
B Retail tenancy legislative activity by state

A number of jurisdictions have made progress with implementing certain recommendations from the Commission's 2008 retail tenancy report beyond the COAG reform activity. These include reforms to improve transparency and accessibility of lease information in the retail tenancy market and to improve tenancy market information.

New South Wales, Western Australia and South Australia, following Victoria's lead, are also in the process of establishing a Small Business Commissioner to assist with the resolution of retail tenancy disputes.

At the same time, some recent retail tenancy reform undertaken by the South Australian Government and proposed by the Western Australian Government appears inconsistent with the Commission's previous 2008 recommendations (see box 9.3 in chapter 9).

Recent and prospective state government legislative activity is outlined below.

B.1 New South Wales

The New South Wales Government has undertaken some reforms in response to the Commission's 2008 recommendations to improve transparency and accessibility of lease information in the retail tenancy market. Consistent with recommendation 1(a) in box 9.3, it has developed a retail tenancy kit which provides information to all retail tenants in plain English about key lease terms, including what to look for and what to ask during tenancy negotiations. In addition, consistent with recommendation 1(b) in box 9.3, it also provides a phone hotline for all tenants, landlords and advisers to call when seeking assistance and advice on all retail tenancy matters.

To improve access to tenancy market information, the New South Wales Government already provides for the lodgement of leases with the NSW Land and Property Management Authority — consistent with recommendation 2 in box 9.3.

Finally, the recently elected New South Wales Government has also committed to appoint a Small Business Commissioner as part of its Small Business Action Plan (NSW Liberals & Nationals 2011). The Commissioner's role would include:

- advocating for the small and medium enterprise sector
- providing a central point where small business concerns about unfair market practices can be addressed in a low cost and timely manner
- resolving disputes between small businesses and government agencies
- ensuring the impact on small businesses is fully considered in the introduction of any new regulations.

This initiative, if implemented, would be consistent with recommendation 1(b) of the Commission's 2008 report (box 9.3).

B.2 Western Australia

The Western Australian Government is currently progressing amendments to the *Commercial Tenancy (Retail Shops) Agreement Act 1985*. The Commercial Retail Tenancy (Retail Shops) Agreement Amendment Bill 2011 was introduced into the Western Australian Parliament on 16 March 2011 and it is anticipated that it will be passed this year.

According to the Explanatory Memorandum of the Bill, it contains a number of amendments which aim to:

- allow tenants to make more informed leasing decisions by requiring landlords to include additional information in the disclosure statements provided to tenants (including options to renew, 'hidden' leasing costs and trade restrictions)
- enhance security of tenure by protecting the rights of tenants with respect to options to renew leases and also during shopping centre redevelopments or relocations
- improve the negotiating power of tenants by prohibiting landlords from passing on certain legal fees to tenants associated with preparing and negotiating the lease
- assist in the preparation of more consistent and equitable rent reviews by requiring landlords and tenants to supply valuers with relevant leasing information (such as information about retail shops in the same building or retail shopping centre)

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- prohibit misleading and deceptive conduct and give the State Administrative Tribunal the jurisdiction to hear claims in relation to misleading and deceptive conduct (Western Australian Government 2011a).

Some of these amendments appear to be inconsistent with the spirit and intent of the Commission's 2008 recommendations. They may reduce the incentive for businesses to enter negotiations, reduce flexibility in setting rents and inhibit the allocation of retail space to those tenants who value it most. It would also appear that compliance and administrative costs, particularly for landlords, may increase, without necessarily delivering significant benefits to tenants.

Further legislative activity in Western Australia includes the introduction of the Small Business and Retail Shop Legislation Amendment Bill 2011, which aims to create a Small Business Commissioner for Western Australia. The Commissioner will perform advisory and mediation functions in relation to retail tenancy matters and will have an important alternative dispute resolution function in retail tenancy disputes, but it will not have the power to make a determination. This power will continue to be vested in the State Administrative Tribunal. This proposal, if implemented, could be viewed as fulfilling, at least partially, recommendation 1(b) of the Commission's 2008 report (box 9.3).

According to the Explanatory Memorandum for this Bill, the intent of the proposed legislation is to:

- encourage the fair treatment of small businesses in their commercial dealings with other businesses and government bodies
- provide support for small businesses during the transition to a more deregulated retail trading environment
- reduce the vulnerability of small businesses to unfair market practices
- reduce the frequency and cost of disputes involving small businesses (Western Australian Government 2011b).

In addition, the Western Australian Government is also examining ways to increase transparency of lease information in the market. One of the options that it will be considering is the creation of a publicly accessible database of lease information (managed by a government authority) — the information included on the database would be drawn from summaries of key lease details lodged by the parties to the lease.

The Western Australian Government is still in the early stages of consultation and policy development in relation to this issue. This initiative, if implemented, would be broadly consistent with recommendation 2 (box 9.3) to improve access to

tenancy market information. While the Commission recommended voluntary lodgement of lease information by the contracting parties, the Western Australian Government's proposal is likely to be mandatory in nature (Western Australian Government, pers. comm., 10 June 2011).

B.3 South Australia

The South Australian Government has not made any legislative changes in response to the recommendations of the Commission's 2008 report. However, it has made a number of minor changes that were included in the Retail and Commercial Leases Regulations 2010. Perhaps the most significant of these was the increase in the rent threshold associated with the application of the *Retail and Commercial Leases Act 1995 (SA)*.

As small retail businesses are considered most likely to be at a disadvantage in terms of access to information and negotiating power in lease negotiations, all jurisdictions have sought to define a retail business for the purpose of the legislation and the threshold needed to define a 'small business'. South Australia has a value-based limit. Under the previous regulation, the Act only applied to premises where the rent did not exceed \$250 000 per annum. The new regulation, which came into operation on 4 April 2011, increases the rent threshold to \$400 000. This means that leases for which annual rent payable is between \$250 000 and \$400 000, which previously were excluded from the application of the Act, will now fall within its scope. This change would appear to be inconsistent with the thrust of the Commission's 2008 report, which focused on avoiding more stringent and prescriptive regulation and having a pause in legislative change as a pre-cursor to greater self-regulation in the retail tenancies market.

In addition, like the New South Wales and Western Australian Governments, the South Australian Government is in the process of establishing an office for the Small Business Commissioner. One of the Commissioner's key roles will be mediating retail tenancy disputes between small businesses and landlords (South Australian Government 2010).

B.4 Queensland

The Queensland Government is currently conducting a statutory review of the *Retail Shop Leases Act 1994*. The review will incorporate consideration of the recommendations from the Commission's 2008 report that may be addressed through legislation. The review is to be completed by June 2012.