

31st January 2008

Retail Tenancy Leases
Productivity Commission
PO Box 1428
Canberra City, ACT. 2601



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Dear Sir or Madam,

Re: Response to the Productivity Commission Draft Report on Retail Leases in Australia

The Retail Traders' Association of Western Australia (RTAWA) is the oldest and is the broadest and largest representative association of retailers in Western Australia. The RTAWA has been in existence for 85 years at this time.

In response to your draft report we would pass the following comments and responses.

1. General Comments:

The RTAWA notes that we have concerns with some assumptions upon which the Commission relied in making their conclusions in the draft report. In particular the report does not take into account the disproportionate market power of landlords over small tenants. This is particularly applicable in the case of shopping centre landlords who enjoy higher turnover and retail demand for space within these retail developments over others. The draft report suggests that any such powers may dissipate through time, but offers little other assistance.

Shopping centres may only represent 20% of the retail leasing market, but they represent 40% of national retail (Calculations from MapInfo Dimasi for 2005/06). These average statistics demonstrate the dominance of shopping centres throughout Australia and perhaps, more so here in Western Australia.

We understand that shopping centres, in particular, regional shopping centres have this market power principally because there are few of them and they have long queues of prospective tenants awaiting available tenancies. Low vacancy rates may reflect this factor, rather than that all is well and functioning in the retail lease arena.

In the Perth metropolitan market potential monopoly positions exist. Regional shopping centres are controlled by relatively few companies, even with some cross ownership; sub-regional shopping centres are only a little more diverse in ownership. Most shopping centres (regional and sub-regional) are site specific within locations that are either unique or exclusive, therefore without opposition or direct competition, hence to enter that specific market, the retailer has little option. In most cases, rental reviews commence with the landlords aspirations; they have little, if any, relationship to the market.

Retail leases in major shopping centres (regional and sub-regional) are generally leased on the basis of annual reviews, be it CPI or Market alternated/varied over time. Small retailers are concerned that many retailers see such huge increases in rent at the renewal of a lease term.

The RTAWA notes that small retailers continue to express concerns about the current imbalance of bargaining power that they have with landlords. Shopping centre tenants are especially of note where centre managers/owners have access to tenant turnover figures. An unfair advantage can be gained here, as the calculating of profit margins is very easily extrapolated from these figures, thus fully exposing the



marketing and financial position of the tenant. This imbalance can potentially have severe consequences on the viability and future entrepreneurial encouragement/growth opportunities for a small tenant. The RTAWA is most concerned with any changes or reviews of current legislation, as suggested by the Commission, which may act to worsen the existing power imbalance between landlord and tenant.

The RTAWA also notes that the increasing demand in Western Australia for retail consultants to negotiate, on behalf of retailers, suitable lease conditions, is a further sign that retailers are not able to handle the current negotiations, the imbalance of bargaining power with landlords and the ability to gain the required market information for themselves.

Similarly, with the expiration of a lease, no certainty of renewal for a tenant is available. Even long term tenants at the end of their leases, have no security, no goodwill and stand to lose their livelihood at the sole discretion of the landlord. We appreciate that this is a very tenuous point and that there is a great deal of conjecture surrounding this issue, but when a landlord fails to renew a tenancy 'for no just cause' then surely something should be able to be done to control these circumstances. At present, there is a 'void' in the legislation; the retail tenancy legislation and the Trade Practices Act are silent on the matter of lease renewals.

A further comment concerns the assignment of leases. Currently, under the legislation, the lessee transfers liabilities to the assignee. This is fair, considering that the landlord has the right to 'check out' the assignee. It is unfair that a lessee remain liable on matters created by the market, shopping centre or assignee that are totally out of the lessee's control once the lease is assigned. The RTAWA therefore supports regulatory measures that protect retailers from continuing liability following an assignment.

2. Looking at the recommendations of the Commission:

Measures for the immediate future

Avoid more stringent and prescriptive regulation.

Accordingly, in the immediate future, States and Territories should not pursue measures that increase the prescriptiveness of retail tenancy legislation nor further widen the gap between the retail tenancy market and the broader market for commercial tenancies.

In many circumstances the RTAWA has argued against regulations that inhibit a freer market, in such areas as trading hours, industrial relations, liquor and petrol distribution and industry licensing. However, in circumstances where there is evidence of market failure and in the absence of a competitive market the RTAWA has argued for the intervention of regulation to support the development of a fair, equitable and competitive market. The retail leasing environment is characterised, from time to time, and to varying degrees, as a sector of the economy where anti-competitive conditions may prevail in the absence of regulation.

