



Presentation to Productivity Commission – The Market for Retail Tenancy Leases in Australia

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Commissioner, Deputy Commissioner, Ladies and Gentleman

Thank you for the opportunity to present to you today at this Public Hearing. This paper is prepared in response to the Draft Report released by the Productivity Commission in November 2007. Since the release of this report, we have conducted further research and analysis which we would like to table today.

Our comments in relation to the draft report are limited to Chapter 8 – Market information, transparency and disclosure and sections of Chapter 11 – The Commission’s draft recommendations, which relate to market information issues, our area of expertise. (See Appendix 1 – About Leasing Information Services)

This paper will be divided into two sections as shown below:

- Discussing draft findings of the report in relation to our area of expertise
- Recommendations on alternative methods of delivery of leasing data, particularly in States where leasing data is not commonly registered.

Section 1 – Draft Findings

Finding 1 – Leasing advisory and market information services have evolved to provide information to landlords and tenants.¹

We would like to challenge this finding. Where retail leasing data is not freely available, advisory services have not in fact been able to evolve. The Productivity Commission Report states on page 146 that “more information is available in jurisdictions where most leases are registered. Accordingly the most comprehensive market information appears to be available in jurisdictions such as New South Wales and Queensland where lease registration by market participants is more prevalent”.²

In order to test this finding, we researched the market of tenant representatives who specialise in providing retail leasing advice and are not commercial estate agents. The reason, we have excluded commercial agencies, is that they tend to predominately act for Lessors, and are therefore often conflicted in acting for lessees.

The results of our findings show that leasing advisory services have only evolved in States where there is leasing information available in the public domain. Leasing advisory and market information correlate, particularly in relation to companies that act predominantly for tenants. Logically, it is virtually impossible for a tenant representative to provide comprehensive leasing advice, without an extensive and up to date database of rental and other information.

Table 1, below, shows a list of known retail leasing consultants in the Australian market by State. The list excludes major agents who act for both tenants and landlords. Whilst this list may not include every tenant representative in the retail industry, it is indicative of representation by State.

Queensland	NSW / ACT	VIC	SA	WA
18	21	9	6	6
16	19	7	4	4
Independents				

In WA, VIC and SA there is a scarcity of registered retail leasing data. The number of retail advisory firms servicing the local State market is disproportionately lower than in States where leases are predominantly registered, namely, NSW, QLD and the ACT. Furthermore, if you exclude the major multinational companies, who have their own private databases, as well as access to the public registers, the actual number of independent firms providing retail leasing advice is alarmingly low.

¹ Productivity Commission Draft Report, *The Market for Retail Tenancy Leases in Australia* (2007) 147.

² Productivity Commission Draft Report, *The Market for Retail Tenancy Leases in Australia* (2007) 146-7.

Supporting this view is Martin Dempsey of the Western Australian Retailers Association. He stated, "There are a couple of firms in WA that act for franchisors, however, the lions share act for lessors, depending on the group. This is because there is virtually no leasing data available, making tenant representatives reluctant to assist retailers as all the information resides with the Landlords".

Furthermore, the Australian Financial Review reported that there was a severe shortage of valuers in WA willing to act for tenants in market rental reviews.³ This is a direct result of the lack of publicly available information. This is creating a major problem for retailers with market rent reviews, which predominantly affects retailers in major strips and larger anchor tenants.

Therefore, this finding by the Productivity Commission should more likely reflect the following statement.

Leasing advisory and market information services have evolved in States where registered data is predominantly available.

³ Perinotto, Tina, 'Retailers in west want to join the rest on leases' *Australian Financial Review* (16 October 2007) 67.

