Response to Productivity Commission Draft Report on the Market for Retail Tenancy Leases in Australia

Professor W D Duncan
Professor Sharon Christensen
Faculty of Law
Queensland University of Technology, Brisbane

1. Towards national consistency in regulation

Less prescription and greater harmony in legislation between States and Territories must improve the efficiency of retail tenancy market given the fact that in the shopping centres, both city and regional, comprise 35% of all retail shops and many owners have tenants who are part of a national chain of retail outlets. The added compliance costs to both the landlords and tenants of disparate regulation across the interstate borders alone must justify a more conscious effort on the part of the State and Territory regulators to seek greater harmonisation on a generally agreed standard. Excessive compliance costs of landlords must be passed on to consumers through higher rental and outgoings charges.

There is little doubt that not only is the retail lease market one of the most regulated markets in Australia but also in the rest of the common law world. On top of this, the regulation is constantly reviewed. Because no sectional interest is ever satisfied by all proposed amendments to legislation, each revision is accompanied by sunset provisions requiring a further review either 3 or 5 years subsequent to the last amendment. With retail lease legislation in 6 States and 2 Territories, this gives rise to rolling reviews, the tendency for the reviewers in each jurisdiction to naturally consider what was last done in another State or Territory most recently reviewed, the result being piecemeal reform, not based upon any nationally agreed principles, but upon “ad hoc’ problems in the last reviewed jurisdiction. It is difficult to see how the regulation of a shopping centre in Darwin might realistically differ from the regulation of the same entity in Hobart or Broken Hill given the substantial subject matter of the existing legislation.

The result of frequent, separate reviews over a period since 1984 (when the first retail legislation appeared in Queensland) is that whilst some aspects of the legislation nationally are now identical or reasonably comparable, there are still what could only be described as irrational differences in approach to the same issues between some jurisdictions which simply cannot be justified by claims of the need to comply with other existing property legislation affecting leases generally in any one particular jurisdiction.
There is sufficient commonality at present to initiate some national approach to regulating this market, either through COAG or another mechanism which would ultimately over a period lead to greater harmonisation and consistency of application nationally. It might also lead to more regularity in reviews of the legislation on a nationally agreed timeframe with major reforms being introduced once into all jurisdictions instead of on the irregular and random time frames which now exist.

Recommendation 1

This Commission should recommend the formalisation by the States and Territories of a representative body (of COAG or otherwise) from all jurisdictions to meet on a regular basis, to consciously consider an attempt to standardise the laws as much as possible and, at least to consult upon the subjects and times for reviews of the legislation.

2. Security of tenure provisions

We are philosophically opposed to the prescription of minimum lease terms of 5 or any number of years. The requirement was initially enacted in Queensland in 1984 and now ironically Queensland is the only jurisdiction where this provision has been repealed. In jurisdictions such as NSW where complex minimum term provisions are retained, there is evidence of landlords and property managers artificially manipulating tenancy terms in an attempt to avoid the minimum 5 year term. This is unsatisfactory for both landlords and tenants who may desire to agree on a different more commercially viable term. The question of minimum terms in Queensland has been left to market negotiation as it should be and the retail market in that State has not collapsed.

We would strongly oppose any automatic right or preferential right to renewal of a retail lease and wonder about the utility of any of these provisions. Ultimately, even with the most complex preferred tenant provisions in South Australia, at the end of the day, a

landlord can still object to the renewal of a lease on any grounds. It is also expressly stated in legislation not to constitute unconscionable conduct by the landlord. Whilst there may be some benefit in having a landlord up to 6 months out advising that they will not be renewing a lease, why should this be confined to retail tenants? All tenants install trade fixtures, many rely upon site goodwill and have to amortise fitout.

Most retail leases for small traders have a three to five year terms with no options.
These types of provisions are a very good example of wallpaper laws, look good on paper to the tenants, easily removed and of little practical advantage to anyone.

Recommendation 2

Consideration should be given to the utility of the various so called "security of tenure" provisions in all legislation to determine whether or not they achieve any practical purpose

3. Simplification of Disclosure Statements

Some information required by statutory Disclosure Statements is simply beyond the ability of the landlord to give any type of sensible response. For example, section 3 (p)(x) of the *Retail Shop Leases Regulation 2006* (Qld.) (and these questions are replicated in other jurisdictions) the landlord is required to provide details of:

> "whether the types of business carried on by the centre's tenants is to change during the term of the lease and details of any proposed changes".

Over a 5 year period, there may be many changes in tenancy mix of which the landlord could not be reasonably aware given the dynamic nature of retailing and the necessity to respond to changing trends quickly.

Likewise, in the Tenant's Disclosure Statement in s4 of the same Queensland Regulation, the tenant is asked to give the landlord details of:

> “anything known to the prospective lessee that may affect the prospective lessee’s ability to meet the financial and other obligations of the lessee”.

Again, this would seem to be a very unusual question to ask once a lease has been negotiated, a draft prepared together with a Disclosure Statement. It invites a flippant and worthless answer.

Given the length and complexity of some retail leases, the Disclosure Statement is a good idea but the requirements should reflect commercial reality in that the tenant should take some of the commercial risk associated with the running of any business.

Recommendation 3

Disclosure Statements should be retained in the contracting process but only the answers to factual information of relevance should be sought from the recipient not information which could not be reasonably known at the time of the request.

4. Repeal of complex and unused provisions

Provisions which do not achieve their purpose, or only do so at great cost or complexity in process should be repealed. Examples are given by some submissions to the Commission. Section 25 of the *Retail Leases Act 2003* (Vic) relating to notification of lease details to the Small Business Commissioner when lease registration mechanism is established under the *Transfer of Land Act 1958* (Vic) on what will shortly be an electronic land register is one such provision illustrating duplication of function. Another is the complex provisions in Part 2A of the *Retail Leases Act 1994* (NSW) relating to the processing of cash security deposits which has led to a greater number of deposit being from tenants by way of bank guarantee.

Recommendation 4

Where there is cogent evidence that compliance with existing requirements is either ignored, becomes too costly, time consuming or otherwise complex, it is time to repeal the provisions establishing those requirements