

Productivity Commission Issues Paper

Inquiry into the Market for Retail Tenancy Leases in Australia

Introduction - Overview of the Queensland Regulatory Environment

Retail shop leasing in Queensland is regulated by the *Retail Shop Leases Act 1994* (the Act). The Act provides for mandatory minimum standards for retail shop leases and a low cost dispute resolution process for retail tenancy disputes.

A copy of the Act is provided at Attachment 1.

The Act's mandatory minimum lease standards incorporate provisions for:

- disclosure requirements;
- payments under a lease;
- requirements if rent includes a percentage of turnover;
- rent reviews including market rent;
- definition, calculation and auditing of outgoings including promotions and sinking funds;
- prohibitions on key money;
- compensation provisions;
- notification process for options for further lease terms;
- notification process for lease renewals;
- unconscionable conduct;
- relocation of retail premises;
- demolition of retail premises;
- conditions under which lessor's legal expenses may be passed on to the lessee;
- assignments of retail shop leases; and
- trading hours.

The Act's dispute resolution process incorporates a mediation conference and referral to the Retail Shop Lease Tribunal where mediation is unsuccessful.

In particular, the Act provides for:

- lodgement of a retail tenancy dispute;
- the mediation process;
- mediation agreements;
- referral to the Retail Shop Lease Tribunal;
- directions hearings;
- tribunal hearings;
- jurisdiction and orders of the Retail Shop Lease Tribunal;
- restricted right to appeal decisions of the Retail Shop Lease Tribunal; and
- the maintenance of a Register of Retail Tenancy Disputes.

The Register of Retail Tenancy Disputes is required to be available for public inspection. The Register can be accessed online at www.sd.qld.gov.au/retail.

The *Retail Shop Leases Regulation 2006* (the Regulation) provides for:

- the particulars of disclosure statements and legal and financial advice reports
- a schedule of businesses defined as ‘retail businesses’ for the purposes of the Act.

A copy of the Regulation is provided at Attachment 2.

The Act is administered by the Retail Shop Leases Registry. The staff of the Registry has responsibility for providing administrative support for the formal processes of mediation and tribunal hearings.

Registry staff also undertake an active role in informal dispute resolution and deliver a comprehensive awareness/education campaign throughout Queensland.

The Registry has produced a booklet entitled “Retail Leasing Guidelines” for the retail sector containing information for retail lessees, lessors and professional advisors on the provisions of the Act and general leasing information.

A copy of the Retail Leasing Guidelines is provided at Attachment 3.

The Act incorporates provisions requiring that the Act must be reviewed within seven (7) years of the previous review.

Response to Terms of Reference

The focus of this submission reflects the role and content of the *Retail Shop Leases Act 1994* and the *Retail Shop Leases Regulation 2006* in Queensland.

Responses to the Terms of Reference are guided by and based on the application of the Act to the relationship between lessor and lessee.

Examine the structure and functioning of the retail tenancy market in Australia, including the role of retail tenancies as a source of income for landlords, investors and tenants and the relationships with the broader market for commercial tenancies.

The *Retail Shop Leases Act 1994* and the schedule of retail businesses in the *Retail Shop Leases Regulation 2006* ensure the application of the Act is limited to premises where a retail business is conducted, but does include commercial businesses located in a retail shopping centre.

Section 8 of the Act defines a “retail shopping centre” –

“8 Meaning of retail shopping centre

*(1) A **retail shopping centre** is a cluster of premises having all of the following attributes—*

(a) 5 or more of the premises are used wholly or predominantly for carrying on retail businesses;

(b) all the premises—

(i) are owned by the one person; or

(ii) have the one lessor or head lessor, or, if the premises were leased, would have the one lessor or head lessor; or

(iii) comprise lots within a single community titles scheme;

(c) all the premises are located in—

(i) 1 building; or

(ii) 2 or more buildings if—

(A) the buildings are adjoining; or

(B) if the premises are owned by the one person—the buildings are separated by

common areas or other areas owned by the owner or a road; or

(C) if the premises are not owned by the one person—the buildings are separated by common areas or a road;

(d) the cluster of premises is promoted, or generally regarded, as constituting a shopping centre, shopping mall, shopping court or shopping arcade.

