



26 July 2007

Mr David Cobau  
Retail Tenancy Lease Market in Australia Inquiry  
Productivity Commission  
PO Box 80  
Belconnen ACT 2616

Dear Mr Cobau,

**Productivity Commission Inquiry – The Market for Retail Tenancy Leases in Australia**

The Law Institute of Victoria (LIV) is pleased to have this opportunity to make an initial submission in response to the Productivity Commission's (Commission) inquiry into the retail tenancy lease market in Australia.

This submission is confined to matters of a non-partisan, drafting and technical nature.

*The Retail Leases Act 2003 (Vic)*

The *Retail Leases Act 2003 (Vic)* (RL Act) took into account submissions made by the LIV in respect of the workings and content of the *Retail Tenancies Reform Act 1998 (Vic)* (which in turn took into account submissions made by the LIV in respect of the *Retail Tenancies Act 1986 (Vic)*). The LIV made further submissions in respect of the workings of the RL Act which were taken into account in the substantial amendments made by the *Retail Leases (Amendment) Act 2005 (Vic)*.

The LIV is reasonably satisfied with the content and workings of the RL Act as so amended, and would like to see its essential content and framework continue.

*A National Approach*

The LIV is in favour of a national approach to retail tenancies regulation especially because of the benefit it will provide to legal practitioners who have clients with transactions in more than one state.

The LIV considers that for the present each state should retain its current legislative controls with the legislation to be as uniform as can reasonably be achieved. The LIV is of the view that complete uniformity is not currently possible due to the significant differences, state by state, in

leasehold and other conveyancing law practice and also due to the differences in the underlying general property and leasehold law applicable, apart from the retail leases legislation.

In particular the LIV wishes to preserve the current system of administration of retail tenancies in Victoria, which LIV members have found to be most successful and acceptable, since 1986, to practitioners and parties alike.

A comparative analysis of the various state and territory legislative provisions will show that there is already a large degree of uniformity.

#### *The Content of Legislation*

In particular the LIV notes that some, but not all, states and territories deal with the rights of tenants to continue their tenancy after the expiration of the lease term. The LIV sees this as an important matter for consideration by the Commission.

Section 21 of the RL Act provides only for limited security by way of a 5 year term. In the experience of LIV members, much of the concern which has been expressed by tenants in respect of unfair lease conditions and practices arise from an inability to negotiate continuing lease terms.

#### *Disclosure and Transparency*

Generally the LIV is satisfied with the current regulation in respect of disclosure of relevant information to tenants before and during the course of the lease term.

The RL Act is a fair example of the disclosure provisions that operate generally throughout Australia and which, in the LIV's view, are working satisfactorily.

These deal with the disclosure of information before the lease is entered into, the disclosure of outgoing information during the course of the lease and the disclosure of times for renewal of leases pursuant to an option granted in the lease before the lease term ends.

#### *Rent Reviews*

The rent review provisions of the RL Act have been refined over the years, and appear to have been generally accepted and are workable.

The one area that is in need of clarification is whether a provision for the capping of rent reviewed to market will be enforceable. However, this is a minor legislative and policy issue.

The LIV is concerned that the valuation process is largely lacking in transparency, and that it would be of assistance to all parties if the legislation placed greater emphasis upon the provision of detailed reasons for valuations and the right to challenge expert valuations. It would also be of assistance to clarify the matters to which a valuer should or should not have regard.

#### *Unconscionable Conduct*

In the experience of LIV members, the unconscionable conduct provisions of the various states' retail tenancies legislation (which reflect the unconscionable conduct provisions of the *Trade Practices Act 1974* (Cth)) 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 perhaps best illustrated by the decision of the Victorian Civil and Administrative Tribunal in *Barbcraft Pty Ltd v Geobel Pty Ltd and AL & AN Pty Ltd* [2003] VCAT 1700.

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. It may also be desirable to extend the application of the legislation to "unconscionable" conduct whenever it occurred, even if this is prior to the commencement of the relevant retail leases legislation.

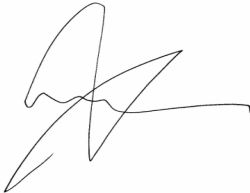
#### *Dispute Resolution*

The pre-litigation alternative dispute resolution procedures administered under the RL Act have, in the opinion of LIV members, been very successful.

Details of the working of these procedures can be obtained from the office of the Victorian Small Business Commissioner ([www.sbc.vic.gov.au](http://www.sbc.vic.gov.au)). The LIV would be most reluctant to consider any reforms in this area that did not include the adoption of these or closely similar procedures.

If you would like to discuss any of the matters raised in this submission please do not hesitate to contact Karen Cheng, LIV Property and Environmental Law Section Lawyer, on 03 9607 0522.

Yours faithfully

A handwritten signature in black ink, appearing to be 'Anthony Burke', written in a cursive style.

Anthony Burke  
Acting President  
Law Institute of Victoria