Finding 2 – In some States, where the incidence of registration is higher (potentially related to reference clauses in existing retail tenancy legislation, for example, in New South Wales), many retail tenants seemingly do not make use of the available information, or of specialists who analyse and report on this information.⁴

In order to analyse the availability and the use of leasing information in Australia, one must examine the history of retail leasing data and the providers who service the industry. Companies such as Leasing Information Services (LIS) have only existed for a very short period of time, in our case a little over three years. Prior to the introduction of Leasing Information Services, registered leasing data was predominantly purchased from the Land Titles Office, over the counter or via an information broker. This process was expensive, time consuming and frustrating. However, with the advent of advanced computer technology all leases in NSW, QLD and the ACT are now electronically scanned by the relevant Land Titles Offices (LTOs) and can be uploaded electronically in a matter of minutes. This has created the ability to provide mass data, on a scale that was not possible five years ago.

The considerable ease with which leasing information can now be obtained has meant that it is now cheaper than ever for small business operators to utilise the data. The fastest growing sector of users is in the 1–10 store categories; these are wholly managed by small independent operators. The access of these users to leasing data has been facilitated by the introduction of special discounted services by information providers such as LIS. LIS for example offers small companies access to their data base for a nominal fee of \$300 for ten leases. This is affectively less than the acquisition cost of obtaining this data.

Given this history, we challenge this finding. In our experience the uptake of leasing data has been phenomenally embraced by the retail leasing community. Evidence of this is in the subscription numbers to our services which number over 300 retailers and includes multinationals, investors, governments, industry groups, universities and independent operators. In total we estimate that the number of shops that now have access to leasing information data in NSW, QLD and ACT, either via their corporate franchisor, industry associations, tenant advocate groups, valuers, buyers groups or individual operators is in the order of **20,000 – 30,000 retail shops. This has been in the space of merely three years.**

This gives some sort of indication of the demand for retail leasing information in both shopping centers and strips.

⁴ Productivity Commission Draft Report, *The Market for Retail Tenancy Leases in Australia* (2007) 159.

Finding 3 – It is unclear whether tenants in these States and Territories (NSW, QLD, ACT, NT) are in a significantly improved negotiating position and consequently are making better business decision than their counterparts in those jurisdictions where lease registration is less common.⁵

In order to test this finding, we conducted a survey of our own clients on 31st January, 2008.

The criterion for selection was that the retailer must be a paying subscriber and must have a multi-site portfolio that consisted of at least one shop in a jurisdiction where data is predominately not registered, i.e VIC, WA, SA and TAS. The Productivity Commission was also notified of this survey on that day. The survey was conducted at random and without notice. The survey was conducted on the basis that the organisations would be kept confidential.

Survey Questions

- 1. If comprehensive and up to date retail leasing data were available in Vic, SA, WA and Tas, would your organisation, find this information useful?
Yes or No**

- 2. If comprehensive and up to date retail leasing data were available in Vic, SA, WA and Tas, would this allow your organisation to make better business decisions?
Yes or No**

⁵ Productivity Commission Draft Report, *The Market for Retail Tenancy Leases in Australia* (2007) 159.

We received over 109 responses on the day, with the results shown below:

Survey – 31 Jan 08	Number	%
Yes to Both Questions	98	90%
No to Both Questions	1	1%
Yes to First Question Only	0	
Yes to Second Question Only	0	
Did Not Respond	10	9%
Total Responses	109	

We estimate that the 98 respondents represented more than 10,000 stores across Australia.

A couple of respondents commented further on the survey questions.

Andrew Nock, Group property manager of Gazal Corporation Limited stated that “up to date retail leasing data in these jurisdictions would be extremely helpful in making valued business decisions. Without this data we are flying blind”.

Aaron Green, national property manager of Medibank Private Ltd added that “information must be timely. All lease registrations need to be done with three months execution. 12 months and longer is too outdated for registration.

We then conducted a further telephone survey of some of the larger retailers to ascertain whether they would be prepared to pay for such a service, either to a private data company like ours, or to a government organisation, for this data. There was a 100% positive response rate, on the basis that it was of a similar cost to other States such as NSW, ACT and QLD.