(2) In this section—

community titles scheme means a community titles scheme under the Body Corporate and Community Management Act 1997.”

Section 13 (9) defines a “short term retail shop lease” –

“short term retail shop lease means a retail shop lease for which the combined period of the following is not more than 6 months –

- (a) the lease’s original term;*
- (b) any periods for which the lessee has a right to extend the lease.”*

It should be noted that under section 13(8) a “short term retail shop lease” is excluded from the minimum lease standards prescribed by the Act.

“(8) Despite subsections (1) and (3) to (7) only parts 1 to 3 and 7 apply to a short term retail shop lease entered into on or after the commencement of this subsection.”

Examine any competition, regulatory and access constraints on the economically efficient operation of the market.

As previously noted under “Overview of the Queensland Regulatory Environment”, the Act provides for mandatory minimum lease standards which must be complied with.

In particular, section 39 of the Act prohibits a lessor from seeking or accepting key money from a prospective lessee.

“Key money” is defined in the Act as-

“key money means –

- (a) an amount to be paid to, or at the direction of, a lessor by way of a premium, non-repayable bond or otherwise, for the granting, renewing or assigning of a lease; or*
- (b) any benefit to be conferred on, or at the direction of a lessor for the granting, renewing or assigning of a lease.”*

Section 39-

“39 Payment of key money and amount for goodwill prohibited

(1) A person must not, as lessor or for the lessor, under or in relation to a retail shop lease, seek or accept the payment of key money or any amount for the goodwill of the lessee’s business carried on in or from the leased shop.

Maximum penalty—100 penalty units.

(2) However, subsection (1) does not prevent a lessor from—

- (a) recovering from the lessee the lessor’s costs reasonably incurred in investigating a proposed assignee of the lessee under a retail shop lease; or*
- (b) recovering from the lessee the lessor’s reasonable expenses of and incidental to an assignment of a retail shop lease and any necessary consents to the assignment; or*

- (c) receiving payment of rent in advance if the amount paid is not more than the rent payable for 1 rental period under the lease; or*
 - (d) getting a repayable bond from the lessee to secure the lessee's obligations under the lease; or*
 - (e) receiving from the purchaser of the lessor's business conducted in a retail shop payment for the goodwill of the business or the plant, equipment, fixtures or fittings in the retail shop; or*
 - (f) receiving payment from the lessee for amounts spent by the lessor for fitting out the leased shop; or*
 - (g) seeking and accepting payment for the grant of a franchise in relation to the grant of a retail shop lease.*
- (3) If an amount is paid to, or a benefit accepted by, a person in contravention of subsection (1), the person who paid or conferred the benefit may recover the amount or value of the benefit as a debt."*

The Act also defines the mechanisms for rent reviews in retail shop leases under section 27 -

27 Timing and bases of rent reviews

- (1) If, under a retail shop lease, the rent payable under the lease or any renewal or extension of the lease is to be reviewed during the term of the lease or under an option to renew or extend the lease, the lease must state the timing of the reviews and the basis on which each review is to be made.*
- (2) The rent may not be reviewed more than once in each year of the lease.*
- (3) Subsection (2) does not apply to the first year of the lease.*
- (4) The rent may be reviewed using different bases during the term of the lease, but each review must be made using only 1 basis.*
- (5) The basis for a rent review must be a single basis consisting of 1 of the following—*
 - (a) the current market rent of the leased shop;*
 - (b) an independently published index of prices, costs or wages;*
 - (c) a fixed percentage of the base rent;*
 - (d) a fixed actual amount;*
 - (e) if the rent is determined as a base rent plus an amount equal to a percentage of the turnover of the lessee's business—the average rental paid over the previous year, or the stated number of previous years, of the lease;*
 - (f) another basis prescribed by regulation;*
 - (g) a single basis formed by a combination of 2 or more bases mentioned in paragraphs (b) to (f).*
- (6) If the rent is determined as a base rent plus an amount equal to a percentage of the turnover of the lessee's business, the review of the base rent must be made in accordance with subsections (4) and (5).Section 27(2) provides that –
"the rent may not be reviewed more than once in each year of the lease".*

Also in relation to rent reviews, section 36 prohibits clauses which allow the lessor the discretion to apply 1 of 2 or more methods of calculating the highest rent (ratchet clauses).