The Commission concludes that some of the current legislation has its own unintended consequences, however, small retailers have expressed their concerns to the RTAWA that most items mentioned by the Commission, because legislation exists, are now able to be negotiated by the parties involved, which means that at least a balance exists that gives the tenant a minimum requirement and the ability to fairly negotiate on concerns that were not available without legislation, for example, the term of lease can now be effectively lessened should the tenant require, but at least the minimum is set that protects the tenants investment. Whilst the RTAWA continually aspires to the achievement of a competitive marketplace it



is not supportive of the removal of regulations that have helped remove the imbalance in bargaining power between landlord and tenant

The Commission has recommended that a pause in state legislation is warranted. The RTAWA may support this move, but only where this pause is effectively directed towards the goal of national consistency, and a substantive plan, or directive, is in place to work through the various state regulation differences toward this goal. The RTAWA supports the achievement of national consistency within the retail tenancy market.

Improve the accessibility and transparency of information

Further clarify and align definitions of unconscionable conduct

Draft Recommendation 1

The following measures should be pursued by State and Territory governments to further improve transparency and accessibility in the retail tenancy market.

- **Enhance the use of simple language in all tenancy documentation and provide clear and obvious contact points for information on leases and dispute resolution**
- **Elaborate the significance of jurisdictional differences in the definition of unconscionable conduct and align definitions where practicable**

The RTAWA supports tenancy laws and regulations written in simple language. Further, the RTAWA supports, the improvement of links between related government agencies that support or hold relevant retail lease information/dispute resolution in order to ensure that contact points for information on leases and dispute resolution are obvious.

The RTAWA also supports the clarification of unconscionable conduct definitions between states.

Improve the national consistency of tenancy information

Draft Recommendation 2

State and Territory governments should seek to improve the consistency of lease information across jurisdictions in order to lower compliance and administration costs. They should:

- **Encourage nationally consistent (plain English) models for retail tenancy leases and for tenant and landlord disclosure statements (for example, all jurisdiction and other specific provisions could be set out in annexes to the standard documents).**
- **Institute nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolution.**

The RTAWA supports creating a national retail lease model with jurisdictional amendments noted. The RTAWA believes that this along with nationally consistent disclosure statements would facilitate the removal of a great deal of misunderstanding and associated costs between jurisdictions.

The RTAWA supports the consistent collection and reporting on a national basis of the incidence of tenant inquiries, complaints and dispute resolution as being extremely beneficial in highlighting the recurring problems and challenges within the retail lease arena.



Lease registration - The commission invites comments on the feasibility and benefits of more widespread lease registration and facilitation of this process by landlords

Western Australia has no legislation that enforces the registration of leases, it is only voluntary, and therefore the RTAWA submits that Western Australia needs compulsory lease registration regulations to be enacted to give more transparent information, particularly with rental reviews/market rents. However, enforcement of registration outside of those retail leases clearly identified within a shopping centre may become a problem.

The Commission has requested ideas to resolve and achieve the benefits of a more widespread lease registration and facilitation process; the RTAWA suggests the following by way of an alternate solution for Western Australia.

The RTAWA is supportive in matters that help to remove the imbalance in bargaining power between landlord and tenant and submits that the requirement that leases be registered would greatly assist in achieving better disclosure and more complete information available to tenants. However, registration is only a part of the solution; the RTAWA submits that the extraction, upkeep and presentation of the information in a relevant format are really the key issue.

The RTAWA having considerable knowledge in this area puts forward the following thought for consideration. Our suggestion is that the RTAWA become an independent information base/depository for all retail lease/rental information. This could be done by the RTAWA creating an electronic database that landlords can access to input the required information. The database is therefore formatted electronically and completed by the landlords themselves inputting/updating the required tenancy/rental information. By opening access to this database to all contributing landlords, landlords would gain up to date rental market knowledge and therefore be encouraged to participate. Tenants, consultants, valuers, etc would find it more convenient to access this information through the RTAWA as we would be able to interpret and present the information in a format as required by these parties. The RTAWA could also be the point of registration of retail leases in Western Australia, if required.

Voluntary national code of conduct for shopping centre leases – The commission invites evidence on the feasibility and benefits associated with the introduction of a voluntary national code of conduct for shopping centre leases enforceable by the ACCC

The RTAWA strongly supports this path of self governance in preference to further legislation; however, all stakeholders would need to be closely involved in the drafting of such a code.