Correlation between dispute resolution and the availability of retail leasing data

The second area of research we undertook was in relation to whether the availability of registered retail leasing data actually resulted in a speedier settlement of retail leasing disputes, covering both rental disputes and market rent reviews. Although the majority of specialty leases in shopping centers do not contain a market rent review, the opposite is true for leases in strips, direct factory outlets, bulky goods centres, highway retail and other formats. This in fact forms the bulk of the retail leasing market in Australia.

In order to test this, we conducted research in NSW, where registered data is predominately available, and WA where less than 5% of retail leases are registered.

In NSW figures supplied by the Retail Tenancy Unit which is administered by the NSW Government, revealed that of the last 379 mediation reports between July 2006 and December 2007, 208 had "rent" listed as an issue for mediation. Of these 208, an average of 80% had been resolved within five weeks of applying for a hearing.

By contrast, in WA, we conducted our own research into the area of dispute resolution, by examining records of pharmacy retailers. We were given access to records by a very senior member of the Pharmacy Guild of Western Australia, who wished to remain anonymous.

These retailers had a high proportion of market rent reviews in their leases. In several of the leases that we examined, there were market rental reviews that dated back to 2005 that were subject to a WA State Administrative Tribunal (WASAT) assessment and remained unresolved. One particular tenant had several reviews in the one lease unresolved.

Martin Dempsey, chief executive of the WA Retailers Association, stated in the AFR November 2007, that the assessments of the landlord's and tenant's valuers in relation to market rent reviews result in a 100% disputation rate.⁶ Disputes are taking years to settle as, in many cases, the WASAT does not have sufficient leasing data to make a decision. The WASAT then seeks to appoint a determining valuer; however, in many cases valuers are unable to carry out this task as there is insufficient public data to make the determination.

Whilst in Perth, we also attended a meeting with the current head of the Western Australian Valuer General, Mr Garry Fenner, Mr Martin Dempsey and several State government ministers in relation to this problem.

At the time of the meeting, Mr Fenner, who collects rental information under the constitution of his position, was considering providing this data to the WASAT. The purpose of this would be to speed up the process of dispute resolution.

In contrast with WA, the NSW settlement of market rental disputes is smooth and sees the majority of disputes resolved in six to eight weeks. The process involves the appointment of panel of retail valuers by the Administrative Decisions Tribunal (ADT).

⁶ Perinotto, Tina, 'Retailers in west want to join the rest on leases' *Australian Financial Review* (16 October 2007) 67.

These valuers must be approved by the NSW division of the Australian Property Institute. I am on that panel.

If a lessee and lessor cannot agree on a market rent review they may choose from a panel of three retail valuers. The valuer is then appointed by the ADT acting as an expert, with each party paying 50% each. The assessment is made within six weeks and each party has the right to have the initial valuation reviewed by another valuer.

Overall, we can categorically conclude that the provision of publicly available retail leasing data, leads to a reduction in the speed at which disputes are resolved.

Finding Five – The regulatory structure for lease registration is already in place in all jurisdictions. While there is scope for market participants to use these provisions more fully, the Commission’s preliminary assessment is that there appears to be little justification for further government intervention as there are currently no legal impediments to the registration of retail tenancy leases.⁷

We know that there is overwhelming support for retail leasing data across every State in Australia.

Supporting this view is the Shopping Council’s submission to the Productivity Commission. This stated, “to improve the transparency of the retail tenancy market there should be mandatory registration of leases in those States which presently do not require registration (Victoria, South Australia, Tasmania and Western Australia) to ensure details of rents or other lease conditions are publicly available to inform retailers during lease negotiations”.⁸

Similarly the Australian Property Institute (API) and the Royal Institution of Chartered Surveyors (RICS) both support registration of data across Australia. The Australian Retailers Association, the Western Australian Retailers Association, the Franchise Council of Australia and Council of Small Business to name a few, all similarly support a national system of compulsory lease registration.

In fact it is hard to find an organisation that is opposed to it.