Specifically, section 36 provides that –

“36 Certain rent review provisions of leases void

A provision of a retail shop lease is void to the extent that it—

(a) requires the lessee to appoint someone to determine the current market rent of the leased shop other than in accordance with this Act; or

(b) requires the lessee to pay for a determination of current market rent by a specialist retail valuer other than under section 34 (Parties to share cost of determination); or

(c) requires the determination of the current market rent of the leased shop to be made other than in accordance with this Act; or

(d) reserves, or has the effect of reserving, to a party a discretion to apply 1 of 2 or more methods of calculating the rent of the leased shop on a particular review of the rent; or

(e) provides for the rent of the leased shop to change on a particular review of the rent in accordance with whichever of 2 or more methods of calculating the change would result in the higher or highest rent.”

Examine the extent of any information asymmetry between landlords and retail tenants and the impacts on business operation.

The Act provides mechanisms to ensure that both lessor and lessee are fully informed prior to entering into a retail shop lease.

These mechanisms include requirements for Disclosure Statements to be completed and provided by the lessor, lessee, assignor and assignee to the other party/parties.

Copies of the Lessor, Lessee, Assignor and Assignee Disclosure Statements are provided at Attachment 4.

In addition, lessees who own less than five (5) retail businesses in Australia are required to seek legal and financial advice on the terms of the lease and provide the lessor with a copy of both a Legal Advice Report and Financial Advice Report prior to entering into a lease.

Copies of the Legal Advice Report and Financial Advice Report are provided at Attachment 5.

The Lessee Disclosure Statement also makes a general recommendation that all prospective lessees seek legal and financial advice about the terms and conditions of the lease and the operation and viability of the proposed business.

In addition, the Retail Leasing Guidelines produced by the Retail Shop Leases Registry provides a Lessee’s Checklist which asks prospective lessees to consider a range of questions related to their own preparedness to start and operate a retail business.

The Queensland Department of State Development provides businesses (including those starting up a business) with access to a range of information and resources to assist with business planning and business management skill development.

Where a retail shop lease requires the lessee to contribute to the lessor's outgoings, the lessor must provide an estimate of the amount at the commencement of the financial year, and an audited statement of actual outgoings within three (3) months of the end of the year.

Section 7 of the Act defines "outgoings"-

"7 Meaning of outgoings

- (1) A lessor's "outgoings" for a retail shopping centre or leased building are—*
- (a) the lessor's reasonable expenses directly attributable to the operation, maintenance or repair of—*
 - (i) the centre or building; and*
 - (ii) areas used in association with the centre or building; and*
 - (b) charges, levies, premiums, rates or taxes payable by the lessor because the lessor is the owner or occupier of—*
 - (i) the centre or building; or*
 - (ii) the land on which the centre or building is situated; and*
 - (c) an amount mentioned in section 24A(2).*
- (2) An outgoing mentioned in subsection (1) may be either an apportionable outgoing or a specific outgoing and the sum of the apportionable outgoings and specific outgoings is the lessor's outgoings.*
- (3) However, lessor's "outgoings" do not include—*
- (a) land tax payable on the land on which the centre or building is situated; and*
 - (b) expenditure of a capital nature, including the amortisation of capital costs; and*
 - (c) contributions to a depreciation or sinking fund; and*
 - (d) insurance premiums for loss of profits; and*
 - (e) lessor's contributions to merchants' associations and centre promotion funds; and*
 - (f) payment of interest and charges on amounts borrowed by the lessor; and*
 - (g) another item prescribed by regulation."*

The lessor's operation of a sinking fund for repairs and maintenance are also governed by the Act.

Specifically, section 40 provides that –

"40 Sinking fund for major maintenance and repairs

- (1) This section applies if a lessee under a retail shop lease is required to pay amounts (maintenance amounts) into a sinking fund for major maintenance of, or repairs to—*
- (a) the buildings, plant and equipment of, and areas used in association with, the retail shopping centre in which the leased shop is situated; or*

*(b) the building in which the leased shop is situated and the plant and equipment of, and areas used in association with, the building; or
(c) the leased shop and the plant and equipment of, and areas used in association with, the leased shop.*

(2) The lessor may keep only 1 sinking fund for the purposes mentioned in subsection (1).

