims limits on matters that can enter mediation and tribunal hearings to reduce the cost of dispute resolution and demands on tribunal and court resources;
- ensuring mediation services are appropriately targeted at retail and commercial tenancy matters. This possibility would relate particularly to those jurisdictions where tenancy matters are heard by authorities with a wider brief;
- promoting better awareness of dispute resolution processes to help improve the effectiveness of dispute resolution provisions; and
- review tenancy advisory and dispute resolution procedures to accelerate hearing processes, where practicable.

Further extension of low-cost alternatives, where practicable, and more stringent requirements to use such alternatives, is likely to improve the reach of dispute resolution processes. For cases that would otherwise proceed to court, this is likely to reduce the total costs to the community of dealing with disputes.

FINDING

A number of approaches are available to improve the accessibility, effectiveness and scope of dispute resolution. Options for improvement vary between jurisdictions.

Possibilities for clarifying unconscionable conduct

As indicated above, some participants to this inquiry were of the view that only a very limited number of unconscionable conduct cases have proceeded to tribunals

or courts because the interpretation of unconscionable conduct sets ‘too high a bar’ to cover the conduct that most tenants complain about.

The ACCC has stated that it intends to take a more ‘aggressive’ approach in the area of unconscionable conduct and that greater clarity will be provided for businesses by creating common law precedent through taking a greater number of cases to court (Samuel 2007 and submission no. 128). Even so, in relation to bringing cases to court, the ACCC is likely to continue to be ‘challenged’ in the areas of parties providing sufficient supportive evidence to make a case and by parties reaching agreements before the case is heard.

Westfield, while acknowledging that further cases dealing with unconscionable conduct will provide greater clarity and certainty as to the range of circumstances where redress will be provided, also noted that:

... there is no valid basis for the belief that the courts have applied or will apply over time a narrow interpretation of the relevant statutory provisions based on the traditional equitable of unconscionable conduct. (submission no. DR191, p. 5)

Other market participants, in particular tenants and tenant groups, suggested that the current protection afforded by unconscionable conduct provisions is not enough to prevent small businesses from being ‘exploited’ by their larger counterparts. One suggestion put forward by Associate Professor Frank Zumbo was for a statutory duty to negotiate in good faith:

While any statutory definition of ‘unconscionable’ could usefully rely on the concept of good faith as a means of ensuring the Courts take a broader approach to s 51AC than their presently onerous and very legalistic approach to the section, an alternative would be to enact a stand-alone statutory duty of good faith. Either way, the concept of good faith offers considerable potential as a mechanism for promoting ethical business conduct. Indeed, this is readily apparent from the growing judicial attention and support given to an implied duty of good faith in commercial contracts, especially in New South Wales. (submission no. DR200, p. 16)

However, a statutory duty of good faith would, like unconscionable conduct, also be a matter of interpretation, disputation and testing in the tribunals and courts.

The essence of many of the other suggestions for extending fairness provisions were based on shifting judgements made on fairness from actions (known as procedural unconscionability, as currently addressed by section 51AC), to outcomes or contract terms (substantive unconscionability) (box 9.5). Under the concept of substantive unconscionability, a party would be perceived to have behaved in an ‘unconscionable’ fashion if the agreed contract has the potential to lead to an ‘unfair’ outcome.

Such a move has the potential to adversely affect the efficient operation of the

market. In business transactions, a ‘hard bargain’ does not necessarily constitute unconscionable conduct. Indeed, legislation should not prohibit businesses from negotiating a hard bargain as such an outcome is likely to represent a return to superior business skills by one party. Attempting to legislate what constitutes a ‘fair transaction’, and what does not, is inherently difficult and is likely to add further uncertainty to the meaning of unconscionability and potentially constrain the efficient operation of the market as returns to superior bargaining skills are eroded, costs of disputation are increased and the efficiency of investment is diminished by increased uncertainty.

Box 9.5 Notions of unconscionable behaviour

The following definitions to procedural and substantive unconscionability have been derived:

- *Procedural unconscionability* is concerned with whether the conduct of a business in the making of a contract or during the course of a contract was so reprehensible as to offend good conscience.
- *Substantive unconscionability* is concerned with fairness of otherwise of the terms of the contract.

Source: Zumbo (2007).

It is also possible that regulations relating to fairness may lead to ‘moral hazard’. Businesses would be afforded greater protection when undertaking negotiations or in a business transaction, increasing the likelihood of bad decision making through the reduced negative consequence of such decisions. In the Commission’s assessment, extending the principle of unconscionable conduct is likely to place constraints on the efficient operation of the market and should be avoided.

