

RETAIL TENANCY LEASES
Productivity Commission
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INQUIRY INTO THE MARKET FOR RETAIL TENANCY LEASES IN AUSTRALIA: PRODUCTIVITY COMMISSION DRAFT REPORT

INTRODUCTION

Thank you for the opportunity to comment on the Productivity Commission's Draft Report on The Market for Retail Tenancy Leases in Australia.

The Small Business Development Corporation (SBDC) supports the Commission's proposal of improving those aspects of the regulatory framework that are working well. In particular, dispute resolution mechanisms and the mandatory provision of disclosure statements. The SBDC also agrees with the Commission's assessment that while the retail tenancy market is working reasonably well, there is scope to improve its operations.

The Commission has formed the view that 'key restrictions' exist in the retail tenancy market impeding the efficient operation of the market, and that States should amend their retail tenancy legislation to wind back these restrictions. However, through its commercial tenancy advisory service, the SBDC evidences retail tenancy market place problems on a daily basis at the operational level. This contact with the market leads the SBDC to believe that regulatory intervention, in the form of minimum standards that govern behaviour, is required to protect those most vulnerable and ensure a healthy retail tenancy market.

The SBDC agrees with the Commission that changes to the *Trades Practices Act 1974* (TPA), such as the unconscionable conduct provisions, potentially provide more protection to small businesses, which could aid improved regulation of the retail tenancy market. However, the practical reality is that small business tenants, in particular, have been unable to avail themselves of the TPA protections because of the prohibitive costs of legal proceedings and the uncertainty of what constitutes unconscionable conduct. Further, the SBDC considers the current unconscionable conduct principle does not offer protection in specific areas requiring attention such as lease end.

The SBDC's comments on the Commission's Draft Recommendations are set out below, followed by separate comment on the issues of lease registers and voluntary codes of 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.***

Impact on Small Business

Generally, improving transparency and accessibility of information in the retail tenancy market will assist small business to be better informed before entering into leases. Use of simple language in all tenancy documentation will significantly assist small business landlords and tenants to understand their leasing rights and obligations.

Providing clear and obvious contact points for information on leases and dispute resolution could help reduce the incidence and length of disputes between landlords and tenants. Further, improving links between relevant organisations dealing with tenancy matters will increase understanding of the needs and difficulties facing stakeholders, which will enable a more holistic approach to supporting the retail tenancy market.

Clarifying what constitutes unconscionable conduct would assist small business operators to more clearly identify whether or not an unconscionable conduct claim is likely to exist in their particular circumstances. Such clarification would help to prevent small businesses expending unnecessary costs, time and effort on ill-founded claims.

SBDC Comment

The SBDC strongly supports Draft Recommendation 1 in relation to the provision of more transparent and accessible information in the retail tenancy market and the use of simple language in all tenancy documentation. However, the SBDC considers that this should be supplementary to current legislation as, by itself, it is not a potent enough action to address the difficulties that exist in the market.

Providing clear and obvious contact points for information on leases and dispute resolution is highly desirable. The SBDC's experience is that a significant number of tenants and landlords are unaware of the resources available to assist in their leasing operations.

The SBDC also considers that the links between dispute resolution bodies, such as the State Administrative Tribunal in Western Australia, and advisory bodies, such as the SBDC need to be significantly improved. Improving these links would better clarify dispute resolution procedures, interpretations of the *Commercial Tenancy (Retail Shops) Agreements Act 1985* (CTA) and facilitate more efficient resolution of retail tenancy disputes. To date, the SBDC has found it difficult to establish an effective relationship with the SAT.

Additionally, existing dispute resolution bodies like the SAT need to ensure that their processes are not unnecessarily complex and that sufficient mediation is provided early in the dispute process to give parties a chance to resolve issues in a non-adversarial environment.

In relation to elaborating the significance of jurisdictional differences and aligning the definitions of unconscionable conduct outlined in Draft Recommendation 1, the SBDC would only comment that any aligning of definitions should not lead to 'lowest common denominator' legislation.

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.***

Impact on Small Business

Improving the consistency of lease information across jurisdictions and encouraging nationally consistent (plain English) documentation would be welcome by those small business operators in Western Australia operating across State borders. As suggested by Draft Recommendation 2 this would lower compliance and administration costs. Further, this approach would provide for easier understanding of documentation.

Instituting nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolution would assist to more clearly identify small business leasing issues that require attention either administratively or legislatively.

SBDC Comment

To the extent that nationally consistent retail tenancy leases and disclosure statement models establish best practice models and do not remove or dilute legislative protections, the SBDC supports this approach. To avoid a scenario where landlords and tenants utilise model retail tenancy leases without obtaining the necessary legal, business and financial advice, the SBDC would advise that the model leases include information that encourages such advice to be sought.