(3) The lessor must pay maintenance amounts paid by the lessee for the credit of the sinking fund into an interest bearing account kept by the lessor.

(4) The lessor must only apply amounts standing to the credit of the sinking fund and interest earned on the fund for a purpose mentioned in subsection (1).

(5) The lessor is liable to pay into the sinking fund any deficiency attributable to a failure by the lessor or any predecessor in title of the lessor to comply with subsection (4).”

Examine the scope for reform of retail tenancy regulation to improve economic performance including -

Differences in retail tenancy regulation between States and Territories, and the scope for nationally agreed regulations and approaches

As noted under “Overview of the Queensland Regulatory Environment”, the Act provides for a regular review process.

Section 122 provides that-

“122 Review of Act

(1) The Minister must carry out reviews of the operation of this Act to decide whether its provisions remain appropriate.

(2) Each review must be carried out within 7 years after the previous review.

(3) The Minister must prepare a report on each review and table a copy of the report in the Legislative Assembly as soon as practicable after it is prepared.”

The Act was last amended in 2006 following a comprehensive review process that commenced in 2003. A Discussion Paper (copy provided at Attachment 6) was released in 2003 and a Policy Review Paper (copy provided at Attachment 7), detailing the proposed amendments, was released in 2005.

The Policy Review Paper was developed in conjunction with an Industry Working Group whose members were drawn from lessor and lessee interest groups. It should be noted that the amendments proposed and agreed to by the Industry Working Group represented a consensus position.

The formulation of the Policy Review Paper also incorporated a detailed examination of interstate legislation.

It is the Queensland Government's understanding that the mandatory minimum lease standards contained in legislation operating in Queensland, New South Wales, Victoria and the Northern Territory have been developed to achieve a similar policy intent despite differences in the regulatory language.

The Queensland Government considers that the *Retail Shop Leases Act 1994* and *Retail Shop Lease Regulation 2006* represent best practice in achieving a balance between the needs of lessees and lessors. Any moves towards nationally agreed regulations and approaches should not dilute the role that retail tenancy legislation plays in effectively providing a sound basis for the development and growth of the retail sector—from both the lessor and lessee perspective.

Examine the extent and adequacy of dispute resolution systems for landlords and retail tenants, including differences in dispute resolution frameworks between the States and Territories;

Part 8 of the Act prescribes the dispute resolution system. The distinguishing feature of the Queensland system is the operation of a specific Retail Shop Lease Tribunal to hear and determine retail tenancy disputes.

The Retail Shop Leases Registry is empowered by section 119 of the Act to assist informally with resolving potential disputes.

“119 Chief executive’s responsibility

For the efficient and proper administration of this Act, the chief executive—

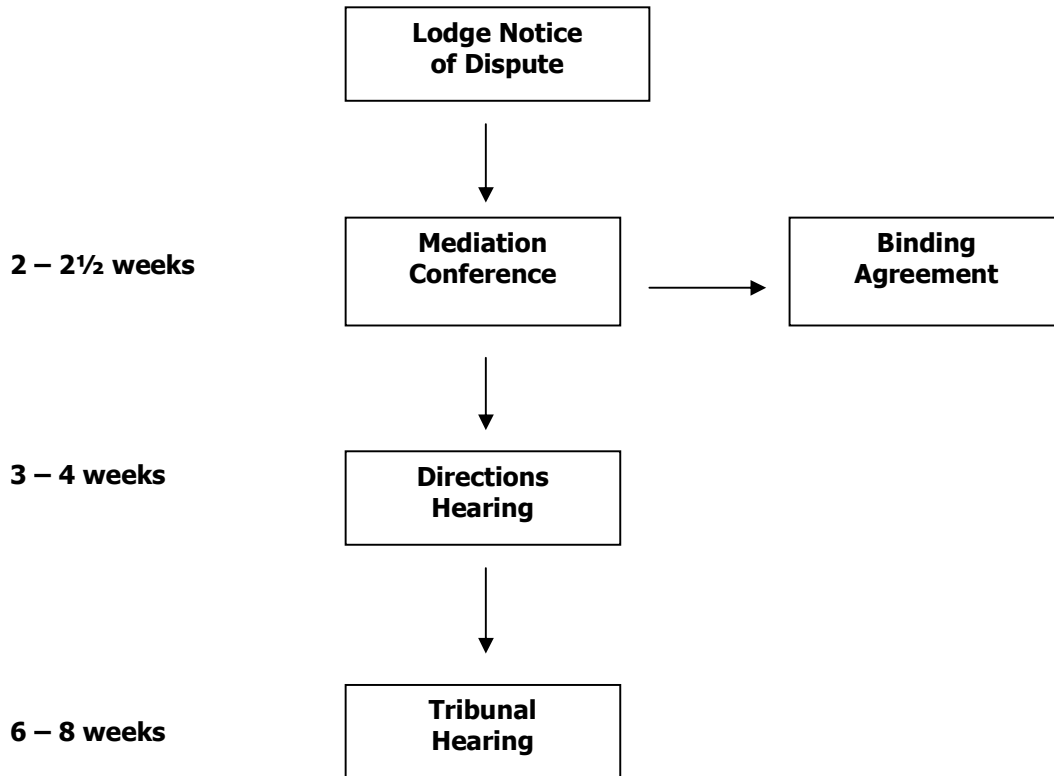
(a) is responsible for ensuring lessors and lessees under retail shop leases are advised about the practices and procedures of the department, mediators and tribunals; and