In addition, the Commission received no compelling evidence during the inquiry from those advocating extending the provisions of unconscionable conduct that such an approach would be effective in reducing market tensions and the cost of contracting. Moreover, the Commission also does not consider it appropriate to inject broad new notions — for which the benefits have not been established and which could drive a further wedge between the retail tenancy market and the broader market for commercial tenancies — into commercial law through the medium of retail tenancy legislation.

FINDING

Extending unconscionable conduct provisions in an attempt to regulate for ‘fair’ outcomes is likely to introduce a number of inefficiencies and market uncertainty.

Introducing a code of conduct

Some participants suggested that there could be merit in introducing an industry code of conduct as a way of dealing with ‘harsh’ business conduct and conduct that does not fall within the scope of the legislation. The Franchise Council of Australia (FCA), for example said:

The type of conduct that ought to be illegal, such as bullying, taking advantage of end of term inequity of bargaining power, massive rental hikes and unfair conduct in relation to tenancy mix will clearly not be considered to be unconscionable. Further, the ability of the ACCC to intervene and help facilitate settlement is in doubt given that at least one major landlord has indicated it will only deal with such allegations in the courts.

It is therefore recommended that instead of relying on an ambiguous definition of ‘unconscionable conduct’, reforms in the retail tenancy market take the form of an industry code of conduct (submission no 117, p. 37)

The FCA’s recommendations for the proposed code included quite prescriptive elements (for example, ‘sitting tenants must be protected from excessive end of term rental increases’) to govern aspects of the landlord-tenant relationship.

The case for a industry code of conduct as a means of dealing with conduct issues needs to be considered in light of the failure of the legislation to govern behaviour and address business conduct in the retail tenancy market. If a industry code of conduct simply represents a switching (or re-badging) of prescriptive legislation to self-regulation, then the benefits are likely to be minimal (if there are any at all) and business conduct problems will remain, as none of the underlying issues are addressed.

Nevertheless, an industry code that seeks to establish good leasing practices (the objective of the original retail tenancy legislation) may have 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). Such an approach could be effective in moderating the adversarial nature of relationships and the more extreme negotiating tactics. By focusing on the environment in which businesses relationships are formed (given the supply and demand for retail space), such an approach has the potential to improve the cost-effectiveness of commercial decision making (fewer small businesses may be discouraged from entering the shopping centre market and/or forced out of market) and the operation of the retail tenancy market.

FINDING

An industry code of conduct that seeks to establish good leasing practices but avoids interfering in the commercial relationships between landlords and tenants has the potential to improve the operation of the market.

9.5 Summing up

Considering the size of the retail tenancy market, the overall number of formal disputes is very small. While the majority of disputes are raised by tenants, a significant proportion are raised by landlords. Further, the incidence of disputes is distributed across all retail formats. The majority of disputes brought to retail tenancy authorities and the ACCC are resolved through consultation or mediation, outside the tribunals and courts.

Disputes cover a wide range of issues facing tenants and landlords. A relatively small number are heard on the basis of allegations of unconscionable conduct. While the tribunals and courts have determined few instances of such behaviour, the legal consideration of these allegations has shed some light on the type of behaviour that the tribunals and courts see as unconscionable.

The dispute resolution systems are working reasonably well and are widely accessible. Because of different market and legal structures and the number of industry participants across jurisdictions, the Commission has reservations concerning the likely cost effectiveness of implementing a ‘uniform’ dispute resolution process across jurisdictions. However, potential efficiency benefits are likely to be available from improving accessibility to dispute resolution processes and strengthening requirements, as appropriate, for parties to use low-cost alternatives prior to being permitted to take a case to a tribunal or court.

Case law has been established to define what is meant by unconscionable conduct. However, it is evident that the concept is not as widely understood, by both tenants and landlords, as it should be. There would be merit in ensuring that market participants were better informed of the concept. Further hearing of unconscionability claims could benefit this process. Although suggestions were made to relax the meaning of unconscionability, the Commission did not receive evidence to suggest that this would reduce tensions in the retail tenancy market. Rather, such a measure could add to uncertainty and industry costs.

There are some remaining business conduct issues in the retail tenancy market. While these conduct issues may not represent breaches of retail tenancy legislation

and therefore fly under the radar of dispute resolution mechanisms, they can still cause inefficiencies in the retail tenancy market. Extension of regulation is unlikely to be effective in redressing these remaining conduct issues. However there may be some merit in a industry code of conduct that seeks to alter the environment in which landlord-tenant relationships are formed.