What the Commission may be attempting to say here is that politically it may be very difficult for mandatory registration to be achieved in WA, SA, VIC and TAS. This is because registration is governed by the *Real Property Act* in each State and, being a matter for each State, is out of the jurisdiction of the Federal Government. The Federal

⁷ Productivity Commission Draft Report, *The Market for Retail Tenancy Leases in Australia* (2007) 160

⁸ Productivity Commission Draft Report, *The Market for Retail Tenancy Leases in Australia* (2007) 156 (submission no. 83, p. 3).

Government would be loathed to enter into a battle with each State and force changes to each State's Real Property Acts.

The Law Society of Victoria has also raised the issue of costs in implementing registration. In the following section, we outline two ways of providing retail leasing data, without any major additional cost to any sector.

Section Two – Possible solutions to create comprehensive leasing information services in WA, SA TAS and VIC.

Solution 1

It is possible to create a fully informed market for both tenants and landlords without having to register leases and affect major changes to the *Real Property Act* of those States.

The Victorian Small Business Commission already collects all retail leases and records information such as; the parties to the lease, the term of the lease and any option period, It was set up originally to ensure that tenants were receiving their minimum five year term. See http://www.sbc.vic.gov.au/landlord_solicitor_agent_info.asp⁹ This system could be augmented to capture those other relevant fields, which summarises the main commercial terms of the lease such as store area, commencement date, expiry date, term of the lease, options, initial net rent, rent escalations, promotions levy, outgoings, bank guarantee and permitted use.

If this information was released to the Public, for a fee, this would avoid the need to change the *Real Property Act* and would also streamline the leasing process, as tenants and information providers would not have to wade through the 60 to 200 pages of the lease to find the key terms. Costs to the private and public sectors would also be avoided creating a fully informed and efficient market.

Alternatively, if a particular State Government did not want to administer the collection of this information the private sector would be more than willing to fulfill this role, thereby relieving the burden on public sector resources.

Such a system could be set-up in each State by a simple amendment to the Retail Leases Act in those States.

⁹ Office of the Victorian Small Business Commissioner, Landlord, Solicitor, Agent Information, <http://www.sbc.vic.gov.au/landlord_solicitor_agent_info.asp> at 28 Jan 2008.

Solution 2

Another solution would be to utilise the Valuer Generals power for collection of rental data for the purposes of rating retail land. Given that the WA Valuer General already collects and updates this information, the Valuer General could be authorised to release this data to the public, as occurs with residential data. This would have no additional cost to the public or private sectors and would not breach any non-disclosure requirements.

We have not investigated whether the Victorian, South Australian and Tasmanian Valuers General, have the same power as the Western Australian Valuer General, however, we would assume that they would given that they must rate shopping centres in their jurisdictions.

Conclusions

There is overwhelming evidence that the availability of leasing information in shopping centres and strips leads to more informed decision-making by retailers. It also expedites dispute resolution and facilitates the settlement of cases involving market rent reviews.

There is an unprecedented level of demand for leasing information in all States, including those States that do not have comprehensive lease registers, namely WA, SA, VIC and TAS. The availability of leasing information is supported by most of the major participants in the industry, including the Shopping Centre Council and peak retail bodies and industry associations.

It is possible to provide leasing data at virtually no additional cost to the private or public sector in those States which do not have comprehensive lease registers without changing the Real Property Act in each State. This could be achieved by simply amending the Retail Leases Act in each State to collect the key terms of a lease and disseminate it to the public. This would avoid any additional costs to tenants and landlords. Alternatively, allowing the Valuers General in WA, VIC, SA and TAS to distribute their retail leasing data to the public could also be considered.

Appendix

What is Leasing Information Services (LIS) and what do they do?

LIS is an independent private company that collects retail leasing information and disseminates the information to its clients, via the internet on www.leaseinfo.com.au. The group consists of retail valuers and land economists, retailers and has an advisory panel of Academics and Industry Associations.