(b) may advise lessors and lessees under retail shop leases about potential retail tenancy disputes.”

During the 2006/2007 financial year, the Registry was notified of 1335 potential disputes. In only approximately 10% (115) of these potential disputes did the claimant lodge a formal Notices of Dispute. In all other cases, Registry staff were able to assist in informally resolving disputes to the satisfaction of both parties. Data collected by the Retail Shop Leases Registry over the past five (5) years reflects a similarly high level of success in informal dispute resolution.

Figure 1 outlines the general process and indicative timeframe for dispute resolution following lodgment of a Notice of Dispute.

Fig. 1 – Overview of the Dispute Resolution Process



All formal disputes lodged with the Registry are recorded in the Register of Retail Tenancy Disputes.

A table providing the particulars of notices of disputes lodged in the period 01/07/2002 to 30/06/2007 is provided at Attachment 8.

The vast majority of disputes lodged with the Registry relate to compensation issues under section 43-

“43 When compensation is payable by lessor

(1) The lessor is liable to pay to the lessee reasonable compensation for loss or damage suffered by the lessee because the lessor, or a person acting under the lessor’s authority—

(a) substantially restricts the lessee’s access to the leased shop; or

(b) takes action (other than action under a lawful requirement) that substantially restricts, or alters—

(i) access by customers to the leased shop; or

Examine the appropriateness and transparency of the key factors that are taken into account in determining retail tenancy rents.

The Act provides for market rent reviews and in section 29 sets out the matters to be considered by a specialist retail valuer in determining market rent. These matters have been endorsed by the valuation profession and retail sector lessor and lessee interest groups.

Section 29-

“29 Matters to be considered by specialist retail valuers

In making a determination of the current market rent, the specialist retail valuer—

(a) must determine the rent—

(i) on the basis of the rent that would be reasonably expected to be paid for the retail shop if it were unoccupied and offered for leasing for the use for which the shop may be used under the lease or a substantially similar use; and

(ii) on the basis of gross rent less lessor’s outgoings payable by the lessee under the lease; and

(iii) on an effective rent basis; and

(b) must not have regard to the value of the goodwill of the lessee’s business or the lessee’s fixtures and fittings in the retail shop; and

(c) must have regard to—

(i) the terms and conditions of the lease; and

(ii) submissions from the lessor and lessee about the market rent of the shop; and

(iii) the other matters prescribed by regulation.”

Sections 97 and 109 of the Act specifically exclude retail tenancy disputes about the amount of rent payable under a retail shop lease from the jurisdiction of mediators and the Retail Shop Lease Tribunal.

However, mediators and the Tribunal can consider a retail tenancy dispute about the procedure for the determination of the rent payable. That is, whether the specialist retail valuer made the determination of market rent in accordance with section 29.

Section 3 of the Regulation prescribes information that must be included in the Lessor Disclosure Statement, including information about rent.