As leases are predominantly drafted by landlords' solicitors, who seek primarily to protect the landlord's interests, it is probable that model retail tenancy leases will not be generally adopted. Further, according to the Department of Consumer and Employment Protection in Western Australia, a standard format model retail tenancy lease did not receive industry support in this State.

The SBDC strongly supports instituting nationally consistent reporting by administering authorities on the incidence of tenancy inquiries, complaints and dispute resolution. The SBDC considers this will assist to justify any calls for retail tenancy reforms.

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.

Impact on Small Business

Winding back key pillars of retail tenancy legislation will remove safeguards required in a number of retail tenancy areas to assist in addressing the inequality in bargaining power between landlords and small business tenants and lead to a deficiency of fair dealing in the retail tenancy market.

SBDC Comment

Whilst the SBDC recognises the benefits of reducing red tape to lower compliance and administrative costs, this should not be at the loss of minimum standard legislation that ensures the necessary safeguards to landlords and tenants.

The SBDC strongly disagrees with the dilution of retail tenancy legislation and considers this a step backward in facilitating a healthy retail tenancy market.

The SBDC considers the content and framework of the CTA should continue and strongly supports further progressive retail legislation to address retail tenancy issues and improve industry outcomes. Minimum standards that exist in retail tenancy legislation address industry concerns identified through extensive industry consultation over a significant period of time. The development of these minimum standard provisions was necessitated by a market that failed to deliver effective and equitable outcomes.

Through its advisory and information role on the CTA, the SBDC has experienced first hand the importance of minimum standard provisions being enshrined in legislation. The CTA provides for good retail tenancy practice including the right to up to five years tenure, rent review provisions, the disclosure of important information, including The Tenant Guide, and access to unconscionable conduct protections. Removal of such provisions could lead to an increase in disputes between tenants and landlord, resulting in an inefficient retail tenancy market.

The SBDC supports the State Government decision to progress legislation that will improve outcomes in the retail tenancy market in Western Australia. The proposed amendments to the CTA are in response to current issues evident in the retail tenancy marketplace.

The SBDC does not agree that the regulation of the retail tenancy market should be better aligned to the broader market for commercial tenancies. The SBDC is strongly of the view that, in the main, a small business retailers' goodwill and operations are more reliant on the location of the business than non-retail commercial businesses. The reliance on location by retail tenants is often fortified by landlords requiring (especially in shopping centres) tenants to expend substantial sums of money on a fit-out of the premises, which is generally not the case in non-retail commercial tenancies.

As a result of this reliance on location, the lease terms and conditions and security of tenure are more critical to the success of business retailers than non-retail commercial businesses. This reliance places retail tenants in a weaker negotiating position than non-retail commercial businesses. Accordingly, State and Territory Governments have recognised the need for regulatory safeguards for retail tenancies.

DRAFT RECOMMENDATION 4

As unnecessarily 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.

Impact on Small Business

Different laws in different States can create barriers to small business expansion and uncertainty in the law. This can lead to increased compliance costs and the risk of non compliance, which adds to costs in the form of penalties and compensation.

Non uniformity between State and Territory governments impacts generally on competition. A small business operating in one State competing with a similar business in another State with favourable leasing conditions is at a competitive disadvantage.

Further, adopting nationally consistent template legislation could facilitate interstate growth of small business activity, particularly in franchising.

SBDC Comment

The SBDC would support working arrangements across governments to harmonise retail tenancy laws provided this does not reduce key safeguards or result in lowest common denominator legislation. The SBDC considers that a comparison of State and Territory retail tenancy legislation indicates that a significant degree of uniformity already exists.

The SBDC has concerns about the success of pursuing national legislation in view of the States and Territories jurisdiction in the area. National retail tenancy legislation has previously been considered by the Commonwealth Government and not progressed. The SBDC would not support a focus on nationally consistent template legislation impeding State legislation reforms that are currently needed to address retail tenancy market problems.

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.

Impact on Small Business

Land planning controls generally restrict the supply of retail space and limit the available space to locations determined by planning policy. A retailer could have little or no opportunity of securing suitable alternative space in a particular locality if the landlord decides not to renew the lease or, as a requirement of renewing a lease, seeks an excessive rent which the tenant is unable to pay.

Relaxing the controls that limit competition and restrict retail space and its utilisation will, as suggested by the Commission, benefit small business operators by addressing the “localised market power” of some shopping centre landlords. This could lead to better leasing arrangements for small business tenants (including downward pressure on rental levels) with flow on benefits to consumers.

SBDC Comment

The SBDC supports measures, including the relaxing of planning and zoning controls, which increase competition between shopping centre landlords for tenants and facilitate improved leasing conditions for small business tenants. However, in relaxing planning and zoning controls consideration should be given to the number of consumers and expected population growth in a given locality. This is to avoid an unsustainable increase in competition causing a significant reduction in business volume for many retailers and in turn underperforming shopping centres.