Options involving more substantial change:

Relax constraints on commercial decision making

Draft Recommendation 3

State and Territory governments should relax key restrictions in retail tenancy legislation to better align the regulation of the retail tenancy market with the broader market for commercial tenancies

Whilst the RTAWA continually aspires to the achievement of a competitive marketplace it is not supportive of the removal of regulations that have helped remove the imbalance in bargaining power



between landlord and tenant. In many circumstances the RTAWA has argued against regulations that inhibit a freer market, however, in circumstances where there is evidence of market failure and in the absence of a competitive market the RTAWA has argued for the intervention of regulation to support the development of a fair, equitable and competitive market. The retail leasing environment is characterised, from time to time, and to varying degrees, as a sector of the economy where anti-competitive conditions may prevail in the absence of regulation. The RTAWA expresses the concerns of smaller tenants in that even under current legislation, imbalances occur between landlord and tenant, and for the Commission to recommend that governments relax key areas of retail tenancy legislation is of major concern to the RTAWA

Further, the RTAWA, submits that research and investigations into the broader market for commercial tenancies have not been offered by the Commission and therefore any recommendation to rationalise the retail tenancy legislation to align with commercial tenancies is most inappropriate at this time. The RTAWA has no supportive evidence that the plight of small tenants within the commercial field is any better than those within the retail tenancy area. In fact, the limited evidence to hand is indicative that small tenants are in fact worse off in the commercial lease market.

Improving national consistency of tenancy regulation

Draft Recommendation 4

As necessarily prescriptive elements of retail tenancy legislation are removed, State and Territory governments should seek, where practicable, to establish nationally consistent template legislation for retail and commercial tenancies available to be drawn down to each jurisdiction

The RTAWA does not necessarily agree that there are ‘prescriptive elements’ that do need to be removed from current retail lease legislation and therefore questions the initial thrust of this recommendation. Further, the RTAWA, seriously questions the validity of the Commissions assumptions that removing retail tenancy legislation to align with existing commercial tenancy legislation will alleviate small tenants concerns in either market. The RTAWA without strong evidence to the contrary would not support any lessening of retail lease legislation to achieve alignment with current commercial tenancy legislation at this time

However, taking these concerns onboard, the RTAWA does support national consistency of retail tenancy legislation between jurisdictions in Australia. Hence, creating nationally consistent template retail lease legislation would be well worth achieving as it would facilitate the removal of a great deal of misunderstanding and costs that currently exists between jurisdictions.

Explore opportunities to reduce constraints on the supply of retail space

Draft Recommendation 5

While recognising the merits of planning and zoning controls in preserving public amenity, States and Territories should examine the potential to relax those controls that limit competition and restrict retail space and its utilisation.

The Commission has commented that it found Western Australia to have the most restrictive zoning and planning requirements in Australia. The RTAWA is supportive of any suggested changes to these laws that can be positively shown to increase the retail rental competition in this State.



Longer-term change

The commission invites comments on the desirability and feasibility of establishing a nationally consistent framework for tenancy leases through the drawing down of nationally consistent template legislation for commercial (including retail) leases to each jurisdiction.

The RTAWA supports a nationally consistent approach to retail tenancy leases within Australia, providing that such framework is appropriate to cover the RTAWA's current concerns to protect small retailers in tenancy matters. Feasibility of this goal currently depends on the ability of all states to work together at the one time to discuss, agree and draft such legislation. Unfortunately, without a national directive, the past has clearly shown that whilst the goal is highly commendable, the reality is indifference.

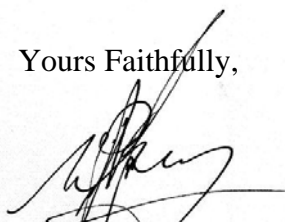
However, there is still much more to be done to alleviate the power imbalance between the small tenant and the landlord, in the retail field and no doubt, in the commercial arena as well.

Adjustment issues and impacts

The commission invites evidence on the costs and benefits of its draft recommendations for retail tenants, landlords, investors and the community generally.

The RTAWA is of the opinion that by the establishment of a nationally consistent approach to retail tenancy leases this will generate significant cost savings and benefits to retailers, especially those whose operations have multiple state representations. Similarly, a standard approach to disclosure documentation and dispute resolution would add greatly to these benefits and cost savings.

Yours Faithfully,



Wayne Spencer
Executive Director