

Statement to PC hearing:

Retail Tenancies inquiry.

The FCA supports the PC (draft report) inclination toward:

- Improved dispute resolution and information disclosure
- Alignment of State regulations to approach uniformity
- National consistency in legislation
- Introduction of a one-page summary of lease terms and conditions (which the FCA believes could provide the documentary base for a national register)

The FCA is disappointed the PC does not regard landlord behaviour (as described in many submissions to the PC) as warranting intervention, though it accepts that another attempt at more prescriptive legislation may not be the most fruitful course in addressing well-documented market problems.

It contests the PC conclusion that prohibiting landlord demands for lessee turnover information would hamper decision making in the shopping centre model and constrain the efficient operation of the market'. FCA contends it would hamper only landlord price gouging and perceived profitability maximisation. Some shopping centre owners are demonstrably intent on salting perceived floorspace values by use of market manipulation measures such as cash incentives and rebates which create an unreal rental value picture when not disclosed alongside nominal rent. Also, without explicit explanation of the difference between the valuation and rental assessment process in a shopping centre compared to a non-centre retail outlet, the PC assertion could be taken to imply that shopping strip landlords are operating in a constrained market, presumably to the benefit of lessees. The negative growth of strip shopping precincts in areas close to large shopping centres suggests this approach is flawed.

The FCA is encouraged by the PC's interest in a Retail Tenancy Code of Conduct and strongly urges the Commission to recommend this in its final report. The Code of Conduct has been highly effective in the franchising sector, where agreement dispute levels have dropped dramatically, to below 1%, since the introduction of the ACCC-policed Franchising Code of Conduct.

The FCA also urges the Commission to recommend national harmonisation of legislation and regulation, including refining dispute resolution to allow independent low-cost mediation where it is desired by landlords or lessees and to prohibit the landlord practice of demanding business sales figures from lessees or, alternatively, creation of an independent 3rd party where sales figures may be held, as well as landlord shopping centre tenancy information.

The FCA recommended

- National legislation, such as a mandatory code, administered by the ACCC
- Prevention of landlord-demanded lessee sales figures
 - o A 'compromise' potentially being disclosure to an independent third party

The FCA observed that:

- While well intentioned, legislation had failed to protect tenants from potentially business debilitating rental hikes, especially in big shopping centres at times of lease agreement renewal
- The sales figures demands made it easier for landlords to press for above real market rents that they understood tenants had the capacity to pay. The inherent market distortion had the potential to seriously hurt small lessees, but not necessarily push them out of business. Their lack of economic power and personal circumstances often meant they were reluctant to 'walk away' from unconscionable rent hikes.
- The 'Unconscionable conduct' provisions of the TPA had not been successfully prosecuted by the ACCC
- Information available to landlords (particularly in shopping centres) is usually far greater than that available to lessees, lessening rental renegotiation power for lessees.
- In States/Territories where tenancy registers did exist, landlord commitment to timeliness and true representativeness in the information provided was weak.
- In many cases, lessees aggrieved at what they regard as intimidatory tactics in renewal processes have not complained for fear of economic reprisal.

The FCA held that initiatives were needed to ensure:

- Tenants had longer guaranteed tenure
- Tenants were not subjected to excessive end of term rental hikes
- Greater information availability for tenants, via mechanism such as a national tenancy register

- Improved efficiency and effectiveness of dispute resolution, possibly using an expert panel of mediators
- Landlords were not able to penalise tenants for using collective bargaining
- Simplification of State laws, including common disclosure documentation and requirements

The FCA has not formally considered, but is positively disposed towards:

- Measures that empower the player with least power in rental renewal negotiations – the lessee (especially franchisees)
- Pre-entry education for all imminent lessees, including a possible co-operative role for Government and organisations such as the Property Council, the Shopping Centres Council, the Retailers Association and the Franchise Council.
- A risk statement to be presented to lessees by landlords before they sign tenancy agreements (and for which they may need to sign an acknowledgement of having read and understood and/or sought advice to understand obligations)
- Simplification of tenancy agreements, possibly incorporating standard terms and conditions in a similar way to real estate contract of sale.
- A one-page summary of key terms and conditions which could form the document base for a national register of tenancy agreements...with key financial information reflecting the effective rent (nominal plus incentives, rebates etc)
- Dispute resolution which is required to be completed before lease expiry

** The FCA intends to supplement its formal submission with current lease renewal examples drawn from current franchisor and franchisee experiences, on condition this information can be presented to the Commission confidentially.