The SBDC also considers efforts to increase competition between shopping centre landlords, through the relaxing of planning and zoning controls could, to some degree, be ineffectual if the same few major landlords existing in the State seize the released land and between them continue to dictate market conditions.

ADDITIONAL ISSUES FOR COMMENT

The Commission invites comments on the feasibility and benefits of more widespread lease registration and facilitation of this process by landlords.

Impact on Small Business

Small business tenants and tenants’ valuers require accessible lease information, in particular rental information, for ascertaining market rents. However, for the reasons set out below, it is unlikely that more widespread lease registration (as it currently exists in various States) would adequately address the needs of small business tenants and tenants’ valuers.

Requiring registration of leases would impose further compliance burdens and registration costs on business including:

- search fees;
- registration of lease fees;
- discharge of lease fees;
- valuers and solicitors fees; and
- if the property to be leased is mortgaged (which is common) the financier will probably request a fee for producing the duplicate certificate of title at the State land titles office, both for registering and

discharging the title. Involvement of a third party could also add to delays in finalising leasing transactions.

Further, knowing what other tenants are paying may not necessarily assist in rental negotiations as there is a tendency for landlords (particularly in larger shopping centres) to charge based on their assessment of a tenant's capacity to pay. Additionally, some tenants are likely to oppose their rental information being disclosed to potential competitors.

SBDC Comment

The SBDC supports the availability of economical, readily accessible rental and other lease information. In considering lease registration there is a need to distinguish between the registration of leases (under the *Transfer of Land Act 1893* in Western Australia) and lease registers (that record additional lease information).

The SBDC questions the practicality, cost and/or usefulness of the registration of leases for lease information purposes. A principal deficiency is the limited information obtainable from registered leases. For example, when information on rebates, kickbacks, escalation clauses, incentive payments, rent free periods and unearned commissions is not incorporated in leases this could distort the actual rental and give inaccurate figures. This results in the information being of reduced value to those seeking information to assist in determining appropriate market rents.

Additionally, there are often lengthy delays in the execution and registration of leases and this would affect the currency of the information available. Further, how many examples of leases should be searched in order to ascertain an appropriate market rent and how would a tenant determine which leases to search? A number of searches would usually be required resulting in escalating costs. This, along with a likelihood of requiring paid advice and guidance to interpret lease provisions, could be prohibitive for small business landlords and tenants including start up business operators.

Alternatively, developing a Government lease register that contains up to date information on all necessary lease information would be complex, expensive and difficult to maintain.

The SBDC suggests consideration be given to requiring shopping centre landlords, under the relevant retail tenancy legislation, to maintain lease registers. The lease registers are to be accessible to licensed valuers, on a confidential basis, for the purpose of market rent determinations. It is understood that shopping centre landlords already collate the relevant information which could be inserted into a prescribed lease register at minimal additional cost.

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.

Impact on Small Business

A voluntary national code of conduct, for shopping centre leases, might assist in promoting competition between shopping centre landlords. It could be expected that small business operators would more keenly pursue shopping centres that were prepared to publish their commitments to tenants.

SBDC Comment

Voluntary codes of conduct should be additional to and not remove or dilute rights and obligations existing under current retail tenancy legislation.

The SBDC considers that the pursuit of voluntary codes of conduct is not the appropriate approach. Voluntary codes have not been successful in the past in other business environments such as franchising.

Conclusion

The SBDC appreciates the opportunity to comment on the draft assessment of the Commission on the retail tenancy market. In conclusion, the SBDC:

- disagrees with the notion that the retail tenancy market could be treated like the broader commercial tenancy market because of the importance of location to retailers, which weakens their bargaining position;
- is of the view that minimum standards have been developed after extensive consultation with industry. The inclusion of provisions like minimum lease terms are a necessary safety net that provide tenants with a chance to make a return on their investment;
- agrees with the productivity commission's focus on shopping centres for a voluntary national code of conduct, however, past experience has shown that voluntary codes can not be relied on in isolation;
- agrees that disclosure and dispute resolution are key areas that assist to address imbalances between market players, consequently, simple language, clear contact points and improved links between tenancy agencies and dispute resolution bodies are supported;
- supports a movement towards greater harmony in legislation across Australia in principle but small business would be heavily impacted upon if that harmony resulted in a 'lowest common denominator' framework;
- believes the benefit of a widespread lease registration system are unclear and the costs are high; and

- relaxing planning zones to increase competition is supported in so far as it is sustainable.

Should you wish to discuss any aspect of this submission, please do not hesitate to contact Mr Jim Mouzalidis or Ms Jenni Collins on 9220 0222.

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