In particular, section 3(f) requires the following information about rent be provided-

“3 Prescribed particulars for lessor’s disclosure statement

(f) the following details about the rent –

(i) the amount of the initial rent (other than rent based on turnover) calculated yearly or the method of calculating the initial rent;

(ii) any rent free or reduced rent period;

(iii) any rent review, whether during the term of the lease or a period covered by an option to renew the lease;”

Examine the appropriateness and transparency of provisions in retail leases to determine rights when the lease ends.

In 2006, the Act was amended to provide that the lessor must give a written notice to the lessee (at least six (6) months before the lease ends) either:

- offering a new lease or
- advising that no new lease will be offered.

Section 46AA applies where a lease does not provide for an option or any other agreement to renew or extend the lease –

“46AA Renewing lease if no option or other agreement

(1) This section applies if a retail shop lease—

(a) does not provide for an option on the lessee’s part to renew or extend the lease; and

(b) is not the subject of an agreement for its renewal or extension.

(2) The lessor must, by written notice given to the lessee within the notice period—

(a) offer the lessee a renewal or extension of the lease on terms, including terms about rent, stated in the notice; or

(b) tell the lessee that the lessor does not intend to offer the lessee a renewal or extension of the lease.

(3) An offer made under subsection (2)(a) can not be revoked—

(a) until 1 month after it is made; or

(b) if the lessee accepts the offer within 1 month after it is made.

(4) If the lessor does not comply with subsection (2), the term of the lease is extended until 6 months after the lessor gives the notice (the extended period).

(4A) However, subsection (4) applies only if the lessee, by written notice given to the lessor before the lease would otherwise expire, asks for the extension.

(5) The lessee may terminate the lease before the extended period ends by giving at least 1 month’s written notice of termination to the lessor.

6) In this section—

notice period means the period that is—

(a) for a lease of not more than 1 year—at least 3 months, but not longer than 6 months, before the lease is to end; or

(b) for a lease of more than 1 year—at least 6 months, but not longer than 1 year, before the lease is to end.”

If the lessor does not issue the written notice the lease is extended for a further six (6) months.

Examine any measures to improve overall transparency and competitiveness of the market for retail tenancy leases.

One of the significant benefits of the Queensland retail tenancy legislation is the compulsory exchange of disclosure information between lessor and lessee and the requirement for lessees to obtain Financial and Legal Advice Reports prior to entering into a lease.

Conclusion

It is the Queensland Government's understanding that the mandatory minimum lease standards contained in legislation operating in Queensland, New South Wales, Victoria and the Northern Territory have been developed to achieve a similar policy intent despite differences in the regulatory language.

The Queensland Government considers that the *Retail Shop Leases Act 1994* and *Retail Shop Lease Regulation 2006* represent best practice in achieving a balance between the needs of lessees and lessors.

Any moves towards nationally agreed regulations and approaches should not dilute the role that retail tenancy legislation plays in effectively providing a sound basis for the development and growth of the retail sector—from both the lessor and lessee perspective.

List of Attachments

Attachment 1

Retail Shop Leases Act 1994

http://www.legislation.qld.gov.au/Acts_SLs/Acts_SL_R.htm

Attachment 2

Retail Shop Leases Regulation 2006

http://www.legislation.qld.gov.au/Acts_SLs/Acts_SL_R.htm

Attachment 3

Retail Leasing Guidelines

http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_doc.cfm?id=2826

Attachment 4

Lessor Disclosure Statement

Lessee Disclosure Statement

Assignor Disclosure Statement

Assignee Disclosure Statement

http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_cntnhtml.cfm?id=2867

Attachment 5

Legal Advice Report

Financial Advice Report

http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_cntnhtml.cfm?id=2867

Attachment 6

Review of the *Retail Shop Leases Act 1994* - Discussion Paper (2003)

Attachment 7

Review of the *Retail Shop Leases Act 1994* - Policy Review Paper (2004)

Attachment 8

Extract from the Register of Retail Tenancy Disputes – 2002 to 2007

Link to the Register -

http://www.sd.qld.gov.au/dsdweb/v3/guis/templates/content/gui_cue_cntnhtml.cfm?id=45118

Attachment 9

Retail Shop Lease Tribunal Decision 2003/0094 – Unconscionable Conduct

<http://apps.sdi.qld.gov.au/RSLR/search/orderdetails.aspx?d=3806>