

Productivity Commission  
The Market for Retail Tenancy Leases in Australia

Outline of Points for Oral Submission to Public Hearing to be held in  
Brisbane on 11 February 2008

Mandatory Registration of Leases  
(Section 8 of Draft Report)

1. Lease registration is currently voluntary in each State and Territory (refer to Table 8.1 of the Draft Report).
2. Leasing practice differs in the various States and Territories in relation to registration.
3. The differing leasing practice stems from the various Torrens Title legislation in each State and Territory which confer an indefeasible leasehold title upon tenants.
4. Generally speaking, short term leases to tenants who are in possession do not need to be registered to give such tenants an indefeasible leasehold title.
5. The concept of a 'short term' lease differs between jurisdictions:
  - NSW, Qld, Tas, ACT – short term means 3 years or less;
  - SA and NT – short term lease means 1 year or less;
  - WA – short term lease means 5 years or less;
6. The exception is Victoria where there is no upper limit on the length of the term – a lease to a tenant who is in possession grants an indefeasible leasehold title regardless of the term. Consequently, leases are rarely registered in Victoria.
7. A tenant under a lease which is not a short term lease should ensure that the lease is promptly registered:
  - so that the lease is effective at law; and
  - to protect the tenant against a successor in title of the landlord.
8. Retail tenancy legislation in all States and Territories (except Qld) mandate minimum 5 year terms so that in all jurisdictions (other than Vic, Qld and WA), retail leases would normally be expected to be registered.
9. However, in all jurisdictions (except WA) where minimum 5 year terms are imposed, it is possible to circumvent the minimum 5 year requirement by obtaining relevant certificates.
10. In Qld and the ACT, before lodging a lease for part of a building (such as a shopping centre) for registration, a survey plan of the leased shop prepared by a registered surveyor must be

attached to the lease. The costs to prepare such a plan (which are typically passed on to tenants) range from \$300 to \$500.

11. Registration fees to register a lease (which are also typically passed on to tenants) are set out in Table 8.1 of the Draft Report.
12. In those jurisdictions where registration is not required to obtain indefeasibility, tenants would be justified in objecting to incurring extra costs merely to improve the transparency of the retail tenancy market.
13. There is often a significant time delay between the signing of a lease and registration due to the need to obtain mortgagee consent (where required or applicable) and prepare a survey plan of the leased shop. Mortgagee consent can often take several months to obtain. Consequently, by the time a lease is registered, the information may be 'out of date'.
14. Where lease incentives are given by a landlord to a tenant, they are often not documented in the lease. Rather, they are commonly included in some form of side deed which is intended to remain confidential. As a result, registration of the lease may not disclose the effective rent payable by the tenant.
15. If the objective is to improve the transparency of the retail tenancy market then my suggested alternative to registration of leases is to require the parties to the lease to prepare, sign and lodge with a central authority an epitome of the lease in a prescribed form which sets out the essential lease terms including any lease incentives.
16. The epitome should be required to be signed by both parties to the lease to ensure that there is less scope for inaccurate information being passed on to the central authority.
17. The central authority would be charged with creating a public register of the essential terms of leases which it would make available for searching for a nominal fee using a variety of parameters.
18. The cost to the parties to prepare, sign and lodge such an epitome should be minimal given that:
  - the essential commercial terms of a lease are foremost in the parties minds when they sign the lease; and
  - most landlords (and some larger tenants) require some form of legal 'sign off' from their solicitors which sets out the essential lease terms before they will sign the lease.

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4 February 2008